

Exploring Legitimacy of Health Governance after Brexit through Law and Language: methodological reflections

Tamara K Hervey, Jean Monnet Professor of EU Law, University of Sheffield and Ivanka Antova, QUB, Research Fellow on ESRC Governance after Brexit project ES/S00730X/1

Abstract

The ‘battle bus’ symbolises the importance of the NHS to the Brexit debate. Evidence suggests that the lie that leaving the EU would mean more NHS resource was one critical component of the referendum result. What happens with health governance will thus be a key determinant of the (perceived) legitimacy of post-Brexit futures.

We already know (including through work undertaken in the UK in a Changing Europe project ES/R002053/1, PI McHale) that all forms of Brexit are harmful, overall, for health. Indeed, the geographical areas of the UK that will be worst affected also correlate closely with those that have the worst health indicators: Brexit will exacerbate health inequalities. Perceptions that ‘others’ are ‘taking up space in GP surgeries/hospitals’ stand in stark contra-distinction to statistical evidence that EEA-nationals in UK hospitals and surgeries are more likely to be *providing* health care than receiving it. In short, people who thought a Leave vote would mean better health care are going to be disappointed.

This paper is an early output from the ESRC Governance after Brexit project ES/S00730X/1. It explores the methodological challenges inherent in exploring the interlocked phenomena outlined above: a set of ‘elite’ understandings of the roles of EU law and policy in health governance that sit very uneasily with at least some perceptions ‘on the street’. Our project takes both established legal and socio-legal methods (doctrinal analysis of novel legal texts and elite interviews in London, Belfast and Dublin), and highly novel ethnographic methods (in particular, street conversations in towns in Northern England and Northern Ireland), and seeks to compare the data generated through each, in order to understand the nature and scale of legitimacy gaps. It does so through centring language, and particularly metaphorical language, as an important indicator of framings, which themselves elucidate notions of legitimacy and accountability.

The paper explores the strengths and weaknesses associated with these methodological approaches, and how the data they generate might be compared.

Introduction

I am going to begin with a story.

It is Saturday 4 June 2016. I am strolling in the sunshine to the concourse outside Sheffield railway station. The concourse is sheltered from a four-lane road by a ‘wall of steel’ sculpture, fitting for a city with a proud history of steel-building. But the sculpture is also controversial, as the steel used to build this civic monument comes from China, not from Sheffield. I spot a ‘Leave UK’ campaigner: an earnest and acne-adorned young white man giving out leaflets and engaging passers-by in conversation. The leaflet includes the now infamous picture of the Battlebus: “We send the EU £350 million a week,” it proclaims (falsely). “Let’s fund our NHS instead”. (Slide Battlebus)

As I approach, I overhear a middle-aged man interacting with the young Leave campaigner. The middle-aged man is becoming increasingly frustrated and irate. He has worked in the NHS in Sheffield for over 30 years, and now he’s a manager in a local hospital. “I’ve seen what the Tories have done to it. Do you really think they [in government] would give more money to the NHS? Do you really believe those lies? Those people [in London] don’t care what happens to Sheffield or its NHS.” I watch the interaction as I approach, and I think that I can help.

“He’s right,” I interject, joining the conversation with the aim of seeking to defuse its increasingly heated nature. After all, everyone present agrees that Sheffield and its NHS are what is important here.

“Being in the EU isn’t harmful to the NHS. In fact, it’s beneficial.”

The information that I feel I need for this conversation comes easily to my mind. I’ve been researching the effects of EU law on health for three decades. These effects are not always as good for health as they could be, but there’s no doubt that they help, especially in the context of the UK, which isn’t in the Eurozone and hasn’t had EU or IMF-imposed austerity. I have just finished a live interview on BBC Radio 4’s *Moneybox*. The BBC had finally woken up to some of the health-related aspects of Brexit, and the *Moneybox* production team wanted to know more from a legal expert. Technical legal questions such as ‘how does the EHIC card work?, what about UK pensioners who have retired to Spain and access clinics there?’ segued into more esoteric interpretative questions such as ‘Won’t being in the EU mean that we can’t renationalise the NHS?’. All of these matters are topics in which I am a technical expert, and I have also been practising making my answers intelligible to a BBC audience.

