

The Legal Architecture of Environmental Justice: Incorporating the Aarhus Convention through the Environmental Rights Bill

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ABSTRACT

This article has two central objectives: to evaluate (i) the implementation of the Aarhus Convention into domestic law and (ii) the effectiveness of the potential incorporation of the Aarhus Convention through the proposed Environmental Rights Bill. The UK has ratified the Aarhus Convention, but it is only empowered in part through the matrix of retained EU law; there remains little substantive or procedural direct incorporation. The politico-legal framework arguably positions the UK in a state of non-compliance with the Convention which has resulted in complaints to the Aarhus Convention Compliance Committee. Communicants have alleged that (i) there is no effective framework to review the substantive legality of a decision which impacts the environment, (ii) there is no effective framework for public participation in the drafting of rules which may significantly affect the environment, (iii) there is no adequate framework to protect claimants from prohibitive costs, and (iv) environmental defenders face persecution for attempting to secure the right to a healthy environment. Applying a critical environmental justice lens, this article argues that full and effective implementation of the Aarhus Convention is necessary, and the proposed Environmental Rights Bill would empower the Aarhus Convention domestically, effectively strengthening environmental rights, democracy, and stewardship.

Keywords: Aarhus Convention, public participation, environmental judicial review, standing, costs.

I. INTRODUCTION

In the UK, air pollution is linked to 64,000 premature deaths annually.¹ No rivers are free from chemical contamination, often combining the worst of sewage, agricultural runoff, and plastic pollution.² The UK is one of the most nature-depleted countries in the world,³ and the

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¹ Environment, Food and Rural Affairs Committee, *Air Quality and Coronavirus* (HC 2019–21, 468).

² Environmental Audit Committee, *Water Quality in Rivers* (HC 2021–22, 74).

³ Environmental Audit Committee, *Biodiversity in the UK: Boom or Bust?* (HC 2021–22, 136).

Planning and Infrastructure Act 2025 (PIA 2025) threatens to further erode protections for nature.⁴ The Government is not on track to meet its environmental commitments.⁵ It ordinarily takes sustained civil society mobilisation to prevent the expansion of fossil fuel extraction.⁶ The UK is a party to the Paris Agreement, which established the target of limiting global mean temperatures to 1.5°C above pre-industrial levels, yet 2024 was the hottest year on record, with global mean temperatures 1.6°C above pre-industrial levels,⁷ and the UK will need to do more to meet its nationally determined commitments to reduce greenhouse gas emissions.⁸

In a landmark ruling on the 3rd July 2025, the Inter-American Court of Human Rights unanimously held that a climate emergency exists, and, by a 5-2 majority, recognised a right to a healthy climate and corollary duties on State parties.⁹ On the 23rd July 2025, the International Court of Justice handed down an advisory opinion on climate change (the ‘ICJ Advisory Opinion’), ruling, *inter alia*, that States have legally binding obligations under customary international law to mitigate their greenhouse gas emissions, and that breach of these duties can trigger State responsibility.¹⁰

In the light of the existential threat posed by the climate crisis to people and planet, and evolving obligations on States in that regard, this article has two central objectives: to critically evaluate (i) the implementation of the Aarhus Convention into domestic law and (ii) the effectiveness of the potential incorporation of the Aarhus Convention through the proposed Environmental Rights Bill.

A. THE AARHUS CONVENTION AND THE ENVIRONMENTAL RIGHTS BILL

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the ‘Convention’), to which the UK is a signatory, provides procedural rights through three pillars, namely access to environmental information,¹¹ public participation in environmental decision-making,¹² and access to justice in environmental matters.¹³ Scholars suggest that Article 1 of the Convention (the objective being to ‘contribute to the protection of the right of every person of present and future

⁴ ‘OEP Welcomes Proposed Amendments to the Planning and Infrastructure Bill’ (OEP, 17 July 2025) <<https://www.theoep.org.uk/report/oep-welcomes-proposed-amendments-planning-and-infrastructure-bill>> accessed 6 April 2026. The letter states: ‘We are clear that even after the material amendments the Government proposes, the Bill would, in some respects, lower environmental protection on the face of the law’.

⁵ Office for Environmental Protection, *Progress in Improving the Natural Environment in England 2024/2025* (2026).

⁶ By way of example, see: *R (Finch) v Surrey County Council & Ors* [2024] UKSC 20; *South Lakes Action Against Climate Change v Secretary of State for Levelling Up, Housing & Communities & West Cumbria Mining Ltd* [2024] EWHC 2349 (Admin).

⁷ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS No 54113; ‘2024 Was the Warmest Year on Record, Copernicus Data Show’ (ECMWF, 10 January 2025) <<https://www.ecmwf.int/en/about/media-centre/news/2025/2024-was-warmest-year-record-copernicus-data-show>> accessed 26 April 2026. Note that the limit relates to a 20-year average.

⁸ Climate Change Committee, *Progress in Reducing Emissions – 2025 Report to Parliament* (2025).

⁹ *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25, Inter-American Court of Human Rights (May 2025) [813]; [298-316].

¹⁰ *Obligations of States in respect of Climate Change* (Advisory Opinion) 2025 <<https://www.icj-cij.org/case/187>> accessed 26/7/25 (the ‘ICJ Advisory Opinion’).

¹¹ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (the ‘Aarhus Convention’). Any articles refer to the Aarhus Convention unless otherwise stated.

¹² Aarhus Convention (n 11) arts 6, 7, 8.

¹³ *ibid* art 9.

generations to live in an environment adequate to his or her health and well-being') could encode a substantive right to a healthy environment.¹⁴ Although this right would primarily take effect as a moral claim, owing to its ambiguity, it would also guide the construction of the Convention's procedural rights. Treaties should be interpreted in the light of their object and purpose.¹⁵ Moreover, a 'living instrument' approach may be appropriate for environmental human rights treaties because of their importance and so that they can respond to rapidly changing times and developing legal problems.¹⁶ The Aarhus Convention Compliance Committee (ACCC) is an arm of United Nations Economic Commission for Europe (UNECE), and is the authority responsible for maintaining compliance amongst the Convention's 47 signatories.¹⁷

Barritt offers a framework for the Convention's purposive construction; she identifies environmental democracy, environmental rights, and environmental stewardship as the Convention's purposes, and suggests that the Convention should be interpreted in the light of them.¹⁸ Kelleher notes that amongst these purposes is executive accountability in environmental matters.¹⁹ In theory, the objectives of the Convention could be mapped to the pillars of critical environmental justice (CEJ),²⁰ including intersectionality,²¹ multi-scalarity,²² a deeper engagement with the embeddedness of social inequality, reckoning with the need for transformative, rather than reformist, approaches to change,²³ and the adoption of more extensively participatory methods, which are inclusive of both human and non-human actors²⁴ and necessary for the production of sustainable and resilient futures.²⁵ This article focuses on the Aarhus Convention because of its ambition. Moreover, the Convention recognises that environmental problems require special legal solutions. In the face of climate emergency and ecological degradation, the Convention, through proper incorporation, can strengthen the foundations of environmental rights, environmental democracy, and environmental stewardship, which are integral to an effective strategy to address exigent environmental challenges.

The Environmental Rights Bill (ERB), as proposed by Wildlife-Countryside Link and drafted by David Wolfe KC and Kate Cook of Matrix Chambers, enshrines the Convention

¹⁴ D R Boyd, 'Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in J H Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 18, 23.

¹⁵ E Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart Publishing 2020) 154.

¹⁶ *ibid* 25; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(2) provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (emphasis added).

¹⁷ 'Mission' (UNECE) <<https://unece.org/mission>> accessed 16 July 2025.

¹⁸ Barritt (n 15) 21-38.

¹⁹ O Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2022) 34 *Journal of Environmental Law* 107, 110.

²⁰ D N Pellow, *What is Critical Environmental Justice?* (2nd edn, Polity Press 2025).

²¹ P Mohai, D Pellow, and J T Roberts, 'Environmental Justice' (2009) 34 *Annual Review of Environment and Resources* 405-430; N Seymour, *Strange Natures: Futurity, Empathy, and the Queer Ecological Imagination* (University of Illinois Press 2013); K Best, C Adams and J Vickery, *Animals and Women: Feminist Theoretical Explorations* (Duke University Press 2007).

²² A Herod, *Scale* (Routledge 2011); J Sze, 'Scale' in J Adamson, W A Gleason and D N Pellow (eds), *Keywords for Environmental Studies* (New York University Press 2016) 178-84.

²³ M Smith, *Against Ecological Sovereignty: Ethics, Biopolitics, and Saving the Natural World* (University of Minnesota Press 2011).

²⁴ Pellow (n 20) 30-34 discusses human and more-than-human indispensability.

²⁵ *ibid* 19.

into law. It does so by conferring a right of access to environmental information (Part 2), a right to public participation in environmental decision-making (Part 3), and a right of access to environmental justice (Part 4).²⁶ The ERB also enshrines a fundamental right to a clean, healthy, and sustainable environment for everyone, including the public's right to secure this right without fear of penalisation, persecution, or harassment (Part 1).²⁷ The ERB envisages a framework for a system of guarantees that is distinct from, but complementary to, the protections afforded under the Human Rights Act 1998. This is because there are only limited environmental protections arising under it, and the Aarhus Convention provides for specific mechanisms through three procedural pillars which require their own legislative solutions.²⁸ The ERB is a civil society initiative and the Bill has not been introduced into Parliament, but this article argues that the ERB would be an effective measure, if introduced, to bring the UK into compliance with the Convention and mitigate environmental harm.

Adopting a socio-legal methodology,²⁹ this article contributes to the literature by evaluating the need for incorporating the Convention in the UK and the effectiveness of the ERB as the proposed means. It also touches on environmental obligations in the light of critical advisory opinions from various apex courts, and responds to recent ACCC correspondence with potential ramifications for environmental law in the UK.

B. THE POLITICO-LEGAL FRAMEWORK

The UK operates under a dualist framework which separates international and domestic law. To give international law domestic legal effect, Parliament must incorporate international legal principles through statute, or the interpretation of an international legal instrument must be relevant to the application of domestic law.³⁰ Despite being a signatory to the Convention, the Convention only enjoys partial incorporation in the UK, mostly through the matrix of retained EU legislation post-Brexit.³¹ There is no statutory reference to the procedural rights provided by the Convention. When the UK exited the EU, the Convention's procedural rights did not enjoy full incorporation into EU law. It is notable that the public participation pillar of the Convention was expressly incorporated only in part into EU law pre-Brexit,³² mainly by Directive 2003/35/EC which focuses on Article 7 of the Convention, and the ACCC has since found that the UK has failed to implement Article 8, which requires a system of effective public participation in the drafting of rules which may significantly affect the environment.³³ Arguably, more should have been and should still be done by the EU to fully implement the Convention into EU law.³⁴

²⁶ 'Environmental Rights Bill' (Wildlife and Countryside Link, September 2024) <<https://www.wcl.org.uk/environmentalrightsbill.asp>> accessed 3 July 2025. Any clauses refer to the Environmental Rights Bill, unless otherwise stated.

²⁷ Aarhus Convention (n 11) arts 1, 3(8).

²⁸ Environmental Rights Bill (n 26) [75].

²⁹ R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005).

³⁰ *Occidental Exploration Production Co v Republic of Ecuador* [2005] EWCA Civ 1116, [2006] QB 432.

