ClientEarth

Summary of threats to the rule of law in the UK

Version 2.1 (18 October 2022)

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Version Notes

- Version 1.1 – 22 July 2022. Original.
- Version 2.1 – 18 October 2022. Amendments to the sections on:
    - The Retained EU Law (Revocation and Reform) Bill (previously referred to as the ‘Brexit Freedoms Bill’);
    - The Bill of Rights.

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Table of Contents:

ClientEarth

Introduction

The rule of law is "*a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards*."

'The rule of law and transitional justice in conflict and post-conflict societies', UN Secretary-General Kofi Annan, August 2004[1]

The rule of law forms part of the foundations on which the UK's long-standing democracy is built – yet, its existence is not guaranteed, nor is its form static. The rule of law is routinely subject to threats that may undermine it and forces that move its boundaries.

This document summarises the main existing and emerging threats to the rule of law in the UK, with a view to assisting the NGO community and the wider public in recognising such threats and their potential impacts. The rest of this document categorises the identified threats as set out below.

- Recently passed and impending legislation:
    - Judicial Review and Courts Act 2022 (1.1);
    - Retained EU Law (Revocation and Reform) Bill (1.2);
    - Bill of Rights (1.3);
    - Police, Crime, Sentencing and Courts Act 2022 (1.4);
    - Public Order Bill (1.5);
    - Nationality and Borders Act 2022 (1.6); and
    - Elections Act 2022 (1.7).
- Wider trends:
    - Further changes to judicial review (2.1);
    - Increased use of secondary legislation (2.2);
    - Failure to meet obligations under the Aarhus Convention (2.3);
    - Cuts to legal aid and the justice system (2.4);
    - Politicisation of the Attorney General / Criticism of the judiciary (2.5).

[1] Microsoft Word - 0439529E.doc (un.org).

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1 Recently passed and impending legislation

1.1 Judicial Review and Courts Act 2022 ("**JRCA**")

1. Summary of threat

a. Section 1 of the JRCA amends the Senior Courts Act 1981 to provide for two new types of quashing order, which can be made with or without conditions:

   i. A suspended quashing order ("**SQO**"), which may provide that quashing does not take effect until a date specified in the order. The impugned decision or act will be valid until that date. The purpose of having a period of suspension would be to retain some certainty in a period during which the original decision is valid, which would allow the public body to re-evaluate its decision before the date of suspension;

   ii. A prospective quashing order ("**PQO**"), which may remove or limit any retrospective effect of the quashing. The effect of a PQO is that only future acts or decisions would be affected.

b. In deciding whether to make an SQO or PQO, the court must take into account factors such as:

   i. The nature and circumstances of the relevant defect;

   ii. Any resulting detriment to good administration;

   iii. The interests or expectations of persons who would benefit from the quashing;

   iv. The interests or expectations of persons who have relied on the impugned act; and

   v. Any other matter that appears relevant to the court.

c. In judicial review, the ordinary remedy is a quashing of the impugned decision – meaning that it is to be treated as void *ab initio*, with subsequent actions/decisions made on the basis of the impugned decision being invalidated. The new remedies alter this process by either setting a quashing date in the future and treating the impugned decision as valid till that point (in the case of a SQO) or removing/limiting the retrospective effect of the quashing (in the case of a PQO). The availability of these remedies, albeit at the discretion of the court, makes judicial review less certain for claimants, who can no longer be sure that, even if successful, the decision in question will be fully quashed. The chilling effect of these changes is likely to weaken the effectiveness of judicial review as an effective check on executive decision making.

d. Section 2 of the JRCA amends the Tribunals, Courts and Enforcement Act 2007 by providing that, where the Upper Tribunal refuses permission to appeal a decision of the First-tier Tribunal, that decision is described as "*final and not liable to be questioned or set aside in any other court*" (subject to certain limited exceptions). This is a legislative attempt to ensure that such a decision is not amenable to judicial review. The purpose of this was partially to reverse the decision in *R. (on the application of Cart) v Upper Tribunal* [2011] UKSC 28. A 'Cart' judicial review is a challenge, by way of judicial review, against a decision made by the Upper Tribunal, Immigration and Asylum Chamber, to refuse permission to challenge a First-tier Tribunal decision, in circumstances where there is no further right of appeal to the Court of Appeal. This

change reduces the ability of concerned individuals to hold government to account in relation to immigration cases, by restricting the number of decisions amenable to judicial review.

2. Relevance

a. The initial bill proposed by the government included a strong presumption in favour of judges having to use SQOs and PQSs, save for in a limited set of circumstances. Fortunately, this presumption was voted down in the Lords and not reintroduced by the government – which was due, at least in part, to committed advocacy by environmental NGOs like ClientEarth, in conjunction with Wildlife and Countryside Link (LINK) and Peers for The Planet.

b. Notwithstanding that the presumption was removed, the inclusion of SQOs and PQOs in the Act may result in these remedies being used. SQOs and PQOs could prove problematic by allowing damage caused by an unlawful decision to continue after a finding of illegality (under a SQO) and/or action to repair the damage caused being avoided (under a PQO). The implications of this change apply to all parts of society – judicial review is the mechanism through which decisions by the government and public authorities are challenged and the existence of SQOs and PQOs makes it less certain that claimants will obtain proper redress, which will likely result In fewer cases of judicial review being brought.

c. These problems of the JRCA apply in the environmental context in the following ways:

    i. E.g. the case *R. (on the application of Preston) v Cumbria CC* [2019] EWHC 1362 (Admin). A local planning authority's decision permitting the installation of a temporary sewage outfall and extending the period for which it would be permitted was rendered unlawful by its failure to meet assessment requirements under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, and the Conservation of Habitats and Species Regulations 2017. Permission was therefore quashed. However, if a SQO had been applied in the case, there could have been a (potentially significant) period of time between a finding of unlawfulness and the taking effect of the quashing order. Throughout this period, the outfall would have been allowed to continue discharging sewage into the local river system. Every month of continued sewage discharge would have been an extra month of harmful impact on fragile freshwater habitats, and on the health of river users. Indeed, this extension of harmful environmental impacts could lead to irreparable harm. It is possible to envisage a situation where a particular local plant species population might be recoverable after one month of sewage outfall but might not be recoverable after six months of sewage outfall. The local population could be entirely lost, as a result of the prolonging of environmental harms caused by a SQO;

    ii. A hypothetical mining case developed by LINK in its parliamentary briefing illustrates the potentially harmful consequences of a PQO. Should a decision to consent a new open-cast coal mine be subsequently held unlawful following judicial review, a PQO could allow the actions between the consent and the judicial review decision to stand, including the removal of wildlife habitats and the extraction (and subsequent burning) of fossil fuels – all at a time of a declared biodiversity and climate crisis. It is also appears that a PQO issued in respect of a policy decision could allow activities consented under that policy decision to continue. For example, if a policy decision to permit fracking was made, then challenged and a PQO issued, future fracking operations would not be

permitted. However, fracking operations granted in reliance on the policy decision before the issuing of the PQO could be allowed to stand, as the legitimating policy decision would only be quashed prospectively.

d. The new orders will also undermine the UK's compliance with international law in the form of the UNECE Aarhus Convention, which requires Parties to provide legal review mechanisms providing "*adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*" (Article 9). The UK is a Party to the Convention, although its compliance with it is poor. The imposition of a SQO in many cases, and the consequent lengthy delay between a finding of unlawfulness and remedy, is unlikely to be considered 'timely'. Similarly, the imposition of a PQO and the consequent lack of remedial action to an unlawful decision is unlikely to be considered 'fair' to the claimant or an 'adequate and effective' remedy.

3. Other comments

a. Received Royal Assent on 28 April 2022.

