

# THE 'MODERN' BILL OF RIGHTS BILL

Substituting 'common sense' with contradictory  
constitutionalism

Joanna George

THE  
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SOCIETY

## **Joanna George**

Joanna George is a research fellow at The Constitution Society and a communication, policy and legal consultant. She is also a steering committee member of the Constitution Reform Group which calls for a new Act of Union Bill. She was previously a research associate at the University of Cambridge.

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## **Abstract**

Calls for reforming or replacing the Human Rights Act with a Bill of Rights have had difficulty progressing due to a lack of consensus on what such reform would contain and the process by which it would come about. As part of its 2019 general election manifesto, the Conservative Party promised to 'update' the Human Rights Act. In 2022, the Conservative Government introduced on a First Reading in the House of Commons the Bill of Rights Bill which would 'repeal and replace' the Human Rights Act, leading to widespread criticism within Parliament and civil society as well as discomfort within the Conservative Party itself.

This report interrogates how 'modern' (the Government's chosen word for its consultation on Human Rights Act reform) the Government's Bill of Rights Bill actually is through the interconnected constitutional themes of the rule of law, standards in public life and devolution, each of which have been undermined by the current Government. By examining the Bill through a constitutionally holistic lens, this report seeks to highlight the unworkability of the Bill in its current form, questions the motives behind the Bill's creation and proposes what a 'modern' Bill ought to include to meet the uniquely 'British' constitutional challenges currently existent and that are likely to arise in future. It ultimately argues that instead of 'restoring a healthy dose of common sense to the justice system', the Bill would do the precise opposite by creating unnecessary constitutional contradictions and confusion at a time when constitutional coherence is required post-Brexit.

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## Overview of the Bill of Rights Bill

The Bill of Rights Bill was introduced on a First Reading in the House of Commons on 22 June 2022. It was scheduled to have its Second Reading on 12 September 2022, however this was postponed under the Liz Truss Government. On succeeding Truss as Prime Minister, Rishi Sunak re-appointed Dominic Raab as Justice Secretary who announced that the Bill would resume its parliamentary passage. At the time of writing, no date has been announced for its Second Reading.

With focus on the specific issues outlined in this report, the Bill would make the following changes:

- Repeal and replace the Human Rights Act 1998.
- Restrict the influence of the European Court of Human Rights ('ECtHR') by making the UK Supreme Court the 'ultimate judicial authority' on questions arising under domestic law in connection with the European Convention on Human Rights ('Convention'). Due to Clause 3, which stipulates how domestic courts must interpret Convention rights, this would likely lead the UK to be in breach of its international treaty obligations as a member of the Council of Europe.
- Restrict free speech. The scope of Clause 4 is narrower than Article 10 of the Convention and is exempt in areas where freedom of speech is at its most vulnerable, specifically in criminal proceedings and issues arising in relation to immigration, citizenship, and national security.
- Weaken rights protection by mandating courts not to interpret Convention rights (post-commencement of the Bill) as requiring a public authority to comply with positive obligations (Clause 5). This would conflict with policy objectives of other pieces of legislation which have a human rights element, such as the Domestic Abuse Act 2021.
- Section 3 of the Human Rights Act, which requires domestic courts to interpret legislation in accordance with Convention rights so far as it is possible to do so, is not replicated in the Bill. The absence of Section 3 will not in itself prohibit domestic courts from interpreting legislation in accordance with Convention rights, but it may reduce the scope of domestic courts to avoid the existence of incompatibilities in the first place and will likely mean that there will be more declarations of incompatibility. As a result, this will require the Government and Parliament to have a more proactive role in rectifying incompatible legislation.
- Restrict the role of domestic courts and asserts the role of Parliament (Clause 7).

- Potentially lead to a gap between UK domestic court's interpretation of the Convention and the ECtHR's, even though, as a matter of international law, it is the ECtHR and not the UK Supreme Court that is the 'ultimate judicial authority'.
- Reduce the influence and role of the Convention in Parliament by not replicating Section 19 of the Human Rights Act. This could lead to legislation being enacted which is incompatible with the Convention. It would also weaken human rights concerns in the legislating process.
- May lead to a higher number of breaches by the UK of its international treaty obligations as a member of the Council of Europe.
- The right to trial by jury (Clause 9) undermines the British application of the Bill with the right to jury trial not applicable in Scots law.
- The Bill fails to acknowledge or provide any aspirational 'British' rights – something which was emphasised in previous attempts to create a 'British Bill of Rights' – that unites England, Scotland, Wales and Northern Ireland. This is a wasted opportunity given concerns about the future of the Union, and risks undermining the Union.
- By failing to foster a sense of UK identity, belonging and community in the Bill, the Government is overlooking a key concern which influenced the Brexit referendum result.
- By not incorporating 'modern' rights such as socioeconomic and environmental rights in the Bill, the English human rights deficit will increase. This will lead to greater policy divergence with the rest of the UK, particularly with Wales and Scotland whose respective governments propose to advance, and not restrict, positive human rights obligations.

## Introduction

*Law translates standards of human rights into reality. Creating a world that is respectful of law is a journey, a utopian journey, and we are still not absolutely sure how to get there. But just as democratic rights were the big idea at the beginning of the twentieth century so human rights are the big idea of the century we have recently entered.*<sup>1</sup>

The idea of a 'Modern' Bill of Rights Bill usually invokes an image of a carefully constructed and consensus-orientated piece of legislation that contains positive proposals to address modern human rights concerns affecting vulnerable and ordinary individuals alike. Unlike other Bills, a Bill of Rights is an ambitious constitutional statement; a representation of who we are and what we wish to achieve, speaking for a nation and its highest human rights ideals. In contrast, the development and unpredictable status of the Bill of Rights Bill currently before Parliament – which, at the time of writing, is reported to be shelved for a second time within a six-month period – is an anomaly rarely encountered in UK constitutional activity.<sup>2</sup> Its proposals can be viewed as a by-product of the climate of political volatility currently engulfing Parliament, as well as the deficiency of constitutional standards and good conduct within the present Government. Instead of what Helena Kennedy refers to as a 'utopian journey', that is respecting and cherishing human rights as a consistent and conscientious practice, the UK's current human rights journey is one of disorientation and contradiction, with the apparent aims of the 'Modern' Bill of Rights not aligning with what the Bill as drafted would actually achieve. This may have been averted had the Government's consultation on reform of the Human Rights Act simply asked whether the Act's replacement with a Bill of Rights would be a good idea. Instead, it 'studiously' avoided asking 'the most important question of all'.<sup>3</sup>

It is with this sentiment in mind that this report will interrogate how 'Modern' (the Government's chosen word for its consultation) the Bill of Rights Bill is through the interconnected constitutional themes of the rule of law, standards in public life and devolution. By examining it through a constitutionally holistic lens, I seek to highlight the unworkability of the Bill in its current form whilst also proposing what a truly 'Modern' Bill ought to include to meet the challenges that are likely to arise in future. I also argue that conscientious constitutionalism in the political decision-making process is an intentional practice worth pursuing, as without it the point and purpose of politics itself becomes weak and directionless. This is particularly pertinent when looking at issues such as the future of the Union, with the Government, on the one

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1 Helena Kennedy KC, *Just Law* (2005, Vintage), p. 318.

2 Aubrey Allegretti, 'Sunak's next U-turn may be to ditch Rabb's bill of rights', *The Guardian*, 8 December 2022, <https://www.theguardian.com/law/2022/dec/08/rishi-sunak-next-u-turn-may-be-to-ditch-dominic-raab-bill-of-rights>, accessed 8 December 2022.

3 Tom Hickman KC, 'A UK Bill of Rights?', *London Review of Books*, 24 March 2022, <https://www.lrb.co.uk/the-paper/v44/n06/tom-hickman/a-uk-bill-of-rights>, accessed 17 July 2022.



hand, voicing its support for strengthening the Union whilst on the other proactively undermining the Union through the 'Modern' (and not 'British' as previously touted) Bill of Rights Bill.

The disruptive nature of governance under the Boris Johnson administration has proved tumultuous for UK politics, with disregard for constitutional norms and laws significantly impacting the culture in which the Bill of Rights Bill has been shaped. Roles within government which have traditionally acted as constitutional guardians to deter such behaviour have either been undermined, dismissed or ignored, including the Minister for the Constitution and Devolution, a post which has remained vacant since September 2021. From this period onwards there has been a decline and erosion of standards in the areas that should be the responsibility of this unfilled office, such as defending democracy and electoral law. This emphasises that the Bill of Rights Bill – whether it be pursued in the near or distant future – cannot be deciphered without a holistic view of other constitutional activity, as well as an awareness of the motivations of the political actors seeking to advance it.

## Human rights reform

### Pre-Human Rights Act

Given the Government's emphasis on the perceived 'serious flaws' of the Human Rights Act, a background of the status of human rights in the UK before the Act is called for so that we can assess what rights we did – and did not – have before it became a topic of ongoing debate.<sup>4</sup> Human rights have been recognised to various degrees in the UK since the Magna Carta in 1215. Yet the extent to which these sources, particularly English common law, provided redress to the full range of domestic human rights concerns by the time of the twentieth century was limited due to the sources' 'traditional limited status in English law' which focused on 'negative freedoms rather than positive rights'.<sup>5</sup> It was during the last century that the development and status of human rights across the world took on a new dimension with the end of the Second World War and an incentive to provide 'global recognition of the inherent dignity and worth of all human beings' – a view which British politicians also identified with.<sup>6</sup> This ethical sentiment was the 'essential message' of the Universal Declaration of Human Rights which inspired the drafting of what became the European Convention of Human Rights.<sup>7</sup> Despite the UK being the first country to ratify the Convention in 1951, it was not until 1965 that the UK accepted jurisdiction of the ECtHR and the right of individual petition.

Since then, the influence of the Convention and the ECtHR in the UK has been criticised and become subject to increasingly reactionary proposals, primarily by the right of the UK Conservative Party who have sought to curtail such influence in one form or another, alongside explicit calls for the repeal and replacement of the Human Rights Act from 2006 onwards. The Bill of Rights Bill is the closest it has come to achieving this by way of wording the Bill such that it gives the illusion that the ECtHR's influence is limited. An example of this is Clause 3, which is drafted in such a way that it reduces the courts' ability to apply the Convention's 'living instrument' doctrine. This indicates that the Government is encouraging a gap between UK domestic courts' interpretation of the Convention and the ECtHR's even though, as a matter of international law, it is the ECtHR and not the UK Supreme Court that is the ultimate judicial authority. Such examples highlight that the proposals within the Bill constitutionally contradict and undermine the Government's commitment to the Convention.

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4 UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – consultation', updated 12 July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>, accessed 14 July 2022.

5 Richard Clayton KC, 'The Empire Strikes Back: Common Law Rights and the Human Rights Act', *Clayton Comments*, <https://www.claytoncomments.com/wp-content/uploads/2020/10/THE-EMPIRE-STRIKES-BACK-COMMON-LAW-RIGHTS-CLAYTON-COMMENTS.pdf>, accessed 2 July 2022, p. 2;  
Francesca Klug, *A Magna Carta for all humanity – Homing in on Human Rights* (Routledge, 2015), p. 162.

6 *Ibid.*, p. 96.

7 *Ibid.*

Curiously, the Bill and the highly dogged approach with which it is being pursued by its key supporter, the Justice Secretary Dominic Raab, varies significantly from the more consensual-orientated attempts to create a new Bill of Rights in the past. Indeed, it is a far cry from the 'possible' one that may have emerged with the involvement of 'all parties' as put forward in the Conservative Party manifesto in 1979; a pledge which Conservatives politicians of today make little if no historical reference to.<sup>8</sup> Conservative thinkers supported the incorporation of the Convention into UK law as a domestic bill of rights with the idea that it would be the 'heir to the Magna Carta and 1689 Bill of Rights.'<sup>9</sup> Yet once in power this commitment came to nothing and was effectively 'air-brushed out of political discourse'.<sup>10</sup>

It was not until the 1990s that this idea began to gain traction amongst civil society in response to the Conservative government of the day, whose actions exposed the lack of checks and balances within the UK's system of governance. The inability of judges to review legislation that impacted fundamental rights on controversial issues at the time, such as the poll tax, left a void for those seeking to challenge it within the UK's political or legal system. So extreme was this gap for challenging legislation which impacted fundamental rights that the then leader of the Labour Party, John Smith, declared with a nod to the UK's uncodified constitution in 1993 that:

'Britain is alone amongst major Western European nations in not laying down in law the basic rights of its people, and in not giving its people a direct means of asserting those rights through the country's courts'.<sup>11</sup>

Through the intentional lobbying of those focused on the public interest, including Charter 88, Liberty, the Liberal Democrats, lawyers and public figures, momentum for legislation that would define and protect human rights had grown by the mid-1990s. By that point there had been three attempts to incorporate the Convention into UK law, including two attempts by Lord Lester of Herne Hill in 1994 and 1996, whilst Sir Edward Gardner had introduced a Private Member's Bill in the House of Commons in 1987.

Eventually, the New Labour Government, under Tony Blair, incorporated the Convention through the Human Rights Act, which enabled human rights claims to be brought in UK courts. By 'bringing rights home' it reduced delay and costs for litigants who would otherwise have had to bring their case all the way to the ECtHR in Strasbourg, spending up to £30,000 and taking, on average, five years.<sup>12</sup>

8 Conservative Party manifesto 1979, 11 April 1979, <https://www.margarethatcher.org/document/110858>, accessed 1 July 2022.

9 Francesca Klug OBE, *A Magna Carta for all humanity – Homing in on Human Rights* (Routledge, 2015), p. 159.

10 Francesca Klug OBE, 'A Bill of Rights; do we need one or do we already have one?', LSE Law, Society and Economy Working Papers 2/2007, <https://eprints.lse.ac.uk/24652/1/WPS02-2007klug.pdf>, accessed 2 September 2022.

11 Speech by John Smith QC MP hosted by Charter 88, 'A Citizen's Democracy', 1 March 1993, <http://www.davidjward.com/wp-content/uploads/2019/05/Citizens-Democracy-large.pdf>, p7, accessed 1 July 2022.

12 HC Deb 16 February 1998, vol 306, col 768.

From a cultural perspective, the Human Rights Act has ‘embedded a human rights culture in public authorities’, a change which has greatly enriched decision-making and emphasised the ‘human’ in human rights.<sup>13</sup> Critics complain of this, but it has added greater meaning to how we treat and respect one another and has become a benchmark and model for good governance in the twenty-first century. In the 1990s, English law was ‘doctrinally incapable of engaging in the kind of reasoning which human rights jurisprudence requires’; more than twenty years on, it is unconceivable that this understanding was once lacking.<sup>14</sup>

A strong and underlying source of this understanding comes from the Convention, whose influence has enabled human rights in the UK to transition into the ‘positive force’ which Winston Churchill spoke of in 1948.<sup>15</sup> Similarly, the inclusive wording of the Convention, with particular focus on the word ‘everyone’ in the main articles, has helped elevate this point. Yet critics of the Convention undermine these subtle, carefully constructed, and crucial points.