³¹ Aarhus Convention (n 11); Freedom of Information Act 2000 s 74; Environmental Information Regulations 2004 (SI 2004/3391); Retained EU Law (Revocation and Reform) Act 2023; Civil Procedure Rules 1998, Part 45 Section VII; see also James Maurici KC, 'The Status of the Aarhus Convention in English Law in 2023' (Landmark Chambers, 2023) <<https://www.landmarkchambers.co.uk/news-and-cases/5-the-status-of-the-aarhus-convention-in-english-law-in-2023>> accessed 14 July 2025.

³² A Lidbetter and N Depani, 'The Aarhus Convention and Judicial Review' (2014) 19 *Judicial Review* 30.

³³ UNECE, 'Findings and Recommendations with Regard to Communication ACCC/C/2017/150 Concerning Compliance by the United Kingdom' (3 October 2025) (ACCC/C/2017/150).

³⁴ Commission, 'Aarhus Convention Implementation Report' COM (2025) 4316 Final.

The primary mechanism of access to justice or executive accountability in the UK is judicial review (JR). The themes discussed below emerge from recent complaints of non-compliance with the Convention, the Convention's purposes, and domestic legal norms.³⁵ Recent non-compliance complaints concerning the UK include the lack of substantive review in JR,³⁶ a failure to properly implement a system of effective public participation in the drafting of rules,³⁷ prohibitive costs for bringing a JR challenge,³⁸ and the treatment of environmental defenders.³⁹

It is important that there is a robust mechanism to review the substantive and procedural legality of executive decisions in order to preserve the rule of law and prevent the misapplication of executive authority. There are, conceptually, three heads of challenge under which a JR may proceed: illegality, irrationality, and procedural impropriety. Illegality may involve a challenge to a decision where the decision-maker has misunderstood a legal instrument which they were required to apply,⁴⁰ or where a decision-maker has taken a decision outside of their powers.⁴¹ Irrationality, through *Wednesbury* review,⁴² may involve a challenge to a decision which is so unreasonable or has been made so unreasonably such that no reasonable decision-maker could have reached that decision or made it in that way.⁴³ Procedural impropriety may, for instance, involve a challenge to a decision where a public-authority has induced a legitimate expectation, by way of clear representation, that it will take a decision in a particular way in accordance with a certain instrument, and then it has not done so accordingly.⁴⁴

Scientific uncertainty presents difficulties for *Wednesbury* review;⁴⁵ the courts are inclined to defer to expert decision-makers on matters of scientific uncertainty.⁴⁶ It is for the judiciary to review the decision-maker's interpretation of the law, but it does not step into the shoes of the decision-maker and render its own decision because it lacks the scientific expertise or democratic mandate to do so. Clause 14 ERB would require that the Secretary of State propose to establish environmental tribunals which could undertake merits review by being

³⁵ Barritt (n 15).

³⁶ UNECE, 'Communication to the Aarhus Convention Compliance Committee submitted by Royal Society for the Protection of Birds, Friends of the Earth (England, Wales and Northern Ireland), Friends of the Earth Scotland, and Leigh Day Solicitors' (7 December 2017) (ACCC/C/2017/156).

³⁷ ACCC/C/2017/150 (n 33).

³⁸ UNECE, 'Findings and Recommendations with Regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom' (14 February 2011) (ECE/MP.PP/C.1/2010/6/Add.3).

³⁹ M Forst, 'Letter to His Excellency Mr David Lammy MP, Secretary of State for Foreign, Commonwealth and Development Affairs of the United Kingdom' (29 January 2025) (Annex 7 to Referral ACCC/SR/R/2025/1, United Kingdom).

⁴⁰ *Hopkins Homes Ltd v Secretary of State for Communities and Local Government & Anor* [2017] UKSC 37.

⁴¹ For example, pursuant to *R (Bridgerow Limited) v Cheshire West and Chester Borough Council* [2014] EWHC 1187 (Admin), a local authority will act unlawfully where it has adopted a scheme of delegation, and it has not taken a decision in accordance with the adopted scheme.

⁴² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁴³ *Tesco Stores Ltd v Secretary of State for the Environment & Anor* [1995] 1 WLR 759; 2 All ER 636.

⁴⁴ *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) is an example in the environmental context.

⁴⁵ C Caine and R Broadbent, 'The Scrutiny of Scientific Evidence by UK Courts in Environmental Decisions: Legality, the Fact-Law Distinction, and (Sometimes) Self-Limiting Review' in M Eliantonio, E Lees and T Paloniitty (eds), *EU Environmental Principles and Scientific Uncertainty before National Courts – The Case of the Habitats Directive* (Bloomsbury, 2023) ch 5, 97–118.

⁴⁶ *R (Plan B Earth) v Secretary of State for Transport* [2019] EWHC 1070 (Admin).

equipped with members which have not only legal, but scientific and local expertise as well, tackling complaints of non-compliance.⁴⁷

Civil society should be able to contribute to the production of the law and challenge its application where it creates injustice. Yet studies suggest that there are hostile politico-legal opportunity structures for Non-Governmental Organisations (NGOs) in the UK.⁴⁸ This article argues that there is no clear, transparent, or consistent framework which enables civil society to meaningfully contribute to the production of rules which may have a significant effect on the environment. This is demonstrated by (1) the drafting of the legislation for the UK to exit the European Union, where no draft text was published in advance, precluding meaningful public comment and response, and (2) this Government's insistence on pushing the PIA 2025 through Parliament, draft text of which was also not published before introduction into Parliament, and which achieved royal assent despite it being the view of experts and members of civil society that it would reduce the levels of environmental protection on the face of the law, arguably with little benefit.⁴⁹

The 'loser pays' system in the UK exposes claimants to the risk of prohibitive costs which can have a chilling effect on NGO legal mobilisation.⁵⁰ Cost Capping Orders in public interest proceedings do not apply to environmental litigation, which are covered instead by CPR r.46.⁵¹ *Holgate IJ* in the Court of Appeal recently recalibrated the scope of Aarhus costs protection under Article 9(3), restricting protection to cases where legal provisions of national law relating to the environment, and its protection or regulation, are contravened; previously, non-planning statute concerning, for example, the regulation of trade, which required that regard was had to a material consideration which was environmental in effect, such as the Paris Agreement, could engage Article 9(3).⁵² The ERB proposes to strengthen the Environmental Costs Protection Regime (ECPR) by imposing costs on the public authority if a public authority fails to act in accordance with the right to a healthy environment or where a party

⁴⁷ Caine and Broadbent (n 45) 115.

⁴⁸ L Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 *Law & Society Review* 523–556.

⁴⁹ ACCC/C/2017/150 (United Kingdom) (n 33); Chartered Institute of Ecology and Environmental Management (CIEEM), 'Comment on the Planning and Infrastructure Bill 2025' (18 March 2025) <<https://cieem.net/wp-content/uploads/2025/03/CIEEM-Comment-on-Planning-and-Infrastructure-Bill-2025-FINAL.pdf>> accessed 1 August 2025; CIEEM, 'The Planning and Infrastructure Act 2025 Is Here – But the Fight for Nature Is Far from Over' (18 December 2025) <<https://cieem.net/the-planning-and-infrastructure-act-2025-is-here-but-the-fight-for-nature-is-far-from-over/>> accessed 6 April 2026; 'Environmental experts, senior lawyers and former regulators repeatedly warned that the reforms would reduce levels of environmental protection, with one prominent barrister describing them as a "licence to kill nature". Concerns were also raised about new limits on judicial review, further constraining the ability to challenge environmentally damaging decisions. To add to this, the Act is highly unlikely to speed up housebuilding as many other factors hold up construction'.

⁵⁰ L Vanhala, 'Is Legal Mobilisation for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organisations in the United Kingdom, France, Finland, and Italy' (2018) 51(3) *Comparative Political Studies* 380–412.

⁵¹ Cost Capping Orders made pursuant to ss 88–90 Criminal Justice and Courts Act 2015; The Environmental Costs Protection Regime (ECPR) incorporates Article 9(4), which prohibits 'prohibitively expensive' litigation costs, limiting costs exposure to £5,000 for individuals, £10,000 for organisations, and £35,000 for defendants. Article 9(1) of the Convention covers environmental information cases, and Article 9(2) of the Convention covers environmental impact assessment cases. Article 9(3) broadly purports to cover all acts or omissions which 'contravene ... national law relating to the environment'. See *Venn v SSCLG* [2015] 1 WLR 2328; and *Austin v Miller Argent (South Wales) Limited* [2015] 1 WLR 62 for a discussion on the traditional construction of these articles.

⁵² *HM Treasury & Anor v Global Feedback Limited* [2025] EWCA Civ 624 [132]–[150].

argues that a putative challenger should not be granted permission to challenge an environmental decision and then permission is subsequently granted.⁵³

Purposively, protections for environmental defenders securing the right to a healthy environment exist on the continuum of public participation—in the sense that environmental defence and protest, even where they take the form of direct action, are manifestations of such participation—and are thus within the scope of the Convention.⁵⁴ Clause 5 ERB provides express protections for environmental defenders. Critical for environmental stewardship, relaxed standing rules generally permit NGOs to challenge decisions by way of JR. The ERB could be strengthened by including express provisions which replicate Articles 9(2) and 2(5) of the Convention which, together, may permit a wider, ‘inclusive’ interpretation of standing by enabling those likely to be affected by a decision which causes harm to nature to challenge it.⁵⁵

This article shall address the main issues which emerge from the politico-legal framework, recent complaints of non-compliance, and the Convention’s purposes. Those themes are: the review of substantive legality in environmental decisions (Chapter II), civil society mobilisation under the Aarhus Convention (Chapter III), and environmental stewardship empowering people and nature (Chapter IV).

II. REVIEW OF SUBSTANTIVE LEGALITY IN ENVIRONMENTAL DECISIONS

The right to challenge the legality of a decision made by a public body protects people from the abuse of executive power, safeguards the rights and freedoms of individuals, and upholds the rule of law. Civil society must be able to rely upon JR to hold the executive to account because there is no other remedy of last resort. Article 9(2) of the Convention requires ‘...access to a review procedure...to challenge the substantive and procedural legality of any decision’.⁵⁶ This section shall consider how this right applies in practice domestically, particularly when faced with scientific uncertainty, and how the courts should apply the precautionary principle. It will then evaluate the effectiveness of environmental tribunals as would be proposed by Clause 14 ERB.⁵⁷

A. CALIBRATING THE STANDARD OF SUBSTANTIVE LEGAL REVIEW IN ENVIRONMENTAL CASES

There ought to be an effective review procedure for the substantive legality of environmental decisions taken by the Executive. Owing to the lack of such a procedure, the Royal Society for the Protection of Birds, Friends of the Earth, and Leigh Day Solicitors submitted a complaint to the ACCC alleging non-compliance with Articles 3(1) and 9(2)-(4) in 2017.⁵⁸ The communicants contended that the failure to ensure that the courts undertake effective

⁵³ Environmental Rights Bill (n 26) cl 13(5), (6).

⁵⁴ UNECE, ‘Letter to the United Kingdom Concerning Compliance with Article 3(8) of the Convention’ (26 February 2024) (ACCC/C/2023/200).

⁵⁵ Kelleher (n 19).

⁵⁶ Aarhus Convention (n 11) art 9(2).

⁵⁷ Environmental Rights Bill (n 26) cl 14.

