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What future for gender equality policy in the UK after Brexit?

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Abstract

The evolution of gender equality policies in the UK prior to, and since, entering the Common Market in the 1970s illustrates the distinctive characteristics of the UK employment system. This can be understood as a movement between historically embedded voluntarism and periods of statutory compliance. European influence on British policies has been filtered through the interests and interaction of four key sets of actors: governments, the legal system, employers and unions. An historical analysis of gender equality policies suggests that the potential future consequences of Brexit are likely to be patterns of continuity, change and unintended consequences. Continuity indicates that existing regulations will persist, until they are challenged. Change will see a removal of appeal to EU-level adjudication. Some unintended consequences may emerge related to the impact of migration patterns and the behaviour of large-scale companies working in the UK which could have unexpected positive outcomes. The analysis in this paper suggests that this will remain a contested terrain.

Key words: gender equality; Brexit; voluntarism; statutory compliance; EU.

Introduction

The development of UK employment equality law has had a positive yet hesitant and incomplete trajectory, according to Dickens.[1] It has moved from legislation on anti-discrimination towards measures to encourage greater equality. This marks a transition from a piecemeal, pragmatic and patchwork coverage to more inclusive, integrated and intersectional approaches since the 1970s. Nevertheless, while this trajectory has strengths and efficacy, there are limitations in legal packages and enforcement mechanisms that continue to be contested in relation to implementation and litigation.

The role of the EU's gender equality framework, including both hard and soft law, through gender mainstreaming, has been very significant for UK policymaking. But Fagan and Rubery suggest that the development of this policy highlights persistent contradictions and political tensions between social democratic principles and neoliberal policies within the EU.[2] In the UK these tensions are likely to be exacerbated by

1 Linda Dickens, 'The road is long: thirty years of equality legislation in Britain' (2007) 45 British Journal of Industrial Relations 463.

2 Collete Fagan and Jill Rubery, 'Advancing gender equality through European employment policy: the impact of the UK's EU membership and the risks of Brexit' (2018) 17 Social Policy and Society 297.

decoupling from the EU's equality framework and pursuing a more insular position where key actors, based in the national jurisdiction, will dominate future developments.

According to Dickens, catalysts for greater equality in the UK have included both internal and external factors.[3] Internal factors include various protests and political mobilisation, as well as riots since the 1970s and 1980s. These protests have influenced the take-up of anti-discrimination policy in UK around gender, race and disability. External factors include influences from the USA as well those from the EU. In the USA, Dobbin has argued that the equal opportunities and diversity agenda has largely been the creation of human resource professionals.[4] In some cases, organisational practices from the USA provide examples of 'best practice'.[5] In the EU, Fagan and Rubery[6] suggest that the early UK legislation on equal pay and sex discrimination was only introduced 'after being offered in membership and to coincide with the EU legislation'. Subsequent adoption of EU policies in the UK was often reluctantly, or only partially, implemented, for example, in relation to the Working Time Directive and gender mainstreaming.

However, this top-down, external effect perspective somewhat underplays the importance of local and national actors contesting discriminatory unequal practices, for example, in the early Dagenham dispute on equal pay and the recent 'no-win no-fee' cases in local government, as well as high-profile cases at the BBC and major retailers like ASDA.[7] Many of these earlier, and more recent, challenges reflect a resistance to the established gender order[8] or the conventional gender norms based on women's primary role as care-givers and their secondary status as workers.[9]

1 From voluntarism to statutory compliance in the UK

The UK has a long and distinctive legal tradition in relation to employment regulation based on liberal principles of 'freedom of contract'. In contrast to the practices on the European continent governed by the principles of 'positive liberty' and enshrined in the *Code du Travail*, as in France, British employers have largely been at liberty to offer employment contracts at will. In contrast, on the continent in legal systems that are more defined by positive liberty employers can only offer employment contracts specified in the codified labour law. This has constrained their ability to introduce flexibility in a comparable way to employers in the UK.[10]

Against the backdrop of this fundamental difference in the legal system governing employment contracts there has also been a tendency in the UK for voluntarist

3 Dickens (n 1).

4 Frank Dobbin, *Inventing Equal Opportunity* (Princeton Press 2009).

5 Indirectly the framing of the Fair Employment (Northern Ireland) Act 1989 was influenced by US practices around positive discrimination but was specifically not applied to the rest of the UK, as per Dickens (n 1) 466.

6 Fagan and Rubery (n 2) 301.

7 Simon Deakin, Sarah Fraser Butlin, Colm McLaughlin and Aleksandra Polanska, 'Are litigation and collective bargaining complements or substitutes for achieving gender equality? A study of the British Equal Pay Act' (2015) 39 Cambridge Journal of Economics 381.

8 Dickens (n 1).

9 Hazel Conly and Margaret Page, 'The good, the not so good and the ugly: gender equality, equal pay and austerity in English local government' (2018) 32 Work, Employment and Society 789; Fagan and Rubery (n 2); Nuria Sánchez-Mira and Jacqueline O'Reilly, 'Household employment and the crisis in Europe' (2019) 33(3) Work, Employment and Society 422–443 <https://doi.org/10.1177/0950017018809324>.

10 Jacqueline O'Reilly, *Banking on Flexibility: Comparing Flexible Employment Practices in Retail Banking in Britain and France* (Avebury 1994).

arrangements between employers and trade unions. In part this derives from the 1970s when trade unions were considerably stronger in demanding the right to free collective bargaining. As with some major industrial unions on the European continent, the ability for unions to negotiate terms and conditions of work was considered more beneficial than relying on minimal statutory implementation, as was the case in France where unions were considerably weaker. So, in countries like Germany, where there was a strong tradition of industry-wide collective bargaining, unions were quite resistant to the imposition of statutory regulation.

However, the deteriorating conditions of employment and the subsequent diminishing of the status of trade unions in the UK modified opinions about the values of state interventions and legal judgments. This happened much earlier in the UK than in other parts of Europe, as evidenced, for example, with the introduction of the National Minimum Wage (1998). The move away from voluntarism in the UK started to become evident in the 1980s with the advent of the Conservative government and the decimation of the trade unions. UK unions, which in some cases may have been quite hostile to the EU (at that time the Common Market), subsequently drew on legal decisions from the European Court of Justice (ECJ) to enforce workers' rights in the UK.[11]

Alongside this deep-running tendency for voluntarism in the UK there coexisted a strong strand of voluntarism in the business community supported by both Conservative and New Labour governments. Essentially, this disposition implied that businesses were best suited to organising their own affairs, rather than relying on government intervention in the form of employment regulation. One of the key characteristics of the UK system of employment relations has been this deeply embedded strand of voluntarism.

Despite these inclinations for governments to provide a 'light touch' to the regulation of employment relations, there has been an increasing level of enforcing statutory compliance, as exemplified in the most recent statutory implementation of Gender Pay Audits. To understand these changes, we trace back the role of the four core actors in the historical development of equality policies in the UK and EU.

2 European influences on gender equality policies in the UK

The EU approach to equality has been central to the UK's legislative development since the outset. As per Article 119 in the Treaty of Rome 1957, the new and developing EU had stated:

> Each Member State shall … ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.[12]

The inclusion of equal pay was largely due to French concerns over other member states gaining a competitive advantage, particularly as the minimum wage in France applied to both men and women, whereas in the Netherlands it only applied to men. France had already enacted its own equal pay provisions and feared that cheap labour, in particular in the garment industry, would put the country at a competitive disadvantage.[13]

11 Abigail Gregory and Jacqueline O'Reilly, 'Checking out and cashing up: the prospects and paradoxes of regulating part-time work in Europe' in Rosemary Crompton, Duncan Gallie and Kate Purcell, *Changing forms of Employment: Organisations, Skills and Gender* (Routledge 1996) 207–234.

12 Article 157 of the Treaty on the Functioning of the European Union (originally Article 119 of the Treaty of Rome Establishing the European Community 1957).

13 Susanne Burrie and Sacha Prechal, 'EU gender equality law' (European Commission Report, Brussels 2013) 1, 2.

The economic perspective on equal pay has remained at the forefront throughout its legislative development.[14] However, the ECJ clarified in *Defrenne v Sabena* that the rationale for equal pay should also include a social aim:

> The provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions … This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.[15]

Correspondingly, the UK's decision to join the EU had important ramifications for its own approach. This was accompanied by a political climate that was increasingly favourable to recognition of the profound changes to women's role in society and the economic structure of the home.[16] Alongside this, industrial action and campaigning, particularly by the Ford sewing machinists at Dagenham, the Women's Liberation Movement and National Joint Action Campaign Committee for Women's Equal Rights, the backdrop within the UK for the implementation of the Equal Pay Act 1970 (EqPA70) was set.

The economic tension and resistance from business brought about by the passing of EqPA70 is notable in the timeframe given for its implementation and in the wording of the legislation itself.[17] The Act required equal pay for work that was the *same*, *similar* or *broadly equivalent*. While *broadly equivalent* went further than the provision in the Treaty of Rome, *equal value* was not considered an appropriate inclusion.[18] However, the EU developed the provision and recognised the importance of equal value 10 months prior to the enactment of the EqPA70 within the UK.[19] While the legislative process takes time, the political will for further change in the UK was clearly not apparent and tempered by the explicit lack of business motivation for any expansion of the legislation. Ultimately, the UK's failure to comply in this regard resulted in proceedings from the EU and in 1983 the Equal Value Amendment (EVA83) was passed. This demonstrates the conflicting elements of ongoing campaigning and movement to support *social progress*

14 Dickens (n 1); Linda Hantrais, 'Assessing the past and future development of EU and UK social policy' (2018) 17 Social Policy and Society 265; Ania Plomien, 'EU social and gender policy beyond Brexit: towards the European Pillar of social rights' (2018) 17 Social Policy and Society 281.

15 *Defrenne v Sabena* [1976] ECR 455 (ECJ) Case 43/75, paras 122–123.

16 Office for National Statistics, 'Women in the labour market: 2013' (ONS 2013) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/womeninthelabourmarket/2013-09-25>. In 1964 the Labour Party election manifesto made a commitment to equal pay in its proposed 'Charter of Rights': 'Manifesto: the New Britain' (Labour Party 1964) <www.labour-party.org.uk/manifestos/1964/1964-labour-manifesto.shtml>; and again in 1966, 'Manifesto: you know Labour government works: time for decision' (Labour Party 1966) <www.labour-party.org.uk/manifestos/1966/1966-labour-manifesto.shtml>.

17 The CBI lobbied for a seven-year period of salary adjustment, while the Trades Union Congress opted for two years (HC Deb 9 February 1970, vol 795, col 923W); also discussed in Laura Levine Frader, 'International institutions and domestic reform: equal pay and British membership in the European Economic Community' (2018) 29 Twentieth Century British History 104, 118.

18 Barbara Castle, in introducing the legislation to the Commons, stated that 'The phrase "equal pay for work of equal value" is too abstract a concept to embody in legislation', with which the CBI agreed (HC Deb 9 February 1970, vol 795, col 916W).

19 The Equal Value Amendment was raised in the *Official Journal* in February 1974 (OJ No C 13, 12.2.1974). By February 1975 a Directive outlining the principle had been agreed (Council Directive (EEC) 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 045 19/2/1975 0019-0020).

alongside a government happy to defer to a more cautious voluntarist business-led approach to addressing the gender pay gap in the UK.

Similar patterns of resistance to change and partial application of European Directives can be seen in the subsequent development of UK law directed at gender pay inequality.[20] For instance, the partial implementation of the European Directive required enactment of the Part-time Workers Regulations 2000 (PTWR00) in UK statute.[21] The UK chose not to legislate around the clause 5 requirements which were aimed at making wider improvements to flexibility in the labour market and helping the reconciliation of work and family life, opting instead for best-practice guidance in that regard.[22] While the impact of the EU is clear from the outset of the UK's relationship, a political will, the needs of business and the wider social climate have also provided both stimuli and resistance to development of the UK's equality provisions in a sustained way since.[23]

Discussion of the period surrounding the Equality Act 2010 (EqA2010), which this article positions as the current legal context, highlights the current framework of competing factors in the law's interaction with social actors.[24] European influence has been filtered through the four key actors shaping gender equality policies in the UK: governments, the legal system, employers and unions. There has been an inherent and deep-running tension between seeking to address social policy goals and neoliberal politics.[25] They will be discussed in light of how they have shifted the debate forwards, or alternatively obstructed progress to achieving gender pay parity.

3 Equality initiatives contextualised by the 2008 financial crisis setbacks

The financial crisis of 2008 was the most significant economic shock since the depression of the 1930s.[26] It prompted an unprecedented response in terms of the financial bailout and resulted in a deep recession, both within the UK and across the rest of Europe. Politically, the repercussions were equally catastrophic.[27] The Labour Party's stewardship through the financial crisis ultimately eroded the electorate's faith in its capacity or competence to rebuild the economy, despite Gordon Brown's image as the 'Iron Chancellor'.[28] While there were numerous other factors at play, resulting in the Labour government's failure in the 2010 election, the party's programme of spending, unwillingness to adopt an activist response to the crisis, blame attributed to the lack of financial regulation, and its light-touch approach during its period in office, undoubtedly

20 Fagan and Rubery (n 2); Hantrais (n 14); Plomien (n 14).

21 Council Directive (EC) 97/81 of 15 December 1997 concerning the Framework Agreement on part-time work [1998] OJ L 14, 20/01/1998, 9–14.

22 Mark Bell, 'Achieving the objectives of the Part-Time Work Directive? Revisiting the Part-Time Workers Regulations' (2011) 3 Industrial Law Journal 254, 255.

23 Dickens (n 1); Frader (n 17).

24 Margaret Davies, 'Feminism and the flat law theory' (2008) 16 Feminist Legal Studies 281.

25 Dickens (n 1); Deakin et al (n 7); Jill Rubery and Damian Grimshaw, 'The 40 year pursuit of equal pay: a case of constantly moving goalposts' (2015) 39 Cambridge Journal of Economics 319.

26 Jacqueline O'Reilly, David Lain, Maura Sheehan, Bob Smale and Mark Stuart, 'Managing uncertainty: the crisis, its consequences and the global workforce' (2011) 25(4) Work, Employment and Society 581–95; Harold Clarke, David Sanders, Marianne Stewart and Paul Whiteley, 'Valence politics and the electoral choice in Britain, 2010' (2011) 21 Journal of Elections, Public Opinion and Parties 237; Peter Taylor-Gooby, *The Double Crisis of the Welfare State and What We Can Do about It* (Palgrave Macmillan 2013) 3.

27 O'Reilly et al (n 26).

28 Clarke et al (n 26).

contributed to the result.[29] The vulnerable and uncertain economic climate witnessed shifting political sands as the Labour government was replaced by a Conservative/Liberal Democrat Coalition in 2010. This result, and the approach subsequently pursued to address the financial crisis, impacted equality measures in several ways, both within the scope of the EqA2010 and beyond.

The political choice of austerity as a means to address the government deficit has seen state spending cuts at unprecedented levels.[30] The programme of cuts introduced resulted in a significant reduction in state services, alongside associated cuts in benefit provision, resulting in an overall reduction in state support.[31] These measures were accompanied by a public-sector pay freeze between 2010 and 2012, followed by a 1 per cent pay cap, below the level of inflation.

To further disadvantage the largely female workforce, public sectors, such as the care sector, were outsourced and so were subsequently beyond the scope of local authority job evaluation and single-status pay scales.[32] Despite the adoption of gender mainstreaming, and commitment to pay 'due regard' to the need to advance equality of opportunity in the EqA2010, as per the public sector equality duty requirements, changes were implemented without any reference to the inequality of impact they might have. It has since been widely noted that this package of measures has led to increasing inequalities, felt most by women and those with 'intersecting disadvantages'.[33]

This contextual analysis demonstrates that the growing preference for reflexive legislation is at odds with the UK's focus on addressing the government deficit and the narrative of cutbacks and efficiencies pursued. Despite the binding effect of Treaty obligations on the UK, austerity served to deprioritise equality and shift the focus of government.[34] Notably there were no equality impact assessments (EIAs) carried out on the programme of government cuts.[35]

This shift in gender relations is again notable by the subsequent abolition of EIAs, part of David Cameron's announcement to the 2011 Confederation of British Industry (CBI) conference, with the intention to reduce unnecessary and costly government

29 Ben Jackson, 'Learning from New Labour' (2018) 89 Political Quarterly 3; Patrick Diamond, 'The progressive dilemmas of British social democracy: political economy after New Labour' (2013) 15 British Journal of Politics and International Relations 89, 95.

30 Taylor-Gooby (n 26).

31 Catherine Albertyn, Sandra Fredman and Judy Fudge, 'Introduction: elusive equalities – sex, gender and women' (2014) 10 International Journal of Law in Context 421; Julie MacLeavy, 'Women, equality and the UK's EU referendum: locating the gender politics of Brexit in relation to the neoliberalising state' [2018] Space and Polity 1.

32 Conly and Page (n 9) 800–01.

33 Sue Durbin, Margaret Page and Sylvia Walby, 'Gender equality and "austerity": vulnerabilities, resistance and change' (2017) 24 Gender, Work and Organisation 1; Taylor-Gooby (n 26) 12; Jill Rubery, 'Austerity and the future for gender equality in Europe' (2015) 68 ILR Review 715.

34 A new emphasis to addressing inequality can be seen in the EU's adoption of gender mainstreaming as a new strategy in 1996, alongside an increased focus on the equality agenda, as per Teresa Rees, 'Reflections on the uneven development of gender mainstreaming in Europe' (2005) 7 International Feminist Journal of Politics 555. This was given binding effect in member states by the Treaty of Amsterdam (Treaty of Amsterdam Amending the Treaty on European Union [1997] OJ C 340, 10/11/97 1-144) that came into force in 1999. Key provisions were included in Article 2 and Article 3(2), which required: 'In all [its] activities … the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

35 Conley and Page (n 9).

bureaucracy.[36] This was part of a series of measures, known as the 'Red Tape Challenge', introduced in April 2011. This illustrates the long-running relationship between government and employers in the UK and the preference for a neoliberal agenda to 'reduce the burden on business'.

The specific impact of the political climate, the needs of the economy and a wider social context will now be outlined with reference to the EqA2010, and how it is applied. Just as these themes were pertinent in the early development of equality provision, they remain just as relevant now. As such, they are used here to help assess the prospects for our current legislative landscape beyond Brexit.

4 The Equality Act 2010: a consolidation or radical reform?

The introduction of the EqA2010 indicated a watershed in the UK's approach to equality. The disparate nature of exiting provisions, alongside their respective shortcomings, required updating. Legislative efforts to approach inequality have changed. The purely prohibitive requirements of the EqPA70 and Sex Discrimination Act 1975 were extended and developed by the EVA83. Developments since have seen the implementation of varied provisions impacting on the causes of gender pay inequality rooted in both European regulation and UK-based initiatives.[37] This resulted in the UK's equality laws being spread over 116 separate legislative provisions, prior to the enactment of the EqA2010. These had grown and developed in a piecemeal way, reflected by the inconsistency and complex nature of their approaches.

The Act's journey to the statute book marked an extended period of review and consultation prior to that point.[38] As one of the final legislative acts of the outgoing government, the EqA2010 highlights how the Labour Party was demonstrably embracing the need for good governance, alongside a political commitment to enhance equality provisions.[39] The Act included proposals to acknowledge the importance of, and attempt to tackle, socio-economic inequality, to use the public sector to model good behaviour and promote equality, and go beyond legislation prohibiting unequal pay to a requirement to publish gender pay gaps.[40]

These represent key developments that were not all based in EU requirements but reflected commitments arising from the political will and social climate of the time in the

36 Doug Pyper, 'The public sector equality duty and equality impact assessments' (Briefing Paper 06591, House of Commons Library 2018) <https://researchbriefings.files.parliament.uk/documents/SN06591/SN06591.pdf>.

37 For instance, improved maternity entitlements and the right to request flexible working alongside more proactive requirements, such as gender and race equality duties.

38 The case for updating and improving existing equality law was well made by the independent assessment of existing equality legislation in the Cambridge Review in 2000. The National Equality Panel, set up in 2008, outlined the proposals for an Equality Bill to reflect the changing nature and understanding of equality in society: The Equality Bill - Government Response to the Consultation (GEO 2008) <https://www.gov.uk/government/publications/the-equality-bill-government-response-to-the-consultation>; Bob Hepple, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation* (Hart 2000).

39 New Labour's concern with bringing the government closer to the people echoed the EU desire for a more accountable inclusive EU as per Byron Sheldrick, 'New Labour and the third way: democracy, accountability and social democratic politics' [2002] Studies in Political Economy 133.

40 EqA2010: section 1, 'Socio-economic duty'; section 149, 'Public sector equality duty'; and section 78, 'Gender pay reporting'.

UK.[41] The new Equality Bill, as was, was first announced in December 2008 and was finally enacted in October 2010.[42] The EqA2010, in compliance with the EU's better legislation programme, intended to make the various equality strands more readable, accessible and transparent. The Act harmonised and reformed the law in potentially decisive ways for gender pay inequality, formalising a shift in approach and attempting to consistently recognise the need for more affirmative action as a means to tackle inequality, as opposed to a purely reactive approach.[43]

Through updating, consolidating and providing some consistency to existing provisions, the EqA2010 also introduced a mandate for new requirements. For instance, Part 11, 'Advancement of equality', acknowledged that equality law is not just about treating everyone the same, but taking additional steps to level existing inequality. Significantly, it introduced proactive measures that attempted to reposition the claimant-centred approach to equality law, which has limited its applicability in the UK, by specifically acknowledging the need to take positive action to address historical disadvantages and, in so doing, has been described as potentially 'transformative'.[44]

5 Measures to improve pay transparency

The requirement for gender pay reporting represented a significant step in requiring employers to recognise their own gender pay inequality and, in so doing, hopefully prompt organisational efforts to address the findings, not dependent on the individual. This went beyond the scope of previous equal pay legislation. Section 78 required an annual publication of any difference in pay between men and women, potentially highlighting not only unequal pay but any organisational occupational segregation and the differential this produces, alongside inevitable pressure to improve year on year. This demonstrated a real commitment to the growing understanding of the factors that impact upon gender pay inequality.

This requirement represented a breakthrough in terms of pay inequality and was included alongside some other important changes, most notably around transparency in pay. Pay secrecy clauses while not prohibited – the clauses themselves are still legitimate – were rendered unenforceable by the Act when an employee is seeking a 'relevant pay disclosure' (section 77(1), EqA2010).

The introduction of statutory discrimination questionnaires enabled employees to ask questions in order to find out whether pay differences were discriminatory. This made pay structures potentially more transparent and the process of challenging inequities more accessible (section 138, EqA2010).

41 The UK acknowledgment of institutional racism, following the Stephen Lawrence enquiry and Macpherson Report in 1999 (Sir William Macpherson, *Report of the Stephen Lawrence Inquiry* (Home Office, Cm 4262-I, 1999), prompted the creation of the race equality duty. This was introduced as an attempt to challenge historical and cultural disadvantage and change attitudes towards discrimination both within organisations and the services they provide (April 2001, inserting section 71 as amendment to Race Relations Act 1975). The gender and disability duties followed in its wake (2007). This represented a new understanding of how inequality pervades society and social structures and introduced a more proactive approach as a means to tackle systemic organisational failures. The EqA2010 introduced the new single equality duty, harmonising and extending the race, disability and gender equality duties.

42 GEO, *The Equality Bill* (GEO 2008) <https://d3n8a8pro7vhmx.cloudfront.net/labourclp63/pages/1284/attachments/original/1414676999/Equalities_ACt_fact_sheet.pdf?1414676999>.

43 Colm McLaughlin and Simon Deakin, 'Equality law and the limits of the "business case" for addressing gender inequalities' (Working Paper 420, Centre for Business Research, University of Cambridge 2011).

44 Hepple (n 38).

Tribunals were also given powers to make recommendations to benefit the wider workforce (section 124, EqA2010). This wider power enabled tribunals to not only make a ruling in favour of the claimant but extended the scope enabling rulings relating to the employer's whole workforce. For instance, in *Tantum v Travers Smith Braithwaite Service*,[45] the tribunal recommended that the company be required to implement diversity training for all its staff. This element of collectivism in the outcome was previously missing from the law and again represented a development away from the wholly claimant-centred reach held by the law. It also illustrated the relationship between statutory obligation and legal enforcement through the judicial system.

6 The 'Think, Act, Report' initiative 2011 – from voluntary to statutory pay audits

The gender pay reporting requirements of the EqA2010 were not initially enacted, merely included, while voluntary measures were pursued in the first instance.[46] The 'Think, Act, Report' 2011 initiative required companies to think about gender equality issues in the workplace, take action to address and improve them, and report on progress.[47] 'Think, Act, Report' encouraged companies to publish their own pay data. With the intention of avoiding more stringent measures, the initiative highlighted the potential benefits of retaining and developing quality staff, the reputational effect of increased gender awareness and the opportunity publication and transparency would afford to promote good work.

However, after three years only five companies had reported on their pay gaps.[48] As such the section 78 EqA2010 requirement was brought into force requiring employers with over 250 employees to report and publish on various measurements of gender pay difference with regards to pay, bonus and breakdown of the division of staff within pay quartiles. This is now a legislative requirement (Equality Act (Gender Pay Reporting) Regulations 2017), with the Equality and Human Rights Commission setting out compliance procedures since March 2018.[49] There are, however, no specific penalties for non-compliance, and the accompanying narrative outlining how the employer has or is addressing the problem is not specifically required.

Despite the potential for low-level compliance, given the intial lack of clarity in enforcement measures, teething problems associated with its introduction, and uncertainty around how many employers are covered by the regulations, the first year achieved 100 per cent compliance within four months of the deadline.[50] This highlights a notable success for the EqA2010. In addition, the discussions and consultation it is now prompting, for instance, with reference to the publication of ethnicity and disability pay

45 *Tantum v Travers Smith Braithwaite Service* 2013 WL 10924087 (ET).

46 'Think, Act, Report' was a voluntary system devised by government in 2011 to encourage employers to publicly report on gender and equality issues.

47 The pay reporting provision was not initially enacted, with the Coalition government preferring this voluntary approach. Interestingly, the government is now consulting over ethnicity pay reporting. The Race Charter is hoping to emulate the success of the pay reporting regulations adopting a voluntary approach to reporting ethnicity pay gaps.

48 Patrick Wintour, 'Lib Dems push through mandatory reporting of gender pay gaps' *The Guardian* (London, 6 March 2015) <www.theguardian.com/money/2015/mar/06/lib-dems-push-mandatory-reporting-of-gender-pay-gaps>.

49 Equality and Human Rights Commission, 'Closing the gap: enforcing the gender pay gap regulations' (Equality and Human Rights Commission 2018) <www.equalityhumanrights.com/en>.

50 GEO, '100% of UK employers publish gender pay gap data' (GEO Press Release 2018) <www.gov.uk/government/news/100-of-uk-employers-publish-gender-pay-gap-data>.

gaps, highlights the potential benefits and transformative nature of the wholesale approach to equality that is afforded by the EqA2010.

7 Assessment of the Equality Act 2010

Assessment of the application of the EqA2010's provisions demonstrates the way that contextual factors have also stymied efforts at change. Disappointingly, powers for wider recommendations have been removed, meaning that employers can now choose if and how to approach any liability found in relation to their wider workforce, removing the much-needed element of collectivism. The questionnaire procedure has been repealed and the costs and bureaucracy of the socio-economic duty were also considered surplus to requirements and so never enacted. The commonalities in the impact of business needs, economic tension and political will frustrating the development of the law here also reiterate the difficulty of enabling change to move beyond the individual claimant-centred potential the law offers. Again, the incomplete implementation of the PTWR00 is illustrative of this trend and the divergent way that these factors can impact. Despite the government's original intention to provide best practice guidance regarding the Directive's clause 5 requirements of reforming flexibility in the labour market, this was subsequently not pursued. This underlines the earlier reluctance to effect the wider proposed remit of the legislation and is in stark contrast to the pay and gender differential between part-time and full-time roles.[51] However, the more favourable political climate of the time is notable in the inclusion, beyond European requirements, of a written statement from employers, should less favourable treatment occur, and the extension of the provisions to agency and casual workers. Reference made in Parliament at the passing of the Bill, from the other side of the House, to the government *gold-plating* the already *burdensome* and costly nature of the regulations highlights these political and economic tensions.[52] This positions the development and progress of equality law within the UK as very much beholden to factors outside the scope of the EU, as well as alongside it.

The development of legal provision within the EqA2010 shows a partial shift towards a more proactive role for the law, given the implementation of statutory compliance with gender pay audits. This shift correspondingly echoes the ongoing reluctance to proscribe and enforce change in deference of business needs. A key feature of the current legislative climate remains its continued, albeit altered, pursuance of discretionary measures. The pay reporting regulations are limited to employers with 250 or more employees and, as discussed, do not require the accompanying narrative addressing the reason for the pay gap. As such, any organisational efforts to address the problem do not need to be included or, indeed, even attempted. While the commitment to voluntarism could be predicted to be unsuccessful, given the historic lack of voluntary change, it reflects on the deeply embedded characteristic of the UK system of employment relations and government–business relations.

The public visibility associated with the international social movement stemming from #timesup and #metoo has re-awakened public awareness of demands for gender equality. The social media campaigns have achieved influence and a new-found willingness for a public narrative about the experience of harassment and abuse for women. In turn, the timing of these social movements coincided with the implementation of the gender pay reporting regulations in the UK and undoubtedly helped redouble their impact. This can be seen by the furore surrounding the BBC's gender pay inequality and in its subsequent

51 Median hourly earnings for part-time workers at the time the legislation was passed was 59 per cent of their full-time counterparts, with women comprising 80 per cent of those roles, as per Bell (n 22) 268–269.

52 HL Debs 22 May 2000, vol 613, cols WA557–64.

self-implemented target of a zero per cent pay gap by 2020.[53] The potency of the movement has underlined the importance of collectivism, particularly in a climate of reduced collective bargaining.[54] However, a public forum for debate around victims of inequality is not a panacea and does not, of itself, signal meaningful change. What it has done is starkly highlight the multitude of ways that inequality pervades society and social interaction and, in so doing, reiterated the importance of transparency and collectivism around the problem.

8 Retrenchment: unfair dismissal rights and conditional fee arrangements

The use of litigation and the legal system has been and remains a pertinent force and key actor in the UK's approach to equal pay. Its effectiveness can be seen in the wave of no-win no-fee equal value cases in the mid to late 2000s, which followed on from the large re-grading agreements in the public sector.[55] These cases illustrate how statutory measures have been taken up through the legal system and resulted in some very significant financial settlements.[56]

This tide of no-win no-fee cases was partially blocked from May 2014 as associated employment law reforms were progressed, including: extending the qualifying period for unfair dismissal rights from one to two years;[57] and the introduction of tribunal fees,[58] together with mandatory early conciliation.[59] These changes occurred alongside changing conditional fee arrangements and the reduction of legal aid and, as such, present a myriad of obstacles to anyone wishing to challenge gender pay inequities. These measures were again intended to reduce the burden on tribunals, give employers greater freedoms and reduce the costs on government budgets.