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1.2 Retained EU (Revocation and Reform) Bill ("**REULB**")

4. Summary of threat

a. The REULB (known initially as the 'Brexit Freedoms Bill') was announced in the Queen's Speech on 10 May 2022. The initial stated purpose of the Bill was to "*end the supremacy of European law and seize the benefits of Brexit*".[2] The main aims of the Bill were stated to be:[3]

> "*Creating new powers to strengthen the ability to amend, repeal or replace the large amounts of retained EU law by reducing the need to always use primary legislation to do so*";
>
> "*Removing the supremacy of retained EU law as it still applies in the UK*"; and
>
> "*Clarifying the status of retained EU law in UK domestic law to reflect the fact that much of it became law without going through full democratic scrutiny in the UK Parliament*."

b. According to the briefing paper for the 2022 Queen's Speech (which introduced the REULB), "*the Government's review of retained EU law has, to date, identified over 1,400 pieces of EU-derived law that have been transferred into UK law*."[4]

c. The REULB was given its first reading in Parliament on 22 September 2022. The Bill was introduced by Jacob Rees-Mogg (Secretary of State for Business, Energy and Industrial Strategy) who, in his opening statement, stated that, "[t]*he time is now right to bring the special status of retained EU law in the UK statute book to an end on 31st December 2023, in order to fully realise the opportunities of Brexit and to support the unique culture of innovation in the UK*." [5]

d. The REULB makes a number of significant changes in relation to retained EU law ("**REUL** – that is, EU-derived law preserved in our domestic legal framework after Brexit, by virtue of the European Union (Withdrawal) Act 2018, for the purposes of ensuring continuity):

   i. All REUL will be subject to a 'sunset' date of 31 December 2023 (save for more complicated reforms, in relation to which the relevant government department can extend the sunset up to 23 June 2026). All REUL contained in domestic secondary legislation and retained direct EU legislation will expire on this date, unless otherwise preserved (using powers included in the Bill). Any REUL that remains in force after the sunset date will become 'assimilated law' in the domestic statute book, through the removal of any special EU law features previously attached to it. The result is that the principle of the supremacy of EU law, general principles of EU law, and directly effective EU rights will end on 31st December 2023;

   ii. Before the sunset date, government departments and devolved administrations will have to evaluate all REUL to determine what should be kept and transformed into assimilated law;

[2] Lobby Pack (10 May 2022) (publishing.service.gov.uk), page 51.
[3] *Ibid*.
[4] *Ibid*., page 52.
[5] Written statements - Written questions, answers and statements - UK Parliament.

iii. Ministers will be given powers to amend, repeal or replace REUL, using secondary legislation. These powers will allow ministers to clarify, consolidate and restate legislation to preserve its current effect, if it is deemed appropriate;

iv. The supremacy of REUL will be ended. Currently, REUL takes priority over domestic legislation passed prior to Brexit (but not after Brexit) where they are incompatible. The Bill will reverse this position, such that domestic legislation, whenever passed, takes priority over REUL with which it conflicts;

v. The UK courts will be given greater discretion to depart from the body of retained EU case law. The Bill will also provide new court procedures for the courts ad UK/Devolved Law Officers to refer or intervene in cases involving retained EU case law.

e. A number of serious issues arise out of the REULB:

i. **A multitude of protections may be lost.** At a fundamental level, the Bill threatens a host of EU-law derived protections that have been built up over decades. Unless government ministers choose to save or replace specific provisions, all REUL will disappear from our legislative framework overnight at the end of 2023. There is no requirement for the government to save or replace any REUL and its window for assessing the thousands of pieces of legislation and regulation that fall in the category is improbably small. It is not implausible that all major protections in the following areas will be lost:

1. Laws setting standards for water pollution levels in our rivers and on our beaches;

2. Regulations setting limits on toxic air pollution to reduce health impacts;

3. Rules protecting habitats and wildlife from destruction;

4. Regulations designed to protect people and wildlife from the harmful impacts of pesticides.

ii. The Bill has the potential to strip away regulations relating to nature, the climate and people's health, but it will also have dangerous implications in other areas – protections that could be thrown on the scrapheap include, for example, employment rights, food safety standards and consumer protection laws;

iii. **The 'sunset' date is completely impracticable**. As mentioned above, each government department will only have until 31 December 2023 to assess all the REUL that it has responsibility for and determine what should be kept or restated and/or whether the 'sunset' date should be extended. The total number of pieces of REUL runs into the thousands, with a significant proportion sitting within Defra (as of 5 October 2022 the government's own REUL tracker, which is not considered to be full or accurate, states that there are 2,417 pieces of REUL, of which 570 sit within Defra[6]). Even though it is completely implausible that the government will be able to make effective determinations for all the REUL ahead of the deadline, the process is still likely to occupy a vast proportion of the time and energy of the civil service over the next 14

[6] UK Government - Retained EU Law Dashboard | Tableau Public.

months. This workload will land on top of a government infrastructure that is facing significant impending cuts. The result is that the 'day to day business' of departments is likely to fall by the wayside;

iv. **Undermining of the government's own policies**. The Bill profoundly undermines the government's ability to meet its own promised targets and policies, such as: those under the Climate Change Act 2008; the long term targets under the Environment Act 2021; the 25-year plan to improve the environment; and the '30x30' biodiversity pledge;

v. **Uncertainty leading to shrinking of corporate investment**. Just at the moment when businesses have started properly to adapt to new rules resulting from Brexit, the Bill threatens to create new and significant uncertainty. Businesses will now be aware that the framework of regulation within which they operate may change dramatically within the next 14 months – yet, they have no way of knowing how extensive the changes might be (i.e., some of the regulations they are subject to might be kept and some might not, but there is currently zero clarity on this point) or when they might take place (i.e., changes might occur before 31 December 2023, at the point of 'sunset' or in June 2023 by virtue of the extension provision). The uncertainty that the Bill is likely to create will, in all probability, lead to a reduction in corporate investment. Furthermore, many businesses recognise that environmental regulation is an important part of the long-term sustainability of the economy and that their customers expect standards to be maintained in the goods and services they pay for. As explained at paragraph f.vi.1.c below, a BEIS Business Perception survey from 2020 reported that less than two-fifths (37%) of businesses agreed that regulation is an obstacle to success.

f. The REULB has particular implications for our democratic processes and the rule of law:

i. **No mandate**. The government does not have a mandate for the Bill. Whilst the 2019 Conservative manifesto, on which this government was elected, did emphasise the idea of 'getting Brexit done', it did not promise a wholescale, reckless revocation of REUL. Indeed, the manifesto recognised that "[g]*ood regulation is essential to successful businesses*".[7] Furthermore, the manifesto stated that "[the government's] *stewardship of the natural environment, its focus on protecting the countryside and reducing plastic waste, is a source of immense pride*"[8] and made clear commitments to "*protect and restore our natural environment*"[9] and to deliver "*the most ambitious environmental programme of any country on earth*".[10] The REULB flies in the face of those commitments;

ii. **No parliamentary oversight**. The Bill empowers ministers to amend, revoke or replace REUL before the 'sunset' date, using secondary legislation. This has repercussions for our democratic process – secondary legislation, unlike an Act, affords Parliament almost no opportunity for scrutiny (as to which, see section 2.2 below). The effect of the Bill is that it will be possible for ministers to change or revoke legislation in important areas (examples of which are set out above) without oversight from the legislature. That

[7] Conservative Party Manifesto 2019 (conservatives.com), p.33.
[8] *Ibid*., p. 55.
[9] *Ibid*., p.43.
[10] *Ibid*., p.3.

represents government by decree and can be added to examples in this document of the government acting anti-democratically and seeking to undermine the rule of law;

iii. **'No increased regulatory burden'**. Related to the point above, Section 15(5) of the Bill states, in relation to the power to amend, revoke or replace REUL, that:[11]

> *No provision may be made by a relevant national authority under this section in relation to a particular subject area unless the relevant national authority considers that the overall effect of the changes made by it under this section (including changes made previously) in relation to that subject area does not increase the regulatory burden*.

iv. The effect of this provision is that when a minister is exercising his or her power under Section 15 (to, for example, put in place a regulation that replaces a piece of REUL), he or she can only do so if, in doing so, they are not increasing the regulatory burden within a subject area.[12] The likely outcome of this wording is that deregulation is baked into all exercises by ministers of the Section 15 powers;

v. **Devolution.** The 'no regulatory burden' provision is likely to be one of the main problem areas when it comes to the Bill and the devolved administrations. Scotland and Wales have both been consistent since Brexit in their intention to improve (amongst other things) environmental standards – which would appear to conflict directly with the 'no increased regulatory burden' requirement. A further fundamental problem is that the Bill appears to give the Westminster government the ability to make regulation in respect of REUL in subject areas that are devolved, which threatens the devolution settlements;

vi. In response to the publication of the Bill, both the Scottish and Welsh governments raised serious concerns:

1. On 22 September 2022 Angus Robertson, Cabinet Secretary for Constitution, External Affairs and Culture, wrote to Rees-Mogg to state that:[13]

    a. "[t]*his bill puts at risk the high standards people in Scotland have rightly come to expect from EU membership. You appear to want to row back 47 years of protections in a rush to impose a deregulated, race to the bottom, society and economy. This is clearly at odds with the wishes of the vast majority of the people of Scotland who will be dismayed at the direction the UK Government is taking*";

    b. "*This bill also represents a significant further undermining of devolution. By allowing UK Government ministers to act in policy areas that are devolved, and to do so without the consent of Scottish Ministers or the Scottish Parliament, is in direct contradiction to devolution and, in particular, the Sewel convention which was given statutory footing in the Scotland Act 1998, in 2016. The speed at which the legislation is being pursued – no impact assessment or basic evaluation has been shared*

[11] Retained EU Law (Revocation and Reform) Bill (parliament.uk).
[12] Regulatory burden is defined at Section 15(10) (Retained EU Law (Revocation and Reform) Bill (parliament.uk)).
[13] Retained EU Law Bill: letter to the UK Government - gov.scot (www.gov.scot).

with my officials – is nothing short of reckless, compounding the recklessness of the propositions themselves";

c. "*In short, the pursuit of this mirage of Brexit freedoms puts at risk environmental, food and animal welfare standards, as well as consumer protection, workers' rights and business certainty. It does so unnecessarily – the BEIS Business Perception survey from 2020 reported that less than two-fifths (37%) of businesses agreed that regulation is an obstacle to success*";

d. "*It remains a fact that the overwhelming majority of people in Scotland voted in 2016 to remain within the EU, with recent evidence suggesting support for EU membership has since risen even higher. Retained EU Law provides Scotland with a high standard of regulation. It is Scottish Ministers' view that the approach the UK Government is taking to this legislation will be hugely damaging to people and business in Scotland. The UK's decision to leave the EU has not changed the EU's importance to Scotland, nor our commitment to it. Scottish Ministers will continue to align regulation in Scotland with EU regulation where appropriate and in a manner that contributes towards maintaining and advancing standards across a range of policy areas. This retained EU Law bill is part of a wider, deregulatory race to the bottom approach being taken by the UK Government which I strongly oppose*."

2. On 23 September 2022 Mick Antoniw, Counsel General and Minister for the Constitution, wrote to Rees-Mogg to state that:[14]

a. "*As currently drafted, this legislation could see UK government ministers given unfettered authority to legislate in devolved areas – contrary to the democratically established devolution settlement*";

b. "*It also risks the reduction of standards in important areas including employment, health and the environment*";

c. "*We are disappointed the bill has reached this stage with such little engagement with the Welsh Government about its most important aspects, and we call on the UK government to bring about the legislative changes that will ensure Wales' constitutional integrity and devolution settlement is respected and preserved*."

5. Relevance

a. The proposed REULB poses a threat to protections in a range of areas, including all existing environmental safeguards (in particular, those relating to air quality, habitats and species (principally, the Habitats Regulations[15]) and water pollution).

[14] Power grab fears over new UK government legislation | GOV.WALES.

[15] The full title of the Habitats Regulations is the Conservation of Habitats and Species Regulations 2017 (2017 No. 1012). The Habitats Regulations implemented European Union Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, more commonly known as the 'Habitats Directive'.

b. Current fears for the Habitats Regulations stem from previous efforts to dilute them. In 2012, then Chancellor George Osborne ordered a review of whether the ‘gold-plating’ of EU regulations was placing unnecessary cost on British businesses. In 2015, the European Commission commissioned its own ‘fitness-check’ of the Habitats and Birds Directives. Both reviews determined that the legislation was both necessary and working well, but could be better implemented. There is strong belief amongst some in the government that environmental regulations, and in particular the Habitats Directive, are placing undue burden on British business. Indeed, the 'Benefits of Brexit' policy paper that was issued in January 2022 stated that "*we are also considering how habitats regulations could be amended to help address problems with nutrient pollution*." This is an allusion to the so-called ‘nutrient neutrality’ issue, whereby developers are required to fund offsetting actions, such as rewilding, in order to gain permission for developments that would increase nutrient levels (in the form of sewage) going into river systems in Special Areas of Conservation (‘SACs’). If developers cannot demonstrate how they will do so, planning permission won’t be granted. The REULB threatens to make it more likely that the Habitats Regulations, and other critical environmental safeguards, are amended through secondary legislation and without proper parliamentary scrutiny.

6. Other comments

a. The government announced its intention to introduce the REULB during the Queen's Speech, issued on 10 May 2022.

b. The REULB received its first reading in the House of Commons on 22 September 2022.

1.3 Bill of Rights ("**BOR**")

7. Summary of threat

a. As explained in more detail at paragraph 9 below, in September 2022 the Bill of Rights was shelved. However, the government has reaffirmed its intention to take forward reform of the UK's human rights framework, through a series of individual (and as yet unidentified) pieces of legislation. Therefore, the analysis set out below will only apply to the extent that the issues raised are the subject of forthcoming legislation.

b. In its 2019 election manifesto, the Conservative party promised reform of the Human Rights Act 1998 ("**HRA**"). The government believes that the HRA (and the rights under the European Convention on Human Rights ("**ECHR**") that it incorporates) has led to: growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest; creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline; public protection being put at risk by the exponential expansion of rights; and public policy priorities and decisions affecting public expenditure shifting from Parliament to the courts, creating a democratic deficit.

c. On 14 December 2021, the government published a consultation on the HRA – entitled, 'Human Rights Act Reform: A Modern Bill of Rights'. As the title suggests, the main thrust of the consultation was the replacement of the HRA with a new Bill of Rights (some draft clauses of which were included). The consultation followed the Independent Human Rights Act Review, instigated by Robert Buckland (then Minister of Justice) and chaired by retired Justice of Appeal Peter Gross, the aim of which was to review how the HRA operates. In broad terms, the Review concluded that there were no significant problems with the HRA and that there exists "*an overwhelming body of support for retaining* [the HRA]".[16] The consultation document largely ignored the Review, far exceeding its terms of reference, soliciting views on proposals explicitly rejected by the Review and ignoring the panel's specific recommendations, such as a programme of human rights education in schools and universities. Many of the questions within the consultation were not considered by the Review at all.

d. At the end of June 2022, the Bill of Rights had its first reading in Parliament – and was subsequently described by the Law Society as a "*lurch backwards for British Justice*".[17] At a fundamental level, the purpose of the Bill is to reform the law by "r*epealing and replacing the Human Rights Act 1998*", which represents a significant departure from the manifesto commitment to 'update' the HRA. Leaving aside the substance of the now-shelved Bill, various criticisms have been levelled at it from a constitutional perspective:

    i. Several pieces of commentary identified that the Bill of Rights might not be compatible with the UK's obligations under the ECHR. For example, the Bill instructs courts not to have regard to any "*interim measure*" issued by the European Court of Human Rights ("**ECtHR**") (interim measures are urgent orders that the ECtHR exceptionally issues where there is an imminent risk of irreparable harm to a person). On 14 June 2022, the

[16] The Independent Human Rights Act Review 2021 (publishing.service.gov.uk), paragraph 19, at page 30; see also a letter, dated 30 June 2022, from the Joint Committee on Human Rights to Dominic Raab, which pointed out that "*many respondees were in favour of maintaining the status quo and were of the view that the changes proposed therein were unnecessary*" (https://committees.parliament.uk/publications/22880/documents/167940/default/).
[17] Bill of Rights signals collision course with rule of law | The Law Society.