⁵⁸ ACCC/C/2017/156 (n 36).

review of the substantive legality of environmental decisions made by public bodies gave rise to non-compliance with the aforementioned articles of the Convention.⁵⁹

The primary procedure, and indeed often the only appropriate procedure in most environmental cases, for the review of the substantive legality of environmental decisions is *Wednesbury* review.⁶⁰ This establishes a very high standard of unreasonableness which,⁶¹ per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*, requires that a decision must be ‘So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’.⁶² The intensity of scrutiny is calibrated by the context of the claim;⁶³ human rights cases typically attract an ‘anxious scrutiny’ standard.⁶⁴ Some environmental proceedings do engage human rights issues, as demonstrated by *Verein KlimaSeniorinnen Schweiz v Switzerland*,⁶⁵ *Öneryıldız v Turkey*,⁶⁶ and *Tatar v Romania*.⁶⁷

In *R (Fighting Dirty) v EA & SSEFRA*,⁶⁸ where it was undisputed that human rights were not engaged, Fordham J noted that the contextually variable intensity of ‘scrutiny’ in reasonableness review could mean that in practice, either JR exercises careful scrutiny in that it *does* more and conducts a closer examination of the decision; or that it *needs* more by requiring stronger reasons of the public authority to justify its decision as reasonable.

Environmental JR has recently attracted a low intensity of scrutiny owing either to the scientific uncertainty which often surrounds the core issues,⁶⁹ or to the political judgement required in balancing the social, economic, and environmental factors which typically undergird the decision matrix;⁷⁰ the court does not have the expertise or authority to deal with either.⁷¹ For example, in *Friends of the Earth*, the High Court was tasked with reviewing a problem with long-term, evaluative, and predictive elements in the polycentric context of climate change.⁷² There were manifold social, economic, environmental, and technological matters of judgement which the court acknowledged it had no real competence or expertise in, whereas such expertise was, conversely, available to the Secretary of State.⁷³ Sheldon J concluded that, as a consequence, the court should apply a low intensity of scrutiny. In *Packham*, the subject of review concerned HS2 and climate change. The Court of Appeal determined that since the decision incorporated political judgement about matters of national macroeconomic policy, a low intensity of scrutiny was appropriate.⁷⁴

⁵⁹ *ibid.*

⁶⁰ *Associated Provincial Picture Houses* (n 42).

⁶¹ L Drummond, F McCartney and A Poole, *A Practical Guide to Public Law Litigation in Scotland* (W Green, 2020), pp 63–65.

⁶² *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374, 410.

⁶³ *R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin) [186].

⁶⁴ *R v Ministry of Defence ex parte Smith* [1996] QB 517 as per Lord Bingham MR: ‘the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above’.

⁶⁵ (2024) 79 EHRR 1.

⁶⁶ (2005) 41 EHRR 20.

⁶⁷ App no 67021/01 (ECtHR, 27 January 2009).

⁶⁸ [2024] EWHC 2029 (Admin) [30] (the Court’s emphasis).

⁶⁹ *Friends of the Earth & Ors v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin) [112], [141].

⁷⁰ *R (Packham) v Secretary of State for Transport & Anor* [2020] EWCA Civ 1004 [48–52].

⁷¹ *Fighting Dirty* (n 68) [30]–[34].

⁷² *Friends of the Earth* (n 69) [141].

⁷³ *ibid.*

⁷⁴ *Packham* (n 70) [48].

In *Fighting Dirty*, Fordham J rejected the suggestion that Aarhus Convention claims, where provisions of national law which relate to the environment are contravened, would attract a heightened standard of review by default,⁷⁵ maintaining the position that the standard of review should be calibrated by context.⁷⁶ Fordham J accepted that environmental issues could attract a higher intensity of scrutiny, but confirmed that the ‘political, policy-laden, complex or predictive quality of the decision’ can point to a lower intensity of scrutiny.⁷⁷ Correspondingly, Fordham J held in *Fighting Dirty* that careful scrutiny ought to be applied, and so a close look into the decision-making process was consequently appropriate, but the Court did not *need* more by way of stronger reasons, meaning that the latitude which the decision-maker was afforded was not narrowed.⁷⁸ As such, environmental decision-makers will continue to be shielded from the regular standard of scrutiny because environmental decisions typically involve matters of political judgement and / or scientific uncertainty; consequently, the latitude which is conferred to the decision-maker will usually be wider.

The courts are already limited to the jurisdiction of *Wednesbury* unreasonableness to review the substantive legality of a decision in most environmental cases. *Fighting Dirty* emphasises the state of non-compliance with the Convention by accepting that environmental cases will continue to be subject to a low intensity of scrutiny.⁷⁹ Therefore paradoxically, larger development projects where environmental impacts are greater but more uncertain will be subject to a lower standard of review than smaller projects with lesser but more certain environmental impacts. This deepens the impact of the lack of a dedicated substantive review procedure, because when the prism of *Wednesbury* irrationality is applied in environmental cases, the prism itself becomes opaque when heightened scrutiny is needed most.

B. APPLYING THE PRECAUTIONARY PRINCIPLE

Public authorities should be required to have regard to the precautionary principle so that scientific uncertainty is not used as a reason to fail to take proportionate steps, such as applying a more anxious standard of scrutiny in *Wednesbury* review, to prevent serious and irreparable harm to nature. In the ICJ Advisory Opinion,⁸⁰ the Court considered the application of the precautionary principle; it followed Principle 15 of the Rio Declaration which states that where ‘there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.⁸¹ The Court concluded that the precautionary principle functions as an applicable guiding principle for the interpretation and application of the relevant legal rules and parties’ obligations under climate change treaties.⁸² Applying Principle 15, the Court further opined that ‘States should not refrain from or delay taking actions of prevention in the face

⁷⁵ *Fighting Dirty* (n 68) [30-31], and [34].

⁷⁶ Fordham J in *Fighting Dirty* (n 68) following *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCv 114, [2013] JPL 1027, [2013] 2 WLUK 655; applying *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin), [2016] PTSR 750, [2015] 11 WLUK 312.

⁷⁷ *Fighting Dirty* (n 68) [34(1)].

⁷⁸ *Fighting Dirty* (n 68) [30], [35]; ACCC/C/2017/156 (n 36), Letter from Communicants.

⁷⁹ *Plan B Earth Ltd* (n 46) [273], so as to not trespass into the ‘forbidden territory’ of merits review.

⁸⁰ ICJ Advisory Opinion (n 10) [158], [180].

⁸¹ ‘Rio Declaration on Environment and Development’ (1992) UN Doc A/CONF.151/26 (Vol I) (the ‘Rio Declaration’), Principle 15.

⁸² ICJ Advisory Opinion (n 10) [180].

of scientific uncertainty'.⁸³ The Court followed the International Tribunal on the Law of the Sea Advisory Opinion in this connection, and considered that '... the precautionary approach or principle, where applicable, guides States in the determination of the required standard of conduct in fulfilling their customary duty to prevent significant harm'.⁸⁴

Domestic courts should be required to apply the precautionary principle in their reasoning where the impugned decision might cause serious and irreversible harm to nature and its features. The position of Fordham J in *Fighting Dirty*,⁸⁵ explained above, appears to contravene the precautionary principle. When reviewing decisions made in situations of scientific uncertainty, courts should *need more* by way of stronger reasons to justify the decision as reasonable, in line with the anxious scrutiny standard.⁸⁶ This approach could empower JR to deal better with substantive legality in environmental decision-making as decision-makers would rightly be afforded less latitude in environmental cases which require precautionary decisions, bringing the UK into closer into compliance with Articles 9(2)-(4) of the Convention, short of transforming the way public law principles have been applied traditionally in JR regarding merits review. It is a strength of the ERB that its formulation of the right to a healthy environment envisages due regard to the precautionary principle.⁸⁷ Given that the ERB provides that it would be unlawful for a public authority 'to act in a way which is incompatible with securing the right to a clean, healthy and sustainable environment',⁸⁸ Fordham J would have been bound to have due regard to the precautionary principle because the ERB would require that due regard is had to it when having regard to the need to secure the right to a healthy environment.⁸⁹ It may accordingly be possible for a putative applicant to challenge a decision where it relies on scientific uncertainty as a reason for adopting a standard of review that is too low.

Developments likely to have significant environmental impacts currently require an environmental impact assessment (EIA).⁹⁰ Although an EIA does not prohibit developments that could significantly harm the environment, it ensures that a development's environmental consequences are exposed to public scrutiny and materially considered during the decision-making process. Indeed, as Lord Leggatt noted in *Finch*, 'You can only care about what you know about'.⁹¹

The law applies the precautionary principle to protect endangered species through protected sites or European sites known as Special Protection Areas and Special Areas of Conservation. These sites are empowered by the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations), which implements the Habitats Directive,⁹² and which requires that the relevant authority carries out an assessment, and is satisfied that, beyond all reasonable scientific doubt, the proposed development will have no adverse effects

⁸³ *ibid* [293].

⁸⁴ *ibid* [294], applying *Responsibilities and Obligations of States Sponsoring Persons and Entities* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 46, [131].

⁸⁵ *Fighting Dirty* (n 68).

⁸⁶ *Smith* (n 64).

⁸⁷ Environmental Rights Bill (n 26) cl 1(8)(c)a.

⁸⁸ *ibid* cl 1(2).

⁸⁹ *ibid* cl 1(8)(c)a.

⁹⁰ Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571.

⁹¹ *Finch* (n 6) [21].

⁹² European Council Directive 92/43/EEC.

on the integrity of a protected site.⁹³ EIAs are a crucial component of our environmental law because they are the primary mechanism by which the law can be engaged to prevent serious and irreparable harm to nature's most valuable features.

Part III of the PIA 2025 erodes the precautionary principle, scraps the need for EIAs in some circumstances, and replaces the existing system with environmental delivery plans (EDPs) and nature restoration levies (NRLs) which purport to compensate for environmental harm through a centralised and strategic mechanism.⁹⁴ Natural England are now the responsible authority for preparing EDPs subject to approval by the Secretary of State. EDPs will identify which features of the environment would be impacted by development and present strategies to address harm. Although, the PIA 2025 provides that the Secretary of State may only make an EDP which passes the 'overall improvement test',⁹⁵ which it will pass if, by the EDP end date, the effect of the conservation measures will materially outweigh the negative effects of the EDP development on the conservation status of each identified environmental feature.⁹⁶

This marks a departure from the precautionary standard established by the Habitats Regulations. Section 72 PIA 2025 goes one step further, and allows developers of developments to which an EDP applies to apply to Natural England to pay a NRL which would require that the decision-maker *disregard* the environmental impact of development on a protected feature of a protected site, equivalent to a licence for the disturbance of a protected species under the Habitats Regulations.⁹⁷ Moreover, the PIA 2025 does not require that NRL be spent at any particular time or in any particularly way during the EDP;⁹⁸ and as such, where there is no requirement to spend before development begins or ends, harm may, to use the language of the Rio Declaration, become 'serious or irreversible'.⁹⁹ Disregarding the precautionary principle by providing that some amount of money may be capable of rationalising serious and irreparable harm to nature constitutes a serious threat to the mitigation hierarchy that is so crucial to the effective conservation of nature's most valuable features, and consequently also, to environmental justice, particularly in the light of the low intensity of scrutiny EDPs will typically be subject to, following *Fighting Dirty*.¹⁰⁰ This emphasises the importance of public authorities being required to have due regard to the precautionary principle.

⁹³ Conservation of Habitats and Species Regulations 2017, SI 2017/1012 (the 'Habitats Regulations'), reg 63; Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2005] All ER (EC) 353.

⁹⁴ Planning and Infrastructure Act 2025.

⁹⁵ *ibid* s 65(3).

⁹⁶ *ibid* s 65(4).

⁹⁷ Habitats Regulations (n 93), reg 55.