My knowledge lands with the middle-aged hospital manager.

But it makes no sense at all to the young Leaver. As he struggles to parry our accounts – at least in my case, delivered as calmly and pleasantly as I can muster – a much older ‘minder’ from the Leave UK campaign comes to his rescue. I don’t recall exactly what he said, but I do know that both the middle-aged NHS manager and I retreat almost immediately. I don’t know about the manager, but my sense was that there was no point

whatsoever in civil engagement with this individual. He is quite simply impervious to fact-based or logical argument.

The story illustrates at least four things about our project and its data. The story is one representation of the threads that fed into our project's research design and agenda. First, it illustrates the nature of the methods we are using to generate our data. Second, the story illustrates the types of the data generated from those methods, including the strengths and limitations of such data. These are discussed in section 1 below. Third, the story illustrates the project's inherent researcher situated-ness or positionality, as well as that of its research subjects and co-producers, and what that means for our obligations as ethical and reflexive researchers, for the claims we are seeking to make, and for our research design. Telling a story about me means that I am being up-front about that aspect of the project's methods, epistemologies and positionality. Section 2 discusses these. In section 3, we discuss what narrative methods such as ours can bring to the study of law, legal text, and socio-legal studies.

Finally, the story illustrates the conundrum that sits at the heart of the project, and what the project seeks to achieve. It illustrates the interlocking phenomena that we are seeking to understand. It also gives a flavour of the reach and ambition of the project, or, to put it another way, the extent to which the project sets itself impossible goals. In the conclusion, we offer some tentative reflections on the scale and ambition of our project, and what contribution it seeks to make to existing literatures and to post-Brexit health governance. (Slide station concourse)

1. Our project data and methods: strengths and weaknesses

In order to explore the question of what could be understood as legitimate post-Brexit health law and policy, and how to achieve those legitimate governance structures, processes and the legal and policy texts that would create and flow from them, we need to understand both the legal and policy landscape for health as it results from the UK leaving the EU, and the UK's future relationships with the EU. That involves doctrinal analysis of legal texts, and interpretations of their effects in practice for health and the NHS. To give just one example, if the Withdrawal Agreement is adopted, what will the legal position of EU-27 staff working in the NHS, or EU-27 patients involved in a cross-border clinical trial? This aspect of our project is represented in my own character in the story, and also in the middle-aged NHS manager. I need to work with him, and others like him, who understand how the NHS works in practice, in order to determine how the new legal settlements will apply in practice. This much involves standard socio-legal data: interviews with elites (see the slide with project partners), to find out what it is like for them on the ground, and analysis from us in terms of how general legal texts (like a new Immigration Act, or a Statutory Instrument adjusting the application of the Clinical Trials Regulation, or allowing permission for substitution of a medicine that is in short supply) will apply in those practical contexts.

But we *also* need to understand the world of the young Leave campaigner and of his 'minder'. Those perspectives are not susceptible to the type of data collection that involves formal interviews or even focus groups. To try to reach those perspectives, we are instead using a type of ethnography involving street conversations. This is a kind of 'hit and run' ethnography

(Rhodes 2011), sometimes associated with political science, rather than deep long-term ethnography normally associated with anthropology. Ethnographic street conversations are useful for capturing a diffuse public ‘mood’ in particular locations identified as important for expectations about post-Brexit health governance. In my story, these are the ‘left behind’ places such as the parts of Sheffield and South Yorkshire where the young Leaver and his older minder come from.

