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Centre for International  
Governance Innovation



British Institute of  
International and  
Comparative Law

Brexit: The International Legal Implications | Paper No. 13 – February 2018

# Advancing Environmental Justice in a Post-Brexit United Kingdom

Damilola S. Olawuyi





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## About the Series

*Brexit: The International Legal Implications* is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum vote and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

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## About the Author

**Damilola S. Olawuyi** is an associate professor of petroleum, energy and environmental law at the Hamad Bin Khalifa University Law School and senior visiting research fellow at the Oxford Institute for Energy Studies, University of Oxford. He is also a chancellor's fellow at the Institute for Oil, Gas, Energy, Environment and Sustainable Development, Afe Babalola University.

A prolific and highly regarded scholar, Damilola has published several peer-reviewed articles, books and reports on climate finance, energy infrastructure and extractive resource governance. His most recent publication is *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press, 2016).

Damilola was formerly deputy director, environmental law, of the International Law Research Program at CIGI. He also previously worked as an international energy lawyer at Norton Rose Fulbright Canada LLP, where he served on the firm's global committee on extractive resource investments in Africa. He has lectured on energy and environmental law in more than 20 countries, including Australia, Canada, China, Denmark, France, Greece, India, Jordan, Kenya, Kuwait, Nigeria, Qatar, Spain, the United Kingdom and the United States.

Damilola holds a doctoral degree in energy and environmental law from the University of Oxford, a master of laws degree from Harvard University and a master's degree in natural resources, energy and environmental law from the University of Calgary.

Damilola was admitted to the bar in Alberta and Ontario, as well as in Nigeria. He serves on the executive committees and boards of the American Society of International Law (co-chair), the International Law Association and the Environmental Law Centre. He is vice-president of the International Law Association (Nigerian branch), editor-in-chief of the *Journal of Sustainable Development Law and Policy*, associate editor of the *Carbon and Climate Law Review* and associate fellow of the Centre for International Sustainable Development Law.

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## About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

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## Acronyms and Abbreviations

<b>BEIS</b>	Department for Business, Energy and Industrial Strategy
<b>CJEU</b>	Court of Justice of the European Union
<b>DEFRA</b>	Department for Environment, Food and Rural Affairs
<b>EC</b>	European Commission
<b>HRBA</b>	human-rights-based approach
<b>IEM</b>	internal energy market
<b>INDC</b>	intended nationally determined contribution
<b>NGOs</b>	non-governmental organizations
<b>PANEL</b>	participation, accountability, non-discrimination and equality, empowerment and legality
<b>PCO</b>	protective costs order
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TPCE</b>	Technical Platform for Cooperation on the Environment
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change





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## Executive Summary

This paper evaluates the possible implications of Brexit for achieving environmental justice in the United Kingdom. It discusses the need for a clear, committed and inclusive approach to environmental governance if the United Kingdom is to maintain and advance recent progress on environmental justice matters post-Brexit.

Several studies have compiled the growing evidence of environmental injustice in, and caused by, the United Kingdom. However, the rise of a robust regional governance approach to stakeholder participation, accountability, non-discrimination and equality, empowerment and legality (PANEL principles) in the European Union over the last decade has made positive impacts and has provided hope for the future of environmental justice in the United Kingdom. Furthermore, the Court of Justice of the European Union (CJEU) has provided commendable opportunities for non-governmental organizations (NGOs) and individuals to access justice on environmental matters whenever justice was inaccessible or unaffordable domestically.

The possible loss of the EU policy “backstop” on environmental justice post-Brexit raises fundamental questions about whether, and how, a stand-alone United Kingdom could guarantee and protect public rights to environmental justice with the same commitment, consistency and vigour as the European Union. Furthermore, loss of the courageous and imaginative jurisprudence of the CJEU on fundamental questions relating to the PANEL principles could stifle environmental justice in the United Kingdom. Despite these concerns, however, Brexit must not only be discussed in terms of challenges and complexities. As the UK government begins the process of clarifying how the United Kingdom’s environmental law will look post-Brexit, there are significant opportunities to revise and revitalize environmental justice mechanisms in the United Kingdom to become clear, committed and inclusive.

To advance environmental justice in the United Kingdom post-Brexit, the UK government should:

- remove legal and procedural barriers to timely and affordable access to environmental justice in the United Kingdom;

- clarify how UK courts should approach and apply decisions of EU courts and bodies post-Brexit; and
- infuse energy and climate change policies and programs with robust human rights safeguards to prevent the execution of projects that could infringe upon human rights.

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## Introduction

This paper evaluates the possible implications of Brexit for achieving environmental justice in the United Kingdom. It discusses the need for a clear, committed and inclusive approach to environmental governance, if the United Kingdom is to maintain and advance recent progress on environmental justice matters post-Brexit.

The term “environmental justice” generally encapsulates the need for countries to mitigate sources of environmental pollution, and to approach development in a manner that respects, protects and fulfills the human rights of all sectors of society, especially populations already living in vulnerable situations.<sup>1</sup> As clarified by the United Nations, the ultimate aim of a human-rights-based approach (HRBA) is to mainstream five interconnected international human rights norms and principles into development planning and decision making.<sup>2</sup> These human rights norms are as follow: participation, accountability, non-discrimination and equality, empowerment and

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1 See David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford, UK: Oxford University Press, 2007) at 1–15; see also Jonas Ebbesson, “Introduction: Dimensions of Justice in Environmental Law” in Jonas Ebbesson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge, UK: Cambridge University Press, 2009) at 4–20; Benjamin K Sovacool et al, “Energy Decisions Reframed as Justice and Ethical Concerns” (2016) *Nat Energy* 16024. See also UN, Human Rights Council, *Human Rights and the Environment*, HRC Res 16/11, UNHRCOR, 16th Sess, UN Doc A/HRC/RES/16/11 (2011), stating in its preamble that environmental damage is felt most acutely by those segments of the population already in vulnerable situations.

2 See UN Practitioners’ Portal on Human Rights Based Approaches to Programming, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, online: <<http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>> [HRBA Portal]. See also Scottish Human Rights Commission, *A Human Rights Based Approach: An Introduction*, online: <[www.scottishhumanrights.com/media/1409/shrc\\_hrba\\_leaflet.pdf](http://www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf)>.

legality (PANEL principles).<sup>3</sup> By implementing the PANEL principles in the design, approval, finance and implementation of energy and climate projects, policy makers could better develop policies that tackle environmental problems and the uneven distribution of environmental benefits and burdens, in a holistic and rights-based manner.<sup>4</sup>

Several studies have compiled the growing evidence of environmental injustice in, and caused by, the United Kingdom.<sup>5</sup> The alleged manifestations of environmental injustice in the United Kingdom include siting and concentrating development projects and factories in low-income communities,<sup>6</sup> uneven access to energy and food resources across the United Kingdom,<sup>7</sup> inadequate opportunities for stakeholder participation in project planning

and implementation,<sup>8</sup> prohibitive costs for filing environmental cases<sup>9</sup> and legislative provisions that limit access to judicial remedies for victims of environmental pollution.<sup>10</sup> The United Kingdom has also been criticized for promoting international projects that stifle environmental justice, especially in developing countries. A good example is the Aguan clean development mechanism project, authorized by the UK government, in Honduras.<sup>11</sup> Failure by the UK government to promptly withdraw authorization of the project, amid petitions and protests within and outside the United Kingdom, further accentuated gaps in the United Kingdom's domestic approach to environmental justice, in particular the lack of political commitment to integrate and safeguard human rights in energy and environmental decision making.<sup>12</sup>