According to Richard Ekins, who advocates for the UK’s withdrawal from the Convention, ‘the UK respected and protected human rights long before the Convention was ever conceived’.<sup>16</sup> But this point glosses over those whose human rights were less respected (or outright ignored) in the past, namely immigrants, potential immigrants, LGBTQ people, victims of domestic abuse, children, elderly people abused in care homes, disabled people, the mentally ill and others belonging to minority or overlooked groups. In essence, people who are the most vulnerable in society. It is the Convention which has provided international impetus and a legally binding framework to aid these groups. It has also broadened understanding and awareness of democratic values which, in the words of Lady Hale, is founded on the principle that ‘democracy values everyone equally even if the majority does not’.<sup>17</sup> Applying this principle to the reception of the Convention across the UK, the Union outside of England is united by this although it is noted that the Democratic Unionist Party (DUP) in Northern Ireland has historically been critical of the approach of the ECtHR. By failing to investigate which Convention rights all nations and parts of the UK support, the Government is overlooking a significant constitutional opportunity to strengthen, and not weaken, the Union – a mandate which it was elected to fulfil.

Whilst it is correct that the UK did stimulate respect for the protection of rights such as the right to fair trial or prohibitions on inhuman and degrading treatment, Ekins fails to explain that these laws protected certain rights and certain groups but not others

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13 Letter from the Acting Chair of the Joint Committee on Human Rights, 30 June 2022, <https://committees.parliament.uk/publications/22880/documents/167940/default/>, accessed 14 July 2022, p. 4.

14 Sir Rabinder Singh, ‘The Place of the Human Rights Act in a Democratic Society’, *The Unity of Law* (Hart Publishing, 2021), p. 145.

15 *Ibid.*

16 Richard Ekins, ‘The Limits of Judicial Power: A programme of constitutional reform’, *Policy Exchange Judicial Power Project*, 10 October 2022, <https://judicialpowerproject.org.uk/how-to-address-the-breakdown-of-trust-between-government-and-courts-2-2-2/>, p. 10, accessed 10 October 2022.

17 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, 132.

pre-Convention. As pointed out by Francesca Klug, the Magna Carta and 1689 Bill of Rights – which are sources of English, not British, rights – as well as the common law (distinct from Scots law) which was the most important source of all, had human rights gaps, most notably the ‘right to free expression, association, privacy or family life and no anti-discrimination protection’.<sup>18</sup> Rights such as the right to protest, now protected in Schedule 1 of the Human Rights Act – although recently weakened by the Police, Crime, Sentencing and Courts Act 2022, the Public Order Bill currently progressing through Parliament and also in the Bill of Rights Bill which disregards the right to protest in many forms – were previously not recognised in English common law. Indeed, Lord Hewart observed in 1935 that ‘English law does not recognise any special right of public meeting for political or other purposes’.<sup>19</sup> The incorporation of the Convention through the Human Rights Act provides accessible language to locate fundamental rights by those who need it, a way for the rule of law to operate in practice. In a globalised world and internet age which provides information to be accessed at the tap of a finger, how can human rights truly be respected and enforced if those who need them most cannot easily source and identify them?

## Post-Human Rights Act

Support for the Human Rights Act, which came into force in 2000, was gained and has been consistently maintained from academics, NGOs, lawyers, and politicians who value how it has enabled individuals to enforce their rights and access effective remedies whilst also maintaining a democratic dialogue between Parliament and the courts. But reservations from politicians within and outside of Government grew (and has since fluctuated) as both domestic courts and the ECtHR ruled, in a relatively small selection of cases, in favour of unpopular minorities such as terrorist suspects and prisoners when UK law was disproportionate or fell outside of the margin of appreciation. This was despite it being well-known from the outset that the incorporation of the Convention through the Human Rights Act would mean that its application would be inclusive of everyone.

In response, a media narrative began to emerge during the 2000s in sections of the UK tabloid press that the Human Rights Act was being used as ‘a tool for protecting the rights of lawbreakers rather than the law-abiding’.<sup>20</sup> This narrative, which commenced around the time of the September 11<sup>th</sup> 2001 attacks in New York and was heightened around the period of the July 2005 bombings in London, grew as public concerns about terrorism and criminal activity were already in the public consciousness. These in turn served to create a negative perception, rather than a confident and full understanding,

18 Francesca Klug OBE, *A Magna Carta for all humanity – Homing in on Human Rights* (Routledge, 2015), p. 101.

19 *Duncan v Jones* [1936] 1 KB 218, 222.

20 Alexander Home and Lucinda Maer, ‘From the Human Rights Act to a Bill of Rights?’, *Parliament and the Law* (Hart Publishing, 2013), p. 254; For examples see: *Mail Online*, ‘Human rights is a charter for criminals and parasites our anger is no longer enough’, 15 July 2012, <https://www.dailymail.co.uk/debate/article-2173666/Human-rights-charter-criminals-parasites-anger-longer-enough.html>, accessed 7 September 2022 and *Daily Express*, ‘The Human Wrongs Act’, 1 October 2013, <https://www.express.co.uk/comment/expresscomment/433542/The-Human-Wrongs-Act>, accessed 7 September 2022.

of the impact of the Human Rights Act. Yet instead of proactively correcting 'public misperceptions about human rights', politicians from the Labour and Conservative parties encouraged them 'by treating them as if they were true'.<sup>21</sup> In the process they became increasingly reactive, instead of responsive, in crediting how far the UK had advanced in the democratisation of human rights. A motivating factor for creating a Bill of Rights has been the desire to provide a greater sense of public ownership over our rights. Yet it is because the New Labour Government failed to consistently explain, defend, celebrate, and claim ownership of the Human Rights Act during their time in office that the public did not embrace it.

This was particularly pertinent when the Hirst case was decided in 2005.<sup>22</sup> The ECtHR ruled that the UK's ban on all serving prisoners from voting breached Article 3 of Protocol 1 of the Convention. Whilst this right is not absolute, each contracting state has a wide margin of discretion to decide the nature of the limits imposed – a point not emphasised enough and which would have broadened public understanding and awareness.<sup>23</sup> The majority of the ECtHR concluded that the 'general, automatic and indiscriminate' nature of the restriction on the right meant that the UK's ban on prisoners' voting rights fell outside of the margin of appreciation and was disproportionate.<sup>24</sup> At UK level it took the Government thirteen years to implement proposals to allow certain prisoners to vote, such as those on temporary release and at home under curfew, and so meet the UK's international law obligations.<sup>25</sup> This delay occurred because of the Government's elongated (and at times, deliberate) intransigence. At the heart of the case was the issue that the Government had 'excessive dominance over Parliament in deciding right-based issues', highlighting that human rights are at risk without Parliament's active role in explaining, debating, and defending them.<sup>26</sup>

Human rights are also at risk when the legal application of them becomes negatively misconstrued by the media – the fourth pillar of democracy – and used for the purposes of making profit. When cases such as Hirst were decided in the mid-2000s, it was during this period that sales of newspapers declined whilst online news became more dominant and competitive. In response, there was 'a greater urgency than ever before to secure headline stories' which in some instances involved the use of unethical practices which is most famously illustrated by the News UK phone hacking scandal with the legal ramifications still ongoing.<sup>27</sup> This was put to the test by Article 8 of the

21 Joint Committee on Human Rights, *A Bill of Rights for the UK?*, (2007-8, HL Paper 165, HC 150-I), <https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf>, accessed 22 July 2022, para 33.

22 *Hirst v United Kingdom (No 2)* (2005) ECHR 681.

23 *Ibid.*, 61.

24 *Ibid.*, 82.

25 The Scottish and Welsh Governments are responsible for elections at local and devolved level.

26 Helen Hardman, 'Prisoner voting rights: the conflict between the government and the courts was really about executive power', *LSE blog*, 20 June 2019, <https://blogs.lse.ac.uk/politicsandpolicy/prisoner-voting-rights/>, accessed 20 July 2022.

27 Baroness Helena Kennedy QC, 'Lecture by Baroness Helena Kennedy QC: 'Inhuman Rights'', 23 June 2014, <http://mediastandardstrust.org/mst-news/lecture-by-baroness-helena-kennedy-qc-inhuman-rights-podcast-and-text/>, accessed 20 July 2022; Jim Waterson, 'The Sun faces fresh claims of phone hacking during Rebekah Brooks era', *The Guardian*, 11 October 2022, <https://www.theguardian.com/media/2022/oct/11/the-sun-faces-fresh-claims-of-phone-hacking-during-rebekah-brooks-era>, accessed 11 October 2022.

Convention, which provides legal protection for the privacy of individuals, which was implemented through the Human Rights Act. This meant that news about certain individuals and celebrities whose private lives and information could attract large paper sales had to be legally considered before publication.

The impact of this restriction meant that certain sections of the tabloid media have been disproportionately negative about the Human Rights Act, a point highlighted by Jack Straw who as Justice Secretary in 2007 declared, 'if you read certain newspapers you might be forgiven for thinking that human rights were an alien imposition foisted upon us by 'the other'.'<sup>28</sup> It was this 'othering' and a fixation on analysing ECtHR cases involving minority and unpopular groups that influenced understanding of and, to a certain extent, misconstrued, the Human Rights Act and fuelled hostility from critics. It also directly influenced Conservative Party policy on Human Rights Act reform, with David Cameron's 2006 speech on a 'Modern Bill of Rights' containing the word 'terrorism/terrorist' 31 times and 'crime/criminal/criminalise' 33 times in an effort to condemn the Human Rights Act.<sup>29</sup>

Concerns about playing to the media and fears of negative media sentiment may explain why the Labour Government did not immediately follow through with its original intention, as declared at its 1993 party conference, to enact a British Bill of Rights following the incorporation of the Convention into UK law. Eager to provide a 'home-grown' human rights alternative that would address the issues raised by hostile media, alongside adding rights such as trial by jury and freedom of speech, Labour's inaction provided oxygen for Cameron's later speech.<sup>30</sup>

It was always intended that Labour's Bill would retain the UK's commitment to the Convention. Eager to reclaim the narrative on human rights under his new premiership, Gordon Brown came to advocate a British Bill of Rights and Duties in 2007 as part of the Labour Government's wider constitutional agenda. This sought to re-invigorate UK democracy by reining in executive power, building on the basic principles of the Human Rights Act and providing 'explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others'.<sup>31</sup> Later, in 2008, the Joint Committee on Human Rights recommended that a Bill of Rights should not dilute any rights under the Human Rights Act and that it should set out a 'shared vision of a desirable future society' and be 'aspirational in

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28 Jack Straw, *Mackenzie Stuart Lecture* (Cambridge University, 25 October 2007), <https://www.cels.law.cam.ac.uk/mackenzie-stuart-lectures/2007-mackenzie-stuart-lecture-human-rights-21st-century>, accessed 3 September 2022.

29 David Cameron's speech to the Centre for Policy Studies, 'Balancing freedom and security – a modern Bill of British Rights', *The Guardian*, 26 June 2006, <https://www.theguardian.com/politics/2006/jun/26/conservatives.constitution>, accessed 2 July 2022.

30 *Ibid.*

31 Secretary of State for Justice and Lord Chancellor, *The Governance of Britain*, (CM 7170, 2007), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228834/7170.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf), accessed 14 July 2022, para 210.

nature'.<sup>32</sup> Yet such a Bill never came to fruition. Neither did the efforts of the 2011 Commission on a UK Bill of Rights which failed to reach consensus and whose report concealed 'fundamental disagreement about the nature of a future Bill of Rights'.<sup>33</sup>

Despite these limitations, the Conservative Party's 2015 manifesto committed to repealing the Human Rights Act and curtailing the role of the ECtHR 'so that foreign criminals can be more easily deported from Britain' even though evidence taken at the time found that there was little demand to repeal the Human Rights Act among the British public.<sup>34</sup> Impetus for this, however, was interrupted by pressure for Cameron to hold a referendum on the UK's membership of the EU. Overcoming the obstacles of the Brexit process and finalising its conclusion were also prioritised in the Conservative Party's 2017 manifesto. But, like the longstanding issue of the UK's membership of the EU, a plan to reform the Human Rights Act has endured despite its political and practical hurdles.

Before Brexit there was cross-party support and receptivity for exploring proposals on a Bill of Rights, albeit each party had its own interpretation of what it ought to contain. Since then, only the Conservative Party has sought to establish one and it has been predominantly pursued by hard-line Brexiteers like Dominic Raab, whose definition of Brexit appears to include reduced influence of the ECtHR. This is despite the Court being a separate entity to the EU. Indeed, this point was referred to by Cameron in his 2013 EU referendum speech where he stated that 'some of this apathy about Europe in general really relates of course to the European Court of Human Rights, rather than the EU'.<sup>35</sup> This was later confirmed – and communicated with intellectual honesty – by Theresa May as Home Secretary in advance of the EU referendum when she declared: 'If we want to reform human rights laws in this country, it isn't the EU we should leave but the Convention and the jurisdiction of its court'.<sup>36</sup>

Yet analysis of UK cases at the ECtHR when these two speeches were made (2013 and 2016 respectively) shows that in fact fewer cases were being considered than had been in the past. From an all-time high of 2,743 cases being allocated to a judicial formation in 2010 (which was likely caused by the UK's failure to implement prisoner

32 Joint Committee on Human Rights, *A Bill of Rights for the UK?*, (2007-8, HL Paper 165, HC 150-I), <https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf>, accessed 22 July 2022, para 53 and p. 5.

33 Mark Elliott, 'A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights', University of Cambridge Faculty of Law, Research Paper No 8/2013, February 2013, p. 8.

34 Conservative Party manifesto 2015, <https://www.theresavilliers.co.uk/sites/www.theresavilliers.co.uk/files/conservativemanifesto2015.pdf>, accessed 15 July 2022, p. 60;

ComRes poll, 'Little appetite to repeal the Human Rights Act new poll finds', *Amnesty International*, 9 November 2015, <https://www.amnesty.org.uk/press-releases/little-appetite-repeal-human-rights-act-new-poll-finds>, accessed 11 November 2022.

35 David Cameron's EU speech – full text, *The Guardian*, 23 January 2013, <https://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>, accessed 3 July 2022.

