

## **BILL OF RIGHTS BILL 2022-23**

### **Briefing for Second Reading**

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1. This briefing provides analysis of top-level points of principal to inform parliamentary consideration during the second reading of the Bill. It will be followed by more granular briefings (including possible amendments) at the later stages.
2. The Bill represents a fundamental constitutional change. It does not merely restore the *status quo ante* the Human Rights Act 1998. Rather, in expanding the power of the executive to ignore rights, it takes the UK back to a pre-1945 level of rights protection.

#### ***Human rights and democracy***

3. Human rights and democracy are mutually essential. Democracy flows from the recognition of the inherent dignity of every individual. Rights guarantee this in practice.<sup>1</sup> Eroding rights risks putting the UK in the same space as states like Russia and Hungary.

#### ***Misunderstanding human rights***

4. The Bill is based on a fundamental misunderstanding of human rights. The European Convention on Human Rights (ECHR) was drafted in the aftermath of the Nuremberg trials primarily by British lawyers and based substantially on British common law rights. But it is not a “British” document. Rather, it enshrines the legal protections necessary to ensure the dignity of the individual is respected. These transcend states.
5. The Convention rights flow from our humanity, not our nationality. The criticism that Strasbourg is a “foreign court” is thus misconceived. The nationality of the judiciary (which includes UK judges) is irrelevant.
6. Rights are “claimant blind”. Indeed, they are designed to protect those of whom the state does not approve. Linking remedies for rights abuses to “good behaviour” is thus incompatible with the nature of human rights. Human rights protect the individual regardless of whether they are in the majority. The Convention recognises that majorities can change but the dignity of the individual is constant. Proposals to allow the parliamentary majority to dictate the application of rights thus run directly contrary to the principle of the Convention.
7. In the UK sovereignty belongs to the people, not the government.<sup>2</sup> Requiring the government to respect the rights of individuals only enhances sovereignty. The

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<sup>1</sup> See, for example, Beitz, C., *The Idea of Human Rights*, (Oxford; OUP, 2009)

<sup>2</sup> See Dicey, A.V., *Introduction to the Study of the Law of the Constitution*, (first published Oxford; Macmillan, 1889)

Convention was drafted with the explicit aim of preventing governments from oppressing citizens under the cover of misconceived appeals to “sovereignty”.

### **Absent Mandate**

8. A constitutional change of this magnitude must be endorsed by an equally strong mandate. That does not appear to exist in this case.
  - (a) There does not seem to have been any attempt to engage other parties in the development of the proposals, or build a cross-party consensus (indeed the executive has refused to permit pre-legislative scrutiny by parliament).
  - (b) The proposals go well beyond those in the Conservative Party’s 2019 manifesto.
  - (c) The proposals run directly contrary to the conclusions of the government’s own Independent Review of Administrative Law and nearly 80% of responses to the government’s consultation.<sup>3</sup>

### **Empowering the Executive, not Parliament**

9. The main beneficiaries of the Bill are ministers and officials, not elected members:
  - (a) Courts will be required to give the government’s policy aims and secondary legislation similar weight to primary legislation – thereby elevating the decisions of the executive to the level of acts of parliament.<sup>4</sup>
  - (b) Ministers will be empowered to pick and choose which existing judicial authority they wish to keep.<sup>5</sup> Thus usurping parliament’s role in determining whether to legislate contrary to judicial decisions.
  - (c) Judges are required to defer to assurances given by public bodies.<sup>6</sup> In other words to take officials at their word without the scrutiny that would normally be expected of witnesses in court. This requirement would have facilitated the cover-ups of major scandals such as the Bloody Sunday massacre and state collusion in the murder of Patrick Finucane and would require the courts to accept officials’ spurious explanations for rights abuses (such as the argument that requiring gay soldiers to keep their sexuality secret somehow impacted discipline).<sup>7</sup>

### **Violation of International Law**

10. The Bill violates two key international law requirements:
  - (a) The ECHR requirement for states to respect and implement the judgments of the Strasbourg Court.

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<sup>3</sup> See D. Lock, ‘Three Ways the Bill of Rights Bill Undermines UK Sovereignty’, U.K. Const. L. Blog (27th June 2022) (available at <https://ukconstitutionallaw.org/>)

<sup>4</sup> See cl. 10(1)(b)

<sup>5</sup> See Cl. 40

<sup>6</sup> See Cl. 20

<sup>7</sup> See *Smith v UK* (2000) 29 E.H.R.R. 493

- (b) The Good Friday Agreement (GFA) requirement for the UK government to apply the ECHR fully in Northern Ireland.
11. The Bill thus risks further damage to the UK's international reputation and ability to agree advantageous treaties (including trade agreements). Moreover, it compromises the moral authority of the GFA risking that other parties will no longer feel bound by the agreement and a potential return to violence in Northern Ireland.
12. With domestic courts no longer able to apply the Convention rights in the same way, human rights claims will no longer be worked out quickly and cheaply at first instance. Rather, those with means will take their claim to the Strasbourg court. This will, in effect, mean that true human rights protections are reserved for the rich.

### **Spurious basis**

13. The executive's case for the necessity of the Bill is spurious in the extreme<sup>8</sup>:
- (a) Of the more than 9000 recorded cases in which the Human Rights Act 1998 has been cited, the government examined fewer than 50.
- (b) That small sample was treated cursorily or misrepresented. The case of *Othman*,<sup>9</sup> for example (in which the ECtHR blocked the deportation of a terrorist suspect) is used as an example of the Strasbourg court's tendency to expand the ambit of rights beyond those "set out in the Convention". But *Othman* turned on the "real risk" the evidence against the appellant had been obtained by torture. Clearly this is squarely within the class of abuses that the framers intended to outlaw.
- (c) The application of Convention rights in new circumstance does not represent an "expansion" of the rights but, rather, the core work of courts applying law.
- (d) The Bill removes the requirement for the courts to apply legislation in a manner compatible with the Convention rights. This removes the presumption that parliament intends to respect the rights of citizens. Yet the executive is unable to produce a single example in which this section has led to a problematic conclusion (that could not be remedied by parliament simply legislating to the contrary).

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<sup>8</sup> See <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights>

<sup>9</sup> *Othman v UK* ECHR Case 8131/09