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The Legal Framework for UK Aid After Brexit

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Abstract

Since 2015, when the UK legislated a target for aid spending, the nature of its spending on official development assistance has changed significantly. Government departments not traditionally associated with spending aid have found themselves in charge of disbursing aid funds as a result of that year's spending review. The vote to exit the European Union has subsequently introduced a number of uncertainties. What considerations will be at play in UK aid spending after Brexit? What will become of official development assistance currently spent through European mechanisms? In what sort of configuration might the Department for International Development and other government departments find themselves? The focus of this paper is on how the vote to leave the European Union might affect the way the UK spends aid. It asks whether the legal framework for this spending is robust enough to withstand the demands that a new post-Brexit political and economic context will make.

1. Introduction

This paper explores the contemporary political and legislative environment for Official Development Assistance (ODA) or development aid. The UK's legal framework for development aid as well as its practices of aid spending have evolved rapidly in recent years. In 2015, the UK legislated a target for aid spending when it enacted the International Development

(Official Development Assistance Target) Act.¹ This was an unprecedented commitment: the UK is the first OECD country to enshrine an obligation to reach an aid target in law. As a result of the new law aid spending has risen significantly: an estimated total of £12 billion was disbursed during 2015 and the aid budget grew to nearly £14 billion in 2017.² A further change in UK aid took place after the 2015 spending review when Departments other than the Department for International Development which has traditionally been responsible for disbursing ODA were allocated aid funds and began to disburse them using a range of new instruments. For example, the Foreign and Commonwealth Office used ODA funds to create a new Conflict, Stability Fund. Similarly, the then Department for Business, Skills and Innovation (now known as the Department for Business, Energy and Industrial Strategy) created the Global Challenges Research Fund, a £1.5 billion fund ‘to support cutting-edge research that addresses the challenges faced by developing countries’³. Available over five years, the fund constitutes a significant investment of Official Development Assistance money in academic research. At the same time, for the first time since the landmark Pergau Dam case discussed below there are signs that challenges to development spending are being brought before the courts by judicial review.⁴

Despite the scale of these changes, the legal framework for UK aid has not received sustained academic attention.⁵ That framework has developed over the years in an ad hoc fashion. It has resulted in a series of interrelated laws. But there is reason to doubt that the legal framework for ODA as a whole is effective. I argue in this paper that recent rapid changes to the way aid is spent may test the current framework. In my view, this element of public spending merits our attention: we should seek to understand its rapid evolution over the past

¹ Ambreena Manji, ‘The International Development (Official Development Assistance Target) Act 2015: Legislative Spending Targets, Poverty Alleviation and Aid Scrutiny’ (2016) 79 *Modern Law Review* 655.

² ‘Foreign Aid: How and Where is the UK’s Budget Spent?’ (*The Week*, 12 May 2017) <<https://www.theweek.co.uk/63394/foreign-aid-how-and-where-is-britain-s-budget-spent>> accessed 24 June 2019.

³ ‘Global Challenges Research Fund (GCRF): How the Fund Works’ <<https://www.gov.uk/government/publications/global-challenges-research-fund/global-challenges-research-fund-gcrf-how-the-fund-works>> accessed 24 June 2019.

⁴ *R(O) v Secretary of State for International Development [2014] EWHC 2371*. For an analysis of the case see John Harrington and Ambreena Manji, ‘Judicial Review and the Future of UK Development Assistance: On the Application of *O v Secretary of State for International Development (2014)*’ (2018) 38 *Legal Studies* 320. For background to the case, Ben Rawlence, ‘The Refugee Who Took on the British Government’ *The Guardian* (12 January 2016) <<https://www.theguardian.com/world/2016/jan/12/ethiopian-refugee-who-took-on-the-british-government>> accessed 24 June 2019.

⁵ But cf McAuslan, ‘The International Development Act, 2002: Benign Imperialism or a Missed Opportunity?’ (2003) 66 *The Modern Law Review* 563; Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (1 edition, Routledge-Cavendish 2011).

few years and to assess the possible outcomes of any volatility to come. My focus in this paper is therefore on how the vote to leave the European Union might affect the UK's ODA. In this domain, as in others, there is great uncertainty. Every day seems to bring new proposals for changes in aid policy and in the architecture of aid disbursement. In this paper, I seek to place recent developments in the broader context of UK aid law and policy.

2. What is ODA?

ODA is governed by rules set out by the OECD's Development Assistance Committee (DAC).⁶ Under these rules, spending counts as ODA if it goes to countries and territories that are listed on the DAC's recipients list or to multilateral organisations such as the World Bank and if it takes the form either of grants or of loans at a more favourable rate than market rates. So, for example, neither military equipment and services nor counter-terrorism activities are reportable as ODA. However, the use of armed forces by a donor in order to deliver humanitarian assistance does qualify as ODA. In addition, the costs of activities interpreted as related to development can be counted as official aid, a good example being election monitoring.

But it is important to stress that the OECD framework is not legally binding upon the UK government. It is adhered to entirely voluntarily. The OECD criteria only determine what is countable as ODA spending when a member is reporting to the DAC committee. The guidelines have been developed by the OECD in order to regularise reporting and to reduce 'the scope for subjective interpretations' of ODA spending.⁷ The OECD itself recognises that what is and is not reportable is not always easy to determine and has stated that what counts as ODA is often dependent on 'intention'. It has advised that '[m]embers must use their judgement as to whether contributions have an ODA character.'⁸

Scholars of development aid have shown that there is considerable flexibility and room for manoeuvre in relation to defining what counts as aid spending.⁹ Aid spending can be inflated by including other amounts in its calculation. The contents of the 'aid envelope' can be altered over time as donors choose what is to be counted as aid. It is possible to stretch the definition of ODA or to take advantage of ambiguities.

⁶ The Organisation for Economic Co-operation and Development, 'What Is ODA?' <<http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/What-is-ODA.pdf>> accessed 24 June 2019.

