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SHORT NOTE
on the proposed new UK data protection regime & on the continuing UK surveillance regime

Attachment 1: General context

Introduction

The present UK government's actions, like the previous Boris Johnson and (brief) Liz Truss administrations, are driven by three main considerations:

- a desire for freedom to adopt laws for the UK without constraint from European or international law (*viz*. also the so-called "British Bill of Rights" that would be better named the British Get Rid of European Rights Bill);
- distrust of "judicial overreach" and especially of European court jurisdiction and European court interpretations of law; and (somewhat paradoxically):
- extensive use of executive legislative powers with limited oversight from Parliament.

1. Freedom to adopt laws without constraint from European or international law

As Ian Brown and I noted in our 2020 submission,[1] the UK Government has been extremely clear it wants to free itself from the "shackles" of the EU Charter of Fundamental Rights and EU law generally and from the oversight of the Court of Justice of the European Union in particular. In fact, it sees that as one of the great gains of Brexit.

This has not changed; if anything, the Boris Johnson and Liz Truss administrations doubled down on this aspiration. Indeed, the UK government has made clear it is willing to break international law to that end, i.e., to "take back control" over its own laws, if needs be in breach of its own international-legal undertakings. This was illustrated in the well-known September 2020 exchanges in the House of Commons on the Northern Ireland Protocol and the then proposed UK Internal Market Act that allows the government to override elements of the Protocol:[2]

> **Sir Robert Neill** (Bromley and Chislehurst) (Con):
>
> The Secretary of State has said that he and the Government are committed to the rule of law. Does he recognise that adherence to the rule of law is not negotiable? Against that background, will he assure us that nothing that is proposed in this legislation does, or potentially might, breach international legal obligations or international legal arrangements that we have entered into? Will he specifically answer the other point: was any ministerial direction given?
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> **Brandon Lewis** (Northern Ireland Minister):
>
> I would say to my hon. Friend that **yes, this does break international law in a very specific and limited way**. We are taking the power to disapply the EU law concept of direct effect, required by article 4 [of the Northern Ireland Protocol], in certain very tightly defined circumstances. … (emphasis added)

In spite of strong objections, both domestically,[3] and by the EU,[4] the UK Internal Market Act was adopted, but with some of the most contentious provisions deleted on the basis of an "agreement in principle" between the UK Chancellor, Michael Gove, and EU Commission Vice-President for Interinstitutional Relations, Maroš Šefčovič, that was reported to have resolved the Brexit issues

(which it is now clear it did not).[5] This approach was also confirmed by Suella Braverman (now again the Home Secretary, after a six-day interruption) in her then role of Attorney General in the litigation on the Act, in which she argued that:[6]

> It is an established principle of international law that a state is obliged to discharge its treaty obligations in good faith. This is, and will remain, the key principle in informing the UK's approach to international relations. However, in the difficult and highly exceptional circumstances in which we find ourselves, it is important to remember the fundamental principle of Parliamentary sovereignty.
>
> **Parliament is sovereign as a matter of domestic law and can pass legislation which is in breach of the UK's Treaty obligations.** Parliament would not be acting unconstitutionally in enacting such legislation. This 'dualist' approach is shared by other, similar legal systems […]

The UK government is also adamant that no "foreign" court should be able to rule on the validity or otherwise of UK law or policies. In its attempts to re-negotiate the so-called Northern Ireland Protocol that is part of the EU-UK Withdrawal Agreement, the UK government is therefore proposing to replace the role of the EU Court of Justice with an international arbitration system:[7]

> The fundamental difficulty is that we are being asked*[see note] to run a full-scale external boundary of the EU through the centre of our country, to apply EU law without consent in part of it, and to have any dispute on these arrangements settled in the court of one of the parties. …
>
> [O]ur proposal looks more like a normal Treaty in the way it is governed, with international arbitration instead of a system of EU law ultimately policed in the court of one of the parties, the European Court of Justice
>
> *note: The UK government was of course not "being asked" to submit to the Court of Justice in relation to the protocol (that expressly provides for a role of the Court), but had formally signed up to it in the binding treaty.

The government widely briefed the press that this is a "red line":

> **Lord Frost: We will never allow EU court to rule on Northern Ireland**
>
> Lord Frost has warned Brussels that it would be making a "historic misjudgment" if it failed to agree to British demands to reform the Northern Ireland protocol.
>
> In a strident defence of the government's stance, the Brexit minister said that a revised deal would be acceptable only if the EU removed Northern Ireland from the jurisdiction of the European Court of Justice.
>
> (*The Times*, 13 October 2021)
>
> **NI Protocol: UK warns role of European Court of Justice 'red line' in new talks**
>
> The European Court of Justice's oversight in the Northern Ireland Protocol is a "red line", Lord Frost is expected to warn ahead of new talks with the EU.
>
> (*Belfast Telegraph*, 10 October 2022)

This UK reluctance to adhere to international and European rules and submit to international and European oversight when this conflicts with its own priorities should be borne in mind in any assessment of UK data protection adequacy from an EU perspective, especially given the extensive proposed powers of the UK executive to change the proposed new Data Protection and Digital Information Act in many fundamental respects.

