

Fracking and the Legal and the Extra-Legal in Planning Procedures¹

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Recently travelling back from London to Sussex during commuting hours, my journey led me to a poignant coincidence of both political and subjective concern. The busy franticness of Victoria almost in retreat as we neared Haywards Heath, I sat contemplating a late evening walk once I returned home. The driver then started to make an announcement, slowly and apologetically, with a hint of sadness. Someone had thrown themselves on to the line at Balcombe and the trains were to be stopped at Three Bridges with the resultant herding of weary work folk on to buses and diverted trains to ensue. My now immaterial sunset walk was most certainly out of the picture. My mind was turning to the poor person who had decided that was the moment to go, that was the way to depart their world, and in such a spectacularly heart-breaking way. I was also immediately trying to place whether there was any link between the person falling to their deliberate death and the ongoing fight against Cuadrilla and the anti-fracking protests in Balcombe.

Why such a link between such a sombre incident and the protests in Balcombe which were supposed to have finished over a year ago? Probably because the rent-a-mob protests may have ended to our knowledge last summer, but the fight to keep Cuadrilla out of Balcombe has by no means ceased—in fact it has become even more protracted and worrisome, serving as yet another example of the growing democratic deficit in our apparently open and accountable planning process, where voices of local communities consistently come second to the commercial interests of the non-renewable energy sector. I suppose the reason why I related the death was obvious—the sadness emanating from the plight of Balcombe as representative of the grief of injustice, and the strength of commitment of those involved in the anti-fracking fight so fierce and all-encompassing in the face of a relentless politico-economic impunity, it could quite easily lead people to a life-threatening cross-roads of conviction of the same nature as that experienced by the lost soul on the railway line at Balcombe. Not least the fear that members of the community have for their wellbeing if Cuadrilla are allowed to drill with the unremitting absolutism that they seem to have. These are two intertwined life and death situations, I thought to myself as I eventually (and gratefully) arrived home two hours later.

It is not difficult to see how matters of human vitality relate to the anti-fracking cause. Whilst being aware of the necessity to dispel myths, there is evidence that fracking (“hydraulic fracturing” as its full term) of shale gas, a fossil fuel whose environmentally unfriendly exploration, drilling and fracturing (emissions, water discharges, spillages) coupled with its non-renewable status depleting much-needed finite resources, automatically makes it a prime perpetrator of climate change. According to the Department of Energy and Climate Change (“DECC”):

¹ This piece has not been written in connection with any of the members of the Balcombe community, or the Frack Free Balcombe Residents Association (“FFBRA”), and therefore is to be taken as the thoughts and words of the author alone. This may not reflect recent developments in Balcombe at the time of publishing.

“Unconventional oil and gas exploration and production activities have been assessed as having a significant negative effect on climate change ... at the sectoral level (i.e. as compared to the effects from the existing oil and gas sector).”²

If climate change is not a risk to generations of hearts and minds, considering the recent Intergovernmental Panel on Climate Change warnings in its latest report that health, homes, food and safety are likely to be threatened by rising temperatures, that “people, societies, and ecosystems are vulnerable around the world”,³ then I am not sure what is. The half-stories of fracking are simultaneously difficult to comprehend and process at an individual level when there are huge political and commercial narratives that dominate in their drive to find viable new markets for the energy industry. According to the British Geological Survey, shale gas aside, the “politics of shale oil will make rows over shale gas pale into insignificance”.⁴

Fracking has become a divisive by-word for not just environmental degradation, but protest, resistance, community action, and perhaps even Balcombe itself. Considering the strength of temerity and sentiment held by members of the community who are opposed to Cuadrilla’s presence in their village, the opaqueness of “fighting for one’s rights” becomes a reality. We are so far removed from risking one’s life for a cause in today’s society, at least in this country, that it can be hard to see the link between a matter of life and death—and protest. The distance between ourselves and having to physically use our bodies to resist undemocratic decisions, results from centuries of *due process*, the manifestation of *justice* and *fairness* through the *substance*, and the *procedures* of law. Without our body of constitutional and administrative law, that which governs the unsaid contract between the individual and the state, there would be no habeas corpus (the body before the law), innocence before proven guilty, right to a fair trial; the Government would not be accountable to its people for the actions it takes in their name or as it is otherwise known, “judicial review”; and ultimately, and most applicable for Balcombe, there would be no legitimate planning process, balancing the interests of communities and developers. This distance between the people and the state is the *justice system*, originating in our name through a democratic franchise that allows us to vote in place of our authorities, and those that pass our laws. The constitutional make-up is reliant on and composite of, a semblant “we the people” that only in circumstances such as Balcombe and other protest causes do we see emerge, reminding us that resistance is a force for change, alteration, reform, and, indeed, the constitution and law itself. Judicial review is seen as one of the last effective and most symbolic legal mechanisms (within the legal process) of subjects holding a public body to account for the decisions it has made, as opposed to the prior or after *extra-legal* (outside of the legal process) permutations of non-institutional objection in the form of protest camps, for example.

