

## Chapter 18

### Conclusion: Brexit, gender justice and the Overton Window

Moira Dustin, Nuno Ferreira and Susan Millns

#### 1. Introduction

It is tempting to talk about Brexit, and in the context of this book, gender and Brexit, in clichés, analogies and metaphors: is gender 'the elephant in the Brexit room'? Is gender a 'known unknown' or an 'unknown unknown' in the Brexit discourse? The framing device we have chosen is the Overton window or window of discourse;<sup>1</sup> that is to say, the metaphor for describing the parameters of public debate at any one moment – a concept we will return to.

When we first had the idea for this collection, our concern was that we saw little recognition of the importance of gender, sexual orientation and gender identity (SOGI) to Brexit discourse, either in political, public or academic discourse, in the run-up to the referendum, the psephology of the vote itself or the post-referendum negotiations. We started from the premise that feminist and queer studies provide a lens to look through every area of public policy and legislation. Similarly, we recognised that Brexit is not a project or process that can be contained within a few or even many areas of public policy. Nevertheless, we did not anticipate how diverse a collection of chapters would result from our call for contributions when we brought together the two topics – gender and Brexit. In the opening chapter we highlight this diversity and here, in this final chapter, we try to bring together some overarching themes, while avoiding imposing commonalities where none exist.

We start by looking at the extent to which our authors take an optimistic or pessimistic view of future prospects for gender and LGBTQI+ rights. We then identify issues relating to globalisation, and specifically migration, as a recurring motif in many chapters. Finally, we note the extent to which the contributions to this book are underpinned by intersectional analysis. Before concluding, we highlight some of the considerations we were unable to explore, which in no way reflects their lack of importance. We hope that by flagging them, they will be addressed in future publications.

#### 2. Horizon scanning

Editors of an academic collection such as this generally attempt to bring together a balanced and nuanced set of contributions, reflecting different perspectives, and we were no different. The purpose of the publication was to provide thinking and analysis of how Brexit might affect women and sexual and gender minorities, and how a gendered and queer perspective shows aspects of the Brexit debate in a different light. Our starting point was not any judgement on the desirability of the UK leaving the EU and we did not prejudge the overall predictions of our authors as to whether Brexit would be 'good' or 'bad' for women and sexual and gender minorities.

Yet, it is fair to say that none of the contributors is looking forward with enthusiasm to a post-Brexit world in which women and sexual and gender minorities have greater rights and freedoms, and where they are freed from the constraints of bureaucrats in Brussels. Rather, our writers express a range of views. Gill and Ahmed bring to life the sense of shock felt by many women on hearing the referendum result. A number of contributors find cause for pessimism in the likelihood that leaving the EU will aggravate existing social or legal problems – see, for example, Solanke's analysis of the

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<sup>1</sup> John Lanchester, 'Brexit Blues' *London Review of Books* (28 July 2016) 3.

plight of the 'Zambrano' families. Yet others outline alternative scenarios in terms of future prospects: Caracciolo di Torella presents alternative paths that are positive, negative or that maintain the status quo. Walker identifies ways in which Brexit offers both opportunities and losses in relation to family law.

Nor is it the case that the UK was ever fully 'in' in the first place. To take the example of asylum, as Lusman points out, the UK opted out of the Family Reunification Directive<sup>2</sup> and only signed up to the 2004 incarnation of the EU Qualification Directive,<sup>3</sup> so is not signed up the 2011 recast Directive<sup>4</sup> with its extended recognition of both sexual orientation and gender identity.<sup>5</sup> Additionally, as Querton argues, opting into the 2004 Directive did not lead to a more inclusive and gender-sensitive approach to asylum. Thus, the 'risks' are less concrete and it is rather a case that UK citizens and residents will not benefit from what are currently unknown future enhanced rights and protections.

A consistent undercurrent is that gender and LGBTQI+ rights are contingent and precarious, and that Brexit, as a political enterprise, will not stand or fall alone. The devolution agendas in Northern Ireland and Scotland are most obviously affected by the particular form that Brexit takes (see chapters by Galligan, Ritch and Weldon-Johns). The UK's human rights legislation and framework is also contingent on Brexit: not least in that, without a vote in favour of leaving the EU and the vast workload that it has created for civil servants and politicians, it is likely that there would have been greater headway on the Government's manifesto commitment to replace the Human Rights Act 1998 with a 'British Bill of Rights'.<sup>6</sup>

Nevertheless, despite clear concerns on the part of many – indeed most – contributors that Brexit will threaten the legal, economic or social gains of women and sexual and gender minorities, there is also a strong sense of resistance and positivity about the potential for addressing some of these risks if only they are identified and publicly recognised. Solanke, for example, suggests an approach for ensuring that non-discrimination principles and policies apply equally to all children, whether or not they are migrants and regardless of their parents' nationality. Equally, Lusman argues that the UK could adopt the measures in the reformed Common European Asylum System to act in 'the best interests of the child'. Stephenson and Fontana highlight the specific recommendations of the Women's Budget Group for avoiding regression in economic areas affecting women.