However, the rise of a robust regional governance approach on environmental justice in the European Union over the last decade has made positive impacts and has provided hope for the future of environmental justice in the United Kingdom.<sup>13</sup> The European Union has one of the world's most comprehensive regimes on environmental justice and has, as a bloc, supported international environmental treaties that promote environmental justice.<sup>14</sup> For instance, the European Union has endorsed, and supported EU member states to

3 HRBA Portal, *supra* note 2.

4 *Ibid.* See also Damilola Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge, UK: Cambridge University Press, 2016) at 1–15 [Olawuyi, *Human Rights-Based Approach*]; Damilola Olawuyi, "Climate Justice and Corporate Responsibility: Taking Human Rights Seriously in Climate Actions and Projects" (2016) 34 *J Energy & Nat Res* L 27.

5 See United Nations Economic Commission for Europe (UNECE), *Draft decision VI/8k concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*, UN Doc ECE/MP.PP/2017/30 (28 July 2017) at paras 1–3 [*Draft decision VI/8k*], expressing concern that the United Kingdom has not yet met the requirements of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 28 June 1998, 2161 UNTS 447, 38 ILM 517 (entered into force 30 October 2001) [Aarhus Convention]; Ole W Pederson, "Environmental Justice in the UK: Uncertainty, Ambiguity and the Law" (2011) 31:2 *J Leg Stud* 279; Simin Davoudi & Elizabeth Brooks, *Environmental Justice and the City: Full Report* (Newcastle upon Tyne, UK: Global Urban Research Unit, Newcastle University, 2012) at 1–20; Carolyn Stephens, Simon Bullock & Alister Scott, *Environmental justice: Rights and means to a healthy environment for all* (ESRC Global Environmental Change Programme, 2001) at 1–20.

6 See Davoudi & Brooks, *supra* note 5; Stephens, Bullock & Scott, *supra* note 5; UK Department for Environment, Food and Rural Affairs (DEFRA), *Measuring Progress: Sustainable Development Indicators 2010* (London, UK: DEFRA, 2010) at 91–92, stating that populations living in low-income and deprived areas in the United Kingdom experience least favourable environmental conditions.

7 Studies indicate that more than 2.5 million homes in the United Kingdom live in energy poverty, while 20 percent of the population lack access to healthy food. See Department for Business, Energy and Industrial Strategy (BEIS), *Annual Fuel Poverty Statistics Report, 2017 (2015 Data)*, online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/639118/Fuel\\_Poverty\\_Statistics\\_Report\\_2017\\_revised\\_August.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639118/Fuel_Poverty_Statistics_Report_2017_revised_August.pdf)>; see also Patrick Butler, "More than 8 million in UK struggle to put food on table, survey says", *The Guardian* (6 May 2016); Gordon Walker & Rosie Day, "Fuel Poverty as Injustice: Integrating Distribution, Recognition and Procedure in the Struggle for Affordable Warmth" (2012) 41 *Energy Pol'y* 69.

8 See Matthew Cotton, "Fair Fracking? Ethics and Environmental Justice in United Kingdom Shale Gas Policy and Planning" (2017) 22:2 *Intl J Justice & Sustainability* 185; Helen Chalmers & John Colvin "Addressing Environmental Inequalities in UK Policy: An Action Research Perspective" (2005) 10:4 *Local Envt* 333.

9 In 2014, the Aarhus Convention Compliance Committee concluded that the cost of filing environmental actions in the United Kingdom was prohibitively expensive. See UNECE, *Draft Findings: ACCC/C/2008/33 with regard to compliance by the United Kingdom with its obligations under the Aarhus Convention* (2008), online: <[www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-27/Findings/C27DraftFindings.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-27/Findings/C27DraftFindings.pdf)>.

10 See Pederson, *supra* note 5; Chalmers & Colvin, *supra* note 8.

11 For comprehensive details of human rights violations by this project, see Damilola Olawuyi, "Aguan Biogas Project and the Government of the United Kingdom: Legal and International Human Rights Assessment" (2013) 4:3 *Queen Mary LJ* 37.

12 *Ibid.* More recently, the United Kingdom has also been accused of trying to lower environmental standards in Brazil. See "UK Trade Minister Lobbied Brazil on Behalf of Oil Giants", *The Guardian* (22 November 2017), online: <[www.theguardian.com/environment/2017/nov/19/uk-trade-minister-lobbied-brazil-on-behalf-of-oil-giants](http://www.theguardian.com/environment/2017/nov/19/uk-trade-minister-lobbied-brazil-on-behalf-of-oil-giants)>.

13 See Ian Johnston, "Will Brexit Help or Damage the Environment?", *The Independent* (27 May 2016).

14 *Ibid.* See also Chad Damro, Iain Hardie & Donald MacKenzie, "The EU and Climate Change Policy: Law, Politics and Prominence at Different Levels" (2008) 4:3 *J Contemp Eur Res* 179.

implement, the UNECE's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).<sup>15</sup> Widely considered as the model for public participation in global environmental governance, the Aarhus Convention places legal obligations on countries to protect the rights of the public to environmental information, participation and access to justice in all environmental matters.<sup>16</sup> EU members are to take necessary legislative and regulatory measures to achieve the aims of the Aarhus Convention.<sup>17</sup> As a state party to the Aarhus Convention, and a member of the European Union, the United Kingdom has made some progress in aligning its domestic legislation and project-approval frameworks with rights set out in the Aarhus Convention, in line with periodic directives and guidelines released by the European Union.<sup>18</sup>

The possible loss of the EU policy "backstop" on environmental justice post-Brexit raises fundamental questions about whether, and how, a stand-alone United Kingdom could guarantee and protect public rights to environmental justice with the same commitment, consistency and vigour as

the European Union.<sup>19</sup> Furthermore, loss of the courageous and imaginative jurisprudence of the CJEU on fundamental questions relating to the PANEL principles could stifle environmental justice in the United Kingdom.<sup>20</sup> Despite these concerns, however, Brexit must not only be discussed in terms of challenges and complexities. As the UK government begins the process of clarifying how the United Kingdom's environmental law will look post-Brexit, there are significant opportunities to revise and revitalize environmental justice mechanisms in the United Kingdom to become clear, committed and inclusive.

This paper evaluates the challenges and opportunities of Brexit for advancing environmental justice in the United Kingdom. It emphasizes the need for an inclusive governance approach, in other words, an approach that addresses barriers to the full realization and implementation of the PANEL principles, as an important aspect of consolidating progress already made on environmental justice issues in the United Kingdom.