So where is the legal and the extra-legal within the story of Balcombe? Like many other accounts of environmental protest groups coming up against the inflated commercial interests of the ever avaricious energy sector, the role of law has been divisive. It seems as though in the Balcombe anti-fracking protest cases, the courts were sympathetic to the rights of freedom of expression and assembly over the tough tactics employed by the police, whereby more than 70 per cent of the charges that went to trial have now resulted in acquittals or were dropped during the court case.⁵ Interestingly, Sussex Police had charged 30 people with s.241 of the Trade Union and Labour Relations Act 1992, as well as using s.14 of the Public

² Department of Energy and Climate Change (2013), *Strategic Environmental Assessment for Further Onshore Oil and Gas Licensing*, Environmental Report, AMEC Environment and Infrastructure UK Ltd, document 33917rr007i3, 91–92.

³ See IPCC, “Summary for Policymakers” in T. F. Stocker, D. Qin, G.-K. Plattner, M. Tignor, S. K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P. M. Midgley (eds), *Climate Change 2013: The Physical Science Basis*, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge, UK and New York, US: Cambridge University Press, 2013).

⁴ “Fracking Timeline”, Investigating Balcombe and Cuadrilla at <http://investigatingbalcombeandcuadrilla.com/2014/04/01/fracking-timeline-march-2014/> [Accessed August 14, 2014].

⁵ “70%+ of Balcombe anti-fracking charges acquitted at trial—latest update”, Investigating Balcombe and Cuadrilla at <http://investigatingbalcombeandcuadrilla.com/2014/04/25/70-of-balcombe-anti-fracking-charges-acquitted-at-trial-latest-update/> [Accessed August 14, 2014].

Order Act 1986 (“PACE”), an innovative use of trade union and picketing law on the behalf of the authorities.⁶ The law is ambiguous as ever, used by protestors, residents, corporations, judges, police and lawyers alike, all with alternating intentions. Its pivotal role is evident in relation to the importance and non-recognition of environmental legal frameworks in the planning process of fracking cases, alongside the use of judicial review, in the most recent planning application made by Cuadrilla.

On April 29, 2014, Cuadrilla were granted planning permission by West Sussex CC (“WSCC”) to continue shale gas exploration in Balcombe. The majority of the village were opposed to any further drilling and Frack Free Balcombe Residents Association (“FFBRA”) are seeking judicial review on grounds of procedural impropriety by the WSCC, represented on a conditional fee arrangement by Leigh Day solicitors. FFBRA have since been granted permission to challenge the legality of Cuadrilla's planning application under judicial review proceedings to take place before the end of 2014. In terms of the National Planning Policy Framework (“NPPF”), the committee erred on the side of development in contrast to sustainability, claiming the NPPF “gives ‘great weight’ to the benefits of mineral extraction, including to the economy and notes that minerals can only be worked where they are found”.⁷

The village has been subject to a prolonged period of Cuadrilla’s presence since 2010 after they were granted permission until 2013 to drill, flow-test and monitor a new borehole “Balcombe-2”. Prior to the 2010 planning application, “Conoco” drilled an exploratory borehole in the 1980s, known as “Balcombe-1”.⁸ Cuadrilla submitted an application on September 27, 2013, prior to the planning permission expiring on September 28, 2013, to continue their work which was at that point refused.⁹ This was followed by an application received by WSCC on December 5, 2013 requesting permission:

“for exploration and appraisal comprising the flow testing and monitoring of the existing hydrocarbon lateral borehole along with site security fencing, the provision of an enclosed testing flare and site restoration.”¹⁰

The planning application received 900 objections with a petition in opposition of 5,000 signatures. FFBRA, amongst a list of very detailed analysis and points of objection, made it clear Cuadrilla had no “social licence” to be in Balcombe as a result of a poll with a majority of the community voting against any further presence of the company in their village. There had been no Environmental Impact Assessment (“EIA”) which is expected of a commercial planning development, and yet fracking developments fall outside of this remit due to their temporary nature and size. This meant, in the past, that Cuadrilla had been, by and large, monitoring itself over the summer of 2013, leaving Balcombe at considerable risk of environmental harm without their activities being effectively monitored and overseen.