⁹⁸ The Planning and Infrastructure Act 2025 s 77 only requires that Natural England spend the levy on conservation measures which relate to the 'environmental feature' to which the NRL is charged.

⁹⁹ Rio Declaration (n 81) Principle 15; see Office for Environmental Protection, 'OEP Gives Advice to Government on the Planning and Infrastructure Bill' (2 May 2025) (the 'OEP Advice') <<https://www.theoep.org.uk/report/oep-gives-advice-government-planning-and-infrastructure-bill>> accessed 9 July 2025, which states: 'The bill is silent as to when conservation measures must be implemented and by when they must be effective. This gives rise to the possibility of significant impacts on the conservation status of protected species or sites arising before the successful implementation of conservation measures. This is not present under existing environmental law (regulation 63 of the Habitats Regulations 2017).'

¹⁰⁰ *Fighting Dirty* (n 68).

C. ENVIRONMENTAL TRIBUNALS

Environmental tribunals could provide an effective avenue for substantive legal review. There is a tension between increasing the avenues of challenge to decisions which relate to the environment, particularly in the planning context, and delivering important developments such as affordable housing and renewable energy infrastructure.¹⁰¹ However, with protections for the environment in ‘regression’,¹⁰² this moment constitutes a critical opportunity to provide an alternative to JR which offers a cost-effective, efficient, and rigorous procedure for substantive legal review in environmental matters. This is especially important in the environmental context where the highly technical, political, and scientifically uncertain nature of environmental decisions can be hard to reconcile with the separation of powers because it could be said that such matters are properly for the executive which is often better equipped with the necessary scientific expertise and democratic mandate. Clause 14 ERB would require that the Secretary of State propose to implement a system of local environmental tribunals with a view to enforcing the right of access to justice.¹⁰³ The purpose of environmental tribunals could be twofold: to (i) address complaints against public authorities and (ii) provide an avenue for the merits review of decisions with environmental impacts.¹⁰⁴ Where complaints would be brought to an environmental tribunal, they may be brought on procedural or substantive grounds. Tribunals can make decisions *de novo* on points of fact and law; moreover, they can, and often must, exercise judgement on what the ‘right’ decision might have been.¹⁰⁵ Tribunals can accordingly ‘stand in the shoes of the decision-maker’ when reviewing a decision, allowing for merits review in a quasi-judicial environment.¹⁰⁶ For example, social security tribunals in the UK are regularly required to grapple with the effects of a particular health condition on a person’s functional capacity in order to determine what level of benefits would have been appropriate.¹⁰⁷

Environmental tribunals in their various forms have already proliferated across the globe in domestic contexts with manifold actors advocating for their wider rollout.¹⁰⁸ An environmental tribunal could enrol members with legal and scientific expertise so that it can legally review matters of science without prejudice to the separation of powers.¹⁰⁹ In JR, despite the Civil Procedure Rules (CPR) enabling the courts to hear evidence from witnesses and experts on relevant scientific information, precedent has developed which means that courts rarely examine evidence from witnesses,¹¹⁰ especially when that evidence relates to matters of science,¹¹¹ and only to inform the basis upon which the decision under challenge has been

¹⁰¹ Charles Banner KC, *Review of Legal Challenges to Nationally Significant Infrastructure Projects* (Ministry of Housing, Communities and Local Government, 2024) (the ‘Banner Review’).

¹⁰² OEP Advice (n 99).

¹⁰³ Environmental Rights Bill (n 26) cl 14(1).

¹⁰⁴ *ibid* cl 14(1)(a-b) (emphasis added).

¹⁰⁵ Robert Thomas, ‘UK Tribunals: Structure, History, Constitutional Status, and Practice’ in Susan Thomson, Matthew Groves and Greg Weeks (eds), *Administrative Tribunals in the Common Law World* (Hart Publishing 2024) 177–204.

¹⁰⁶ Caine and Broadbent (n 45) discuss how tribunals, administrative courts, and planning courts differently navigate the fact-law distinction.

¹⁰⁷ *MH v Secretary of State for Work and Pensions* [2018] AACR 12.

¹⁰⁸ J M Angstadt, ‘Can Domestic Environmental Courts Implement International Environmental Law? A Framework for Institutional Analysis’ (2023) 12(2) *Transnational Environmental Law* 318, 319.

¹⁰⁹ B Christman, ‘Why Scotland Needs an Environmental Court or Tribunal’ (Environmental Rights Centre for Scotland, October 2021) 18–21.

¹¹⁰ *O’Reilly v Mackman* [1983] 2 AC 237 (HL) [282].

¹¹¹ *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649 [36].

made.¹¹² This is to protect the court from the temptation that it may ‘substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament’.¹¹³ By contrast, tribunals often hear detailed evidence from expert witnesses on matters of scientific uncertainty, and environmental tribunals empowered by the ERB could utilise this power to provide a cost-effective method of scrutinising the substantive legality of environmental decisions made by public bodies, because by (i) being equipped with specialist expertise, they may be able to come to a view more efficiently; (ii) being able to review the merits of a decision, legalistic challenges may not be necessary for a challenge to be successful; and (iii) being free from the extensive procedural requirements of JR, costs may be accordingly saved. This would bring the UK into closer compliance with Articles 9(2)-(4) of the Convention.

Environmental tribunals would be partly administrative and partly judicial, diluting a ‘pure’ conception of the separation of powers and fragmenting administrative review. However, as Warnock notes, it is the changing, complex, scientifically uncertain, and polycentric nature of environmental problems that ‘require different legal solutions’.¹¹⁴ Environmental tribunals would enjoy more legitimacy than a purely judicial procedure of review by way of their increased capacity to address the inherent scientific uncertainty, knowledge requirements, and policy-laden nature of environmental problems.¹¹⁵

Tribunals may fairly be criticised for being unable to effectively engage civil society in the co-production of environmental decisions. Although it is not impossible to envision a tribunal situated in every relevant locality, equipped with locally elected members, this may still risk privileging certain voices in decision-making fora over others. Nonetheless, being able to challenge the substantive legality of a decision which impacts the environment is critical to the idea of environmental democracy because it at least enables civil society to engage in the production of environmental outcomes by facilitating a challenge to be brought to decisions which would otherwise go unreviewed, ultimately also empowering environmental stewardship.¹¹⁶ It addresses CEJ by enabling substantive, legal, and bottom-up challenges to decisions which have impacts that reach beyond the legal and towards the socio-ecological. Environmental tribunals may be capable of rendering judgment on the merits without revolutionising the application of public law principles because they are capable of being equipped with legal, scientific, and local expertise. Therefore, the ERB proposes an important and effective solution to the issue of providing an avenue for the review of the substantive legality of environmental decisions.

III. CIVIL SOCIETY MOBILISATION UNDER THE AARHUS CONVENTION

Civil society should be able to meaningfully engage in the production of legal rules which may significantly affect the environment because public participation in the production of legal rules generally produces better results by improving the environmental standard of

¹¹² *R (Transport Action Network Ltd) v Secretary of State for Transport* [2021] EWHC 568 (Admin) [81].

¹¹³ *O'Reilly* (n 110) [282].

¹¹⁴ C Warnock, *Environmental Courts and Tribunals* (Hart 2020) 82

¹¹⁵ *ibid.*

¹¹⁶ According to Barritt (n 15), this is amongst the purposes of the Aarhus Convention.

governance outputs.¹¹⁷ Participation is particularly effective where there is a high intensity of communication and some delegated decision-making power to participants.¹¹⁸ Articles 8(a)-(c) require, in fixed time-frames sufficient for effective participation, that draft rules, which ‘may’ have a significant effect on the environment, should be published in advance, the public should be given the opportunity to consult or comment, and the outcomes of that consultation ‘should be taken into account as far as possible’.¹¹⁹

Civil society should be empowered to challenge decisions where the unlawful application of those legal rules creates injustice. Inaccessibility to JR can undermine the rule of law and reduce executive accountability. Article 9(4) states that review procedures must provide ‘adequate and effective’ relief that is ‘fair, equitable, timely and not prohibitively expensive’.¹²⁰

This chapter shall address the absence of legal procedures which enable public participation in the drafting of rules which may have significant environmental consequences, before reviewing the effectiveness of Clauses 11 and 12 ERB at implementing Article 8 of the Convention. It will also address how the courts have applied Article 9 in relation to costs, and then it will evaluate the effectiveness of Clauses 13(5)-(6) ERB in supporting access to justice in environmental matters.

A. IMPROVING PUBLIC PARTICIPATION IN ENVIRONMENTAL RULE-MAKING

There should be a framework which enables civil society to contribute consistently and effectively to the production of rules which may significantly affect the environment. In 2017, Friends of the Earth submitted a complaint of non-compliance to the ACCC that the preparation of draft legislation to withdraw the UK from the European Union, the ‘Withdrawal Bill’, breached Article 8; that preparation of subsequent legislation would breach Article 8; and that the UK breached Article 3(1) by failing to implement Article 8 effectively through a clear, transparent, and consistent framework.¹²¹ In its draft findings released on the 7th July 2025, the ACCC held that the UK had breached Article 8 during preparation of the Withdrawal Bill by the Department for Exiting the European Union.¹²² Beyond Brexit, the ACCC found that the UK breached Article 3(1) by failing to take the necessary legislative, regulatory, or other measures to establish and maintain a consistent framework to promote effective public participation during the preparation of draft legislation that may have a significant effect on the environment, even though there is no requirement to establish those measures in legally binding form.¹²³ In the UK, the Cabinet Office published guidance called the ‘Consultation Principles’ which outlined the requirements of any putative consultation.¹²⁴ The Government published documentary guidance for officials called ‘Judge Over Your Shoulder: A Guide to Good Decision-Making’, which summarises the relevant common-law

¹¹⁷ N W Jager, J Newig, E Challies, and E Kochskamper, ‘Pathways to Implementation: Evidence on How Participation in Environmental Governance Impacts on Environmental Outcomes’ (2020) 30(3) *Journal of Public Administration Research and Theory* 383.

¹¹⁸ *ibid*.

¹¹⁹ Aarhus Convention (n 11) art 8.

¹²⁰ Aarhus Convention (n 11) arts 9(1)-(3) refer to review procedures for decisions which relate to the environment to challenge substantive and procedural legality.

¹²¹ ACCC/C/2017/150 (n 33) [2].

¹²² The Public Authority responsible for drafting up the legislation to leave the European Union.

¹²³ ACCC/C/2017/150 (n 33), applying ACCC/C/2014/120 (Slovakia), ECE/MP.PP/C.1/2021/19, [74]-[77].

¹²⁴ *ibid* [18].

rules.¹²⁵ The constitutional framework in the UK does not preclude participation in the drafting of legislation, but no effective duty to consult or enable comment during the drafting of legislation is imposed.¹²⁶ The ACCC found that the existing rules do not constitute a transparent, consistent, or clear framework to implement Article 8, as elucidated by the preparation of the Withdrawal Bill. If draft findings are approved by the Parties at the Meeting of the Parties, the findings become binding as a matter of international law as the correct interpretation of the Convention. However, in its unincorporated state, such matters become relevant considerations which are afforded ‘respect’ only and are not binding upon domestic courts.¹²⁷ At the Eighth Session of the Meeting of the Parties to the Aarhus Convention in November 2025 (Eighth Ordinary Session), the UK refused to endorse the findings of the ACCC on the Withdrawal Bill in ACCC/C/2017/150 (United Kingdom), setting a dangerous precedent for compliance with the Convention; endorsement by the other Parties to the Convention has been postponed until the next Meeting of the Parties in late 2029.