Assessing the impact of this subsequent legislation highlights how the potential to redress inequality through litigation is limited by its claimant-centred approach and the question of access to justice. These changes compounded the difficulties already discussed, such as the lack of collectivism in pursuance of equal pay, given the declining remit of collective bargaining and trade union membership, and the prior removal of the Central Arbitration Committee's ability to adjudicate in collective matters.[60]

This illustrates how both the economic crises and the political approach pursued in the aftermath led to a shift in the way individuals are able to use and apply the law.[61] Gender equality was not a key priority in this time of crisis. Just as policy development in the UK and Europe was brought to a 'quasi-halt', after the financial crash the reach of

53 Graham Ruddick, 'Trust is broken at BBC over equal pay, Carrie Gracie tells MPs' *The Guardian* (London, 31 January 2018) <www.theguardian.com/media/2018/jan/31/bbc-in-real-trouble-over-equal-pay-carrie-gracie-tells-mps>. It is worth noting the furore was also fuelled by other areas of the media market.

54 Deakin (n 7).

55 Local Government Single Status Agreement in 1998 and, in the NHS, Agenda for Change 2004.

56 *Barker v Birmingham City Council* [2010] UKEAT 0056_10_0905.

57 As per the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.

58 Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) was introduced in July 2013. This required claimants to pay fees to bring a claim to an employment tribunal. It was intended to assist in the planned reduction of the Ministry of Justice budget, as per Doug Pyper, Feargal McGuinness and Jennifer Brown, 'Employment tribunal fees' (Briefing Paper 7081, House of Commons Library 2017) <http://researchbriefings.files.parliament.uk/documents/SN07081/SN07081.pdf>.

59 Under the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

60 Deakin (n 7); Dickens (n 1).

61 Albertyn et al (n 31) 423.

the law and an individual's ability to use it were equally undergoing challenging change.[62] That said, litigants are still pursuing equal pay through the legal system as evidenced by the recent Glasgow case.[63] The potential mooted liabilities for the pending equal value cases for Asda[64] and Tesco demonstrate that the potency of this mechanism is not to be underestimated, despite these limiting factors.[65]

The EqA2010 and associated measures discussed here therefore represent a mixed picture of ideals impacted by the varied influence of the four key actors. While still embedded in a predominantly voluntarist tradition, we have seen a more proactive move to effective statutory compliance with driving mechanisms both internally and externally. The current gender pay reporting requirements may not result in more compulsory measures to address the cause of these inequalities after our withdrawal from the EU, but organisational approaches and the use of the legal system may still achieve traction on gender pay inequality.

9 Post-Brexit scenarios

Consideration now turns to how these key actors will continue to shape the UK's focus on gender equality measures post Brexit. European influence has been filtered through the four key actors shaping gender equality policies in the UK: governments, the legal system, employers and unions. First, the governmental approach and the future direction on equality measures is concerning. While it is early in a new Parliament, the removal from the European Union (Withdrawal Agreement) Bill 2019–2020 of clauses protecting workers' EU-derived rights has been accompanied by threats to curb trade unions' right to strike.[66] The government proposed new legislation in the December 2019 Queen's Speech to ensure that employment protections are not eroded in the face of European measures, in the form of a forthcoming Employment Bill, but this has yet to come to fruition. The economic impact of exiting the EU is stark as forecasts both in terms of costs and future economic growth remain bleak.[67] Equally, the diversion of resources that has already occupied significant parliamentary time is set to continue.[68] Given the de-prioritisation of equality measures that occurred in the aftermath of the financial crisis and the climate of austerity that followed, we can expect a further shift of resources to meet these alternative needs.

In addition, the parliamentary process and legislative development, as outlined here, is both slow-moving and incremental. It is therefore likely that any shift in approach towards targeted equality measures will be equally slow-moving. This will be combined with a disconnect, moving forward, from future policy development and change driven by

62 Annick Masselot, 'The EU childcare strategy in times of austerity' (2015) 37 Journal of Social Welfare and Family Law 345, 350.

63 *HBJ Claimants v Glasgow City Council* [2017] CSIH 56.

64 *Asda Stores Ltd v Brierley* [2016] EWCA Civ 566.

65 Sarah Butler, 'Tesco faces £4bn equal pay bill as claimant numbers swell to 1,000' *The Guardian* (London, 11 July 2018) <www.theguardian.com/business/2018/jul/11/tesco-faces-4bn-equal-pay-bill-as-claimant-numbers-swell-to-1000>.

66 Conservative Party 'Manifesto: get Brexit done: unleash Britain's potential' (Conservative Party 2019) <https://vote.conservatives.com/our-plan>.

67 CBI, 'Brexit and the economic impact – where are we now? Implications for the UK economy since the vote to leave' *The Business View* (CBI 2019); Benjamin Nabarro and Christian Schulz, 'UK economic outlook in four Brexit scenarios' in *The IFS Green Budget: October 2019* (Institute for Fiscal Studies 2019).

68 Kitty Stewart, Kerris Cooper and Isabel Shutes, 'What does Brexit mean for social policy in the UK? An exploration of the potential consequences of the 2016 referendum for public services, inequalities and social rights' (Research Paper 3, Social Policy and Distributional Outcomes Programme 2019) 1, 19.

the EU, resulting in lack of exposure to benchmarking and peer review, as suggested by the Open Method of Coordination.[69] There may be a corresponding increase in the EU's regulatory approach, as the UK will no longer constrain progress, causing gaps to widen.[70]

There may be further unintended consequences on gender equality through the development of the UK's new approaches to policy, such as trade and migration. For instance, the ending of free movement will impact on the UK's labour market. Existing labour shortages in sectors such as care will be enhanced.[71] Given the additional pressures of an ageing population and predictions surrounding technological innovations in the world of work, these pressures will be enhanced.[72] This may mean increases in wages at the bottom of the pay spectrum, a projection seemingly supported by the 6.2 per cent increase in the Living Wage due to be implemented in April 2020. In addition, the expectation of jobs lost from the top of the earnings distribution, with predictions of 7000 finance jobs to be relocated, may see overall inequality decline.[73]

So, while there is no expectation of proactive development of new approaches to inequality, the impact of combined economic pressures may inadvertently create a more positive environment. That said, there is further caution to be noted from the developments and pressures that the fourth industrial revolution present as to how we will work in the future. As work relationships evolve, existing rights and protections may be eroded.[74]

The trajectory of the UK's equality policy will also continue to be impacted by the role of litigants and the courts. The prominence of gender pay inequality and media attention on the matter looks set to continue regardless of Brexit. High-profile equal pay cases, generating media attention in organisations such as the BBC, Co-op and ASDA, show no signs of slowing and demonstrate the potency that this element still holds.[75] This is likely to remain impactful and set to continue, regardless of the UK's relationship with the EU.

Conclusion: potential intended and unintended consequences

The necessity of understanding how key actors have shaped equality policies in the UK suggests how future policies may develop. Here, we have first emphasised the role of government in its capacity to introduce legislative change and statutory compliance. Second, we turned to the role of the legal profession interpreting legislation in a number of high-profile cases. Third, we have focused on the role of employers and business organisations in the way these policies are implemented in a voluntaristic manner, with more recent evidence of statutory compliance. And, fourth, we have drawn attention to the long tradition of activists, litigants and, more recently, social media in maintaining a

69 Fiona Beveridge and Samantha Velluti, *Gender and the Open Method of Coordination: Perspectives on Law, Governance and Equality in the EU* (Ashgate 2008).

70 Fagan and Rubery (n 2).

71 Global Future, '100,000 carers missing: how ending free movement could spell disaster for elderly and disabled people' (Global Future Report 2018) <https://ourglobalfuture.com/reports/100000-carers-missing/>.

72 Alina Sorgner, Eckhardt Bode and Christiane Krieger-Boden, 'The effects of digitalization on gender equality in the G20 economies' (Women 20 Dialogue 2017) <www.w20-germany.org/fileadmin/user_upload/documents/20170714-w20-studie-web.pdf>.

73 Danny Dorling, 'The curve of inequality and the Brexit way' *(Brexit Blog*, LSE 2019); Stewart et al (n 68) 35.

74 As demonstrated by the Taylor Review (Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (Department for Business, Energy and Industrial Strategy 2017)).

75 *Ahmed v BBC* [2020] 1 WLUK 16; *Asda Stores Ltd v Brierley* [2016] EWCA Civ 566; *Mrs Samantha Walker v Co-operative Group Ltd and Richard Pennycook* [2018] 2403044/2016 (ET).

high profile and highlighting significant legal cases around these issues. Together the interaction of these actors will shape the future outcomes and contested terrain for equality policy in the post-Brexit period.

Exit from the EU is likely to mean the lack of recourse to decisions made by the ECJ and removal of the scope afforded by exposure to the wider forum of the European Commission for policy development and best practice. The current indications and forecasts are that business and the economy will suffer as a result of Brexit and that this might lead us to expect the pursuit of gender equality will also suffer as it did during the financial crisis.[76]

We have seen how there is a long tradition of voluntarism in the UK system. Governments have tended to prefer business organisations to introduce appropriate measures themselves, so that they are not over-burdened by statutory regulation. This was evident even from the delayed implementation of the EqPA70 at the point of the UK's entry into Europe. It can also be seen in the consequences arising from the no-win no-fee litigation, which led to a tightening of resources to stem this tide.

At the same time the recent introduction of compulsory gender pay audits marks a notable change in direction from this voluntarist tradition. Incorporating statutory compliance and transparency to achieve change highlights the importance of the way that the law is built on and developed in the workplace. This could be an indication supporting the work of Dobbin who argues that human resources professionals and business organisations have been largely attributed with creating the equality agenda in the USA and reducing the gender pay gap.[77]

Following this line of argument, we suggest that there could be two potentially unintended consequences arising from the UK withdrawal from the EU related to the impact of migration on organisations and the actions of employers, in particular in large-scale international organisations.

First, we have seen, since the 2016 referendum, a fall in EU migrants coming to work in the UK. Sectors that have been particularly affected include the NHS, care homes, construction work and agriculture. As a result of labour shortages, this is likely to create wage pressure especially in low-paid jobs in these sectors. There is evidence that there has been an increase in wages, but this is still only equivalent to average wage rates in 2011, and still far below those of 2007 before the economic crisis.[78] However, if labour shortages persist, and it would be reasonable to think they will, while the economy is currently expanding in terms of employment, this wage pressure is likely to increase to the potential benefit of women employed in low-waged sectors.

Second, in the USA, Dobbin argues that is has been human resources managers who have driven and created the equal opportunity and diversity agenda.[79] It is plausible that

76 CBI (n 67); Nabarro and Schulz (n 67); Philip Alston, 'Statement on visit to the United Kingdom: Special Rapporteur on extreme poverty and human rights' (UN Report 2018) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881&LangID=E; HM> Government, 'EU exit: long-term economic analysis' (Government Document, Cm 9742, 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/760484/28_November_EU_Exit_-_Long-term_economic_analysis__1_.pdf>.

77 Dobbin (n 4).

78 While wage growth in the UK plateaued post referendum, it is now again showing signs of growth, though still below pre-2008/2009 levels: see ONS, 'Employee earnings in the UK: 2019' (ONS 2019) <www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2019>.

79 Dobbin (n 4).

for large international firms based in the UK we might expect that they are more likely to be influenced by talent management initiatives, which means recruiting highly skilled women and migrants to senior positions. These kinds of organisations are less likely to be affected by either EU or national legislation around equality if they see this strategy as an essential part of implementing best practice and recruiting highly qualified labour. It might be that the success of gender pay reporting and the space this has opened up to tackle disparities is positive. Transparency is prompting debate around how to improve measures impacting upon gender pay inequality. Organisational approaches to extend shared parental leave, or offer flexible working by default, might remain the benefits for a privileged few amongst high-status firms, or attract political support to move into a more common space.

There will perhaps be greater divergence amongst organisational sectors, whose willingness to pursue policies and their capacity to achieve change will be dependent on the different normative values that key actors hold. The extent to which organisations embrace and maintain the notion that eradicating the pay gap is good for business and not just a morally necessary goal is key. Again, here the difficulty will arise in terms of the variability between industries and organisations as good practice companies will seek to do more, while others are more complacent or, worse, actively destructive. In this way the unintended consequences of withdrawal may have less deleterious and more variegated consequences than expected.

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Gender, violence and Brexit

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Abstract

How will the UK exit from the EU affect gender-based violence against women? Four issues are addressed to answer this question. First, the importance of theorising the interconnections with a gender regime, including between gendered economic inequality and gendered violence. Second, the significance of the difference between hard and soft security strategies for the level of gendered violence. Third, the significance of the emerging competence of the EU in the governance of violence/security relative to the member states and international bodies. Fourth, the specific nature of Brexit and the form of the future relationship between the UK and EU. The paper concludes that Brexit is likely to increase gender-based violence against women in the UK, partly as a result of the differences in the regulation of violence/security between the UK and the EU and partly as a result of increases in gender inequality in the economy that has effects across the whole gender regime.

Key words: gender; Brexit; violence; security; inequality.

Introduction

The current strategies to restructure the EU have implications for the governance of violence. Is one site of legal intervention into the governance of violence more important than another? Brexit provides an opportunity to think through these questions as to which polity, which state, which site of governance matters most and in which way for legal interventions that contribute to ending gender-based violence.

Brexit is gendered since the UK and the EU are differently gendered on many issues.[1] Much of the debate on the gender of the EU has focused on changes in gender policy and

1 Moira Dustin, Nuno Ferreira and Susan Millns (eds), *Gender and Queer Perspectives on Brexit* (Palgrave Macmillan 2019); Roberta Guerrina and Annick Masselot, 'Walking in the footprint of EU law: unpacking the gendered consequences of Brexit' (2018) 17(2) Social Policy and Society 319; Aida A Hozić and Jacqui True, 'Brexit as a scandal: gender and global Trumpism' (2017) 24(2) Review of International Political Economy 270.

on the economy.[2] There is an emerging literature on gender in relation to EU governance of violence and security.[3] The European Area of Freedom, Security and Justice is potentially as significant an aspect of the gender of Brexit as the Single European Market because of its significance for gender-based violence. It is thus of concern for the analysis of feminism and the EU.[4] The gender of Brexit raises issues of the relative significance of member states and the EU-level in governance, which are relevant to wider debates on the EU and on the gender of the EU.[5] It raises still wider questions as to the extent to which individual states can be autonomous in a global era in which there are competing hegemons, and how this analysis of the gender of scale should proceed.[6]

2 Gabriele Abels and Joyce Marie Mushaben (eds), *Gendering the European Union* (Palgrave Macmillan 2012); Gabriele Abels and Heather MacRae (eds), *Gendering European Integration Theory* (Barbara Budrich Publishers 2016); Catherine Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996); Sophie Jacquot, 'The paradox of gender mainstreaming: unanticipated effects of new modes of governance in the gender equality domain' (2010) 33(1) West European Politics 118; Sophie Jacquot, *Transformations in EU Gender Equality: From Emergence to Dismantling* (Palgrave Macmillan 2015); Johanna Kantola and Emanuela Lombardo (eds), *Gender and the Economic Crisis in Europe: Politics, Institutions and Intersectionality* (Palgrave Macmillan 2017); Maria Karamessini and Jill Rubery (eds), *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge 2013); Elisabeth Klatzer and Christa Schlagen, 'EU macroeconomic governance and gender orders: the case of Austria' in Brigitte Young, Isabelle Bakker and Diana Elson (eds), *Questioning Financial Governance from a Feminist Perspective* (Routledge 2011); Heather MacRae, '(Re)gendering integration: unintentional and unanticipated gender outcomes of European Union policy' (2013) 39 Women's Studies International Forum 3.

3 Yvonne Galligan, 'Brexit, gender and Northern Ireland' in Dustin et al (n 1); Roberta Guerrina and Katharine A M Wright, 'Gendering normative power in Europe: lessons of the Women, Peace and Security Agenda' (2016) 92(2) International Affairs 293; Roberta Guerrina, Laura Chappell and Katharine A M Wright, 'Transforming CSDP? Feminist triangles and gender regimes' (2018) 56(5) Journal of Common Market Studies 1036; Toni Haastrup and Nadine Ansorg, 'Gender and the EU's support to security sector reform in fragile contexts' (2018) 56(5) Journal of Common Market Studies 1127–1143; Andrea Krizsan and Raluca Popa, 'Europeanization in making policies against domestic violence in central and eastern Europe' (2010) 17(3) Social Politics 379; Annica Kronsell, 'Gender, power and European integration theory' (2005) 12(6) Journal of European Public Policy 1022; Annica Kronsell, 'The power of EU masculinities: a feminist contribution to European integration theory' (2016) 54(1) Journal of Common Market Studies 104; Kathrin S Zippel, *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany* (Cambridge University Press 2006).

4 Petra Ahrens, *Actors, Institutions, and the Making of EU Gender Equality Programs* (Palgrave Macmillan 2018); Cristiano Bee and Roberta Guerrina, 'Participation, dialogue, and civil engagement: understanding the role of organised civil society in promoting active citizenship in the European Union' (2014) 10(1) Journal of Civil Society 29; Rosalind Cavaghan, *Making Gender Equality Happen* (Routledge 2017); Louise Chappell and Georgina Waylen, 'Gender and the hidden life of institutions' (2013) 91(3) Public Administration 599; Yvonne Galligan, *States of Democracy: Gender and the Politics of the European Union* (Routledge 2015); Johanna Kantola, *Gender and the European Union* (Palgrave Macmillan 2010); Johanna Kantola and Lise Rolandsen-Agustin, 'Gendering transnational party politics: the case of the European Union' (2016) 22(5) Party Politics 641; Anna van der Vleuten, *The Price of Gender Equality: Member States and Governance in the European Union* (Ashgate 2007); Anna van der Vleuten, Anouka Van Eerdewijk and Conny Roggeband (eds), *Gender Equality Norms in Regional Governance* (Palgrave Macmillan 2014); Mieke Verloo (ed), *Varieties of Opposition to Gender Equality* (Routledge 2018).

5 Emanuela Lombardo and Maxime Forest (eds), *The Europeanization of Gender Equality Policies: A Discursive Sociological Approach* (Palgrave Macmillan 2011); MacRae (n 2); Verloo (n 4); 'Multiple inequalities, intersectionality and the European Union' (2006) 13(3) European Journal of Women's Studies 211–228; Mieke Verloo and Sylvia Walby, 'Introduction: the implications for theory and practice of comparing the treatment of intersectionality in the equality architecture in Europe' (2012) 19(4) Social Politics 433–445; Cornelia Woll and Sophie Jacquot, 'Using Europe: strategic action in multi-level politics' (2010) 8(1) Comparative European Politics 110–126.

6 Rianne Mahon, 'Introduction: gender and the politics of scale' (2006) 13(4) Social Politics 457–461; Rianne Mahon, 'After neo-liberalism? The OECD, the World Bank and the child' (2010) 10(2) Global Social Policy 172–192.

Thinking through alternative scenarios for Brexit offers an opportunity to consider the way in which different states and polities have implications for the governance of gendered violence. Four scenarios are identified.

- First, no change because only the UK state governs crime and security – so exit from the EU would make no difference.
- Second, little change because the UK continues to take EU rules even while ceasing to make EU rules.
- Third, little change because the main actors will continue their influence: either because of the continuing cooperation of entities other than national states through principles and networks of mutual exchange; or because of the significance of international legal instruments that set the standards for both the UK and the EU.
- Fourth, major change because the UK would lose the EU anchor for (gender) equality policy and for a 'soft' crime/security strategy rooted in the Treaties, the Single European Market and the European Area of Freedom, Security and Justice.

Four conceptual and theoretical issues that underpin the differences between the scenarios are also identified.

- The conceptualisation of the links between different aspects of gender relations and varieties of gender regimes: can one gendered institution be examined in isolation from the others or does it always require analysis of the other gendered institutions that make up its environment and constitute a regime?
- The conceptualisation of and variation in violence/security.
- The significance of the UK, EU and other polities in the governance of gendered violence/security.
- The nature of Brexit, which requires identification of relevant aspects of the EU.

This discussion matters for the prioritisation of political objects, which policies and polities matter most, in strategy to end violence against women.

Gender, violence and state policy

An initial issue is how to compare the UK with the EU and other relevant polities. This is not only to compare the gender projects and programmes of the UK and EU,[7] although this is crucial, but also of other hegemons and international agencies that may shape the UK in the absence of an anchor to the EU.[8] There are two dimensions of gender equality projects to compare: strategy and instruments. Variations in strategy refer to the preferred model of gender relations and how to get there:[9] this requires a conceptualisation of alternative gender futures (discussed below under varieties of gender regimes). Variations in instruments refers to the mechanisms and institutions that are mobilised to take forward the gender equality project; these include laws, courts, governmental departments and agencies, and civil society institutions.

7 Guerrina and Masselot (n 1).

8 Hozić and True (n 1).

9 Emanuela Lombardo, 'EU gender policy: trapped in the "Wollstonecraft's dilemma"?' (2003) 10(2) European Journal of Women's Studies 159–180; Dorothy E McBride and Amy G Mazur, *The Politics of State Feminism* (Temple University Press 2010).

What are the EU-level strategies and instruments for gender equality that the UK might lose on Brexit? The EU-level has innovated on some aspects of gender equality,[10] although there are dilemmas and contradictions[11] and suggestions that it is diminishing.[12] EU equality policy derives its legal competence from Treaties, articulated in Directives and Regulations, with implementation supported by technical agencies and the European Court of Justice, while priorities are set by the European Commission, European Parliament and the European Council. It has long had a distinctive strategy for gender equality,[13] more recently a plan for strategic engagement.[14] Gender equality is embedded, though not always explicit, in the EU strategies for economic growth (articulated in the Single European Market) and security (articulated in the European Area for Freedom, Security and Justice).

A comparison of the UK and EU on gender equality policy finds the EU often in advance over the UK. The UK government White Paper addressing Brexit[15] positions gender equality as if it were sufficiently embedded in UK-level institutions and as an issue to be addressed separately from the economy and security. The structure of the European Union (Withdrawal) Bill (HC)[16] implied that gender equality was fully embedded in UK law. However, Guerrina and Masselot[17] are sceptical of this claim, because of the government refusal of an amendment, during the November 2017 House of Commons debate, that would have safeguarded rights to equality established under the 2010 Equality Act and because of the actions of the UK government in opposing developments in gender equality policy in the EU, such as the Pregnant Workers Directive and for gender balance on corporate boards. Further consideration is needed of the comparison of UK and EU policy on gendered violence/security.[18]

Policies to end violence against women

Should the analysis be restricted to policies that name gendered violence/security (e.g. violence against women, gender-based violence) as their object, or does it include all policies that indirectly have this consequence?

10 Hoskyns (n 2); Kantola (n 4).

11 Verloo (n 4); Heather MacRae, 'The EU as a gender equal polity: myths and realities' (2010) 48(1) Journal of Common Market Studies 155–74; Verloo and Walby (n 5).

12 Jill Rubery, Damien Grimshaw, Collette Fagan, Hugo Figueiredo and Mark Smith, 'Gender equality still on the European agenda – but for how long?' (2003) 34(5) Industrial Relations Journal, 477–497; Petra Ahrens, *Actors, Institutions, and the Making of EU Gender Equality Programs* (Palgrave Macmillan 2018); Sophie Jacquot, *Transformations in EU Gender Equality* (n 2).

13 European Commission, *Strategy for Equality between Women and Men, 2010–2015* (European Commission 2010).

14 European Commission, *Strategic Engagement for Equality between Women and Men, 2016–2019* (European Commission 2015).

15 HM Government, *The United Kingdom's Exit From and New Partnership With the European Union* (Cm 9417, 2017).

16 European Union (Withdrawal), HC Bill, Session 2017–2019, No 2; European Union (Withdrawal), HC Bill, Session 2017–2019, No 3; European Union (Withdrawal), HC Bill, Session 2017–2019, No 4; European Union (Withdrawal), HC Bill, Session 2019.

17 Guerrina and Masselot (n 1).

18 Sylvia Walby, Phillipa Olive, Jude Towers, Brian Francis, Sofia Strid, Andrea Krizsan, Emanuela Lombardo, Corinne May-Chahal, Suzanne Franzway, David Sugarman, Bina Agarwal and Jo Armstrong, *Stopping Rape: Towards a Comprehensive Policy* (Policy Press 2015); Guerrina et al (n 3).

On the one hand, the analysis might only concern policies that name violence against women as the issue; while on the other hand, the analysis might extend to policies that address other (gendered) issues that have indirect but significant effects on gendered violence/security. If there is no Brexit change in policies that name 'violence against women', it might appear as if Brexit could make no difference – if the analysis is restricted to this field. If there is no change in gendered violence/security policies but change in policies that have consequences for gendered violence/security, then it is important that the focus is extended to include these indirect links if a full picture of the implications of Brexit is to be established. The underlying issue is whether analysis treats institutions as if they were autonomous or should extend to the system of interconnected institutions that make up a gender regime.

Underpinning these questions is whether variations in gender violence are theorised at the meso (institutional) or macro (regime/societal) levels. Feminist institutionalist analysis in political science has argued for a focus on institutions, not only the micro level.[19] However, the connections between gendered political institutions have also been demonstrated, for example in the impact of feminist movements on the state[20] and in the impact of descriptive and substantive political representation of gender on the constitution of gender relations.[21] Further, there is a link between gendered economic inequality and gendered violence.[22] Gendered institutions should not be treated as if they were autonomous, but rather analysed as part of an interconnected system of gender relations or gender regime.[23] Developing gender concepts at the macro level also facilitates engagement with other macro level debates on European change.[24] The analysis of the consequences of Brexit should include gender regimes as well as gendered institutions in order to consider the indirect effects of changes in institutions other than gendered violence/security on gendered violence/security.

Varieties of gender regimes

Comparing gender regimes requires a conceptualisation of varieties of gender relations, so that pre-Brexit and post-Brexit forms of gender relations can be compared.

The comparison of macro level gender relations has been addressed in several ways. This has included the extent to which there is a male breadwinner or dual earner household and its relationship to the welfare state,[25] but this does not include

19 Georgina Waylen, *Engendering Transitions: Women's Mobilization, Institutions, and Gender Outcomes* (Oxford University Press 2007); Louise Chappell and Georgina Waylen, 'Gender and the hidden life of institutions' (2013) 91(3) Public Administration 599–615; Rosalind Cavaghan, *Making Gender Equality Happen* (Routledge 2017).

20 McBride and Mazur (n 9); Mala Htun and S Laurel Weldon, 'The civic origins of progressive policy change: combating violence against women in global perspective, 1975–2005' (2012) 106(3) American Political Science Review 548–569; S Laurel Weldon, *Protest, Policy, and the Problem of Violence against Women: A Cross-National Comparison* (University of Pittsburgh Press 2002).

21 Sarah Childs, Paul Webb and Sally Marthaler, 'Constituting and substantively representing women: applying new approaches to the UK case study' (2010) 6 Politics and Gender 199–223.

22 Sylvia Walby, Jude Towers and Brian Francis, 'Is violent crime increasing or decreasing?' (2016) 56(6) British Journal of Criminology 1203–34.

23 Sylvia Walby, *Globalization and Inequalities* (Sage 2009).

24 Hans-Jürgen Bieling and Thomas Diez, 'Linking gender perspectives to integration theory: the need for dialogue' in Abels and MacRae (eds) (n 2) 279–292.

25 Jane Lewis, 'Gender and the development of welfare regimes'(1992) 3 Journal of European Social Policy 159–173.

violence/security. The analysis of gender orders by Connell[26] is wider, but it does not include violence/security as a distinctive institutional domain. Walby's typology of gender regimes,[27] includes violence as well as economy, polity and civil society, and is drawn on here in order to conceptualise the potential changes in gender relations consequent on Brexit.

Walby differentiates between domestic and public gender regimes, and then further differentiates public gender regimes along a spectrum from neoliberal to social democratic. These differences in varieties of gender relations are mobilised at the meso level of specific institutional clusters (economy, polity, violence and civil society) and at the macro level of the gender regime as a whole (for example, UK, EU), while also being relevant to the micro level of practices and projects (such as a strategy for gender equality). In the domestic gender regime, there is appropriation of women's labour within the household, and the exclusion of women from paid employment and other public domains of the polity, education, and some aspects of civil society. In the public gender regime, while appropriation of women's labour in the household does not cease, it is less significant since women are not excluded from the public domains of employment, polity, education and civil society. Different trajectories from a domestic to public gender regime has consequences for its form, sometimes a more social democratic and other times a more neoliberal form of the public gender regime. The social democratic variety has greater gender depth of democracy and less inequality than the neoliberal form. The more unequal forms of the gender regime generate higher levels of violence against women.[28]

There has been a slow change from domestic towards a public gender regime in Europe; but this is still not complete, so the two varieties co-exist. There is a spectrum from more neoliberal public gender regimes (e.g. UK) to more social democratic public gender regimes (e.g. Sweden). The EU has a more social democratic public gender regime than the average of EU member states.[29] In the crisis starting from 2008, there have been varied changes in the gender regime in Europe: in the UK, within the public gender regime, a turn away from social democratic towards neoliberal;[30] while in Spain both a partial push-back from public to domestic and also from social democratic towards neoliberal public form.[31]

Will the UK develop a more neoliberal public gender regime after Brexit? The typology of varieties of gender regime that distinguishes not only between domestic and public forms, but also between social democratic and neoliberal public forms, is helpful in conceptualising changes.

1 Violence against women

The concept of gendered violence/security sits at the point of overlap of three fields – gender, violence, and security. This paper is not the place for a discussion of the nuances

26 Raewyn W Connell, *Gender and Power* (Polity Press 1987).

27 Walby (n 23).

28 Ibid.

29 Ibid.

30 Sylvia Walby, *Crisis* (Polity Press 2015).

31 Emanuela Lombardo, 'The Spanish gender regime in the EU context: changes and struggles in times of austerity' (2017) 24(1) Gender, Work and Organization 20–33.

in the relationship between the concepts, which has been developed elsewhere.[32] The focus here is on 'gender-based violence' and 'violence against women' as short-hand for a variety of practices.