Digging deep back to the origin of the rounds of applications that Cuadrilla had made since 2010, there are some even more disturbing causes for concern in terms of conflicts of interest that, unfortunately due to judicial review application constraints, can now no longer be considered reviewable as more than six weeks has elapsed since the original planning applications. Nevertheless it is worth observing the multi-faceted nature of the chains of interest and influence that are part of this story of Balcombe, and perhaps the wider debates on the political influence of the energy industry. The landowner who has leased the drilling field to Cuadrilla for 30 years, also sits on Balcombe Parish Council and is the employer and landlord of many of the villagers.¹¹ According to the FFBRA Objection to the most recent Cuadrilla application:

⁶ “70%+ of Balcombe anti-fracking charges acquitted at trial—latest update” Investigating Balcombe and Cuadrilla.

⁷ WSCC *Planning Committee Recommendation*, April 29, 2014, 2.

⁸ *FFBRA Objection* March 2014, 3.

⁹ *FFBRA Objection* March 2014, 3.

¹⁰ WSCC/005/14/BA at <http://buildings.westsussex.gov.uk/ePlanningOPS/loadFullDetails.do?apId=1634> [Accessed August 14, 2014].

¹¹ *FFBRA Objection* March 2014, 10.

“Our Parish Council never considered the first planning application sent by WSCC. The document was not circulated to members, the application was not put on the agenda, and was mentioned in the minutes of the meeting only briefly under the application number for someone’s porch. The Councillor ... did not declare an interest. The parish clerk emailed ‘no objection’ to the Planning Department only after he was prompted by the planners.”¹²

The Parish Council as a public body under Local Government Act 1894 c.73 s.5–10, is technically judicially reviewable and, had an application been made for review in the correct time frame, there could well have been arguments of procedural impropriety on the part of the Parish Council and its Councillors for not adhering to the necessary consultative and democratic procedures, as well as non-disclosure of what amounts to a very clear pecuniary conflict of interest on the part of the Councillor. Not surprisingly, “a great mistrust has arisen as a result”, in the words of FFBRA.¹³ Remarkably, according to a recent piece in the *Independent*, WSCC also has indirect holdings in Cuadrilla, as well as substantial investments in Centrica which took a 25 per cent stake in a shale-gas project in Lancashire run by Cuadrilla.¹⁴ The WSCC Planning Committee who considered the most recent application for shale gas exploration was in majority Conservative who are notoriously pro-fracking in their policies. The planning meeting with Cuadrilla was limited to 100 people and by ticket only which puts planning obligations regarding sufficient access to information under the Aarhus Convention under question. According to FFBRA, Cuadrilla used “misleading and inaccurate information” by the Confederation of British Industry (“CBI”) to portray good relations between the company and the local villagers and have recently been discovered to be operating under another name, “Bolney Resources Ltd”, which admitted planning to undertake hydraulic fracturing in the Balcombe area, a claim Cuadrilla have repeatedly denied.¹⁵

The legal juxtapositions become even more complex as new fracking laws recently unveiled with the Queen’s Speech raise issues of trespass in relation to accessing private land for underground shale gas exploration. According to the Law of Property Act 1925 s.205(1)(ix), the legal definition of “land” incorporates:

“Land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments.”¹⁶

This follows the Roman legal maxim “cuius est solum eius est usque ad coelum et ad inferos”, meaning “he who owns the land owns everything up to the heavens and down to the depths”. Despite the Crown’s claim on certain minerals and resources, the courts generally support the freeholder’s right to control that which is directly above or beneath their land. In the Town and Country Planning (Development Management Procedure and s.62A Applications) (England) (Amendment No.2) Order 2013,¹⁷ secondary legislation under review in December 2013, applications for development, including applications to extract oil or natural gas from underground were of concern. The Order provides that, “in relation to development of land which is underground only, the applicant is no longer required to notify each owner and tenant individually”.¹⁸ There are also proposed changes to primary legislation that are to be part of the new Growth and Infrastructure Bill, whereby developers can “fast-track” major projects instead of going to the local

¹² *FFBRA Objection* March 2014, 10.

¹³ *FFBRA Objection* March 2014, 10.