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2. Distrust of "judicial overreach" and especially of European courts' interpretations of law

The recent and current Conservative governments feel that there is "judicial overreach" even within the UK, and are especially criticial of European courts' interpretations. Domestically, again with reference to the principle of Sovereignty of Parliament, they want to limit judicial review to ensure judges take more heed of the wishes of the legislator.[8] But they are particularly criticial of European judges ruling on matters covered by UK law – and want to limit if not completely eradicate what they see as "foreign" interference with this hallowed Sovereignty of the UK Parliament. As noted in the previous section, the government is adamantly opposed to any say in UK matters (including the NI Protocol) by the Court of Justice of the EU. But the other European court, the European Court of Human Rights, has also for a long time attracted their ire[9] - and this has not abated.

As recently as 4 October this year, the then new, and now reinstated, Home Secretary, Suella Braverman (previously the Attorney General) called for the UK to formally leave the ECHR.[10] Although she was officially rebuked for this,[11] the government remains hostile to the Convention and the way it is interpreted and applied by the Strasbourg Court. This is most clearly reflected in the Bill of Rights Bill that was supposed to replace the Human Rights Act of 1998 that transposed the European Convention on Human Rights into UK domestic law.[12] Its intentions are clearly set out in its very first clause:

> (1) This Act reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998.
>
> (2) In particular, this Act clarifies and re-balances the relationship between courts in the United Kingdom, the European Court of Human Rights and Parliament by ensuring—
>
> (a) that it is the Supreme Court (and not the European Court of Human Rights) that determines the meaning and effect of Convention rights for the purposes of domestic law (…);
>
> (b) that courts are no longer required to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights (…);
>
> (c) that courts must give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament (…).
>
> (3) It is affirmed that judgments, decisions and interim measures of the European Court of Human Rights—
>
> (a) are not part of domestic law, and
>
> (b) do not affect the right of Parliament to legislate.

The Bill was shelved by the brief Truss administration – but not because of a fundamental re-think on the above principles. Rather, her government reportedly realised the Bill was "*poorly drafted and risked being 'shredded' in the [House of] Lords*".[13] Government sources confirmed that the Truss administration "*remain[ed] committed to the 'principles and objectives' outlined in the Bill*", as summarised in the above-quoted clause – and there is every reason to believe this also holds true for the present Sunak government.

3. Extensive use of executive legislative powers with limited oversight from Parliament

A final important contextual element is the keenness that the recent and current Conservative governments have for conferring extensive powers on the executive to change or expand laws through statutory instruments (delegated legislation) that are subject to very limited parliamentary oversight – so-called "Henry VIII clauses" (after the 16th Century absolute monarch). There is no constitutional constraint on the use of such clauses to introduce rules that impact on fundamental rights (cf. the German/Austrian concept of *Gesetzesvorbehalt*).[14]

Statutory instruments (SIs) are "placed before Parliament" but can only be approved or rejected; they cannot be amended:[15]

> Secondary legislation cannot be amended by parliament: the most it can do is debate an instrument (this is a requirement for a minority of instruments – those subject to the 'affirmative' procedure – but very rarely happens for 'negative' instruments, which are the majority) and ultimately reject it outright (which is rarer still).

In practice, according to Parliament's website that also explains the processes in more detail, the last time an affirmative SI was rejected in the Commons was 1978, and a negative one in 1979.[16] Lords normally merely adopt "regret" motions if they are unhappy with an SI, without even trying to decline approval.

The more recent increasing use of statutory instruments can be partly explained by the Covid pandemic that required fast, complex executive action,[17] but in fact concerns have been raised about the lack of serious parliamentary control over them for a long time,[18] and concerns were raised that their sweeping use in the pandemic would further normalise their extensive use.[19]

In February 2022, the government announced that it planned to introduce a Brexit-related law to make it easier to amend or repeal "retained EU law", and end its special status, and on 22 September, the Truss administration released the Retained EU Law (Revocation and Reform) Bill. Although it was reported that the latest prime minister, Rishi Sunak, "may deprioritise Rees-Mogg['s] Brexit bill to switch off 2,400 EU law[s]",[20] the aim remains.