I contend that the passage of the PIA 2025 also breached Article 8 of the Convention. Part III received backlash throughout its passage through Parliament from environmental NGOs, industry representatives, sector and business leaders, and notably, the Office for Environmental Protection (OEP).¹²⁸ Although amendments have improved the position since the introduction of the Planning and Infrastructure Bill (PIB) into Parliament, critics remain concerned about the impact of EDPs and NRLs on the mitigation hierarchy, that funding has already been increasingly stretched recently for Natural England in particular who may lack the resources to prepare EDPs effectively, and that in any event, this upheaval of our existing rules will be ‘highly unlikely to speed up housebuilding’.¹²⁹ In addition, Wild Justice launched a legal challenge, pursuant to section 20 Environment Act 2021, against the Secretary of State’s comment that the bill would not reduce the level of environmental protection, citing in particular the removal of the precautionary standard applied in the Habitats Regulations; although, the High Court has since determined that the claim was not justiciable due to parliamentary privilege protecting the comments made by the Secretary of State as statements made in the context of a legislative function.¹³⁰

To engage Article 8, the ACCC affirmed that it need merely be demonstrated that the draft legislation ‘may’ have a significant effect on the environment.¹³¹ Taken together, the OEP’s assessment, opinions of senior barristers, and belief by critical players in civil society that ‘there is no conceivable way that the bill would not result in a weakening of the levels of

¹²⁵ *ibid* [19].

¹²⁶ *R (Better Streets for Kensington and Chelsea) v RBKC* [2023] EWHC 536 (Admin).

¹²⁷ *Walton v The Scottish Ministers* [2012] UKSC 44 [100].

¹²⁸ Justin Adams and others, ‘Joint Statement: Pause to Bad Law’ (2025) <https://www.rskwilding.com/wp-content/uploads/2025/05/joint-statement_pause-to-bad-law-%E2%80%93-a-call-for-meaningful-consultation-on-the-planning-and-infrastructure-bill-1-3.pdf> accessed 26 April 2026; and OEP (n 4) which noted that the provisions of the PIB with amendments would still ‘lower environmental protection on the face of the law’.

¹²⁹ CIEEM (n 49); British Ecological Society, ‘What Does the Planning and Infrastructure Act Mean for Ecology?’ (2026) <<https://www.britishecologicalsociety.org/content/what-does-the-planning-and-infrastructure-act-mean-for-ecology/>> accessed 7 April 2026.

¹³⁰ Wild Justice, ‘Wild Justice Starts Legal Proceedings against Government’s Controversial Planning and Infrastructure Bill’ (12 May 2025) <<https://wildjustice.org.uk/general/wild-justice-starts-legal-proceedings-against-governments-controversial-planning-and-infrastructure-bill>> accessed 1 August 2025; Francis Taylor Building, ‘Challenge to Planning and Infrastructure Bill Statement Not Justiciable, High Court Rules’ (2025) <<https://www.ftbchambers.co.uk/news/news-view/challenge-to-planning-and-infrastructure-bill-statement-not-justiciable-high-court-rules>> accessed 12 December 2025.

¹³¹ ACCC/C/2017/150 (n 33) [89].

environmental protection’,¹³² suggest that the PIB meets the bar that it ‘may’ have a significant effect on the environment, and therefore engages Article 8. The consultation focused on the ‘Planning Reform Working Paper’ only, which was not a draft text of the legislation, like the White Paper that was published for the Withdrawal Bill, which pursuant to ACCC/C/2017/150 (United Kingdom) contravenes Article 8.¹³³ The government published its impact assessment on the PIB without asking the OEP for advice,¹³⁴ and before the conclusion of the consultation, rendering civil society engagement with the drafting of legislation tokenistic.¹³⁵ In the light of the absence of ‘meaningful inclusions’, this suggests that the consultation was not ‘taken into account as far as possible’ which would further contravene Article 8.¹³⁶ The drafting of the PIB demonstrates that there remains no consistent or effective framework for consultation or comment on draft legislation, and that Article 8 has not been properly implemented pursuant to the requirements of Article 3(1). Perhaps one reason why the UK went against the grain of precedent and chose not to endorse the findings of the ACCC on the drafting of the Withdrawal Bill at the Eighth Ordinary Session was because it would leave the PIA 2025 open to challenge for breach of its obligations under international law, however inconsequential any putative breach might be. Ultimately, the impacts of the failure to effectively consult in the drafting process will be felt by developers, who lack certainty about the EDP provisions in the PIA 2025, by nature and biodiversity, due to the regression in protections, and by communities that are connected with and dependent upon nature.

Clause 11 ERB proposes a solution: implementing Article 8. Clause 11(2) provides:

Before proposals for a relevant legal provision are introduced into Parliament a draft of the proposed text must be published by a prescribed means alongside an invitation for public comment on the proposal while all options remain open and allowing sufficient time frames for the public to consult a draft and comment so as to ensure effective public participation.

Clause 11 therefore proposes to create legal obligations which require draft text of legal provisions be published for comment prior to introduction into Parliament. This is because Article 2(2) provides an exception for bodies acting in a legislative capacity; thus, upon introduction into Parliament, Article 8 obligations can no longer be discharged.¹³⁷ Once a bill is left in the hands of the legislature, there is no duty on ministers to consult civil society or respond to concerns from constituents, although the House of Lords retains an important scrutineering role.¹³⁸

Environmental matters are often scientifically uncertain and involve technical matters which require experience and expertise to engage with. As a consequence, it could be argued

¹³² Wild Justice (n 130).

¹³³ ACCC/C/2017/150 (n 33).

¹³⁴ Despite this being its statutory role as designated by the Environment Act 2021 ss 28-30.

¹³⁵ CIEEM, ‘Comment on the Planning and Infrastructure Bill 2025’ (2025) <<https://cieem.net/wp-content/uploads/2025/03/CIEEM-Comment-on-Planning-and-Infrastructure-Bill-2025-FINAL.pdf>> accessed 1 August 2025; notably: ‘It is evident that the broad consensus of concern raised by a wide range of environmental professionals, professional bodies, NGOs, learned societies and developers in response to the Planning Reform Working Paper have been entirely disregarded in the Bill drafting process’.

¹³⁶ Wild Justice (n 130).

¹³⁷ ACCC/C/2017/150 (United Kingdom) (n 33) [86]: ‘Once the draft is submitted to the body or institution with legislative capacity and that body commences its deliberations on the draft, the exception in article 2(2) excluding ‘bodies acting in a legislative capacity’ from the scope of the Convention will apply’.

¹³⁸ *ibid*.

that lower levels of participation are appropriate in environmental matters. Moreover, rigorous public participation in the drafting of legal rules will, if done properly, take time, and potentially slow the passage of legislation needed to address urgent problems promptly, thereby limiting the executive's ability to produce effective solutions to pressing challenges. Nevertheless, Heffron and Haynes found that amongst stakeholders, public participation in the formation of environmental legislation is considered 'by all as too low'.¹³⁹ Improving engagement with civil society from the outset will produce better rules which will likely be subject to fewer challenges. Environmental problems require urgent and highly effective solutions which address challenges immediately and fully. Properly engaging civil society at the drafting stage offers a critical opportunity to produce better rules from the outset, potentially mitigating the need for further and more extensive rules as environmental problems become increasingly hard to solve.

Implementing Article 8 through Clause 11 could ensure that civil society can meaningfully engage in the bottom-up production of rules which affect the environment, moving closer to satisfying the transformative objects of CEJ. Legislation which empowers civil society to co-produce and continually negotiate the rules which impact the environment is a step towards an ecological politics that can be more than simply reformist and can become expansively participatory.¹⁴⁰ It develops the foundations of environmental democracy upon which the Convention itself is premised.

B. AVOIDING PROHIBITIVE COSTS IN ENVIRONMENTAL JUDICIAL REVIEW

Prohibitive costs should not stifle proportionate challenges to executive decisions. At the 29th Meeting of the Parties in 2010, the ACCC found the UK not to comply with Article 9(4) because the UK failed to ensure that costs were not prohibitively expensive, and establish binding rules from the legislature or the judiciary to this effect.¹⁴¹ The ECPR did evolve in an effort to become consistent with international law, but research has shown that hostile politico-legal opportunity structures persist.¹⁴² The current ECPR still may have a chilling effect on smaller NGO mobilisation in particular.¹⁴³ In practice, well-established and well-funded environmental NGOs have paradoxically mobilised to bring several legal challenges.¹⁴⁴ With the restricted ambit of Aarhus costs protections following *Global Feedback*,¹⁴⁵ costs will be more frequently prohibitive and JR increasingly inaccessible.

On the 18-20th October 2021, Decision VII/8s confirmed that several elements of the ECPR remain prohibitively expensive and are in need of reform, and the UK has failed to discharge its obligations under Article 9(4).¹⁴⁶ It is fair to say that since the implementation of

¹³⁹ R.J. Heffron and P. Haynes, 'Challenges to the Aarhus Convention: Public Participation in the Energy Planning Process in the United Kingdom' (2014) 10 *Journal of Contemporary European Research* 243, with perspectives from national and intranational governance, legal, academic, non-public sector practitioner, public sector practitioner, and local governance stakeholders.

¹⁴⁰ Smith (n 23) offers a biopolitical analysis against ecological sovereignty and towards a radical ecological politics that emerges bottom up, through human and more-than-human agents.

¹⁴¹ ECE/MP.PP/C.1/2010/6/Add.3 (n 34) [141]-[142].

¹⁴² ECPR (n 51); Vanhala (n 48).

¹⁴³ Vanhala (n 48) 540.

¹⁴⁴ Vanhala (n 50).

¹⁴⁵ *Global Feedback* (n 52).

¹⁴⁶ UNECE, 'Decision VII/8s Concerning Compliance by the United Kingdom' (2021) ECE/MP.PP/2021/2/Add.1.

Aarhus costs protections into the civil procedure rules, the number of environmental challenges has increased.¹⁴⁷ The Banner Review, an independent review into whether unmeritorious legal challenges to development consent orders were causing undue delay to the delivery of nationally significant infrastructure projects, was prompted by a government concern for the consequent detriment to the public interest.¹⁴⁸ In this context, it was considered that there was ‘no case for amending the rules in relation to costs caps in order to reduce the number of challenges to NSIPs’.¹⁴⁹ In addition, James Maurici KC considered that there was ‘little justification’ for providing yet further costs protections to claimants as existing rules may be said to ‘go too far’.¹⁵⁰ Nonetheless, following *Global Feedback*,¹⁵¹ on the 29th May 2025, Sarah Sackman KC MP, in her position as Minister of State in the Ministry of Justice, wrote to the ACCC outlining the Government’s proposed response to ACCC recommendations.¹⁵² Decision VII/8s detailed a number of specific concerns which bring the UK into non-compliance with Articles 9(4) and 3(1) of the Convention, and suggested that the UK should extend the scope of the ECPR, clarify the extent of liability for parties in adverse costs if losing, amend the way that the ECPR functions, and improve the way that time limits for JR work in planning decisions.¹⁵³ The letter proposed amendments to the ECPR which appeared to take the UK’s obligations under the Convention more seriously. It was suggested that the UK is to follow, or has since demonstrated that it has followed, 13 of the 14 recommendations made by the ACCC.¹⁵⁴ *Inter alia*, private nuisance claims *could* be covered by the ECPR, there could be a revision of CPR r.46.27 to expressly note that the Aarhus costs caps can be revised downward and that variation downward should be considered for each party, that the CPR could expressly mention that the court can award costs on an indemnity basis following an unsuccessful challenge to the position that a claim is an Aarhus claim, and that costs protections may be awarded to interveners.¹⁵⁵ Since, in its Report to the Meeting of the Parties on decision VII/8s, the ACCC considered that, whilst appreciating the engagement of the UK, these proposals did not yet satisfy many of its recommendations in Decision VII/8s.¹⁵⁶ The report also recalled its findings in ACCC/C/2011/63 (Austria), where the ACCC made clear that Article 9(3) of the Convention covered ‘any law that relates to the environment’, including law under any policy; the ACCC accordingly invited the UK to explain why regulations under challenge due to their alleged significant impacts on the environment would not constitute ‘national law relating to the environment’ for Article 9(3) purposes.¹⁵⁷ However, the UK refused to endorse the ACCC’s findings in this report at the Eighth Ordinary Session.¹⁵⁸ Accordingly, it is likely

¹⁴⁷ J Maurici KC, ‘Ten Reasons Why Labour Will Fail to Build 1.5 Million New Homes (Revisited): What Else Can Be Done to Help Deliver This Goal?’ (Landmark Chambers, 2025) [74].