¹⁴ “Exclusive: Local authorities have ‘conflict of interest’ on fracking investments”, *Independent* at <http://www.independent.co.uk/news/uk/politics/exclusive-local-authorities-have-conflict-of-interest-on-fracking-investments-9294590.html> [Accessed August 14, 2014].

¹⁵ “Who are Cuadrilla?” *Frack -Off* at <http://frack-off.org.UK/Who-are-cuadrilla-company-overview/> [Accessed August 14, 2014].

¹⁶ Law of Property Act s.205(1)(ix).

¹⁷ Town and Country Planning (Development Management Procedure and s.62A Applications) (England) (Amendment No.2) Order 2013 (SI 2013/3194).

¹⁸ *Lords Secondary Legislation Scrutiny Committee, 28th Report*, Session 2013–2014, 3.

authority, including “large onshore gas extraction”.¹⁹ As in the case of the Balcombe estate, there are many other still feudal-esque towns and villages (the Grosvenor Estate in Chester for example), where the majority of the land is owned by the local large landowner. This makes arguments relating to trespass more complex in terms of those freeholders residing on estate land. In contrast, the case of wind turbines, where more planning applications for wind farms are being turned down as opposed to those of non-renewables, “companies wanting to erect a single turbine of more than 15m tall must conduct a pre-consultation with local communities before submitting the planning application”.²⁰

So it seems as though the legal and the extra-legal are working both ways with the political interests of the commercial sector winning in spite of the legitimate procedures in place to serve as checks on unaccountability and misuse of public authority. What the residents of Balcombe appear to have been grappling with is the importance of both legal and extra-legal, in the sense that they need both preventative institutions, such as the FFBRA, in place to proceed down the judicial review route using a formal legally recognised identity, whilst simultaneously recognising the usefulness of reactive protest. It is relief indeed to hear that the High Court have decided to take this into account and allow review proceedings to begin. This is similar to the “Community Bill of Rights” approach emanating from the United States, and other examples of “Community Charters” that have been used in the United Kingdom, whereby the values and assets of local communities are expressed in a quasi-legal document that over time may be recognised as sacrosanct against unwanted developments. The place and space dissent of the anti-fracking protests last year seemed to have highlighted the courts’ unwillingness to reprimand peaceful assembly whilst at the same time demonstrating somewhat draconian police tactics and interesting uses of picketing law to uphold this. The recourse to using judicial review, as the formal bedrock of “social licencing”, one might say, highlights the role of legal pressure is still tantamount to both the residents and the commercial interests of Cuadrilla concerned. This author hopes that the judicial review will be viewed favourably by the Administrative Court and the decision to grant Cuadrilla further permission to remain in Balcombe be quashed, not just for the concerns of the local residents, as they have stated themselves, but for other communities such as Barton Moss in Manchester, Farndon in Cheshire, and Boras in Wrexham (to name but a few), as well. The fundamental role of EIAs and, hopefully, a change in their remit would be an additional legal solution to future fracking applications, as well as further developments in case law through the protection of art.8 (Right to Private and Family Life) of the European Convention on Human Rights (“ECHR”) and enshrined in our law through the Human Rights Act 1998, of communities affected, in balance of course with the private property protection of ECHR art.1 Protocol 1 on behalf of the landowner concerned, the landowner leasing the land to the commercial energy enterprise, and the company property itself.

Most important here has been the role of procedural justice (the Right to a Fair trial, ECHR art.6), and in this instance, the apparent procedural injustices that have come to light in the course of Balcombe’s plight against the energy giants. The resilience and intelligence of the community are not least expressed through the fantastically intricate documents and evidence produced in defence of their situation, members of the community clearly dedicating days and nights to the cause and, as a result, their health and energy too. It is to the in-depth analysis and reportage of the “Investigating Balcombe and Cuadrilla” website to which I owe the majority of the information I have found, not just on the Balcombe cause, but on fracking around the globe. The manipulation of law, whether legal or extra-legal, is clear in each of the stakeholders concerned, but let us hope that administrative distance between life and death that we call justice, whether procedural, moral, natural or otherwise, will protect the people of Balcombe from future distress, and cease any further mortals plunging to unnecessary metaphorical railway lines.

¹⁹ Growth and Infrastructure Bill cl.23.

²⁰ “Fracking Timeline” Investigating Balcombe at <http://investigatingbalcombeandcuadrilla.com/2014/04/01/fracking-timeline-march-2014/> [Accessed August 14, 2014].