There are differences in strategies towards gendered violence by the UK, EU and other relevant entities. A key distinction in strategy towards violence is between 'hard' and 'soft'. 'Hard' entails the use of violence and coercion to deter the use of violence by others. 'Soft' entails the use of policy instruments other than violence and coercion to generate the forms of society that generate less violence.[33] 'Hard' seeks to improve security and reduce violence in society by increasing security and criminal justice activities of the state/polity. There is a tendency to grow the state and its agencies concerned with criminal justice and security.[34] 'Soft' seeks to reduce violence and improve security by reducing inequalities between perpetrators and victims, including targeted support for victims. Less coercive practices can be adopted by states: diplomacy in the neighbourhood;[35] a variety of 'peace' processes;[36] supporting victims and those in vulnerable situations through both targeted services and by generic developments in welfare state provisioning; the use of civil legal rather than criminal legal interventions; and regulations to reduce exploitation and inequalities in the economy and elsewhere. These strategies implicitly mobilise different theories of the relationship between violence and society.[37] While many entities deploy some aspects of both approaches, the balance between them and resources allocated to them varies significantly, with varied outcomes for the level of violence in a society (for example, homicide rates in the US are five times higher than those in Europe).[38] 'Hard' is associated with neoliberalism, 'soft' with social democracy.[39] The EU has a softer security strategy than the US;[40] the UK is in between.[41]

Violence varies with inequality, so policies addressing inequality are relevant to violence. The extent of violence in a country varies not only with the nature of the strategy and capacity of its national state, but also with the extent of inequality and

32 Guerrina and Wright (n 3); Guerrina et al (n 3); Aisling Swain, *Conflict-Related Violence against Women: Transforming Transition* (Cambridge University Press 2018); Chris J Bickerton, Bastien Irondelle and Anand Menon, 'Security co-operation beyond the nation-state: the EU's common security and defence policy' (2011) 49(1) Journal of Common Market Studies 1–21; Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner 1998): Mary Kaldor, *Human Security* (Polity Press 2007); Nick Vaughan-Williams, *Europe's Border Crisis: Biopolitical Security and Beyond* (Oxford University Press 2015); Didier Bigo, 'Globalized (in)security: the field and the ban-opticon' (2006) in Didier Bigo and Anastassia Tsoukala (eds), *Illiberal Practices of Liberal Regimes: The (in) Security Games* (L'Harmattan 2006).

33 John D Brewer, *Peace Processes: A Sociological Approach* (Polity Press 2010); Johan Galtung, *Peace by Peaceful Means* (Sage and PRIO 1996).

34 Loïc Wacquant, *Punishing the Poor* (Duke University Press 2009); Loïc Wacquant, 'Crafting the neoliberal state' (2010) 25(2) Sociological Forum 197–220; Buzan et al (n 32).

35 Karen E Smith, *European Union Foreign Policy in a Changing World* (Polity Press 2003).

36 Galtung (n 33); Brewer (n 33).

37 Walby (n 23); Sylvia Walby, 'Violence and society' (2013) 61(2) Current Sociology 95–111.

38 Walby (n 23).

39 Wacquant, *Punishing the Poor* (n 34); Wacquant, 'Crafting the neoliberal state' (n 34); Walby (n 23).

40 Smith (n 35).

41 Walby (n 23).

poverty.[42] Domestic violence against women increases in gendered economic crisis.[43] Hence, changes in policy towards (gendered) economic inequality has implications for (gendered) violence/security. Further, gendered violence varies with gendered political representation, for example, the rate of femicide is higher in countries with lower rates of women in parliament.[44] Variations in many aspects of the gender regime are relevant for the structuring of violence/security.

The analysis of potential changes in gender-based violence against women, or more generally gendered violence/security, consequent on Brexit needs to include not only policies directly focused on violence against women but also policies towards (gender) equality (including in the economic and political domains).

2 Polities and governance

What are the differences in the governance of gendered violence of the various polities? The analysis of the governance of gendered violence relevant can be divided into two aspects: the strategies; and the entities. The strategies for violence vary in focus between 'hard', using force to deter others; and 'soft', using non-coercive means to secure peace, which were discussed above. The discussion of relevant entities and their capacities includes not only the UK and the EU, but potentially also the UN and the USA, which make up the world system in which these changes are taking place. There are four approaches to the relevant polities: states only; member states and EU only; multiple polities in a world system, in addition to member states and EU; and governance by non-polities.

2.1 States only

If only national states (including devolved administrations) were involved in the governance of violence and security, then UK exit from the EU would have no consequences for gendered violence/security. This is consistent with the traditional 'Westphalian' approach to states, which assumes that they are the only significant entities involved in governance and that the sovereignty of individual states is paramount, even if compromised a little in practice. In this approach, violence/security is regarded as a matter for states alone. Both 'law and order' and 'warfare' were considered the prerogative of the sovereign state. However, this is not the case in practice.

2.2 States plus EU

If the EU is significant for the governance of violence/security, then Brexit would make a difference to violence in the UK. Is the EU different and, if so, is it better than the UK in reducing violence? Is such a zero-sum approach to the powers of the member state and EU-level[45] appropriate or, since the EU assists member states to complete their domestic

42 Theodore G Chiricos, 'Rates of crime and unemployment (1987) 34(2) Social Problems 187–212; Pablo Fajnzylber, Daniel Lederman, Norman Loayza, 'Inequality and violent crime' (2002) 45(1) Journal of Law and Economics 1–39; Ching-Chi Hsieh and M D Pugh, 'Poverty, income inequality and violent crime' (1993) 18(2) Criminal Justice Review 182–202; Walby (n 23).

43 Walby et al (n 22).

44 Walby (n 23).

45 Andrew Moravcsik, 'Preferences and power in the European Community: a liberal intergovernmentalist approach' (1993) 31 Journal of Common Market Studies 473–526.

agendas, is it better to conceptualise this as a situation in which pooling some sovereignty aids all?[46]

The EU has a softer violence/security strategy than the UK. The EU has developing competence in internal and external violence/security, especially since the 2006 Treaty of Lisbon.[47] It is addressed by EU law (Treaties, Directives, Regulations, European Court of Justice), by EU political institutions (Parliament, Council, Commission), by Commission Directorate-Generals, and by more than 10 technical agencies (from Europol to Eurostat). The 2006 Treaty of Lisbon significantly expanded the legal competence at the EU-level to act to pursue the EU's goals, leading to new Directives and new agencies. In Article 82 of the Treaty, EU-level competence to address violent crime is enabled (though limited to cross-border and serious crime) and underpins several Directives that engage with gender-based violence against women.[48] The EU technical agencies are important in the practical integration of the EU into a single Area of Freedom, Security and Justice. They include: Europol (police); Eurojust (judges); Frontex (borders); CEPOL (police college); EASO (asylum); FRA (fundamental rights); and EIGE (gender equality). Under the direction of the European Commission, and the guidance and jurisdiction of the European Court of Justice, each agency assists the practical cooperation of professionals across all the member states of the EU, for example, setting standards and exchanging sensitive information.

The EU has a stronger approach to gender equality than the UK, which has consequences for gendered violence/security. Policy instruments to implement the goal of gender equality are varied and are lodged in institutions that have different amounts of power and influence. These instruments include: legal principles (for example, equal treatment); descriptive representation (for example, gender balance in decision-making institutions); and gender mainstreaming (the inclusion of gender equality goals in all policy-making instruments and institutions). The UK government, in its White Paper on Brexit, addresses gender (and other) equalities issues as if they were a separate policy field from those of the economy or violence/security. However, there are significant variations in the extent to which the project, or goal, of gender equality is embedded in different policy fields. The variations have significant effects. For example, the legal principle of 'equal treatment', written into the Treaties that underpin the EU, is differently and more strongly institutionalised in the EU institutions that regulate the Single European Market than in the Area of Freedom, Security and Justice; by contrast, the policy of 'gender mainstreaming' potentially has implications for a wider range of policies but tends to be weakly institutionalised.

The EU has significant powers to promote the reduction of gendered violence, both directly through its policies on violence/security and indirectly through its policies on gender equality. Changes in EU-level competence that diminish UK autonomy have implications for the extent to which Brexit would make a difference to the governance of gendered violence/security.

46 Alan Milward, *The European Rescue of the Nation-State* (Routledge 1992).

47 European Union, Treaty on the European Union (Treaty of Lisbon) (European Commission 2007); European Union, Treaty on the Functioning of the European Union (European Commission 2007).

48 Sylvia Walby, *European Added Value of a Directive on combating violence against women, Annex 1 Legal Perspectives for Action at EU Level*, PE 504.467, EAVA 3/2013 (European Parliament 2013).

2.3 Polities in addition to states and the EU

If there are relevant polities in addition to states and the EU, then the implications of Brexit will depend on the significance, capacities and strategies of these entities in addition.

An exclusive focus on states is challenged by the recognition of a plurality of polities and sources of governance, such as organised religions, cities, the UN, Council of Europe, and NATO, which overlap rather than saturating a given territory.[49] It is further challenged when these entities are understood to operate in a wider, global environment.

These other polities differ in the extent to which their gendered violence/security strategies are aligned with the EU's relatively soft strategy, such as the UN and its concern for human rights, or aligned with a harder more coercive strategy, such as that of the USA. The former includes the UN (UN Declaration of Human Rights, UN Office of Drugs and Crime, UN Security Council, UN Women) and the Council of Europe (European Convention on Human Rights, European Court of Human Rights, Istanbul Convention). The latter includes major states seeking hegemony over global rules and practices, especially the USA.[50]

There are parallel institutional structures in the UK and EU and additionally in the Council of Europe, UN and NATO, including law, politically led policy-making institutions, technical agencies to implement policy, shaped by wider and varied systems of inequality. Identifying what forms of governance are being left behind on exit from the EU is entangled with identifying whether these were 'really EU' or were a consequence of simultaneous engagement of the UK and EU with the Council of Europe (for example, the European Convention on Human Rights) or the UN (for example, the Universal Declaration on Human Rights, or UN Security Council Resolutions) or the USA.

2.4 Other entities

One approach to the governance of gendered violence/security focuses on polities, while a second addresses wider forces, including economy (e.g. global capital) and civil society (e.g. feminist projects).

Within the UK, interpersonal violent crime is directly addressed by law, government ministries of home affairs and justice, the criminal justice system, and the provision of services to victims, and indirectly shaped by the system of inequality. Interstate violence/security is directly addressed by law, government ministries of foreign affairs and defence, the military and security services, and indirectly shaped by the global system of inequality. In the second approach, the governance of objects other than violence affects violence. Hence, variations in violence may be caused by many institutions in society not only by states. For example, changes in gendered economic inequality may change the rate of gender-based violence. The approach selected depends on the theory of violence in society.

49 Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press 2006); Walby (n 23).

50 Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press 2006).

These issues are entangled with more theoretical questions as to the nature of polities and of governance involved in the relationship between the UK and EU polity. One traditional debate, which concerned the balance in a zero-sum game of power between two discrete states,[51] has been challenged by those noting the multiplicity of sites of governance linked through networks,[52] and complicated by the significance of scale.[53] In a parallel, how should the tension between complex systems theory[54] and post-structuralism,[55] which is a dimension of these debates, be resolved for the purposes of this analysis?

2.5 Conclusion

Would UK exit from the EU mean that the nature of the governance of gendered violence/security would be set autonomously by the UK, or shaped by other non-UK forces: multiple plural polities; international regimes such as the UN; the imperatives of the US hegemon; or other forces? Since autonomy is unlikely, and the EU has the softest violence/security regime among relevant polities, Brexit is likely to have the consequence of hardening the UK violence/security regime and increasing violence against women. The extent of this change will depend on the nature of Brexit.

3 Brexit

Despite the early slogan that 'Brexit means Brexit', there are multiple contested approaches to Brexit. Although the UK left the EU on 31 January 2020, with the transition period intended to end on 31 December 2020, many issues concerning the future relationship between the UK and EU were not settled in the 2020 Act.[56] There have been two sets of agreements between the UK and EU for a *Withdrawal Agreement* and *Political Declaration* of the European Commission and UK government, first in 2018[57] and second in 2019;[58] and in March 2020 further negotiations are ongoing. The two existing sets of documents appear to be similar for England, Wales and Scotland, but differ considerably for Northern Ireland, which is more closely aligned to the EU in the more recent *Agreement*. In early December 2019, there appeared to be a spectrum of options from 'hard Brexit' to 'soft Brexit', which are discussed below. 'Hard' Brexit means a rupture from the EU, with trade with the non-EU world prioritised over the EU on World Trade Organization rules or bespoke trade rules (e.g. 'Canada' model). Hard Brexit may be reached either via a failure to agree ('no deal') or via a negotiated departure and a future distant relationship. 'Soft' Brexit means maintaining a close relationship with the EU, maintaining EU regulatory standards and much of the 'acquis' (e.g. 'Norway' model).

51 Milward (n 46); Moravcsik (n 45).

52 Zielonka (n 49).

53 Neil Brenner, Jamie Peck and Nick Theodore, 'Variegated neoliberalization: geographies, modalities, pathways' (2010) 10(2) Global Networks 182–222; Mahon (n 6).

54 Walby (n 23).

55 Nick Vaughan-Williams, *Europe's Border Crisis: Biopolitical Security and Beyond* (Oxford University Press 2015).

56 European Union (Withdrawal Agreement) Act 2020.

57 European Commission, *Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union* (TF50(2018) 55, European Commission 2018); European Commission, *Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom* (European Commission 2018.

58 HM Government, *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (CCS1019294568 10/19, 2019); HM Government, *Political Declaration Setting Out the Framework for the Future Relationship between the European Union and the United Kingdom* (CCS1019297528 10/19, 2019).

Soft Brexit is reached via a negotiated departure and future relationship. There are further variations and potential scenarios.

Understanding the implications of hard and soft Brexit requires understanding of the structure of the governance of the EU and the numerous entanglements of the UK with EU-level institutions. There are several types of EU institutions: political (European Parliament, European Commission, European Council); legal (Treaty, Directives); juridical (European Court of Justice); technical (e.g. Europol for law enforcement, CEPOL or the European police college, Eurojust for judicial cooperation, Frontex for border guards, EASO for asylum issues, FRA for fundamental rights, EIGE for gender equality, and Eurostat for statistics). There are also strategic clusters (especially the Single European Market and the European Area of Freedom, Security and Justice). The Single European Market has a complex and highly developed set of legally binding regulatory practices to achieve four principled freedoms of movement for people, goods, services and capital and a 'level playing field' for all actors within this economic space. These regulations concern matters ranging from chemical safety to equalities. The coherence and significance of the strategic clusters has often been underestimated; but these are crucial in understanding the dilemmas of Brexit.

Hard Brexit means leaving all the EU institutions – political, legal, juridical, and technical – as well as the strategic clusters. Soft Brexit seeks to continue economic trade with the EU as before, with no tariffs or checks at borders for freedom of movement except that of people (migration). The internal coherence of the regulatory space of the Single European Market makes selective exit from one of the four freedoms very challenging. The UK has been offered exit from the freedom of movement of people and from participation in the political institutions but not exemption from the detailed regulation of economic space. This is not surprising if the highly regulated and integrated nature of the Single European Market is appreciated in the context of an understanding that markets are always regulated by sets of rules.

The 'negotiations' between the UK and EU have considered many alternatives as to which institutions the UK would leave and which it stays part of. Even before Brexit, the UK had obtained a bespoke relationship with the EU over its engagement in EU institutions, being involved in many but far from all of these. For example, on the economy, the UK is not a member of the EU currency; on security, the UK routinely opts out from Directives and selectively opts back in some. However, the high level of integration of institutions within strategic clusters makes exit from some institutions but not others difficult. The scope for further ad hoc bespoke arrangements seems exhausted. The UK Brexit strategy for opting in or out of EU institutions may be the same or different for violence/security as for the economy, but is not covered in either *Withdrawal Agreement* and only briefly mentioned in the two *Political Declarations*. There are suggestions that, despite the ostensible centrality of crime/security for traditional understandings of sovereignty, the UK is seeking greater continuity of its engagements over violence/security than it is for the economy, but that the *Political Declaration*, by its nature, is not an agreement to this.

A further challenge to analysing the situation is that Brexit is not a process occurring between two stable entities, since neither the UK nor EU, nor indeed the wider environment, is stable. Brexit has the potential to rupture the internal relations between the nations and devolved administrations of the UK, including that concerning Northern Ireland, and to change their capacities to govern violent crime and security. The EU continuously deepens its institutional architecture towards ever closer union, as part of its

original design,[59] with implications for democracy and justice.[60] It has been undergoing an internal review, 2017–2019, of the balance of decision-making between member state and EU-level, in the context of a crisis, where one possible outcome is some form of 'ever closer union'.[61] The COVID-19 pandemic further unsettles the wider environment in which Brexit is taking place, with both closure of national borders and new forms of cooperation occurring. Brexit is taking place in the wider context of an unstable polarisation and turn to the right of politics in Europe and North America, potentially altering the nature of Brexit.

3.1 Potential post-Brexit futures for gendered violence/security

Four potential outcomes (scenarios) for Brexit are postulated following the discussion of the nature of gender, violence/security, the governance of gendered violence/security and Brexit. They are: no change because the UK state governs crime and security policy; little change because the UK continues to take EU rules while ceasing to contribute to the making of EU rules; little change because the relevant governance actors continue; and major change because of the loss of the EU anchor for gender equality and for a softer violence/security strategy.

At the time of writing (March 2020), Brexit has happened; but it is unlikely that the process of adjusting the relations between the UK and EU will be complete by the target date for the end of the transitional period of 31 December 2020. While the details will soon be out of date, the wider issues brought into focus by Brexit concerning the significance of the relationships between the UK, member states and the EU for the governance of gendered violence will continue to be relevant.

3.2 No change because the UK state governs crime and security

The premise of the first scenario is that there would be no change because the UK state (and devolved administrations in Scotland, Wales and Northern Ireland) governs crime and security policy. If the competence to govern violent crime and security is solely that of the UK polity (and devolved administrations), then exit from the EU would make no difference to the governance of gendered violence and security in the UK. However, this is not the case since the UK state (and devolved administrations) is not the sole source of governance over crime and security.

The EU-level has acquired significant competence over law and policy for crime and security, especially since the 2006 Treaty of Lisbon. This moved the subsidiarity boundary between member states and the EU-level, concerning the lowest level of decision-making consistent with effective governance, in favour of the EU-level. This is likely to change further in this direction. The extent to which the EU has legal and practical competence in the field of violence and security is underestimated in the 'no change' scenario. Since the EU as well as the UK governs crime and security, the premise of this scenario is voided.

59 Ernst B Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950–1957* (Stanford University Press 1958); Walter Hallstein, *Europe in the Making* (Norton 1973).

60 Jürgen Habermas, *Europe: The Faltering Project* (Polity Press 2009); Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012).

61 European Commission, *Draft Agreement* (n 57); European Commission, *Political Declaration* (n 57) .

3.3 Little change because the UK will continue to take EU rules while ceasing to contribute to making EU rules

The premise of the second scenario is that the EU has become a hegemon at least in its neighbourhood, and the UK will struggle to produce and implement a different form of governance of gendered violence/security. There would be little change if the UK implements EU rules after it exits from the EU-level political entities that set the rules. If the UK continues to participate in and accept the rulings of the EU-level technical agencies while removing itself from the EU-level political decision-making entities, there will be little change. For example, the independent body proposed to oversee legal disputes would take guidance on its legal principles from the European Court of Justice.

Taking EU rules while not making EU rules depends on the nature of the legal Brexit process. It appears to be proposed in both *Withdrawal Agreements* and is consistent with the earlier UK White Paper. It is also consistent with previous UK decisions concerning the Area of Freedom, Security and Justice, in a context in which the UK had acquired the capacity to select into which EU initiatives (e.g. Directives) in this Area it would opt in. While the UK had stated that it would not accept the jurisdiction of the European Court of Justice, the *Withdrawal Agreements* propose an independent body that would take its legal practice from this court. However, a hard, no deal Brexit would reject the supremacy of the European institutions, including its court.

3.4 Little change because the main governance actors will continue to influence

The premise of the third scenario is that the state institutions of the UK and EU are not important in the governance of gendered violence as compared with other polities and entities at different scales. There would be little change if the sources of governance in the EU and UK operate through principles and networks of mutual exchange that are not dependent on centralised EU state machinery and its relationship to the UK state. There would be little change if the governance of gendered violence/security is centred not in the EU or UK, but rather in international entities, in particular the UN, but also the Council of Europe, the European Court of Human Rights and NATO. If the source of governance is other than the EU polity, then exit from the EU will have little effect.

However, in the governance of crime and security, centralised state machineries that make and clarify law and its implementation are significant. It is not possible to avoid centralised harmonised standard-setting and interpretation of legal rules in this domain. While practices for implementation and exchange of innovative and best practices involve cooperation between actors at other levels, including local states, ultimately local entities benchmark and anchor their legal regulations in centralised state/polity institutions. Hence, changes in the nature and relationship of the UK and EU polities will have implications for the (gendered) governance of violence and security.

Further, while the UN is important in setting international standards at an abstract level, their implementation remains extremely varied between states. Implementation matters. Even if the UK were to continue to abide by international legal instruments that also set standards for the EU, this is not a guarantee of stable practices, since these UN (and other international entities) are not the main source of practices for implementation.

This scenario is unlikely, since the UK and EU states are important in the shaping the governance of gendered violence/security.

3.5 Major change because of the loss of the EU anchor for (gender) equality and for a 'softer' security strategy

The premise of the fourth scenario is that the EU is a significant source of governance of gendered violence and that exit will remove this influence. There is likely to be a major change because the UK governance of gendered violence would lose its anchor to laws and policies embedded in EU Treaties and implemented in institutions developed for its economic and security strategies. The EU contributes to the governance of gendered violence/security in the UK through laws and policies rooted in the Treaty of Lisbon and related acquis and implemented through the European Commission, European Court of Justice, and many technical agencies supporting its strategies for the economy through the Single European Market and for violence/security through the European Area of Freedom, Security and Justice. There are four components: gender equality laws and policies; general economic policies that affect overall levels of inequality in society; the violence/security strategy; and global forces. In each, the EU policies are more likely to reduce gendered violence than those policies the UK is likely to pursue and be able to implement by itself on exit. Probably, these components would be lost with Brexit. The effects of loss of the EU anchor are likely to increase over time.

The first component concerns gender equality laws; and whether these are domestically rooted in the UK or dependent on the EU. Currently, it is both. There is a debate as to whether this was independently developed by the UK, developed jointly by UK and EU actors, or imposed on the UK by the EU.[62] There is the additional and perhaps more important issue of the trajectory of development of UK law on gender equality on exit from the EU, if and when the Treaty obligations to maintain the Directives end. There are competing political forces: on the one hand, advocates of free markets have included gender equality labour market regulations and maternity leave in their recommendations to cutting out 'red tape' (Institute of Directors), and these may be given impetus in the search for 'free trade deals'; on the other hand, the UK government has so far committed to maintaining the current laws and policies (White Paper).

The second component concerns equality laws more generally; and whether the loss of laws and policies for equality centred on the Single European Market would have consequences for the rate of violence against women. On the one hand, it might appear that they concern separate institutional domains – economy and violence/security – so they would not. On the other hand, the increase in gendered economic inequalities that would be consequent on their loss would be likely to increase violence against women. If gender is conceptualised as a regime, rather than as a set of autonomous institutions, then links between economy and violence can be brought into focus. The loss of gender equality regulations would increase gendered economic inequalities and would be likely to increase violence against women.

The third component concerns the approach to the governance of violence/security; and whether the EU is different from the UK. The EU has a softer, more social-democratic approach to the strategy for violence and security, which is more gender-equality aligned, than the strategy that the UK pursues when it has the capacity for independent action. This concerns both internal security, or law and order, and external

62 Hoskyns (n 2).

security, such as interstate diplomacy and capacity for war. The UK has a harder, more coercive and violent internal and external security strategy than the EU. The EU strategy is softer, more dependent upon diplomacy than violence. The EU has been developing its competence in internal and external security matters. In external affairs this includes the capacity for diplomacy. While NATO has been the primary form of military cooperation, where the US has been hegemonic, the EU is developing capability in external affairs and security. The UK is preparing to exit from a large bloc that has a softer security strategy than its own or NATO. An example concerns whether the UK is more or less likely to go to war after Brexit than before and its implications for gendered violence since conflict zones have higher rates of violence against women than non-conflict zones. The loss of the EU anchor is likely to increase gender-based violence.

The fourth component concerns vulnerability to other forces. These forces include other polities, such as the US hegemon, China and any state with which the UK seeks a trade deal, and global capital, especially global finance capital. These forces generate higher levels of inequality and violence. The EU has greater capacity to withstand the pressures of these forces than the UK because of its scale and capabilities. The loss of the EU anchor is likely to increase inequality and violence in the UK.

The loss of the EU is likely to change the nature of the gender regime in the UK so that it takes a more neoliberal form of the public gender regime, which is associated with higher rates of violence against women.

Conclusions

The analysis of the governance of gendered violence addressed four issues: gendered institutions and gender regimes; the governance of violence; the relationship of states and other entities in the governance of gendered violence; and the nature of the EU. They are relevant to the evaluation of the potential of different feminist strategies to end violence against women.

To understand the causes of changes in gendered violence it is necessary to know the connections between the different aspects of gender relations, the extent to which changes in one institutional domain would change another; and to conceptualise the changes. There are sufficient links between clusters of gendered institutions (economy, polity, civil society, violence) to constitute gender regimes; and that understanding developments in any one gendered institution required taking into account its environment that is made up of other gendered institutions. Varieties of regimes can be distinguished not only between domestic and public, but also between forms of the public gender regime, which can be divided into more social democratic and more neoliberal forms. The implications are that changes in the form of the gendered economy from a more social democratic to more neoliberal form can have consequences for other gendered institutions and for the regime as a whole. Hence, the consequences of Brexit for gendered violence/security are affected by the consequences of Brexit for gendered economies. Brexit is likely to lead to a change in the form of the UK gender regime, which has consequences for gendered violence/security.

There is one interconnected institutional domain of violence, which underpins the field of security. While there are multiple institutions, each with its specificity, they are sufficiently linked together to constitute a single domain so that an increase in violence in one institution is likely to entail an increase in violence in the others. Strategies for violence/security differ. One is to increase state capacity to utilise harsher, more coercive, more violent opposition to the violence of others with the goal of reducing their violence through deterrence and reducing their capacity. A second is to utilise state capacity to

reduce inequalities including between potential victims and perpetrators of violence, including targeted support to potential victims for prevention and mitigation of harm. The UK is closer to the first, harder strategy, and the EU to the second, softer strategy.

The governance of violence requires analysis along two dimensions: strategies and the institutional capacity of relevant polities. The most relevant polities for the UK currently are the UK and the EU. Transnational entities such as the UN and Council of Europe have legal instruments focused on human rights that are significant for standard-setting, but much less significant for implementation. The notion of autonomous state action is not supported. If the UK were to leave the EU, then the harder security strategy of the US becomes more significant.

The different forms of Brexit entail the UK leaving different EU-level institutions, varying from all institutions to only the political institutions. However, it is difficult to leave some but not all EU institutions because of the high level of integration of EU institutions within its strategies for economic growth in the Single European Market and for violence/security in the European Area of Freedom, Security and Justice.

Four potential scenarios for Brexit were assessed: no change because only the UK state governs violence/security; little change because polities and entities other than the EU shape violence security in the UK; little change because the UK will continue to take EU rules in relation to violence/security while leaving EU political institutions; and major change as a consequence of the loss of the EU anchor for gender and equality and for the governance of violence/security. The three scenarios that lead to little or no change were found unlikely. The fourth scenario, major change, is the most likely. The probable changes would be linked to the significantly greater capacities and strategies for (gender) equality in the EU than UK and the significantly softer more social democratic security strategy of the EU than UK, both of which are likely to be lost to the UK as Brexit occurs. These changes would be consistent with expectations of an increase in violence against women. This is a consequence of three associations: reduced strength of (gender) equality laws and policies, rooted in the Single European Market, leading to an increase in gendered violence; reduced pressure to deploy a soft rather than coercive security strategy, which is likely to lead to increased violence, some of which will be against women; and the general shift away from social-democratic to neoliberal social formation, which generates more inequality and more violence. Brexit is likely to diminish the quality of the governance of gendered violence/security over the medium and long-term. It is likely to diminish laws and policies that promote gender equality, equality in the economy more generally, and to harden the violence/security strategy. The consequence of these changes is likely to lead to an increase in gendered violence. The changes are interconnected, since changes in one institutional domain in the gender regime change other institutional domains. The overall change in the gender regime in the UK is towards a more neoliberal form of the public gender regime. The analysis of Brexit provides a lens through which to consider the implications of changes in multiple polities for the governance of violence. No single state or polity is sufficient; multiple polities and their changing intersection need to be brought into focus.

The implications of this analysis for feminist strategy to end violence against women is that Brexit is very important, rather than marginal; it is potentially a tipping point in the violence system. This is because of the interconnections between gender violence and the form of the gender regime and because of the significance of the EU in the shaping of the form of the gender regime.

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Planning, property and profit: the use of financial viability modelling in urban property development

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Abstract

By drawing upon McAuslan's analysis of the ideologies underpinning land use planning law, this paper examines financial viability modelling and legal processes in the context of local authority decision-making related to property development on large urban sites. A local authority can make a site ready for development by using 'compulsory purchase' powers to acquire land, by transferring that land to a property developer and by granting that developer planning permission to commence construction. Analysis of case law, academic criticism of viability modelling practices and a recent property development project highlight issues arising when local authority planning departments use viability appraisals to legitimise decisions purportedly taken in the public interest. An in-depth examination of viability modelling within local authority estates departments then opens a new site for critical inquiry of local authority land acquisition practices. The paper's conclusions reflect upon how financial viability modelling shapes decision-making, despite questions surrounding both modelling techniques and the outputs that viability appraisals produce.

Key words: compulsory purchase; local authorities; property development; planning; viability.

Introduction

Local authority planning departments in England formulate and apply policies for property development in their areas. Local authority estates departments, on the other hand, often use both the local authority's landholdings and the local authority's power to 'compulsorily purchase' privately owned land to stimulate property development activity. By granting planning permission to property developers and by transferring both their own and compulsorily purchased land to those developers, these local authority departments facilitate the 'assembly' of land for property development purposes.[1]

A type of financial viability modelling device, called a development viability appraisal (DVA), is integral to each aspect of land assembly. Local authority planning departments use DVAs in negotiations with property developers on such things as the amount of 'affordable housing'[2] a specific project should provide. DVAs are also a component of a common form of conditional property development contract, known as a development

1 Discussed in Antonia Layard, 'Shopping in the public realm: a law of place' (2010) 37(3) Journal of Law and Society 412.

2 Lower-cost housing sold or rented below market value: see Ministry of Housing, Communities and Local Government (MHCLG), *National Planning Policy Framework* (MHCLG 2019) Annex 2.

agreement (DA), made between local authority estates departments and property developers to consolidate disparate urban landholdings into plots capable of accommodating large-scale property development projects.