Court issued an interim measure to prevent the removal of an applicant to Rwanda as part of the UK-Rwanda asylum agreement until the legality of the scheme has been established. Interim measures are binding – by instructing courts to disregard interim measures, the Bill of Rights Bill directly contravenes the UK's obligations under the ECHR;

ii. The Bill of Rights would have had significant implications with respect to devolution. Human rights – and the HRA itself – are entrenched in the devolution settlements of Scotland, Wales and Northern Ireland in a way that they are not at the UK level; for instance, acts of the devolved legislatures can be quashed by courts for non-compliance with the ECHR, unlike Acts passed at Westminster. The Scottish and Welsh governments both opposed the repeal of the HRA and its replacement with the Bill of Rights in their consultation responses and the JCHR has stated that the government "*should not proceed without the consent of the devolved legislatures*".[18] An inquiry by the Lords European Union Committee concluded that devolved assemblies were unlikely, if asked, to consent to the repeal of the HRA and its replacement by a Bill of Rights, and that, "*if for no other reason, the possible constitutional disruption involving the devolved administrations should weigh against proceeding with this reform*";[19]

iii. The Chairs of several parliamentary committees criticised the fact that such a significant constitutional change was not submitted for pre-legislative scrutiny, to permit more analysis in Parliament.[20]

8. Relevance

a. A number of the changes proposed in the Bill of Rights may, if taken forward in separate legislation, undermine society's ability to hold public authorities to account:

i. The BOR sought to remove the ability of the courts to interpret legislation in a rights-compatible way and appeared to mandate that previous interpretations made under Section 3 of the HRA fall away unless specifically preserved by the government. If adopted, this would undo the advancements in human rights made since the implementation of the HRA and leave the question of what rights individuals can rely on in the hands of ministers;

ii. The stripping of domestic human rights protections (and the related attacks on access to justice detailed in this document) will mean more people are forced to bring cases in Strasbourg. This will dramatically increase the time and cost to those who are determined to bring a claim and have a chilling effect on those less committed to doing so;

iii. The HRA and ECHR are embedded in the devolution settlements of Scotland, Wales and Northern Ireland, yet the concerns raised in the consultation responses submitted by each of those administrations have largely been ignored;

iv. Forthcoming legislation may seek to limit positive obligations by pausing the development of new rights and turning back the clock on existing protections and

[18] https://committees.parliament.uk/publications/22880/documents/167940/default/.
[19] House of Lords - The UK, the EU and a British Bill of Rights - European Union Committee (parliament.uk).
[20] 2006 (parliament.uk).

subordinating them to public bodies' priorities (positive obligations being duties on the state to secure the protection of human rights). The reason why positive obligations have been implied into Convention rights by courts is not, as the Government argued in the context of the BOR, so that unnecessary burdens can be placed on authorities by way of judicial overreach. The courts have deemed certain obligations to exist because they are necessary to secure the effective protection of fundamental rights. Positive obligations have improved peoples' day-to-day existence and have proved critical in holding the public authorities to account – it is because of positive obligations that the families of the 97 people who died at Hillsborough, as well as the loved ones of people who have died in State custody or in other State institutions, have been able to demand proper investigations;

v. Should a permission stage be introduced for human rights claims, it will increase the risk that genuine claims are not heard, which will have a 'chilling effect' on those weighing up whether to bring a claim;

vi. Standalone legislation may seek, like the BOR, to create classes of people, with different classes benefitting from different levels of human rights protection. For example, the BOR proposed to: restrict the ability of those in prison to bring human rights claims; and limit the circumstances in which migrants can rely on human rights arguments.

9. Other comments

a. The government announced its intention to introduce a Bill of Rights during the Queen's Speech, issued on 10 May 2022. The Bill was given its first reading on 22 June 2022.

b. In the wake of Boris Johnson's resignation and the elevation of Liz Truss to Prime Minister, the future of the Bill of Rights has become uncertain:

i. The Bill of Rights was a project of special interest for Boris Johnson and, in particular, his Lord Chancellor and Secretary of State for Justice, Dominic Raab. Raab supported Rishi Sunak in the Conservative Party leadership contest and was therefore removed from the cabinet by Liz Truss. Raab was replaced as Lord Chancellor and Secretary of State for Justice by Brandon Lewis;

ii. In early September 2022, it became clear that the Bill of Rights was being shelved by the government – reportedly because there were serious concerns about the text of the bill and its workability;[21]

iii. In recent weeks, it has been reported that certain aspects of the Bill of Rights will still be taken forward (in particular, provisions relating to illegal immigration), but through multiple pieces of targeted legislation. This was confirmed on 2 October 2022 by Lewis, speaking at the Conservative Party conference, who stated that:[22]

> *We are looking at a range of things from what would have been in the Bill of Rights Bill, which we're not bringing forward at the moment. What we are looking at is, what is the right piece of legislation to bring forward some of the measures that we wanted*

[21] Liz Truss halts Dominic Raab's bill of rights plan | UK bill of rights | The Guardian.
[22] Lewis defends judicial independence - by Joshua Rozenberg (substack.com).

to deal with, for example, I've just been talking, at the end of my few words there, freedom of speech, strategic lawsuits against public participation, things like that, and how we do that. What's the best, speediest way of dealing with that? I know a lot of people and we as a government are determined to make sure we are dealing with the issues that can help us deal with the issues around illegal immigration. I'm working closely with the Home Secretary to ensure that we can put together legislation that deals with that. So those key tenets we wanted to deal with we will deal with, but we'll probably do it in different pieces of legislation.

iv. During her speech at the party conference, Suella Braverman (Home Secretary) indicated that she wanted to reform the asylum system, including the operation and influence of the HRA, the ECtHR and the ECHR.[23] Braverman briefed the press on some of the details of her proposals in the lead up to her speech, including: barring anyone who crosses the Channel from claiming asylum in the UK; ending 'abuse' of human rights and modern slavery laws; and bringing down net migration (including through a reduction in the number of foreign students admitted to the UK).[24]

[23] Suella Braverman – 2022 Speech to Conservative Party Conference – UKPOL.CO.UK.
[24] Suella Braverman: No migrants who cross Channel will be able to claim asylum in the UK (telegraph.co.uk).

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1.4 Police, Crime, Sentencing and Courts Act 2022 ("**PCSCA**")

10. Summary of threat

a. The PCSCA contains a raft of measures that will criminalise or disproportionately punish tactics employed as part of non-violent protest.

b. Changes brought about through the Act:

   i. Under the Public Order Act 1986, the police are able to place conditions on 'static demonstrations'. Previously, those conditions were limited to place, duration and size. Under the PCSCA, the police can issue any condition they deem 'necessary'. Police will therefore now be able to impose conditions on protests (even non-violent) deemed: too noisy; seriously disruptive to an organisation's activities; or having a 'relevant' impact on people in the vicinity. These conditions can apply even if it is a single-person protest. The effect of this change is that a protest aimed at a certain group of decision makers or an organisation might be severely restricted if it is anticipated it will be noisy – which largely defeats the point of the protest. This will have a chilling effect on those organising protests;

   ii. Individuals can be prosecuted for breaching a police condition, even if they were not aware that the condition had been imposed. Previously, police needed to prove that protesters knew they had breached restrictions before penalising them. This will have a chilling effect on those considering attending a protest;

   iii. A vague new offence of 'intentionally or recklessly causing public nuisance' has been introduced, with a maximum sentence of 10 years, which can be interpreted many ways and can apply to non-violent protest. As an example, blocking a highway could now lead to a prison sentence.

11. Relevance

a. The Act makes it fundamentally harder to exercise the right to protest, which is a key democratic right and a foundation of the rule of law – it will now be easier for decision makers to avoid scrutiny and being held to account. For example, it is entirely possible to envisage large-scale protests over fuel pricing this winter, given the significant rise in the price cap, which may become fundamentally more difficult due to the provisions of the PCSCA.

b. The PCSCA will have a significant impact on the (large number of) NGOs that undertake direct action as part of their *modus operandi*. For example, protest was an essential part of the campaign against fracking. Numerous concerned organisations and communities protested outside council meetings, fossil fuel firms' headquarters, drilling sites and on high streets. Those protesting were vindicated by a moratorium on fracking. These protests were often noisy, and may have caused inconvenience, but that is no reason to restrict them, as would now be likely under the PCSCA.

12. Other comments

a. Received royal assent on 28 April 2022.