Briefly, if passed as drafted, the Bill (which then becomes an Act) will have the following effects:[21]

- **Sunset retained EU law** – The Bill will sunset the majority of retained EU law so that it expires on 31st December 2023, unless specifically preserved. Before that date, the Government will need to review every piece of retained EU Law [of which there are some 2,400][22] to determine which should be retained or amended. The Bill includes an extension mechanism for the sunset of specified pieces of retained EU law until 2026 should it be required;
- **Modification of retained EU law** – The Bill will make it easier to amend [or repal or replace] retained EU law by giving ministers powers to amend retained EU law by secondary legislation;
- **End the supremacy of retained EU law** – The Bill will reverse the current situation that retained direct EU legislation takes priority over domestic UK legislation passed prior to Brexit (where they are incompatible); and

- **Departure from EU caselaw** – The Bill will give the UK courts greater discretion to depart from the body of retained EU case law.

The Bill was expected to become law by the end of this year, but this may now be delayed.

The main issue for the LIBE Committee is in the second bullet-point: serious concern has been raised that EU rules protecting the environment and workers' rights and many other matters may be replaced, with very limited parliamentary scrutiny, with rules providing less protection, by means of statutory instruments:[23]

> **Democratic concerns**
>
> Clause 15 of the Retained EU Law bill gives ministers the freedom to make major changes to EU-derived secondary legislation without the need for an Act of Parliament. In practice, this gives the government free rein to change laws as it likes – not least because, if ministers decide to sit on their hands, the sunset clause threatens the complete repeal of these laws by the end of 2023.
>
> This concerning lack of democratic scrutiny and accountability continues a dangerous precedent of growing executive power. Parliament is at risk of becoming increasingly marginalised as the government forges ahead with its post-Brexit plans.

This is relevant for the Committee because, as noted in Attachment 2, the Data Protection and Digital Information Bill that will, when adopted, determine the future of UK data protection law, also contains many clauses that allow ministers to change that law in many respects through statutory instruments, with little parliamentary scrutiny. This includes the designation of other countries as providing "adequate" protection from the UK perspective by means of SIs that are not even subject to the affirmative, but rather only to the negative procedure.

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Prof. Douwe Korff
Cambridge (UK), 27 October 2022

NOTES:

[1] Douwe Korff and Ian Brown, The inadequacy of UK data protection law in general and in view of UK surveillance laws, Part One on general inadequacy of UK data protection law, section 3.3.2, *Diverging from European fundamental rights standards*, p. 21, October 2020, available at:
https://www.ianbrown.tech/2020/10/09/the-uks-inadequate-data-protection-framework/
(For the full references to both parts of the submission, see note 1 to the Short Note.)

[2] *Hansard* (the official record of speeches in the House of Commons), Volume 679, debate on the Northern Ireland Protocol: UK Legal Obligations, 8 September 2020, column 509, available at:
https://hansard.parliament.uk/commons/2020-09-08/debates/2F32EBC3-6692-402C-93E6-76B4CF1BC6E3/NorthernIrelandProtocolUKLegalObligations

[3] See the full debate as reported in *Hansard* (previous note) and the *Wikipedia* entry on the Act, *inter alia* on the objections from the Welsh and Scottish devolved governments, available at:
https://en.wikipedia.org/wiki/United_Kingdom_Internal_Market_Act_2020#:~:text=On%209%20September%202020%2C%20the,acknowledged%2C%20illegal%20under%20international%20law.

[4] See, e.g., BBC, *Brexit: EU ultimatum to UK over withdrawal deal changes*, 10 September 2020, available at:
https://www.bbc.co.uk/news/uk-politics-54097320

[5] BBC, *Brexit: UK and EU reach deal on Northern Ireland border checks*, 8 December 2020, available at: https://www.bbc.co.uk/news/uk-politics-55229681

[6] *HMG [Her Majesty's Government] Legal Position: UKIM Bill And Northern Ireland Protocol*, 10 September 2020, emphasis added, available at: https://www.gov.uk/government/publications/hmg-legal-position-ukim-bill-and-northern-ireland-protocol

[7] Speech by Lord Frost, then the UK Brexit Minister, *Observations on the present state of the nation*, Lisbon, 12 October 2021, available at: https://www.gov.uk/government/speeches/lord-frost-speech-observations-on-the-present-state-of-the-nation-12-october-2021