⁷ *ibid.*

⁸ Development Assistance Committee, 'Is It ODA? Note by the Secretariat' <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/STAT\(2001\)8&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC/STAT(2001)8&docLanguage=En)> accessed 24 June 2019.

⁹ Gordon D Cumming, 'French Aid and UN Norms: From Coincidental Convergence to Pseudo-Conformism' in Thorsten B Olesen, Kristian Paaskesen and Helge Ø Pharo (eds), *Saints and Sinners: Official Development Aid and Its Dynamics in a Historical and Comparative Perspective* (Fagbokforlaget 2013).

There has also been considerable controversy about what should or should not be counted as ODA. For example, some observers have expressed concern that money that should be going towards combating poverty in poor countries around the world has instead been diverted by European Union governments towards meeting costs arising from taking in refugees and strengthening their own border security.¹⁰ Spending on hosting and processing these refugees by OECD DAC member states more than doubled between 2014 and 2015.¹¹ The OECD allows spending on temporary assistance to refugees (food, shelter and training) is reportable for the refugees' first year in the country. And crucially, all costs associated with voluntarily repatriating them to their country of origin also count.¹² This has been controversial, with questions asked about whether it is an inappropriate use of aid budgets.¹³

In addition, the UK has shown itself to be an effective lobbyist for changes in OECD aid rules. In February 2016 the DAC announced changes to “when expenditures for peace and security may be reported as ODA” – for example, allowing “the use of military aircraft for the delivery of medical help in health emergencies such as the recent Ebola crisis.”¹⁴ That too has had its critics. We hear intermittently that if its efforts to change OECD rules fail, UK law would be changed instead. Secretary of State for International Development Penny Mordaunt has not ruled out that the UK might develop its own definition of ODA through legislation.¹⁵

¹⁰ Independent Commission for Aid Impact, 'The UK's Aid Response to Irregular Migration in the Central Mediterranean. A Rapid Review. March 2017' (Independent Commission for Aid Impact 2017) A rapid review <<http://icai.independent.gov.uk/wp-content/uploads/Migration-ICAI-review-EMBARGOED-00.01-10-March-2017.pdf>> accessed 24 June 2019.

¹¹ The Organisation for Economic Co-operation and Development, 'Development Aid Rises Again in 2015, Spending on Refugees Doubles - OECD' (*OECD*, 04 2016) <<http://www.oecd.org/dac/development-aid-rises-again-in-2015-spending-on-refugees-doubles.htm>> accessed 24 June 2019.

¹² Development Co-operation Directorate Development Assistance Committee, 'Clarifications to the Statistical Reporting Directives on In-Donor Refugee Costs' (Organisation for Economic Co-operation and Development 2017) DCD/DAC(2017)35/FINAL <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC\(2017\)35/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC(2017)35/FINAL&docLanguage=En)> accessed 24 June 2019.

¹³ 'NGOs Censure EU Countries for Spending Foreign Aid on Asylum Costs.' <<https://www.theguardian.com/global-development/2016/oct/26/watchdog-censures-eu-countries-spending-foreign-aid-on-asylum-costs-concord-aidwatch-report>> accessed 24 June 2019.

¹⁴ Rowena Mason, 'OECD Redefines Foreign Aid to Include Some Military Spending' *The Guardian* (20 February 2016) <<https://www.theguardian.com/global-development/2016/feb/20/oecd-redefines-foreign-aid-to-include-some-military-spending>> accessed 24 June 2019.

¹⁵ 'UK can now use foreign aid budget to help richer overseas territories hit by natural disasters.' <<https://www.independent.co.uk/news/uk/politics/foreign-aid-budget-caribbean-overseas-territories-british-virgin-islands-anguilla-penny-mordaunt-a8612021.html>> accessed 24 June 2019.

3. *Aid and Brexit*

In this section, I explore what might be implied in the ODA field by Brexit. Before that, however, it is important to set out what was happening in the aid domain in the period immediately before the referendum held on 24th June 2016.

First, in the years immediately preceding the vote to exit the European Union, the UK had been busy developing further its framework for governing aid. In 2015, after a long campaign, the International Development (Official Development Assistance Target) Act 2015 (the ODAT Act) was passed. This piece of legislation is part of what is now a quite detailed framework governing ODA. It needs to be read alongside the International Development Act 2002, which is discussed below, and the 2006 Reporting Act which sets out the obligations to monitor and report on ODA spending.¹⁶

The Target Act commits the United Kingdom to spending 0.7 percent of Gross National Income (GNI) on aid each year. The enactment of the ODAT Act means that the UK now has a legal duty to meet this target every year. Section 5 of the Act requires arrangements to be made by the Secretary of State for International Development for the independent scrutiny of development assistance. The task of scrutiny will fall to the Independent Commission for Aid Impact (ICAI). In addition, parliament (through the International Development Committee) and the National Audit Office (NAO) (responsible for external audit) will continue to review spending.

As well as supplementing its legal framework, the UK was also evolving its aid policy before Brexit. In its Aid Strategy published in 2015 the government announced that the Department for International Development would not be the sole Government Department responsible for disbursing Official Development Assistance (ODA).¹⁷ Instead, aid funds would be spread throughout Whitehall, including to the Foreign and Commonwealth Office (FCO), the Ministry of Defence (MOD) and the Department for Business, Skills and Innovation (BIS).

¹⁶ International Development (Reporting and Transparency) Act 2006

¹⁷ DFID and HM Treasury, 'UK Aid: Tackling Global Challenges in the National Interest' (2015) Cm 9163 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478834/ODA_strategy_final_web_0905.pdf>.