The less than positive assessment of the potential results of leaving the EU for the UK's women and sexual and gender minorities raises some larger questions for the editors. Are women and sexual and gender minorities likely to be *more* disadvantaged by Brexit than other citizens and residents in the UK? One of the common perceptions of the EU and arguments in the taking-back-control camp, is that the EU is heavily bureaucratic and imposes a high regulatory burden on its Member States.<sup>7</sup> Outside the EU, UK citizens will be free from the shackles of Brussels' red tape. The argument of many Remainers is that EU regulation is not unnecessary bureaucracy, but very necessary protection for marginalised and disadvantaged individuals – including, disproportionately, women and sexual

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<sup>2</sup> Family Reunification Directive 2003/86/EC

<sup>3</sup> Council Directive 2004/83/EC.

<sup>4</sup> Council Directive 2011/95/EU.

<sup>5</sup> With regard to the right to asylum, the 2004 EU Qualification Directive referred explicitly to sexual orientation, and the amended version, adopted in 2011, marks further progress in ensuring LGBTI applicants' rights by adding gender identity as a basis for identifying a Particular Social Group. [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582031/EPRS\\_BRI\(2016\)582031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582031/EPRS_BRI(2016)582031_EN.pdf)

<sup>6</sup> The Conservative Party, 'The Conservative Party Manifesto 2017' <<https://www.conservatives.com/manifesto>> accessed 26 June 2018.

<sup>7</sup> [http://www.voteleavetakecontrol.org/briefing\\_control.html](http://www.voteleavetakecontrol.org/briefing_control.html) accessed 30 June 2018.

and gender minorities.<sup>8</sup> So far, the UK Government has not suggested that it will use exiting the EU as an opportunity for regression on rights, whether or not they derive from Brussels. In this, the Government is perhaps responding to the many expressions of concern on this front from statutory and non-governmental bodies, such as the House of Commons Women and Equalities Committee, which recommended that '[t]he Government should include a clause in the Great Repeal Bill that explicitly commits to maintaining the current levels of equalities protection when EU law is transposed into UK law.'<sup>9</sup> Thanks to lobbying by equality campaigners, the Act as passed included an amendment requiring Ministers to make a statement to the House before any proposed changes to equality legislation.<sup>10</sup>

### 3. Migration and globalisation

In media and political discourse since the referendum, we have seen the many ways in which the UK is bound to the EU – ways that most people would previous not have thought about. Continuing involvement in the Galileo satellite project might be one example.<sup>11</sup> If the purpose of Brexit was demonstrating that 'no man is an island' (sic) then it succeeded. If the purpose of this collection is to demonstrate that no woman or LGBTQI+ person is an island, we feel that we have also succeeded in this. In part, this is because the movement of people has never been so visible as it is today,<sup>12</sup> alongside recognition of the need for protection that this generates in a world of extreme inequality. That is reflected in the preceding chapters, where we repeatedly see that the rights of migrant, refugee and asylum seeking women and LGBTQI+ individuals are at risk, perhaps most starkly in the case of the 'Zambrano families' (Solanke). Writing just before the outburst of anger at the separation of children from their parents under Trump's presidency,<sup>13</sup> Lusman's chapter is prophetic in highlighting growing recognition of the specific threat to children, specifically to male unaccompanied minors, created by apparently neutral or abstract decisions about borders and territorial lines.

Following on from this, leaving the EU will not only affect women and sexual and gender minorities in the UK, but should also be a priority for feminists and LGBTQI+ campaigners across Europe. The

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<sup>8</sup> See, for example, submissions by Fawcett Society, Stonewall and other equality and human rights NGOs to the Women and Equalities Select Committee inquiry 'Ensuring strong equalities legislation after EU exit': <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/ensuring-strong-equalities-legislation-after-eu-exit-16-17/publications/> accessed 30 June 2018.

<sup>9</sup> 'Ensuring Strong Equalities Legislation after EU Exit Inquiry - Publications - UK Parliament' 27 <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/ensuring-strong-equalities-legislation-after-eu-exit-16-17/publications/>> accessed 30 June 2018. See also joint statement Joint statement on Brexit from the UK's four statutory bodies for human rights and equality, 13 June 2018 <https://www.equalityhumanrights.com/en/our-work/news/joint-statement-uks-human-rights-and-equality-bodies-brexit> accessed 30 June 2018.