This paper identifies problems that emerge when local authority planning and estates departments use DVAs as decision-making tools during land assembly. To analyse these problems, the paper considers McAuslan's well-known examination of the 'ideologies' running through land use planning law.[3] For McAuslan, this law includes legislation and judicial decisions related to development control and compulsory purchase activity[4] and the 'paraphernalia of plans, hearings, appeals, notices, orders, circulars, agreements, etc' that these activities generate.[5] McAuslan's account pinpoints three competing ideologies that complicate decision-making within the context of land use planning: first, that the law exists to protect and serve private property rights; second, that the role of the law is to promote the public interest; and, third, that the law should promote public participation in land use planning.[6] This paper moves McAuslan's ideas into a new area by focusing on how councillors, local authority officers, third-party consultants and property developers working on land assembly projects formulate and pursue a shared vision of the public interest. The paper argues that this manifests most clearly in an assumption that there is a public interest, first, in enhancing the monetary profit accruing from particular projects and, second, in carefully controlling public participation in the decision-making processes at play in this context.

To illustrate how conflicting notions of the public interest create tensions in land assembly practice, this paper studies a recent project in Winchester (the Winchester Development), a small city in the south of England. The local authority participating in the Winchester Development (Winchester Council) did so by attempting to address what Harding has called 'the ownership logjam'.[7] This arises if ownership of landholdings on an earmarked development site is spread across landowners who refuse to participate in the redevelopment of that land. To address this, Winchester Council granted a preselected property developer planning permission to construct an agreed set of buildings and used a DA with that developer to acquire those landholdings and thus assemble a development site in an area deemed to be blighted by a downtrodden property market and a lack of 'investability'. The ostensible goal was the construction of new buildings on a predefined site to leverage the provision of urban housing and other public goods and to bring associated 'trickle-down' benefits to the area through the creation of

3 Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980).

4 When discussing development control, McAuslan examines how decision-makers determine applications for planning permission (ibid 147). When discussing compulsory purchase, McAuslan addresses compensation payable to landowners when public bodies expropriate their property rights (ibid 103). This paper does not consider the compensation regime but, instead, discusses the law regulating the use of compulsory purchase powers.

5 Ibid 268.

6 For more recent discussions of these ideologies, see Julie Adshead, 'Revisiting the ideologies of planning law: private property, public interest and public participation in the legal framework of England and Wales' (2014) 6(1/2) International Journal of Law in the Built Environment 174 and Emma Lees and Edward Shepherd, 'Incoherence and incompatibility in planning law' (2015) 7(2) International Journal of Law in the Built Environment 111.

7 Anne Harding, 'The rise of urban growth coalitions, UK-style' (1991) 9(3) Environment and Planning C: Government and Policy 295, 314. See also Anna Minton, *Ground Control: Fear and Happiness in the Twenty-First-century City* (1st edn, Penguin Books 2009) and Peter Wyatt, *Property Valuation* (2nd edn, John Wiley & Sons 2013) 427.

jobs and an enhancement in land values.[8] This paper examines, however, the tensions to which Winchester Council had to respond when promised planning gains and perceptions of development viability exerted competing pressures. The paper also shows how a DA functions as a type of legal–economic hybrid that regulates the transfer of compulsorily purchased land from private to public ownership and then from public ownership into a new form of private ownership on terms conditioned by the outputs of DVAs. The paper then analyses how, as Henderson has put it, local authorities involved in this type of property development activity treat land assembly and private profit 'as a public interest objective' that trumps other policy goals.[9]

The tensions examined in this paper were highlighted in court proceedings related to the Winchester Development[10] but also emerged in various documents that Winchester Council produced for consideration at internal meetings and that its officers presented to a public inquiry convened to consider its use of compulsory purchase powers. These documents provide important empirical data because they record what local authority officers and councillors read and said about DAs, DVAs and land assembly. The paper also inspects the findings of the Information Commissioner (IC) in response to public complaints about the availability of information related to the financial underpinnings of the Winchester Development. Alongside this examination of local authority decision-making and financial viability modelling in the context of the Winchester Development, the paper probes other recent judicial decisions related to planning, DVAs and public participation in land assembly processes. Taken together, this range of sources reveals the contradictions that emerge when the public interest dimension of planning becomes synonymous with the pursuit of private commercial imperatives.

The paper addresses these tensions in five sections. First, the paper introduces the Winchester Development and elaborates on McAuslan's analysis of the ideologies at play in planning law. The second section then discusses critical studies of financial viability-modelling practices, judicial decisions involving DVAs and aspects of the Winchester Development to analyse the tensions that emerge when planning departments and property developers use DVAs to reduce or avoid any obligation to provide public goods, such as affordable housing, which would otherwise be imposed as a condition of the grant of planning permission. The paper's third section then considers various access to information requests to highlight conflicts related to public participation in the use of DVAs. The paper then shifts focus to examine the land acquisition aspect of land assembly. It does so by analysing data drawn from the Winchester Development and by considering the High Court case of *R (on the application of Wylde) v Waverley Borough Council*.[11] This section unpicks the interrelationship between DAs and DVAs to analyse land valuation and public procurement controversies arising from viability-led changes to local authority–property developer DAs. The paper concludes by reflecting upon how financial viability shapes local authority decision-making, despite questions surrounding the robustness and objectivity of modelling techniques, the underlying assumptions and the outputs that DVAs produce.

8 Winchester CC, *The Winchester CC (Silver Hill) Compulsory Purchase Order 2011. Statement of Case* (22 March 2012) paragraph 8.4. This process has also been examined in legal and urban regeneration studies (see Layard (n 1), Minton (n 7) and, for an American perspective, Debbie Becher, *Private Property and Public Power: Eminent Domain in Philadelphi*a (Oxford University Press 2014).

9 Steven R Henderson, 'City centre retail development in England: land assembly and business experiences of area change processes' (2011) 42 Geoforum 592, 599.

10 *R (on the application of Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin) (hereafter *Gottlieb*).

11 [2017] EWHC 466 (Admin) (hereafter *Wylde*).

1 Silver Hill, Winchester

The choice of the Winchester Development as the focal point of this paper followed the aforementioned *Gottlieb* judicial review.[12] The decision to focus primarily on a single project was also, however, a product of the complex interplay between planning and land acquisition decision-making and the explanatory detail required to highlight the specific problems arising from the use of DVAs in land assembly practice. Moreover, examining a single project enables, paraphrasing McAuslan, a close examination of the occasions during land assembly when ideological conflicts arise.[13] The Winchester Development provides particularly rich insights because of the frequency with which Winchester Council and the Winchester Developer used DVAs in an effort to legitimise controversial planning and land acquisition decisions. In addition, studying the Winchester Development reveals limitations to the scope of access to information laws as a means for public scrutiny of the DVAs that are crucial to land assembly processes.

The urban site that Winchester Council's Estates Department[14] identified in the late-1990s as suitable for property development (the Winchester Site) consisted of five Winchester Council-owned landholdings, Winchester's privately owned bus station and other landholdings owned by various third parties.[15] The Winchester Development began when Thornfield Properties (Winchester) Ltd agreed, with the owner of the bus station, to redevelop that land.[16] The Developer then attempted, unsuccessfully, to reach land acquisition agreements with other landowners with interests on the Winchester Site.[17] The combination of the Developer's agreement in relation to the bus station, the fragmented nature of landownership on the Site and Winchester Council's desire for development illustrates why a local authority estates department and a property developer might agree a conditional property development contract containing a land assembly mechanism.

Winchester Council's Estates Department and the Winchester Developer signed a DA on 22 December 2004 (the WDA), in which they agreed that the Development would include various commercial buildings, a new bus station and at least 287 homes, of which

12 *Gottlieb* (n 10).

13 McAuslan (n 3) 269.

14 Winchester Council operates an Estates Department (Winchester CC, *Constitution of the City Council – Part 7 – Management Structure* (adopted 26 June 2019)), which has been tasked with 'maximising' the revenue that the Council's land generates (as stated in part 7 of the previous iteration of the Constitution (adopted 7 February 2017)). Christophers explains the long history of central and local government initiatives, often involving privatisation schemes, designed to maximise revenues produced from local authority-owned land: see Brett Christophers, *The New Enclosure: The Appropriation of Public Land in Neoliberal Britain* (Verso 2018). A current example is the One Public Estate project: Local Government Association, *One Public Estate: Building a Movement through Partnership* (Local Government Association 2018).

15 Winchester CC, *CAB1030. Broadway Friarsgate – Development Agreement. Report of Chief Estates Officer* (February 2005) appendix 1. When this research began, documents related to the Winchester Development cited in this paper were available on the Council's website. Winchester Council has since redesigned its website and some documents are no longer available. The author has copies of documents cited in this paper available for review on request.

16 Thornfield Properties (Winchester) Ltd was a property development company established specifically for the Winchester Development. In 2010, its parent company (Thornfield Properties plc) entered administration and Henderson Real Estate acquired the development company and changed its name to Silverhill Winchester No 1 Ltd: see Winchester CC, *CAB2085. Silver Hill Regeneration Project – Latest Developments. Report of the Chief Executive* (November 2010). The shorthand 'the Winchester Developer' is used here for simplicity.

17 Matthew Bodley, *Proof of Evidence* (presented to the Public Inquiry held to consider the Winchester CC (Silver Hill) Compulsory Purchase Order 2011) (May 2012).

35 per cent were to be affordable.[18] To enable construction to commence, the Developer agreed to apply for planning permission[19] and to continue its attempt to acquire all required landholdings not in the ownership of Winchester Council. If the Developer failed to acquire those landholdings, Winchester Council's Estates Officers agreed that they would attempt to complete the acquisition process using the Council's compulsory purchase powers and by leasing the entire Site to the Developer.[20] This paper consequently examines the negotiations that took place between the Winchester Developer and Winchester Council's Planning and Estates Departments until the *Gottlieb* judgment determined that the Council's decision to approve variations to the WDA was unlawful. The High Court's decision led to the collapse of the Development in March 2016,[21] so the decision to examine the Winchester Development means studying a project that failed. Nevertheless, the longevity of the project meant that the Council and the Developer engaged with various legal processes. This variety provides multiple original insights into how legal mechanisms regulate this type of land assembly activity.

Much of the law in this area, McAuslan has argued, is dominated by two ideologies. On the one hand, McAuslan suggests, the courts often interpret and apply land use planning law in a way that prioritises private property rights over other interests.[22] On the other hand, McAuslan highlights the tendency amongst the politicians and local authority officers who formulate and apply land use planning law to construct and interpret that law primarily in accordance with a broadly defined public interest ideology.[23] Sections 226(1)(a) and (1A) of the Town and Country Planning Act 1990 (TCPA 1990) exemplify the latter tendency. These provisions permit a local authority to make a compulsory purchase order (CPO) if it believes that expropriating third-party land would 'facilitate … development, redevelopment or improvement' and would be likely to contribute social, economic or environmental benefits to the wider area. In the context of land assembly, the public interest ideology underpinning these provisions often manifests in the use of public powers to realign existing private property rights to enable land uses deemed to be more socially and economically productive.[24] This is a use of legal mechanisms to resolve a conflict between how public administrators perceive the public interest and the rights of a private property owner to use her land in ways that challenge the pursuit of presumed public interest goals. While McAuslan suggests that there is a complex interplay between these dominant ideologies in this and in other aspects of land use planning, he also argues that the content, interpretation and application of law often diminishes the role of public participation. This is because public participation is seen as a threat to the predominance of these ideologies.[25] According to this outlook, enhanced public

18 Clause 5.3 of the WDA called these the 'required elements'. The WDA originally required 364 new homes, but a Deed of Variation reduced this to 287 (Winchester CC, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team* (July 2014) paragraph 2.4). The WDA is available, as of 16 October 2019, for download in four parts, with variations in 2009 and 2010, from <https://www.whatdotheyknow.com/request/a_copy_of_the_contract_between_h>.

19 WDA, schedule 2, paragraph 3.3.

20 WDA, clauses 10.1 and 11.2.

21 Winchester CC, *Withdrawal of Silver Hill Appeal by Developer* (Press release 7 April 2016).

22 McAuslan (n 3) 3.

23 Ibid 4.

24 Brett Christophers, 'Geographical knowledges and neoliberal tensions: compulsory land purchase in the context of contemporary urban redevelopment' (2010) 42(4) Environment and Planning A: Economy and Space 856, 864.

25 Adshead's more recent analysis of public participation in land use planning law provides examples of situations in which McAuslan's critique still applies: Adshead (n 6) 187.

participation in the substantive aspects of land use decision-making might improve public satisfaction with and produce greater clarity in processes, decisions and outcomes.[26]

Land assembly practices highlight conflicts between public interest goals, protection for private property rights and public participation mechanisms. This paper focuses particularly on how councillors, local authority officers, third-party consultants and property developers use DVAs to determine how far land assembly projects should comply with policies related to the provision of affordable housing or the price property developers should pay for local authority land. The paper also probes the tensions that emerge when members of the public seek to intervene in land assembly practices. These tensions flow from a perception, on the part of some local authorities, that these DVAs are themselves a type of private property and that disclosure of them will be detrimental to both a property developer's right to maximise its profits and a local authority's efforts to promote property development in accordance with its perception of the public interest. Public participation thus creates, from the perspective of these local authorities, an interference with both private property rights and the public interest ideology underpinning land assembly decision-making. By following McAuslan's lead, this paper examines what contractual agreements, judicial and ministerial decisions, central and local government policies, documents submitted to and emanating from CPO inquiries and reports related to local authority land transfers show about the legal mechanisms that administrators and developers use to pursue their vision of the public interest and to restrict public participation in viability-related decisions.

2 Financial viability modelling, planning and affordable housing

The National Planning Policy Framework (NPPF) encourages planning departments to assess the amount of affordable housing required in their area[27] and to set targets for affordable housing provision on individual development sites.[28] To do so, planning departments commonly use actual and hypothetical projects on land identified as suitable for residential development to assess the financial viability of specific targets.[29] Third-party consultants then convert a proposed affordable housing target into a monetary figure, which can be added to likely land acquisition, site preparation, construction and other costs in DVAs relevant to the various schemes.[30] A proposed target is 'viable' if projected revenues sufficiently outweigh projected costs. A planning department can then incorporate that target into its development plan as a policy priority to be considered in relation to applications for planning permission. Planning departments can then seek to ensure affordable housing provision through 'planning obligations', in a 'section 106

26 McAuslan (n 3) 269.

27 MHCLG (n 2) paragraph 60.

28 Ibid paragraph 62.

29 Brett Christophers, 'Wild dragons in the city: urban political economy, affordable housing development and the performative world-making of economic models' (2014) 38(1) International Journal of Urban and Regional Research 79. In addition to the texts referred to in this and in subsequent footnotes, this paper draws upon Wyatt (n 7) 403–453 for its understanding of viability modelling practices.

30 Patrick McAllister, Emma Street and Peter Wyatt, 'Governing calculative practices: an investigation of development viability modelling in the English planning system' (2016) 53(11) Urban Studies 2363, 2366.

agreement',[31] in which a developer promises to provide affordable housing in return for the grant of planning permission.[32]

Recent research suggests that policy-making processes afford property developers and landowners control over the formulation of development plan targets because consultants producing DVAs for local authority planning departments seek 'buy-in' from those groups.[33] Recent research also, however, identifies problems arising from 'input uncertainty' when officers or consultants assess hypothetical property development schemes based on estimated land values and development costs.[34] This work criticises the incapacity of planning officers to challenge the conclusions that their consultants reach and the paucity of community involvement in testing viability findings and concludes that DVAs are often insufficiently robust to have become so deeply embedded in the processes that planning departments use to formulate policies.[35] Moreover, most DVAs prescribe a pre-determined value for private profit. 'Profit', however, is not simply a product of revenue exceeding expenditure. Rather, profit is itself reconfigured as a cost that can be added in a DVA to other costs. These total costs can be weighed against projected revenue to determine if a development is viable. Most DVAs conceptualise profit as a proportion of either projected total costs or estimated development value and stipulate that a developer should be entitled to a profit of 15–20 per cent of either total costs or estimated development value.[36] This entitlement is a given,[37] so profit features in these DVAs as a non-negotiable prerequisite to construction commencing.[38]

The use of DVAs in local authority planning practice means that profitability often takes precedence over housing need. But demonstrating that area-wide development plans inscribe a financial logic onto the spaces in which people live addresses only one problematic aspect of the use of viability modelling. As Christophers explains, an effect of the preoccupation with viability at a policy level is to 'explicitly embed viability considerations within another, connected domain: that of on-the-ground negotiations between local authorities and developers'.[39] This happens because most development

31 So-called because of the operation of section 106, TCPA 1990.

32 See, for example, London Borough of Tower Hamlets, *Core Strategy* (2010), policy SP13, and Winchester CC, *Core Strategy* (2013), chapter 10. See also the recommendations in the NPPF (MHCLG (n 2) paragraph 34) and the government's accompanying guidance on viability modelling and planning (MHCLG, *Viability* (last updated 1 September 2019)) <https://www.gov.uk/guidance/viability> paragraph 001.

33 McAllister et al (n 30) 2374, citing Anthony J Jakeman, Rebecca A Letcher and John P Norman, 'Ten iterative steps in development and evaluation of environmental models' (2006) 21(5) Environmental Modelling and Software 602.

34 Peter Byrne, Patrick McAllister and Peter Wyatt, 'Precisely wrong or roughly right? An evaluation of development viability appraisal modelling' (2011) 16(3) Journal of Financial Management of Property and Construction 249; Neil Crosby, Patrick McAllister and Peter Wyatt, 'Fit for planning? An evaluation of the application of development viability appraisal methods in the UK planning system' (2013) 40(1) Environment and Planning B: Planning and Design 3.

35 Christophers (n 29) 94.

36 Charlotte Coleman, Neil Crosby, Patrick McAllister and Peter Wyatt, 'Development appraisal in practice: some evidence from the planning system' (2013) 30(2) Journal of Property Research 144, 158–161.

37 Antonia Layard, 'Planning by numbers: affordable housing and viability in England' in Mike Raco and Federico Savini (eds), *Planning and Knowledge: How New Forms of Technocracy Are Shaping Contemporary Cities* (Policy Press 2019) 213–224, 218.

38 Christophers (n 29) 87.

39 Ibid 87. See also Neil Crosby and Peter Wyatt, 'Financial viability appraisals for site-specific planning decisions in England' (2016) 34(8) Environment and Planning C: Government and Policy 1716 and Patrick McAllister, Peter Wyatt and Charlotte Coleman, 'Fit for policy? Some evidence on the application of development viability models in the United Kingdom planning system' (2013) 84(4) Town Planning Review 495.

plans state that any application for planning permission for residential development on a site of or over a certain size will be rejected unless the applicant promises that a certain amount of the units to be constructed will be 'affordable'. These policies make affordable housing provision a public interest objective, but most development plans also envisage three possibilities if an applicant can show that provision of the stipulated quantity of affordable housing on-site would render development proposals 'unviable'. First, a local authority can approve an application if the applicant promises to construct the same amount of affordable housing off-site. Secondly, a local authority can approve an application if the applicant promises to pay money in lieu of either on-site or off-site construction. Finally, many local authorities accept that development plan targets might 'need to be varied' further if applicants provide 'detailed and robust financial statements' to justify that outcome.[40]

This creates an incentive for developers to argue that affordable housing targets should not apply to their projects. A property developer seeking planning permission for a large residential development project will usually be required to submit a DVA as part of its application. This can produce what Layard calls 'the duel of the spreadsheets' if a local authority concludes that established targets should apply to a project, but the developer applying for planning permission reaches a different conclusion.[41] In those circumstances, close scrutiny of the inputs to DVAs is essential because, as analysis of these practices has shown, 'subjective'[42] and 'uncertain'[43] estimated land values, site preparation and construction costs and developer revenues are fundamental to showing if specific levels of affordable housing provision would prevent a developer attaining a 'competitive' profit.

While much of this action takes place in behind-the scenes negotiations between planning officers and property developers, planning law is a 'funnel' at which controversies converge.[44] In *Kensington and Chelsea RLBC v Secretary of State for Communities and Local Government*,[45] for example, a property developer (Vannes) applied to a local authority (RBKC) for planning permission for residential property development. RBKC's development plan policies had expired so the case considered the then extant version of the Mayor of London's London Plan. The London Plan provides statutory guidance for London Borough planning departments and stated that each borough should 'encourage rather than restrain residential development',[46] but that any site with capacity for 10 or more homes would be expected to achieve 50 per cent affordable housing provision.[47] Vannes and RBKC agreed that the site could accommodate 10 or more homes, but Vannes' application envisaged the construction of nine 'high-end' homes and no affordable housing. To justify deviation from the London Plan, Vannes produced a DVA showing that any affordable housing would render the scheme unviable. RBKC's consultant, however, produced an alternative DVA showing that a development

40 See London Borough of Tower Hamlets, *Core Strategy* (2010) paragraph 4.4 and Winchester CC, *Core Strategy* (2013) paragraph 7.22.

41 Layard (n 37) 217. See also Christophers (n 29) 91.

42 Layard (n 37) 221; McAllister et al (n 30) 2376 (in relation to DVAs used for policy formation).

43 Crosby et al (n 34) 9; Crosby and Wyatt (n 39) 1728.

44 Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (University of Chicago Press 2012) 12.

45 [2010] EWCA Civ 1466 (also known as *Vannes KFT v Kensington and Chelsea RLBC*). Discussed in Christophers (n 29) 93–94.

46 *Kensington and Chelsea* (n 45) [11].

47 Ibid [6].

incorporating affordable housing would generate a significant profit.[48] Based on the consultant's DVA, RBKC's planning officers recommended that the Planning Committee should reject Vannes' application, which the Committee did. On appeal, however, a planning inspector overturned RBKC's decision and granted planning permission. The inspector acknowledged that Vannes' DVA contained unreliable data but felt that RBKC's consultant had used similarly unreliable data to assess the site's capacity to achieve viability while accommodating affordable housing.[49] In the Court of Appeal, Aikens LJ concluded that the inspector was justified in disregarding the conflicting viability data, in attaching more weight to the policy requirement that boroughs should encourage residential development and in granting planning permission for a project that incorporated no affordable housing.[50]

In a more recent dispute over incompatible DVAs, *Parkhurst Road Ltd v Secretary of State for Communities and Local Government*,[51] Holgate J upheld a planning inspector's decision not to grant planning permission for a residential development that did not comply with the London Borough of Islington's affordable housing policy. Islington's policy states that every new residential development should provide the 'maximum reasonable amount' of affordable housing.[52] For the purpose of the disputed application, Islington produced a DVA showing that the developer could construct 34 per cent of the homes as affordable housing.[53] The developer, however, produced a DVA suggesting that this would render development unviable.[54] The differences in these DVAs came from conflicting valuations of the development site in its use prior to construction and, consequently, conflicting conclusions as to whether the developer would draw an 'adequate' profit. Holgate J found flaws with both DVAs but concluded that the developer had failed to justify its assertion that 10 per cent affordable housing was the maximum reasonably attainable.[55]

The *Parkhurst Road* decision, like the decision in *Kensington and Chelsea*, flowed from a judge grappling with a disagreement between an applicant and a local authority about the use of a DVA, based on questionable inputs, as a tool to determine affordable housing provision. In a postscript to his judgment in *Parkhurst Road*, Holgate J noted the 'proliferation of litigation' from viability-related disputes and implored the government and professional bodies to address this.[56] This 'proliferation', however, represents only one problematic aspect of the use of viability modelling in this context. During the Winchester Development, by contrast, the Developer and Winchester Council agreed that no affordable housing needed to be provided. There was no 'duel of the spreadsheets' here, although a brief history of the Development reveals that problems nonetheless arose from the use of DVAs.

In 2007, the Winchester Developer had applied for permission to construct various residential and commercial buildings.[57] While the Council's planning policies indicated

48 Ibid [14].

49 Ibid [17]–[25].

50 Ibid [49]–[53].

51 [2018] EWHC 991 (Admin).

52 London Borough of Islington, *Core Strategy* (2011) paragraph 3.3.30.

53 *Parkhurst Road* (n 51) [18].

54 Ibid [18].

55 Ibid [131]–[132].

56 Ibid [142]–[147]. See, in relation to this, Royal Institution of Chartered Surveyors (RICS), *Financial Viability in Planning: Conduct and Reporting* (1st edn, RICS 2019).

57 GVA Grimley LLP, *Planning Statement Addendum on behalf of Thornfield Properties (Winchester) Ltd* (January 2007) paragraph 2.

that any buildings to be constructed on the Site should be no more than 14–15 metres high,[58] the Developer had argued that these requirements would prevent it from achieving a competitive financial return[59] and proposed a maximum building height of over 20 metres.[60] The Developer did, however, offer a policy-compliant affordable housing provision[61] and a policy-compliant 'public open space' payment.[62] The Council agreed to grant planning permission as soon as the Developer signed a section 106 agreement in these terms.[63] The Developer did not do so, however, and, in August 2008, informed Winchester Council that the 2008 economic downturn had diminished the financial viability of the Development. The Developer thus amended its application for planning permission, preserving the proposed building heights but seeking an increase in the overall permitted residential component and a reduction in the proportion of affordable housing.[64] The Developer also sought the removal of the open space payment.[65] The Council's planning officers reviewed the Developer's viability assumptions and agreed that the Development could support neither policy-compliant levels of affordable housing nor a public open space payment.[66] Those officers recommended that the Council should grant planning permission because the overall importance of the project to the area trumped the need for smaller buildings, on-site affordable housing provision or an open space payment.[67] The Council granted planning permission in February 2009 after the Developer signed a section 106 agreement promising that, if it did not provide the required affordable housing on-site, it would pay the Council an amount equivalent to the cost of on-site provision.[68]

Winchester Council's grant of planning permission might simply indicate a one-off desire to promote development activity following the 2008 economic downturn. However, the Council then agreed subsequent reductions to the public gains on offer. In October 2014, the Developer applied for permission to increase the proposed retail floor-space, reduce the overall residential component and avoid any affordable housing provision and any contribution in lieu of on-site provision.[69] A policy-compliant financial contribution in lieu would have required a £7 million payment when construction commenced,[70] which the Developer stated would prevent 'an acceptable competitive development return'.[71] Instead, the Developer proposed to pay £1 million on

58 Winchester CC, *PDC673. Report of Director of Development* (March 2007) paragraph 10.9.

59 Winchester CC, *CAB938. Report of Chief Estates Officer* (September/October 2004) paragraph 3.4.2; Winchester CC, *CAB1179. Report of Chief Estates Officer* (December 2005) paragraph 3.6.

60 Winchester CC, *PDC673* (n 58) paragraph 10.9.

61 The Developer proposed to provide 40 per cent of the homes as affordable housing: see also Winchester CC, *PDC673* (n 58) paragraph 13.1.

62 In the form of a £360,806 payment. GVA Grimley LLP, *Planning Statement on behalf of Thornfield Properties (Winchester) Ltd* (May 2007) paragraph 6.17; Winchester CC, *PDC673* (n 58) paragraph 22.1; Winchester CC, *PDC768. Report of Head of Planning Control* (October 2008) paragraph 5.25.

63 Winchester CC, *Minutes of the Meeting of the Planning Committee* (27 March 2007) Resolution 1.

64 Winchester CC, *PDC768* (n 62) paragraph 1.8.

65 Ibid paragraph 1.8.

66 Ibid paragraph 7.3.

67 Ibid paragraph 7.5.

68 Winchester CC, *PDC1012 Item 01, Report to Planning Development Control Committee* (December 2014) paragraphs 2.1, 3.4 and 20.1. Christophers notes other examples of developers seeking to renegotiate development proposals incorporating affordable housing provision (n 29) 92.

69 Winchester CC, *PDC1012 Item 01* (n 68) paragraph 10.1.

70 Ibid paragraph 20.13.

71 DP9 Ltd, *Affordable Housing Statement for Silverhill Winchester No 1 Ltd* (October 2014) paragraphs 5.14–16.

commencement of construction and £1 million if it accrued a 15 per cent profit on cost.[72] In response, the Council's planning officers commissioned a review of the DVA that the Developer used to justify these claims. That review questioned some of the inputs to the Developer's DVA[73] but confirmed that the proposals would produce a return below 'an acceptable range'.[74] Drawing upon their consultant's assessment, Winchester Council's Planning Department recommended the grant of planning permission for a development incorporating no affordable housing and the aforementioned £1 million payments,[75] which the Council's Planning Committee duly confirmed.[76]

The Winchester Development is significant, therefore, because it shows how a Developer might begin planning negotiations with a relatively generous section 106 offer before presenting revised DVAs to reduce the overall public benefits. An administrative preoccupation with facilitating property development and a perception that the public interest is served by using market mechanisms to determine when property development takes place makes this possible. Moreover, critical analyses of financial viability modelling techniques and the outcomes in the *Kensington and Chelsea* and *Parkhurst Road* cases show that unreliable inputs can produce disputed outputs and that DVAs are not always suitable tools for legitimising decisions purportedly taken in the public interest.

3 Financial viability modelling and access to information

The preceding section of this paper examined the tensions that can arise when decision-makers seek to balance policies designed to promote profit-generating property development and those directed towards the provision of planning gains such as affordable housing. This section now addresses public participation in that decision-making by examining the publication of viability data that the Winchester Developer used to justify its 2014 planning application and by explaining the access to information law relevant to planning proceedings. Examining this provides an opportunity to consider if current access to information provisions counterbalance the close relationship between notions of the public interest and the pursuit of a private profit.