The Aid Strategy envisaged that thirty per cent of ODA would be spent by Other Government Departments (OGDs) by 2020.¹⁸

Although it was presented as a joint Treasury-Department for International Development document, the new Aid Strategy was widely known to have been driven by the Treasury. The Chancellor of the Exchequer George Osborne had, like his predecessor, taken an active interest in Departments beyond the Treasury. He played a leading role in the development of the Aid Strategy. In the 2015 Spending Review and Settlement, a number of new funds were announced. The Global Challenges Research Fund is a good example of ODA being spread more widely across Whitehall – it is disbursed to the UK Research Councils through their sponsoring ministry, the Department for Business Innovation and Skills (BIS) (which became the Department for Business, Energy and Industrial Strategy [BEIS] in July 2016).¹⁹

The volume of UK aid that other government departments distribute varies across years, but the following provides a broad indication: the Department for Business, Energy and Industrial Strategy spent £769 million in 2017, the Foreign and Commonwealth Office spent £560 million and the Home Office £335 million.²⁰ These are significant aid budgets and the overall trend has certainly been towards other government departments spending a higher proportion of ODA relative to DFID. The ratio today is 30:70.²¹

The vote to exit the European Union came at a time when the UK was debating the purpose and scale of its ODA spending. Not all commentary was supportive of this form of spending. It is important to bear in mind that there has been a significant decline in public support for aid spending since the heyday of the Jubilee 2000 Campaign for debt cancellation. There is now a great deal more scepticism about, and outright criticism, of aid. The tone and nature of criticisms of aid are perhaps best captured in the headline of the Sun newspaper

¹⁸ Rory Stewart, 'Overseas Aid: Written Question - 45924' (www.parliament.co.uk, 09 2016) <<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-12/45924/>>; Molly Anders, 'Aid Divisions Emerge as UK Election Looms' (*Devex*, 5 June 2017) <<https://www.devex.com/news/sponsored/aid-divisions-emerge-as-uk-election-looms-90422>> accessed 24 June 2019.

¹⁹ Ambreena Manji and Peter Mandler, 'Parliamentary Scrutiny of Aid Spending: The Case of the Global Challenges Research Fund' [2018] Parliamentary Affairs.

²⁰ Department for International Development, 'Statistics on International Development Provisional UK Aid Spend 2017' (Department for International Development) 9 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697331/Statistics-International-Development-Provisional-UK-aid-spend2017.pdf>.

²¹ *ibid* 10.

Funding Nemo: Taxpayers' aid cash splashed on tropical African fish and in the Daily Mail's *Britain gives 5 million pounds to Ethiopian Spice Girls*.²² The aid programme was a source of particular controversy during the 2015-17 parliament. Sections of the public and the media, along with some politicians, questioned the purpose and value of important elements of that programme. Perhaps less intense at present, debate about aid have continued in the press with vocal opponents of overseas spending continuing to question the scale and efficacy of the UK's aid programme.

The result of the Brexit referendum has significantly altered the landscape for ODA. ODA – which before Brexit had already begun to be disbursed and delivered by quite different means to those traditionally associated with aid – will now further change in nature and use. At the most general level, any party political shifts will also entail shifts in aid policy. And of course, there are fast-changing and unpredictable global dynamics, signalled by discussions of tariffs and trade wars. Similarly, an economic downturn will affect GNI and so the 0.7% target. It is important to note that a significant downward devaluation of the Pound following the decision to leave the EU in the June 2016 referendum caused the UK aid budget to lose some of its real purchasing-power.²³ There is also the question of what happens to UK aid currently channelled through European development mechanisms. The EU has been one of the UK's largest multilateral aid partners. In 2016, 12% of the UK's aid budget was channelled through the European Commission. Some of this went into the development part of the EU budget which funds programmes in North Africa and Asia for example, some through its thematic and humanitarian programmes, and some through the European Development Fund which is the main funding instrument for the European Commission in seventy eight African, Caribbean and Pacific countries.

Those are some unknowns. More concretely, there have been a number of important ideas mooted about the role that aid might play after Brexit. Only a few months after the Brexit vote, it was suggested by Priti Patel that a good use for development aid would be to use it to

²² Oliver Harvey, 'Funding Nemo... UK Taxes Blown on Lonely Fish in Africa' *The Sun* (24 June 2015) <<https://www.thesun.co.uk/archives/news/231809/funding-nemo/>> accessed 24 June 2019; Larissa Brown and Matt Dathan, 'Britain Gives £5 Million to African Version of the Spice Girls' *Mail Online* (18 December 2016) <<http://www.dailymail.co.uk/~article-4046308/index.html>> accessed 24 June 2019; International Development (Official Development Assistance Target) 2014 Philip Davies MP during Second Reading at HC Deb vol 585 col 1234.

²³ Katie Allen, Jill Treanor and Simon Goodley, 'Pound Slumps to 31-Year Low Following Brexit Vote' *The Guardian* (24 June 2016) <<https://www.theguardian.com/business/2016/jun/23/british-pound-given-boost-by-projected-remain-win-in-eu-referendum>> accessed 24 June 2019.

leverage trade deals and to encourage African countries in particular in relation to the UK's position in WTO negotiations.²⁴

It was Priti Patel who generated the idea and language of 'Aid in the national interest'.²⁵ That idea has survived her resignation and been widely taken up. On a visit to South Africa, Kenya and, Theresa May elaborated on the idea that development aid needs to work for the UK:

I am unashamed about the need to ensure that our aid programme works for the UK.... I am committing that our development spending will not only combat extreme poverty, but at the same time tackle global challenges and support our own national interest.²⁶

When she was Secretary of State for International Development, Penny Mordaunt, described "a bold new Brexit-ready proposition to boost trade and investment with developing countries".²⁷ Mordaunt placed great stress on the importance of trade in promoting development, while insisting that this will not involve using ODA to facilitate deals for British companies (known as 'tied aid' about which more below). To achieve this, she envisaged a closer relationship between the development department, the City of London, and the Treasury. For his part Rory Stewart, the most recent Secretary of State for International Development, has described the links between ODA and Brexit in the following terms: 'Obviously, we are going through a difficult stage, our relationship with Europe is difficult, we're going to have to make a new relationship with the world, and having some money to do it, some resources to do it – to put

²⁴ Priti Patel, 'Speech. Priti Patel: Commonwealth Trade Speech' (*GOV.CO.UK*, 10 March 2017) <<https://www.gov.uk/government/speeches/priti-patel-commonwealth-trade-speech>>.