<sup>10</sup> European Union (Withdrawal) Act, Schedule 7, Part 3, Para 28.

<sup>11</sup> <https://www.theguardian.com/technology/2018/jun/13/eu-member-states-block-uks-access-to-galileo-satellite-programme-after-brexit> accessed 30 June 2018.

<sup>12</sup> Martina Tazzioli and William Walters, 'The Sight of Migration: Governmentality, Visibility and Europe's Contested Borders' (2016) 30 *Global Society* 445; Stephen Castles, Dr Hein de Haas and Prof Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (5th edition edition, Palgrave Macmillan 2013).

<sup>13</sup> Stephen Castles, Dr Hein de Haas and Prof Mark J Miller, *The Age of Migration: International Population Movements in the Modern World* (5th edition edition, Palgrave Macmillan 2013); Martina Tazzioli and William Walters, 'The Sight of Migration: Governmentality, Visibility and Europe's Contested Borders' (2016) 30 *Global Society* 445. accessed 30 June 2018

lack of a UK voice in negotiations may slow down progress on LGBTQI+ rights in other Member States (see Danisi, Dustin and Ferreira). The chapter by Holst, Skjeie and Teigen shows some of the possibilities, but also the complexities, of promoting gender equality for a state sitting alongside but not among EU Member States.

A circular process is at work: the EU has been a driver for policy and regulation, enhancing the rights of women and minorities of all kinds; the UK, as a long-standing EU Member State, has contributed to that process and in some cases been at the forefront of the drive for change. Without the UK as a cog in the larger wheel, change will be determined by a different set of relationships, not always likely to have a positive outcome for women and sexual and gender minorities living around the EU, if the concerns of our contributors materialise.

Recognition that individuals' ability to live fulfilling lives, protected from arbitrary injustice and abuse, is dependent at least in part on membership of an international community suggests that, in the absence of the EU, other supranational bodies will need to take their place – and that women and sexual and gender minorities experiencing discrimination or marginalisation will need to look to these bodies in future. The Council of Europe and the United Nations are the obvious candidates, however, as a number of contributors point out (Danisi, Dustin and Ferreira), the legislation that gives further effect to the European Convention on Human Rights (ECHR) in UK law is also under threat, and most UN instruments lack the kinds of enforcement mechanisms that EU law has. The UK will then find itself in a situation where it is trying, as lusman argues, 'to solve transnational problems with national means'.

#### **4. Intersectionality**

Lastly, in our attempt to compare and draw together themes from this collection, we identify intersectionality as a theme that is sometimes explicit and sometimes implicit in many chapters. Perhaps what these contributions show most strongly is that there is no value in talking about women or sexual and gender minorities as homogenous groups. Aside from gender and sexuality identifiers, individuals need to be seen as workers, consumers, public service users, carers (Caracciolo di Torella, Walker, Stephenson and Fontana). They also need to be seen as people seeking asylum (Querton), people from minority ethnic communities (Solanke), people with disabilities (Huijg), young people (lusmen, Walker). The part of the UK they come from makes a difference (Galligan, Ritch, Weldon-Johns).

To take one example, Huijg highlights the importance of considering the impact of leaving the EU for disabled EU citizens and carers – the majority of whom are likely to be women but who are disadvantaged in different ways, because of who they are and what they do. Yet, as she convincingly explains, no one is inherently vulnerable. Rather, disabled people are 'vulnerabilised' by the state. The concept of being made vulnerable – and perhaps more vulnerable – by the fallout of leaving the EU may usefully be applied beyond disability to people historically marginalised because of ethnicity, nationality, religion or age, as well as gender and sexuality.

We also feel that the collection benefits from the interface and juxtaposition of the authors' disciplines and sectors. The editors of the book are based at Sussex Law School, but we were keen that this should not be a legal text book, and we hope that the contributors' diversity of disciplines has enabled us to give a sense of the wide range of implications of Brexit – implications in the areas of legislation, policy and regulation; employment; economic and financial considerations; potential changes to social provision and protection, and more. Moreover, while this is essentially an academic collection, we knew that it would benefit from input from outside 'the academy' and that it should bridge academia, NGO and policy sectors. From the perspective of Engender, a Scottish

women's organisation, Ritch shows the difference that including women's voices makes to political debates. Stephenson and Fontana end their contribution with specific recommendations for policy makers taken from their work with the Women's Budget Group.