The paper is organized into four sections. The second section develops a profile of key environmental justice challenges raised by Brexit. These challenges include the potential loss of a coordinated regional approach on environmental issues, the untangling and loss of the robust jurisprudence of EU courts and bodies on environmental justice, and the loss of the integrated electricity and energy market. The third section discusses practical opportunities and pathways provided by Brexit for the United Kingdom to review and revitalize its environmental justice programs. These include opportunities to achieve greater efficiency in decision making on environmental issues, to integrate human rights safeguards into energy and climate change

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15 EC, Commission, *Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters*, 17 May 2005, [2005] OJ, L 124/1 (in force) [Council Decision of 17 February 2005]. Aarhus Convention, *supra* note 5. See also EC, Commission, *Communication from the Commission of 24.4.2017: Commission Notice on Access to Justice in Environmental Matters*, C(2017) 2616 final, at para 24, stating that "the Aarhus Convention is an integral part of the EU legal order and binding on Member States under the terms of Article 216 (2) of the TFEU."

16 See Vera Rodenhoff, "The Aarhus Convention and its Implications for the 'Institutions' of the European Community" (2002) 11:3 Rev Eur Comp & Intl Env L 344.

17 *Council Decision of 17 February 2005*, *supra* note 15. See also article 19(1) of the *Treaty on European Union (Consolidated Version)*, 7 February 1992, [2002] OJ, C 325/5 (entered into force 1 November 1993) [TEU], which requires that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

18 See *Council Decision of 17 February 2005*, *supra* note 15 at para 24. Relevant provisions of the Aarhus Convention are implemented in England, Wales and Northern Ireland by the *Environmental Information Regulations 2004*, SI 2004/3391, and in Scotland by the *Environmental Information (Scotland) Regulations 2004*, SSI 2004/52.

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19 The United Kingdom ratified the Aarhus Convention on February 23, 2005. Consequently, the United Kingdom's obligations as a state party to the Aarhus Convention will remain intact even after a departure from the European Union. However, one key question is whether a stand-alone United Kingdom, without any EU constraint, will have the appetite and courage to implement Aarhus provisions with the same consistency and vigour as the European Union. See David Baldock et al, *The Potential Policy and Environmental Consequences for the UK of a Departure from the European Union* (London, UK: Institute for European Environmental Policy, 2016) at 1–10; Janice Mophet, *Beyond Brexit? How to assess the UK's future* (Bristol, UK: The Policy Press, 2016) at 55–56.

20 See Francis Jacobs, "The Role of the European Court of Justice in the Protection of the Environment" (2006) 18:2 J Envtl L 185, rightly noting that "the Court has performed a difficult task, if not always coherently, nevertheless imaginatively, boldly and with broadly satisfactory results." See also Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford, UK: Hart, 2013) at 1–20.

policies, and to reform environmental policies and programs to make them more inclusive. The paper concludes in the fourth section.

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## Brexit and Environmental Justice Challenges

Brexit has opened a floodgate of questions about how the United Kingdom's commitment to environmental justice may weaken or change in the wake of the United Kingdom's exit from the European Union. This section discusses three key environmental justice challenges raised by Brexit.

### Fragmentation and the Loss of a Coordinated Regional Framework on Environmental Issues

One of the most complex threats to environmental justice globally is the deep and growing divide between countries in international environmental treaty negotiations, which has, for many years, stifled and decelerated international cooperation in addressing serious global environmental challenges.<sup>21</sup> Due to divisions, bifurcations and political alignments at international levels, especially the North-North divide and the North-South divide, the process of consensus building at the international level, especially on complex issues of climate change and energy poverty, has been increasingly complicated.<sup>22</sup> Brexit, and the attendant possibility of the United Kingdom developing negotiation alignments and positions

that could be at variance with EU countries, could further exacerbate this concern.<sup>23</sup>

The European Union has played a major role in deepening environmental multilateralism, not only by developing regional responses to global environmental problems, but also by promoting common and coordinated positions for EU members in multilateral environmental treaty negotiations.<sup>24</sup> A most recent example is the Paris Agreement,<sup>25</sup> under which the European Union submitted an intended nationally determined contribution (INDC) on behalf of its member states, acting jointly.<sup>26</sup> With the United Kingdom's impending departure from the European Union, a re-evaluation of the INDC will be needed. It is still unclear how the United Kingdom and the European Union will decide to move forward on this issue. Whatever the route taken, Brexit could create further divisions in calls for collective global and regional action to protect the environment.

Second, the loss of a regional watchdog on environmental issues raises questions about whether, and how, a stand-alone United Kingdom could implement, monitor and enforce public rights to environmental justice with the same consistency and vigour as the European Union. The European Union provides guardianship, monitoring and enforcement mechanisms aimed at ensuring that member states properly implement EU legislation and directives on environmental

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21 The problem of fragmentation in international environmental law, and its implications for environmental justice, has been highlighted in several studies. See generally Carmen Gonzalez, "The North-South Divide in International Environmental Law: Framing the Issues" in Shawkat Alam et al, eds, *International Environmental Law and the Global South* (Cambridge, UK: Cambridge University Press, 2015) at 1–10; Sander Happaerts & Hans Bruyninckx, "Rising Powers in Global Climate Governance: Negotiating in the New World Order" (2013) Leuven Centre for Global Governance Studies Working Paper No 124; Radoslaw Dimitrov, "Inside UN Climate Change Negotiations: The Copenhagen Conference" (2010) 27:6 Rev Pol'y Res 795.

22 Andrew Guzman describes this as the problem of getting to "yes" in international law. See Andrew Guzman, "Against Consent" (2012) 52:4 Virginia J Intl L 748; Carmen G Gonzalez, "Bridging the North-South Divide: International Environmental Law in the Anthropocene" (2015) 32 Pace Envtl L Rev 407; Dimitrov, *supra* note 21.

23 See S Karcher & T Forth, "Carbon Markets: Which Way Forward? Essentials on Cooperation with Developing Countries" (2013) Carbon Mechanisms Rev 4, where the authors argue that the ability to form a consensus in designing the future outlook of climate instruments has already reached its limits as far as climate change negotiations are concerned; see also Gonzalez, *supra* note 22.

24 See Gracia Marin-Duran, "The Role of the EU in Shaping the Trade and Environment Regulatory Nexus: Multilateral and Regional Approaches" in Bart Van Vooren, Steven Blockmans & Jan Wouters, eds, *The EU's Role in Global Governance: The Legal Dimension* (Oxford, UK: Oxford University Press, 2013) at 342.

25 United Nations Framework Convention on Climate Change (UNFCCC), *Adoption of the Paris Agreement*, 12 December 2015, Dec CP.21, 21st sess, UN Doc FCCC/CP/2015/L.9 [Paris Agreement].

26 Latvian Presidency of the Council of the European Union, *Intended Nationally Determined Contribution of the EU and its 28 Member States* (2015), online: <[www4.unfccc.int/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf](http://www4.unfccc.int/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf)>.



issues.<sup>27</sup> Pursuant to article 211 of the Treaty on European Union (TEU),<sup>28</sup> the European Commission (EC) is to ensure that EU members apply the provisions of the TEU on all matters.<sup>29</sup> Member states are to report to the EC their implementation and enforcement action taken at the national level to achieve environmental justice. The Treaty on the Functioning of the European Union (TFEU) also empowers the EC to investigate and initiate enforcement proceedings before the CJEU against members that fail to comply with EU environmental legislation and directives.<sup>30</sup> These enforcement and compliance mechanisms of the European Union have created strong checks and balances and have provided impetus for EU member states to properly implement all EU environmental legislation. Whether the UK government will have the appetite and courage to effectively and consistently implement safeguards on access to information, participation and access to justice without any EU constraint or oversight is a key question that will have to be monitored and evaluated post-Brexit.