36 Speech by the Rt Hon Theresa May MP, 'Home Secretary's speech on the UK, EU and our place in the world', 25 April 2016, <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>, accessed 1 November 2022.



voting cases) the numbers have since fallen.<sup>37</sup> Since 2017 the number of cases brought against the UK per 100,000 inhabitants has been the lowest amongst the 47 states signed up to the Convention, with the proportion of UK cases at the ECtHR only 0.17% of total cases in 2021.<sup>38</sup> The number of successful claims brought against the UK is also the lowest amongst Council of Europe states.<sup>39</sup> Conservative scepticism of the Convention may be explained by the fact that, in contrast to other states, the UK does not already have its own national constitutional bill of rights which protects domestic human rights standards – something which could have come about long before the Convention came into force had historical actors been active and willing enough to make happen. The perception that the UK system places too much focus on the Convention via the Human Rights Act is therefore misconceived as the human rights standards of other European countries will generally align with the Convention, which, unlike the EU, was strongly shaped by British influence and actors from the outset.

The relationship between the ECtHR and the Supreme Court is another 'problem' that concerns the Conservative Party even though the requirement that UK courts 'take into account' the decisions of the ECtHR, as provided by Section 2 of the Human Rights Act, is legally clear. Taking into account decisions of the ECtHR does not mean that every decision must be followed, a point made by Lord Neuberger in *Manchester City Council v Pinnock*. In fact, Lord Neuberger observed that to do so would be impractical, sometimes inappropriate and 'would destroy the ability of the court to engage in the constructive dialogue with the European Court which is of value to the development of Convention law.'<sup>40</sup>

The Government's own consultation paper on a 'Modern' Bill of Rights confirmed a positive response to the role of the ECtHR, with a small minority (63 respondents out of a total of 12,873 responses) advocating for the UK to be governed by common law alone.<sup>41</sup> The Government's decision to attempt to sidestep the authority of the ECtHR in the Bill of Rights Bill can therefore be seen as an awkward constitutional square dance; one that the Government commences on its own and is obsessed with, but which in reality, its audience has no interest in engaging with or watching the performance of.

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37 Adam Wagner, '4 Charts Which Show The European Court of Human Rights Has Dramatically Changed Its Approach To The UK', *Each Other*, 18 May 2016, <https://eachother.org.uk/4-charts-which-show-the-european-court-of-human-rights-has-dramatically-changed-its-approach-to-the-uk/>, accessed 23 September 2022.

38 Letter from the Acting Chair of the Joint Committee on Human Rights, 30 June 2022, <https://committees.parliament.uk/publications/22880/documents/167940/default/>, accessed 14 July 2022, p. 3;

Ministry of Justice, Responding to Human Rights Judgments, (CP763, 2022), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1121552/responding-human-rights-judgments-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121552/responding-human-rights-judgments-2022.pdf), accessed 10 December 2022, Table 4, p. 13.

39 *Ibid.*, p. 4.

40 *Manchester City Council v Pinnock* [2011] UKSC 6 & [2010] UKSC 48, para 48.

41 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights – Consultation Response, (CP704, 2022), <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/results/modern-bill-rights-consultation-response.pdf>, accessed 7 September 2022, para 20, p. 12.

A more constitutionally coherent alternative to leaving the ECtHR (should this be seriously considered) would be to amend Section 2 to clarify the priority of rights protection. In other words, this would make explicit that common law takes precedence over ECtHR law. This was recommended by the Independent Human Rights Act Review which proposed 'applying UK domestic statute and common/ case law first before, if proceeding to interpret a Convention right, taking into account ECtHR case law'.<sup>42</sup> Even so, the Government must have willingness to play its part in 'protecting rights and maintaining constitutional principles and values'.<sup>43</sup> This extends to trusting and defending the role of UK courts at all times, not simply when it agrees with its judgments, such as the 2022 Supreme Court ruling that the Scottish Parliament does not have the power to legislate for a referendum on Scottish independence.<sup>44</sup>

Given this necessity, reforming human rights laws seems ill-advised when weighed against the benefits of the Convention through the Human Rights Act. There is also the UK's contribution to the ECtHR, which was acknowledged by the Independent Human Rights Act Review, but is rarely by the Government itself. There are numerous cases where the UK courts and ECtHR have learned from and influenced each other, whilst the ECtHR continues to hold UK courts and judiciary in 'high regard'.<sup>45</sup> This, the Review points out, 'is a UK asset' and should 'be widely and better appreciated domestically'.<sup>46</sup> By assessing the Human Rights Act through a one dimensional lens, instead of looking at it holistically and engaging with expert opinion which confirms that it has improved human rights for ordinary 'law abiding' individuals and not simply 'undeserving' individuals, it appears that those wishing to repeal the Human Rights Act will never be satisfied despite the substantial benefits it has provided. This becomes especially clear when assessing the three eras of opposition to the Human Rights Act and how the topic of concern – currently sovereignty and immigration – changes according to the political and media climate of the day, becoming a never-ending debate and distraction.<sup>47</sup>

42 Secretary of State for Justice, The Independent Human Rights Act Review, (CP 586, 2001), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040525/ihrar-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf), accessed 31 October 2022, p. 6.

43 Cheryl Saunders, 'Does the UK need a Modern Bill of Rights?', *Constitutional Law Matters*, 25 March 2022, <https://constitutionallawmatters.org/2022/03/does-the-uk-need-a-modern-bill-of-rights-by-cheryl-saunders/>, accessed 2 October 2022.

44 *Lord Advocate's Reference* [2022] UKSC 31.

45 Secretary of State for Justice, The Independent Human Rights Act Review – Executive Summary, (CP587, 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040526/ihrar-executive-summary.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040526/ihrar-executive-summary.pdf), accessed 11 September 2022, para 35.

46 *Ibid.*

47 See Frederick Cowell, 'The Three Eras of Opposition to the Human Rights Act', *UK Constitutional Law Association*, 14 November 2022, <https://ukconstitutionallaw.org/2022/11/14/frederick-cowell-the-three-eras-of-opposition-to-the-human-rights-act/>, accessed 14 November 2022.

## The Bill of Rights Bill

For the first time since a new Bill of Rights was contemplated, a Bill of Rights Bill was introduced on a First Reading in the House of Commons in June 2022. The origins and thinking behind the Bill stem from Dominic Raab's 2009 book *The Assault on Liberty: What Went Wrong with Rights*, as well as his time as Human Rights Minister in 2015 where he contributed towards an unpublished consultation paper on replacing the Human Rights Act with a British Bill of Rights.<sup>48</sup> Beyond these, the 2015 Conservative Party manifesto which promised to 'scrap the Human Rights Act' and 'break the link' between British courts and the ECtHR provided added impetus to legislate. However, little thinking on present and future human rights concerns that has occurred since then is evident in the Bill's proposals, suggesting that the Bill is stuck in a 2015 time warp.

As will be discussed later, the contentious nature of the creation of the Bill of Rights Bill and the adverse reaction to its proposals even within government itself has been highly unusual and reflects a 'crisis of constitutional culture' at the heart of UK Government.<sup>49</sup> Absent such crisis, it is doubtful given the 'radical nature' of the Bill that it would have managed to reach a First Reading, with the Bill coined as Raab's 'favourite hobby horse', rather than a Bill which is needed or wanted.<sup>50</sup> Certainly, a constitutionally conscientious government who seeks to legislate for the long-term and common good would not have attempted to bypass the sort of cross-party and parliamentary collaboration which was achieved in the enactment of the Human Rights Act.

In contrast to a Bill which offers 'rights-expanding innovation', this one is a rights-reducing decimation of the hard fought for and highly considered human rights law protection that took decades to achieve.<sup>51</sup> It is also a Bill which is poorly drafted – a point apparently made by government insiders – and uses vague language such as 'great weight', 'greatest possible weight' and 'significant disadvantage' which leaves the courts to decipher their meaning.<sup>52</sup> Rather than a Bill which promotes 'a healthy

48 UK Parliament, 'A British Bill of Rights?', (HC Briefing Paper 7193, 2015), <https://researchbriefings.files.parliament.uk/documents/CBP-7193/CBP-7193.pdf>, accessed 3 November 2022, p. 18.

49 See Jessica Elgot, 'Liz Truss halts Dominic Raab's bill of rights plans', *The Guardian*, 7 September 2022, [https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan?CMP=share\\_btn\\_tw](https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan?CMP=share_btn_tw), accessed 7 September 2022;

Grace Mallon, @GraceMallon3, *Twitter*, 20 October 2022, <https://twitter.com/GraceMallon3/status/1583070458622382080>, accessed 21 October 2022.

50 Lord Sumption, *Oral evidence: Legislative Scrutiny: Bill of Rights Bill*, HC 611, Joint Committee on Human Rights, 7 September 2022, <https://committees.parliament.uk/oralevidence/10694/pdf/>, accessed 29 September 2022, p. 1;

Peter Foster, 'Dominic Raab's Bill of Wrongs', *Financial Times*, 10 November 2022, [Dominic Raab's Bill of Wrongs | Financial Times \(ft.com\)](https://www.ft.com/content/dominic-raab-bill-of-wrongs), 10 November 2022.

51 Marko Milanovic, 'The Sad and Cynical Spectacle of the Draft British Bill of Rights', *EJIL: Talk!*, 23 June 2022, <https://www.ejiltalk.org/the-sad-and-cynical-spectacle-of-the-draft-british-bill-of-rights/>, accessed 2 August 2022.

52 Harry Cole and Jack Elson, 'Gloating leftie lawyers rejoice as Liz Truss shelves plans to rip up Human Rights Act', *The Sun*, 7 September 2022, <https://www.thesun.co.uk/news/19738845/liz-truss-human-rights-act/>, accessed 10 September 2022;

dose of common sense' that is supposedly lacking at present in the justice system, the Bill conflicts with practical policy outcomes and adds a layer of confusion to human rights law that no one will benefit from.<sup>53</sup>

This has led Lord Pannick to claim that 'if this Bill were being sold in the shops the Lord Chancellor, in my view, would be at risk of prosecution for false or deceptive advertising.'<sup>54</sup> Such sentiment appears accurate from the very first page of the Bill where it states that it is 'compatible with the Convention rights.'<sup>55</sup> Whilst the Government has confirmed that it will maintain the UK's commitment to the Convention, the Bill itself attempts to curtail its influence and diverge from it in a number of ways. Firstly, Section 19 of the Human Rights Act requires a Minister to make a statement of compatibility with Convention rights before a Bill's Second Reading. Yet this does not appear in the Bill of Rights Bill, suggesting that the Government wants to reduce Convention influence on domestic politics. Dislodging Parliament's two-decade institutional habit of keeping Convention rights at the forefront of legislating will weaken human rights as well as Parliament's institutional memory. Such action reflects a hard-line Brexiteer conviction that the UK ought to detach itself legally from anything that has an association with European influence or control.

Secondly, Section 3 of the Human Rights Act, which requires domestic courts to interpret legislation in accordance with Convention rights so far as it is possible to do so, is not replicated in the Bill. This could bring up several issues. The absence of Section 3 will reduce the scope of the courts to 'avoid the existence of incompatibilities in the first place' and will most likely mean that there will be more declarations of incompatibility – a 'relatively rare' occurrence under the Human Rights Act.<sup>56</sup>

It is questionable, however, how remedying incompatible legislation will work in practice as it will require government or Parliament to allocate more time to resolving it. This is not a negative; to the contrary, more time spent scrutinising legislation so that it is compliant with the Convention is a good thing. But based on the decline of parliamentary scrutiny and the increase in the use of secondary legislation and skeleton clauses, most notably as a result of Brexit and the Covid-19 pandemic, as well as the dominance of the Government in controlling the parliamentary agenda, it is uncertain how well declarations of incompatibility will be responded to. Further, the absence of Section 3 will not in itself prohibit domestic courts from interpreting legislation in accordance with Convention rights.

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Bill of Rights Bill, HC Bill 117 (2022-3), cl5(2).;

*Ibid*, cl6(2).;

*Ibid*, cl15(3)(b) and (8).

53 Dominic Raab, 'New bill of rights will deliver a healthy dose of common sense', *The Times*, 14 December 2021, <https://www.thetimes.co.uk/article/dominic-raab-new-bill-of-rights-will-deliver-a-healthy-dose-of-common-sense-vxj50bks6>, accessed 3 July 2022.

54 Lord Pannick KC, *Oral evidence: Parliament and human rights*, HC 550, Joint Committee on Human Rights, 6 July 2022, <https://committees.parliament.uk/oralevidence/10561/pdf/>, accessed 29 July 2022, p. 13.

55 Bill of Rights Bill, HC Bill 117 (2022-3), p. 1.

56 Mark Elliott, 'The UK's (new) Bill of Rights', *Public Law for Everyone*, 22 June 2022, <https://publiclawforeveryone.com/2022/06/22/the-uks-new-bill-of-rights/>, accessed 24 June 2022.

Thirdly, by remaining a party to the Convention, the UK must adhere to judgments of the ECtHR. Clause 3(1) of the Bill is peculiar as it states the legally obvious – that the Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection to Convention rights. But the Bill avoids stating the other legally obvious point – that the Convention is an international treaty, and that the ECtHR is the ultimate judicial authority. This skirting around is misleading and evidences well the criticisms of Lord Pannick.

Contrary to its name, the Bill seeks to restrict rights for individuals. Clause 5(1) states that a court may not adopt a post-commencement interpretation of a Convention right that would require a public authority to comply with a positive obligation. The consequence of this would be a profound step backwards for human rights accountability, leading to the disempowerment of individuals who are currently able to challenge wrongdoing by public authorities and the Government under Section 6 of the Human Rights Act. Why the Government would seek to restrict positive obligations when it is a fundamental ingredient to a variety of its own policy ambitions, such as supporting all victims of crime, who would no longer be able to hold the police and other criminal justice agencies to account for their failures, is constitutionally and politically confused.<sup>57</sup> Such thinking also speaks of a Government unwilling or unable to comprehend the very nature of human rights law, which views rights, such as the right to vote, as having positive and proactive obligations attached to them.<sup>58</sup>

Despite the Bill's weaknesses, the addition of Clause 25 would be welcome. This clause stipulates that the Government has a duty to notify Parliament of any judgments of the ECtHR against the UK, as well as instances where the UK has unilaterally declared in proceedings before the ECtHR that it has failed to comply with a Convention right. As observed by Tom Hickman, there is an 'assumption that Parliament has a watching vigil over what is going on in Strasbourg and in other international tribunals and so forth when it does not'.<sup>59</sup> This point reflects wider concerns that MPs have limited means of learning about developments at the European level, an issue that has become especially acute since 2010.<sup>60</sup> Such a section could allow Parliament to become more vigilant and proactive in its scrutinising functions. As the Government has come under criticism for its executive hegemony, this could 'shore up the sovereignty of elected law-makers in Parliament' that the Government emphasises but has a habit of restricting in practice.<sup>61</sup> For the Government to place legal onus on itself to conform

57 This was a 2019 Conservative Party manifesto commitment. See <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>, accessed 20 September 2022, p. 19.