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1.5 Public Order Bill ("**POB**")

13. Summary of threat

a. A number of the more extreme provisions put forward by the government as part of the PCSCA were dropped as part of the parliamentary 'ping pong' process. However, in the Queen's Speech on 10 May, the government announced its intention to bring many of these provisions forward, as part of a standalone Public Order Bill.

b. The measures proposed as part of the POB include:

   i. Serious Disruption Prevention Orders, which are individual protest banning orders imposed on a person, including at the request of the police. These can be imposed both on people with previous protest convictions as well as those merely engaging in activities that result in, or were likely to result in 'serious disruption' (a phrase to be defined by the Home Secretary). 'Likely' is the key word – the disruption does not need even to have taken place. Once the order is imposed, the individual loses their freedom of assembly, with their activities being monitored. Something as simple as meeting with an activist group – even in a social setting – could be seen as a breach, leading to imprisonment. A person could be stripped of their civil rights for their previous protest activity, even where these weren't illegal, or only became so because of the numerous new offences the government intends to create through the bill;

   ii. New criminal offences of locking on, and going equipped to lock on to others, objects or buildings – carrying a maximum penalty of six months' imprisonment and an unlimited fine;

   iii. The new criminal offence of interfering with key national infrastructure, such as airports, railways and printing presses – carrying a maximum sentence of 12 months in prison and an unlimited fine;

   iv. Measures to make it illegal to obstruct major transport works, including disrupting the construction or maintenance of projects like HS2 – punishable by up to six months in prison and an unlimited fine;

   v. Extended power of stop and search to allow police to seize articles related to the new offences set out above.

14. Relevance

a. As explained in relation to the PCSCA, these measures would constitute a significant limitation of the individual right to protest, which is a democratic right and a foundation of the rule of law – should the measures outlined for the POB comes to pass, it will be easier for decision makers to avoid scrutiny and being held to account.

b. As with the PCSCA, the POB will have a significant impact on NGOs that undertake direct action, as well as members of the general public who wish to protest. For example, once a Serious Disruption Prevention Order is imposed, an individual's freedom of speech and assembly is severely restricted. Individuals could be monitored for, and restricted in, who they associate with and where they go.

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15. Other comments

a. The government announced its intention to introduce the POB during the Queen's Speech, issued on 10 May 2022.

b. In her speech to the Conservative Party Conference on 4 October 2022, Suella Braverman highlighted that police officers should have powers to "*stop protesters who use guerrilla tactics*" and warned activists from environmental groups Just Stop Oil, Insulate Britain and Extinction Rebellion that they will be jailed for breaking the law during protests.[25]

[25] Home Secretary Suella Braverman vows to stop Channel migrant crossings - and will 'make Rwanda scheme work' | Politics News | Sky News.

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1.6 Nationality and Borders Act 2022 ("**NBA**")

16. Summary of threat

a. The NBA changes the asylum system by:

   i. Introducing a two-tier asylum system, meaning those who arrive in the UK via 'irregular' means are likely to receive less protection and support;

   ii. Increasing the standard of proof for establishing someone is a refugee;

   iii. Reducing the threshold at which someone is considered to have committed a particularly serious crime and therefore may not receive refugee protection;

   iv. Removing stages of appeal or fast-tracking certain cases;

   v. Introducing penalties for late submission of evidence, so that this is either taken to damage the claimant's credibility or to affect the weight given to the evidence;

   vi. Giving the Immigration Tribunal additional powers, on top of those that already exist, to fine lawyers for improper, unreasonable or negligent behaviour.

b. The NBA also puts into statute provisions that already exist in the Immigration Rules. Under those Rules, asylum seekers whose claims are inadmissible (including on the basis they've stopped in another country during their journey to the UK) can be removed to a 'safe third country', as long as that country agrees to receive them. Previously, no agreements were reached and so no one was removed under these provisions. However, a Memorandum of Understanding has been signed with Rwanda, pursuant to which Rwanda has agreed to receive asylum seekers whose claims are inadmissible in the UK. If no other country agrees to receive the person (including a country where the person has a 'connection'), it's possible that they may face relocation to Rwanda, even if they have no connection there.

17. Relevance

a. The NBA represents a clear example of the government pushing legislation through Parliament which knowingly undermines the UK's international legal obligations – an increasingly clear trend in recent years which threatens the rule of law.

b. The NBA contains a number of measures which potentially constitute breaches of the UK's international legal obligations and threaten the rule of law and access to justice. The NBA:

   i. Is likely inconsistent with international law, in particular the 1951 Refugee Convention, which specifically stipulates that refugees must not be penalised for their mode of entry. Given that the NBA explicitly proposes to treat people differently and in a discriminatory manner despite their equally genuine claims to asylum, it could also potentially be deemed incompatible with the HRA;

   ii. Without justification, introduces a more stringent definition of a 'particular social group', which forms one of the grounds of persecution under which a person may qualify as a refugee under the 1951 Refugee Convention. The definition of a 'particular social group' is contrary to both the position of the United Nations High Commissioner for Refugees and UK case law, which only require one of two conditions to be met – under the NBA,

a person must: (i) establish they are a member of a group of persons who share innate unchangeable characteristics, a common background that cannot be changed, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; **and** (ii) show they are a member of a group that would be perceived as having a distinct identity in their home country;

iii. Introduces an expedited appeals procedure, which is being viewed as an attempt by the government to revive a detained fast track scheme that the Court of Appeal ruled unlawful in 2015.[26] The procedure seeks to oust the jurisdiction of the Court of Appeal to prohibit an appeal from a first-instance decision on appeal by the Upper Tribunal. There is a public interest in legal issues of general importance being reviewed by appellate courts and to exclude that possibility undermines the rule of law and access to justice;

iv. Allows the Home Office to regulate (for itself and local authorities) the process of age assessments that determine whether or not a person subject to immigration control is a minor child. These provisions were inserted very late in the process, during Committee stage in the House of Commons, preventing the full scrutiny of Parliament. They crucially impact the welfare of children but, without having conducted meaningful pre-legislative consultation, the NBA stipulates that certain 'scientific methods' to determine age (the use of which is highly contested) may be prescribed in regulations to be made by the Secretary of State. The proposals would also move age assessment hearings, when the outcome of an assessment is in dispute, to the First-tier Tribune.

18. Other comments

a. Received Royal Assent on 28 April 2022.

[26] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

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1.7 Elections Act 2022 ("**EA**")

19. Summary of threat

a. The EA made two notable changes to the way elections are carried out in the UK:

   i. Previously, being registered and giving your name and address was sufficient to enable you to vote. With the passage of the EA, it is now a requirement to provide an approved form of voter identification. Whilst there is some confusion as to what constitutes valid identification (a bus pass appears to be sufficient for a pensioner, but not anyone else), the government's own figures suggest that about 2 million people could be disenfranchised as a result of not owning a valid form of identification.[27] In reality, that number may be much larger – in 2015, the Electoral Commission found that around 3.5 million people in the UK do not have access to photo identification;[28]

   ii. The government now has the power to set a 'strategy and policy statement' for the independent Electoral Commission, which was formed in 2000 for the purposes of overseeing the electoral process.[29] A parliamentary committee, which includes the government's 'election minister', will then examine whether the commission is giving "*due regard*" to these instructions. Whilst the Commission will retain autonomy to determine individual cases (e.g. whether an individual party candidate has breached the rules), the strategy and policy statement could steer the Commission responses to breaches in general. The Commission has itself warned that this change could lead to the government directing it to promote voter registration in areas where it has supporters, rather than those in which it does not.[30]

20. Relevance

a. The changes made under the EA threaten the rule of law, which only operates properly when the processes and rules of democracy apply evenly to all. The changes risk impinging upon the independence of the electoral process and could lead to large scale disenfranchisement of disadvantaged groups (e.g.: the unemployed, 11% of whom are without existing ID; those renting from a local authority (13%) or housing association (12%); and disabled people (8%)).[31]

21. Other comments

a. Received royal assent on 28 April 2022.

[27] These are the last elections without voter ID. Next time, millions could be turned away (inews.co.uk).
[28] Voter ID report untracked (electoralcommission.org.uk).
[29] The important changes coming to future elections in the UK | The Week UK.
[30] The important changes coming to future elections in the UK | The Week UK.
[31] These are the last elections without voter ID. Next time, millions could be turned away (inews.co.uk).