The term ‘ethnographic’ means these interviews occur in ‘unstructured’ public spaces, like the station concourse in my story, shopping centres or high streets, and are based on unobtrusive questions about abstract concepts. They aim to capture intuitive conceptions of key ideas, in a context where research participants are more likely to give answers reflecting their intuitive expectations and views in a way that more structured methods like interviews or focus groups do not. So we set ourselves up, as here (slide), in a shopping centre, with our University-branded table, and we invite people into conversations about the NHS, Brexit, legitimacy and accountability. ADD HERE THE TIMES WE ARE PRESENT.

To start the conversation, we show participants a laminated photo of the NHS bus commissioned by Boris Johnson during the referendum campaign and we ask them what they think about the photo. To begin the conversation, we seek to find out whether the person perceives that the bus was true or false, and if false, who should be held to account for the lie? What should the consequences be? We ask what they perceive as the effects of that? What happened as a result? Was it a good thing? The language – and especially the metaphors or narratives people use to describe abstract or complex concepts (such as accountability for post-Brexit governance of health and the NHS) – reveal how they frame, experience and understand the world, its possibilities and impossibilities, likelihoods and improbabilities. These ‘vox pop’ street conversations, following Richardson et al’s (2014) method, enable researchers to get at the ‘snap’ views of the public about abstract concepts, in a way they might think about them on a day-to-day basis, through ‘fast’ thinking (Stoker et al 2016; Kahneman 2011).

From these encounters, and also using whatever information is available in the public domain, we also seek to engage in conversations with community representatives, in a broad sense. This allows us to mitigate to some extent the temporal and spatial limitations of the street conversations: we go to these community representatives at a time and place that works for them, during the fieldwork week. Where feasible, these are people with some insights into health or the NHS, but they need not necessarily be. We reach community representatives in part through snowballing techniques, where local networks lead from one person to another: ‘oh, you’re interested in Brexit and the NHS. You should talk to X, in Y organisation’. But we are also mindful of the need to meet people who are not in the demographics represented predominantly in the street conversations. So, for instance, in Newry which is a predominantly Irish nationalist community, we were mindful of the need to reach Unionist as well as Muslim and Polish communities present there. Everywhere, we are attentive to the need to enter into conversations with Leave and Remain voters, and people from the ‘left’ and ‘right’ of the political spectrum (if that remains a meaningful categorisation in contemporary UK politics). Everywhere we seek, to the extent we are able, to compensation polarisations. The combination of the street conversations and the conversations with community representatives is a

compromise between various possible sampling strategies (slide, here illustrated by Harrison 2018: 47). All have inherent limitations.

Conversations are recorded in fieldnotes, true to standard ethnographic methods (LITERATURES here). There are a range of ways of doing this (Walford 2009), and the project team is feeling its way a little in terms of exactly how we will do it for this project. At present, each of us is carrying a small notebook for any observations at any time during the project that need an immediate jotting or ‘scratch note’ (Sanjek 1990, cited in Harrison 2018: 24). The intensive fieldwork weeks are being written up in a separate notebook specifically dedicated to recording the ethnographic observations. During the conversations no notes are taken, in order to maintain a personal conversation. After each conversation, we record some scratch notes data on anything disclosed by the person in terms of gender, ethnicity and religion, disability and any other relevant information that we can ascertain (slides). In the absence of disclosure, the researcher also notes any perceptions in terms of those categories.

Each ethnographer moves from the immediate scratch notes into handwritten and then word processed fieldnotes, through a process of revisiting the immediate notes and reconstructing them into thematic narratives and drawing out meanings and significance, as well as evoking a sense of place and time. Here we are looking for creating meaningful data: reporting on themes or expressions that occur repeatedly so that a certain saturation suggests a reliability in terms of the way that people in the relevant location at the relevant time ‘see’ or perceive the matters under discussion. At the same time, we are also looking for unusual, striking or surprising elements in the stories people tell in the conversations we record. In writing these fieldnotes, we are paying particular attention to the narratives used by those whom we bring into conversation: any metaphorical language they use and stories that they tell. (Here, the notes on the slide include the language of ‘underplay’ and the metaphor of ‘watering down’ the Good Friday agreement.) The fieldnotes from the conversations provide an insight into social and political interpretations of accountability, and hence of the extent of the socially perceived legitimacy of post-Brexit health governance. The writing of the fieldnotes is thus also a form of analysis (Richardson and St Pierre 2005). So the way that I told the story at the beginning is an example of how notes taken at the time might subsequently be worked into a narrative with significance for the project.