²⁵ Priti Patel, 'Speech at "What the World Needs from Global Britain" Event' (*GOV.UK*, 29 June 2017) <<https://www.gov.uk/government/speeches/priti-patel-speech-at-what-the-world-needs-from-global-britain-event>> accessed 24 June 2019.

²⁶ Joe Watts, 'Theresa May Makes "unashamed" Vow to Use UK Aid to Boost British Private Sector in Africa' *The Independent* (Cape Town, 27 August 2018) <<https://www.independent.co.uk/news/uk/politics/theresa-may-british-uk-aid-africa-private-sector-us-france-2022-a8509791.html>> accessed 24 June 2019.

²⁷ Penny Mordaunt, 'Penny Mordaunt's Five Pledges for the Future of UK Aid - DFID in the News' (15 January 2018) <<https://dfidnews.blog.gov.uk/2018/01/15/britain-will-no-longer-fund-the-good-works-foreign-governments-can-fund-themselves/>> accessed 24 June 2019.

Britain on the world stage again – is hugely important.’²⁸ There has been much debate about Brexit’s implications for the UK’s trade and development policies and the question of whether Brexit is an opportunity to improve on inadequate EU policies in this regard. If the UK is not in a customs union with the EU following Brexit, it will need to decide what tariff regime it wants to put in place for developing countries, subject to WTO rules, and agree any of its own trade deals. A detailed discussion of this lies outside the scope of this paper but it is important to point out that we are hearing articulated quite explicitly the connections that might be made between development aid and the commercial and post-Brexit global ambitions of the UK. Whilst it is of course true that aid has always been spent more or less explicitly in the national interest, it is in my view critical to recognise the tone of urgency that now characterises these statements after Brexit. Quite what the national interest is has of course changed radically as a result of that vote.

²⁸ ‘Rory Stewart defends UK aid target and vows to tackle climate emergency’ *The Guardian* (2nd May 2019) <<https://www.theguardian.com/global-development/2019/may/02/rory-stewart-defends-uk-aid-target-and-vows-to-tackle-climate-emergency-new-development-minister-penny-mordaunt-dfid>> accessed 24 June 2019.

4. *The Legal Framework*

The process of constructing the current legal framework for UK development assistance began, as I have shown, with the enactment of the International Development Act 2002, which repealed the Overseas Development and Co-operation Act 1980. The objective of the International Development Act 2002 was, in the words of the then Secretary of State for International Development, Clare Short, ‘legislatively to entrench poverty reduction as the overriding aim of United Kingdom development assistance and to ensure that money for development assistance is spent for that reason alone.’²⁹ The Overseas Development and Co-operation Act 1980 which at that time governed development aid set out in section 1 that:

The Secretary of State shall have power, for the purposes of promoting the development or maintaining the economy of a country . . . or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature.³⁰

The 2002 Act effectively ‘place[d] development assistance on a new legal basis’.³¹ It set out the grounds on which development assistance could be provided, stipulating in section 1 that:

The Secretary of State may provide any person or body with development assistance if he is satisfied that the provision of the assistance is likely to contribute to a reduction in poverty.³²

The work of constructing a new framework for UK aid can be traced back to 1994 and to the Pergau Dam case. In that case, the High Court ruled that the decision of the then Foreign Secretary to fund the building of the Pergau Dam in Malaysia was unlawful. The Pergau Dam case fundamentally changed UK aid law, not least by leading to the creation of an independent Department for International Development and so removing responsibility for aid from the Foreign Office.³³ The Pergau case remains one of the controversial incidents in the history of

²⁹ HC Debs. 7 Nov 2001, col. 274. In Patrick McAuslan, ‘The International Development Act, 2002: Benign Imperialism or a Missed Opportunity?’ (2003) 66 *The Modern Law Review* 563, 564.

³⁰ Overseas Development and Co-operation Act 1980 s 1.

³¹ McAuslan (n 29) 563.

³² International Development Act 2002 s 1.

³³ Tim Lankester, *The Politics and Economics of Britain’s Foreign Aid: The Pergau Dam Affair* (1 edition, Routledge 2012); Clare Short, *An Honourable Deception?: New Labour, Iraq, and the Misuse of Power* (New Ed edition, Simon & Schuster UK 2005).

British aid. It arose because the British government under Margaret Thatcher committed aid to fund a costly dam in Malaysia in exchange for a major arms deal. An ‘irregular promise’³⁴ was made: in return for aid, a major arms deal would be signed. A legal challenge led to a ruling that the agreement was unlawful. By that time, hundreds of millions of pounds had been spent on the project.

The events that led to the legal challenge began to unfold in 1988 after the Secretary of State for Defence George Younger agreed with the government of Malaysia that Britain would provide aid which amounted to 20% of the value of arms sales from Britain to Malaysia. This aid would come in the form of a dam project. Experts at the Overseas Development Administration, then the body in charge of the aid budget and which, crucially, reported to the Foreign Secretary, were very clear that in their judgement the proposed dam was neither economical nor cost-effective. Nonetheless, in 1991 the Foreign Secretary, Douglas Hurd, authorized the expenditure of £234 million from the aid budget. The aim was to keep alive the prospects of a deal that had been made by the defence secretary and which had received the approval by Prime Minister.³⁵

A judicial review action brought by the World Development Movement found that the project was not of economic benefit to the Malaysia and that because the deal linked aid directly to commercial contracts it was unlawful. In finding the lending decision of the Secretary of State to be ultra vires, Rose LJ accepted the argument of the applicant that although the word is not used in the legislation, aid must be given for sound development purposes because if parliament’s intention had been ‘to confer a power to disburse money for unsound developmental purposes . . . the statute would have said so expressly’.³⁶ According to the judgment, if the money had been spent for sound development purposes, it would have been appropriate for the Foreign Secretary to have other considerations in mind, such as political and economic considerations. The World Development Movement had claimed that the aid was disbursed in order to secure the United Kingdom’s political and commercial relations with Malaysia. However, in the view of the court:

³⁴ Tim Lankester, *The Politics and Economics of Britain’s Foreign Aid: The Pergau Dam Affair* (1 edition, Routledge 2012).