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2 Wider trends

2.1 Further changes to judicial review

22. Summary of threat

a. The Judicial Review and Courts bill initially presented by the government did not represent as significant an attack on the process of judicial review as the NGO community had feared. However, Dominic Raab (Lord Chancellor and Secretary of State for Justice) has indicated that further changes to judicial review may be coming. For example, there was discussion at the end of 2021 that the government was seeking to introduce a mechanism by which it could 'strike out' findings from judicial review proceedings with which it disagrees.[32] Raab has also suggested that the government will "*get into the habit of legislating on a more periodic basis*" to overturn particular court judgments, and has suggested that a particular "*mechanism*" may be set up for this purpose.[33]

23. Relevance

a. Judicial review is a key element of the rule of law, as it allows for the government to be held to account for its actions.

[32] https://www.theguardian.com/politics/2021/dec/06/no-10-plans-to-let-ministers-strike-out-legal-rulings-they-disagree-with.
[33] The government's reforms to judicial review must respect the separation of powers | The Institute for Government.

2.2 Increased use of secondary legislation

24. Summary of threat

a. Ministers use secondary legislation (usually in the form of regulations created through statutory instruments ("**SIs**")) to make laws under power conferred by earlier primary legislation (Acts of Parliament).

b. SIs are subject to one of two Parliamentary procedures:

   i. Made negative, resolution procedure – SI laid before Parliament, which then has 40 days to object to it and call for debate. This is done by a motion to annul ('praying against the SI'). The 'prayer' is the negative resolution. These SIs are usually laid at least 21 days before they are due to come into force, to allow for time for scrutiny. This is the more common procedure, but it is extremely rare for SIs to be prayed against and annulled: the Commons has prayed against secondary legislation only 11 times since 1950[34] and last did so in 1979;[35] the Lords has not rejected a negative instrument since 2000;[36]

   ii. Made or draft affirmative procedure – SI usually laid in draft form. Both houses need to debate and approve the SI by resolution before it can be made, unless it deals with tax, in which case it only needs to be approved by the Commons.. Debates usually take place in a Delegated Legislation Committee. This is the less common procedure and is reserved for SIs that are likely to be controversial;

   iii. The made affirmative process is usually only used for SIs that are urgent. The SI ceases to have effect unless approved by resolution in both Houses within the time limit in the parent act (usually 28 or 40 days from date of being made). However, the parent act usually makes clear that the SI ceasing to have effect does not invalidate anything done whilst the SI was in effect;

   iv. Importantly, it is not possible, under either the positive or negative procedures, to amend an SI once it has been laid. If an amendment is needed, the department concerned must withdraw the SI and lay an entirely new draft. It is for this reason that so few SIs are rejected by Parliament – to do so means rejecting all the positive parts of the instrument as well as the negative parts that are in issue, and forcing the department in question to do a full redraft and start the process over again, which adds significant delay and inefficiency into the system.

c. Using regulations/SIs to prescribe technical or procedural detail, pursuant to policies and structures set out in Acts of Parliament, is normally entirely common and sensible – it avoids parliamentary time being wasted on minutiae. However, over the last 20 years there has been a steady increase in the number of SIs implemented with a concomitant decrease in the number of Acts passed. Those Acts that are passed are increasingly skeletal, leaving important policy detail to be provided by unscrutinised SIs.

[34] Delegated Legislation: Frequently Asked Questions (hansardsociety.org.uk).
[35] Secondary legislation: how is it scrutinised? | The Institute for Government.
[36] *Ibid*.

d. This trend has accelerated significantly in the last five years, initially due to Brexit and latterly due to COVID-19. More than 600 SI were made to give effect to Brexit – mostly to ensure that the UK had an operational statute book of retained EU law. Between March 2020 and October 2021, more than 500 SIs were made in response to COVID-19. Whilst many of the SIs made in response to Brexit and COVID-19 were technical, many of them conferred wide powers on ministers that went beyond the procedural matters normally reserved for SIs.

25. Relevance

a. The clear trend of increasingly using secondary legislation, in circumstances where primary legislation should be used, undermines the rule of law and the role of Parliament:

   i. Legislating in haste leads to badly drafted laws. Over the last few years there have been a significant number of SIs which have been made only days (or even hours) before they are due to come into force. This process of legislating at speed, with little consultation even inside government, leads to instruments which are inconsistent, poorly drafted and liable to require amendment;

   ii. SIs lack parliamentary scrutiny. Even at the best of times, most SIs are made using the negative resolution procedure, meaning they are not debated by default. Those that are debated are almost never rejected. However, in response to Brexit and COVID, the government adopted an approach which afforded Parliament even less opportunity for scrutiny. For example, of the more than 500 COVID-related SIs up to October 2021, only about 30 were debated; of those subject to the negative procedure, 54.7% breached the '21 day' rule.[37]

b. The trend explained above is only likely to become more entrenched as and when the Retained EU Law (Revocation and Reform) Bill is enacted. As explained at paragraphs 4 to 6 above, the Bill is designed to allow the government to amend retained EU law using secondary, rather than primary, legislation. The effect would be that the government is able to amend retained EU law (which touches upon a wide range of social, political and economic issues) without the parliamentary scrutiny afforded by primary legislation. The Bill raises the prospect of 'government by decree' in relation to issues determined by retained EU law.

[37] Reliance on secondary legislation has resulted in significant problems: it is time to rethink how such laws are created | The Constitution Unit Blog (constitution-unit.com).

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2.3 Failure to meet obligations under the Aarhus Convention

26. Summary of threat

a. The UK is a signatory to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, more commonly known as the "**Aarhus Convention**".

b. Under the Aarhus Convention, signatory Parties are required to guarantee three 'pillars' of the Convention, being:

   i. Access to information (the 'first pillar');

   ii. Public participation in decision-making (the 'second pillar'); and

   iii. Access to justice in environmental matters in accordance with its provisions (the 'third pillar').

c. The central objective of the Convention is to contribute to the protection of the right of every person of present and future generations to live in an environment adequate for his or her health and well-being.

d. However, the UK's implementation has been criticised and challenged in both the domestic courts and the ECJ. In addition, while the UK was a member of the EU, the European Commission took infraction proceedings, and the Aarhus Convention Compliance Committee ("**ACCC**") has criticised UK implementation and rendered decisions against it. These criticisms and challenges were based, primarily, on the UK's failure to ensure that its access to environmental justice was not prohibitively expensive (as required under Article 9 – part of the 'third pillar'). The government sought to address these criticisms by introducing (in 2013) and then updating (in 2017) a specific costs regime for Aarhus Convention claims under Civil Procedure Rule 45.

e. The ACCC has been reviewing the UK's compliance with its obligations under the Convention since 2010. In September 2017, the ACCC published a decision on UK compliance with its obligations under the Convention to ensure access to environmental justice, which stated that:

   i. While introducing some positive improvements, the 2017 amendments to the costs protection regime under the CPR for courts in England and Wales moved it further away from meeting the Convention's requirements of ensuring access to environmental justice; and

   ii. The UK had made slow progress on establishing a costs protection regime that meets the Convention's requirements.

f. In 2017, ClientEarth, Friends of the Earth and the RSPB brought a judicial review challenge of the 2017 Civil Procedure Rules amendments, on the basis that the costs reforms denied the access to environmental justice that is required by the Aarhus Convention. In September 2017, the High Court concluded that:

   i. CPR 45.44, which allows the default recoverable costs cap to be varied, complies with EU law implementing the Aarhus Convention and ensures that access to environmental justice is not prohibitively expensive;

ii. A private hearing is required for all applications for variation of the default costs cap. This is to prevent the disclosure of confidential financial information of the claimant or third party supporters acting as a deterrent to bringing an Aarhus Convention claim. The CPR should also be amended to clarify that applications should be with the acknowledgment of service. This amendment came into force on 6 April 2018; and

iii. A claimant's own costs in bringing an Aarhus Convention claim should be included in any assessment of their financial resources to ensure that it is not prohibitively expensive.

g. In September 2021, the ACCC published a progress report on the findings that the UK had failed to comply with the requirements of access to environmental justice despite its reforms of the Civil Procedure Rules and introduction of the 'Aarhus Convention claims' costs rules under CPR 45.

h. At the October 2021 Aarhus Convention meeting, the Meeting of Parties adopted a decision based on the ACCC's September 2021 report that the UK must take steps to end its longstanding non-compliance with the access to environmental justice requirements of the Convention. The Meeting of Parties adopted the ACCC's report and recommendations, including that the UK must:

i. By 1 July 2022, submit a plan of action, including a time schedule, to the ACCC regarding the implementation of its recommendations. This could require further amendments to the Civil Procedure Rules and costs capping provisions; and

ii. Provide detailed progress reports to the ACCC by 1 October 2023 and 1 October 2024 on the measures taken and the results achieved in the implementation of the plan of action and the ACCC's recommendations.

i. On 1 July, the UK submitted its plan of action to the ACCC. This document failed to address the specific questions and points raised in the decision of October 2021, repeatedly falling back on a stock response stating, "[t]*he UK Government is committed to reviewing the Environmental Costs Protection Regime (ECPR). It proposes to do this through a Call for Evidence in the coming months. This will consider and seek views from stakeholders on how to best address outstanding Aarhus Convention compliance issues relating to the ECPR and other outstanding compliance issues*."