58 Kate O'Regan, *Oral evidence: Legislative Scrutiny: Bill of Rights Bill*, HC 611, Joint Committee on Human Rights, 7 September 2022, <https://committees.parliament.uk/oralevidence/10694/pdf/>, accessed 29 September 2022, p. 9.

59 Tom Hickman KC, *Oral evidence: Legislative Scrutiny: Bill of Rights Bill*, HC 611, Joint Committee on Human Rights, 7 September 2022, <https://committees.parliament.uk/oralevidence/10694/pdf/>, accessed 29 September 2022, p. 2.

60 Rt Hon Baroness Gisela Stuart, 'Brexit Witness Archive', *UK in a Changing Europe*, 2 November 2020, <https://ukandeu.ac.uk/interview-pdf/?personid=42218>, accessed 2 August 2022, p. 4.

61 Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – consultation', updated 12 July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>, accessed 14 July 2022.

to its own words would be a positive development, but it would be more aligned with legal conformity and the high human rights standards established by the Convention if the UK did not fail to comply with the Convention in the first place.

## Human rights and devolution

### Prioritising human rights

According to the UK Government a key aim of the Bill of Rights Bill is to strike a 'proper balance of rights and responsibilities' whilst reflecting and respecting the UK's 'diverse legal traditions'.<sup>62</sup> Yet this was a fallacy from the outset, with the Bill attempting to weaken and restrict rights. As we shall see, this is the antithesis of what the Scottish and Welsh Governments are doing with their respective competencies and contrary to the sensitive legal and political needs of Northern Ireland. Why, it might be asked, would the UK Government seek to restrict human rights protection when this is not desired by the devolved administrations who gave their unequivocal support for the retention of the Human Rights Act in response to the Government's consultation paper? As will be discussed, protecting and enhancing human rights is a core value within the political and constitutional cultures of the devolved administrations. Appetite for legislation that resembles a Human Rights Act 'negative' is highly unlikely to be welcomed as a principle 'common to all' within the Union, especially as the Welsh and Scottish governments are seeking to boost human rights and have sought to put these at the forefront of their respected legislative agendas, with some noted successes to date.<sup>63</sup>

Despite justice being a reserved issue, human rights in Wales (alongside the other devolved nations) have been strengthened by the simultaneous enactment of devolution and the Human Rights Act. Indeed, the Convention is engrained within the Senedd's political DNA, acting as a strong influence over a wide range of Welsh legislation. The Government of Wales Act 2006 provides that a provision is outside legal competence if it is incompatible with Convention rights and Welsh ministers have no power to make, confirm or approve any subordinate legislation so far as it is incompatible with any Convention rights.<sup>64</sup> By comparison, if a court declares that an Act of the UK Parliament is incompatible with any Convention rights under the Human Rights Act then this will not affect the validity, operation or enforcement of the law.<sup>65</sup> This provides the UK Parliament with the option, not the requirement, to amend the law so that it is compatible with Convention rights.

62 UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – consultation', updated 12 July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>, accessed 14 July 2022.

63 Vernon Bogdanor, *Brexit and our unprotected constitution* (The Constitution Society, 2018), p. 22; UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – consultation', updated 12 July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>, accessed 14 July 2022.

64 Government of Wales Act 2006, s108A(2)(e) and s81.

65 Human Rights Act 1998, s4(6)(a).

For Wales this means that the Convention has become an 'essential reference point' in defining the scope of the powers of the Senedd to the extent that it ultimately acts as a lens through which to legislate.<sup>66</sup> Unlike the UK Government, which views the Convention as a political and legal limitation, the Welsh Government sees it as a basic framework to operate from which ought to be embraced. This difference in approach was not 'sufficiently' discussed in the UK Government's consultation paper and neither was the degree to which devolution depends on the Convention, with only 10 out of 318 paragraphs making reference to devolution in Wales and Scotland.<sup>67</sup> How this lack of consideration chimes constitutionally with calls for 'the creation of a revitalised, better-functioning and less rancorous Union' is clear – it does not.<sup>68</sup>

Reference to significant human rights developments in Wales was also neglected in the consultation. This includes the Welsh Government's position that it will continue to 'embrace, celebrate and build upon the Convention rights and protections bestowed on each and every person in Wales', with policy initiatives satisfying Convention rights but also going beyond them to include social, economic and cultural rights.<sup>69</sup> This is illustrated by recent policy initiatives such as the Welsh Government's effort to become a Nation of Sanctuary for refugees and asylum seekers as well as in forward-thinking legislation such as the Well-Being of Future Generations (Wales) Act 2015. In 2021 the Welsh Government published a report outlining its recommendations to strengthen and advance equality and human rights and put forward the idea of creating a Human Rights (Wales) Act which would give effect to international human rights in Welsh law, enabling courts and tribunals to enforce these rights.<sup>70</sup> It would seem then, from the Welsh perspective, that the UK Human Rights Act is limited in ambition.

Prior to the Bill of Rights Bill, it was acknowledged by former Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, that 'the people of Wales are being let down by the justice system in its present state'.<sup>71</sup> The UK Government's lack of curiosity regarding the human rights culture of the Senedd when drafting the Bill of Rights Bill could, in the long-term, create a wider division between the rest of the UK

66 Thomas Glyn Watkin, *Human Rights from the Perspective of Devolution in Wales* (British Academy, 2016), [https://www.thebritishacademy.ac.uk/documents/123/HR\\_Wales\\_211\\_web\\_002.pdf](https://www.thebritishacademy.ac.uk/documents/123/HR_Wales_211_web_002.pdf), accessed 8 August 2022, p. 4.

67 Welsh Government's response to 'Human Rights Act Reform: A Modern Bill of Rights', 8 March 2022, [https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights\\_0.pdf](https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights_0.pdf), accessed 8 August 2022, p. 8.

68 House of Lords Constitution Committee, 'Calling for respect and co-operation to build a stronger Union for the 21<sup>st</sup> century', 20 January 2022, <https://committees.parliament.uk/committee/172/constitution-committee/news/160376/calling-for-respect-and-cooperation-to-build-a-stronger-union-for-the-21st-century/>, accessed 24 July 2022.

69 Welsh Government's response to 'Human Rights Act Reform: A Modern Bill of Rights', 8 March 2022, [https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights\\_0.pdf](https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights_0.pdf), accessed 8 August 2022, p. 2.

70 Welsh Government, *Strengthening and advancing equality and human rights in Wales*, 26 August 2021, <https://gov.wales/strengthening-and-advancing-equality-and-human-rights-wales>, accessed 10 August 2022.

71 Welsh Government, *Delivering Justice for Wales*, May 2022, <https://gov.wales/sites/default/files/publications/2022-06/delivering-justice-for-wales-may-2022-v2.pdf>, accessed 10 August 2022, p. 7.



and Wales, with the Welsh Government actively seeking a devolved justice system.<sup>72</sup> In the interim, Wales is honing a holistic human rights culture that promotes human rights.

To value something you must be educated to understand and respect it. This is recognised by the Welsh Government who have promoted human rights education as a cross-cutting theme in the Curriculum for Wales.<sup>73</sup> In contrast, England suffers from a woeful level of human rights education due to a lack of prioritisation by the UK Government.<sup>74</sup> This might not be an issue at all if England had its own political channel to enable it to voice its view on human rights at English and UK level, making it one facet of a much bigger question about England's position within the devolved constitution.

A similar sentiment can be witnessed in Scotland where 'the clear direction of travel is to extend and enhance human rights protections.'<sup>75</sup> Justice is devolved in Scotland, but like Wales and Northern Ireland, Scottish Ministers must ensure that Acts of the Scottish Parliament are compatible with Convention rights and MSPs have no power to make subordinate legislation so far as it is incompatible with any Convention rights.<sup>76</sup>

In sync with the Welsh Government, the Scottish Government has actively sought to embed human rights in the policy, legislation and culture of the Scottish Parliament. Examples include the Scottish Commission for Human Rights Act 2006 which created the Scottish Human Rights Commission which itself promotes and protects the human rights of everyone in Scotland, whilst the Social Security (Scotland) Act 2018 recognises that social security as a human right. The Scottish Government's proposal to incorporate the United Nations Convention on the Rights of the Child into Scots law to the maximum extent of the Scottish Parliament's powers is currently being deliberated, after the UK Supreme Court ruled in 2021 that certain provisions of the UNCRC (Incorporation) (Scotland) Bill were outside the legislative competence of the Scottish Parliament.<sup>77</sup> The United Nations Convention on the Rights of the Child was ratified by the UK Government in 1991. Had the UK Government prioritised the 'modern' human rights concerns of children on a UK-wide basis by incorporating the treaty into UK law in 1991, then this delay to secure fundamental rights for all

<sup>72</sup> *Ibid.*

<sup>73</sup> Welsh Government's response to 'Human Rights Act Reform: A Modern Bill of Rights', 8 March 2022, [https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights\\_0.pdf](https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights_0.pdf), accessed 8 August 2022, p. 8.

<sup>74</sup> See Leah Culhane and Emma McGeough, *Respect, equality, participation: exploring human rights education in Great Britain* (Equality and Human Rights Commission, 2020), [https://www.equalityhumanrights.com/sites/default/files/respect\\_equality\\_participation\\_exploring\\_human\\_rights\\_education\\_in\\_great\\_britain.pdf](https://www.equalityhumanrights.com/sites/default/files/respect_equality_participation_exploring_human_rights_education_in_great_britain.pdf), accessed 11 August 2022.

<sup>75</sup> Scottish Government, 'UK Independent Human Rights Act review: our response summary', 3 March 2021, <https://www.gov.scot/publications/uk-independent-human-rights-act-review-our-response---summary/>, accessed 8 August 2022.

<sup>76</sup> Northern Ireland Act 1998, s6(2)(c);  
Scotland Act 1998, s29;  
Scotland Act 1998, s57(2).

<sup>77</sup> *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill Reference* [2021] UKSC 42.

children in Scotland would not have occurred. Instead, it is the Scottish Government which is taking initiative to lead in this area to the benefit of children in Scotland. In turn, this would mean that children in England are more vulnerable and less legally protected than their Scottish counterparts.

Even though the UK Government has opted into a number of international treaties which focus on economic, social and cultural rights, these rights are not codified into UK law and thus have less protection than the Convention. Because of this, the Scottish Government has sought to rectify this by proposing a Human Rights Bill for Scotland which is due to be introduced in the course of the current parliamentary session.<sup>78</sup> This will incorporate four United Nations human rights treaties into Scots law, encompassing not only economic, social, and cultural rights but legislation that would enhance rights for women, disabled people, and minority ethnic communities – the groups whose rights would be put at risk under the Bill of Rights Bill.<sup>79</sup> Scotland's Human Rights Bill will also include the right to a healthy environment and will ensure equal access to everyone, including older people and LGBTQ people.<sup>80</sup>

Whilst there are likely to be practical and budgetary constraints on the ambitious recommendations of the National Taskforce for Human Rights Leadership, as established by the Scottish Government in the development of proposed human rights legislation, the difference in tone and ambitions with the UK Government is striking. Rather than restrict positive obligations on public authorities to protect human rights the Scottish Government seeks to impose extra positive obligations, highlighting that there is a fundamentally different attitude between the UK and Scottish Government on human rights protection.

Meanwhile, the unique political and constitutional position of Northern Ireland has made the role of the Human Rights Act more constitutionally significant. The Convention has equalised human rights protection across Northern Ireland and the Republic of Ireland, in turn supporting the operation of the Good Friday Agreement which is committed to the 'mutual respect, the civil rights and the religious liberties of everyone in the community'.<sup>81</sup> The Human Rights Act has also enabled direct access to

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78 It is noted that some of the proposals appear to be taken from the Joint Committee on Human Rights 2008 paper *A Bill of Rights for the UK?* (HL Paper 165-I HC 150-I). It states 'We believe that there is a strong case for a Bill of Rights and Freedoms having detailed rights for children, and we recommend that the public should be consulted about including specific rights for other vulnerable groups. In addition, we argue that there is a strong case for including the right to a healthy and sustainable environment in a Bill of Rights and Freedoms.'

79 Scottish Government, 12 March 2021, <https://www.gov.scot/news/new-human-rights-bill/>, accessed 8 August 2022.

80 Scottish Government, 'Universal Periodic Review 2022: Scottish Government Position Statement', 17 October 2022, <https://www.gov.scot/publications/universal-periodic-review-2022-scottish-government-position-statement/pages/4/>, accessed 24 October 2022.

81 Secretary of State for Northern Ireland, *The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland*, (Cm 3883, 1998), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1034123/The\\_Belfast\\_Agreement\\_An\\_Agreement\\_Reached\\_at\\_the\\_Multi-Party\\_Talks\\_on\\_Northern\\_Ireland.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf), accessed 10 August 2022, p. 16.

the courts and remedies for breach of Convention rights, a change which has 'brought about greater stability and reconciliation than has been possible since the foundation of Northern Ireland in 1920'.<sup>82</sup>

Positive obligations have played a significant part in contributing towards this stability and reconciliation which has facilitated abortion rights and legacy investigations into people killed during "The Troubles". Despite this, it is noted that the Northern Ireland Executive has been less assertive in legislating on human rights issues than the rest of the UK would consider 'crucial', such as equal marriage and abortion law reform.<sup>83</sup> In Northern Ireland, such reforms occurred only because of UK government intervention between 2017 and 2020 when Stormont was suspended.

Such is the particular importance of upholding human rights that the Good Friday Agreement established an independent Northern Ireland Human Rights Commission which promotes and protects the rights of everyone in Northern Ireland. Beyond this, it was also envisioned at the time of the signing of the Good Friday Agreement that a separate Bill of Rights for Northern Ireland would be created. Since then, the Northern Ireland Human Rights Commission produced a report outlining its advice for the Secretary of State for Northern Ireland in December 2008; but progress has stalled on its creation. In 2012 the Commission stressed that the 'onus is now on the [UK] Government to take the necessary steps to ensure that a Bill of Rights for Northern Ireland will be adopted', however the Government has in turn stated that it will not act without established consensus between the Northern Ireland political parties.<sup>84</sup> In terms of priorities, a Bill of Rights for Northern Ireland, as opposed to a UK Bill of Rights, is of greater constitutional concern with the UK's departure from the EU leaving a gap in Northern Ireland's human rights architecture with the loss of the EU Charter of Fundamental Rights. Whether a Bill of Rights for Northern Ireland will come to fruition in the near future remains uncertain, but human rights will remain fundamental as a force in driving forward Northern Ireland's future, even if the politics of it remain challenging.