Third, the European Union has provided a regional platform for the exchange of ideas, best practices and knowledge on environmental issues by EU countries. Regional cooperation can help promote expertise on environmental justice and the adoption of energy efficiency best practices. For example, EU regional centres and platforms, such as the European Union Network for the Implementation and Enforcement of Environmental Law and the Technical Platform for Cooperation on the Environment (TPCE), have provided robust platforms for policy makers, environmental inspectors and enforcement officers to exchange ideas and foster the development of

enforcement structures and best practices.<sup>31</sup> It is still unclear how the United Kingdom and the European Union will decide to move forward on the issue of regional cooperation and knowledge sharing. If the United Kingdom adopts and domesticates EU environmental legislation, perhaps it could continue to access these regional centres in some capacity. In turn, the European Union may choose to restrict its platforms and resources to EU members. Another possibility is for the United Kingdom and the European Union to work together and agree to continued technical cooperation on environmental issues. In negotiating Brexit, the United Kingdom should try to avoid losing a vast network of regional knowledge-sharing platforms and institutions that have been available to it for more than 30 years.

## Untangling UK Courts from EU Jurisprudence on Access to Environmental Justice

Brexit raises two significant questions on whether and how UK courts will continue to refer to, and take into account, relevant decisions of and principles laid down in EU courts or entities, specifically with respect to access to environmental justice.

First, although not yet in effect, the EU (Withdrawal Bill) sheds some light on the future of EU legislation, regulations and decisions of the CJEU in the United Kingdom post-Brexit.<sup>32</sup> Section 6(1)(a) and (2) of the bill states that a UK court “is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court” and that a UK court “need not have regard to anything done on or after exit day” by the CJEU or another EU entity or the European Union, “but may do so if it considers it appropriate to do so.”<sup>33</sup> Section 6(4) of the bill also notes that UK courts will, in most cases, not be bound by any retained EU case law or domestic precedents based on EU law. These provisions effectively limit the continuous application and influence of CJEU principles and decisions in UK

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27 According to the European Union, in addition to any implementation and enforcement action taken at the national level, the EC fulfills the role of “Guardian of the Treaty” to ensure that states comply with EU environmental legislation. See EC, Commission, *Communication on Improving the Delivery of Benefits from EU Environmental Measures: Building Confidence through Better Knowledge and Responsiveness*, online: <[http://ec.europa.eu/environment/legal/implementation\\_en.htm](http://ec.europa.eu/environment/legal/implementation_en.htm)>.

28 TEU, *supra* note 17.

29 EC, Commission, *supra* note 27.

30 See *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, [2012] OJ, C 326/47, art 253 (entered into force 26 October 2012), arts 258–60 [TFEU].

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31 The TPCE was set up by the European Union’s European Committee of the Regions’ Commission for Environment to bring together environmental practitioners, experts and stakeholders from local and regional administrations in the European Union to foster cooperation, dialogue and knowledge exchange on key environmental issues. See EC, Commission, “Technical Platform for Cooperation on the Environment, DG Environment and the European Committee of the Regions”, online: <[http://ec.europa.eu/environment/legal/platform\\_en.htm](http://ec.europa.eu/environment/legal/platform_en.htm)>.

32 Bill 5, *European Union (Withdrawal) Bill* [HL], 2017–2019 sess (1st reading 13 July 2017), s 6 [Withdrawal Bill].

33 *Ibid.*

courts.<sup>34</sup> This means that the extensive jurisprudence of the CJEU, with respect to procedural justice in environmental matters, will only, at best, be of persuasive influence in UK courts.<sup>35</sup>

Despite its shortcomings, the imaginative and courageous jurisprudence of the CJEU has provided opportunities for NGOs and individuals to access justice, whenever justice was inaccessible or unaffordable domestically.<sup>36</sup> For example, in the Slovak Bears case,<sup>37</sup> the CJEU held that a national judge should interpret national procedural law in light of the Aarhus Convention, to the fullest extent possible so as to enable NGOs to challenge a government decision or action that is contrary to EU law. Similarly, in *European Commission v United Kingdom*, a case was brought by UK NGOs, persuading the EC to investigate UK environmental legal costs pursuant to article 9.4 of the Aarhus Convention.<sup>38</sup> This article provides that members of the public should be able to challenge environmental decisions, and the procedures for doing so shall be adequate and effective and “not prohibitively expensive.” The NGOs argued that the practice of UK courts in requiring claimants to give “cross-undertakings” resulted in high financial costs for parties seeking justice on environmental issues.<sup>39</sup> After reviewing the substantive arguments and findings of the EC, the CJEU found that the UK courts’ practice of requiring claimants to give cross-undertakings resulted in high financial costs and violated EU directives that mandate EU members to remove regulatory or legal provisions that make it difficult for citizens to access justice in environmental matters.

As a result of this ruling, UK courts have over the last few years updated costs and expenses protection

rules in environmental public law cases.<sup>40</sup> However, there is growing concern that Brexit may result in a reversal or dilution of progress made by UK courts in introducing cost caps that peg and limit the total costs of losing an environmental case in UK courts. These concerns have been fuelled by a decision of the UK government in February 2017 to scrap automatic cost caps provisions.<sup>41</sup> Under the changes, any person or organization wanting to bring a judicial review in environmental cases will not automatically receive the protection of a costs cap if the person or organization loses. According to the United Nations, these changes have moved the United Kingdom further away from achieving the tenets of environmental justice.<sup>42</sup> This procedural reversal by UK courts is one of the early warning signals that a stand-alone United Kingdom, without the constraints of the European Union’s enforcement oversight, could trigger a fundamental reversal of some of the progress made in adhering to the PANEL principles under the European Union’s regional umbrella.

Second, the provisions of the EU (Withdrawal) Bill could result in significant indeterminacy, which could further complicate environmental justice in the United Kingdom. Section 6(2) of the bill states that a UK court may only refer to anything done by EU courts or bodies post-Brexit “if it considers it appropriate to do so.”<sup>43</sup> This provision is, however, silent on when and how judges should consult EU decisions post-Brexit. The lack of clarity on the status of decisions of post-Brexit EU courts presents complex challenges for environmental justice in the United Kingdom. In the absence of a clear and comprehensive framework that mandates judges to have regard to EU case law where the dispute concerns interpretation of EU law, which provides judges with the latitude to apply the CJEU ruling if they consider it appropriate to do so, the ability of an NGO to successfully invoke relevant and applicable

34 EU case law will be treated like all other decisions of national and international courts and will not be binding on UK courts. See UK, Department for Exiting the European Union, *Enforcement and Dispute Resolution: A Future Partnership Paper* (London, UK: HM Government, 2017) at 1–3.

35 *Ibid.*

36 See Jacobs, *supra* note 20 at 203, rightly noting that “the judicial system of the EU is, among all international and transnational courts, unique in its effectiveness.”

37 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, C-240/09 [2011] ECR I-01255.

38 *European Commission v United Kingdom of Great Britain and Northern Ireland*, C-530/11, [2014] 3 WLR 853.