Second, the story illustrates the nature of the data generated from those methods. I have already alluded to a number of the limitations of our method and its data. We are in the street, during the working day. This means that our demographic is likely to be over-inclusive of some groups (retired people, people not in work for various other reasons, such as because of (mental) ill-health, or caring responsibilities for children or adults. Both of those groups mean, for instance, that we are statistically more likely to be in conversation with women.

Also, we are only in the locations that we have chosen to cover. Resourcing for the project means that these are limited to two broad geographical locations: Northern Ireland (slide) and the north of England (slide with referendum voting patterns). These are key sites because of their vulnerable economic positions in the UK. These regions have also either produced strong ‘Leave’ voting patterns (Rochdale and Rotherham), or have very specific constitutional positions within the UK and uniquely close relations with a bordering EU Member State (the Republic of Ireland) that are highly salient in the health policy domain (Northern Ireland). Our two Northern

Ireland sites each involve a well-established cross-border health care route. As the local Newry hospital has been subject to disinvestment over time, people seek hospital care in Dundalk in the Republic of Ireland. CHECK WITH IVANKA ADD a BIT MORE HERE HOW WE DECIDED WHERE TO GO. A focus on two specific geographic areas will ensure a deeper, sharper, richer, more textured analysis than would otherwise be possible with the resource available. The choice of one English region with some competences in health, and a ‘devolved’, will ensure attention to the multi-level elements of the post-Brexit constitutional settlement, as they emerge.

2. Positionality (‘how do we know what we know’), and what it means for our research design and for ‘ethnographic comportment’

Furthermore, using an ethnographic method involves a necessary involvement of the personal identity of the researcher. To put it another way, the researcher is understood as the key ‘instrument of knowing’ (Ortner 1995: 173). This is illustrated by my place in the story. I am not a neutral observer, constructing a ‘real’ account of ‘what happened’. The account of the incident as project data takes the form of a stylised account that is told by me. It is explicit about my positionality: how I know what I know. It distinguishes ‘that which is concrete and/or directly observed – for example, verbatim quotes – and that which is inferred, approximated, or logically assumed’ (Harrison 2018: 25).

One of the challenges for the project team (and limitations but at the same time promise of the project) is to be constantly reflexive and self-aware about the power dynamics that shape our conversations. This is an aspect of research ethics, broadly understood, and is variously described in the literature(s) as ‘ethnographic comportment’ (Harrison, 2018: 29-30; 40-41) ADD HERE from literatures.

Reflexivity is also a way of countering the problem of interpretative bias, where the data collection and analysis aligns too closely with pre-conceived assumptions and expectations or hypotheses. Reflexivity demands a ‘process of a continual internal dialogue and critical self-evaluation of [a] researcher’s positionality as well as active acknowledgement and explicit recognition that this position may affect the research process and outcome’ (Berger 2015: 220). Or, to put it another way ‘the choice of ... approach – like the research projects we elect to pursue – is a matter of personal style. ... These approaches [to which we are naturally drawn] themselves inform the types of [research] questions we think are interesting or worthwhile’ (Cryer et al 2011: 8-9). Adopting this approach to our research design means that we are taking seriously that knowledge is always situational, rather than independent of the person producing it or objective. This – of course – has drawbacks, in particular in terms of the limitations of generalisability of claims we might make, as well as benefits, such as emerge from detailed situational knowledges and understandings.