³⁵ Tim Lankester, *The Politics and Economics of Britain’s Foreign Aid: The Pergau Dam Affair* (1 edition, Routledge 2012).

³⁶ *R v Secretary of State for Foreign Affairs ex p The World Development Movement Ltd* [1994] EWHC Admin (EWHC (Admin)) 28.

the project was so economically unsound that there was no economic argument in favour of it. In these circumstances, it was not possible to draw any material distinction between matters of propriety and regularity, and questions of economy and efficiency of public expenditure. Hence the decision was unlawful.³⁷

Rose LJ argued that in the particular circumstances of the case it was not possible to make a distinction between propriety and regularity on one hand, and economy and efficiency on the other, because the project was so economically unsound.³⁸

In his assessment of the International Development Act 2002, McAuslan sought to explore the implications of the new legislation for public expenditure and public law.³⁹ He argued forcefully that the 2002 Act was a direct response to the Pergau Dam case. In his analysis of the 2002 legislation, he argues that it was precisely the ‘the willingness of the court in the Pergau Dam case to extend judicial control to development assistance’⁴⁰ that had led to a scramble to find ways to avoid future judicial review of any decision by a development minister. McAuslan was highly critical of this approach. He argued that

[i]t is not acceptable to propose legislation to Parliament authorising a Minister to incur public expenditure which is deliberately designed to make proper scrutiny of that public expenditure virtually impossible . . . it is not desirable to grant a Minister such large and unstructured discretion that whatever the Minister thereafter does or does not do can be justified as being within the powers granted.⁴¹

The reason why McAuslan thought ‘proper scrutiny of . . . public expenditure virtually impossible’ was because the purpose for which development aid could be given was, as a result of the International Development Act 2002, now so widely drawn as to be meaningless.⁴² What, asked McAuslan, is not encompassed by the objective of poverty alleviation?⁴³ He described the 2002 law as giving:

³⁷ *R v Secretary of State for Foreign Affairs ex p. The World Development Movement Ltd* [1994] EWHC Admin (n 34).

³⁸ *ibid.*

³⁹ McAuslan (n 29).

⁴⁰ *ibid* 597.

⁴¹ *ibid* 585.

⁴² *Ibid.* 585.

⁴³ *ibid* 583.

the Secretary of State very wide and hopefully unchallengeable powers to disburse aid as she thinks fit, so avoiding addressing the problem that she will be likely to be disbursing monies that she and her officials have a pretty shrewd suspicion will often be wasted or misused. She doesn't wish to be tied down by a legal framework which imposes specific duties on her which will have all sorts of internal British legal and accountability implications. Far better to legislate for a more judge-proof version of the present system...⁴⁴

McAuslan concluded that it was 'Pergau Dam relief not poverty relief which is at the root of section 1.'⁴⁵

It is important to note that recent developments may have called into question McAuslan's assessment that the International Development Act 2002 is more 'judge proof' than earlier legislation. Judicial review of ODA spending decisions are still rare, but the recent case of *R(O) v Secretary of State for Development* suggests the courts are willing to contemplate reviewing decisions of the Secretary of State for International Development.⁴⁶ In this 2014 case, an Ethiopian national known only as Mr O had claimed that funding provided by DfID for a Protection of Basic Services (PBS) Programme coordinated by the World Bank had contributed to human rights abuses by the Ethiopian government through a forced villagisation programme that led to evictions, forced removals, and the alienation of the land of farmers in the Gambella and Omo districts. It was claimed that DfID had failed to monitor and evaluate its programme and that it had failed adequately to assess Ethiopia's compliance with its human rights obligations which was a pre-condition for receiving British aid money. In July 2014, permission to apply for judicial review was granted. In March 2015, it was announced that DfID was terminating its aid programme with Ethiopia.⁴⁷ Because the case did not go to full judicial review and because it remains a rare example of the courts showing a willingness to scrutinise UK aid, it is difficult to assess how 'judge-proof' the International Development Act 2002 really is. What can be said with certainty is that judicial review of development aid cannot be relied upon as a mechanism for regular scrutiny.

⁴⁴ *ibid* 585.

⁴⁵ *ibid* 584.

⁴⁶ *R(O) v Secretary of State for International Development [2014] EWHC 2371*.

⁴⁷ Harrington and Manji (n 4).

5. *Raids on the Aid Budget?*

I have suggested that there is good reason to expect that after Brexit, aid and other non-poverty alleviation related considerations will become more entangled. In this section, I substantiate this argument. It is important to note that there is considerable evidence that the substantial aid budget resulting from the 2015 aid target law had already become difficult to manage before Brexit.⁴⁸ Some understanding of how UK aid spending has been working in practice in the past few years may help to cast light on the pitfalls that could await ODA spending.

As I suggest above, in recent years there have been significant shifts in responsibility for disbursing UK aid with a significant widening of disbursing departments. Other UK government departments such as the Foreign and Commonwealth Office, the Home Office and the UK Border Agency are becoming involved in spending ODA. This suggests that beyond the 0.7 percent target itself (that is, the size of the aid envelope), we should also be attentive to shifting responsibilities for the disbursement of aid and the priorities this might signal (that is, what happens within the aid envelope itself).