39 *Ibid.*

40 The Aarhus Convention is now specifically applied to costs in judicial review proceedings in England and Wales by the *Civil Procedure (Amendment) Rules 2013*, SI 2013/262, Part 45; in Northern Ireland by the *Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013*, SR & O 2013/81, which sets out specific rules for fixed protective costs orders for proceedings to which the convention applies.

41 Under the *Civil Procedure (Amendment) Rules 2017*, 2017 No 95 (L 1), cost caps are no longer fixed, and cost limits will be determined by the courts on a case-by-case basis. See also Clive Coleman, “Fears for environment as automatic legal ‘cost cap’ scrapped”, *BBC News* (28 February 2017), online: <[www.bbc.com/news/uk-39109865](http://www.bbc.com/news/uk-39109865)>.

42 See *Draft decision VI/8k*, *supra* note 5 at para 1.

43 *Withdrawal Bill*, *supra* note 32, s 6(2).



EU rulings, especially in environmental justice matters, will rest squarely on the whims or liberality of the judge or court concerned. The problem of indeterminacy and “polycentricity” has been identified in several studies as a threat to access to justice.<sup>44</sup> For instance, one of the shortcomings of climate change litigation is that while some courts have recognized the failure of government to take action on climate change as a violation of human rights, other courts have failed to recognize or apply such an expansive view.<sup>45</sup> Brexit could result in a similarly uncertain and inconsistent approach to the interpretation or application of important EU-derived domestic legislation in UK courts. This could leave the chances of obtaining remedies for PANEL principles claims to the understanding or interpretation of the adjudicating court or judge.

It remains to be seen how the United Kingdom will deal with both the problem of untangling British courts from EU courts and precedents and the indeterminacy concern. One way forward is to put in place a clear legislative requirement that UK courts should refer to, and take into account, relevant decisions of and principles laid down in the CJEU, where a dispute concerns the interpretation of EU law. While this requirement would not make EU decisions automatically applicable or binding, it would go a long way in providing some measure of certainty that UK courts will take into account the relevant and applicable jurisprudence of EU courts. It could also provide greater opportunities for a uniform interpretation and application of EU precedents in the United Kingdom. A follow-up action would be to constitute a legal or judicial committee that would constantly review decisions of UK courts post-Brexit, especially decisions relating to EU-derived domestic legislation. Constant monitoring and surveillance of post-Brexit judicial interpretations could help eliminate uncertainty and divergence in how UK courts interpret and apply EU decisions.

44 See Clive Coleman, “UK Judges Need Clarity after Brexit – Lord Neuberger”, BBC News (8 August 2017), online: <[www.bbc.com/news/uk-40855526](http://www.bbc.com/news/uk-40855526)>, with Lord Neuberger, outgoing president of the UK Supreme Court, warning that “If [the government] doesn’t express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best.”

45 For a discussion of the problems of indeterminacy of environment and climate change litigation, see Francesco Francioni, “International Human Rights in an Environmental Horizon” (2010) 21:1 Eur J Intl L 55; William CG Burns & Hari M Osofsky, eds, *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge, UK: Cambridge University Press, 2009).

## Energy Poverty Concerns and the Loss of an Integrated Energy Market

Despite its challenges, the European Union has been rightly cited in several studies as a good example of the possibility and workability of an integrated regional electricity market.<sup>46</sup> The European Union internal energy market (IEM) was created to integrate the supply and distribution of energy across the European Union.<sup>47</sup> The aim of the IEM is to address energy poverty by facilitating the availability, affordability and accessibility of energy across the European Union.<sup>48</sup> Pursuant to article 194 of the TFEU,<sup>49</sup> the IEM aims to ensure the security of energy supply in the European Union, promote energy efficiency, energy saving and the development of new and renewable energy and promote the interconnection of energy networks, so as to make it possible and easier for member states to rely on neighbour countries for the importation of the electricity they need.<sup>50</sup> To achieve these aims, the European Union’s Directive 2009/72/EC calls on all EU countries to remove obstacles to cross-border interconnections and the sale of electricity on equal terms within the European Union.<sup>51</sup> The directive also calls on member countries to work together to develop social systems to tackle energy poverty. Further, the European Council, in October 2014, called on all member states to achieve interconnection of at least 10 percent of their installed electricity production capacity by 2020 as a primary way of addressing energy poverty.<sup>52</sup>

46 Peter D Cameron & Raphael J Heffron, *Legal Aspects of EU Energy Regulation: The Consolidation of Energy Law Across Europe* (Oxford, UK: Oxford University Press, 2016) at 1–20; Tim Boersma & Michael E O’Hanlon, “Why Europe’s Energy Policy is a Strategic Success”, *Brookings* (2 May 2016); Per Ove Eikeland, “EU Internal Energy Market Policy: Achievements and Hurdles” in Vicki L Birchfield & John S Duffield, eds, *Toward a Common European Union Energy Policy: Problems, Progress, and Prospects* (New York, NY: Springer, 2011) at 13–40.

47 Eikeland, *supra* note 46. See also TFEU, *supra* note 30, art 194.

48 European Parliament, *Fact Sheets on the European Union: Internal Energy Market*, online: <[www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU\\_2.1.9.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_2.1.9.html)>.

49 TFEU, *supra* note 30, art 194.

50 European Parliament, *supra* note 48.

51 EC, Commission, *Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC*, 14 August 2009, [2009] OJ, L 211/55.

52 Council of the European Union, *Transport, Telecommunications and Energy Council* (Luxembourg, October 2014), online: <[www.consilium.europa.eu/en/meetings/tte/2014/10/08/](http://www.consilium.europa.eu/en/meetings/tte/2014/10/08/)>.

The United Kingdom has been one of the strongest voices in pushing for this integration, and has been increasing its level of dependence on imported energy in recent years.<sup>53</sup> In 2014, 45 percent of the United Kingdom's gas consumption and 6.5 percent of its electricity needs relied on imports.<sup>54</sup> Due to problems of uneven access to energy resources, the United Kingdom currently has one of the highest levels of energy poverty within the European Union.<sup>55</sup> Given this growing interdependence and the strong position that the United Kingdom has taken with regard to a unified energy market in the past, it is unlikely that the United Kingdom will want to unplug itself from the EU IEM. Isolating UK electricity systems from the integrated EU-wide energy market could exacerbate energy poverty in the United Kingdom.<sup>56</sup> Without integrated electricity infrastructure, it will be difficult for the United Kingdom to buy and sell electricity at competitive prices across borders. Brexit raises fundamental questions about whether, and how, a stand-alone United Kingdom could successfully address energy poverty challenges outside of the EU integrated energy market.<sup>57</sup>

It is still unclear how the United Kingdom and the European Union will decide to move forward on the issue of interconnection and integration of energy infrastructure. To maintain open access to its European market, the United Kingdom will have to stay compliant with a large portion of EU laws, including some environmental policy. Until an exit agreement is reached, the kind of model that will be put in place to govern the United Kingdom's future relationship with the European Union is open to

speculation.<sup>58</sup> If the United Kingdom adopts and domesticates EU energy directives and legislation, perhaps it could continue to access these regional networks in some capacity. In turn, the European Union may choose to restrict its networks and resources to EU members. Another possibility is for the United Kingdom and the European Union to work together and agree to continued technical cooperation on energy integration to address energy poverty.<sup>59</sup> Brexit could result in the isolation of UK electricity systems, a situation that could further exacerbate energy poverty concerns in the United Kingdom. Incentives for the United Kingdom to remain integrated in a European energy scheme and the Single Market are high, and this will not be a reality unless the United Kingdom is willing to continue to comply with relevant EU policies to a significant degree.