The Local Government Act 1972 (LGA 1972) entitles members of the public to access copies of reports produced for local authority council, committee and sub-committee meetings[77] and provides a public right of access to background papers used in preparing those reports.[78] A local authority can, however, withhold disclosure of those documents if an officer deems that they are exempt from publication.[79] Material can be exempt if it relates to any financial or business affairs,[80] and an officer can show that the public interest favours non-disclosure.[81] Recently, however, local interest groups have

72 Ibid paragraphs 5.19–22.

73 Deloitte LLP, *Silver Hill, Winchester. Viability Assessment* (December 2014) paragraph 4.2.

74 Ibid paragraph 3.6.

75 Winchester CC, *PDC1012 Item 01* (n 68) paragraph 20.20.

76 Winchester CC, *Minutes of the Meeting of the Planning Committee* (11 December 2014) Items 1–3.

77 Section 100B(1).

78 Section 100D(1).

79 See sections 100B(2) and 100D(4).

80 LGA 1972, schedule 12A, paragraph 3.

81 Ibid schedule 12A, paragraph 10.

sought to challenge both the ideologies underpinning and flaws inherent to viability modelling techniques but have found that local authorities often refuse to disclose DVAs received from developers.[82]

Following receipt of the Winchester Developer's 2014 planning application, Winchester Council had in its possession an affordable housing statement in which the Developer summarised both the modelling techniques used to assess the economic viability of its proposals and the outputs of its DVAs.[83] The Developer did not, however, provide Winchester Council with copies of either its DVAs or detailed information about the underlying inputs.[84] Instead, the Developer provided this material in a 'data room'.[85] Having reviewed the available information, the Council's consultants then confirmed that they believed that the development proposition was not viable.[86] The Council published the consultant's report and the Council's Planning Committee granted planning permission, having received and considered this report, the Developer's affordable housing statement and a planning officer's report addressing the viability questions.[87]

The information that Winchester Council received raises questions about the material that a planning committee should consider and that a local authority should publish for public scrutiny. These questions have been addressed in recent High Court proceedings. *R (on the application of Perry) v London Borough of Hackney*[88] and *Turner v Secretary of State for Communities and Local Government*[89] involved projects in which planning departments granted permission for residential developments incorporating affordable housing levels below those required in planning policies. *Perry* considered an allegation that Hackney's Planning Committee had failed to scrutinise the DVA used to justify the proposals. A planning officer had reviewed the DVA and instructed a third-party consultant to examine the data it contained. This consultant advised that the data in the DVA was robust and the officer communicated this to the Planning Committee in a report assessing the merits of the developer's application. The officer did not provide the Committee with a copy of either the DVA or the consultant's report, however, and the claimant, a local resident, argued that this meant that the Committee did not have access to all the information needed to reach an informed decision as to the application's merits. *Turner* involved a similar set of facts, albeit that the claimant alleged that a planning inspector appointed to determine a planning application could not reach a valid decision without having seen the DVA a developer used to deviate from the London Borough of Lambeth's affordable housing policy.[90]

The allegations in *Perry* and *Turner* mattered to the respective claimants because, as Collins J put it in *Turner*, materials disclosed to a decision-maker should also be disclosed to an objector.[91] However, both Collins J and, in *Perry*, Patterson J concluded that the

82 See, for example, Jerry Flynn, 'Complete control: developers, financial viability and regeneration at the Elephant and Castle' (2016) 20(2) City 278.

83 DP9 Ltd (n 71) paragraphs 5.4–5.17.

84 Deloitte LLP (n 73) paragraph 3.1.

85 Ibid paragraph 3.1.

86 Ibid paragraph 4.2.

87 Winchester Council, *PDC1012* (n 68).

88 [2014] EWHC 3499 (Admin).

89 [2015] EWHC 375 (Admin).

90 Ibid [16].

91 Ibid [15].

respective decision-makers had received sufficient information because officers provided reports summarising the content of both the DVAs and the third-party reviews.[92] In *Perry*, Patterson J deemed that there was no basis on which to require disclosure of the DVAs or the accompanying reviews and went on to say, citing an earlier decision of Ouseley J in *R (on the application of Bedford) v London Borough of Islington*,[93] that obliging planning departments to disclose DVAs might 'hinder' negotiations between a local authority and a developer, prevent development proposals coming forward and obstruct the delivery of public goods such as affordable housing.[94] The cases also reveal a judicial unwillingness to require planning departments to disclose a developer's viability assumptions if there is a possibility that doing so might undermine a developer's economic interests. Moreover, these cases establish that a local authority planning department will have adequately scrutinised a developer's DVA if it appoints a third-party consultant to report on that DVA and if a planning officer then communicates the contents of that report to the person tasked with determining the planning application.[95]

The *Perry* and *Turner* decisions indicate that Winchester Council had probably complied with its obligations in the LGA 1972 when it provided for consideration copies of the Developer's affordable housing statement and its own consultant's report. This situation does little, however, to address questions about a lack of either openness in the use of DVAs or mechanisms for informed public scrutiny of the underlying assumptions.[96] The Environmental Information Regulations 2004 (EIR 2004), which require a local authority to disseminate certain types of 'environmental information' in its possession[97] or to make that information available on request,[98] provide a potential means for enhanced openness.[99]

92 Ibid [25]; *Perry* (n 88) [64]–[65]. In *Turner*, Collins J also dismissed the applicant's contention that the inspector's conduct during the original planning proceedings created a perception of bias [67]. The applicant received permission to appeal on this ground, although the Court of Appeal affirmed Collins J's decision: see *Turner v Secretary of State for Communities and Local Government* [2015] EWCA Civ 582. The Court of Appeal's judgment does not examine the specific viability issues discussed above.

93 [2002] EWHC 2044 (Admin).

94 *Perry* (n 88) [91]. Patterson J also refused to order disclosure of unredacted copies of the specific DVA to the applicant prior to the judicial review proceedings: see *R (on the application of Perry) v London Borough of Hackney* [2014] EWHC 1721 (Admin). The applicant subsequently sought permission to appeal Patterson J's conclusion that the local authority had not unlawfully withheld the viability information from committee members. However, the Court of Appeal refused this application: *R (on the application of Perry) v London Borough of Hackney* [2015] EWCA Civ 557.

95 See also Jorren Knibbe, 'Viability assessments, dead rubber appeals, and EU law' (2017) 5 Journal of Planning Law 473. The author first encountered these cases in a seminar paper: Jorren Knibbe and Jay Jagasia, 'Viability assessments and challenges to planning decisions' (April 2015) <http://www.guildhallchambers.co.uk/uploadedFiles/Viability_Assessments_and%20Challenges_to_Planning_Decisions.pdf>; and a presentation on the topic by Andrew Byass, 'Environmental information (and viability assessments)' (January 2017) <https://www.landmarkchambers.co.uk/wp-content/uploads/2018/07/Environmental-Information-and-Viability-Assessments-ABB.pdf>.

96 Knibbe, 'Viability assessments, dead rubber appeals, and EU law' (n 95) 475.

97 Regulation 4(1).

98 Regulation 5(1).

99 The EIR 2004 employ a broad definition of environmental information that encompasses data in policies, plans, agreements and reports on activities likely to affect the natural environment (regulation 2(1)). Consequently, viability data will often fall within the ambit of the Regulations. See Rebecca Warren, 'A review of the trend towards greater transparency and public access to information in the planning arena with a particular focus on viability appraisals' (2016) 13 Supp (Ch-Ch-Changes…) Journal of Planning Law OP40; and Philip Coppel QC, 'The use and disclosure of confidential information in planning applications' (2016) 3 Journal of Planning Law 204, 218.

However, the duty to disclose is limited by statutory exemptions and a perception that the public interest might sometimes favour non-disclosure.[100]

The Winchester Development illustrates how administrators might balance public interest arguments for transparency against public interest arguments for protection of purportedly confidential data because, after Winchester Council granted planning permission, a member of the public requested disclosure of the Developer's DVA.[101] The Council did not hold copies of the DVA, but it did acknowledge that it had some background information related to it, which it refused to disclose.[102] This information set out the estimated costs of the project, estimated sales and rental values of the buildings to be constructed and the estimated overall profitability.[103] The applicant consequently complained to the IC alleging that the Council had unlawfully withheld this information. The Council argued that this information was commercially sensitive because disclosure would undermine the Developer's bargaining position in negotiations with residential buyers,[104] commercial tenants,[105] building contractors[106] and other local authorities with which it might seek to engage in property development projects.[107] While the IC acknowledged that some of the more detailed information related to construction and land acquisition costs was so sensitive that the public interest favoured non-disclosure,[108] the IC also concluded that there was a strong public interest in the disclosure of the bulk of the information in Winchester Council's possession, particularly in light of the use of the information to justify both the non-provision of affordable housing[109] and a development that was larger in scale than local planning policy recommended.[110]

This outcome is consistent with recent First-tier Tribunal decisions on the application of the EIR 2004.[111] In three of those cases, members of the public requested that local authority planning departments disclosed DVAs that developers had used to justify deviations from affordable housing policies. In *Southwark*, *Greenwich* and *Clyne*, the local authorities involved argued that regulation 12(5)(e), which protects the confidentiality of commercial information related to a legitimate economic interest, entitled them to disclose only redacted copies of the developers' DVAs.[112] In *Clyne*, the most recent of these decisions, the London Borough of Lambeth argued that the release of a DVA would place the developer at an economic disadvantage when negotiating with both housing associations for the sale of the proposed affordable housing stock and building contractors whom the developer would pay to construct the development.[113] The tribunal rejected Lambeth's arguments and ordered disclosure of the full DVA, with the

100 Regulation 12(1), EIR 2004.

101 See the Information Commissioners Office's Decision Notice *FER0572663* (17 September 2015).

102 Ibid paragraph 7.

103 Ibid paragraph 21.

104 Ibid paragraph 34.

105 Ibid paragraph 35.

106 Ibid paragraph 51.

107 Ibid paragraph 59.

108 Ibid paragraphs 48–49.

109 Ibid paragraph 64.

110 Ibid paragraph 66.

111 *London Borough of Southwark v The Information Commissioner* EA/2013/0162 (*Southwark*); *Royal Borough of Greenwich v The Information Commissioner* EA/2014/0122 (*Greenwich*) and *Clyne v The Information Commissioner* EA/2016/0012 (*Clyne*).

112 *Clyne* (n 111) paragraph 20(q); *Southwark* (n 111) paragraphs 35 and 51–52; *Greenwich* (n 111) paragraphs 15 and 19–21.

113 *Clyne* (n 111) paragraph 20(q).

exception of data related to a 'rent-free' period that the developer proposed to offer to certain end-users.[114] The tribunal did so because it concluded that the data in a DVA provides only a temporary snapshot of likely costs and revenues and disclosure of data that quickly becomes out of date would cause no significant commercial disadvantage.[115]

The tribunals considering the *Southwark* and *Greenwich* applications reached similar decisions to that in *Clyne*, noting the strong public interest in disclosure when DVAs form the basis of contentious planning decisions.[116] However, these rulings simply reinforce a type of procedural public participation because they led, long after the substantive planning decisions had been taken, only to disclosure of some of the information that had formed the basis for the decisions.[117] Moreover, there was a notable difference between those rulings and the Winchester Development that highlights further limits to access to information provisions as a tool for public participation in the substance of viability discussions. Winchester Council did not have the Developer's DVA in its possession, presumably so that the access to information provisions in the EIR 2004 could not be applied to it.[118] This type of dynamic, in which the Developer, first, reduced the proposed planning gains and, second, apparently did not allow its local authority partner to hold a copy of its DVA, has the potential to create suspicion about the basis for and use of viability assumptions. While a Winchester Council member did question the integrity of the Developer's DVAs,[119] there is no evidence that shows that the Developer did provide an unreliable DVA. However, more openness might have enabled Winchester Council to dispel any such suspicion in relation to the Winchester Development, particularly given the use of the DVA to legitimise controversial planning decisions purportedly being taken in the public interest. Instead, the IC described the information that Winchester Council did hold, in relation to the Developer's DVA, as 'not extensive'.[120] It is doubtful, therefore, that the published material would have enabled intensive scrutiny of either the Council's decision-making or the Developer's viability assumptions even if it had been released before the Council granted planning permission. Timely publication of detailed viability data might address scepticism about choices administrators and developers make, enable members of the public to contribute to the substance of live viability discussions and provide for meaningful public debate about the reliability of viability findings.

The NPPF now recommends that DVAs, both produced at the plan-making stage and in relation to site-specific applications for planning permission, 'should be made publicly available'.[121] Some local authorities have also produced guidance stating that developers will be expected to disclose DVAs used during the planning application process.[122] This guidance suggests that those local authorities are adapting their attitudes to transparency when a property development project rests upon financial viability data. However, the multifaceted legal and practical issues arising from the use of DVAs still produce

114 Ibid paragraph 10.

115 Ibid paragraphs 19(i) and 45.

116 *Southwark* (n 111) paragraph 58; *Greenwich* (n 111) paragraphs 27–28; *Clyne* (n 111) paragraph 64.

117 As noted in Flynn (n 82) 280.

118 *FER0572663* (n 101) paragraph 21.

119 Winchester CC, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb* (July 2014).

120 *FER0572663* (n 101) paragraph 21.

121 MHCLG (n 2) paragraph 57. See also MHCLG (n 32) paragraphs 020–021.

122 See, for example, London Borough of Islington, *Development Viability: Supplementary Planning Document* (2016) and London Borough of Southwark, *Development Viability: Supplementary Planning Document* (2016). See also Warren (n 99).

contentious and controversial outcomes and the High Court and First-tier Tribunal decisions discussed here show how the use of DVAs pulls local authority planning departments in different directions when officers and councillors are asked to balance private profit and public policy goals.

4 Financial viability modelling, local authority landownership and land assembly

Despite the criticisms of DVAs outlined above, viability data has also permeated decision-making in local authority estates departments. This paper has already explained that Winchester Council's Estates Department entered into a property development contract (the WDA) with the Winchester Developer in which the latter promised to apply for planning permission and then to construct a pre-agreed set of buildings on the Winchester Site. The Winchester Development thus provides an exemplar of the volatile relationship between property development contracts, DVAs and local authority land acquisition strategies.

While Winchester Council owned some of the landholdings on the Winchester Site, its estates officers could not use the WDA to compel the Developer to commence construction until two key pre-conditions had been satisfied. First, a 'Site Assembly Condition' stated that the Developer's promise to commence construction could only become 'fully unconditional' either when the Developer and the Council had acquired all the landholdings or when the Council received confirmation of the validity of a CPO made to that end.[123] A 'Financial Viability Condition' then added further conditionality to the WDA by stating that the Developer's promise to commence construction would only become binding if the Developer was satisfied as to the viability of the development proposition. The development would be 'viable' only if a DVA, conducted after all other pre-conditions had been satisfied, demonstrated that 'the anticipated profit is not less than 10% of anticipated Development Costs'.[124]

The WDA was a legal–economic hybrid that made a guaranteed private profit a contractual right and a preoccupation for the Council's estates officers. This led to a series of profit-driven changes to the WDA. These changes began in 2008 when the Developer produced a DVA showing that the WDA made the Development 'unviable'.[125] In response, the Council changed the building specifications stipulated in the WDA to ensure that the Developer did not breach the contract when it made its revised 2008 planning application.[126] The Council also agreed to change the leasing mechanism in the WDA so that the Developer would obtain possession of the Site before construction commenced,[127] reducing the stamp duty land tax payable on the grant of the lease but

123 WDA, schedule 2, paragraph 2.3. A local authority must submit a CPO that it has made to the Secretary of State for Housing, Communities and Local Government (previously the Secretary of State for Communities and Local Government (abbreviated hereafter to SSCLG)), who appoints a planning inspector to adjudicate at a public inquiry if individuals or organisations whose land is to be acquired object to the CPO (Acquisition of Land Act 1981 (ALA 1981) sections 2(2) and 13A(3)). The SSCLG can either confirm or refuse to confirm a CPO (ALA 1981, section 13A(5)). An estates department can exercise confirmed powers within three years of confirmation (Compulsory Purchase Act 1965, section 4; Compulsory Purchase (Vesting Declarations) Act 1981, section 5A).

124 WDA, schedule 2, paragraph 2.9. *Gottlieb* (n 10) at [13(iii)]. The sequencing of the conditions in the WDA is typical: the author has copies of various DAs containing similar site assembly and viability conditions available for review on request.

125 Winchester CC, *CAB1739. Silver Hill Winchester – Compulsory Purchase Order. Report of Head of Estates* (November 2008) paragraph 2.4.

126 Ibid paragraph 9.4.

127 Ibid paragraphs 8.1–8.3.

transferring the Site to the Developer earlier in the development process.[128] Having then received assurance that the Development was viable, the Council's estates officers made a CPO in 2011 (the Winchester CPO), which was examined at a public inquiry in 2012 (the Inquiry) and which the SSCLG confirmed in 2013.[129] To demonstrate that construction would begin soon after confirmation of the CPO, the Council had informed the Inquiry that the WDA committed the Developer to construct the then permitted development.[130] A Council officer also stated that, before the Inquiry, the Developer had shown that 'the scheme is viable'.[131] This evidence presented the amended WDA and the pre-Inquiry DVA as a mechanism produced in the public interest to guarantee that construction would commence as soon as the SSCLG confirmed the CPO.

Despite the assurances provided at the Winchester Inquiry, the pre-Inquiry DVA did not discharge the financial viability condition in the WDA because it did not post-date discharge of the other pre-conditions. Moreover, the Council had not disclosed the pre-Inquiry DVA, so there was no scrutiny of the Developer's viability assumptions during the Inquiry. After the Inquiry, the Developer then produced the 2014 DVA that it also presented to the Council's Planning Department to support its application to amend the 2009 planning permission. That DVA showed that the Development would only be viable if the Council's Estates Department agreed further changes to the building specifications stipulated in the WDA.[132] The Council's estates officers agreed to these changes and the Cabinet approved them in August 2014 (the 2014 Variations).[133] Between 2008 and 2014, the Developer had thus used three DVAs, each showing different outputs and drawing upon its contractual entitlement to a guaranteed profit, to direct the Council's decision-making. By embedding a DVA within the legal underpinnings of the Winchester Development, the Developer had also gained significant control over the purposes for which estates officers deployed the Council's compulsory purchase powers.

However, Winchester Council's Cabinet approval for the 2014 Variations led to the *Gottlieb* judicial review,[134] in which a Council member claimed that the Council had breached its public procurement law duties by failing to conduct a tendering exercise before approving the Variations.[135] The claimant also alleged that estates officers had inadequately scrutinised the Developer's DVAs and that the Council had consequently approved a land assembly mechanism that was not in the public interest because it would not enable the Council to lease the Site at a price equivalent to the 'best consideration'

128 The WDA originally stated that the Council would grant the lease after construction commenced (ibid paragraphs 8.1–8.3). See also WDA, clause 11.2.1.

129 DCLG, *The Winchester CC (Silver Hill) Compulsory Purchase Order 2011 – Confirmation Letter* (20 March 2013).

130 Winchester CC, *Statement of Case* (n 8) paragraph 12.1(2).

131 Steve Tilbury, *Proof of Evidence* (presented to the Public Inquiry held to consider the Winchester City Council (Silver Hill) Compulsory Purchase Order 2011) (May 2012) paragraph 5.3.3.

132 Winchester CC, *CAB2603* (n 18), paragraphs 2.4 and 4.11.

133 Winchester CC, M*inutes of the Special Cabinet Meeting held on 10 July 2014*; Winchester CC, *Minutes of the Special Cabinet Meeting held on 6 August 2014*.

134 *Gottlieb* (n 10).

135 R *(on the application of Gottlieb) v Winchester City Council*, Order by Dove J, CO/4150/2014 (8 October 2014).

reasonably available.[136] Following the 2014 Variations, Winchester Council stood to receive an annual rent of at least £250,000, payable following the grant of a 200-year lease of the Site, and a share of the Developer's profit if that profit exceeded £2 million.[137] Around the time that the claimant made his application for judicial review, however, the Developer agreed to increase the minimum annual rent to £305,000.[138] An applicant will receive permission to seek judicial review if they have a realistic prospect of success[139] and sufficient interest or standing to bring the claim.[140] When the High Court considered the claimant's application, Dove J and Lindblom J separately noted that estates officers had received professional advice stating that the Council would obtain the best consideration reasonably available, despite the Developer having subsequently found more money for the Site. The best consideration point consequently had a low prospect of success.[141] The claimant did, however, obtain permission for judicial review of the alleged procurement law breach.[142] Lang J then concluded that the 2014 Variations amounted to the formation of a new contract,[143] that the Council had thus breached public procurement rules and that the Cabinet approval for the Variations was void.[144]

The *Wylde* decision has since suggested that Lang J erred in her judgment in *Gottlieb* because she should have concluded that the claimant did not have standing.[145] The point here is not, however, that a possible procedural shortcoming defeated the Winchester Development. The underlying thread is the use of DVAs. In 2015, an independent review that Winchester Council commissioned indicated that, while the Council had received legal advice stating that the 2014 Variations did not breach procurement rules, earlier legal advice had stated that substantial changes to the WDA would trigger a tendering exercise.[146] This suggests that the need to produce a positive DVA may have led the Council's officers to advise councillors to take legally risky actions, purportedly in the public interest, to facilitate both the transfer of the Council's landholdings and the commencement of a property development project.

Considered in isolation, the Winchester Development might only reveal how estates officers struggled to reorder landownership on a specific site for presumed public interest purposes while complying with the Council's general public law duties. A brief discussion of the project considered in *Wylde*, however, shows that other developers have offered one proposition prior to a CPO inquiry before reducing the offer after the SSCLG

136 Ibid. See also: Winchester CC, *OS104* (n 119) 6–7; Winchester City Council, *CAB2609. Silver Hill Update. Report of Head of Estates* (September 2014) paragraph 5.3. When a local authority transfers land it should ensure that it does so at a price equivalent to that which is the best reasonably obtainable (LGA 1972, section 123(2), and TCPA 1990, section 233(3)). A local authority will obtain best consideration if an independent valuation indicates that the price to be received represents the best reasonably obtainable: see *R (on the application of Midlands Co-Operative Society Ltd) v Birmingham City Council* [2012] EWHC 620 (Admin) at [124].

137 Winchester CC, *CAB2603* (n 18) paragraph 6.7; see also *Gottlieb* (n 10) [21].

138 *Gottlieb* (n 10) [38].

139 *Sharma v Browne-Antoine* [2006] UKPC 57.

140 See section 31(3) of the Senior Courts Act 1981.

141 Order by Dove J (n 135). See also *R (on the application of Gottlieb) v Winchester City Council*, Order by Lindblom J, CO/4150/2140 (24 November 2014).

142 *Gottlieb* (n 10) [151]–[152].

143 Ibid [70]

144 Ibid [142].

145 *Wylde* (n 11) [42]. The Winchester Developer received permission to appeal against Lang J's decision: see *R (on the application of Gottlieb) v Winchester City Council* [2015] EWCA Civ 1369. The Developer later abandoned that appeal when the deadline for exercise of the Winchester CPO expired (see n 21).

146 Claer Lloyd-Jones, *A Perfect Storm – Report on Silver Hill* (January 2016) paragraph 5.21 and appendix 4.

confirms a CPO. In 2003, Waverley Borough Council (Waverley) and Crest Nicholson Developments Ltd (Crest) signed a DA in which Crest promised to apply for planning permission for and to construct commercial and residential buildings on a pre-selected site (the 'Waverley DA).[147] Waverley promised to transfer land it owned on the development site to Crest, and the parties agreed to work together to acquire the other landholdings that they required.[148] Waverley could then only compel Crest to commence construction following discharge of a viability condition that required a positive DVA produced after all other pre-conditions in the DA had been discharged.[149]

Waverley and Crest failed to acquire the privately held landholdings on the development site by agreement, so Waverley sought confirmation, in 2012, for a CPO that would complete these land acquisitions.[150] The SSCLG confirmed that CPO in August 2013.[151] At the time of the public inquiry, the DA obliged Crest to pay a one-off lump sum to Waverley of no less than £8.76 million for the site.[152] Before the inquiry, Crest had produced a DVA that indicated that the development proposition, including this pre-agreed minimum price, was viable.[153] At this point in the land assembly process, however, other pre-conditions in the DA had not been discharged, so the pre-inquiry DVA did not discharge the viability condition.[154]

In May 2016, Crest then submitted a report to Waverley's Estates Department indicating that it would only discharge the viability condition if Waverley amended the minimum price in the DA to £3.19 million.[155] Waverley's consultants advised that this amendment would still enable the Council to obtain best consideration for the transfer of the land.[156] Waverley approved the necessary amendments but did so without conducting a tendering exercise. The claimants in *Wylde* thus argued that this breached Waverley's public procurement law duties, so Dove J's judgment considers if the claimants should have permission for judicial review of this allegation. Dove J concluded that the claimants did not have sufficient standing because they had suffered no direct disadvantage as a result of Waverley's decision to vary the minimum price.[157] As with the earlier discussion regarding the *Gottlieb* decision, however, the point in this paper is not to examine the procurement law basis for Dove J's judgment. Rather, the point is to emphasise that Crest produced two DVAs in a relatively short period of time, either side of a CPO inquiry, which carried around markedly different outputs. These manoeuvrings indicate that there may be circumstances in which local authorities undersell land despite satisfying the legal definition of 'best consideration'. The Waverley development specifically shows that

147 Waverley and Crest have since agreed various amendments to the 2003 DA. A copy of the latest amendment is available, as of 15 October 2019, from <https://www.waverley.gov.uk/downloads/download/544/brightwells_development_agreement>. The 2010 iteration of the DA was operative at the time of the CPO inquiry and the judicial review proceedings discussed above. The author has a copy available for review on request.

148 The Waverley DA, clause 3.3.

149 Ibid clause 3.6.

150 Discussed in C J Ball (2013) *CPO Report to the Secretary of State for Communities and Local Government* [NPCU/CPO/R3560/70501].

151 *Wylde* (n 11) [6].

152 Ibid [5].

153 Ball (n 150) paragraph 183.

154 Waverley BC, *Brightwells Regeneration Scheme. Report to Executive* (24 May 2016) paragraphs 57–61.

155 Ibid paragraph 61. See also *Wylde* (n 11) [7].

156 Waverley BC, *Brightwells Regeneration Scheme. Report to Executive* (24 May 2016) paragraph 17.

157 Cited in *Wylde* (n 11) at [43]–[44], cross-referencing *R (on the application of Chandler) v Secretary of State for Children, School and Families* [2009] EWCA Civ 1011 per Arden LJ at [77].

some local authorities might accept significant reductions in the price that they receive for land if doing so serves the perceived public interest in facilitating property development and reordering private property rights in favour of property developers. The Winchester Development, on the other hand, shows that public pressure can lead developers to offer more money for the transfer of land and that some developers will seek to develop sites even if DVAs indicate that they will not achieve the 'required' profit margin.

The opacity of financial viability modelling and adjustable underlying inputs complicate these issues. As noted earlier, local authority planning practice suggests that some planning departments have started to adopt a more critical attitude to the use of DVAs. A recent CPO inquiry for a property development project in Seven Sisters, North London, indicates that some estates departments are also changing their practices.[158] The London Borough of Haringey submitted its consultant's review of the developer's DVA to that inquiry,[159] which suggests that Haringey embraced greater transparency than Winchester Council. However, the report presented at the Seven Sisters Inquiry reveals only the methodology deployed and the estimated profit. In that respect, the information disclosed is generic and broadly comparable to that which Winchester Council published during the Winchester Development.

Financial viability modelling creates mistrust, which is heightened when DAs between local authorities and property developers embed a guaranteed profit as a non-negotiable entitlement. Moreover, this paper shows that the focus on private profit can be detrimental to the provision of public goods and to public revenue-raising. On its own, this latter finding is unsurprising because conventional property development theory suggests that local authorities should not seek to generate revenue directly from a property development project but should simply promote projects that enhance the 'investability' of an area and that produce economic benefits that 'trickle down' to the locality. However, there are numerous examples of projects in which an estates department has obtained confirmation for a CPO only for its development partner to cite viability concerns to delay the commencement of construction and to extract concessions from the local authority.[160] It seems essential, therefore, that local authority estates officers either establish and apply robust mechanisms enabling intensive public scrutiny of a developer's viability assumptions or pursue property development approaches that place less emphasis on a 'required' private profit.

Conclusion

Financial viability modelling presents challenges to the local authority planning officers, estates officers and councillors who engage with modelling techniques, the underlying assumptions used in modelling practices and the outputs that viability appraisals produce. This paper has examined judicial decisions and academic commentary that highlight problems arising from contestable viability inputs and that question the use of DVAs as a tool for determining such things as the quantity of affordable housing to be constructed on a site. Judicial decisions in this context focus on disputes between local authority planning departments and property developers, but this paper demonstrates that questions are also likely to arise about viability modelling practices when a local authority accepts the substance of a developer's viability outputs. Analysis of the Winchester

158 The project in question is for the regeneration of the Wards Corner site. The development company delivering the project is a subsidiary of Grainger plc, a predominantly residential property developer.

159 The author has a copy available for review on request.

160 In addition to the projects mentioned in this paper, notable examples include the Sevenstone, Westfield, Silk Street and Brent Cross projects in Sheffield, Bradford, Macclesfield and North London, respectively.

Development, for example, illustrates how a property developer might begin planning negotiations with a local authority by making a relatively generous affordable housing offer before presenting DVAs to reduce that offer over the course of a long-term land assembly and property development project. Further discussion of the Winchester Development in the context of access to information law and judicial decisions related to the publication of viability data illustrates the paucity of community involvement in viability-related discussions. Viewing this through McAuslan's framework for examining land use planning law shows that public participation rights rarely enable members of the public to influence these discussions because access to information law often does little more than entitle outsiders to review documents after a viability-based decision has been made. In the context of local authority estates practice, examination of the Winchester Development and the project discussed in the *Wylde* judicial review reveals that some property developers produce DVAs showing markedly different outputs either side of public inquiries convened to confirm the use of compulsory purchase powers purportedly for public interest purposes. These two projects also show how the use of DVAs can raise questions about the price at which local authorities are willing to transfer land to property developers and the way that viability outputs affect local authority compliance with public law duties. Taken together, the findings discussed in this paper show that current viability modelling practices should only form a basis for decision-making in local authority planning and estates departments if they are subjected to intensive public scrutiny at the time that viability-based decisions are made.

NOTES AND COMMENTARIES

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Why does the United Kingdom now need a written constitution?

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AND

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Introduction

The following exchange of views between Professor Andrew Blick of King's College London and Professor Brice Dickson of Queen's University Belfast was compiled over a four-month period between September 2019 and January 2020, a time of extreme constitutional tension in the UK. The exchange was prompted by the authors' initial difference of opinion over whether the UK should devise for itself a written constitution.

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AB: The contemporary political environment in the UK adds a new perspective to a pre-existing argument. It involves whether the UK should adopt a text with a special legal status setting out the fundamental principles, rules and practices of the political system, that is, a 'written' constitution.

Advocates of the so-called 'unwritten' UK constitution often stress the merits of its supposed flexibility. In fact, the debate on this point is not one of rigidity versus flexibility but of considered change versus casual change. Recent events in the UK surrounding Brexit, whatever view one takes on the substantive matter, have revealed a substantial weakness in our constitution in this regard. The enormous constitutional changes necessitated by the implementation of the 'leave' result were treated as afterthoughts. They were devised after the vote. Under a written constitution (depending, of course, precisely how it was devised) this approach would have been more difficult to pursue. Some of the arrangements that will have to alter to accommodate Brexit – for instance, the relationship between the UK and devolved levels of government, and the position of Northern Ireland within the UK – would probably be provided for in a UK written constitution, if it existed. Their implementation could not have been forced through from the centre, despite pronounced misgivings in various parts of the UK. Consequently, those devising the referendum would have needed to give more thought in advance to what was required; and to the need to establish a broader consensus for those changes.

Slightly removed from but connected to Brexit is the question of protective mechanisms. Under written constitutions, core principles and arrangements are protected by heightened amendment procedures and hard judicial enforcement. The traditional

view of the UK constitution has been that it does not need such mechanisms, which are anyway undemocratic in nature. Those espousing this perspective have argued that the security of the system comes from other sources. In particular, they highlight the existence of informal codes of behaviour that ensure politicians behave in ways that are constitutionally appropriate; and the first-past-the-post system used for parliamentary elections, which creates an incentive for parties to gravitate towards the centre ground. The effectiveness of these safeguards seems doubtful at present. The two main parties in Parliament have lately shifted towards the extremes; and pronounced disagreement is developing about proper constitutional conduct in crucial areas such as the relationship between the executive and Parliament. The firmer regulation that a written constitution might provide is needed. Whether and how it can be obtained are unclear.