¹⁴⁸ Banner Review (n 101) [3].

¹⁴⁹ *ibid*, see Recommendation 1.

¹⁵⁰ Maurici (n 147) [76].

¹⁵¹ *Global Feedback* (n 52).

¹⁵² Sarah Sackman, ‘Letter to Fiona Marshall, Legal Officer and Secretary to the Aarhus Convention Compliance Committee: UK Compliance with the Aarhus Convention’ (29 May 2025).

¹⁵³ ECE/MP.PP/2021/2/Add.1 (n 146).

¹⁵⁴ By inviting the Civil Procedure Rules Committee to amend the CPR.

¹⁵⁵ Sackman (n 152).

¹⁵⁶ UNECE, ‘Report of the Compliance Committee on Decision VII/8s of the Meeting of the Parties Concerning Compliance by the United Kingdom’ (2025) ECE/MP.PP/2025/66.

¹⁵⁷ *ibid* [74]–[75]; UNECE, ‘Findings and Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication ACCC/C/2011/63 (Austria)’ (2014) ECE/MP.PP/C.1/2014/3 [52].

¹⁵⁸ UNECE, ‘Report of the Eighth Session of the Meeting of the Parties’ (17 March 2026) ECE/MP.PP/2025/2/Add.1; and see ‘Communication to the Aarhus Convention Compliance Committee Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland with Articles 3(1) and 8 of the Con-

that little thought will be given to those reforms proposed by Sarah Sackman KC, at least until the approach of the next meeting of the parties. One reason why the UK refused to endorse the findings of the ACCC at the Eighth Ordinary Session may be because doing so could place additional pressure on the Government to make provisions for further costs protections which could be thought to prejudice its housebuilding agenda. Moreover, with *Global Feed-back* due to be heard on appeal to the Supreme Court, greater ‘respect’, however substantial, may be required to be given to ACCC/C/2011/63 (Austria), which is plainly inconsistent with the reasoning of *Holgate LJ* in the Court of Appeal.

The ERB approaches costs differently. Clause 13(5) ERB provides that where a court considers that a public authority has ‘not acted in accordance with the obligation in section 1’ in an environmental case, then costs will be awarded against that authority.¹⁵⁹ This places adverse costs against public authorities where a court considers that public authority has not had due regard to ‘... the right to a clean, healthy and sustainable environment’.¹⁶⁰ Expanding on what that right means in practice, the ERB lists a number of principles of international law which that public authority must have due regard to, including, amongst others, the precautionary principle, the principle of non-regression, and the best available science principle.¹⁶¹ The meaning of the right to a healthy environment is also taken to include clean air, clean water, biodiversity and green spaces, living soil, resilience and reduction of vulnerability, and early warning systems for environmental disasters.¹⁶² By requiring that public authorities have due regard to the right to a healthy environment, or risk adverse costs themselves, the ERB expands costs protections and simultaneously improves environmental decision-making as the impacts of a decision on the physical environment will often be material, and further be taken into account at least for fear of adverse costs, where they otherwise might not be considered.

Clause 13(6) ERB also provides that adverse costs reasonable for securing permission will be awarded against the public authority if it should argue that a claim should fail at permission stage, and then the Claimant acquires that permission.¹⁶³ This could meaningfully improve access to justice by materially reducing the risk of exposure to adverse costs because bringing an application for JR is a ‘frontloaded’ procedure with substantial costs arising at the pre-permission stage.¹⁶⁴ This would strengthen environmental democracy by empowering civil society to play a more active role in holding the executive to account to produce best outcomes for people and nature.

Ostensibly, this risk of adverse costs may stifle the decision-making of smaller local authorities with limited resources. However, such a risk is proportionate in the environmental context for three reasons. First, there is a significant inequality of arms between putative claimants and public authorities. Second, decisions which cause irreparable harm to nature require early and preventative action which similarly might be stifled by a fear of adverse costs for a putative claimant. Third, there are difficulties in identifying the model litigant, and so it is in

vention (ACCC/C/2017/150): Letter from the Party Concerned’ (30 October 2025) <https://unece.org/sites/default/files/2025-10/frPartyC150_30.10.2025.pdf> accessed 7 April 2026, for the UK’s reasons as to why it refused to endorse the findings of the ACCC.

¹⁵⁹ Environmental Rights Bill (n 26) cl 13(5).

¹⁶⁰ *ibid* cl 1(1).

¹⁶¹ *ibid* cl 1(8)(e) a-f

¹⁶² *ibid* cl 1(8)(f) a-f.

¹⁶³ *ibid* cl 13(6).

¹⁶⁴ UNECE, ‘Findings on Communication ACCC/C/2015/131 United Kingdom’ (26 July 2021) ACCC/C/2015/131 [140].

the interests of justice that rules are more relaxed so that a challenge can be brought. In any event, adversarial costs remain which still presents risk of prohibitive costs exposure for putative claimants. Overall, taken together with the establishment of environmental tribunals which themselves could provide a cost-effective avenue to challenge the legality of executive decisions, these measures would produce an effective framework improving access to justice in line with the transformative and participatory objects of CEJ.

IV. ENVIRONMENTAL STEWARDSHIP EMPOWERING PEOPLE AND NATURE

Civil society will typically have to launch its legal challenges through NGOs as the relevant actors with sufficient resources, experience with the legal process, and standing. NGOs purport to act in the best interests of society, but they can unintentionally reproduce sub-altern,¹⁶⁵ techno-scientific,¹⁶⁶ and top-down epistemic hierarchies, thus concretising material exclusions.¹⁶⁷ Robust protections for environmental defenders are crucial to ensure that civil society mobilises in a way that is expansively participatory, preserves the rule of law, and strengthens environmental democracy.¹⁶⁸ To do so, the law should recognise human and non-human actors as indispensable to the production of legal outcomes.¹⁶⁹ This Section shall consider how effectively the Convention protects environmental defenders in the UK, and will critically evaluate the proposed protections in Clause 5 ERB. It will then consider whether an inclusive interpretation of standing should be adopted, and how the ERB could be improved.

A. STRENGTHENING PROTECTIONS FOR ENVIRONMENTAL DEFENDERS

In the UK, securing the right to a clean, healthy, and sustainable environment remains just an ‘aspiration’, but it should be central to our environmental law.¹⁷⁰ The recent recognition of this right by the highest of international courts, as ‘a pre-condition for the enjoyment of many human rights’,¹⁷¹ emphasises the importance of considering the absence of this right domestically.¹⁷² Article 1, taken together with Article 3(8), protects those taking action to secure

¹⁶⁵ F Sultana, ‘The Unbearable Heaviness of Climate Coloniality’ (2022) *Political Geography* 99, 102638.

¹⁶⁶ C Abbot and M Lee, ‘NGOs Shaping Public Participation Through Law: The Aarhus Convention and Legal Mobilisation’ (2024) 36 *Journal of Environmental Law* 85–106.

¹⁶⁷ I Kapoor, ‘Participatory Development, Complicity and Desire’ (2005) 26(8) *Third World Quarterly* 1203.

¹⁶⁸ GC No. 37 of the Human Rights Committee on the right of peaceful assembly, CCPR/C/GC/37 [1]: the human right of peaceful assembly: ‘... constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism’.

¹⁶⁹ Pellow (n 20) on non-human indispensability.

¹⁷⁰ Foreign Office, *Declaration upon Signature and Ratification of the Aarhus Convention* (Cm 6586, 2005). The declaration reads: ‘The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the “right” of every person “to live in an environment adequate to his or her health and well-being” to express an aspiration which motivated the negotiation of this Convention, and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention’.

¹⁷¹ ICJ Advisory Opinion (n 10) [393].

¹⁷² Environmental Rights Bill (n 26) Overview, [41]; note that 101 States have incorporated this right into domestic legislation already, 19 of 27 EU States have enshrined this right into their constitutions, and 17 into their domestic law.

the right to a healthy environment against penalisation, persecution, and harassment.¹⁷³ In the eyes of the Convention, an environmental defender is defined broadly, as ‘any person exercising his or her rights in conformity with the provisions of the Convention’.¹⁷⁴ Environmental protest is, by consensus at the Meeting of the Parties, protected by the Convention as a form of public participation in environmental decision-making.¹⁷⁵ A rapid response mechanism for the protection of environmental defenders was adopted on the 21st October 2021, establishing the role of the UN Special Rapporteur on Environmental Defenders Under the Aarhus Convention by consensus.¹⁷⁶

There are three separate complaints across 2023-2024 concerning environmental defenders in the UK which are discussed in a letter sent on 29th January 2025 from the Special Rapporteur. Notably, ACSR/C/2024/26 (United Kingdom) relates to the imposition of a four-year sentence on one Mr. Shaw for ‘participating in a Zoom call to discuss peaceful environmental protest’, albeit a protest which would concern the criminal act of intentionally sealing gantries on the M25 which would create the risk of or cause serious harm to the public and thereby causing a public nuisance.¹⁷⁷ Some consider that serious sentences for protests by Just Stop Oil activists were perfectly ‘just’ consequences for the contravention of criminal law without contrition.¹⁷⁸ The Special Rapporteur, on the other hand, considered that the sentence was ‘... not only utterly unacceptable from a social standpoint, it also clearly falls far short of the requirement that any sanction imposed on persons exercising their rights under the Convention is reasonable, proportional and serves a legitimate purpose’.¹⁷⁹

The UK responded in a letter dated 18th March 2025, emphasising the position in its interpretive declaration on ratification, that Article 1 confers no additional rights beyond those set out in the three procedural pillars of the Convention, and that under Article 3(8), there ‘is no right to civil disobedience set out in the Convention’.¹⁸⁰ The Court of Appeal has since handed down judgment on the reduction in sentencing of Mr. Shaw in *R v Hallam & Ors*.¹⁸¹ The Court of Appeal reduced Mr. Shaw’s sentence by one year from four years to a maximum of three years, in line with the reduction for Mr. Hallam, ‘in the light of his conscientious motivation’, and the need to have an assessment on the proportionality of interference with his human rights.¹⁸² The Special Rapporteur noted that, with Mr. Shaw having spent 113 days on remand in prison already, ‘... the only reasonable and legitimate response will be to order [his] immediate release from prison and declare that his sentence has been served’.¹⁸³ ‘The

¹⁷³ Aarhus Convention (n 11) art 3(8).