Brexit raises substantial law and governance challenges that, if not properly addressed, could threaten progress in addressing environmental injustice in the United Kingdom, most especially with respect to energy poverty, access to judicial remedies and public participation in decision-making processes. However, Brexit also provides momentous opportunities for the United Kingdom to recalibrate and revitalize its environmental justice architecture to make it more inclusive, focused and committed. The next section reviews opportunities for the United Kingdom to advance environmental justice issues post-Brexit.

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53 See UK, Department of Energy and Climate Change, "More Interconnection: Improving Energy Security and Lowering Bills" (17 December 2013), concluding that Great Britain's security of supply would be enhanced by further interconnection; see also UK, Department of Energy and Climate Change, "UK National Energy Efficiency Action Plan" (April 2014) at 1-5, online: <[https://ec.europa.eu/energy/sites/ener/files/documents/2014\\_neeap\\_united-kingdom.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2014_neeap_united-kingdom.pdf)>.

54 UK, Office of National Statistics, "UK energy: how much, what type and where from?" (15 August 2016), online: <<http://visual.ons.gov.uk/uk-energy-how-much-what-type-and-where-from/>>.

55 See BEIS, *supra* note 7; Butler, *supra* note 7; Walker & Day, *supra* note 7.

56 See Michael Grubb & Stephen Tindale, "Brexit and Energy: Cost, Security and Climate Policy Implications" (May 2016), online: UCL European Institute <[www.bartlett.ucl.ac.uk/sustainable/documents-news-events/brexit-and-energy](http://www.bartlett.ucl.ac.uk/sustainable/documents-news-events/brexit-and-energy)>; Joint Declaration by a Group of Industry Associations, "2016, time to deliver...an ambitious power market reform" (April 2016), online: <<https://windeurope.org/fileadmin/files/library/publications/position-papers/Joint-Declaration-by-a-Group-of-Industry-Associations.pdf>>.

57 See Grubb & Tindale, *supra* note 56.

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58 This arrangement could take a form similar to the relationship between Norway and the European Union. Another option would be to follow Switzerland's piecemeal approach of negotiating a multitude of agreements with the European Union on an issue-by-issue basis. See UK, *Alternatives to Membership: Possible Models for the United Kingdom Outside the European Union* (March 2016) at 16, online: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504661/Alternatives\\_to\\_membership\\_possible\\_models\\_for\\_the\\_UK\\_outside\\_the\\_EU\\_Accessible.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504661/Alternatives_to_membership_possible_models_for_the_UK_outside_the_EU_Accessible.pdf)>.

59 *Ibid.*

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# Advancing Environmental Justice in the United Kingdom Post-Brexit: Opportunities

Brexit has created an uncertain and complex outlook on the future of environmental justice in the United Kingdom. However, Brexit is not only about the United Kingdom untangling or isolating itself from the rest of the European Union. It provides the United Kingdom a chance to clarify, recalibrate and consolidate its domestic commitment to environmental justice issues post-Brexit. This section discusses three key opportunities for environmental justice created by Brexit.

## Achieve Greater Inclusiveness and Transparency in Environmental Decision Making

Brexit will trigger a range of amendments or reforms to some of the United Kingdom's extant environmental legislation, to achieve a distinctive environmental regime for the country post-Brexit.<sup>60</sup> The ensuing legislative reform process provides a chance for the United Kingdom to emerge from the Brexit process with domestic laws and institutions that strengthen and protect the right of the UK public to environmental information, participation and access to justice in all environmental matters. Brexit provides an opportunity for the United Kingdom to integrate and reinforce some of the positive lessons learned from the European Union's environmental framework on the PANEL principles, by revitalizing decision-making processes on environmental issues to make them more transparent and inclusive.

The process of determining aspects of the EU environmental framework that will be transposed to the United Kingdom must itself be inclusive. How the United Kingdom will decide to move forward on the issue of revising its post-Brexit environmental

policies and legislation is still a subject of speculation and debate.<sup>61</sup> One option is for the United Kingdom to review each piece of environmental legislation to remove or update references to EU standards in line with a UK focus. Another possibility is to keep UK domestic policies and legislation aligned with the European Union as much as is practicable to maintain consistency and to reduce market and policy instability. This would include transferring all EU legislation and directives into UK legislation, in order to ensure as much stability and continuity as possible. Whatever the route taken, the UK government must approach the task of revising its domestic environmental policy post-Brexit with as much transparency and stakeholder engagement as possible. Brexit provides a chance for the UK government to address social exclusion concerns by ensuring that all segments of society are given equal opportunities to take part in, and influence, decision-making processes on the future and outlook of UK environmental laws post-Brexit. It is only through an accountable and transparent approach that the positive implications of Brexit will be realized.

To achieve greater inclusiveness in decision-making processes on the future and outlook of UK environmental laws post-Brexit, a starting point is for the UK government to align its decision-making processes with provisions of the Aarhus Convention. This will include providing an open consultation process to ensure the voices of all members of the public can be heard. Article 2(4) of the Aarhus Convention defines the public to include individuals, NGOs, grassroots organizations, youth, women's groups, corporations and other business organizations that might be affected by environmental issues.<sup>62</sup> Article 3(9) of the Aarhus Convention also provides opportunities for the public to participate in decision making "without discrimination as to citizenship, nationality, domicile or seat of activities."<sup>63</sup> The United Kingdom can adopt this inclusive approach by publishing a schedule of when environmental laws and regulations will be reviewed and debated, and providing information on how members of the public can participate in the process.

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60 See Eloise Scottford & Megan Bowman, "Brexit and Environmental Law: Challenges and Opportunities" (2016) 27:3 Kings LJ 416; Robert G Lee, "Always Keep a Hold of Nurse: British Environmental Law and Exit from the EU" (2017) 29:1 J Envtl L 155, noting the significant workload that lies ahead in clarifying UK domestic environmental law; Colin Reid, "Brexit and the future of UK environmental law" (2016) 34:4 J Energy & Nat Res L 407.

61 *Ibid.*

62 *Aarhus Convention*, *supra* note 5.

63 *Ibid.*, art 3(9).

## Remove Procedural Barriers to Environmental Justice

As noted above, under the Aarhus Convention and the TEU, the United Kingdom undertook to ensure that members of the public would have access to procedures and processes that are fair, equitable, timely and not prohibitively expensive.<sup>64</sup> While Brexit raises challenges and questions on whether a stand-alone United Kingdom will continue to uphold this commitment, it also raises new opportunities for the United Kingdom to reform and revitalize its environmental justice institutions and processes to enhance their capabilities to deliver environmental remedies in a “fair, equitable, timely and inexpensive manner,” as stipulated in article 9(4) of the Aarhus Convention. One important step is to holistically address and remove barriers to environmental public interest litigation in the United Kingdom, especially the costs regime of UK courts.