27. Relevance

a. There is a significant and increasing volume of environmental litigation in courts across the UK and the cost of bringing such litigation is therefore important. Litigation in England and Wales (where most of ClientEarth's cases are brought) is, in general, prohibitively expensive and the reforms to the CPR have failed, in breach of the provisions of the Aarhus Convention, to provide sufficient protections for those brining environmental claims.

2.4 Cuts to legal aid and the justice system

28. Summary of threat

a. Over the past fifteen years, the legal aid system has been dramatically impacted by financial cuts. The 2013 Legal Aid, Sentencing and Punishment of Offenders Act saw £350 million knocked off the £2 billion legal aid budget and the eligibility criteria severely restricted, resulting in large numbers of people losing access to legal support. The number of civil legal aid providers has fallen by approximately 30% in the last 10 years,[38] while the number of criminal legal aid providers has almost halved in the last 15 years.[39] In 2018, the Law Society warned that criminal defence barristers may become extinct in parts of the country within five years.[40]

b. The cuts to legal aid have disproportionately affected the most economically deprived areas in the country, as well as the BAME community, who make up approximately 70% of the clients of legal aid.[41]

c. In conjunction with cuts to legal aid, over the last decade the Ministry of Justice has seen a major overall reduction in its budget – almost a quarter.[42] This led to, *inter alia*: the sale of a significant number of court buildings to bridge shortfalls;[43] and restrictions on the number of sitting days for judges, creating increasingly long waiting times for cases to come to trial (across both the civil and criminal courts). This trend was exacerbated by the COVID-19 lockdown. Whilst the civil courts adapted reasonably efficiently by moving to remote hearings with few significant issues, criminal (and family) cases, which are more reliant on in person testimony, largely came to a halt. The result is a huge backlog of cases that is yet to be resolved.[44]

d. The government has recently made changes to address the problems highlighted above. In the 2021 autumn budget, the Chancellor committed to: a £3.2 billion increase in the Ministry of Justice's budget in 2024/2025; and £1 billion to increase capacity and efficiency in the court system, address the backlog and help the system recover from COVID-19 (£477 million to the criminal system, £324 million to the civil system and £200 million to fund the Ministry's court reform program).[45] However, whilst these commitments are welcome, the Law Society has analysed that the actual increase in criminal legal aid solicitors' fees will be only 9%, rather than the promised 15%.[46]

29. Relevance

a. The impact of the above on the rule of law is clear. The court system is not functioning properly, with 'unacceptable'[47] levels of delay (particularly in the criminal system) meaning significant numbers of people are having to wait too long for justice to be served. The parlous state of

[38] Inequality within Britain's legal aid funding system | Bolt Burdon Kemp.
[39] British justice in crisis: the end of criminal legal aid? | The Law Society.
[40] Criminal defence solicitors may be extinct in five years, says Law Society | UK criminal justice | The Guardian.
[41] Inequality within Britain's legal aid funding system | Bolt Burdon Kemp.
[42] Covid has undermined chronically under-funded justice system | Law | The Guardian.
[43] Half of magistrates courts in England and Wales closed since 2010 | UK criminal justice | The Guardian.
[44] UK criminal justice creaking under 'unacceptable' levels of delay | Financial Times (ft.com).
[45] Government acts on our calls for crucial investment in the justice system | The Law Society.
[46] British justice in crisis: the end of criminal legal aid? | The Law Society.
[47] UK criminal justice creaking under 'unacceptable' levels of delay | Financial Times (ft.com).

legal aid means that, for most of the population, vindicating their legal rights is too expensive and opaque a process to undertake.

2.5 Politicisation of the Attorney General / Criticism of the judiciary

30. Summary of threat – Politicisation of the Attorney General

a. The Attorney General is one of the Law Officers of the Crown. His or her deputy is the Solicitor General. The Attorney General has three main functions:

   i. They are the guardian of the public interest;

   ii. They are the chief legal adviser to the government;

   iii. They superintend the principal prosecuting authorities in England and Wales (the Crown Prosecution Service, which incorporates the Revenue and Customs Prosecution Office, and the Serious Fraud Office).

b. The Attorney General also has overall responsibility for the Government Legal Department, Government Legal Services and HM Crown Prosecution Service Inspectorate.

c. Placing a senior lawyer at the heart of government has both practical and symbolic significance – it is an acknowledgement that the government is bound by the law (as made by the democratically elected Parliament) and an assurance that it will govern accordingly. This includes ensuring that ministers discharge their duty to protect judicial independence. Although the Attorney General is a political appointment, the role has historically been more lawyer than politician. The Attorney General must advise the government on the law, even when that advice does not align with the government's political priorities.

d. However, in recent years the role of Attorney General has become increasingly politicised, as explained below:

   i. From July 2018 to February 2020, the role of Attorney General was occupied by Geoffrey Cox (MP Torridge and West Devon (Con)). Cox was appointed largely on the basis of his support for Brexit and became a prominent member of the Conservative party – even introducing the PM at the party conference in 2018. Previous attorney generals tended to take the view that political distance increased their credibility, whilst Cox apparently considered that he had "*a perfect right in cabinet to comment on all matters of policy and to participate in the fashioning of policy of the government*".[48] Cox drew criticism from across the political spectrum when, in February 2020, he suggested that proposed appointments to the Supreme Court should be subject to questioning from Parliament.[49] Criticism pointed out that this risked politicising the appointment process and influencing judges' decisions when sat in the lower courts. The suggestion from Cox/the government was seen as potentially being in response to politically inconvenient judicial review loses (for example, the cases in respect of: Article 50, brought by Gina Miller; prorogation of Parliament by Boris Johnson; and the blocking of the deportation flight to Jamaica);

   ii. However, Cox was eventually forced out of the role for, it is understood, not being a 'team player' (i.e. refusing to provide the legal advice the government needed to justify

[48] The attorney general should not always be a 'team player' | The Institute for Government.
[49] Attorney General Geoffrey Cox faces backlash after saying Supreme Court judges should be quizzed by Parliament (inews.co.uk).

its actions). On 12 February 2020, Cox said (during a talk at the Institute of Government) that "*the attorney general must ensure that he gives honest, candid and independent advice to the government… it is not acceptable for an attorney general to massage or improve his advice for the purposes of party politics*";[50]

iii. In the 13 February 2020 reshuffle, Suella Braverman (MP Fareham (Con)) became Attorney-General. Braverman has since made a number of highly partisan interventions, often on questionable legal grounds;[51]

iv. In May 2020, Braverman publicly cleared Dominic Cummings of breaking lockdown rules before Durham police had completed its investigation;[52]

v. In September 2020, Braverman argued, in the Commons, that the government has the right to implement the Internal Market Bill, which (it has been agreed by most legal commentators) would constitute a breach of the UK's international law obligations.[53] Braverman's analysis was predicated on what the All Party Parliamentary Group on Democracy and the Constitution ("**APPGDC**") described as a "*very basic legal error*";[54]

vi. In November 2020, Braverman appeared to indirectly pressurise judges when she endorsed a comment from an unnamed "*friend*" (which may have been Braverman herself) claiming that, if judges ruled against her when she appeared personally in an appeal, it "*will be another example of wet, liberal judges being soft on crime*";[55]

vii. On 19 October 2021, Braverman made a speech at the Policy Exchange, in which she criticised the "*huge increase in political litigation*" and the Supreme Court for stepping into matters of "*high policy*" in the Miller judicial reviews. She also criticised various other judgements with which she disagreed in strident terms. In the same speech, the Attorney General welcomed a return to a "*more orthodox*" (i.e., more deferential) approach to judicial decision making;[56]

viii. In May 2022, Braverman advised that the government could unilaterally alter the Northern Ireland Protocol because the EU was acting in a 'disproportionately and unreasonable' manner and risked undermining the Good Friday Agreement by creating a trade barrier in the Irish Sea.[57] These conclusions were widely rejected by those in the legal sector.[58] In the process, Braverman breached a long-standing constitutional convention that the Attorney General does not disclose her legal opinion (unless required to do so by parliament). When asked on 25 May by Emily Thornberry MP to