## A 'British' Bill of Rights?

As highlighted earlier, both the Conservative Party and Labour Party proposed a 'British' Bill of Rights either before or while in government between 2006 and 2015. Despite the Government's commitment to strengthening the Union whilst also

82 Christopher McCrudden, *Oral evidence: Potential Impact on EU law of Repealing Human Rights Act*, Select Committee on the European Union, 26 January 2016, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/potential-impact-of-repealing-the-human-rights-act-on-eu-law/oral/28283.html>, accessed 4 September 2022, Q68.

83 Alan Whysall, 'Northern Ireland's Political Future Challenges After the Assembly Elections: A Discussion Paper', UCL Constitution Unit, May 2022, [https://www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/194.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/194.pdf), accessed 14 July 2022, p. 54.

84 Northern Ireland Human Rights Commission, 'Is that right? Fact and Fiction on a Bill of Rights', 2012, <file:///C:/Users/44736/Downloads/Fact%20and%20Fiction%20on%20a%20Bill%20of%20Rights%20Is%20that%20Right.pdf> accessed 4 September 2022, p. 5.

updating the Human Rights Act in its 2019 manifesto, it is noteworthy that the Bill of Rights Bill lacks the word 'British'. Such was the degree of ostensive concern that former Prime Minister Boris Johnson established a new convention (albeit cosmetic) that the Prime Minister now also holds the position of Minister for the Union.<sup>85</sup> Yet the nature, tone, and substance of the Bill of Rights Bill in many respects represents 'a particularly British – nay English – form of anti-European nationalism'.<sup>86</sup> This contradicts the Government's very own Union strategy which includes maintaining and building intergovernmental trust based on effective communication and respecting the competencies of the devolved nations, making it a fundamentally anti-Unionist piece of constitutional legislation. Consequently, the process and the proposals within the Bill have agitated relations with the devolved governments and acted as another destabilising force on top of the poor ethical conduct within the UK Government.

Despite confirmation from the Justice Secretary that the Bill will affect the whole of the UK, how any changes would be 'made on a UK-wide basis' remains unclear.<sup>87</sup> Of particular importance is the unique position of the Human Rights Act and Convention in Scotland, Wales, and Northern Ireland which are incorporated into the devolution settlements. Whilst this was acknowledged at the time of the Bill's First Reading, what was not referenced was the response of the Scottish and Welsh Governments, who rejected the repeal of the Human Rights Act in the Government's consultation paper due to the concern that it would weaken human rights protection. The absence of the Northern Ireland Executive meant that it did not provide a response. Whilst the Government has declared that it would 'seek legislative consent motions' from the devolved governments, this is not a guarantee that their responses will be respected.<sup>88</sup> Indeed, precedent for this came in the form of the rejection of the European Union (Withdrawal Agreement) Bill in January 2020 by Scotland, Wales, and Northern Ireland, regardless of which, the UK Parliament passed the legislation.

On the day of the Bill's First Reading the Scottish Government declared that it was 'shocking and unnecessary' while the Welsh Government criticised the UK Government for its 'very little engagement' given the magnitude of its potential implications for Wales and for not providing an advanced copy of the Bill for it to review.<sup>89</sup> The UK Government's indifference and lack of respect for the wishes of the devolved governments was a counterintuitive response to recent Union developments

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85 This position was created in 2019 by the Rt Hon Boris Johnson MP whilst he was Prime Minister.

86 Lady Hale, 'Annual Human Rights Lecture 2022: Lady Hale's Keynote Address in Full', Northern Ireland's Human Rights Commission, 25 July 2022, <https://nihrc.org/news/detail/annual-human-rights-lecture-2022-lady-hales-keynote-address-in-full>, accessed 4 September 2022.

87 Letter from the Chair of the Joint Committee on Human Rights, 22 June 2022, <https://committees.parliament.uk/publications/22881/documents/167942/default/>, accessed 16 July 2022.

88 HC Deb 22 June 2022, vol 716, col 846.

89 Scottish Government, 'UK Bill of Rights condemned', 22 June 2022, <https://www.gov.scot/news/uk-bill-of-rights-condemned/>, accessed 4 July 2022;

Welsh Government, 'Written Statement: UK Government Bill of Rights', 22 June 2022, <https://gov.wales/written-statement-uk-government-bill-rights>, accessed 4 July 2022.

such as the changes made to the machinery and principles of intergovernmental relations, which aims to 'provide a positive basis for productive relations'.<sup>90</sup> In fact, the introduction of the Bill does the exact opposite.

Of immediate concern is the status of Northern Ireland which at the time of writing does not have a functioning executive. The Government has (on the surface) vocally defended the Good Friday Agreement at all costs, and has even risked breaking international law over it.<sup>91</sup> Yet by introducing a new Northern Ireland Protocol Bill the Government's actions are constitutionally contradictory. With more than half of the members of the Northern Ireland Legislative Assembly condemning the Government's actions as 'utterly reckless', the Protocol Bill shows that the Government is in fact willing to undermine the Good Friday Agreement.<sup>92</sup> In this respect, the Bill of Rights Bill is another example of how the Government fails to understand, or have genuine interest in, the workability of devolution in Northern Ireland, which requires political sensitivity and legal compromise at all times.

At present, each nation and part of the UK is reflecting seriously on its own political and constitutional destiny. The SNP wishes to use the next UK general election as a de facto second Scottish independence referendum in light of the Supreme Court's ruling that the Scottish Parliament does not have the power to unilaterally hold any such referendum. At the beginning of 2022, the Welsh Government established an Independent Commission on the Constitutional Future of Wales to develop options for fundamental reform of the UK's constitutional structures which Wales would remain a part of, and to develop and consider options to strengthen democracy in Wales. Meanwhile, as the DUP resists calls to power-share at Stormont in response to the Northern Ireland Protocol, where discussions are ongoing, in the background, talk of Ireland's reunification grows louder.<sup>93</sup>

The UK has been at a constitutional crossroads for some time and was exacerbated in the lead up to the Scottish Independence referendum in 2014. But despite being coined as 'Modern', the Bill of Rights Bill fails to live up to its name and anticipate the uniquely British challenges that are likely to arise in the near future, namely a constitutionally divided UK. An important but repeatedly overlooked issue is English opinion which remains the elephant in the room of UK constitutional conversation.<sup>94</sup> Unlike the devolved nations and parts, the Convention is not protected in England.

90 UK Government, 'Review of intergovernmental relations', 13 January 2022, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1046083/The\\_Review\\_of\\_Intergovernmental\\_Relations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf), accessed 29 July 2022, p1.

91 Rt Hon Elizabeth Truss MP, 'We have a duty to fix the problems of the Northern Ireland protocol', Gov.uk, 26 June 2022, <https://www.gov.uk/government/speeches/we-have-a-duty-to-fix-the-problems-of-the-northern-ireland-protocol-article-by-liz-truss>, accessed 11 August 2022.

92 Katy Hayward, 'The Northern Ireland Protocol Bill: 'by necessity'', *UK in a Changing Europe*, 15 June 2022, <https://ukandeu.ac.uk/northern-ireland-protocol-bill/>, accessed 10 July 2022.

93 See Jude Webber, 'Ireland's reunification talk grows louder', *Financial Times*, 9 October 2022, <https://www.ft.com/content/c215d0d3-bce7-444c-8b92-94570a6e0338?shareType=nongift>, accessed 9 October 2022.

94 Joanna George, 'To save the Union English aspiration needs a voice', *The Times*, 4 December 2020, <https://www.thetimes.co.uk/article/to-save-the-union-english-aspirations-need-a-voice-wxwr6ll3r>, accessed 19 July 2022.

This means that England has a human rights deficit. As observed by the Independent Human Rights Act Review panel, there is a more positive public perception of the Human Rights Act 1998 in Northern Ireland, Scotland, and Wales ‘than was apparent in England’.<sup>95</sup> Such evidence points to a deficiency in human rights advocacy in England and highlights the need for more active interest and understanding of this issue from an English perspective if it is to be valued to the same extent as the rest of the UK.

Alarming, a recent report by the House of Commons Public Administration and Constitutional Affairs Committee has warned that people in England ‘do not feel political and social change is possible, and in particular they feel that their participation in the political process is unlikely to bring about change’.<sup>96</sup> This feeling is not aided by a UK Government that seeks to reform UK human rights law through negative and disempowering sentiment, taking away rights, rather than granting them, or at least maintaining the status quo. It is no wonder then that the English feel short-changed in comparison to their counterparts in the rest of the UK who enjoy the attending benefits of devolution.

Rather than being a point of division, a future British Bill of Rights could be a collaborative piece of constitutional legislation that incentivises stronger intergovernmental relations. A British Bill of Rights crafted with care could also provide a rare legislative opportunity to exercise political patriotism, enhance fundamental rights and culturally collaborate with a wide range of British voices to unite the country. Such an approach would likely be welcomed by parliamentarians and the public alike.

With Britishness itself becoming a hotly debated concept amongst younger people, a “triple lock” of opportunity could prove to be immensely profitable for a government which wishes to keep the Union together, while serving to define which rights British citizens could claim and ‘own’ in the twenty-first century and beyond.<sup>97</sup> In contrast to the idea that a domestic Bill of Rights is ‘automatically dismissed’ as ‘a manifestation of right-wing nationalism’, a British Bill of Rights could be an expression of collective patriotism.<sup>98</sup> In contrast to a UK Government with a short-term memory and a patchy implementation record on its Unionist commitments, it would require constant

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95 Secretary of State for Justice, The Independent Human Rights Act Review – Executive Summary, (CP587, 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040526/ihrar-executive-summary.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040526/ihrar-executive-summary.pdf), accessed 11 September 2022, para 14 (vi), p8.

96 House of Commons Public Administration and Constitutional Affairs Committee, *Governing England*, (2022-3, HC Paper 463), <https://committees.parliament.uk/publications/31418/documents/176171/default/>, accessed 31 October 2022, p. 4.

97 Joanna George, ‘Job losses, insecurity, and expensive travel—is it any wonder millennials are conflicted about “Britishness”’, *Prospect Magazine*, 17 April 2020, <https://www.prospectmagazine.co.uk/economics-and-finance/job-losses-insecurity-and-expensive-travel-is-it-any-wonder-millennials-are-conflicted-about-britishness>, accessed 2 September 2022.

98 Guglielmo Verdirame, ‘Which theory? Whose bill of rights?’, *Policy Exchange Judicial Power Project*, 13 March 2018, <https://judicialpowerproject.org.uk/guglielmo-verdirame-which-theory-whose-bill-of-rights/>, accessed 17 September 2022.

commitment in both words and deeds on Union matters. Yet its success would rest on stronger ethics and standards in public life before such a Bill could transcend to garner attention and respect from across the country.

## The bigger constitutional picture

### The influence of ethos and standards in public life

The failure to uphold ethical standards at the heart of UK government significantly shaped the process in which the Bill of Rights Bill was developed. By the time of the Bill's First Reading in the House of Commons, the then Prime Minister, Boris Johnson, faced calls to resign in part due to his lack of integrity and his contribution to a government-wide and Conservative Party culture of law-breaking in office. This is illustrated by the flouting of the Ministerial Code, holding illegal parties during Covid-19 lockdowns and numerous allegations and incidents of unlawful sexual misconduct.<sup>99</sup> Alongside the 'changed circumstances in the current political ecology, in particular Brexit turbulence', the environment from which human rights legislation now originates has changed from the (predominantly) cross-party, multi-focused and consensual approach in which the Human Rights Act came into force.<sup>100</sup> Instead, the Bill of Rights Bill is progressing as a direct reaction to the migrant crisis, and a desire from the Government to allegedly 'allow UK courts to ignore European case law more often' and so reduce rights for migrants and terrorists.<sup>101</sup>

Concerns about the culture and motives for shaping human rights reform may have influenced a House of Lords motion to debate 'the impact on the domestic process of any reduction in the standards of behaviour and honesty in political life' the day after the Bill's First Reading.<sup>102</sup> During the debate reference was made to the Lord Chancellor's oath which declares respect for the rule of law. It is this, Lord Wolfson of Tredegar claims, that 'underpins standards of honesty and behaviour in public life'.<sup>103</sup> Indeed, a number of Lord Bingham's eight core principles underpinning the rule of law do not correlate with the Bill's creation.<sup>104</sup> Of particular concern is that Ministers 'must exercise the powers conferred in good faith, fairly, for which the purposes for they were conferred – reasonably and without exceeding the limits of such powers' and that 'the law must afford adequate protection of fundamental Human Rights'.<sup>105</sup> By seeking to repeal and replace the Human Rights Act which provides a floor, not a ceiling, for rights protection, the Government exceeded the commitment

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99 ITV News, 'All the Tories embroiled in sexual misconduct allegations since 2019', 4 July 2022, <https://www.itv.com/news/2022-07-01/all-the-tories-embroiled-in-sexual-misconduct-allegations-since-2019>, accessed 12 January 2023.

Esther Webber, 'British Conservative MP found guilty of sexual assault', *Politico*, 11 April 2022, <https://www.politico.eu/article/british-mp-found-guilty-sexual-assault/>, accessed 12 January 2023.

100 Andrew Blick and Peter Hennessy, 'Good Chaps No More? Safeguarding the Constitution in Stressful Times', *The Constitution Society*, 2019, <https://consoc.org.uk/wp-content/uploads/2019/11/FINAL-Blick-Hennessy-Good-Chaps-No-More.pdf>, accessed 21 August 2022, p. 3.

101 Tony Diver, 'Rishi Sunak bringing back Bill of Rights to resolve migrant clash with European court', *The Telegraph*, 5 November 2022, <https://www.telegraph.co.uk/politics/2022/11/05/rishi-sunak-bringing-back-bill-rights-resolve-migrant-clash/>, accessed 5 November 2022.

102 HL Deb 23 June 2022, col.345.

103 *Ibid.*

104 See Rt Hon Lord Bingham, *The Rule of Law* (Penguin UK, 2011).

105 *Ibid.*, principles 4 and 5.



it was elected to deliver on as stated in its 2019 manifesto.<sup>106</sup> A Lord Chancellor who promotes legislation which appears to be designed to make it easier to breach binding international human rights obligations may arguably be breaching his oath – that he swore to abide by twice – by undermining the rule of law.

The process of the Bill's development was similarly misleading. In December 2020 the Government established a panel to consider the framework of the Human Rights Act, how it was working and whether any changes were required as part of an Independent Human Rights Act Review. As part of this, the panel engaged in a number of 'roadshow' events hosted by universities across the UK to help inform deliberations. The following year, in December 2021, the Government launched its own consultation on a modern Bill of Rights which initiated over 12,000 responses. Despite spending 18 months consulting on human rights reform and encouraging what appeared to be democratic engagement, the contents of the realised Bill is contrary to the consensus that emerged from the two exercises. Additionally, the recommendations of the Joint Committee on Human Rights were also ignored. How this conduct measures up to the Seven Principles of Public Life (Nolan Principles) – selflessness, integrity, objectivity, accountability, openness, honesty, and leadership – is again self-evident.