Innovations in ODA spending have added considerable complexity to the work of aid. But even before the creation of a more complex aid landscape was underway, DfID – a department well used to aid spending – has itself had faced questions about the effectiveness of its spending. In 2015, the National Audit Office expressed concern about that it saw as the rush and lack of strategic focus at DfID when the Department was faced with a sudden increase in its budget in the financial year 2014-2015 (when aid spending reached 0.7% GNI even before the aid Target Law was passed).⁴⁹ In 2017, the National Audit office made this point forcefully in a further report assessing progress in the management of the 0.7% aid target, pointing out that DfID was effectively pushing money out of the door and failing to spend ODA strategically and with sufficient evidence of planning.⁵⁰

It is surely right to expect that newcomers to ODA will face similar, if not greater difficulties. It is in this context that I would argue it is important to revisit analyses of the Pergau Dam affair. In his forensic diagnosis of the Pergau affair based on his study of the two parliamentary inquiries, the court case itself and media coverage, Tim Lankester, the senior

⁴⁸ Ambreena Manji, 'The International Development (Official Development Assistance Target) Act 2015: Legislative Spending Targets, Poverty Alleviation and Aid Scrutiny' (2016) 79 *Modern Law Review* 655.

⁴⁹ *ibid* 667.

⁵⁰ *ibid* 667–8.

civil servant at the Foreign Office at the time of Pergau, details how the events of Pergau came to pass.⁵¹ Rereading accounts of the incident in the present day, with the rapidly changing context for UK aid in mind, is a most instructive exercise. What was the context within which the landmark Pergau Dam case took place?

Pergau arose at a time of fierce and conflicting policy agendas within government. In the years running up to Pergau, there was what Tim Lankester describes as a ‘botched attempt to run [conflicting policy agendas] in parallel.’⁵² In the present day, I would suggest, there is a risk of just such a series of conflicting policy agendas across Whitehall. There is now an explicit ambition to use ODA in the national interest. A large and ring-fenced aid budget is being disbursed by non-traditional departments. Most crucially, they do not feel themselves bound by the provisions of the International Development Act and its aim of poverty reduction (however vague an aim that might be). They have said as much. In response to written questions put to a number of Government Departments by the chair of the International Development Select Committee, Stephen Twigg in 2016, the Foreign and Commonwealth Office and the Department for Business, Energy and Industrial Strategy stated that although they are not bound by the Act, although they said they would ‘be guided by the aims’ of the IDA 2002 (Parliament, 2016). Others, such as the Ministry of Defence, responded that they are not bound by the IDA in handling ODA. They state that expenditure on overseas development assistance is governed by the Supply and Appropriation Acts, the general legislative means by which Government Departments are authorised to spend money. BEIS has stated that it has opted not to use the International Development Act as the basis of its spending. Instead, it has stated that the Science and Technology Act and Higher Education Act form the legal bases its aid expenditure (on the Global Challenges Research Fund for example). BEIS argues however that spending such as the GCRF is in the spirit of the International Development Act 2002 because its aim is to maximise development impact for the poor (ICAI 2017).⁵³

The result is that a number of Departments now disbursing large amounts of ODA and whose spending is counting towards meeting the ‘quantitative’ Target Act 2015, are formally

⁵¹ Lankester (n 33).

⁵² Ibid 114.

⁵³ ‘Written Questions and Answers’ ([www.parliament.uk](http://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/?page%1&max%20&questiontype%AllQuestions&house%commons%2clords&usedates%True&answered-from%2016-02-01&answered-to%2016-04-01&member%4264&keywords%%22InternationalpDevelopmentpAct%22), 21 March 2016) <<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/?page%1&max%20&questiontype%AllQuestions&house%commons%2clords&usedates%True&answered-from%2016-02-01&answered-to%2016-04-01&member%4264&keywords%%22InternationalpDevelopmentpAct%22>> accessed 24 June 2019.

doing so outside the purview of the main legislative provisions governing how aid is to be spent and are not bound by the ‘qualitative’ IDA with its provisions on the aims of aid spending. That so much of the UK’s ODA spending has been effectively cut loose from its moorings in the IDA is a critical change that has not received the attention it deserves. The parliamentary debates on the Target Law are full of references to the millennium development goals, to the UK’s obligations to ‘the world’s poorest, and to the need to keep the promises made to legislate the aid target. The strong implication was that any new legislation enshrining an aid commitment in law would be read in tandem with the IDA which set out the aims of such spending. But in reality, the connection to the IDA has been severed. Newer players in the field of ODA will assist in meeting the aid target commitment but are freed of the UK’s commitment to poverty alleviation as established by the IDA.

Pergau arose in the context of the ‘improper entanglement’⁵⁴ of development and other objectives – defence objectives and aid. There is a danger in the present day that the aid budget could become increasingly closely linked to strategic aims just as in Pergau, development aid was used as a ‘backdoor industrial subsidy’.⁵⁵ Britain has seen a rapid turnover in Secretaries of State for International Development since Brexit - Justine Greening, Priti Patel, Penny Mordaunt and now Rory Stewart- but these individuals has had in common a fondness for presenting aid, diplomacy and military operations as closely related. In his new role, Stewart has been an advocate of ‘stronger coordination between aid and defense operations’ and ‘the complementarity of development, diplomacy and defense operations.’⁵⁶ The polite distance that Britain, smarting from the Pergau scandal, wished to be seen to maintain between its development concerns and other strategic considerations - not least by creating the Department for International Development as a separate ministry - has closed significantly. Put another way, whereas in the immediate aftermath of Pergau, the institutional and legal framework created for ODA was meant to signal strongly a separation of development from other interests, what is today construed as the best way to view, spend and govern the aid budget is determined not by Pergau but by Brexit.

⁵⁴ Lankester (n 33).

⁵⁵ *Ibid* 114.