¹⁷⁴ UNECE, ‘Decision VII/9 on a Rapid Response Mechanism to Deal with Cases Related to Article 3(8) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Meeting of the Parties to the Aarhus Convention, Addendum to the Report of the Seventh Session’ (2021) ECE/MP.PP/2021/2/Add.1, preambular para: ‘Recognizing that an “environmental defender” is any person exercising his or her rights in conformity with the provisions of the Convention’.

¹⁷⁵ UNECE, ‘Decision VI/8c Concerning Compliance by Belarus’ (2018) ECE/MP.PP/2017/2/Add.1 [4].

¹⁷⁶ At the meeting of the parties on the 23rd-24th June 2022. Despite challenges to the re-election of the Special Rapporteur, Michel Forst, at the Eighth Ordinary Session, the Meeting of the Parties re-elected him.

¹⁷⁷ Forst (n 39); Police, Crime, Sentencing and Courts Act 2022, s 78.

¹⁷⁸ T Dowson, ‘The Just Stop Oil Sentences Were Just’ (*The Critic*, 22 July 2024) <https://the-critic.co.uk/the-just-stop-oil-sentences-were-just/> accessed 26 April 2026.

¹⁷⁹ Forst (n 39), following UNECE, ‘The Compliance Committee’s Findings on Communication ACCC/C/2014/102 (Belarus)’ (24 July 2017) ECE/MP.PP/C.1/2017/19 [69].

¹⁸⁰ M Creagh, ‘Letter to Ms. Tatiana Molcean, Executive Secretary of the United Nations Economic Commission for Europe’ (14 October 2024).

¹⁸¹ [2025] EWCA Crim 199, [2025] 1 WLR 1164 [88]-[89].

¹⁸² *ibid* [88].

¹⁸³ Forst (n 39).

Special Rapporteur also urged the Government to compensate Mr. Shaw for any material and non-material harm suffered whilst in prison.¹⁸⁴ The Court in *Hallam* considered what weight, if any, to afford to the opinion of the Special Rapporteur:

In our judgment, it would not have been appropriate for the sentencing judges to have had regard to the Aarhus Convention or the views of the UN Special Rapporteur. The Aarhus Convention is not incorporated into English law. That is sufficient, in itself, to decide the point. However, we also agree with the Crown's submission that article 3(8) of the Aarhus Convention did not apply to the appellants' activities.¹⁸⁵

The Court opined that Article 3(8) did not apply to the appellants' activities because they were 'not penalised for exercising their rights *in conformity with*' the Convention, because these were criminal offences at issue, meaning that the appellants were not environmental defenders within the meaning of the Convention.¹⁸⁶ Although many of the complaints to the Special Rapporteur are ongoing, the application of the Convention in *Hallam* demonstrates that the Convention in its unincorporated state does not protect all activists in pursuit of Article 1 from penalisation. The threat of non-compliance with the Convention will rarely, if ever, be sufficient to guide judicial determination in line with the Convention's objectives.

Clause 5 ERB incorporates express protections for environmental defenders. It provides that a person (A) 'penalises, persecutes or harasses another person (B)' if A subjects B to a detriment because B 'does a protected act', or A 'believes that B has done, or may do, a protected act'.¹⁸⁷ Clause 5(2) ERB protects any action taken in relation to Parts 1-4 ERB, giving evidence in connection with proceedings under the ERB, and any other thing in connection with the ERB.¹⁸⁸ It could be argued that Clause 5 ERB may have protected Mr. Shaw from penalisation because 'it is unlawful for a public authority to act in a way which is incompatible with securing the right to a clean, healthy and sustainable environment for everyone'.¹⁸⁹ However, if the relevant public body, 'issues an emergency statement confirming the temporary suspension of the duty for a limited period in a case of public emergency', although the bar for that emergency is high,¹⁹⁰ no such protection from penalisation would be afforded. Although the ambit of actions protected under the ERB is wide, protecting 'any (other) thing for the purposes of or in connection with this Act',¹⁹¹ a similar argument could be brought to that which was concluded in *Hallam*, that a court could not properly consider an action as done 'for the purposes of or in connection with' the ERB where that action plainly contravenes domestic criminal law. In addition, even if one were to accept that Mr. Shaw's actions were in pursuit of the right to a healthy environment, as the plan proposed the unsafe, criminal act of scaling M25 gantries, posing a danger to themselves and the public in the process, an emergency statement could have arguably been issued and the ERB would not have consequently

¹⁸⁴ *ibid.*

¹⁸⁵ *Hallam* (n 181) (emphasis added).

¹⁸⁶ *ibid* [50].

¹⁸⁷ Environmental Rights Bill (n 26) cl 5.

¹⁸⁸ *ibid*; cl 5 also excludes the giving of false information from protection; and applies 'whether the person subjected to a detriment is an individual or an organisation'.

¹⁸⁹ *ibid* cl 1(2); footnote 28 notes with regard to 'act compatibly', that this takes 'the same approach as the HRA does to Convention rights'.

¹⁹⁰ *ibid* cl 1(3)(b); a public emergency could include: 'a serious threat to public health or safety and where there is no alternative to the suspension in order to protect human life, health and or the environment'.

¹⁹¹ *ibid* cl 5(1)(c).

afforded Mr. Shaw protection from penalisation. Nonetheless, Clause 1(4) ERB could have then required that the Court have due regard to the need to secure the right to a healthy environment.¹⁹² Arguably, the Court in *Hallam* applied this principle to some extent, taking into account ‘conscientious motivation’ to offer Mr. Shaw an, albeit limited, sentence reduction.¹⁹³ Clause 1(8) ERB could place Mr. Shaw’s conscientious motivation on a spectrum of putative mitigation, depending on the importance of securing, for example, ‘the right to clean water’ at a time where access to clean water is particularly poor.¹⁹⁴

The ERB provides meaningful protections for environmental defenders which support civil disobedience that is safe, peaceful, and non-violent. Where criminal activities such as criminal damage and assault plainly contravene domestic criminal law, activists would not be protected from penalisation entirely but may see their sentences reduced in line with the need to secure the right to a healthy environment. Ultimately, these strengthened protections in the ERB may, (i) require protections from penalisation for certain criminalised activities such as forms of aggravated trespass, implicitly modifying the scope of domestic criminal law; (ii) be taken into account in the drafting of legislation which seeks to impose unduly onerous restrictions on environmental protest; and (iii) fairly require that courts have due regard to the extent of conscientious motivation that the need of securing the right to a healthy environment contextually suggests when determining the extent to which the hypothetical defendant’s sentence would be reduced. Requiring public bodies to have due regard to the equality principle would involve States ensuring equal and effective protection in relation to the right to a healthy environment and States taking additional measures to protect the rights of those most vulnerable to environmental harms.¹⁹⁵ This could further progress an intersectional justice that aligns with the objects of CEJ, especially protecting those most impacted by climate injustice to take direct action, because such equality would not be dependent upon the composition of the particular court that hears a putative challenge, but instead the very state of unequal harm and vulnerability to climate harm would confer material weight in its own right in decision-making.¹⁹⁶

Protections under the ERB would not therefore be entirely limited to non-criminal matters as they may be under the Convention. Although, the ERB could not, it is thought, protect actors from penalisation entirely where they have plainly contravened domestic criminal law. Criminalised matters may be more amenable to protections from penalisation where they are safe and necessary, and it is thought that they would also need to be proportionate to the need to secure the right to a healthy environment. In any event, a court would be required to have due regard to the contextual need to secure this right when determining how it exercises its sentencing discretion. This is, it is argued, a proportionate and necessary measure when taking into account the magnitude of environmental harms, and how these harms will be lived, experienced, and suffered deeply and unequally amongst communities and nature. Empowering civil society to negotiate environmental outcomes by taking direct action speaks

¹⁹² *ibid* cl 1(4).

¹⁹³ *Hallam* (n 181).

¹⁹⁴ Environmental Rights bill (n 26) cl 1(8)(f)b.

¹⁹⁵ *ibid* cl 1(8)(e); United Nations Human Rights Council, ‘Framework Principles on Human Rights and the Environment’ (2018) A/HRC/37/59. Pursuant to Principle 3, ‘States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment’ and Principle 14, ‘States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities’.

¹⁹⁶ Mohai, Pellow, and Roberts (n 19).

directly to the requirement by CEJ of participation to be inclusive by empowering bottom-up mobilisation.¹⁹⁷

B. TOWARDS INCLUSIVE STANDING

Standing should be afforded an inclusive interpretation in environmental matters because the special nature of environmental problems can make it challenging to identify the model litigant. A court will not grant permission for JR unless it considers that the applicant has ‘sufficient interest in the matter to which the application relates’,¹⁹⁸ meaning that they are directly and personally affected by the outcome of the decision.¹⁹⁹ The courts arguably take a relaxed approach to standing, and claims will rarely fail on this point.²⁰⁰ The responsible pressure or campaign group may have standing,²⁰¹ taking into account some of the following factors: the merits of the underlying claim, the particular legislative context, the impact on the claimant, the gravity of the allegations or findings, the availability of other appropriate claimants, and the position of the actual claimant.²⁰² For example, in *Greenpeace*, an NGO was afforded standing because, *inter alia*, it had a genuine concern for the environment, it was an entirely responsible and respected body, there were 2,500 local supporters of the applicant, and those that the applicant represented may not otherwise have been able to bring a challenge to the decision, nor could other putative applicants command similar experience or expertise.²⁰³ However, ‘an aggregate of individuals each of whom has no interest cannot of itself have an interest’.²⁰⁴

Following *Aireborough*,²⁰⁵ issues of wider public policy such as the environment and the Aarhus Convention may be relevant in determining standing, although they are unlikely to be an overwhelming factor. As noted by Burton J in *Grierson*,²⁰⁶ there is a connection between the strength of the claim and the extent of the claimant’s interest; consequently, the stronger the case on its merits, the more likely the courts are to be favourable towards the claimant’s standing.²⁰⁷ Lord Hope noted in *Axa General Insurance*²⁰⁸ that the primary test is to ensure that one is ‘directly’ affected by a decision, and that in itself is sufficient qualification on ‘affected’ to enable the court to ‘distinguish the mere busybody’. Crucially, Lord Reed opined in *Walton* that:

... there may also be cases in which any individual, simply as a citizen, will have sufficient interest ... The rule of law would not be maintained if, because everyone was

¹⁹⁷ Pellow (n 20) 30-34.

¹⁹⁸ Senior Courts Act 1981 s 31(3).

¹⁹⁹ *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

²⁰⁰ F Foster and A Mills, ‘Judicial Review—Sufficient Interest (Standing) in Environmental Matters’ (LexisNexis Practice Note, updated 2025) accessed 4 August 2025.

²⁰¹ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 All ER 611.

²⁰² *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWHC 2468 (TCC) [501].

²⁰³ *R v Inspectorate of Pollution & Anor ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329.

²⁰⁴ *National Federation* (n 199) as per Lord Wilberforce.

²⁰⁵ *Aireborough, Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 45 (Admin).

²⁰⁶ *R (Grierson) v Ofcom & Atlantic Broadcasting Ltd* [2005] EWHC 1899 (Admin).

²⁰⁷ Foster and Mills (n 200).