The fixed protective costs order (PCO) litigation cap that has recently been scrapped will further increase the cost of environmental litigation in the United Kingdom.<sup>65</sup> The PCO limits, at an early stage of litigation, the amount that a litigant will have to pay to the other side if the litigation is unsuccessful.<sup>66</sup> Removing the fixed-cost protection cap creates a possible situation whereby NGOs and individuals may have to expend personal resources to challenge environmental decisions, if the court decides to vary or remove costs limits. Unless this fixed cap is reinstated, the UK cost regime could make it expensive and difficult for individuals and NGOs to challenge processes and projects that affect environmental human rights. To achieve environmental justice, the United Kingdom must ensure that the allocation of costs in environmental matters is fair, consistent and not prohibitively expensive.

Further, article 9(4) of the Aarhus Convention requires that procedures must be “timely.”<sup>67</sup> One barrier to environmental justice in the United Kingdom is the lengthy delays in the administrative

courts. Environmental cases in the United Kingdom often face a very slow process of determination, which makes it difficult for victims of environmental pollution to access justice in a timely manner.<sup>68</sup> Brexit provides an opportunity for the United Kingdom to reform and streamline its judicial processes to provide timely justice for victims of environmental pollution. One option is to establish specialist environmental tribunals and courts in the United Kingdom with jurisdiction to hear land use and environmental cases. Previous studies have examined the feasibility, in terms of the cost and impact, of establishing such specialist environmental courts in the United Kingdom.<sup>69</sup> Another proposal is to create a new environmental review jurisdiction for the Upper Tribunal to provide direct access for the timely resolution of environmental disputes.<sup>70</sup> Brexit provides fresh opportunities to revisit these proposals and consider how to address procedural delays in the process of obtaining redress for environmental harm in the United Kingdom.

## Integrate Human Rights Standards in Climate and Energy Policies and Projects

Since the first World Climate Conference was organized by the World Meteorological Organization in 1979, the United Kingdom has established

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64 Council Decision of 17 February 2005, *supra* note 15. See also TEU, *supra* note 17, art 19(1), which requires that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

65 *Supra* note 41.

66 See John Litton, *Protective Costs Orders in UK Environmental and Public Law Cases* (London, UK: Landmark Chambers, 2015) at 1–3.

67 Aarhus Convention, *supra* note 5, art 9(4).

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68 See Richard Gordon, “What’s Wrong with Judicial Review in the Aarhus Context?” (Public lecture delivered at the Centre for Law and Environment, University College London, 8 April 2015); see also Amy Street, *Judicial Review and the Rule of Law: Who is in Control?* (London, UK: The Constitution Society, 2013) at 54–56, online: <[www.consoc.org.uk/wp-content/uploads/2013/12/J1446\\_Constitution\\_Society\\_Judicial\\_Review\\_WEB-22.pdf](http://www.consoc.org.uk/wp-content/uploads/2013/12/J1446_Constitution_Society_Judicial_Review_WEB-22.pdf)>.

69 See Malcolm Grant, *Environmental Court Project: Final Report (Report to the Department of Environment, Transport and the Regions)* at 3–5, stating that a specialist environmental court would have the ability to overcome problems of high costs associated with normal civil litigation; see also George Pring & Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (United Nations Environment Programme, 2016) at iv–x.

70 The Upper Tribunal is an appellate body under the UK administrative justice system. It hears appeals against decisions of lower administrative tribunals in the United Kingdom and has the status of a superior court of record. The tribunal currently consists of four chambers, structured around subject areas of administrative appeals: tax and chancery, lands, and immigration and asylum. Creating a new environmental chamber could provide a timely and accessible path for the UK public to seek and obtain redress for environmental harm. See the *Tribunals, Courts and Enforcement Act 2007* (UK), c 15, ss 3–12; see also Gordon, *supra* note 68, arguing that the Upper Tribunal could provide a more effective forum for Aarhus legal challenges than conventional courts. See also Brian J Preston, “Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study” [2012] 29 Pace Envtl L Rev at 396, 398, stating that a court with special expertise in environmental matters is best suited to advance environmental justice.



itself as a leader in international climate change diplomacy.<sup>71</sup> Apart from playing a major part in shaping the European Union's commitments to negotiations under the UNFCCC, the United Kingdom has frequently matched its international climate diplomacy with commendable domestic action.<sup>72</sup> However, one aspect of the UK climate change response that has yet to be aligned with the international climate regime is the requirement to address the human rights impacts of climate change mitigation and adaptation projects and policies.

The twenty-first Conference of the Parties to the UNFCCC in Paris recognized, in the Paris Agreement, that parties should, "when taking action to address climate change, respect, promote and consider their respective obligations on human rights."<sup>73</sup> This includes the rights of Indigenous peoples, local communities and people in vulnerable situations.<sup>74</sup> Without an environmental justice perspective, projects and actions designed to combat climate change risk exacerbating social exclusions, land grabs and human rights concerns within the United Kingdom and internationally.<sup>75</sup>

Despite progress made in addressing climate change in the United Kingdom, several questions remain on the implications of energy and climate policies and projects on the enjoyment of fundamental human rights, especially in vulnerable and low-income communities. As noted earlier, human rights concerns, such as a lack of adequate information on climate policies and projects, inadequate stakeholder consultation and uneven access to energy and food resources across the United Kingdom are threats to environmental justice that must be holistically addressed.<sup>76</sup> Although the Department for Business,

Energy and Industrial Strategy (BEIS)<sup>77</sup> and the Foreign & Commonwealth Office have provided great leadership in international climate change negotiations and diplomacy, more work needs to be done domestically to address human rights gaps in the design, approval and implementation of climate and energy projects in the United Kingdom.

Brexit provides an opportunity for the United Kingdom to revitalize and reform domestic climate change legislation and policies to incorporate robust human rights safeguards. The BEIS department must examine the implications of climate and energy policies and projects on human rights in the United Kingdom. Human rights standards and principles should inform and strengthen policy measures on climate change.<sup>78</sup> Decision-making processes that have excluded poor and vulnerable communities must be reformed to be more inclusive, based on the PANEL principles.<sup>79</sup>

The UK government could approach the task of revising UK climate change policy post-Brexit with equal or greater ambition than what is in place in the European Union. Climate change responses could reflect the renewed global consensus on the need to respect human rights in all climate actions. To advance this objective, the United Kingdom could develop robust legal and institutional frameworks that fully mainstream and integrate human rights standards into the design, approval, finance and implementation of energy projects.<sup>80</sup> This would ensure that human rights and climate change obligations are coherently and systemically integrated, to avoid overlap, inefficiency and waste of resources.

As the United Kingdom evaluates and establishes its distinctive environmental policies and agenda post-Brexit, the ensuing legislative restructuring process provides great opportunities for the United Kingdom to develop and implement a clear, transparent and inclusive framework on

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71 See John W Zillman, "A History of Climate Activities" (2009) 58:3 World Meteorological Org Bull; see also Clea Kolster & Sophie Smith, "The UK Post-Brexit: A Leader in Climate Change Diplomacy?" (2017) Imperial College London Discussion Paper at 1–2.

72 See Kolster & Smith, *supra* note 71.

73 See *Paris Agreement*, *supra* note 25.

74 *Ibid.*

75 See Damilola Olawuyi, "Advancing Climate Justice in International Law: Potentials and Constraints of the United Nations Human Rights Based Approach" in Randall S Abate, ed, *Climate Justice: Case Studies in Global and Regional Governance Challenges* (Washington, DC: Environmental Law Institute Press, 2016) at 1–10; Robin Bronen, "Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine" (2011) 35 NYU Rev L & Soc Change 357.