⁵⁶ Sophie Edwards ‘Rory Stewart: What to expect from DFID's new leader’ (Devex 10 May 2019) <https://www.devex.com/news/rory-stewart-what-to-expect-from-dfid-s-new-leader-94859> accessed 24 June 2019.

In light of the much wider ODA disbursement by Other Government Department that I have described, it is important to remember that Departmental cultures are very different across Whitehall. DfID has worked within the confines of the International Development Act and with an awareness of the Pergau case for nearly twenty years. The FCO and BEIS have not. Even where Departments have taken in specialist DfID staff on secondment to assist with their involvement in ODA, as the FCO has done, the priorities of these Departments – promoting Britain’s place in the world or leading the Government’s relationship with business– are very different. They are not always compatible with the aims of poverty alleviation, as the 2016 Malawi oil and gas case revealed. In that instance, a Freedom of Information request by Friends of the Earth showed that the FCO had used ODA funds to support a project on a UNESCO site in Malawi with the aim of securing Britain as the preferred partner for that country’s oil and gas sector. The amounts involved were not substantial - £30,000 was used out of the Cross-Government Prosperity Fund. This Fund was announced as part of the 2015 Strategic Defence and Security Review and in furtherance of the 2015 UK Aid Strategy. Its aim is to ‘promote growth and prosperity in developing countries’ and to do so by help build markets for British firms overseas. Its budget of £1.3 billion over five years was to be spent in countries like India, China and Brazil.⁵⁷ But the Independent Commission for Aid Impact which monitors aid spending, has criticised the Fund’s lack transparency and raised concerns about whether it represents value for money and questions whether it lacks effectiveness because of its rapid creation as an ODA disbursing fund.⁵⁸ The risks have been explicitly recognised by the International Development Committee. In its 2018 report it warned that

‘...programmes administered with dual objectives (notably the cross-government funds) risk delivering on neither their primary poverty reduction purpose, nor their secondary national interest objective. ODA must be directed primarily at reducing poverty, helping the very poorest and most vulnerable rather than being used as a slush fund to pay for developing the UK’s diplomatic, trade or national security interests.’⁵⁹

⁵⁷ Independent Commission for Aid Impact, ‘Rapid Review of the Prosperity Fund’ (Independent Commission for Aid Impact 2017) A Rapid Review <<https://icai.independent.gov.uk/wp-content/uploads/Rapid-Review-of-the-Prosperity-Fund.pdf>> accessed 24 June 2019.

⁵⁸ *ibid* 23.

⁵⁹ International Development Committee, ‘Definition and Administration of ODA’ (House of Commons) HC 547 para 112.

Indeed, both the Conflict Stability and Security Fund and Prosperity Fund have been criticised in this regard for using confidentiality as an excuse for a lack of transparency.⁶⁰

In response to the problems raised by spreading ODA monies across Whitehall, the International Development Committee did make an attempt to rein in oversight of aid in early 2018. It did this by recommending that DfID be given oversight of all ODA spending regardless of which Department was doing the spending.⁶¹ In September 2018, the Government published its response. It strongly rejected this recommendation as well as an additional recommendation that the Independent Commission for Aid Impact should play a role in reviewing ODA spending across Whitehall.⁶² In addition, whereas all Departments have also stated that they will comply with the Organisation for Economic Cooperation and Development guidelines on aid spending, that reassurance only really goes to the question of what spending is countable as aid (and, as we have seen, there is no sanction for non-compliance). It can provide little reassurance that considerable amounts of ODA will be properly spent. We are witnessing an increasingly complex ODA landscape in which the governance of ODA appears to be diverging. DfID is bound in its spending by the albeit weak provisions of the IDA 2002, but the duties and responsibilities of new, non-traditional aid actors is dependent on their broad attitude to the IDA 2002.

Lankester's account argues persuasively that Pergau arose at a time when Parliament was unable to provide any serious challenge. He is at pains to point out that this does not mean there was not 'serious and searching scrutiny' of the Pergau issues.⁶³ There was indeed robust scrutiny, but as Lankester shows, this took place three years after the decision. By that time, both 'project implementation and aid disbursement were well underway and effectively unstoppable.'⁶⁴ What was missing was parliamentary scrutiny at the time the decision was made. This remains a problem in the present day. Scrutiny of ODA decisions still take place ex post. And of course, Parliament is pre-occupied and will be for some time with Brexit itself. In this regard, it is important to remember that the period preceding the Pergau Dam case was marked by political and other tensions around aid policy and by disagreements about the

⁶⁰ Independent Commission for Aid Impact (n 59).

⁶¹ International Development Committee (n 61) para 15.

⁶² <<https://publications.parliament.uk/pa/cm201719/cmselect/cmintdev/1556/155602.htm>> accessed 24 June 2019.

⁶³ Lankester (n 33), 114.

⁶⁴ *Ibid.*

purpose of aid. Then, as now, there were many who were either indifferent or openly hostile to aid.

There are a number of objections that might be raised to the argument I have made. First, it might be objected that the key to Pergau was that the government departed from declared policy and that the difference in the present day is that all parties are more or less explicit about their political aims of promoting the national interest. That might be said to be a bar to a Pergau like reoccurrence: there is no attempt to obfuscate about what is being attempted, rather urgently, in the present day. It might also be said that in the past DfID was not a department able to stand up to other departments in Whitehall. It did not at the time of Pergau have its own Cabinet Secretary. Its creation was thought to provide some guarantee that the aid budget would no longer be used to further other commercial and foreign policy objectives as had happened with Pergau. Dfid is now a much more substantial and more experienced department, with a much stronger identity in Whitehall. And of course, Parliament will remain an important site to raise questions of accountability for ODA expenditure by the Government, for example through oral questions. But the fact remains that there has been something of a weakening of Dfid since the 2015 spending review and allocation when it ceased to be the sole disburser of ODA. As the ODA disbursement terrain shifts in Whitehall, and the FCO and others rise as aid spenders, Dfid will arguably become less able to withstand pressure. Could we not then envisage a scenario unfolding in which the government attempts to use the aid budget for purposes other than poverty alleviation, for example to sweeten a potential trade deal, the ODA funded project is manifestly unfeasible and uneconomic but the FCO or other department nonetheless applies pressure? In my view, the legal framework to prevent such a scenario would be found to be remarkably thin despite the appearance of a detailed legislative framework for UK aid.