This disdain for democratic forms of accountability is not new and has become part of the Government's 'legacy of disregard for appropriate checks and balances'.<sup>107</sup> In *Miller I* it was held that the decision to trigger the Article 50 process to leave the EU required Parliament's approval in statute and that the Government's prerogative powers did not apply as withdrawal from EU Treaties would fundamentally change the UK's constitutional arrangements.<sup>108</sup> The Government's attempt to sidestep Parliament in *Miller I*, as well as in *Miller II* where the Government sought to prorogue Parliament for five weeks at a crucial point in the Brexit process, speaks of an executive that is uninterested and unwilling to properly fulfil its democratic function and respect parliamentary sovereignty.<sup>109</sup> This can also be illustrated through the increasing use of skeleton bills, most recently expedited by Brexit and the Covid-19 pandemic, which led two House of Lords Select Committees to warn that 'government by diktat needs to stop'.<sup>110</sup> Continuing to make laws without proper parliamentary scrutiny would, according to Lord Judge, lead to 'constitutional catastrophe'.<sup>111</sup>

106 Conservative Party manifesto 2019, <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>, accessed 13 August 2022, p. 48.

107 Meg Russell, 'The constitutional causes and consequences of the Truss-Kwarteng budget crisis', *UCL Constitution Unit*, 5 October 2022, <https://constitution-unit.com/2022/10/05/the-constitutional-causes-and-consequences-of-the-truss-kwarteng-budget-crisis/>, accessed 6 October 2022.

108 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC5.

109 *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

110 UK Parliament, 'Lords warn: Government by diktat – the urgent need for the balance of power between Parliament and the Government to be re-set and the role of Parliament restored', 24 November 2021, <https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notice/2021/november-2021/lords-warn-government-by-diktat-the-urgent-need-for-the-balance-of-power-between-parliament-and-the-government-to-be-reset-and-the-role-of-parliament-restored/>, accessed 2 October 2022.

111 Speech by Lord Judge to the Seldon Society Inns of Court, 'The King's Prerogative 1622: the Prime Minister's Prerogative 2022', 1 November 2022, [https://www.scribd.com/document/604898021/The-King-s-Prerogative-1622-the-Prime-Minister-s-Prerogative-2022?utm\\_source=substack&utm](https://www.scribd.com/document/604898021/The-King-s-Prerogative-1622-the-Prime-Minister-s-Prerogative-2022?utm_source=substack&utm)

Yet it is parliamentary sovereignty which is always emphasised by the Government, including the former Justice Secretary, Brandon Lewis, who has stressed the 'need to be clear that parliament is sovereign' when speaking about future human rights reform.<sup>112</sup> The nature and form of parliamentary sovereignty and its place within the UK's modern constitutional settlement continues to be contested, especially when human rights protection is 'uniquely vulnerable to the prevailing political winds'.<sup>113</sup> But it is also 'clear' that parliamentary sovereignty is an intentional, institutional, and collective practice for the whole of Parliament and not something that enables the Government to get its own way. For the Government to perceive and practice executive hegemony in disguise of parliamentary sovereignty – such as treating Parliament 'as a mere rubber-stamp for the Government's legislative programme' – is as untruthful as it is deceptive.<sup>114</sup>

Neither can true parliamentary sovereignty be ignored in favour of the media, who were briefed before Parliament about the Bill's First Reading and its return to Parliament for a subsequent reading, defying the Ministerial Code.<sup>115</sup> Prioritising performance and being 'seen' to legislate in contrast to carefully thinking through the contents and process of the Bill is constitutionally contradictory to sustainable policy and professional governance. The ethos of prioritising short-term media 'clicks' over crafting a workable Bill which helps those dealing with sensitive and human rights concerns undermines the 'human' in human rights law and fails to measure the intrinsic legal and social value it has. As pointed out by Baroness Helena Kennedy, 'if ministers spoke passionately about human rights as ethical standards which we should all meet, with government setting the example, there might be a greater enthusiasm'.<sup>116</sup> Decline in ethical standards is closely entwined with a failure to honestly communicate the process and motivation behind the Bill and how it will impact human rights. Indeed, by re-appointing Suella Braverman who resigned after breaching the Ministerial Code during the final days of Liz Truss' premiership and standing by Gavin Williamson and Dominic Raab in light of bullying allegations and unprofessional behaviour, Sunak has made their integrity his problem which is not helped by the six-month absence of an Independent Adviser on Ministers' Interests since the resignation of Lord Geidt

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[medium=email](#), accessed 4 November 2022.

- 112 Joshua Rozenberg, 'Lewis defends judicial independence', *The Lawyer Writes*, 2 October 2022, <https://rozenberg.substack.com/p/lewis-defends-judicial-independence#details>, accessed 2 October 2022.
- 113 Merris Amos, 'The place of human rights in the Constitution of the United Kingdom', *UK Constitutional Law Association*, 9 November 2022, <https://ukconstitutionallaw.org/2022/11/09/merris-amos-the-place-of-human-rights-in-the-constitution-of-the-united-kingdom/>, accessed 9 November 2022.
- 114 Daniella Lock, 'Three Ways the Bill of Rights Bill Undermines UK Sovereignty', *UK Constitutional Law Association*, 27 June 2022, <https://ukconstitutionallaw.org/2022/06/27/daniella-lock-three-ways-the-bill-of-rights-undermines-uk-sovereignty/>, accessed 27 July 2022.
- 115 Ministerial Code, May 2022, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1079310/Ministerial\\_Code.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1079310/Ministerial_Code.pdf), accessed 2 September 2022, para 9.1.
- 116 Baroness Helena Kennedy KC, *Just Law* (Vintage, 2005), p302.

in June 2022.<sup>117</sup> This contrasts with other professionals delivering public services (government scientific advisers, judges, the Bank of England etc) who possess higher levels of trust.<sup>118</sup>

Whilst party political gain 'is seen too often as a higher priority than adhering to the rules and norms' it is poor ethical standards and conduct that will undermine it in the long-term.<sup>119</sup> Nick Barber reflects that 'one of the dangers faced by democratic systems is that their parties ossify and decay from within, becoming shells of their former selves.'<sup>120</sup> The process, presentation, and procedures of the Bill of Rights Bill can be viewed as one of the outcomes of a Conservative Party that is in the process of political ossification with recent polls showing that its popularity has declined from 53% of the vote in April 2020 to 24% in November 2022.<sup>121</sup>

Against the backdrop of political events during the time of the Bill's First Reading, most notably the scandal of the Boris Johnson government and the close vote of no confidence in his leadership on 6 June 2022, there was a clear correlation between the intense media scrutiny of Government failures and significant constitutional announcements and activity. This included the announcement of a new Northern Ireland Protocol Bill on 13 June, followed by the resignation of the Prime Minister's Independent Adviser on Ministers' Interests on 15 June. On 14 June the ECtHR granted an urgent interim measure to prevent an asylum-seeker from Iraq from being deported to Rwanda as part of the Government's UK-Rwanda Migration and Economic Development Partnership scheme which has to date proved unworkable. This in turn triggered a number of legal challenges. Shortly over a week later, on 22 June, the First Reading of the Bill of Rights Bill took place without any forewarning in Parliament. This is despite a request from the Joint Committee on Human Rights on 27 May that it was 'vital' that the Bill should receive public and parliamentary scrutiny to ensure its 'appropriateness, practicality and longevity'.<sup>122</sup> Based on Boris Johnson's well-known use of his 'dead cat strategy', whereby major announcements are made to divert media

117 Catherine Haddon, 'The row over Braverman's future shouldn't overshadow the problems it has exposed', *Institute for Government*, 31 October 2022, <https://www.instituteforgovernment.org.uk/blog/braverman-sunak-ethics-adviser>, accessed 1 November 2022.

118 UCL Constitution Unit, 'What Kind of Democracy Do People Want?', January 2022, [https://www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/report\\_1\\_final\\_digital.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/report_1_final_digital.pdf), accessed 19 July 2022, p. 3.

119 Lord Jonathan Evans KCB DL, 'Upholding Standards in Public Life', Committee on Standards in Public Life, 4 November 2021, <https://www.gov.uk/government/speeches/upholding-standards-in-public-life-speech-by-lord-evans>, accessed 11 October 2022.

120 Nick Barber, 'Populist Parties and Political Leaders', *German Law Journal* (2019), 20, p139.

121 See Daniella Lock, 'Three Ways the Bill of Rights Bill Undermines UK Sovereignty', *UK Constitutional Law Association*, 27 June 2022, <https://ukconstitutionalallaw.org/2022/06/27/daniella-lock-three-ways-the-bill-of-rights-undermines-uk-sovereignty/>, accessed 27 July 2022; YouGov, 'Voting Intention: Con 24%, Lab 50% (1-2 Nov 2022)', 4 November 2022, <https://yougov.co.uk/topics/politics/articles-reports/2022/11/04/voting-intention-con-24-labour-50>, accessed 5 November 2022.

122 Joint Letter to the Lord Chancellor relating to Pre-Legislative Scrutiny of the Bill of Rights, 27 May 2022, <https://committees.parliament.uk/publications/22567/documents/166044/default/>, accessed 17 July 2022.

attention away from his own ethical or other failures, it appears that introducing the Bill of Rights Bill during this period was an effort at political distraction and not providing positive legislative benefits for the population at large.<sup>123</sup>

It is interesting that Clause 24(1) of the Bill states that 'no account is to be taken of any interim measure issued by the European Court of Human Rights.' Yet the inclusion of this within the Bill speaks of a government unable or uninterested in how this would apply in practice. In truth, it could not so long as the UK remains a signatory to the Convention. Under Article 34, signatory states must undertake not to hinder in any way the effective exercise by those claiming to be a victim of a Convention violation.<sup>124</sup> To proceed with Clause 24 would put the UK in breach of the Convention. Would this Clause have existed had the ECtHR not issued the interim measure in response to the flight that was set to depart to Rwanda? The author thinks not. But this question and its associated motives are worthy of careful contemplation when assessing the Government's deliberate willingness to defy international law across multiple areas of constitutional policy.

### International implications

Brexit has honed the political conviction, according to hard-line Brexiters, that the UK ought to detach itself politically and legally from anything that hints of European influence. This sentiment can be traced back as far as 2012. Indeed, seven out of nine members, including four Conservatives, of a Government-established independent Commission on a Bill of Rights supported the creation of a British Bill of Rights because they believed that the 'Europe' label prevented the Human Rights Act from acquiring popular support and greater public ownership.<sup>125</sup> In contrast, a majority of respondents to the Commission's consultation supported the retention of a 'European' connotation.<sup>126</sup> The gap between what the Government is seeking to achieve and what Parliament, relevant stakeholders and the UK population at large value and expect from human rights legislation has since widened. This is important to acknowledge when assessing how the tone, language, and motive for enacting a new Bill of Rights has shifted since the 2010 Coalition and 2015 Conservative governments.

At a time when democracy, human rights and the rule of law have come under sustained attack, both within nation states and internationally, the international responses to the proposals put forward in the Bill of Rights Bill were ones of concern. The Council of

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123 Jon Craig, 'Boris Johnson resigns: Prime minister's 'dead cat' strategy failed – so how did he use up his nine lives?', *Sky News*, 8 July 2022, <https://news.sky.com/story/boris-johnson-resigns-prime-ministers-dead-cat-strategy-failed-so-how-did-he-use-up-his-nine-lives-12520068>, accessed 11 July 2022.

124 See *Mamatkulov and Askarov v Turkey* App no 46827/99 and 46951/99 (ECtHR 4 February 2005).

125 Vernon Bogdanor, 'Brexit and our unprotected constitution', *The Constitution Society*, 2018, <https://consoc.org.uk/wp-content/uploads/2018/02/Brexit-and-our-unprotected-constitution-web.pdf>, accessed 29 June 2022, p. 22.

126 The National Archives, Ministry of Justice, *Commission on a Bill of Rights*, para 8.5 <https://webarchive.nationalarchives.gov.uk/ukgwa/20130206021312/http://www.justice.gov.uk/about/cbr/>, accessed 7 July 2022.

Europe Commissioner observed that ‘it is worrying that the proposed legal reforms might weaken human rights protections at this pivotal moment for the UK, and it sends the wrong signal beyond the country’s borders at a time when human rights are under pressure throughout Europe’.<sup>127</sup> Special rapporteurs to the UN high commissioner for human rights outlined their concerns in a letter where they highlighted that the Bill would, amongst other things, backtrack on the UK’s commitments to the Convention, undermine its obligations under the Universal Declaration of Human Rights and contravene the Vienna Convention on the Law of Treaties 1969.<sup>128</sup> In a provisional response to the letter, the Government rejected such criticisms, claiming that the concerns rested ‘on a flawed understanding of the UK tradition of liberty’.<sup>129</sup> This resistance to criticism from international institutions, NGOs, and political actors from outside of the UK is a characteristic trait of a populist government with authoritarian tendencies.<sup>130</sup> It does not speak of a government that wishes to seek consensus and approval from within the international legal community on a Bill which would be of ‘supreme constitutional significance’ to the UK and influence other countries.<sup>131</sup>

Whilst it is often argued that the UK has a longstanding reputation as a reliable and trustworthy partner and upholder of international law, the Bill of Rights Bill undermines this claim. The short and long-term repercussions are legally detrimental and politically isolating for Britain. At the time of writing, it is likely hindering the Government’s ‘Global Britain’ agenda, which aims to establish new alliances and secure post-Brexit trade opportunities.<sup>132</sup> This can be evidenced by reports that a bilateral trade agreement between the UK and US would not be forthcoming unless the Government ceases its attempt to undo the Northern Ireland Protocol by replacing it with the Northern Ireland Protocol Bill.<sup>133</sup> This Bill would breach international law obligations that the UK ‘freely and willingly’ entered into as part of the EU-UK Withdrawal Agreement in 2019.<sup>134</sup>

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- 127 Council of Europe, ‘United Kingdom: backsliding on human rights must be prevented’, 4 July 2022 <https://www.coe.int/en/web/commissioner/-/united-kingdom-backsliding-on-human-rights-must-be-prevented>, accessed 6 July 2022.
- 128 Letter by UN Special Rapporteurs, 17 August 2022, [OL GBR \(12.2022\) \(ohchr.org\)](https://www.ohchr.org/en/press/2022/08/letter-by-un-special-rapporteurs), accessed 3 September 2022.
- 129 Michael Cross, ‘Raab rejects ‘flawed’ UN criticism of Bill of Rights’, *The Law Society Gazette*, 23 August 2022, [Raab rejects ‘flawed’ UN criticism of Bill of Rights | News | Law Gazette](https://www.lsgazette.com/news/raab-rejects-flawed-un-criticism-of-bill-of-rights), accessed 23 August 2022.
- 130 See Alison L Young, Populism and the UK Constitution, *Current Legal Problems*, Volume 71, Issue 1, 2018, pp 17–52 for further discussion.
- 131 Joint Letter to the Lord Chancellor relating to Pre-Legislative Scrutiny of the Bill of Rights, 27 May 2022, <https://committees.parliament.uk/publications/22567/documents/166044/default/>, accessed 17 July 2022.
- 132 UK Foreign and Commonwealth Office, ‘Global Britain: delivering on our international ambition’, updated 23 September 2019, <https://www.gov.uk/government/collections/global-britain-delivering-on-our-international-ambition>, accessed 9 August 2022.
- 133 Beth Rigby, ‘Liz Truss admits UK-US trade deal could be years away with no ‘negotiations taking place’’, *Sky News*, 20 September 2022, <https://news.sky.com/story/liz-truss-admits-uk-us-trade-deal-could-be-years-away-with-no-negotiations-taking-place-12701700>, accessed 23 September 2022.
- 134 Mark Elliott, ‘The Northern Ireland Protocol Bill’, *Public Law for Everyone*, 13 June 2022, <https://publiclawforeveryone.com/2022/06/13/the-northern-ireland-protocol-bill/>, accessed 15 June 2022.