## 5. What did we miss?

In producing this work, we are fully conscious that it is a patchwork quilt with some holes in it. We could not address all the ways in which Brexit will make a difference to women and sexual and gender minorities in the UK (and other EU countries) and, while many of these holes may not yet be visible, we are very conscious of some others. In particular, we have no contribution specifically addressing the concerns of and prospects for Welsh women and LGBTQI+ people. Like England, but in contrast to Scotland and Northern Ireland, most voters in Wales favoured Brexit yet Welsh women are likely to be particularly vulnerable – according to the Director of the Women's Equality Network Wales, who pointed out the role that the European Social Fund has had in helping Welsh women out of poverty.<sup>14</sup>

Nor have we addressed regional and socio-economic differences within UK countries through a gendered or queer lens. The geographical boundaries of the UK featured strongly in post-Brexit analysis, with the assumption that the wealthier Southern electorate voted mainly to remain, while the poorer Northern regions favoured leaving. And the rural-urban divide is similarly important, given that one way of viewing the referendum outcome is that country dwellers voted for Brexit,<sup>15</sup> while cities – with their more heterogenous ethnic communities – voted to remain. As Galligan points out, the withdrawal of EU funding is a particular concern for women's rural networks in Northern Ireland.

Regional and country-specific perspectives are important because, as the contributions from Northern Ireland and Scotland clearly show, there is no single pan-UK response to Brexit by women and sexual and gender minorities. Moreover, one result of leaving the EU may be that differences between gender and queer politics across the four nations become more pronounced. Weldon-Johns, in her contribution, points to the potential for Scotland to take a different path on family conflict resolution to the rest of the UK. Likewise, rights for women and sexual and gender minorities in Scotland may take a more distinct path, reflecting Scottish positions on issues such as integration and human rights.<sup>16</sup>

In line with our recognition of the importance of intersectionality, we also recognise the challenges that it imposes. While we have been able to highlight the issues for some groups – disabled women, LGBTQI+ people seeking asylum, black and Asian British families – we have not been able to drill down in all areas. Age, for example, is largely unaddressed, yet we know that older people have been 'blamed' for swinging the vote and 'selling out' the younger generation.<sup>17</sup> Inevitably, that age dimension also has a gender dimension. There are many other important dimensions we have not been able to address, such as the gendered dimensions of health, employment and education policies and disparities that might arise here.

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<sup>14</sup> <https://www.bbc.co.uk/news/uk-wales-politics-41528416> accessed 30 June 2018

<sup>15</sup> Sascha O Becker, Thiemo Fetzner and Dennis Novy, 'Who Voted for Brexit? A Comprehensive District-Level Analysis' (2017) 32 *Economic Policy* 601.

<sup>16</sup> See for example, Scotland's National Action Plan on human rights <http://www.snaprights.info> accessed 30 June 2018 or the New Scots Refugee Integration Strategy <http://www.gov.scot/Publications/2018/01/7281> accessed 30 June 2018.

<sup>17</sup> <https://yougov.co.uk/news/2016/06/27/how-britain-voted/> accessed 30 June 2018.

## 6. Not 'just' law

There seems to be general agreement that, as Dunne says in relation to sexual minorities, 'the de jure outcome of Brexit may be limited'. We are unlikely to see a bonfire of gender and LGBTQI+ equality protections, yet as Caracciolo di Torella points out in relation to promoting a work-life balance, it is not 'just' about legislation. It is also about principles, values, discourse and the parameters of possibility. This is where the Overton window is a useful descriptor. As Barrow suggests, while leaving the EU's Common Security and Defence Policy may not be as complex as withdrawal from other areas of EU policy, it may mean that momentum on mainstreaming gender in peace and security is lost and there is a return to the traditional assumption that gender is irrelevant to security matters. Combine this with recognition that the Brexit debate in the UK has been dominated by militaristic language and metaphors from the world of business (Achilleos-Sarll and Martill), and we see a narrow window of policy debate focussed on winners and losers. Thus, we suggest that the Overton window is likely to shrink after Brexit. Outside the EU, the possibilities for solidarity between NGO activists and for participation in new rights measures will inevitably dwindle over time – Ritch, for example, highlights the concern that Scottish feminist organisations have about loss of engagement with the European Women's Lobby.

Our conclusion, based on these contributions, is that the immediate threat is not to the broad categories of 'gay' or 'female' UK citizens and residents, but rather to those sometimes termed 'minorities within minorities'<sup>18</sup> – BME families, disabled women, unaccompanied asylum-seeking boys, women living in border regions of Northern Ireland, to give just a few examples. We hope that highlighting such threats will be the first step in addressing them not simply with the defensive demand for no regression on rights but also the inclusive aspiration for an expanding rather than narrowing of horizons.

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<sup>18</sup> Avigail Eisenberg and Jeff Spinner-Havel (eds), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge University Press 2009).

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