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UK reform of its human rights legislation: consequences for domestic and European human rights protection

Introductory memorandum

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1. Introduction

1. This introductory memorandum is based on a decision of the Bureau, Reference 4660, dated 24.06.2022. The committee appointed me as rapporteur at its meeting in Strasbourg on 11 October 2022.

2. In this introductory memorandum, I will start by setting out some background principles in relation to the the different ways that member States give effect to the European Convention on Human Rights (ECHR), including the importance of the principle of subsidiarity (i.e. that human rights should, in general, be secured by domestic mechanisms rather than through reliance on the ECtHR). I will then look at (i) the current way that the UK gives effect to the ECHR through the Human Rights Act 1998 (HRA), (ii) the background discussions in the UK relating to reform of the HRA, (iii) the key elements of the Bill of Rights Bill as introduced into the House of Commons on 22 June 2022, and (iv) commentary to date on that Bill. I will finally make proposals on further work needed for the finalisation of my report. For the purposes of this report, I will focus on those proposals with the most relevance for other States and for the European Convention on Human Rights system.

2. The obligation to secure respect for human rights and to provide an effective remedy for a violation of human rights: The principle of subsidiarity and enforcement of ECHR rights in member States

3. All member States are contracting parties to the European Convention on Human Rights and, as such, are bound, as a matter of international law, to respect the obligations flowing from it. This includes the obligation to respect the human rights set out in the ECHR of all people within their jurisdiction (Article 1 ECHR).[1] It also includes the obligation to provide an effective remedy to any person whose rights and freedoms have been violated by that State.[2] This requires action by the State to provide a system of effective practical enforcement of ECHR rights domestically, including adequate avenues of redress where violations occur.

4. The primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention resides with the national authorities - not with the European Court of Human Rights (ECtHR). This is a reflection of the principle of subsidiarity, as well as the obligations in Article 1, 13 and 35(1) ECHR.[3] The

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[1] Article 1 ECHR (obligation to respect human rights) provides "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

[2] Article 13 ECHR (right to an effective remedy) provides "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

[3] Applying to the ECtHR to seek to enforce one's rights is subsidiary to national systems safeguarding human rights, as can be seen from the *travaux préparatoires* of the European Convention on Human Rights, and as set out in *Kudła v.*

principle of subsidiarity is expressed in the additional preambular paragraph to the ECHR, added by Protocol 15, which provides: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

5. The object of Article 13 ECHR is to ensure that individuals can obtain relief at national level for violations of their Convention rights without having to set in motion the international machinery of complaint before the ECtHR. Article 13 thus requires States to protect human rights first and foremost within their own legal system. Where domestic remedies are ineffective and do not meet the requirements of Article 13, individuals are forced to refer complaints to the ECtHR that should have been addressed within the national legal system and the number of ECtHR cases against a State will be more significant. Where the domestic system for enforcement of ECHR rights – and in particular the right to an effective remedy – is effective, there will naturally be fewer cases brought before the ECtHR as well as fewer violations found against that member State.

6. Article 13 requires a domestic remedy before a "competent national authority" affording the possibility of dealing with the substance of an "arguable complaint" under the Convention and of granting appropriate relief.[4] Contracting States are nevertheless afforded a margin of appreciation in determining how they comply with their obligations under Article 13.[5] Therefore, Article 13 does not require any particular form of remedy, given the margin of appreciation afforded to Contracting States.[6] Article 13 does not require a State to have a remedy to challenge in abstracto non-compliant domestic legislation.[7] In an application brought before the Human Rights Act 1998 had entered into force, the ECtHR found that Article 13 ECHR did not require the incorporation of the Convention in domestic law.[8] However, since then, all States parties have now all incorporated the Convention rights into their domestic legal order, there is thus perhaps a question as to whether this change in state practice could be of relevance in future ECtHR caselaw relating to Article 13 ECHR.

7. How States give effect to the ECHR will depend on their constitutions and their legal systems. Some member States have monist systems, meaning that they consider international law obligations to be directly binding (often providing the treaty is 'self-executing'), often in a similar way to their domestic legal obligations.[9] Other member States have dualist systems, often in recognition of the different legal subjects and different sources of law.[10] In dualist States, international legal obligations need to be transposed or somehow incorporated into domestic law in order to have full legal effect domestically. In reality, many States have a mixed type between monism and dualism. As has been noted in the Introductory Memorandum prepared by Mr George Katrougalos, on the "European Convention on Human Rights and national constitutions", "neither monism nor dualism provide a sufficient answer for determining the factors that influence the integration of human rights treaties into domestic law and States following either approach can be very successful in implementing such treaties".[11] Moreover, even in monist States, there can often be scope for further reflection on how best to give effect and practical enforcement to the rights protected under the ECHR. It is important to note that irrespective of the system and the margin of appreciation, a State cannot adduce its domestic law, including its constitutional system, as a justification for its failure to respect its international law obligations under the European Convention on Human Rights.[12]

Poland [GC], 2000, § 152. This is made clear by Article 13 ECHR, as well as the requirement to exhaust domestic remedies in Article 35(1). See also *Cocchiarella v. Italy* [GC], 2006, § 38; *Scordino v. Italy (no. 1)* [GC], 2006, § 140.