Similarly, with war in Ukraine a matter of international concern, the Government cannot, on the one hand, condemn Russia's violations and abuses of international law whilst simultaneously breaking it itself.<sup>135</sup> As pointed out by Alice Donald and Philip Leach, in 2015 Russia practiced the UK Government's threat of cherry-picking which ECtHR judgments to abide by or which ones to ignore when it passed a law enabling the Russian Constitutional Court to declare rulings of any international human rights body 'impossible to implement'.<sup>136</sup> It was also in 2015 that the UK Ministerial Code was changed to omit reference to ministers being bound by international law, despite this not being actionable in practice. With the rule of law 'at risk of disappearing' in Europe, the Government must align its actions with its words if it wishes to be considered a democratic enforcer, and not an influential democratic backslider, of legal obligations.<sup>137</sup>

The Government's willingness to weaken parliamentary scrutiny of the Bill has tainted the UK's international standing and doubts about the UK's commitment to the Convention persist. The UK played a leading role in the creation of the Convention under Conservative Party politicians including Winston Churchill and Sir David Maxwell-Fyfe. Lord McNair also proved an influential presence as a scholar of international law and the first President of the ECtHR. Yet despite this, this legacy is not treated with pride or as relevant by the current Conservative Party Government. This, in turn, can be traced back to David Cameron's 2013 EU referendum speech as cited earlier in this report.<sup>138</sup>

Whether the UK will remain committed to the Convention is at this point uncertain under the new premiership of Rishi Sunak. But what is certain is that there is a lack of unity and agreement within the Conservative Party on this issue. The former Justice Secretary, Robert Buckland, the Leader of the House of Commons, Penny Mordaunt, and Minister for Security, Tom Tugendhat, have all voiced support for the UK's membership of the Council of Europe, as have other Conservative politicians. Others advocate for the UK's withdrawal, with one Conservative MP proposing a Private Members' Bill in July 2022 which sought to make an application to the Council of Europe to withdraw from the Convention.<sup>139</sup> Yet, ironically, Owen Paterson, a former Conservative MP who has previously voiced his scepticism of the Convention is now

135 Speech by Dame Barbara Woodward DCMG OBE, 'Emerging evidence of further potential Russian violations and abuses of international law in Ukraine: UK statement at UN Security Council', UK Foreign, Commonwealth & Development Office, 7 September 2022 <https://www.gov.uk/government/speeches/emerging-evidence-of-further-potential-russian-violations-and-abuses-of-international-law-in-ukraine-uk-statement-at-un-security-council>, accessed 13 September 2022.

136 Alice McDonald and Philip Leach, 'Why the Bill of Rights poses problems for human rights in Europe – and the UK's international standing', *UK in a Changing Europe*, 11 August 2022, <https://ukandeu.ac.uk/why-the-bill-of-rights-poses-problems-for-human-rights-in-europe-and-the-uks-international-standing/>, accessed 11 August 2022.

137 European Court of Human Rights, 'Speech by Robert Spano President of the European Court of Human Rights', 24 June 2022, [https://www.echr.coe.int/Documents/Speech\\_20220624\\_Spano\\_JY\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20220624_Spano_JY_ENG.pdf) accessed 26 August 2022, p5.

138 David Cameron's EU speech – full text, *The Guardian*, 23 January 2013, <https://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>, accessed 3 July 2022.

139 UK Parliament, 'British Bill of Rights and Withdrawal from the European Convention on Human Rights Bill', Private Members' Bill by Peter Bone MP, 15 July 2022, <https://bills.parliament.uk/bills/3242>, accessed 5 November 2022.

seeking to rely on it in a case against the UK Government at the ECtHR, highlighting that Convention sceptics fail to consider that it may actually prove helpful to them when they find themselves in a vulnerable situation.<sup>140</sup> Nevertheless, if Brexit divided the Conservative Party, then the Convention could break it up even further, particularly given its implications for migration and asylum issues.

As mentioned earlier, the Justice Secretary previously declared that the UK would remain 'fundamental[ly] committed' to the Convention, yet it is doubtful whether this is really the case under the newly appointed cabinet.<sup>141</sup> Whilst contending to become the new Conservative Party leader and Prime Minister, the new Home Secretary, Suella Braverman, advocated for the UK's withdrawal from the Convention in response to the ECtHR's intervention to block the first scheduled flight to Rwanda under the UK-Rwanda Migration and Economic Development Partnership.<sup>142</sup> She also defied Cabinet collective responsibility by writing the foreword on a think tank report advocating for the UK's withdrawal from the Convention.<sup>143</sup> Meanwhile Brandon Lewis, the former and short-lived Justice Secretary, said that an update to the Human Rights Act must 'reflect our wish to reduce the Convention's influence in our system'.<sup>144</sup> This was not stated in the Government's 2019 manifesto and would require an electoral mandate to secure democratic legitimacy.

As the Government continues to pursue and legally defend the controversial UK-Rwanda Migration and Economic Development Partnership, the role of the ECtHR will likely continue to be criticised by key figures in Government.<sup>145</sup> Should the Government find political consensus to withdraw from the Convention, it would place the UK alongside Russia as the only other country to leave the Council of Europe. This would subsequently result in the UK violating international law as membership of the Convention is required for the operation of the Good Friday Agreement, although

140 Matt Honeycombe-Foster and Annabelle Dickson, 'Ex-Tory who slammed European Court of Human Rights takes UK to... European Court of Human Rights', *Politico*, 22 November 2022, <https://www.politico.eu/article/tory-brexiteer-who-slammed-european-court-of-human-rights-takes-uk-parliament-to-european-court-of-human-rights/>, accessed 22 November 2022.

141 UK Ministry of Justice, 'Bill of Rights to strengthen freedom of speech and curb bogus human rights claims', 22 June 2022, [https://www.gov.uk/government/news/bill-of-rights-to-strengthen-freedom-of-speech-and-curb-bogus-human-rights-claims#:~:text=Freedom%20of%20speech%20and%20the%20today%20\(Wednesday%202022%20June\),&text=The%20Bill%20will%20ensure%20courts,to%20express%20their%20views%20freely](https://www.gov.uk/government/news/bill-of-rights-to-strengthen-freedom-of-speech-and-curb-bogus-human-rights-claims#:~:text=Freedom%20of%20speech%20and%20the%20today%20(Wednesday%202022%20June),&text=The%20Bill%20will%20ensure%20courts,to%20express%20their%20views%20freely), accessed 19 September 2022.

142 Suella Braverman, 'As the next Prime Minister, I would truly bring rights home', *PoliticsHome*, 12 July 2022, <https://www.politicshome.com/thehouse/article/suella-braverman-conservative-leadership-prime-minister-leave-echr>, accessed 13 July 2022;

Press release from the European Court of Human Rights, 15 June 2022, [file:///C:/Users/44736/Downloads/Further%20requests%20for%20interim%20measures%20in%20cases%20concerning%20asylum-seekers%20E2%80%99%20imminent%20removal%20from%20the%20UK%20to%20Rwanda%20\(1\).pdf](file:///C:/Users/44736/Downloads/Further%20requests%20for%20interim%20measures%20in%20cases%20concerning%20asylum-seekers%20E2%80%99%20imminent%20removal%20from%20the%20UK%20to%20Rwanda%20(1).pdf), accessed 21 July 2022.

143 Nick Timothy and Karl Williams, 'Stopping the Crossings', *Centre for Policy Studies*, December 2022, <https://cps.org.uk/research/stopping-the-crossings/>, accessed 9 December 2022.

144 Brandon Lewis speech, 'The Future of Human Rights Reform', *Policy Exchange*, 3 October 2022, <https://rozenberg.substack.com/p/lewis-defends-judicial-independence#details>, accessed 3 October 2022.

145 Melanie Gower and Patrick Buchard, 'UK-Rwanda Migration and Economic Development Partnership', House of Commons Library, 28 June 2022, <https://commonslibrary.parliament.uk/research-briefings/cbp-9568/>, accessed 24 September 2022.

it should be noted that this view is not universally held. There may also be legal ramifications for the UK should there be a human rights gap with the requirements of Article 763 of the EU-UK Trade and Cooperation Agreement which commits the UK and EU to respecting human rights and the rule of law as 'shared values and principles' which 'underpin their domestic and international polices'. This risks terminating or suspending the Agreement itself under Article 772, which could lead to severe geopolitical tension with the EU.

Without holistically analysing the benefits of the Convention as a vital legal instrument which enables the UK to easily maintain its international legal obligations whilst also signalling its political commitment to a universal understanding of human rights, there is risk that its significance to the UK constitution, history and culture of human rights is being overlooked and inadequately analysed. To leave the Convention in favour of creating a new Common Law Rights Charter with 'like-minded' countries such as Canada, Australia, and New Zealand is constitutionally contradictory as it would not embed legal protection within UK human rights law.<sup>146</sup> Instead, it would only provide a 'political commitment to stand up for rights globally' – something which the Government ought to first start prioritising at home.<sup>147</sup>

### **What is needed in a 'Modern' Bill of Rights?**

What was striking about the Government's consultation paper was the absence of consideration for 'modern' human rights concerns that are currently being discussed in civil society and beyond. This is despite it being likely that in the future some of these concerns, such as maintaining adequate environmental protections, will lead to calls for their mandatory protection in a Bill of Rights as they transition into significant political challenges affecting a wide range of policy areas. In this respect, a Bill of Rights would be a suitable place to promote and safeguard such important rights. Why the Government has chosen to pursue – or at least allow to linger on the parliamentary agenda – a Bill of Rights Bill which is completely devoid of ambition in advancing them ought to be interrogated and speaks of a lack of imagination and leadership on the serious human rights challenges of today.

Whilst the Bill maintains the same catalogue of Convention rights as the Human Rights Act (through attempts to weaken them as addressed earlier) it adds no additional new rights; rather, it tries to emphasise 'quintessentially' British rights, although it fails to even do that.<sup>148</sup> Particular attention has been given to the right to a fair trial (Clause 9), yet this is not a new right, rather it 'appears to be a symbolic gesture to

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146 Suella Braverman, 'As the next Prime Minister, I would truly bring rights home', *PoliticsHome*, 12 July 2022, <https://www.politicshome.com/thehouse/article/suella-braverman-conservative-leadership-prime-minister-leave-echr>, accessed 13 July 2022.

147 *Ibid.*

148 Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – consultation', updated 12 July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>, accessed 14 July 2022.



distinguish the Bill of Rights from the Convention'.<sup>149</sup> Such a Clause also undermines the British application of the Bill with the right to jury trial not applicable in Scots law – a significant legal omission which interferes with a devolved competence and signals a lack of awareness or respect for Scotland's distinct legal system. Despite already having protection under Article 10 of the Convention, Clause 4 stipulates that courts must 'give great weight' to freedom of speech. Yet the scope of Clause 4 is narrower than Article 10 of the Convention and is exempt in areas where freedom of speech is at its most vulnerable, specifically in criminal proceedings and issues arising in relation to immigration, citizenship, and national security. In essence, areas which would affect 'less deserving' people the most.

A truly 'modern' Bill of Rights would be a positive declaration of rights that we can all share, value and be collectively invested in and inspired by. This is especially pertinent in the aftermath of the Brexit referendum result which was, in part, a response to the loss of a sense of identity, belonging and community in the UK.<sup>150</sup> Such a Bill should therefore be drafted with unity, clarity, dignity, and conviction at the core of its purpose and would reflect a time when 'modern' human rights concerns, such as restrictions in accessing justice, urgently need addressing. The current Bill not only reflects a deficiency of imagination in doing this, but it also highlights the significant gap between the political priorities of the Government and the reality of the human rights needs of the population at large. Access to justice in England and Wales is a key need, with criminal aid legal spending 38% lower in 2019-2020 than it was in 2010-2011.<sup>151</sup> The enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has also radically reduced the provision of civil legal aid in England and Wales which is now only able to help a much smaller proportion of the population than it once could.<sup>152</sup> Between 2010 and 2022, 43% of all courts in England and Wales have closed due to a lack of funding.<sup>153</sup> Not only does this undermine the rule of law and reinforce the public's perception that it is only available for the economically privileged, it reduces the social and economic safety-net for ordinary, as well as vulnerable, people. This, at a time when the aftermath of the Covid-19 pandemic and cost of living crisis is proving to be a collective human rights crisis impacting health, wellbeing and economic security for many.

Enacting a 'Modern' Bill of Rights for the twenty first century requires constitutionalising with care. The process, procedures, and presentation of the Bill's First Reading in June 2022 neglected to do this and failed to engage with the facts arising from the Government's consultation. For example, the Government 'remained

149 Letter from the Acting Chair of the Joint Committee on Human Rights, 30 June 2022, <https://committees.parliament.uk/publications/22880/documents/167940/default/>, accessed 14 July 2022, p. 13.

150 Gisela Stuart, *The Vitality of Democracy* (2022, Haus Publishing), p. 47.

151 House of Commons Justice Committee, *The Future of Legal Aid*, (2021-2, HC Paper 70), <https://committees.parliament.uk/publications/6979/documents/72829/default/>, p. 12.

152 House of Commons Library, 'Spending of the Ministry of Justice on Legal Aid', 21 October 2020, <https://researchbriefings.files.parliament.uk/documents/CDP-2020-0115/CDP-2020-0115.pdf>, accessed 10 October 2022, p. 6.