BD: I would accept that recent events have exposed a lack of certainty in the UK's constitution, but I would not necessarily characterise that as a weakness. Nor do I think that a piecemeal approach to constitutional reform makes it casual rather than considered. Short Bills on a small number of constitutional issues are likely to receive more detailed scrutiny than large Bills with clauses that are just too numerous for exhaustive parliamentary debate.

What the vote for Brexit showed was not so much the need for constitutional changes as the need for referendums to place clear choices before the electorate. When the Scots voted in their 2014 referendum on independence, they had a definite blueprint for what independence would look like: in 2013 the Scottish government published a 650-page book explaining its vision. Likewise, when the Irish voted in 2018 in favour of deleting the Eighth Amendment from their Constitution (thereby abolishing the ban on abortion), they knew what the new provisions on abortion were likely to be because the government had indicated what it was going to table for discussion in the Irish Parliament.

In 2016, when Brits voted in the Brexit referendum, they had no notion of what a vote to leave the EU would actually mean. Mrs May's aphorism that 'Brexit means Brexit' had a simplistic attractiveness to it, but it glossed over the huge differences of opinion as to what kind of Brexit would be in the UK's best interests. It reminds me of the referendum in Australia in 1999, when the people were asked whether they wanted to abolish the monarchy and make their country a republic with a President at its head: more than 60 per cent voted to maintain the status quo, largely (it seems) because those in favour of a republic disagreed bitterly on how a President should be chosen.

We do not have to wait for a written constitution in order to amend the law on referendums in the UK. Such a reform should also make it clear that referendum results are merely advisory, not mandatory. If the government fails to follow the advice of the people, the electorate can show its disapproval in the next general election.

Yes, informal codes of behaviour and the current voting system are not satisfactory ways of achieving good governance in the UK, but again the answer lies in reform, not in complete reconstruction. Parliament does occasionally restrict itself from doing certain things in the future – as an example, the Human Rights Act 1998 effectively compels Parliament to comply with the European Convention on Human Rights unless it *explicitly* votes not to do so. Further self-imposed restraints are imaginable and should be campaigned for. But not by developing a wholly new constitution.

AB: If we are relying on regular Acts of Parliament to uphold rules, we are dependent upon the government of the day not seeking to amend or repeal them as it could any other form of legislation. It is true that Parliament, via the Human Rights Act 1998, has limited the doctrine of implied repeal. But it is also true that a government could repeal the Human Rights Act using express terms on simple majority votes. I would certainly not exclude the possibility of a government setting out to do so in the near future – indeed, it has long been part of the agenda of groups that are now fully in the political ascendant. In other words, we are reliant on the self-restraint of the executive and groups in Parliament to a greater extent than is comfortable. The main body that takes upon itself a role of constitutional guardianship is the House of Lords. But it – for good reason – feels restrained in the extent to which it can impose itself, and its powers are legally limited also, under the Parliament Acts 1911/1949.

I do not think it would be possible by legislative or other means to guarantee that governments avoid referendum questions that are open-ended, since they are often held for reasons of political expediency, and political expediency may dictate an open-ended question. However, if the outcome of a referendum could entail substantial constitutional change, then, were that change subject to heightened amendment procedures, then some kind of check would be in place. A vague referendum question could not be a basis for major constitutional change without some kind of requirement for a higher level of consensus to that which follows.

For evidence of casual constitutional change leading to problems, I would draw attention to the Fixed-term Parliaments Act 2011, which has created confusion about one of the most fundamental features of our democratic system: how the House of Commons, the only elected component of Parliament, can express and withdraw its confidence in the government of the day, and what happens when it does. This legislation was introduced to Parliament, on a swift timetable, as an outcome of a coalition negotiation between two parties that wanted to form a government in May 2010.

A written constitution need not be vast; and would not prevent reform from taking place. But if there are rules that we genuinely want to provide with a special constitutional status, then it is the most viable means of doing so.

BD: Your argument proves too much. If 'casual' constitutional legislation can cause problems because it is poorly drafted or incomplete, how much greater difficulty could arise from a supposedly well-considered provision in a Constitution which can be amended only by a weighted majority? Putting more care into the wording of an enactment does not insulate it against interpretative questions prompted by unforeseen circumstances. South Africa's 1996 Constitution gives everyone 'the right to have the environment protected through reasonable legislative measures … that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. How many interpretative conundrums does that throw up?

More fundamentally, how is a Constitution going to prevent a future Parliament from repealing it? This could be achieved only if the Constitution abolished the doctrine of parliamentary sovereignty and specified a new set of rules for determining what is or is not constitutional. Personally, I think it is a blessing that at present we do not need to distinguish between what is or is not constitutional: it is enough that we distinguish between what is or is not legal.

I am not against signifying the importance of some laws by requiring their repeal to be subject to a weighted majority in Parliament – as has recently been done at the devolved level regarding proposals to change electoral law in Scotland and Wales (which now need to be approved by two-thirds of the MSPs or AMs) – but, just as you suggest could happen with the Human Rights Act, the new provisions in the Scotland Act 1998 and Government of Wales Act 2006 could still be repealed by a simple majority vote at Westminster.

At base I am against any rules being given a special constitutional status, other than the rule that Parliament is sovereign. Even with a first-past-the post electoral system, which I would certainly replace with a PR system, it is preferable to maintain the status quo rather than fixate on agreeing a set of quasi-immutable principles. Let's have Acts on human rights, equality, fairness and socio-economic justice. That's how societies thrive, not through highfalutin constitutionalism.

Finally, I am content that our judiciary continue to do a good job in holding our law- and policy-makers to account. Lord Sumption's Reith Lectures, in which he bemoans the expansion of the judicial empire, are overstated. He fails to articulate the very real constraints under which our top courts still operate, however much they appear to be free agents. I can anticipate the day when, if required, they will be prepared to declare an Act to be illegal because it is contrary to the rule of law.

AB: That it can be relatively easy to bring about changes of a constitutional nature, without their being subject to due consideration that might improve their quality, does not necessarily mean that, if they prove problematic, they can as easily be reversed. An obvious example of a change that will be incredibly difficult to reverse is departure from the EU. Even if the UK were to decide at some point in the future that it wished to rejoin, doing so would be dependent upon the agreement of the EU and its member states. Perhaps they would be more inclined to readmit a country that could not embark upon such major constitutional courses of action at such a low threshold of approval.

While Brexit may be an exceptional example of constitutional change that is too easy to bring about but too difficult to change, there are other examples. The progressive transfer of power away from local government from the 1930s onwards came about in the supposed grand tradition of pragmatic incrementalism. The movement was in one direction. The central authorities, once they had acquired this power, were unlikely to relinquish it.

Then there is the Barnett Formula. This method of calculating changes in territorial funding allocations may have its supporters, but I am not aware of who they are. It came about in the late 1970s as a stopgap. The person whose name is attached to it, Joel (later Lord) Barnett was not aware at the time he was creating an important component of the UK constitution; and was subsequently bemused to discover that he had. It is hard to imagine a more casual form of constitutional change. There has long been a consensus that the formula is flawed on technical and principled grounds. But it has become heavily politically entrenched, to the point that, during the 2014 Scottish independence referendum campaign, the leaders of the Conservative, Labour and Liberal Democrat parties pledged to maintain it in perpetuity. Whether that commitment will prove true, the lack of a written constitution made the introduction of a problematic funding distribution formula easier than it might otherwise have been; but it has not made it easy to dispense with and to replace with a needs-based formula. A UK written constitution

would probably not include an actual formula in its main text. But it could well contain a statement of the principle of redistribution, the basic requirements it would address, and the process by which such a formula could be established and changed.

I agree with you that Sumption has overstated the case about judicial interference. He does so as part of a thesis that is also opposed to the idea of a written constitution for the UK. You make a better case against the written constitution than Sumption does. However, your final point, that judges might one day declare an Act of Parliament illegal because it violates the rule of law worries me. I am aware that jurists in the so-called 'common law constitutionalist' school take the view that courts might take it upon themselves to put aside the doctrine of parliamentary sovereignty in the interests of upholding core constitutional values. If they did so, they would be playing into the hands of those who subscribe to the thesis, of which Sumption is an exponent, of judicial overreach. It would be easy to caricature them as assuming a role that is beyond their proper remit. However, that you contemplate the possibility of judges setting aside an Act of Parliament in certain circumstances demonstrates that there may be circumstances in which it is proper, and indeed necessary, to do so. It is precisely the purpose of a written constitution to set out what those circumstances are. It would be better, therefore, to have a written constitution to perform this function, rather than expecting the courts, who would be politically exposed, to infer core principles on their own account.

Distinguishing matters of constitutional principle from more regular activities is not an abstract exercise, it is a means of determining who we are and what we stand for as a democratic society. It would not resolve all disagreements over ambiguities, but might provide some clearer guidance than presently exists, for instance, regarding whether the purported desire of an incoming Prime Minister to set out a new legislative agenda should take priority over the ability of Parliament to convene to discuss issues of major importance. As it stands, the constitution is often little more than a matter of opinion, with the opinion of whoever is in the position of most power prevailing.

Creating Acts of Parliament which protected certain areas of the constitution through parliamentary supermajority requirements would be a task almost as demanding as establishing a proper written constitution (which I recognise would be a challenging exercise). Why go to this trouble, if the protections themselves could be removed by simple legislative procedures? Supermajority protections can work in the devolved context precisely because the devolved legislatures are not 'sovereign' in the same way as the UK Parliament, and aspects of the basic constitutional framework within which they operate are beyond their reach. To draw attention to the effectiveness of such measures is to make the case for a written constitution, since the devolution statutes in many senses perform this function for the devolved polities. The UK Parliament should be subject to these kinds of limitations, just as its devolved counterparts are. I do not buy the argument that it is impossible to supplant parliamentary sovereignty. There are many territories across the world that were once (in theory at least) subject to the sovereignty of the UK Parliament, but that are no more, and have their own legislatures that are, with the exception of the case of New Zealand, subject to written constitutions of some kind. This outcome was achieved by various means, ranging from the violent and abrupt, to the more gradual and peaceful. The crucial requirement was that those responsible for the operation of the constitution came to accept that a new fundamental source of constitutional authority, or 'rule of recognition', applied. If it was possible elsewhere, it is possible here.

BD: I cannot agree that a written constitution would avoid the problem of too easily taking a constitutional step and then discovering that reversing the step is very difficult. If a written constitution had been adopted in the 1980s it may have made it clear how the UK could adopt or reject future amendments to the Treaty of Rome (as Ireland's Constitution did), but I doubt if anyone would have thought to insert a provision on how the UK would be able to withdraw itself from that amended treaty. Even the EU itself had not worked out its stance on that by then. When it did do so (by drafting Article 50 in the Treaty on European Union in 1992) it clarified what the EU would require, but it left it up to member states to decide what their own constitutional requirements should be. UK lawyers knew that those requirements included the repeal of the European Communities Act 1972, but we had to await a decision by the Supreme Court before knowing whether the power to trigger the leave process was in the hands of government or Parliament. Would a written constitution have provided a quicker answer?

The Barnett formula does need to be reformed, and frankly I do not see the party leaders' 2014 pledge to maintain the current formula in perpetuity as a real obstacle to its reform. Breaking a pledge by a former party leader would be embarrassing for a new leader, but it could easily be justified by citing changed circumstances. Everyone knows that politicians are in no position to make commitments that are binding for ever. That said, I am at one with you in hoping that the method for calculating the formula should be put on a legislative (if not constitutional) basis.

We are currently in the midst of a plethora of court cases challenging the Prime Minister's decision to prorogue Parliament for a longer than usual period. While I am generally in favour of judicial activism, I am not in favour of judges trespassing into areas that are quintessentially political in nature, and a decision to put an end to a parliamentary session is one such area. Judges would be very unwise to substitute their own political intuition for that of an elected government. An Act of Parliament, on the other hand, is a product not just of the government but of the whole legislature. If an Act clearly breaches some fundamental common law principle, such as the right of access to justice, I think the Supreme Court would be duty-bound to declare that fact, thereby questioning the Act's legality.

I suspect that Parliament would then reconsider the Act, much as currently occurs when the Supreme Court issues a declaration that an Act is incompatible with European Convention rights. Supreme Court judges do not have the final say; they simply provide another hurdle which elected politicians need to surmount if they want their legitimacy as law-makers to be maintained. Ideally, the circumstances in which the Supreme Court could exercise this declaratory power should be specified in legislation, as is already the case with the Human Rights Act 1998. But a written constitution is not required – an ordinary Act will do. The Fixed-term Parliaments Act 2011, whatever one thinks of it otherwise, is a good example of Parliament imposing restraints on both the government and on itself (through requiring a two-thirds majority if there is a proposal to hold an early general election).

The attractiveness of Act-based supermajority requirements is precisely that they are not preserved in aspic, as a constitutional provision would be. The fact that they can be repealed does not mean that they cannot perform an important restraining function during the period in which they operate. Thus does the country's constitution gradually evolve and renew itself. I approve of a constitution where Parliament is sovereign but is nevertheless subject to at least temporary constraints which mean that a supermajority, or more explicit legislation, is required before certain actions can be taken.

AB: There has been a relatively long interlude since our last exchange. During this time, two events of major constitutional significance have taken place. They will no doubt provide ammunition for both sides of the written constitution debate. The first is the 'Miller 2' Supreme Court judgment of 24 September 2019 on the (illegal) prorogation of Parliament; and the second is the calling of an early General Election for 12 December 2019.

On the Supreme Court judgment, I will say the following. It would have been better – for the constitution, for the legal system, for Parliament, for the Supreme Court, for the monarchy, and even for the Johnson government itself, if no attempt had been made to prorogue Parliament in the first place. Everybody lost. The Supreme Court found itself in a very difficult position – being the only barrier to a clear abuse of executive power, but having to make a decision that would inevitably be controversial. Whether or not the conclusion that was reached was correct in law I am not qualified to decide. But the reason the court found itself in this dilemma was because the traditional fallback position of our unwritten constitution – that people in positions of authority will be 'good chaps' and behave themselves – failed. One response to this episode could be simply to place the prorogation power on a statutory basis and perhaps provide for parliamentary approval. But legislating for the last abuse will not necessarily protect us against the next one. It was hard to predict that the government would attempt this particular wheeze; and the present administration or a future one may surprise us again in future with the use of the prerogative or other powers for malign ends. A more comprehensive codification of executive powers, including those exercised by the monarch pertaining to the relationship with Parliament, which makes the role of the courts more secure, is appropriate. And it might deter this or another Prime Minister from gaming the system in the way that was recently attempted. As usual, nothing is guaranteed, but this experience suggests we should now plan to prevent problems, rather than rely on an increasingly exposed judiciary to step in.

On the early General Election, some might see the bypassing of the Fixed-term Parliaments Act 2011 as a tribute to the divine flexibility of the unwritten constitution. But this flexibility was the source of the problem. The 2011 Act served the political convenience of the leaderships of two parties to the Coalition government that introduced the legislation. It was taken through Parliament with excessive haste and without sufficient consultation. Warnings were issued about defects in the Bill, but not properly heeded. If the UK had a written constitution (even the minimalist text I advocate as the most sensible initial option), basic rules pertaining to the length of Parliaments and the holding of elections would certainly be included within it. Establishing – and changing – such rules would have to be a more inclusive process, requiring closer consideration and wider approval. Any problems identified in a proposed system and the way it links to other aspects of the constitution would have to be taken into account in a way they were not in 2011. Not proceeding in this way, and preferring the use of the fabled incremental approach, led to an Act with multiple flaws. It failed to prevent an unnecessary early General Election in 2017; it created uncertainty about the rules governing confidence and the removal and installation of prime ministers; and its ultimate malfunction came when MPs chose to bypass it altogether. That Parliament is able readily to repeal constitutional legislation is not a strength. It is the source of problems, since the 'sovereignty' of the legislature enables the hasty enactment of badly conceived constitutional measures. It may well be that the Fixed-term Parliaments Act will

be replaced in the near future. Are there any guarantees that whatever takes its place will not also be undermined by adherence to narrow interests and political imperatives?

BD: It is strange how something can appear so unfortunate to one person and yet so fortunate to another.

On the prorogation case, surely the same question could have reached the Supreme Court even if we had a written Constitution, for would such a Constitution inevitably pin down the precise circumstances in which a Parliament can be prorogued? After all, a prorogation simply marks the ending of one parliamentary session and the start of another one. Some discretion will almost inevitably have to be granted to the government of the day – or even to the Parliament of the day – to decide when that caesura should fall. All sorts of dubious reasons could be given for such a decision, and it would take a court to rule on which reasons were valid or not. You should not say that you are not qualified to say whether the Supreme Court made the correct decision or not. What matters more is whether you agree with the *ratio decidendi* of the case – if you don't object to reverting to that much maligned concept. I think the court was right to say that prorogation is lawful only if it is justified on reasonable grounds, just as most other decisions taken by public bodies are valid only if they are a reasonably justifiable exercise of the power which is being exercised. I see the decision as one more step on the path to a constitution in which the doctrine of separation of powers plays a full and proper role. That said, I would not be averse to a codification of all prerogative powers and an express legislative statement as to the basis on which their exercise can legitimately be challenged.

The Supreme Court's decision was also remarkable in other ways. That such a momentous step was taken unanimously and with relative brevity speaks volumes for the persuasiveness of the President, Lady Hale. Given that the Deputy President, Lord Reed, had been one of the three dissenters in the first *Miller* case, where he held that the government did have the power to trigger Article 50 of the Treaty on European Union, I had imagined that he and at least one or two other 'conservative' judges, such as Lord Carnwath or Lord Lloyd-Jones, would find that the Prime Minister was within his rights to prorogue in the way that he did. The fact that the prorogation was in any event ineffective in preventing Parliament from passing a law to stop the country leaving the EU on 31 October with 'no deal' – the European Union (Withdrawal) (No 2) Act 2019 – did, I thought, considerably undermine Gina Miller's case. My hunch was that the Supreme Court would say that it had the power to control the use of the prerogative power to prorogue, but that on the facts of this case the exercise of the power had been within acceptable bounds. I was pleasantly surprised by the clarity of the eventual outcome, but I still wonder what the court would have said if Boris Johnson had been more honest and open with the court in revealing his reasons for deciding to lengthen the normal period for a prorogation: would the court still have held that his political reasons were unjustifiable and, if so, what objective criteria would they have used to make their assessment?

On the evasion of the Fixed-term Parliaments Act 2011, I see the Early Parliamentary General Election Act 2019 as an ingenious example of the doctrine of parliamentary sovereignty at work. Yes, the 2011 Act was not properly thought through at the time and perhaps should be repealed (as a Private Members' Bill in the House of Lords is trying to do at the moment), but had the provisions for fixed-term Parliaments been included as part of a written Constitution we would have to go through all sorts of constitutional

contortions to allow it to be disregarded at a time when it was patently necessary to do so. The saga should remind us that politics is the art of the possible, and that the more the constitution tries to restrict the artistry of politicians the less likely it is be effective in facilitating a healthy democracy.

I am curious to know how you think the question of a second independence referendum in Scotland is likely to be resolved. If the Scottish National Party (SNP) wins anything like the number of seats there as it did in 2015 (56 out of 59), would it be 'constitutional' for the UK government and/or Parliament to continue to refuse the Scottish government the right to hold another people's vote on independence? How can the SNP obtain that right except through political persuasion? And if you think a written Constitution could easily make provision for such eventualities as regards Scotland, Wales or Northern Ireland, what would happen if an English region – let's say Yorkshire – suddenly decided it wanted to break away too?

AB: I doubt that a written constitution would stipulate that the government could prorogue Parliament unilaterally if a majority in the Commons were opposed to this course of action. It could thereby close off the potential for abuse.

On the 2019 General Election, perhaps this early poll was needed, perhaps it was not. The point is that the 2011 Act was readily discarded, and by legislation the drafting of which raises some very problematic and complex issues, which I expect shortly to be subject to expert scrutiny. I doubt a written constitution would make an early election impossible. But it is interesting to ask, what if the 2017–2019 House of Commons had known that it had to continue operating until 2022? Would the deadlock have continued throughout this period? Or would political leaders have been forced to behave in a more conciliatory fashion?

As regards the position with referendums on departure from the UK, a written constitution could, if deemed appropriate, establish the principle that a territory can leave the UK, the means by which it could do so (presumably a referendum), the requirements for the triggering of that referendum (such as a vote in the devolved legislature) and how frequently such referendums could be held. This position would be an improvement on where we are now. Creating a right of secession would probably be unique internationally, but we already have it for Northern Ireland, and the Scottish independence referendum suggests that it exists in some vaguely defined sense for Scotland. Whether it should have been implicitly conceded in the way it was by David Cameron in 2011 is potentially a subject of debate – but he was able to do so, because of the nature of our constitution. Flexibility often means flexibility for whoever holds office at UK level.

Would this principle apply to Yorkshire (or Cornwall etc)? A written constitution could provide for the establishment of devolved units within England, if there was demand within those areas, but need not establish them immediately. If they were formed, they could acquire the same rights of secession as the other parts of the UK, in the (presently unlikely) event they wished to use them. It is entirely possible for this kind of process of decentralisation to take place within the context of a written constitution, which could mandate for flexibility.

I would query whether the way in which the UK has approached territorial issues reveals its 'unwritten' constitution as the model for success that is sometimes claimed. It has demonstrated the capacity both to resist change for an inordinate period, and to act in haste in ways that create problems for the future. Lord Byron noticed this tendency

long ago. As he put it in his maiden speech in the House of Lords on 27 February 1812 (objecting to the government plan to introduce the death penalty for 'Luddite' frame-breakers), when faced with desirable measures, Parliament could 'hesitate … deliberate for years … temporise and tamper with the minds of men'. But less well-advised Bills could 'be passed offhand, without a thought of the consequences'. Our constitution invites this kind of abuse.

BD: If the kind of written constitution you envisage is going to provide the degree of flexibility you talk about, I cannot see that we would then be in a very different position from the one we are in at present. Byron, predictably, over-dramatises the situation: 'act in haste, repent at leisure' is a maxim for every level of governance, but we should not let it be an excuse for inaction.

I maintain that, when it comes to constitutional developments, evolution is better than revolution. If a written constitution is to be more than just a consolidation of existing statutory provisions, coupled with a bunch of new provisions that will supplement the others and create an overall constitutional code, it is going to have to adopt firm positions on a range of issues that at present are shrouded in the garb of constitutional conventions. If it were to re-enact a provision such as we find in section 28(8) of the Scotland Act 1998, which says 'it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament', the constitution would surely have to indicate whether judges are allowed to decide what 'normally' means. At present, as we know from the first *Miller* decision in 2017, judges regard that provision as asserting only a political convention not a legal rule, so they treat it as something they have no jurisdiction to deal with. If the written constitution were to alter that present position it would need to indicate what principles judges should use when interpreting the term 'normally'. Would traditional judicial review principles apply, even though what is being reviewed is a decision to enact primary legislation?

The current position regarding the status of Northern Ireland is different because what might be challenged is not a decision to enact (or not enact) primary legislation, but a decision to hold (or not hold) a border poll. The Northern Ireland Act 1998 provides (in Schedule 1, paragraph 2) that a border poll must be held 'if at any time it appears likely to [the Secretary of State for Northern Ireland] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'. I would suggest that in a few years' time a court challenge will be raised against the Secretary of State's refusal to decide to hold a poll. It will then be up to the courts to rule on whether the Secretary of State's assessment of the 'likely' outcome of a poll was '*Wednesbury* unreasonable'. They are bound to be reluctant to second-guess the Secretary of State's assessment, which will have been deeply influenced by political considerations. Some years ago, the courts refused to strike down a decision by the then Secretary of State, Mo Mowlam, that the IRA's ceasefire was still holding, notwithstanding considerable evidence that it had already been breached (*Re Williamson's Application* [2000] NI 281).

You might retaliate by saying that a written constitution cannot be expected to cover all bases, but surely the main point of writing it is to make the constitution less uncertain in its application. I think that's largely a chimera.

AB: I agree that a written constitution should not be constructed in such a way as to allow a court to determine what 'normally' means. But neither should it be left to a government with a majority in the Commons, potentially with little political support in devolved territories, to make this decision. I do not believe that the UK is uniquely incapable of collectively arriving at a definition and/or mechanism by which a more consensual conclusion could be reached on these matters, which would not necessarily always require the courts to become involved.

Conventions are unavoidably a part of any constitution, written or unwritten. At the moment, some of our conventions have come into question, along with the general idea that we can rely on politicians of different affiliations to abide by an implicit code of good behaviour. Recent events have cast doubt upon some of the most basic assumptions surrounding our system, such as (as I mentioned previously) how to discern whether or not a government possesses the confidence of the House of Commons, and what should happen if it has lost it; and the idea that politicians will take steps to avoid drawing the monarch into political controversy. The failure to give due consideration to the impact of UK departure from the EU on the Northern Ireland peace process, both before and after the 2016 referendum, is another example of politicians not accepting that they are constrained by certain obligations. The failure of our constitution to prevent or resolve this particular issue has meant that outside forces, namely the EU27, have had to impose a solution upon us – the implications of which are difficult to predict in advance. It would be better if we were able to devise rules of our own and stick to them than have to have others carry out the task for us.

I am not attributing the whole of the blame for these problems to any one individual or party – there are systemic problems at work here.

I would question the evolution–revolution dichotomy that is sometimes advanced to distinguish the UK constitution from that of others. There are plenty of instances of abrupt change in the past of the UK and its precursors and successor states. In 1973, for instance, a Parliament that until not long beforehand had claimed 'sovereignty' over a large portion of the population of the world, arguably subordinated this sovereignty to that of European institutions. The constitutional changes of 1997–2005 – including devolution, the Human Rights Act 1998, the removal of most hereditary peers from the House of Lords (1999), the creation of the Supreme Court and the Judicial Appointments Commission (under the Constitutional Reform Act 2005), the Freedom of Information Act 2000, the Political Parties, Elections and Referendums Act 2000 – amounted to a major systemic overhaul that goes beyond 'evolutionary', but might be better provided for within the context of a written constitution.

Perhaps another revolution is underway as we leave the EU. As Vernon Bogdanor has argued, it is as though we are moving away from a system that had some of the features of a written constitution, provided by European law. This fundamental transition is taking place after a General Election. The party that won it did so on a manifesto containing various statements that it could claim provide it with a mandate to circumscribe the power of the courts, dilute human rights protection, and various other changes. Under the UK constitution, having a supposed mandate under the first-past-the-post system and a majority in the House of Commons can be enough to bring about changes that would require adherence to more demanding and consensual amendment procedures under other systems. None of those systems are perfect, and ours has many strengths. Unfortunately, we are now witnessing some of its weaknesses, which may show why it

would be good if we already had a written constitution in place. In a strange way, we may be witnessing the type of scenario Lord Hailsham wished to avert when, in 1976, he called for a written constitution to protect against elective dictatorship. However, the chances of securing a written constitution – or at least one worthy of the name – are now remote.

BD: I remain unconvinced that some sort of special constitutional provision should have been envisaged in relation to the Belfast (Good Friday) Agreement for the day when the UK might want to leave the EU. Frankly, I think that Brexit is perfectly compatible with the maintenance of the Agreement and that the alleged negative consequences have been greatly over-hyped, not least in the field of human rights. It is difficult to imagine what constitutional provision could have been devised to prevent the complexities of Brexit for Northern Ireland short of an outright exemption for Northern Ireland from any UK referendum on whether Brexit should happen or not. That would have amounted to a much more obvious breach (in spirt at least) of the Belfast (Good Friday) Agreement than Brexit itself is claimed to be.

The truth is that the peace process in Northern Ireland can and should continue notwithstanding Brexit. A much more significant threat to the process has been the combined failure of the Democratic Unionist Party (DUP) and Sinn Féin to agree a way in which the Assembly and Executive can be restored in Belfast: they collapsed, of course, not because of Brexit but because of Sinn Féin's exasperation at the way the DUP was supposedly treating the nationalist community with disrespect and at how Arlene Foster, the DUP's leader, was handling a monumental financial scandal concerning expenditure on a 'renewable heat incentive' scheme.

Ironically, the exit deal which Boris Johnson secured from the EU27, while portrayed in unionist circles as 'placing a border down the Irish Sea', has the potential for being economically advantageous for Northern Ireland because it allows Northern Ireland to be part of the EU customs union and, simultaneously, of the UK's own internal customs union. There may be some extra bureaucracy at ports and airports, and we still do not know how Northern Ireland will feature in the future trade deal between the EU and the UK, but Northern Ireland might well continue to benefit from the best of both worlds.

The constitutional changes made between 1997 and 2005 were possible only because the then Labour government had a huge majority in the House of Commons. Maybe that period was more illustrative of Hailsham's elective dictatorship? Even so, I don't see the changes as revolutionary. They left the doctrine of parliamentary sovereignty fully intact, the House of Lords has continued in being as a completely unelected body with legislative powers and the Supreme Court is virtually indistinguishable from the Appellate Committee of the House of Lords, notwithstanding that the judges now have their own separate building. Devolution was a huge step, yes, but in hindsight it may be seen as the first step on the road to the break-up of the UK. I maintain that what would help to prevent that calamity would be a Constitutional Reform Act that formally federalises the UK, thereby confirming the purpose of the union and setting out clearer dividing lines between the powers of the constitutive states and the federal government.

I welcome the new government's commitment to establishing a Commission on the Constitution, Democracy and Rights. It should stimulate debate and force everyone to think carefully about what really makes for a free and fair society. Yes, there are risks that recommendations may emerge from it which you and I would disagree with, but I believe

that there are sufficient checks and balances in our unwritten constitution, and enough common sense in the electorate as well as in Parliament, to ensure that hare-brained ideas do not ultimately become enshrined in law or policy. I am happy to agree with you that enactment of a written constitution is, in my view happily, a very unlikely outcome.

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Effective access to justice: myth or reality?

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Introduction

In the world of litigation, in its multifarious forms, issues of mental capacity almost invariably raise questions of effective access to justice and procedural fairness. While international human rights instruments such as the European Convention on Human Rights and Fundamental Freedoms (ECHR)[1] and the UN Convention on the Rights of the Child[2] can sometimes wield some influence in resolving questions of this kind, resort to the riches of the common law frequently provides the best solution. This is so because one of the greatest strengths and successes of the common law is the contribution which it has made to the development and protection of fair hearing (or due process) rights. It may be said that such rights are of elevated importance in every context where the litigant or, indeed, a witness, suffers from some form of mental incapacity. And every such case places the spotlight firmly on the presiding judge.