In addition to our inner reflexivity, as good social scientists, we also have an inbuilt project reflexivity. The project team consists of four people with very different backgrounds, at different career stages, and different disciplinary preoccupations. Antova is an early career disability rights theorist, with experience in ADD HERE ... She has lived in Northern Ireland for X years. Her

family is in Bulgaria. Flear works at the intersection of law and STS. ADD HERE He has X years of scholarly work while based in Northern Ireland. ADD HERE... His family lives in Lincolnshire, England. Hervey is Scottish by education, and has lived in the North of England for 25 years. She has worked on EU health law for three decades and, although disciplinarily open, is predominantly drawn to legal scholarly approaches. Wood is an early career political scientist by training ... ADD HERE His family lives in the south of England. From the beginning of the research, the project team committed to an ongoing dialogue about the research process, data and analysis. This team dialogue adds a layer of external accountability to each of us as researchers, as we are constantly interacting within the team, and making explicitly the assumptions on which we base our knowledge and understanding. Furthermore, we are interacting with other relevant data, particularly from companion contemporary projects. [CITE THESE – especially the work of Jean McHale & Liz Speakman, Katy Hayward, Steve Peers, Charlotte O’Brien, Catherine Barnard, Colin Murray & Ben Warwick & Aiofe xxx etc]

In summary, our method/approach etc requires us – as ‘aspirational goals’ (Harrison 2018: 99) – to detail our methods; represent ourselves as researchers; and to represent the research processes and experiences in the field as honestly and reflexively as feasible.

3. Law, legitimacy, narratives and metaphors

Finally, using a *story* to frame this paper is deliberate. Stories do not describe the truth, in the way that, say, a natural science experiment or equation might be understood to describe the truth about the natural world. But stories *express* truths. There are indeed wolves in the woods, Red Riding Hood, and beware of those who pose as grandmothers. Beauty is only skin deep, and once Beauty understands that, she can see a person for who they truly are (including that a Beast could be a bibliophile). The omnipotent ruler of the universe born as a baby in barn, who has to flee for his safety to a foreign land, teaches us about how early Christians understood (and contemporary Christians still understand) the nature of divinity, and of humanity.

And one way that stories express truths is through the metaphors that they use. Wherever we find metaphorical language, or narratives, those are doing a job of communicating meaning, truths, about how the speaker or writer sees the phenomenon described or discussed. We think that we will be able to understand something(s) about how our ‘elite’ interviewees and those people ‘in the street’ whose conversations with us we record and reflect on, see the post-Brexit world, by interrogating the metaphors that they use and the stories that they tell.

We also think that metaphors and narratives that are used in (rarely) and of (much more often) *legal* language will be revealing. We hope that our project will build on work that is attentive to the metaphorical aspects of law (Boyd White 1973; Gurnham 2016; Hanne & Weisburg 2018). Metaphor is a central concept in our approach, as it both reveals and obfuscates, enables and constrains. Metaphors in legal language become accepted without question, and preclude alternative ways of understanding legal relationships, stultifying and capturing the way a field of law is understood (Philippopoulos-Mihalopoulos 2016; Cowan & Wincott 2016; Cowan et al 2015). Metaphors are replete with information about how people make sense of the world and themselves. They operate as framing devices, expressing what is seen as possible and impossible,

likely and out of the ordinary. They are mirrors onto epistemology and ontology (Goffman 1974; Rein and Schön 1977; Sammut et al 2015; LeBaron 2016).

Much existing work on law and metaphor concerns litigation and judicial reasoning. It often discusses criminal processes (see examples in Hanne & Weisberg 2018; Gurnham 2016). Deploying this approach in the context of civil justice/administrative law and of legislation/Treaty law is relatively unusual, though not entirely untrodden territory (see some contributors to Cowan & Wincott 2016). As the new legislation/Treaties are by and large yet to be adopted, even in April 2019, litigation on the texts we will study is unlikely to reach the higher courts during the project. (We will of course include the *Miller* judgment, with its ‘pipeline’ metaphor.) Some work on the metaphorical nature of law concerns health law broadly speaking (Harrington 2015, drawing on Valverde 2015). There is very little work in this vein on EU law (Cardwell & Hervey 2016; Hervey 2013), and none on the law of Brexit.