153 Bar Council, 'New Data Reveals the Decline in Access to Justice in England and Wales', *PoliticsHome*, 20 June 2022, <https://www.politicshome.com/members/article/new-data-reveals-the-decline-in-access-to-justice-in-england-and-wales>, accessed 6 November 2022.

convinced that reform is needed to secure the deportation of foreign national offenders' despite 77% of respondents believing that no change is required to the current framework.<sup>154</sup> This response indicates that the Government has forgotten – or outright side-lined – the fact that *democracy is supposed to have meaning and purpose and so too is a Bill of Rights. Pursuing the creation of one is a worthy endeavour when the why can be clearly answered. A logical reason could be to build on the human rights as already enshrined in the Convention and facilitated by the Human Right Act, such as protection from discrimination for people who identify as LGBTQ and protecting victims of domestic violence. These are quintessentially 'modern' human rights and areas that the Government has proactively advocated in policy plans and other law.*<sup>155</sup> Why it is trying to advance a Bill that attempts to do the complete opposite is as confusing as it is contradictory.

Another reason could be to fix 'supposed' deficiencies in the Human Rights Act, which are said to include 'legal uncertainty, confusion and risk aversion for those delivering public services on the front line'.<sup>156</sup> This particular 'problem' that has 'undermined public confidence' is one that is entirely self-inflicted by the Government.<sup>157</sup> As pointed out by the Equality and Human Rights Commission, the Government has failed to adequately raise awareness of human rights or provide training for public officials.<sup>158</sup> No central UK Government provision exists to achieve this. The Government itself must truly value human rights if it is to invest in adequate funding and resources for inclusive education in this area, especially in England. How can human rights, either contained in the Human Rights Act or a new Bill of Rights, be understood and truly 'owned' by the public if that same public is not educated to value it? A clear example of this occurred in the Covid-19 pandemic, where a failure to wear masks to protect others who were vulnerable showed that public understanding of human rights was 'far from perfect'.<sup>159</sup>

A Citizens' Assembly focused on a new Bill of Rights would be a democratic way of cultivating 'ownership' of British human rights ideals at a grassroots level and would confirm which rights to include. Such a process could be conducted in a similar

154 Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights – Consultation Response, (CP704, 2022), <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/results/modern-bill-rights-consultation-response.pdf>, accessed 7 September 2022, para 114, p. 31.

155 See LGBT Action Plan, <https://www.gov.uk/government/publications/lgbt-action-plan-annual-progress-report-2018-to-2019> accessed 10 September 2022 and Domestic Abuse Act 2021.

156 UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – consultation', updated 12 July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>, accessed 14 July 2022.

157 *Ibid.*

158 Equality and Human Rights Commission, *Human rights education, trainings and awareness raising – UK Government assessment*, <https://humanrightstracker.com/en/progress-assessment/human-rights-education-trainings-and-awareness-raising-uk-government-assessment/>, accessed 11 September 2022.

159 Merris Amos, 'The place of human rights in the Constitution of the United Kingdom', *UK Constitutional Law Association*, 9 November 2022, <https://ukconstitutionallaw.org/2022/11/09/merris-amos-the-place-of-human-rights-in-the-constitution-of-the-united-kingdom/>, accessed 9 November 2022.

fashion to the Citizens' Assembly on Democracy in the UK.<sup>160</sup> This method would be proactive and positive in nature, in contrast to 'the prevailing British constitutional ideology' that citizen rights are 'negative in their nature', detailing that Parliament and public authorities should exercise their powers in a way that avoids excessive interference with individual freedom.<sup>161</sup> Yet in correlation with cultural changes in British society over the last 50 or so years, individual freedom for the most vulnerable members of society requires additional attention if it is to be appropriately recognised.

Merris Amos touched on this sentiment when she declared that it is 'important to pay attention to moving forward' when assessing the place and nature of human rights in the UK's constitutional framework.<sup>162</sup> Should there be rights relating to access to technology, such as guaranteed access to high-speed broadband as envisaged in the Labour Party's 2016 Digital Democracy Manifesto?<sup>163</sup> Or what about socio-economic rights, such as a right to minimum subsistence considering the level of destitution in the UK, which encompassed 2.4 million people in 2019?<sup>164</sup> The Labour Party recently proposed constitutionally protecting health, education, and housing rights in the UK.<sup>165</sup> These would be well placed in a 'modern' Bill of Rights and would appeal to all nations and parts of the UK. Assessing recent attempts to constitutionalise rights across the world would be a helpful way of learning what would – and would not – be suitable to incorporate into a new UK Bill.

In 2022, Chile held a referendum on a new progressive constitution which would have enshrined over 100 rights into Chile's national charter and addressed 'modern' human rights issues such as the right to abortion, housing, internet access, and education. Whilst the referendum was rejected, its exercise was a useful one in emphasising which human rights issues are increasingly valued and those which are at risk in the modern world. The role of climate change was underlined, with nature itself declared to possess rights to the extent that 'the State must guarantee and promote the rights of nature'.<sup>166</sup> A healthy environment was also acknowledged as a human right, a protection that is enshrined in constitutions across the world as well as the UN General

- 160 See UCL Constitution Unit, *Citizens' Democracy in the UK*, April 2022, <https://www.ucl.ac.uk/constitution-unit/research/deliberative-democracy/democracy-uk-after-brexit/citizens-assembly-democracy-uk> accessed 30 August 2022.
- 161 Anthony Lester, *Human Rights and the British Constitution*, (7th ed, Cambridge University Press, 2011), p. 71;  
Colm O'Cinneide, *The Changing Constitution*, (9th ed, Oxford University Press, 2019), p. 63.
- 162 Merris Amos, 'The place of human rights in the Constitution of the United Kingdom', *UK Constitutional Law Association*, 9 November 2022, <https://ukconstitutionallaw.org/2022/11/09/merris-amos-the-place-of-human-rights-in-the-constitution-of-the-united-kingdom/>, accessed 9 November 2022.
- 163 BBC News, 'Jeremy Corbyn proposing digital 'bill of rights'', 30 August 2016, <https://www.bbc.co.uk/news/uk-politics-37219140>, accessed 5 November 2022.
- 164 Mark Simpson, Gráinne McKeever and Ciara Fitzpatrick, Legal protection against destitution in the UK: the case for a right to a subsistence minimum, *Modern Law Review* (2022), <https://doi.org/10.1111/1468-2230.12773>, accessed 6 November 2022, p. 1.
- 165 Labour Party, 'Report of the Commission of the UK's Future', December 2022, <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>, accessed 9 December, p. 72.
- 166 Draft Constitution for Chile, 14 May 2022, <https://www.chileconvencion.cl/wp-content/uploads/2022/05/PROPUESTA-DE-BORRADOR-CONSTITUCIONAL-14.05.22.pdf>, accessed 14 September 2022, Article 103. \_

Assembly.<sup>167</sup> The UK is the first major economy to commit in law – but not within a human rights context – to net zero emissions by 2050.<sup>168</sup> As there is a clear correlation between climate change and consequences for humans and nature, Amos is right to ask ‘How long should we have to wait until this right is reflected in UK law? Is the HRA really the best that we can do?’<sup>169</sup>

The right to abortion has become a pressing issue in the aftermath of the ruling in *Dobbs v Jackson Women’s Health Organization* by the US Supreme Court.<sup>170</sup> The precariousness of abortion rights in UK law has been put under the spotlight in response, but the question remains whether a Bill of Rights is the right place to guarantee it. When asked about including a right to abortion in the Bill, the Justice Secretary claimed that abortion was ‘settled in UK law’.<sup>171</sup> This is incorrect. Parliamentary sovereignty enables Parliament to pass laws without being limited by an existing law created by a previous Parliament or any court.<sup>172</sup> Further, only women in Northern Ireland – and not England, Wales, and Scotland – have the constitutional right to abortion under Section 9 of the Northern Ireland (Executive Formation etc) Act 2019. Yet access to abortions remain difficult in Northern Ireland – but not in England, Wales, and Scotland – because of a stalemate within the Northern Ireland Executive, with the UK Government likely to intervene to correct this.<sup>173</sup> Due to the dilution of positive obligations, the Bill as drafted would weaken abortion rights in the UK.<sup>174</sup> A ‘Modern’ Bill of Rights acknowledging the right to abortion is an issue that the UK population would like Parliament to debate, but whether it will in a future version of the Bill remains uncertain.<sup>175</sup>

167 *Ibid*, Article 104;

Alexandra Huneus, ‘Win or Lose, Chile’s Draft Constitution Heralds a New Era of Climate Constitutionalism’, *Verfassungsblog*, 31 August 2022, <https://verfassungsblog.de/win-or-lose/>, accessed 31 August 2022.

168 UK Government, ‘UK’s path to net zero set out in landmark strategy’, 19 October 2021, <https://www.gov.uk/government/news/uks-path-to-net-zero-set-out-in-landmark-strategy>, accessed 1 September 2022.

169 Merris Amos, ‘The place of human rights in the Constitution of the United Kingdom’, *UK Constitutional Law Association*, 9 November 2022, <https://ukconstitutionallaw.org/2022/11/09/merris-amos-the-place-of-human-rights-in-the-constitution-of-the-united-kingdom/>, accessed 9 November 2022.

170 *Dobbs v Jackson Women’s Health Organization* 597 U.S. (2022).

171 Dominic Raab, *Oral answers to questions*, HC Deb 29 June 2022, Vol 717, Col 292.

172 Jamie Fletcher and Karolina Szopa, ‘UK abortion laws are more precarious than they seem – replacing the Human Rights Act could unsettle them further’, *The Conversation*, 18 July 2022, <https://theconversation.com/uk-abortion-laws-are-more-precarious-than-they-seem-replacing-the-human-rights-act-could-unsettle-them-further-186353>, accessed 5 September 2022.

173 Chris Heaton-Harris MP, ‘Secretary of State: No Excuse For Executive Not To Be Formed’, *Irish News*, 27 September 2022, [https://www.irishnews.com/news/northernirelandnews/2022/09/27/news/secretary\\_of\\_state\\_no\\_excuse\\_for\\_executive\\_not\\_to\\_be\\_formed-2840810/](https://www.irishnews.com/news/northernirelandnews/2022/09/27/news/secretary_of_state_no_excuse_for_executive_not_to_be_formed-2840810/), accessed 27 September 2022.

174 See discussion by Kirsty Hughes, ‘The Bill of Rights and the Precarity of Abortion Rights’, *UK Constitutional Law Association*, 11 July 2022, <https://ukconstitutionallaw.org/2022/07/11/kirsty-hughes-the-bill-of-rights-and-the-precarity-of-abortion-rights/>, accessed 3 September 2022.

175 See UK Parliament petition, ‘Include abortion rights in the Bill of Rights’, 163,632 signatures supported this, exceeding the 100,000 signatures required, <https://petition.parliament.uk/petitions/619334>, accessed 4 September 2022.

## Conclusion

Throughout the period of writing this report, an unrelenting whirlpool of significant political and constitutional changes took place which in previous years would not have occurred over such a short period of time. This includes the dramatic resignation of Boris Johnson as Prime Minister in response to the resignation of more than 50 government ministers, the passing of Queen Elizabeth II and succession of King Charles III, the volatile market response to Kwasi Kwarteng's attempted fiscal initiative, the 45-day tenure of Liz Truss as Prime Minister and succession of Rishi Sunak, further announcements about Scottish Independence, numerous ministerial reshuffles, the Government's U-turn on elections in Northern Ireland and the migrant crisis, to name just a few.

The Bill of Rights Bill has also been subject to this instability, with the Bill initially shelved under Liz Truss in response to concerns about its drafting and functionality. Yet her successor, Rishi Sunak, permitted the Bill to come back with the return of Dominic Raab as Justice Secretary. However, the Bill may now be shelved once again due to concerns that it will provoke a 'protracted parliamentary battle' although Raab's declaration that the Bill 'is ready to go' in December 2022 suggests that the Bill will remain on the Government's agenda.<sup>176</sup> With the Conservative Party remaining internally divided, Sunak's decision to permit the progression of the Bill – whether that be by allowing it to sit on the parliamentary agenda for a few months, or by enabling it to reach a Second Reading – suggests that he is doing so for party political reasons, in turn ignoring the constitutional, legal and wider political ramifications outside of his own party. By doing this, and by failing to engage in conscientious constitutionalism, he risks continuing with the poor patterns of his predecessors, Boris Johnson and Liz Truss.

This short-term thinking is likely to cause more problems if the Bill progresses in its current form, which is lacking competent legal and political detail. This in itself has the potential to stop the Bill in its tracks because of its ambition to replace the Human Rights Act which was not part of the 2019 Conservative Party manifesto. In turn, this means that the Salisbury Convention will not apply, allowing the House of Lords to make major amendments to the Bill. Why consideration of this was did not occur while the Bill was being drafted is unclear. But what is clear is the misguided role the Government has played in creating the very 'democratic deficit' that it criticised in its

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176 Aubrey Allegretti, 'Sunak's next U-turn may be to ditch Rabb's bill of rights', *The Guardian*, 8 December 2022, <https://www.theguardian.com/law/2022/dec/08/rishi-sunak-next-u-turn-may-be-to-ditch-dominic-raab-bill-of-rights>, accessed 8 December 2022; Joint Committee on Human Rights, 'Oral evidence: Legislative Scrutiny: Bill of Rights Bill', HC 611, 14 December 2022, <https://committees.parliament.uk/oralevidence/12467/pdf/>, Q18, accessed 30 December 2021.

consultation.<sup>177</sup> It also claims that the Human Rights Act has supposedly 'distorted the proper protection of human rights'; something which the 'Modern' Bill of Rights Bill does in a very deliberate way.<sup>178</sup>

This rise in constitutional carelessness, especially on matters relating to human rights, is not only problematic but also dangerous for democracy – what it is and what it is supposed to mean. This applies to key constitutional actors within Government and Parliament, but also supporting actors such as the media (especially the traditional press) who have an important influence and role in thoroughly researching, reporting and educating for the collective good. Indeed, the media acts as a mirror to society and thus has a democratic responsibility to help, and not hinder, democracy in the UK by highlighting what is working well alongside what is not. Like an entrepreneur creating a business, a musician making music, or a nurse treating a patient, our legislators are the creators of the country we live in through their law-making powers. Because of this, the details and the process matter. Indeed, in some extreme cases it can result in either life or death.

If the Government is serious about human rights reform – and wishes for others to treat the proposed Bill as a serious and workable piece of constitutional legislation – it is necessary for it to get intentional. Why is the proposed Bill necessary for this moment in time? Who will truly benefit from it in the long-run? When could it prove to be an obstacle to democracy at large and does it truly complement the UK's wider constitutional picture? A government unwilling to engage with these questions speaks of an executive uninterested in properly fulfilling its democratic function and raises serious concerns about what kind of political and constitutional legacy it wishes to bestow on the people – actual and perceived – it governs.

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177 UK Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – consultation', updated 12 July 2022, <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>, accessed 14 July 2022.

178 *Ibid.*

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The Constitution Society

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