[8] For details, see the Judicial Power Project, which is supported by the thinktank Policy Exchange that is close to the Conservative Party, and that is based on the conviction that "*judicial overreach increasingly threatens the rule of law and effective, democratic government*". See: https://judicialpowerproject.org.uk/about/#:~:text=Judicial%20overreach%20increasingly%20threatens%20the,separating%20judicial%20and%20political%20authority
But as the Law Society President, I. Stephanie Boyce, said:
"*Proposals on judicial review – which the government claims are intended to adjust the balance of power between executive, parliament and the courts – risk taking power away from citizens and putting more into the hands of government. The rule of law and access to justice would be significantly weakened.*" See: https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/british-values-of-justice-must-not-be-undermined-in-the-rush-to-recover-from-covid

[9] *UK government plans to remove key human rights protections*, Observer/Guardian, 13 September 2020, available at: https://www.theguardian.com/law/2020/sep/13/uk-government-plans-to-remove-key-humanrights-protections [*original footnote*]

[10] The Times, *Suella Braverman angers No 10 with attack on human rights convention*, 5 October 2022, available at: https://www.thetimes.co.uk/article/suella-braverman-angers-no-10-with-attack-on-human-rights-convention-9l5b956hr

[11] *Idem*.

[12] Full text at: https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf
A good overview is provided by *Landmark Chambers* at: https://www.landmarkchambers.co.uk/wp-content/uploads/2022/07/Presentation-BoRB-Session-1.pdf

[13] Eachother, Why Has The Government's Bill Of Rights Been Shelved?, 8 September 2022, available at: https://eachother.org.uk/why-has-the-governments-bill-of-rights-been-shelved/
This references reports in the *Sun* tabloid newspaper under the header, "*A RIGHTS MESS Gloating leftie lawyers rejoice as Liz Truss shelves plans to rip up Human Rights Act*", 7 September 2022, available at: https://www.thesun.co.uk/news/19738845/liz-truss-human-rights-act/ –
and in the *Daily Telegraph* broadsheet under the header, "*British Bill of Rights shelved as Liz Truss faces pressure to sideline ECHR*", of the same date, available at: https://www.telegraph.co.uk/politics/2022/09/07/british-bill-rights-shelved-liz-truss-faces-pressure-sideline/

[14] See: https://de.wikipedia.org/wiki/Gesetzesvorbehalt

[15] *The Constitution Unit*, *Reliance on secondary legislation has resulted in significant problems: it is time to rethink how such laws are created*, 13 October 2021, available at: https://constitution-unit.com/2021/10/13/reliance-on-secondary-legislation-has-resulted-in-significant-problems-it-is-time-to-rethink-how-such-laws-are-created/

[16] See: https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-commons/

[17] *Idem*.

[18] A 1957 book, The Unservile State, by George Watson, had a section on civil liberties, which already argued that secondary legislation was the biggest threat to civil liberties. It is now available as an e-book at: https://books.google.co.uk/books/about/The_Unservile_State.html?id=yA9mDwAAQBAJ&redir_esc=y

[19] *The Guardian*, *Boris Johnson's Covid laws took away our rights with flick of a pen. Don't let that happen again*, by Adam Wagner, 13 October 2022, available at:

https://www.theguardian.com/commentisfree/2022/oct/13/boris-johnson-covid-laws-rights-decree-two-years-democracy?CMP=Share_iOSApp_Other

[20] *Sunak may deprioritise Rees-Mogg Brexit bill to switch off 2,400 EU law*, Guardian, 27 October 2022, available at:
https://www.theguardian.com/law/2022/oct/27/sunak-may-deprioritise-brexit-bill-to-switch-off-2400-eu-laws

[21] Bullet-points taken (with minor edits) from HerbertSmithFreehils, *Retained EU law – Bill will sunset the majority of retained EU Law*, 23 September 2022, available at:
https://hsfnotes.com/corporate/2022/09/23/retained-eu-law-bill-will-sunset-the-majority-of-retained-eu-law/
For the full text of the Bill, see: https://bills.parliament.uk/bills/3340

[22] See the UK Government "dashboard" of the retained EU regulations, available at:
https://www.gov.uk/government/publications/retained-eu-law-dashboard

[23] Institute for Public Policy Research (IPPR), *Retained EU Law Bill: Government's 'power grab' a huge concern for rights, democracy and international relations says IPPR*, 30 September 2022, available at:
https://www.ippr.org/news-and-media/press-releases/retained-eu-law-bill-government-s-power-grab-a-huge-concern-for-rights-democracy-and-international-relations-says-ippr
See also *The Guardian*, *Truss promises to slash EU red tape – what's the truth behind the rhetoric?*, 13 October 2022, available at:
https://www.theguardian.com/politics/2022/oct/13/truss-promises-to-slash-eu-red-tape-whats-the-truth-behind-the-rhetoric

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