What we want to do (see appendix) is to consider the language used in and about the law, by ‘elites’, and the law and policy documentation that they produce, and what that reveals. We are interested both in the effects of the post-Brexit ‘law in practice’ (in classical sociolegal mode), and in the perceptions and understandings of those elites and elite discourses about the effects of post-Brexit health governance. We want to compare that with the language used in our street conversations, and the stories that explain understandings of post-Brexit health governance from those perspectives. Bringing those two narratives or sets of narratives together will, we hope, allow us to present a rich and nuanced analysis of the gap between legal, elite and public understandings of the post-Brexit world, and who is responsible for it, and how they should be held to account. Understanding those gaps is a first step in beginning to close them, and to develop an idea of what legitimate post-Brexit health governance might look like to its various interlocutors. This aspect of our research project is, we believe, methodologically novel in sociolegal studies, as well as in political science.

Conclusion: How can you possibly ...?

This conclusion reflects on the scale and the almost impossibility of the research agenda we have set ourselves. The gaps between ‘elites’ and ‘left behinds’, the many meanings of Brexit, and its hopes, fears, dreams and dreads, the complexities of NHS governance, across the territorial constitution of the UK and its various post-Brexit relationships both within the UK, and beyond into the EU, especially the Republic of Ireland, the speed of legal change and indeed the spectre of ‘alegality’ (Hervey and Speakman 2018) if a No Deal Brexit means that many necessary laws simply are not in place ... we could go on and on. Is it even possible to study an event which has not taken place and I suppose may never take place?

Why, you might ask, are we even embarking on a research project with so many apparent impossibilities? There are many reasons. As one audience member at the SLSA conference at which we first presented this work in progress put it, there are good reasons for at least sometimes undertaking such hubristic projects: ‘we can colour in the lines, but we never get anywhere new if we do that all the time’.