76 See *Draft decision VI/8k*, *supra* note 5; Pedersen, *supra* note 5; Davoudi & Brooks, *supra* note 5; Stephens, Bullock & Scott, *supra* note 5.

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77 Formerly known as the Department of Energy and Climate Change.

78 Open letter from Navanethem Pillay, UN High Commissioner for Human Rights, to all permanent missions in New York and Geneva (30 March 2012), online: <[www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf](http://www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf)> [Pillay Open Letter]; see also United Nations Regional Information Centre for Western Europe, "Pillay urges states to inject human rights into Rio+20" (19 April 2012), online: <[www.unric.org/en/latest-un-buzz/27492-pillay-urges-states-to-inject-human-rights-into-rio20](http://www.unric.org/en/latest-un-buzz/27492-pillay-urges-states-to-inject-human-rights-into-rio20)>.

79 Pillay Open Letter, *supra* note 78.

80 Olawuyi, *Human Rights-Based Approach*, *supra* note 4.

environmental justice issues post-Brexit.<sup>81</sup> A good starting point is to provide transparent opportunities and a timetable for members of the public to take part in and influence decision-making processes on the future of UK environmental regulation post-Brexit. The UK government must also remove barriers to participation, such as a lack of easy access to meeting venues, complex voting processes or a lack of proper information on deliberations. A useful approach is to disclose a detailed agenda of how environmental legislation and regulations will be evaluated and then provide online platforms for stakeholders to participate in and influence final outcomes.

Similarly, legislative re-evaluations that will occur in the United Kingdom over the next few years as a result of Brexit provide excellent opportunities for the United Kingdom to generally reinvigorate its overall environmental legislation and programs with human rights safeguards and obligations, in accordance with the PANEL principles. Human rights could be integrated into the work, processes and budgets of UK environment and climate change institutions in order to address issues of social exclusion, energy poverty, costs barriers to environmental litigation and inadequate opportunities for low-income communities to participate in and influence decision-making processes. This could include integrating human rights safeguards into extant legislation and policies in the United Kingdom to reflect an emphasis on the importance of implementing climate and energy policies and projects in a manner that respects human rights.

Finally, an equally important step would be to establish an independent environmental standards watchdog to monitor and assess environmental justice issues in the United Kingdom post-Brexit.<sup>82</sup> An environmental watchdog, with a direct mandate, independence and funding to continually evaluate and report on how government agencies and departments are complying with the PANEL principles, could help identify and address social

exclusion concerns in energy policies and projects. A good example is the Canadian Commissioner of the Environment and Sustainable Development, an independent environmental watchdog, housed within the Office of the Auditor General of Canada.<sup>83</sup> The commissioner has legislative powers to launch independent assessments as to whether federal government departments are meeting their sustainable development objectives. Consequently, incumbents have been able to pursue their mandates independently and address complaints from the public. To advance and deliver environmental justice programs in the United Kingdom post-Brexit, similar institutions could be established.

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## Conclusion

Brexit creates a complex and uncertain outlook on the future of environmental justice in the United Kingdom. However, the ensuing legislative re-evaluations that will occur in the United Kingdom over the next few years as a result of Brexit equally provide opportunities for the United Kingdom to develop and implement a clear, committed and inclusive framework on environmental justice issues post-Brexit. This approach will focus on removing legal and procedural barriers to the delivery of environmental justice programs in the United Kingdom. It will also mean clarifying how UK courts should approach and apply decisions of EU courts and bodies post-Brexit. Further, great emphasis could be placed on infusing energy and climate change policies and programs with robust human rights safeguards to prevent the execution of projects that could infringe upon human rights.

Revitalizing UK environmental laws and institutions to achieve environmental justice will come with considerable costs. This would include the cost of achieving wider public participation, establishing new institutions and expanding current institutions, including staffing, training

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81 See also the 2017 UNECE decision calling on the United Kingdom to establish a clear, transparent and consistent framework to implement the provisions of the Aarhus Convention: *Draft decision VI/8k*, *supra* note 5.

82 The UK government will have to deliver on its promise to establish an environmental watchdog post-Brexit. See Charlotte Ryan, "U.K. Environment Secretary Promises Green Brexit With Watchdog", *Bloomberg* (12 November 2017), online: <[www.bloomberg.com/news/articles/2017-11-12/u-k-environment-secretary-promises-green-brexit-with-watchdog](http://www.bloomberg.com/news/articles/2017-11-12/u-k-environment-secretary-promises-green-brexit-with-watchdog)>.

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83 See Office of the Auditor General of Canada, *Reports to Parliament, "Commissioner of the Environment and Sustainable Development Reports"*, online: <[www.oag-bvg.gc.ca/internet/English/parl\\_lp\\_e\\_901.html](http://www.oag-bvg.gc.ca/internet/English/parl_lp_e_901.html)>.



and program funding.<sup>84</sup> To reduce the cost of an HRBA, the United Nations emphasizes the importance of eliminating institutional overlaps and fragmentation, improving institutional coordination and building on existing capacities and resources.<sup>85</sup> Further research is, therefore, necessary to understand how human rights and environment agencies in the United Kingdom can be restructured and strengthened to better monitor, assess and report on social exclusion issues in energy policies and projects in a coordinated manner. The Scottish Human Rights Commission, for example, is already spearheading significant efforts in mainstreaming a rights-based framework in decision making in various sectors in Scotland.<sup>86</sup> It will be important to examine how lessons learned from the Scottish human rights mainstreaming effort could inform and strengthen the robust implementation of the PANEL principles across the United Kingdom.

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84 See Grant, *supra* note 69 at 3–5; Christopher McCrudden, “Mainstreaming Human Rights” in Colin Harvey, ed, *Human Rights in the Community: Rights as Agents for Change* (Oxford, UK: Hart, 2005) at 9–26.

85 HRBA Portal, *supra* note 2; United Nations Population Fund, “A Human Rights-Based Approach to Programming: Practical Implementation Manual and Training Materials” (2014) at 165, online: <[http://hrbaportal.org/wp-content/files/UNFPA\\_HRBAto-Programming\\_2014.pdf](http://hrbaportal.org/wp-content/files/UNFPA_HRBAto-Programming_2014.pdf)>.

86 Scottish Human Rights Commission, “PANEL principles”, online: <[www.scottishhumanrights.com/rights-in-practice/human-rights-based-approach](http://www.scottishhumanrights.com/rights-in-practice/human-rights-based-approach)>.

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## About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

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Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

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## About BIICL

BIICL is a leading independent research centre in the fields of international and comparative law. For more than 50 years, its aims and purposes have been to advance the understanding of international and comparative law; to promote the rule of law in international affairs; and to promote their application through research, publications and events.

BIICL has significant expertise both in conducting complex legal research, and in communicating it to a wider audience. Its research is grounded in strong conceptual foundations with an applied focus, which seeks to provide practical solutions, examples of good practice and recommendations for future policy changes and legal actions. Much of the research crosses over into other disciplines and areas of policy, which requires it to be accessible to non-lawyers. This includes, for example, drafting concise and user-friendly briefing papers and reports for target audiences with varying levels of experience of the law.



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