It could also be argued that there are now improved accountability mechanisms in parliament since Pergau. Nowadays, if a Permanent Secretary objected to a proposal to make some expenditure, this is immediately notified to the public accounts committee whereas in Pergau, this was simply noted in the file and later discovered by the NAO. And, as Lankester himself argues, ministerial directions are requested more often now than before Pergau.⁶⁵ The case changed the way ministerial directions are recorded: ‘One of the consequences of the controversy was that it was decided that, in future, instructions should be made public and the

⁶⁵ Ibid 114.

Comptroller and Auditor General told.⁶⁶ Previously, directions requested on propriety grounds would have been passed to the legality auditor, with the National Audit Office chief only notified if a Ministerial Direction was an economic issue. Now the NAO was to be informed of all cases.⁶⁷ And it is arguable that there are now also stronger scrutiny criteria since Pergau because of the introduction of the ‘value for money’ criterion in place of a more nebulous requirement for public spending to be ‘prudent and economical’. This casts the NAO in an important role but I would argue that it is still one that is concerned with value for money rather than the lawfulness or otherwise of a decision.

To summarise, there is a two-pronged problem with ODA. One problem is that in relation to DfID spending an imprecise and vague IDA cannot defend against improper use of ODA. At the time of Pergau ‘It was well understood that aid could and should serve other goals beside development, such as fostering trade and protecting and promoting political relations with recipient countries; but development and improving welfare had to be the main purpose.’⁶⁸ Today, the International Development Act requires that poverty reduction be the main aim of aid. Nonetheless, there is certainly scope for other, secondary goals to be served, including trade and political relations with other countries, without contravening the Act, so long as some tenuous link to poverty reduction can be evidenced. And outside of DfID, we have seen that other government departments are explicitly projecting themselves as departments not bound by even this weak legislative framework. What modifications – if any – could be made to these existing legal accountability mechanisms to address these post-Brexit challenges? The response must be that what is needed in the short term is a reassertion of the International Development Act 2002 as the governing legislation for all ODA spending. In spite of its manifest weaknesses, as McAuslan pointed out, it is clear that unless a more robust attempt is made firmly to re-root ODA - regardless of which government department is spending it - in the International Development Act, the risks I have suggested lie ahead will not be avoided. In the medium term, if ODA is to be insulated from political interference, an overhaul of the entire framework for international development assistance will be necessary. The legal framework governing aid has been allowed to develop in an ad hoc and incoherent fashion. It has struggled to keep up with the realities of aid spending. The experience of Pergau explored above strongly suggests that without adequate legal constraints on the purposes for which ODA may be spent, there are significant risks that it will be viewed as a budget to be raided, a temptation

⁶⁶ Ibid. 114.

⁶⁷ Ibid. 115.

⁶⁸ Ibid 115.

significantly heightened by Brexit and the reconfiguration of Britain's relations with the world that that decision will entail.

6. Conclusion

Myles Wickstead has described the UK's situation as being that of 'an aid super-power at a cross-roads'⁶⁹ and I agree with this analysis. Part of the reason is institutional. Key proponents of Brexit – Priti Patel in her time, and Boris Johnson still – are enthusiastic about bringing the Foreign Office and DfID closer together. Indeed, Johnson has referred to the creation of an independent Dfid as a 'colossal mistake'.⁷⁰ As international development secretary Penny Mordaunt is from the same camp: she has recently showed open hostility towards the department she leads and calling into question the continuance of the 0.7 aid target.⁷¹ Early indications are that whilst Rory Stewart is an advocate of the 0.7% target, he is also aware of the post-Brexit uses to which it might be turned to 'put Britain on the world stage again'.⁷² Whereas a great deal of attention has been paid to the right-wing assault on the 0.7 per cent target, and on DfID itself, in my view this is to misunderstand the risks that lie ahead. Clare Short reminds us after all that there is little new in challenges to DfID - right from the start the Conservatives opposed the creation of a separate government department to oversee international development policy.⁷³

But in my view, it is not just the aid envelope or even the aid ministry itself that will come under assault but concretely the purposes to which ODA will be put that poses the greatest risk. The UK has since 2002 had what amounts to a legislative framework which is characterised by wide discretion and broad duties. A new target for development spending has now been set. And now Cross-Whitehall aid disbursement has significantly blurred questions of legal responsibility for ODA spending. This is now overlaid with political pressures to promote 'global Britain'. Is the legal framework for aid sufficiently robust to protect public money at a time when it might constitute a slush fund for making friends and influencing new

⁶⁹ M Wickstead An aid superpower at a crossroad (forthcoming paper, paper on file with the author).

⁷⁰ <https://www.theguardian.com/global-development/2017/oct/24/no-foreign-office-takeover-of-international-aid-budget-says-priti-patel>

⁷¹ <https://www.independent.co.uk/voices/penny-mordaunt-foreign-aid-budget-seven-per-cent-brexit-a8754911.html>

⁷² 'Rory Stewart defends UK aid target and vows to tackle climate emergency' *The Guardian* (2nd May 2019) <<https://www.theguardian.com/global-development/2019/may/02/rory-stewart-defends-uk-aid-target-and-vows-to-tackle-climate-emergency-new-development-minister-penny-mordaunt-dfid>> accessed 24 June 2019.

⁷³ Short (n 33).

partners? It remains an open question what this country's international role, standing and intentions will be after Brexit. But there can be little doubt that its aid policies will be affected. And in my view, there is reason to doubt whether the current legal framework can withstand the challenges that lie ahead.

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