Access to the court has been described as a right of constitutional stature.[3] Thus, it is possible, for example, to challenge by judicial review measures such as excessive court fees, invoking this constitutional right. Notably, it has also been possible to bring challenges of this nature without any reliance on the common law. In *R (Unison) v Lord Chancellor*[4] the challenge to the instrument of subordinate legislation whereby fees were introduced in Employment Tribunals for the first time[5] was based substantially on principles of EU law. In particular, the challenge invoked the established principle of EU law, now enshrined in Article 47 of the Charter of Fundamental Rights of the EU, that persons who claim that their rights under EU law have been infringed must have access to an effective remedy for the breach.

The foregoing may be considered a paradigm illustration of the valuable contribution to the UK legal system which is now under threat in the Brexit process. Though the common law was not expressly invoked, its influence in the development of this principle of EU law is readily ascertainable. Thus, in *Johnston v Chief Constable of Royal Ulster*

1 Part of Domestic Law via the Human Rights Act 1998.

2 UNHRC: barely visible in the domestic law of the UK. And see section 55 of the Borders, Citizenship and Immigration Act 2009.

3 *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

4 [2015] EWCA Civ 935.

5 By the Employment Appeal Tribunal Fees Order 2013 (SI2013/1893).

Constabulary[6] the European Court of Justice described the so-called 'effectiveness principle' as something common to the legal systems of all member states.

While immigration proceedings are a main focus of this commentary, it is instructive to cast one's eye towards a broader panorama. A brief review of the leading cases in both the UK and the Commonwealth shows that a person's right of access to the court is not absolute. Thus, for example, both reasonable time limits and reasonable court fees have been upheld.[7] Equally, legislative measures of acute political contention have been affirmed, one of the clearest illustrations being the statutory amnesty from suit granted to those who made full disclosure to the Truth and Reconciliation Commission in South Africa, upheld by the Constitutional Court of that country.[8]

It is helpful to formulate the overarching principle. Given that everyone is bound by, and entitled to the protection of, the law, resort to the court is essential for the purpose of determining legal rights and resolving legal disputes. This is nothing less than a fundamental requirement of the rule of law. It is no coincidence that the ultimate judicial arbiters on disputes relating to restrictions on access to the courts are Constitutional Courts and Supreme Courts, reflecting the importance of the right in play. Such cases not infrequently entail judicial review of public policy. In this context one is at once reminded that capacity to bring or defend legal proceedings is a long-entrenched requirement of our legal system. Equally, there is no right of access to the court for the purpose of pursuing a frivolous or vexatious claim or otherwise misusing the process of the court. Considerations of balance and proportionality are invariably to the fore.

1 Access to justice in recent immigration litigation

The sphere of immigration litigation underscores the enduring vigour and influence of the common law. This is especially evident in two of the most important decisions. In *R (Kiarie and Byndloss) v Secretary of State for the Home Department,*[9] the UK Supreme Court decided unanimously that the making of a ministerial certificate the effect whereof was that the immigrant could pursue an appeal to an immigration tribunal only from abroad was unlawful. The essence of the illegality lay in the breach of the principle of effectiveness, in a context where the financial and logistical barriers to giving live evidence to the tribunal from overseas were virtually insurmountable. Notably, the principle of effectiveness was considered to derive from the procedural dimension of Article 8 ECHR. The decision of the Supreme Court displays a welcome grasp of practical realities: the unavailability of legal aid; the improbability of securing legal representation; formidable difficulties in giving and receiving instructions where legal representatives were engaged; the availability of facilities for live evidence; securing the attendance of UK-based witnesses at the tribunal hearing; and the ability to navigate one's way through bundles of documents.

> While it might seem to many observers that the appeal could equally have succeeded on the basis of common law fair-hearing principles, the decision is, once again, a signal illustration of the influence of international law in the UK legal system.

6 C-222/84, [1987] QB 129 at [17] (page 147).

7 See, for example, *Mwellie v Ministry of Works etc* [1995] 4 LRC 184 and *Bahamas Entertainment v Koll* [1996] 2 LRC 45.

8 *Azanian People's Organisation v President of the Republic of South Africa* [1997] 4 LRC 40.

9 [2017] UKSC 42.

The principle of effectiveness featured prominently again in *AM (Afghanistan) v Secretary of State for the Home Department and Lord Chancellor*.[10] (Many of those associated with the Migrant Mental Capacity Advocacy project will have some familiarity with this case.) It confronted squarely the question of the effective right of access to immigration tribunals by incapacitated and vulnerable individuals. The factual matrix, in brief compass, involved the Secretary of State's refusal of an asylum claim by a citizen of Afghanistan aged 15 years. There ensued the dismissal of the appellant's appeal by the FtT[11] in circumstances where the evidence included the report of an expert in psychology drawing attention to the appellant's moderate learning difficulties and impaired intellectual skills and recommending that a series of measures be adopted for the hearing: informality, restrictions on those attending, specially tailored questions and so forth. The FtT dismissed the appeal, as did UTIAC[12] on further appeal.

Neither tribunal paid proper attention to the expert psychological evidence. In the language of the Court of Appeal, neither tribunal took:

> … sufficient steps to ensure that the appellant had obtained effective access to justice and in particular that his voice could be heard in proceedings that concerned him.[13]

The legal infirmity thereby generated was the familiar one of common law procedural unfairness. The judgment continues:

> The Appellant was a vulnerable party with needs that were not addressed.[14]

The framework of legal principle rehearsed by the Court of Appeal is worthy of note:[15]

> a. Given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as 'a reasonable chance', 'substantial grounds for thinking' or 'a serious possibility';
>
> b. While an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;
>
> c. The findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an 'add-on' and rejected as a result of an adverse credibility assessment or finding made prior to and without regard to the medical evidence;
>
> d. Expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below and JL (medical reports – credibility) (China) [2013] UKUT 00145 (IAC), at [26] to [27]);
>
> e. An appellant's account of his or her fears and the assessment of an appellant's credibility must also be judged in the context of the known objective

10 [2017] EWCA Civ 1123.

11 First-tier Tribunal (Immigration and Asylum Chamber).

12 Upper Tribunal (Immigration and Asylum Chamber).

13 *AM (Afghanistan)* at [16].

14 Ibid.

15 Ibid at [21].

> circumstances and practices of the state in question and a failure to do so can constitute an error of law; and
>
> f. In making asylum decisions, the highest standards of procedural fairness are required.'

Predictably, the court emphasised that this is not an exhaustive or immutable checklist.[16]

The Court of Appeal next turned to consider the extant tribunal rules, practice directions and guidance. It observed that adherence to these measures would have served to avoid the procedural unfairness which had been permitted to permeate the proceedings at both levels.[17] The judgment states:

> Critically, the Appellant's age, vulnerability and learning disability could have been recognised as taken into account as factors relevant to the limitations in his oral testimony. Likewise, the Tribunal's procedures could have been designed to ensure that the Appellant's needs (including his wishes and feelings) as a component of his welfare were considered to ensure that he was able to effectively participate.

Drawing attention to various provisions of the FtT Rules (rule 2, the overriding objective, rule 4, the tribunal's power to regulate its own procedure, and rule 14, the tribunal's broad power to give directions), the court concluded:

> It is accordingly beyond argument that the Tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the Tribunal can utilise to deal with a case fairly and justly. Within the Rules themselves, this flexibility and lack of formality are made clear.[18]

The Court of Appeal also placed some emphasis on the need for early alertness on the part of the tribunal in cases of impaired capacity and the desirability of an early case management hearing and specially tailored case management directions.[19] The judgment also draws attention to:

(i) the Senior President of Tribunal's Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses' (October 2008).

(ii) the Joint Presidential Guidance Note No 2 of 2010.

The Court of Appeal cautioned that a failure to give effect to these instruments would normally constitute a material error of law.[20] These measures repay careful reading. They have the following central features:[21]

> a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
>
> b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that 'the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so' (PD [2] and Guidance [8] and [9]);

16 Ibid at [22].
17 Ibid at [23].
18 Ibid at [27].
19 Ibid at [28]–[29].
20 Ibid at [30].
21 Ibid at [37]

> c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
>
> d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
>
> e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

Next the judgment draws attention to the advent of section 55 of the 2009 Act[22] suggesting that the statutory duty to have regard to the best interests of any affected children in the discharge of immigration, asylum and nationality functions extends to tribunals.[23] The court also discourages excessively elaborate and literal interpretation of the Guidance Note.[24] Next, the court decided that a direction for the involvement of an intermediary is possible.[25] Finally, the court interpreted the relevant primary and secondary legislation as supportive of the conclusion that tribunals are empowered to appoint a 'litigation friend'.[26] The relevant passage is at [44]:

> I have come to the conclusion that there is ample flexibility in the tribunal rules to permit a tribunal to appoint a litigation friend in the rare circumstance that the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without such a step being taken. In the alternative, even if the tribunal rules are not broad enough to confer that power, the overriding objective in the context of natural justice requires the same conclusion to be reached. It must be remembered that this step will not be necessary in many cases because a child who is an asylum seeker in the UK will have a public authority who may exercise responsibility for him or her and who can give instructions and assistance in the provision of legal representation of the child.

Notably, the need for intervention by the Tribunal Procedure Committee, in the form of procedural rules, was expressly acknowledged.[27]

The right of effective access to a court must, I suggest, be the core element of every litigant's right to a fair hearing. It is this right which unlocks all of the other constituent ingredients of a fair hearing – the independence and impartiality of the tribunal, the right to be alerted to the case to be answered and so forth.[28] It has been consistently recognised in various juridical contexts – European human rights, EU law and domestic law – that, being a right which by its very nature invites regulation by the state, limitations, including financial limitations, may be valid, *but provided only that these*:

> … pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[29]

22 See note 2 above.

23 *AM (Afghanistan)* at [36].

24 Ibid at [37].

25 Ibid at [38].

26 Ibid at [38]–[42].

27 Ibid at [4] and [45].

28 *Podbielski v Poland* (Application No 39199/98) and [2005] ECHR 543 at [61].

29 Ibid at [63].

It is abundantly clear from all of the leading cases addressing this issue that *context* is of crucial importance. The common law had, of course, taught us this from long ago. Thus, in one case, the court fee in question – approximately €115 – for the enforcement of a judgment, did not, objectively, appear unreasonable. But it was held to constitute a disproportionate restriction on the right of access to the court on the ground that the claimant's monthly income was a pension of just €19.[30] The same conclusion was made in another case where the fee in question equated to the average annual salary in the state concerned.[31]

As the foregoing brief reflection demonstrates, the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to the litigant's fundamental right to a fair hearing. For the migrant litigant the *context* will frequently include elements of family separation, vulnerability of all kinds, psychological trauma, emotional instability, an unfamiliar language and an alien country and culture. Sheer desperation is commonplace. Worry, perplexity, fear and uncertainty abound. Furthermore, the factor common to many migrant litigants is a lack of support – moral, psychological, material and financial.

Accordingly, an assessment in any given case that a migrant litigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. But the typical migrant litigant will not have available a pool of candidate litigation friends to which to turn. This stands in marked contrast to the British national litigant who, typically, can call on a parent, parental figure, older sibling or other blood relative for this purpose. There is, therefore, an unmistakable disparity of treatment issue.

The need for a simple, accessible, expeditious and workable framework to give effect to the assessment that a migrant litigant should have the benefit of a litigation friend is incontestable. In the absence of this – coupled with the necessary related public funding – the pioneering decision in *AM (Afghanistan)* will be set to nought and our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing. Are we in the UK really prepared to sink to depths so low?

2 Post–*AM*: whither?

At this point, one pauses – and, unfortunately, continues to do so. Clearly, a framework of procedural rules is required to give proper effect to the litigation friend mechanism. Whimsical and essentially unregulated and unsupervised judicial decision-making in a matter of this importance simply will not work. Procedural regulation is required not merely in the interests of legal certainty and consistent, predictable judicial decision-making but, fundamentally, in furtherance of the overarching right in play, namely the litigant's right to a fair hearing.

Funding will obviously be an issue, one of not less than vital importance, predictably the biggest issue of all. In the same breath one adds that the corollary of every judicial assessment that a person is of sufficiently impaired capacity to warrant the assistance of a litigation friend, or some other comparable support measure, must surely be that a failure to provide such facility will impact adversely on the person's right to a fair hearing – one of the fundamental, inalienable rights in the UK legal system. It is trite that rights of this kind must be practical and effective, not theoretical or illusory. This principle also

30 *Apostol v Georgia* [2006] ECHR 999.

31 *Kreuz v Poland* [2001] 11 BHRC 456.

was entrenched in the common law, before the (welcome) advent of international law influences. It has been said by the European Court of Human Rights:

> This is particularly so of the right of access to the Courts in view of the prominent place held in a democratic society by the right to a fair trial …[32]

In that case, which concerned the availability of legal aid, the test which the Strasbourg Court formulated was:

> … whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.[33]

The procedural framework which I have advocated above is nowhere to be seen. It would appear that the Tribunals Procedure Committee, with its many and under-resourced commitments, has not yet devised a model. Presumably, the related issue of *judicial training and expertise* similarly lies dormant.

Conclusion

One recalls the scholarly argument of Dr E J Cohn:[34]

> Our law makes access to the Courts dependent on the payment of fees and renders assistance by skilled lawyers in many cases indispensable. Under such a legal system the question of legal aid to those who cannot pay must not be allowed to play a Cinderella part. Its solution decides nothing less than the extent to which the State in which that system is in force is willing to grant legal protection to its subjects. Where there is no legal protection, there is in effect no law. Insofar as citizens are precluded from access to the Courts, the rules of the law which they would like to invoke are for them as good as non-existent.[35]

In a later passage the author refers to the plight of those citizens who are too weak to protect themselves and reasons:

> Just as the modern state tries to protect the poorer classes against the common dangers of life such as unemployment, disease, old age, social oppression etc, so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of protection. The state is not responsible for the outbreak of epidemics, for old age or economic crises. But the state is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the state to make its machinery work alike for the rich and the poor.[36]

It seems remarkable that these wise words were written fully 75 years ago. Today they would appear to resonate as strongly as ever. One might justifiably question whether access to justice – a cornerstone of the rule of law – has in truth been moving in a progressively backwards direction.

It is also instructive to recall that the supposedly enlightened UK legal system has been legislating for free legal advice and representation for some five centuries (since 1494) following the example of a Scottish Act of 1424.

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32 *Airey v Ireland* [1979] 2 EHRR 305 at [57].

33 Ibid.

34 An academic writer and author of an article published in the Law Quarterly Review 1943.

35 E J Cohn, 'Legal aid for the poor – a study in comparative law and legal reform' 59 Law Quarterly Review (1943) 250 at 251.

36 Ibid page 256.

These admittedly gloomy reflections prompt the recollection that philanthropy and human solidarity have for long been established features of the UK legal system. The so-called 'dock brief' gained currency in the eighteenth century when the practice whereby the trial judge in a criminal case asked the barristers who had speculatively attended the courtroom to represent the accused without any fee developed. And one looks back with unvarnished admiration at the altruism of those involved in the Bentham Committee (established in 1929) and the Poor Man's Lawyer at Toynbee Hall (from 1884). By 1928 there were 27 such centres operating in London, spreading to the main provincial towns and cities. The momentum towards a proper legislative vehicle gradually became irresistible, culminating in the Legal Aid and Advice Act 1949.

The noble work of the Bar Pro Bono Unit dates formally from 1972. It involved a commitment by participants to offer at least three days' advice and assistance annually without charge. Solicitors established an equivalent agency. In 1996 the Bar Pro Bono Unit provided free advice and representation to 1615 individuals. The suggestion that, now, there is a more compelling need than ever for this service seems incontestable. My personal experience has been that the law departments of universities are increasingly alert to this and examples of impressive free legal advice and representation schemes are multiplying. These almost invariably require voluntary input and assistance from practising professionals. It has been my pleasure to make a modest contribution to some such worthy ventures.

The principles which inspired the development of the Toynbee Hall Poor Man's Lawyer over a century ago continue to resonate: that the laws of our country exist for the benefit of the poor as well as the rich; that equality before the law is a mere pretence if some citizens can assert and protect their rights while others cannot; and that the rule of law will be empty of meaning if justice is not available to every citizen, irrespective of means. The underlying precept was expressed memorably by Colonel Rinborough during the Putney Debates of 1648:

> The poorest he that is in England has a life to live as the greatest he.

The case for a keen sense of civic duty, an altruistic disposition and solidarity with the weakest and most vulnerable of our fellow citizens seems more powerful than ever before. If government will not act, conscientious and responsible lawyers and other professionals must attempt to at least partly fill the void. I have witnessed with admiration approaching awe how some of the worst-paid cases have been conducted by legal and other professionals to the highest standards imaginable. This has served to rekindle my innate belief in the rule of law. To all young aspiring lawyers especially I say, '**Seize the day.**' *Carpe diem!*

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Procurement in the time of COVID-19

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Abstract

This piece reflects on the role of public procurement regulation in the face of a situation, such as the COVID-19 pandemic, generating an extremely urgent need for the public sector to buy additional supplies and equipment. Counterintuitively, at a time of heightened public expenditure, public procurement rules are 'deactivated'. That does not mean that unusual procurement mechanisms are not 'activated', though, as the example of the EU's Joint Procurement Agreement shows. It also does not mean that 'reactivating' public procurement regulation will not present challenges, some of which deserve careful consideration.

Keywords: public procurement; extreme emergency; negotiated procedure without publication; COVID-19; joint procurement agreement; economic stimulus.

Introduction

Public procurement is at the forefront of the response to the challenges of COVID-19. Only well-equipped hospitals can save patients' lives without endangering those of the medical, nursing and support workers in the NHS. Shortages of relatively simple consumables such as personal protection equipment (PPE), but also cleaning and hygiene products, can endanger lives and have devastating effects on the resilience of the healthcare system to (continue to) cope with the pandemic. Shortages of essential equipment such as ventilators can have even more direct nefarious impacts on individual lives.

The importance of public procurement and supply chain management has rarely been so prominently in the public eye and political debate – except, perhaps, in the case of

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notorious procurement scandals, such as the recent Brexit-related so-called 'ferrygate'.[1] In this piece, I reflect on some of the emerging issues in the procurement response to COVID-19 and on the perhaps even bigger challenges that will follow, from a regulatory perspective.

1 'Deactivating' procurement rules

Given the importance of public procurement in the current context, it is perhaps counterintuitive that public procurement regulation vanishes in the face of such challenges. Where unforeseeable and extremely urgent circumstances not attributable to the contracting authority arise, public procurement rules get out of the way to free public buyers up to do all they can to get the required supplies and equipment. This is embedded in the system, probably as a result of the long experience all public administrations have historically had in bending or setting the procurement rules aside when more important (or at least, more urgent) public interests than ensuring probity and economy in the expenditure of public funds arise.

The 'deactivation' of procurement rules in the face of extreme emergencies could not have been put more clearly than in the *Guidance on Procurement related to the COVID-19 Crisis*[2] from the European Commission (the Commission) which stressed that under such conditions:

> ... public buyers may negotiate directly with potential contractor(s) and *there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level.* In practice, this means that authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery'.[3] (emphasis added)

This bold and clear statement and policy steer at EU level echoes the earlier guidance published by UK Cabinet Office in its *Policy Note on Responding to COVID-19*,[4] which more sparsely (or perhaps cautiously) stated that 'in responding to COVID-19, contracting authorities may enter into contracts without competing or advertising the requirement'.

1 See e.g. University of Bristol Law School, 'Dr Albert Sanchez-Graells' #FerryGate evidence discussed in House of Commons emergency debate' (14 March 2019) <http://www.bristol.ac.uk/law/news/2019/ferrygate-evidence-discussed-in-hoc-debate.html>. For more details, see National Audit Office, 'The award of contracts for additional freight capacity on ferry services' (February 2019) <https://www.nao.org.uk/wp-content/uploads/2019/02/The-award-of-contracts-for-additional-freight-capacity-on-ferry-services.pdf>; and idem, 'Out-of-court settlement with Eurotunnel' (May 2019) <https://www.nao.org.uk/wp-content/uploads/2019/05/Out-of-court-settlement-with-Eurotunnel.pdf>.

2 European Commission, Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis [2020] OJ C108I/1. For a full analysis, see A Sanchez-Graells, 'European Commission's Guidance on Extreme Emergency Procurement and COVID-19 – some thoughts and a word on the Dyson contract' (*howtocrackanut.com*, 1 April 2020) <https://www.howtocrackanut.com/blog/2020/4/1/european-commissions-guidance-on-extreme-emergency-procurement-and-covid-19-some-thoughts>.

3 European Commission Guidance (n 2) section 1, emphasis added.

4 Procurement Policy Note on Responding to COVID-19 (PPN 01/20, 18 March 2020) <https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>. For a full analysis, see A Sanchez-Graells 'Extreme emergency procurement and COVID-19 – re today's UK guidance' (*howtocrackanut.com*, 18 Mar 2020) <https://www.howtocrackanut.com/blog/2020/3/18/extreme-emergency-procurement-and-covid-19-re-todays-uk-guidance>.

Of course, a complete retreat from public procurement rules is a narrow exemption and it needs to be interpreted and applied as such.[5] Written justification for the use of direct awards, as well as the different steps in the decision-making process leading to the choice of specific contractors and the agreement of specific conditions need to be duly documented and subject to proper record-keeping. Those records will be very relevant for the assessment (and potential challenge) of procurement decisions once the emergency ends, in particular where there are doubts as to the contracting authority's respect for the boundaries of the extreme emergency procurement exemption. Both the Commission's and the Cabinet Office's documents provide detailed and actionable guidance to public buyers on how to check that they face extreme urgency in the carrying out of a specific procurement. Beyond these basic requirements of good administration, no other public procurement rules remain active in the context of the current extreme emergency.

What could be perhaps even more surprising is that the Commission has taken a commercially oriented approach to its guidance and, for example, explicitly endorsed 'active buying' techniques, which should reassure contracting authorities taking abnormal steps to try and secure emergency supplies of PPE, ventilators and any other needed equipment and consumables. Indeed, the Commission guidance explicitly mentions that:

> In order to speed up their procurements public buyers may also consider to: contact potential contractors in and outside the EU by phone, e-mail or in person, hire agents that have better contacts in the markets, send representatives directly to the countries that have the necessary stocks and can ensure immediate delivery, [or] contact potential suppliers to agree to an increase in production or the start or renewal of production.[6]

This is certainly welcome and will provide comfort to those taking a more commercial approach than they usually would to market engagement (or scouting).

Further than that, the Commission also endorsed the use of urgent procurement to spur market innovation and matchmaking, thus dispelling doubts about the legality (under procurement rules) of even more active interventions in the market whereby the contracting authority is directly involved in structuring the collaboration between potential suppliers (and even potential competitors, although this will require careful competition law assessment), for example, through COVID-19 challenges or hackathons. In that regard, the guidance is also clear that:

> ... [t]o satisfy their needs, public buyers may have to look for alternative and possibly innovative solutions, which might already be available on the market or could be capable of being deployed at (very) short notice. *Public buyers will have to identify solutions and interact with potential suppliers in order to assess whether these alternatives meet their needs … Public buyers are fully empowered under the EU framework to engage with the market and in matchmaking activities*. There are various ways to interact with the market to stimulate the supply and for the medium term needs, the application of urgent procedures could prove a more reliable means of getting better value for money and wider access to available supplies.[7]

The guidance also stresses the relevance of these approaches in terms of boosting the uptake of other strategic considerations so that 'environmental, innovative and social requirements, including accessibility to any services procured, are integrated in the

5 See eg judgment of 4 June 2009 in *Commission v Greece*, C-250/07, EU:C:2009:338, paragraphs 34 to 39.

6 European Commission Guidance (n 2) section 1.

7 Ibid (emphasis added).

procurement process'.[8] However, it is unlikely that contracting authorities will be able to concentrate efforts on this, even if they can obtain some of the benefits due to engaging in some 'unconventional' procurement approaches, including more digital procurement (and innovation related to 3D printing, for example).

These general policy and strategic guidelines clearly convey the basic message that procurement professionals should do all they can to obtain the urgently required supplies, as well as aim to transition to a more sustainable (and planned, and hopefully less expensive and more innovative) approach in the medium term. The basic message is thus: procure what we need as best as you can and not worry about the rules for now.

2 Proactive international coordination efforts

However, the deactivation of public procurement regulation does not mean that all procurement mechanisms are set aside. On the contrary, there are specific procurement arrangements that seek to coordinate international responses to public health threats. In particular, the EU's *Joint Procurement Agreement for the Procurement of Medical Countermeasures* (JPA)[9] has also gained notoriety in recent weeks.[10]

The JPA is a *sui generis* agreement that allows its signatories to jointly procure the medical countermeasures (that is, not only medication) required to respond to a serious cross-border health threat. As of 30 March 2020, all EU countries, the UK and two EEA countries had signed the JPA, with some very recent COVID-19-related additions to the list of signatories (Sweden, Poland, Norway, Finland and Iceland).[11] The EU launched procurement procedures under the JPA, both for PPE[12] and for ventilators.[13]

The purpose and operation of the JPA are largely unknown or misunderstood, even by public procurement specialists. Without getting into technicalities, I would stress that the JPA is simply a mechanism of international collaboration that seeks to avoid duplication of procurement procedures at national level and competition between buyers for the sourcing of the supplies that, not only they may all need, but which they may need in different amounts and at different times. The JPA is primarily a mechanism of coordination of the procurement procedure and, more importantly, of the execution of the supply contracts through specific case-by-case agreements on how to distribute the

8 Ibid.

9 See relevant documents available at <https://ec.europa.eu/health/preparedness_response/joint_procurement_en>. For in-depth discussion, see A Sanchez-Graells, 'The EU's Joint Procurement Agreement: how does it work, and why did the UK not participate?' (*howtocrackanut.com*, 4 April 2020) <https://www.howtocrackanut.com/blog/2020/4/4/the-eus-joint-procurement-agreement-how-does-it-work-and-why-did-the-uk-not-participate-procurement-pill-with-recording>.

10 The JPA needs to be distinguished from the also novel and rather unconventional creation of an EU stockpile of necessary supplies – the rescEU stockpile; see Commission Implementing Decision (EU) 2019/570 of 8 April 2019 laying down rules for the implementation of Decision No 1313/2013/EU of the European Parliament and of the Council as regards rescEU capacities and amending Commission Implementing Decision 2014/762/EU [2019] L 99/41; as amended by Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities [2020] OJ L 82I/1.

11 See <https://ec.europa.eu/health/preparedness_response/joint_procurement/jpa_signature_en>.

12 European Commission, 'Coronavirus: Commission bid to ensure supply of personal protective equipment for the EU proves successful' (24 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_523>. This followed a first unsuccessful attempt; see contract award notice 2020/S 051-119976 of 12 March 2020.

13 It has been reported that the procedure was launched on 16 March 2020, although there is no public information on the outcomes as of the time of writing (6 April 2020).

quantities procured across participating countries, allowing for a concentration of supplies on those in acute need, as well as donation of quotas. The JPA is also a mechanism that can aggregate buying power and improve the participating countries' collective-bargaining position, although that is highly dependent on the supply-side structure of the relevant markets.

The governance of the JPA is two-tiered, with a first-tier JPA-wide Steering Committee with representation from all signatories entrusted with general issues in the administration of the cross-border collaboration, and a second-tier Specific Procurement Procedure Steering Committee (SPPSC) for each of the procurement procedures launched under the JPA, with representation of the participating states and the Commission only.[14] Signatories of the JPA have no obligation to participate in any specific joint procurements and thus the composition of the SPPSC is variable, with the committed financial contribution being a relevant factor in the allocation of votes. The SPPSC retains decision-making powers and aims to operate on the basis of common accord or, failing that, qualified majority for the most relevant decisions. The JPA only transfers to the Commission an executive role in the design and execution of the procurement procedure, which is carried out under the strict surveillance of and with a range of necessary approvals by the SPPSC. Moreover, participating countries are not barred from engaging in parallel procurement procedures at national level (which can be a weakness rather than a strength of the system).

The JPA has a *sui generis* legal nature. It is subjected to EU law and operates as a budgetary implementing measure of Decision 1082/2013/EU.[15] Litigation resulting from disputes between signatories of the JPA is to be heard by the Court of Justice of the European Union (CJEU). Procurement under the JPA is carried out in accordance with the Financial Regulation – currently, the Omnibus Regulation 2018/1046/EU.[16] This implies that any challenges to the procurement decisions need to be heard by the General Court.[17]

However, each of the participating countries is meant to enter into direct legal and economic relationships with the relevant contractors and '[t]he law applicable to framework or direct contracts pursuant to [the JPA] and the competent court for the hearing of disputes under these contracts shall be determined in these contracts'.[18]

14 See European Commission, Explanatory Note on the Joint Procurement Mechanism (December 2015) <https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_explanatory_en.pdf>.

15 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] L 293/1. See European Commission, Considerations on the legal basis and the legal nature of the Joint Procurement Agreement (undated) <https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_legal_nature_en.pdf>.

16 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] L 193/1. For discussion of some of the main requirements, see A Sanchez-Graells, 'Transparency in procurement by the EU institutions', in K-M Halonen, R Caranta and A Sanchez-Graells (eds), *Transparency in EU Procurements: Disclosure within Public Procurement and During Contract Execution*, vol 9 EPL Series (Edward Elgar 2019) 82–104.

17 On the limitations that this implies, see European Court of Auditors, Special Report No 17/2016, 'The EU institutions can do more to facilitate access to their public procurement' (13 July 2016) <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=37137>.

18 JPA, article 42(2).

The JPA is thus a non-exclusive 'procurement only' *sui generis* agreement. The only clearly pre-defined legal issues concern the subjection of the JPA and the ensuing procurement (up to award) to EU law and CJEU jurisdiction only. Its final legal structure is left to specific decisions of the participating member states (and market acceptability).

The legal set-up of the JPA and, more importantly, the sets of framework agreements and specific contracts which it is meant to generate are yet to be subjected to detailed analysis.[19] The COVID-19 crisis and the use of the JPA in responding to it will be a test of this mechanism for international coordination at European level and provide additional practical insights into its operation. At the time of writing, the emerging picture is mixed, although only time will tell.

The same can be said of the UK's decision not to participate in the JPA and rather *go it alone* in seeking to procure large numbers of ventilators.[20] I would be remiss not to put on the record that I harbour serious doubts as to the drivers for that decision, and some specific contract awards in particular,[21] and that I would like to see a full enquiry into that decision as soon as the UK Parliament is back in session.[22]

3 Some challenges in reactivating procurement after the COVID-19 crisis

Looking beyond the COVID-19 crisis, I think three further challenges lie ahead.