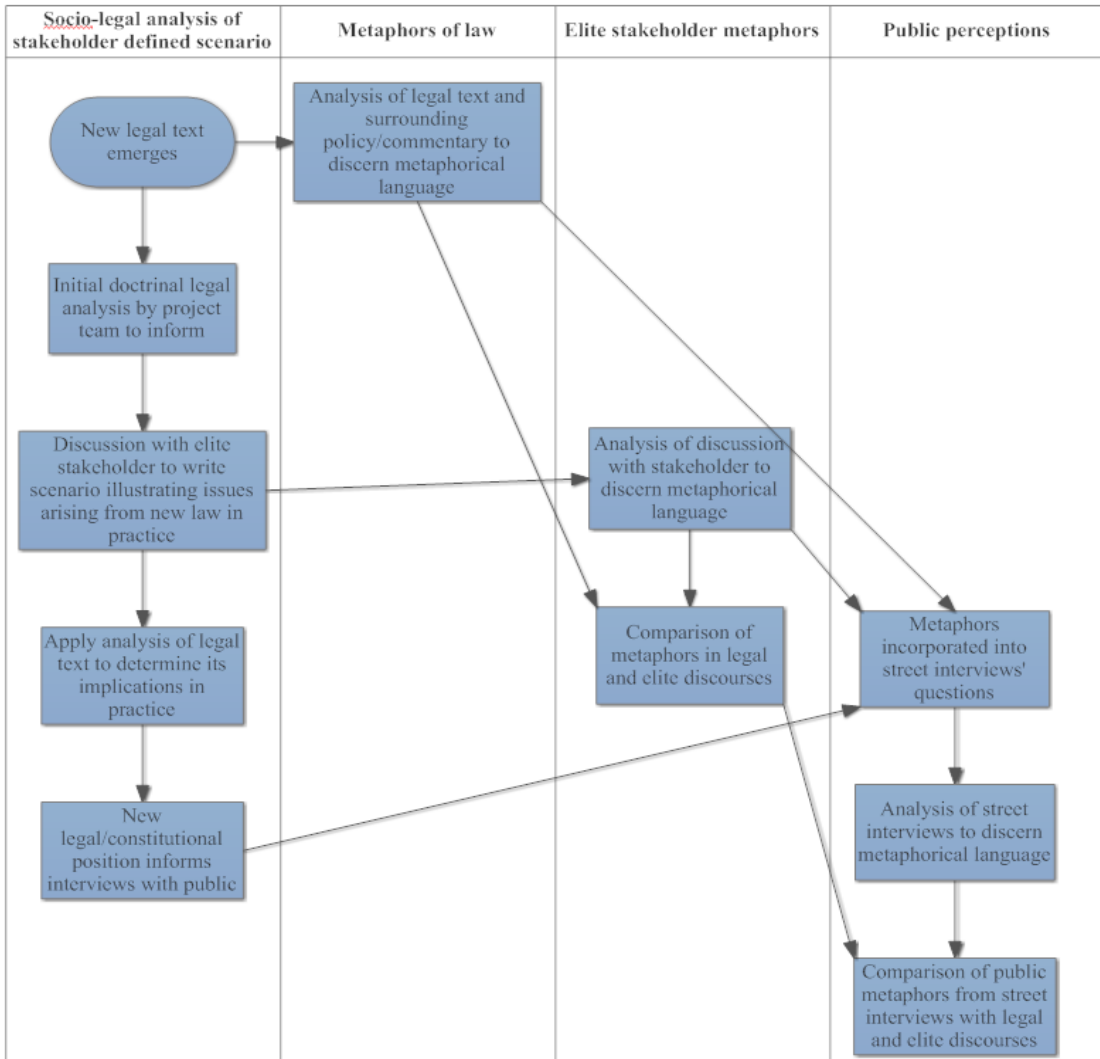
Whatever happens with the UK's membership of or relationships with the EU, the phenomena that fed into the EU referendum vote predate the European Union Referendum Act 2015, and will continue. Everything that we know understand that is embodied in the referendum vote was already there, hidden in plain sight. While formal legal positions are not the only phenomena that are important, the rights and obligations of people, legal persons, public and third sector entities are among what is important in order to understand contemporary social, political, economic and cultural contexts, in the UK and in the wider Europe. Health and the NHS are crucially important to people and are a central element of state-individual relationships in the UK. Any government or governance process that pays scant attention to legitimacy gaps is deficient and likely to face problems. Therefore, any light that we can shed on how contemporary (and possibly/likely post-Brexit) futures for health and the NHS are understood among 'elites' and at 'grassroots' level, and how those understandings differ in terms of their notions of legitimate (post-Brexit) health governance, will play some small part in forging a more hopeful future.

So, here we are, at the start of our project, as Ewick and Silbey (1998: xii) put it, 'collecting stories' and 'having conversations'. To the inquirer who wants to know why this is a *legal* project, or why it should be carried out by legal scholars, we want to say first, 'we are not all legal scholars', second 'why does it matter?', and third, 'what a narrow notion of law is implied in your question'. But we also want to say that this *is* a socio-legal project.

Law can be understood through material relations, institutional dynamics *and* the world of ideas. In particular, a focus on how the law constrains or enables agency; constructs or works through institutions; *and* 'frames', embodies and perpetuates or excludes ideas involves close attention to legal text and the language it uses. This body of scholarship is neutral (or eclectic) in terms of social science metatheory (Cowan & Wincott 2016: 3-4). Our project is inspired by and will contribute to this literature.

Appendix

Summary of methods and their interactions:



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