[50] In conversation with Geoffrey Cox QC MP | The Institute for Government.
[51] The attorney general has failed in her constitutional duties, says report - Politics.co.uk.
[52] Attorney general faces calls to resign after she defends Dominic Cummings | Suella Braverman | The Guardian.
[53] Internal Market Bill prompts questions on UK's commitment to rule of law | International Bar Association (ibanet.org).
[54] SOPI+Report+FINAL.pdf (squarespace.com), at page 53.
[55] SOPI+Report+FINAL.pdf (squarespace.com), at page 22.
[56] *Ibid*.; see also 'Huge increase in political litigation': Braverman defends JR reforms | News | Law Gazette.
[57] UK can scrap parts of N.Ireland protocol, advises attorney-general - The Times | Reuters.
[58] Experts scorn UK government claim it can ditch parts of NI protocol | Brexit | The Guardian.

disclose the analysis behind her conclusions, Braverman responded with a highly personal and partisan attack;[59]

ix. On 27 May 2022, Braverman publicly told schools that they should not treat trans students as the gender with which they identify because "*under-18s cannot get a gender recognition certificate*."[60]

31. Summary of threat – Criticism of the judiciary

a. The section directly above outlines various criticisms of the judiciary made in the last few years. A catalogue of further criticism and undue pressure placed on the judiciary was compiled by the APPGDC in its report, of 8 June 2022, entitled '*An Independent Judiciary – Challenges since 2016*'.[61] Examples include:

i. In November 2016, after the Divisional Court found that parliament, not the executive, had the power to trigger Brexit, various newspapers and politicians attacked the court: the Daily Mail ran its infamous "*Enemies of the People*" headline; Sajid Javid told Question Time the decision flew in the face of democracy and was "*an attempt to frustrate the will of the British people and is unacceptable*"; Dominic Raab described the decision as "[a]*n unholy alliance of diehard Remain campaigners, a fund manager, and an unelected judiciary*" which had "*thwart*[ed] *the wishes of the British public*"; Liz Truss (then Lord Chancellor) declined publicly to defend the judges;

ii. In October 2019, the Supreme Court ruled that the Johnson government's decision to prorogue parliament for five weeks (with the effect of blocking MPs from scrutinising Brexit trade agreements) was unlawful after the government refused to give the court a reason for the prorogation. In response: Kwasi Kwarteng accused the judges of bias; a Downing Street 'unnamed source' briefed the Sun's political editor Tom Newton-Dunn that judges were "*politically biased*" (no evidence was offered other than that they had decided against the government); and Jacob Rees-Mogg described the ruling as a "*constitutional coup*";

iii. In May 2020, the Home Office wrote directly to the President of the Immigration and Asylum Tribunal appearing to attempt to influence the Tribunal to grant fewer bail applications;

iv. In August 2020, the Home Office, using official social media accounts, accused "*activist lawyers*" of frustrating deportations of immigrants. In fact, the deportations failed because the Home Office had not followed the procedure set down by the law;

v. In October 2020, the Home Secretary, Priti Patel, attacked "*do-gooders*" and "*lefty lawyers*" in a speech. In the same month a law firm suffered a 'violent, racist attack' by a knife wielding man.[62] The attack was linked to Patel's comments;

[59] Suella Braverman tried to embarrass Emily Thornberry but only exposed her complete lack of respect for scrutiny (inews.co.uk).
[60] Attorney general says schools do not have to accommodate children's gender wishes | Transgender | The Guardian.
[61] SOPI+Report+FINAL.pdf (squarespace.com) (see SOPI+Report+-+Exec+Sum+FINAL.pdf (squarespace.com) for the executive summary).
[62] 'Activist lawyers' row: government silent on alleged knife attack | News | Law Gazette.

vi. In March 2021, the 'Independent Review of Administrative Law' (set up by the executive, with a panel selected by the executive, and chaired by a former minister) concluded that there was no case for substantial reform to judicial review and did not find evidence to support legislating to address any problem of judges "*interfering*" in politics. The then Lord Chancellor, Robert Buckland, on announcing the findings, materially misrepresented them by suggesting that the IRAL had concluded: (i) there was a growing tendency for the courts in judicial review cases to "*edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made*"; and (ii) that "[t]*he reasoning of the decision makers has been replaced, in essence, with that of the court*". The IRAL's chair, Lord Faulks, had to publicly state that the Lord Chancellor had misrepresented the findings;

vii. On 21 July 2021, during a speech to the Policy Exchange, the Lord Chancellor claimed that judges were exercising more "*restraint*" after being "*encouraged*" to do so by the executive; and

viii. On 6 December 2021, a government advisor, writing in The Telegraph, accused judges of "*adhering to their own political views when interpreting the law*" and "*activist QCs*", and "*Left wing campaigners*" of using "*activist judges*" to impose social policies against the will of the electorate.

b. The APPGDC's overall conclusions were that:[63]

i. Ministers have, in attacking judges, sometimes failed to act in a constitutionally proper or in a helpful manner;

ii. The constitutional safeguards which should ensure a proper relationship between the executive and the judiciary are not sufficiently effective. In particular, the politicisation of the offices of Lord Chancellor and Attorney General, and the appointment of politicians with little or no legal experience or standing, has left the executive without a strong figure to assist ministers' understanding of their constitutional duties. Moreover, the possibility that politicians may see the offices of Lord Chancellor and Attorney General as 'stepping stones' to subsequent promotions may conflict with their constitutional duties to safeguard the independence of the judiciary;

iii. This has caused significant concerns amongst the judiciary;

iv. It may also have created the impression that the Supreme Court has been influenced by ministerial pressure (even if indirectly).

c. The APPGDC also found that:

i. "*The high number of instances in which the Supreme Court has reversed its previous position on the law, so as to adopt an approach that is more favourable to the executive, is notable. Since 1 Jan 2020 (the first judicial term after the executive intensified its rhetoric in the wake of the Miller II case), the court has made fewer than 40 public law judgments (i.e., decisions in cases in which the executive was a litigant). Generally it is relatively rare for the court to reverse its previous judgments (indeed the legal doctrine*

[63] SOPI+Report+-+Exec+Sum+FINAL.pdf (squarespace.com).

of stare decisis discourages it from doing so). It is, therefore, somewhat surprising that it has done so at least seven times in two years";[64]

d. The findings of the APPGDC were reflected in an article in the Guardian of 23 June 2022, which found that (according to their own research), "[t]*he proportion of civil judicial reviews in England and Wales, excluding immigration cases, which claimants won out of total claims lodged fell by 50% on 2020…The figure is 26% if the success rate is measured out of cases that went to a final hearing*".[65] The article went on to point out that this fall in successful challenges to government policy and decisions by public authorities indicated that the government's consistent attacks on the judiciary and lawyers were likely having a chilling effect.

32. Relevance

a. Attacks on the judiciary and legal profession that have a chilling effect on the ability of the public to challenge government policies and decisions by local authorities are clearly a serious threat to the rule of law.

b. ClientEarth and other NGOs regularly bring challenges against the government and public authorities – cases that are often at the cutting edge of emerging issues. If the judiciary feels pressurised into finding in the government's favour because of politics, rather than deciding cases on the merits of the arguments, it makes it less likely that claimants will succeed (there is also likely to be a wider chilling effect on those individuals who might bring claims). A more 'conservative' judiciary will probably be less likely to find in favour of NGOs/individuals bringing environmental claims.

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[64] SOPI+Report+FINAL.pdf (squarespace.com). at page 49.
[65] Dramatic fall in successful high court challenges to government policy | Law | The Guardian.