The first one concerns the reactivation of standard procurement rules, once the conditions of extreme emergency subside. This will not happen overnight, nor in the same way across contracting authorities or across categories of supplies and equipment. It will thus be a challenge for each contracting authority, but also for those with oversight powers, to make a call as to when 'normal procurement' must resume. Litigation on these issues is also likely to arise, in particular if the extreme emergency situation lasts for a long time and economic operators need to challenge each opportunity to get public sector contracts shielded from competition under the cover of the extreme urgency exemption.

The second challenge lies in learning from the crisis. Significant thought and research will have to go into understanding what contingency planning (and procurement) needs to be in place to ensure an adequate level of readiness for the next pandemic. It will also be very important to extract lessons from the international coordination efforts (in the EU, but also beyond). Both of these areas of analysis are likely to be very prominent, and they should.

But this should not lead us to forget that there is more learning to be extracted from this situation. An important area for research and analysis concerns the 'unconventional' or more commercial approaches to procurement that public buyers are taking once the rules have been deactivated. I will be personally very interested to see to which extent, perhaps with minor tweaks, they can be adopted in 'normal times' and under full application of the procurement rules. My working hypothesis is that most of the practices

19 For discussion of related issues, with further references, see A Sanchez-Graells, 'The emergence of trans-EU collaborative procurement: a "living lab" for European public law' (2020) 29(1) Public Procurement Law Review 16–41.

20 For discussion, see M Flear, 'EU joint procurement – UK's delayed participation undermines the NHS and risks lives' (*UK in a Changing Europe*, 27 March 2020) <https://ukandeu.ac.uk/eu-joint-procurement-uks-delayed-participation-undermines-the-nhs-and-risks-lives/>.

21 While I have no doubts about the general legality of the actions of the UK government, my main concern is with the award of an emergency contract to a consortium that, at the time of writing, is yet to obtain regulatory approval for its proposed respiratory ventilator. For details, see Sanchez-Graells (n 2).

22 For extended discussion, see the debate in multiple entries between P Telles in telles.eu (starting on 24 March) and myself in *howtocrackanut.com* (for the same period).

that will emerge from the flexibility created under the current 'no rules' scenario can be retained in the future, contrary to the standard claim that procurement rules are unduly rigid and too limiting on the exercise of discretion by public buyers. I look forward to having a chance to test it.

A third possible challenge lies in making sure that the situation of extreme emergency does not morph into one where public procurement is used purely as an economic stimulus mechanism, with the ensuing disregard (or bending) of the rules to achieve specific economic goals. This risk is in two parts. One is about protectionism and the use of procurement for industrial policy purposes, of which there were already very clear signs before the COVID-19 crisis (in Europe and in the UK). The other part concerns the target for the (additional) public expenditure to be channelled through procurement.

Here, a lesson from the use of procurement by Spain in the aftermath of the 2008 financial crisis may be a cautionary tale. A significant proportion of additional public expenditure (the so-called 'Plan E') was dedicated to minor works procured by local authorities (notoriously, improving sidewalks and fixing potholes). While that was seen to address a short-term employment problem, it certainly did not do much to improve the country's infrastructure or to prepare it for future changes in labour markets.

Post COVID-19, every procurement package aimed at restarting the economy needs to avoid that short-termism. In my opinion, the (unavoidable) stimulation of the economy through procurement needs to be oriented towards ground transport infrastructure or digital infrastructure and services projects, have a very clear environmental orientation and contribute to the fight against climate change, as well as be coupled with significant investment in re-skilling and life-long education programmes.

Conclusion

On the whole, while procurement regulation is dormant in the initial phase of the COVID-19 crisis, it will have a very significant role to play as it subsides and when it passes. This is perhaps a counter-cyclical understanding of procurement and its role in a crisis, but I think it reflects the oddities of these challenging times of COVID-19.

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The COVID-19 pandemic and the challenge for innovation policy

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The scramble to develop and deliver a vaccine for COVID-19 has led to calls for the establishment of a prize fund to incentivise scientists and pharmaceutical companies to invest in the endeavour.[1] The thrust of the argument will be familiar to anyone who has followed disputes over the limitations of the patent system in relation to pharmaceutical research: patents only work to create incentives if potential patent owners are able to fix prices at a level that will allow them to recoup the costs of their investment. The inability to charge such prices means that there is relatively little investment in drugs to treat conditions that blight the lives of millions in the global south or in last-line antibiotics that need to be prescribed in the smallest possible number of cases to preserve their efficacy. The market for a COVID-19 vaccine is, of course, vast and includes the world's wealthiest populations, but pharmaceutical companies know that there will be political pressure to keep prices low, with some countries already indicating that they will be willing to issue compulsory licences to force down the costs of any patented COVID-19 vaccine.[2]

We have argued elsewhere that policymakers are right to be experimenting with innovation prizes as a way of incentivising research.[3] Some areas of medical research would seem to be particularly well-suited to this form of policy intervention, although we need more evidence of the impact of prizes like Longitude 2014 (which seeks to incentivise the development of a point-of-care diagnostic test as a means of conserving

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1 Daniel Hemel and Lisa Larrimore Ouellette, 'Want a corona virus vaccine, fast? Here's a solution' *Time Magazine* (New York, 4 March 2020) <https://time.com/5795013/coronavirus-vaccine-prize-challenge>; Chris Callaghan, 'Would a Longitude Prize speed production of a Covid-19 vaccine' *Times Higher Education* (28 March 2020), <www.timeshighereducation.com/blog/would-longitude-prize-speed-production-covid-19-vaccine>; Alexander Tabarrok, 'Grand innovation prizes to address pandemics: a primer' <www.mercatus.org/publications/covid-19-policy-brief-series/grand-innovation-prizes-address-pandemics-primer>; Tyler Cowan, '$1 million plus in emergent ventures prizes for coronavirus work' <https://marginalrevolution.com/marginalrevolution/2020/03/1-million-plus-in-emergent-ventures-prizes-for-coronavirus-work.html>.

2 The Chilean Chamber of Deputies passed a unanimous resolution to this effect on 17 March 2020. An English translation of this resolution is available at <www.keionline.org/chilean-covid-resolution>.

3 R Burrell and C Kelly, 'Public rewards and innovation policy: lessons from the eighteenth and early nineteenth centuries' (2014) 77 Modern Law Review 858.

antibiotics) before we can say this with certainty. We have significant reservations, however, about whether the establishment of an innovation prize is the right policy intervention for dealing with the challenges of getting a COVID-19 vaccine into general use. It has been reported that some 35 companies and academic institutions are working on a vaccine,[4] and a handful of candidates are now entering trials. There is, of course, no guarantee that any of the current efforts will bear fruit, since the development of a new vaccine is difficult and carries a high risk of failure. But it is far from clear that there are research teams currently sitting on the sidelines needing motivation to enter the fray. We need to be cautious of additional regulatory intervention in situations where the empirical evidence suggests that there are already adequate incentives to invest in a creative endeavour, a point that applies at least as strongly to the creation of prizes as it does to the extension of intellectual property rights. Scientists, engineers, research managers and funding bodies will step up when faced with a global health emergency. A handful of researchers may do so because they know that fame and quite possibly fortune will come to those who make the most noteworthy contributions to solving the current crisis. But few participants in the research push are likely to be motivated by dreams of a Nobel Prize or similar. The current crisis has revived our sense of community (panic-buying of toilet rolls notwithstanding), and people of all descriptions are bringing their expertise to bear on solving what problems they can. Engineers volunteering their time to work out how to repurpose industrial air separation units to produce medical grade oxygen or to find ways of printing plastic ventilator valves have done so without any expectation of recognition or reward.[5] Rarely has the construct of *homo economicus* seemed like a less safe guide for regulatory intervention.

None of this is to say that there are not likely to be significant barriers to the roll-out of a global immunisation programme. The winner of the race to produce a vaccine may well seek to patent it and, if so, there are likely to be fierce arguments over pricing. Upscaling manufacture may be difficult, particularly if manufacturers are concerned about liability for producing a vaccine that has been put through an expedited set of approvals. Distributing vaccines is likely to be a significant problem in least developed and war-torn countries, and even in some developed countries anti-vaxer sentiment may delay herd immunity. These are not trivial problems, and some will demand a regulatory response. However, once a vaccine has been developed, manufacturing will be upscaled. Governments are, by their own description, on a war footing. We are in a world where the US government has already demonstrated its willingness to use emergency powers to force a private company to manufacture ventilators. Even if this move was largely a

4 Laura Spinney, 'When will a coronavirus vaccine be ready?' *The Guardian* (London, 5 April 2020) <www.theguardian.com/world/2020/apr/05/when-will-a-coronavirus-vaccine-be-ready>.

5 The latter example is taken from a newspaper article on ingenuity and COVID-19: Oliver Wainwright, '10 Covid-busting designs: spraying drones, fever helmets and anti-virus snoods' *The Guardian* (London, 5 April 2020) <www.theguardian.com/artanddesign/2020/mar/25/10-coronavirus-covid-busting-designs>; the former is drawn from an anecdote relayed to one of the authors by someone who works in the petrochemical industry.

matter of political theatre,[6] it demonstrates that states will do what is necessary to ensure that a vaccine is produced as quickly as possible and in large quantities.[7]

To our minds, therefore, the current crisis does not demand an immediate innovation policy response. The challenge for innovation policy lies not in how it can get us from where we are to where we need to be. Rather, to play on an old joke, the question that needs to be asked is whether we should be starting from our current location. Hopefully, the terms of reference for public enquiries into our preparedness for the current pandemic will encompass missed research opportunities. In the meantime, it is important not to rush to judgement. Nevertheless, the early signs are that promising research opportunities *were* missed. In particular, scientists who had been working on a SARS vaccine have reported their frustration that funding dried up as the risks of SARS receded. If funding had been maintained and a successful SARS vaccine had been developed, we might be much closer to being able to produce a vaccine for COVID-19.[8]

We believe the challenge lies in moving towards a more 'proactive' innovation policy:[9] one that recognises that a patent-centric and market-focused innovation model may result in underinvestment in promising treatment opportunities until a crisis is upon us, at which point – if the crisis is of a sufficient magnitude – the market may in any event be forced to give way to the command and control imperatives of the state.

Prizes could have an important role to play in building a more proactive innovation system, but issues of prize design need to be taken seriously. Innovation ecosystems are invariably complex, and this is particularly true for medical research, where there are a vast array of actors and stakeholders. History can offer insights into how a system of prizes might operate. Attention soon falls on the eighteenth-century Longitude Prize whenever innovation prizes are being discussed: recent calls for the establishment of a COVID-19 vaccination prize have all referenced this historical precursor. However, in the UK at least, grand innovation prizes were unusual in the eighteenth and nineteenth centuries. Much more important was the system of *post hoc* rewards that complemented the still-developing patent system – and ameliorated some of its failures.[10] These were awarded by Parliament in response to petitions from inventors, with no *ex ante* guidance as to the categories of endeavour that might attract parliamentary approval. These rewards were used by the British state to endorse some of the most important discoveries of the period. Of most immediate relevance are the parliamentary payments to Edward

6 W J Hennigan, 'Inside Trump's coronavirus theatrics on war powers, ventilators and GM' *Time Magazine* (New York, 31 March 2020).

7 Access to specialised machinery and raw materials may well prove to be a problem, and lack of preparedness to upscale vaccine manufacture (which bodies like the World Health Organization have been warning about for years) may well produce delays and prolong the crisis. See Stanley Plotkin et al, 'The complexity and cost of vaccine manufacturing – an overview' (2017) 35(33) Vaccine 4064. The point we are making is simply that once nations like the USA are on a war footing these problems will eventually be overcome.

8 See, for example, the testimony of Professor Peter Hotez, Dean of the National School of Tropical Medicine, Baylor College of Medicine and co-Director of the Texas Children's Hospital Center for Vaccine Development, before the Congressional Committee on Science, Space and Technology, 5 March 2020: <https://science.house.gov/hearings/beyond-coronaviruses-understanding-the-spread-of-infectious-diseases-and-mobilizing-innovative-solutions>.

9 As to the differences between proactive and reactive innovation policies, see also 'Scientists were close to a coronavirus vaccine years ago. Then the money dried up' *NBC News* (5 March 2020): <www.nbcnews.com/health/health-care/scientists-were-close-coronavirus-vaccine-years-ago-then-money-dried-n115009>, reporting the comments of Dr Jason Schwartz, Yale School of Public Health.

10 On the existence of this system of rewards running parallel to patent protection see, Burrell and Kelly (n 3).

Jenner, developer of the smallpox vaccine, who was awarded £10,000 in 1802 and a further £20,000 in 1807. In the parliamentary debates over Jenner's petitions it was accepted by all sides that Jenner 'could expect no reward from the method of patents, which were not applicable in the present case'.[11]

A generalised system of rewards comes with its own limitations, not least that (like the patent system) it does not provide a proactive steer as to the types of innovation that society is seeking to incentivise. It is, in any event, more or less impossible to imagine the re-creation of a generalised reward system given modern controls on the dispersal of public funds. The future must therefore lie in prizes, but here it is important to note that the distinction between prizes and rewards is one that needs to be handled with care. The more the subject of 'a prize' is described in broad terms, and the more there is discretion to adjust the size of the prize after the nature of the invention has been revealed, the closer a prize is to a reward. If the use of prizes is to be expanded, we need to be wary of schemes that close off promising lines of enquiry by defining 'success' narrowly. It may be that by defining very specific goals, prize competitions restrict the natural creativity of scientists and discourage exploration of tangential ways of tackling the underlying problem. We also need to be sceptical of the argument that highly prescriptive victory criteria can prevent arguments over whether a prize should be awarded. The original Longitude Prize was governed by a strict set of clearly articulated criteria and yet debate over whether Harrison was treated fairly continues to this day.[12]

The most interesting historical model – which combines the upfront steer provided by prizes with something of the expansive culture of a system of rewards – is the operation of the Board of Longitude in the period after the controversy over Harrison's timepiece had been resolved. Over time the Board's mandate was expanded to allow it to make payments in relation to a broad range of nautical inventions. The Board's very existence sent a signal as to the types of invention that were important, and the Board could give further guidance as to research priorities, but the attempt to prescribe narrow

11 HC Deb 2 June 1802, page 596 per Mr Fuller MP. Jenner was committed to making his invention publicly available as soon as possible. Having tried, and failed, to find a willing patient for a public demonstration of vaccination in London, he self-published a guide to vaccination. See John Baron, *Life of Edward Jenner* (Henry Colburn 1827).

12 Dava Sobel in her enormously influential book on the Longitude Prize famously argued that the eventual recipient of the prize, John Harrison, was poorly treated by England's scientific establishment: Dava Sobel, *Longitude: The True Story of a Lone Genius Who Solved the Greatest Scientific Problem of His Time* (Walker and Co 1995). There is, however, a case to be made that the Board of Longitude did not act entirely unreasonably in refusing to grant Harrison the full prize. On this account Harrison was an awkward character whose endeavours were supported for many years by the Board despite his seeming reluctance to disclose the nature of his invention. See Jim Bennett, 'The travels and trials of Mr Harrison's timekeeper' in Marie N Bourguet, Christian Licoppe and H Otto Sibum (eds), *Instruments, Travel and Science: Itineraries of Precision from the Seventeenth to the Twentieth Century* (Routledge 2002); Katy Barrett, 'Explaining themselves: the Barrington Papers, the Board of Longitude, and the fate of John Harrison' (2011) 65 Notes and Records of the Royal Society of London 145.

criteria for the award of a prize was largely abandoned.[13] A pandemic prize fund modelled along these lines might have a number of advantages beyond correcting for market failure. The financial and reputational incentives provided by prizes are important, but history shows that prizes and rewards have other functions. In the eighteenth century, the reward system was self-consciously used by Parliament to send a signal that society valued scientific endeavour, that accumulation of wealth was not the only criterion by which to judge an individual's contribution to society, and that there was something noble about 'giving an invention to the world with liberality',[14] as unfashionable as that may now sound. Closely related to these other functions is the possibility that a pandemic prize fund might also echo the Parliamentary processes of the past and further the process of rehabilitating the role of the expert in public life, a process that, thankfully, already seems to be underway.

It is not possible to predict future pandemics. That the Spanish flu pandemic occurred almost exactly a century ago is purely a matter of chance; there is no epidemiological equivalent to Kondratieff long-wave cycles. The next pandemic might hit in two years or two hundred years, and it might take any number of forms. There does, nevertheless, appear to be a consensus around some of the areas where future research will be crucial if we are to be in a better position to fend off the next crisis.[15] These include finding ways of predicting which animal pathogens are most likely to produce zoonotic diseases, tackling antimicrobial resistance (most immediately so that we can fight secondary bacterial infections during a viral pandemic, but in the longer term to guard against the renewed risk of bacterial pandemics), finding ways of accelerating the testing of vaccines without compromising patient safety, and developing new antivirals so that we have a greater range of therapies to test when confronted with a novel disease. These are some of the areas at which a new, flexible and open-ended pandemic prize fund might be targeted.

The establishment of a pandemic prize fund would, however, ideally form part of a comprehensive review of the benefits and costs of moving to a more proactive innovation policy. Such a review would not be a simple matter: the proactive/reactive distinction is a useful shorthand, but there are proactive elements of the current

13 This is an oversimplification of a complex topic, but the gradual expansion of the Board's remit is clear. See e.g. Peter Johnson, 'The Board of Longitude 1714–1828' (1989) 99 Journal of the British Astronomical Association 63, 68: 'With the award of the main prize to Harrison … the Board had fulfilled its role under the 1714 Act. However, it was kept in being under a new Act of 1774 which moved the emphasis away from longitude to navigation in general. The scope of the Board became much wider'; Sophie Waring, 'The Board of Longitude and the funding of scientific work: negotiating authority and expertise in the early nineteenth century' (2014) 16 Journal for Maritime Research 55, 58: 'In the nineteenth century, the remit of the Board of Longitude was considerably widened as the Admiralty attempted to extract useful technologies from the scientific community after the decisive, if limited, success of the marine chronometer… [this] … left the precise nature of scientific expertise that the board should support, and how it was meant to advise the Admiralty, increasingly vague …'. The flexible role of the Board in granting monetary awards meant that after 1800 the Board and Parliament presented alternative avenues by which inventors might seek recompense and recognition for their efforts. See Burrell and Kelly (n 3 above) 868. The Board had a number of ways of signalling its priorities, including by establishing sub-committees (although the history of these sub-committees is itself complex). We also acknowledge that the 1819 prize for discovering the north–west passage was run on the basis of precise navigational criteria, but this does not detract from the general thrust of the point being made here.

14 HC Deb 15 March 1802, page 203, per Admiral Berkeley: '[Jenner] had, with a generosity, liberality, and modesty, inseparable from true merit, communicated the result of his inquiries to the world. If he had pursued a contrary conduct, he would have realised a princely fortune.'

15 See also Bill Gates, 'Responding to Covid-19 – a once-in-a-century pandemic?' New England Journal of Medicine, 28 February 2020 <www.nejm.org/doi/full/10.1056/NEJMp2003762>.

innovation policy landscape (as reflected in, for example, research council funding priorities). The patent system will remain important and thought needs to be given to how public funding of research, whether it comes in the form of grants or prizes, should bear on the rights of patent owners who have benefited from this funding. Some elements of the innovation policy landscape, such as R&D tax credits may, for better or worse, have an important role in international tax competition, irrespective of their impact on innovation outcomes. Thought also needs to be given to the time horizon in which innovation takes place. In the private sector there is the concern that the UK's model of corporate governance leads to a narrow and short-term focus on maximising share price at the expense of investment in technological advance. In the university sector difficult questions need to be asked about whether the REF-driven 'impact agenda' creates both a similar short-termism and a broader skewing effect (research bureaucrats across the land will soon be reappraising the work of those who not so long ago had been categorised as squandering opportunities to do 'impactful' research by wasting their time on novel corona viruses, disease transmission modelling, the history of pandemics and the optimal design of take-home examinations, to take just some of the more obvious examples).

Difficult questions and choices lie ahead, but if there is a positive to emerge from the current crisis it can only lie in forcing us to confront the need to do things differently. Critics have been arguing for years that the health innovation model is broken, but radical action has been ducked. There are, moreover, other areas where innovation is probably even more important. This is true for climate change mitigation technologies, bearing in mind that under some models of the impact of climate change worrying about the deaths of 50–100 million of us in a pandemic will seem quaint. Perhaps the best thing that we can do now is to create an expectation that innovation policy, like many other things, needs to change. There must be no return to the *status quo ante*.

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Langford v Secretary of State for Defence: taking a functional approach towards survivors' benefits?

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This is a commentary on Langford v Secretary of State for Defence*, where the Upper Tribunal's decision was overruled by the Court of Appeal. The decision has implications for the payment of pensions and survivors' benefits in future cases, but, as will be argued here, the case is also important from a family law perspective.*

Keywords: cohabitation; survivors' benefits; pensions; function-based recognition.

Introduction

Langford v Secretary of State for Defence involves a claim to survivors' benefits for adult dependants granted under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (the Scheme). The Court of Appeal took a different approach from the Upper Tribunal and allowed the claim. The case has clear implications for the payment of survivors' benefits and will be of interest due to the discussion of principles deriving from the Supreme Court decision in *Re Brewster*.[1] But it will be argued here that the decision is also important from a family law perspective, which has been largely overlooked so far, because the Court of Appeal decision points towards a need for comprehensive law reform in relation to the way the law treats unmarried cohabiting partners.

Background

The appellant, Mrs Langford, had been in a 15-year cohabiting relationship that was 'akin to marriage'[2] with her partner, Air Commodore Green, when he unexpectedly died in May 2011. Throughout, the appellant remained legally married to another man. She had been estranged from her husband for 17 years and received no financial support from him and had no expectation of receiving any in the future. Prior to Air Commodore Green's death, the couple had begun investigating the possibility of securing the appellant's divorce and had declared that they intended to marry. The appellant gave evidence that the couple shared the belief that, in the event of Air Commodore Green's death, regardless of whether they married, she would be entitled to survivors' benefits and a pension.

The procedural history of this case is complicated, and as such it is worth briefly outlining it here. The appellant began separate but parallel proceedings involving similar

1 [2017] UKSC 8.

2 *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271, [4].

issues. As well as the claim to survivors' benefits under the Scheme, the appellant also claimed she was entitled to a pension under the Armed Forces Pensions Scheme. Both schemes contained similar rules as to when a surviving cohabiting partner would have entitlements upon their partner's death. 'Surviving adult dependants' would be entitled to benefits/pension provision in the same way as spouses and civil partners where they could prove four things. First, that they have cohabited with the deceased 'as partners in an exclusive and substantial relationship'; second, that the deceased did not leave a surviving spouse or civil partner; third, that they were 'not prevented from marrying' the deceased; and, fourth, that the survivor was financially dependent on the deceased or that the partners were financially interdependent.[3] As the appellant remained married to her estranged husband, she could not have married her partner,[4] and so her claim to a pension, as well as her initial claim to survivors' benefits, failed.

The High Court,[5] in dismissing the appellant's claim to a pension, found that, while the appellant had been subject to differential treatment which fell within the ambit of Article 1 of Protocol 1 (A1P1) of the European Convention on Human Rights, the discrimination was justified because in the majority of cases, 'a person who is married, may be expected … to have some claim on their spouse … for financial support if needed'.[6] Similarly, the Upper Tribunal[7] in the proceedings about survivors' benefits held that the Secretary of State was entitled to treat 'married partners who would otherwise satisfy the definition of "surviving adult dependant" differently from unmarried partners'.[8] This was justifiable because a person who is dependent on another and is free to marry has no claim to financial support from a spouse, whereas a person who is dependent on another and is not free to marry, due to their already being married, *is* in a position to claim financial provision from their spouse.[9]

The Court of Appeal decision and commentary

The appellant appealed the Upper Tribunal's decision in relation to survivors' benefits. The appellant argued that the exclusionary rule in the Scheme, preventing the payment of survivors' benefits to a cohabiting partner who was prevented from marrying the deceased, discriminated against her unlawfully contrary to Article 14, read in conjunction with A1P1. She argued that her position was analogous to that of a surviving unmarried partner who does not have a continuing marriage to an estranged spouse because both would have been in a substantial and exclusive relationship, characterised by financial dependency, with the deceased. The exclusionary rule was not necessary to establish that the relationship between the appellant and the deceased was a 'substantial and exclusive' relationship, and the rule was inconsistent with the 'overarching objective' of the Scheme, which was to benefit unmarried couples. She further argued that it was disproportionate to withhold benefits from a dependent partner 'for want of compliance with a technicality'.[10] The Secretary of State argued that the exclusionary rule was necessary and

3 Armed Forces and Reserve Forces (Compensation Scheme) Order 2011, Article 30; Armed Forces Pension Scheme Order 2005, Schedule 1, rules E.1 and E.2.

4 The Matrimonial Causes Act 1973, section 11(b), provides that a marriage will be void if one party is either already lawfully married or in a civil partnership. See similar provision in the Civil Partnership Act 2004, section 3(1)(b).

5 *Langford v Secretary of State for Defence* [2015] EWHC 875 (Ch).

6 Ibid [22] (Timothy Fancourt QC).

7 *JL v Secretary of State for Defence* [2016] UKUT 0482 (AAC).

8 Ibid [39] (Mr E Mitchell).

9 Ibid.

10 [2019] EWCA Civ 1271, [13]–[14].

legitimate in order 'to achieve consistency of treatment between married and unmarried persons and to ensure the Scheme was affordable and administratively workable'. As such, it was argued that the difference of treatment was justifiable because it was not 'manifestly without reasonable foundation'.[11]

Lord Justice McCombe, in the only reasoned judgment, allowed the appellant's appeal. It was explained that the aim of the Scheme was to ensure that partners of deceased Scheme members who had been in a substantial and exclusive relationship with the deceased were placed in the same position for the purposes of survivors' benefits regardless of whether they were married.[12] The exclusionary rule was one way of determining whether a partner was entitled to benefit and was not indicative of any aim of the Scheme itself.[13] In the present case, the exclusionary rule had the effect of discriminating between a person in the appellant's position, who was in a substantial and exclusive relationship with the deceased while remaining married to her estranged husband, and a person also in a substantial and exclusive relationship who was not married to the deceased or anyone else.

While the discriminatory treatment fell within the ambit of Article 14, read with A1P1,[14] in order to deny the appellant's claim, the discrimination needed to be justified and proportionate, which, following *Re Brewster*,[15] required the court to determine whether the rule was 'manifestly without reasonable foundation'. This required the court to examine the reasons advanced for the difference of treatment 'and start from the basis that unless it is shown that it is without reasonable foundation then justification is established'.[16] The Secretary of State put forward three legitimate aims in favour of the exclusionary rule: first that the Scheme intended to treat married and unmarried partners in the same way; second that the exclusionary rule attempted to prevent double recovery, in case the partner's spouse was also a member of the same/a similar public service scheme; and, third, to avoid increasing the cost of the scheme and creating administrative inconvenience.[17] In line with *Brewster*, there was no evidence that the second and third aims were relevant to the introduction of the exclusionary rule, and as such they weighed less heavily in the assessment of reasonableness.[18] In relation to the first aim, achieving the legitimate aim of parity of treatment between married and unmarried partners is achieved by requiring the unmarried partner to prove they shared a substantial, exclusive and financially dependent relationship with the deceased; there was no need to impose further restrictions based on marital status.[19] In relation to the second and third aims, there was no evidence as to the likely numbers of people involved or evidence to suggest that allowing such claims would increase costs or administrative inconvenience.[20] As such, it was held that none of the aims stated by the Secretary of State gave rise to a reasonable foundation.

It seems that, while the Upper Tribunal was concerned with a literal reading of the provisions and focused on the fact of the appellant's marriage to her estranged husband,

11 Ibid [15].
12 Ibid [35].
13 Ibid [36].
14 Ibid [38].
15 [2017] UKSC 8.
16 [2019] EWCA Civ 1271, [56].
17 Ibid [60].
18 Ibid [61].
19 Ibid [62]–[63].
20 Ibid [64]–[66].

the Court of Appeal took a more flexible, or functional, approach. As Jenni Millbank explains: '[f]unctional family claims rest on a performative aspect, that is, the parties are granted legal rights because of what they *do* in relation to one another, not because of the *status* of who they *are* or what manner of legal formality they have undertaken'.[21] Arguably, Lord Justice McCombe has adopted a functional analysis in order to allow the appellant's claim to survivors' benefits. He explained that the legitimate aim of parity of treatment between married and unmarried partners 'is in reality achieved, not by imposing restrictions based on a partner's marital status, but by requiring the demonstration of a substantial, exclusive and financially dependent relationship in practice'.[22] Considering the overall aim of the Scheme, instead of focusing on the technicality of the appellant's legal marriage to her estranged husband, allowed the court to focus on the fact that the relationship was a substantial and exclusive relationship characterised by financial interdependency, or to use Lord Justice McCombe's phrasing, a relationship 'akin to marriage'. As such, the technicality of the appellant's marriage could be overlooked by adopting a functional approach which focused on the nature of the relationship and the aim of the Scheme.

While this approach is to be welcomed because it ensures the appellant received survivors' benefits, Lord Justice McCombe explained in his concluding paragraph that, although the discrimination in the appellant's case cannot be justified and is not proportionate, this does not mean that *other* cases involving *similar* exclusionary rules would be decided in the same way.[23] It seems to be a matter of evidence: if sufficient evidence could be raised to demonstrate that an exclusionary rule is justified and proportionate, then a surviving partner, such as the appellant, may not have a claim. These concluding comments are a cause of concern and point towards the need for general law reform in the area of cohabitation: a cohabiting partner in Mrs Langford's position could find themselves in a position of real financial need on their partners' death. Mrs Langford believed (as did her deceased partner) that she would be entitled to benefits upon her partners' death, and this corresponds with the findings of a recent study that found that 46 per cent of people in the UK continue to believe that cohabitants are treated in law as if they were married.[24] In fact, the legal position of cohabiting couples is complicated. As Anne Barlow and others succinctly put it, 'sometimes the law treats cohabitants as married, sometimes ignores the relationship altogether and treats them as individuals, and in other instances treats them as a couple, but a couple which is inferior to their married counterparts'.[25] Law reform is needed so that individuals like Mrs Langford in long-term cohabiting relationships are not having to fight their case in the courts in order to achieve benefits that would be provided to a spouse in the same position.

21 J Millbank, 'The limits of functional family: lesbian mother litigation in the era of the eternal biological family' (2008) 22(2) International Journal of Law, Policy and the Family 149, 150 (emphasis in original text).

22 [2019] EWCA Civ 1271, [63].

23 Ibid [68].

24 NatCen, 'Almost half of us mistakenly believe that common law marriage exists' (22 January 2019) <www.natcen.ac.uk/news-media/press-releases/2019/january/almost-half-of-us-mistakenly-believe-that-common-law-marriage-exists>.

25 Anne Barlow, Simon Duncan, Grace James and Alison Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century* (Hart 2005) 6.