²⁰⁸ *AXA General Insurance Ltd & Ors v HM Advocate & Ors* [2011] UKSC 46; [2012] 1 AC 868; 2011 SLT 1061, as per Lord Hope at [63].

equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.²⁰⁹

Cases which involve environmental harm often have diffuse impacts which manifest slowly and over time.²¹⁰ If the law were to require that claimants demonstrate that they are particularly affected by climate harm, access to justice could be excluded for those who need it most because the ‘core victims of climate injustice’ are subalternised, or ‘othered’, in Western legal systems.²¹¹ The Irish Supreme Court held in *Friends of the Irish Environment*²¹² that NGOs must demonstrate sufficient interest *and* rights impairment, and should the UK Supreme Court apply the rules of the Convention in a similar way, standing could prove to be a barrier for the enforcement of environmental rights and access to justice in environmental matters.

The courts’ approach to standing has narrowed such that public interest standing may be limited where an alternative capable challenger exists. In both *Millard & Connolly* and *Bateman*,²¹³ the Courts were prepared to treat standing as limited to the individual designated by statute only, else the Courts risked offending the intent of the relevant statutory scheme.²¹⁴ Since then, the Good Law Project have been denied standing in the public procurement context because statute envisaged that the ‘obvious and “natural” claimants would be the economic operators whose interests are the subject of the [Public Contracts Regulations 2015]’.²¹⁵ The Court considered that this did not mean that any other person could not be afforded standing.²¹⁶ Most recently, the Good Law Project were denied standing because a sincere interest did not amount to a sufficient interest, and there were already three individual Claimants that were before the Court who were directly and personally affected by the guidance under challenge.²¹⁷ In any event, the ERB does not identify specific claimants, and so standing would not be restricted in this way.

Kelleher contends that it is not essential to re-write standing rules or stretch them to breaking point; for those ‘core victims’, including nature, to access justice, Parties to the Convention need only take their access to justice obligations seriously.²¹⁸ Article 9(2) stipulates that ‘the public concerned’ must have access to a procedure of review for substantive and procedural legality. ‘The public concerned’ as defined by Article 2(5) includes ‘the public affected or likely to be affected by or having an interest in environmental decision-making;’ and NGOs ‘promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest’.²¹⁹ Guided by the Convention’s preambular objective of envi-

²⁰⁹ *Walton* (n 127) [94].

²¹⁰ Kelleher (n 19).

²¹¹ A Grear, ‘Towards Climate Justice: A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterns of Hierarchies, Directions for Future Law and Policy’ (2014) 5 *Journal of Human Rights and the Environment* 103, 117.

²¹² *Friends of the Irish Environment CLG v Government of Ireland* [2020] IESC 49 [6.46].

²¹³ *R v Brimingham CC, ex parte Millard & Connolly* (1994) 26 HLR 551, 559 (QB); *R (Bateman) v Legal Aid Board* [1992] 1 WLR 711 (QB).

²¹⁴ J Bell, *The Anatomy of Administrative Law* (Hart Publishing 2020).

²¹⁵ *Good Law Project* (n 203) [509].

²¹⁶ *ibid* [510].

²¹⁷ *R (Good Law Project & Ors) v Equality and Human Rights Commission* [2026] EWHC 279 (Admin) [15]-[16], applying the reasoning in *R (Good Law Project) v Prime Minister* [2022] EWHC 298 (Admin) at [31] and [54]-[59].

²¹⁸ Kelleher (n 19).

²¹⁹ *ibid* (my emphasis); Aarhus Convention (n 11) art 2(5) is inclusive of ‘non-governmental organizations promoting environmental protection and meeting any requirements under national law’.

ronmental stewardship,²²⁰ the consequence of adopting a purposive construction is that standing is likely afforded an inclusive interpretation, which would permit members of present generations to represent nature or members of future generations to challenge decisions which threaten to cause harm to nature.²²¹ A purposive interpretation of Articles 9(3)-(4) also supports the notion that States should exercise restraint in adopting strict criteria on standing.²²² It might be said that inclusive rules on standing risk transforming JR into a forum to facilitate redress for non-legal, political complaints.²²³ However, it is especially important in the environmental context that standing is afforded an inclusive interpretation because it is particularly difficult to identify the model litigant. It may be that the only and best placed applicant to bring a vital challenge is a group such as Greenpeace or, alternatively, an individual solely by way of their being a citizen that is dependent upon nature at risk.

A more faithful approach to Article 9 of the Convention could have led to a different result in *Friends of the Irish Environment*.²²⁴ The ruling has been criticised for failing to consider the gravity of the climate crisis, the threat posed to the rights considered, and the nature of the rights engaged.²²⁵ If, by way of Clause 1 ERB, courts had to have regard to the gravity of the need to secure the right to a healthy environment for present and future generations, acknowledge difficulties in identifying the model litigant, and recognise the ‘inequality of arms’ and the immense ‘toll’ taking a case against the State brings,²²⁶ they may decide an inclusive standing is the best construction of the law. Although, as the ACCC noted in ACCC/C/2005/11 (Belgium), ‘Parties are not obligated to establish a system of popular action (actio popularis) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment’.²²⁷ It is right that there should be limits on standing generally, and it is not argued that the ERB should include an express right of actio popularis, for fear of disproportionately widening the floodgates.

However, environmental claims should be subject to special rules. Decisions which relate to a State’s climate mitigation policies affect everyone, and are unconfined even by borders. Nature cannot speak for itself, but serious and irreparable harm might percolate into communities before a preventative challenge may be brought. Inclusive standing could ensure that the core victims of environmental injustice, whose voices do not ordinarily ring loud in policymaking fora, may see their harms remedied. Members of local communities that are connected with and dependent upon nature and its features may be able to bring a challenge, whether together or separately, where there is a threat of serious or irreversible of harm to nature without needing to demonstrate specific harm to or rights impairment of those putative

²²⁰ In its very first preambular paragraph, the Aarhus Convention (n 11) recalls Principle 1 of the Stockholm Declaration on the Human Environment, which as Kelleher (n 19) 112 recalls, signals a commitment to environmental stewardship as it states that humanity ‘bears a solemn responsibility to protect and improve the environment for present and future generations’.

²²¹ Barritt (n 15) 22; Kelleher (n 19) 112.

²²² *ibid* (n 17) 112; ACCC/C/2008/32 (European Union) (Part I) [77]–[78]; ACCC/C/2006/18 (Denmark) [29]–[30].

²²³ Ivan Hare, ‘Due Reprocess – Thorp, Sellafeld and Greenpeace’ (1995) 54(1) *Cambridge Law Journal* 1; Ministry of Justice, *Judicial Review – Proposals for Further Reform: The Government Response* (Cm 8811, 2014) [32]; in the Banner Review (n 101), Recommendation 2 states that ‘there is no convincing case for amending the rules in relation to standing to reduce the number of challenges to NSIPs’.

²²⁴ *Friends of the Irish Environment* (n 212).

²²⁵ V Adelmant, P Alston, and M Blainey, ‘Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court’ (2021) *Journal of Human Rights Practice* 1, 7.

²²⁶ Kelleher (n 19) 126.

²²⁷ UNECE, ‘Findings and Recommendations with Regard to Communication ACCC/C/2005/11 Concerning Compliance by Belgium’ (28 July 2006) ACCC/C/2005/11 [35].

citizens or groups, strengthening environmental stewardship. Those members that are interconnected with and dependent upon nature and its features will be well placed to discern the existence of a threat to those features. Civil society coalitions could work together to mobilise techno-scientific expertise, legal experience, and local knowledge to best discern when a challenge should be brought.

Ultimately, it is crucial that the law (i) is informed by the unique spatio-temporal dynamics of climate change and environmental harms, (ii) is intersectional in that it protects the core victims of environmental injustice, and (iii) recognises the entanglement of nature and humanity as interdependent and interconnected participants, equivalently indispensable to the production of legal outcomes and the safeguarding of our collective futures.²²⁸ Therefore, the ERB would be improved by including a provision mirroring Article 2(5) of the Convention (on the definition of the ‘public concerned’) and by placing emphasis on wording to the effect of affording standing to those ‘likely to be affected’ by or ‘having an interest in’ environmental decisions.

V. CONCLUSION

The UK’s implementation of the Convention has given rise to cases of non-compliance concerning, *inter alia*, the lack of substantive review procedure, a failure to implement effective public participation mechanisms into the drafting of legal rules, prohibitive costs, and the hostile treatment, persecution, and penalisation of environmental defenders. Compliance mechanisms are slow to respond, and there is no certainty that those mechanisms will lead to executive action or legislative change. As shown by its engagement with the Special Rapporteur, the UK continues to turn itself away from the need to secure the right to a clean, healthy, and sustainable environment. Until domestic law commits to guaranteeing that right, the procedural pillars of the Convention may not enjoy the purposive construction which could enable them to take proper power and effect real change. This is especially crucial in the absence of full and effective incorporation. The current state of need for robust mechanisms to protect against the regression of protections for nature, especially in the face of uproar from civil society, is elucidated by the accelerated passage of the PIA 2025 from drafting to readings in Parliament. A more faithful, CEJ-aligned implementation of the Aarhus Convention is needed to respond to the ‘existential’ crisis that climate change presents, which ‘imperils all forms of life and the very health of our planet’.²²⁹

Neither the Convention nor the ERB are perfect. An expansive conception of environmental justice would view communities as interdependent and interconnected with nature, afford the core victims of climate injustice sovereignty, and empower the solidarity of others.²³⁰ The conventional anthropocentric focus of international rights mechanisms limits the potential for rights-based actions which are emancipatory for core victims in a broadly nature-inclusive manner. Legislation should provide robust rights-protection provisions that develop the foundations of inclusive standing for those that need it most, which neither the Convention nor the ERB afford.

²²⁸ Pellow (n 20) 31: ‘... both human and more-than-human – must be viewed not as expendable but rather *indispensable* to our collective futures’.

²²⁹ ICJ Advisory Opinion (n 10) [456]: ‘... the questions posed by the General Assembly represent more than a legal problem: they concern an existential problem of planetary proportions that imperils all forms of life and the very health of our planet’.

²³⁰ Pellow (n 20) 30-34.

Nonetheless, the ERB implements the Aarhus Convention in effective and novel ways which are concomitant with many of the objects of CEJ. Environmental NGOs arguably under-utilise the Convention's middle pillar of public participation, although current obligations requiring participation appear thin.²³¹ The recent ACCC/C/2017/150 (United Kingdom) findings, although presently lacking endorsement by the UK, have shown that the ACCC is receptive to challenges on these grounds, and the treatment of consultation for the PIA 2025 has demonstrated that greater focus on the middle pillar is urgently needed. Implementing Article 8 through Clause 11 ERB could strengthen environmental democracy and develop the foundations of a progressive ecological politics capable of being expansively participatory. Clauses 13(5)-(6) enshrine meaningful costs protections for prospective litigants which reduces exposure to risk of prohibitive adverse costs, particularly pre-permission, which will assist the Convention in achieving its objective of executive accountability by improving access to justice. Enshrining the fundamental right to a healthy environment for present and future generations empowers the Convention's procedural pillars with a purposive foundation. Through Clauses 1 and 5, the ERB inspires environmental stewardship by protecting environmental defenders. Clause 14 and the deployment of local environmental tribunals could improve access to justice by facilitating merits review on a low-cost basis, tackling scientific uncertainty head-on.

The objectives of the Convention are nothing short of revolutionary insofar as they align with the objects of CEJ. Without proper implementation, the Convention's progressive potential can only reliably be aspirational. The existential nature of the climate crisis requires nothing short of the proper implementation of environmental rights and a legal framework which considers nature indispensable to the negotiation of our collective futures. Civil society should find hope in empowering the Convention through the ERB, and rally the executive to transform this aspiration into mechanisms which empower the subjects of the law to protect sustainable futures for people and nature.

²³¹ Abbot and Lee (n 166).