[4] *Boyle and Rice v. the United Kingdom*, 1988, § 52; *Powell and Rayner v. the United Kingdom*, 1990, § 31; *M.S.S. v. Belgium and Greece* [GC], 2011, § 288; *De Souza Ribeiro v. France* [GC], 2012, § 78; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], 2014, § 148.

[5] *Vilvarajah and Others v. the United Kingdom*, 1991, § 122; *Chahal v. the United Kingdom*, 1996, § 145; *Smith and Grady v. the United Kingdom*, 1999, § 135.

[6] *Budayeva and Others v. Russia*, 2008, § 190.

[7] *De Tommaso v. Italy*, § 180.

[8] *Smith and Grady v. the United Kingdom*, 1999, § 135.

[9] Examples of this approach include France, Spain and many central and Eastern European States.

[10] Examples of this approach include Finland, Hungary, Iceland, Ireland, Norway, Sweden, the United Kingdom.

[11] At paragraph 9.

[12] *Grzeda v. Poland* § 340. See also the Vienna Convention on the Law of Treaties, 1969. It is noteworthy that the Russian Constitutional Court, on 19 January 2017, delivered a judgment concluding that it was impossible to implement the ECtHR's judgment in the case of *OAO Neftyanaya Kompaniya YUKOS v Russian Federation*, on just satisfaction without contravening the Russian Constitution (due to the amendments to the Federal Law on the Constitutional Court passed in December 2015). The Committee of Ministers however stressed the "unconditional obligation assumed by the Russian Federation under Article 46 of the Convention to abide by the judgments" of the Court, irrespective of constitutional challenges. It this respect it is also worth noting that ECtHR judgments can and have required changes to a State's constitutional provisions (e.g. *Paksas v Lithuania*).

3. The UK Human Rights Act 1998

8. Prior to 1998 the UK had not directly incorporated the ECHR rights into domestic law. Prior to the Human Rights Act 1998 ("HRA"), some rights were protected under domestic ordinary laws, or under the common law, and the ECHR had some effect under domestic law, but it was not directly enforceable.[13] It was therefore more common for individuals to need to resort to the subsidiary protection of the ECtHR in order to enforce their rights – which was both a lengthy and a costly process. Moreover, due to the lack of incorporation, domestic courts only rarely considered the extent of ECHR rights and thus only rarely had regard to the case-law of the ECtHR, meaning that domestic courts and the ECtHR were often approaching cases using different methodology and reasoning.

9. The Human Rights Act 1998 sought to resolve these concerns and "bring rights home" through creating a better system of domestic enforcement of ECHR rights, that was closely linked to the methodology of the ECHR system.[14] This approach allowed human rights claims to be brought in domestic courts and introduced a culture shift through embedding human rights thinking into the policy-making and operational actions of public authorities. Of particular interest, this included:

a. **Incorporation of the ECHR rights:** Section 1 and Sch. 1 HRA incorporate the Convention rights contained in Articles 2-12 and 14 ECHR into domestic law[15]

b. **Ensuring that the UK Courts and the ECtHR can speak the same legal language**: Section 2 HRA includes an obligation on UK courts, when determining the application of ECHR rights, to "take into account" ECtHR judgments that are "relevant" to the proceedings before them. This requirement ensures that UK judges meaningfully engage with the reasoning of the relevant ECtHR caselaw in domestic proceedings. This has led to fewer unintentional discrepancies in the application of ECHR rights, and better judicial dialogue between the courts.

c. **Aligning primary legislation with Convention rights whilst still respecting the principle of parliamentary sovereignty:**

i. Section 3 HRA contains an interpretative obligation to read legislation compatibly with the ECHR rights, "so far as it is possible to do so". This requirement is a strong interpretative obligation to ensure that legislation is given an ECHR-compliant reading, where that is possible within the terms of the legislation.

ii. Section 19 HRA requires the Government Minister responsible for a Bill (a legislative proposal introduced into Parliament) to make a statement as to whether or not he considers the Bill to be compatible with Convention rights. This statement is usually accompanyied by human rights analysis that helps Parliament (and civil society) to understand the Government's human rights analysis in proposing any provision in a Bill before Parliament. This therefore helps to ensure parliamentary scrutiny of draft legislation for ECHR-compatibility as well as indicating the Government's intention and reasoning in preparing the legislation.

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[13] Prior to the HRA, the ECHR was an aid to construction of domestic legislation in case of ambiguity (it being assumed in cases of ambiguity that Parliament intended to legislate compatibly with the UK's international human rights obligations (*R v. Secretary of State for the Home Department, ex. Parte Brind* [1991] 1 AC 696). The ECHR could also inform the exercise of judicial discretion and it assisted in establishing the scope of the common law where that was developing and uncertain or incomplete (*R v. Lyons* [2003] AC 976 [13] per Lord Bingham).

[14] Some provisions of the UK HRA are similar to approaches taken to giving effect to the ECHR in other States, although there are some innovations. Of note, some provisions in the Irish European Convention on Human Rights Act 2003 (ECHRA) are very similar to some of the provisions of the UK's Human Rights Act 1998. For example, the requirement to interpret the law compatibly with Convention rights "so far as is possible" in section 2 ECHRA is very similar to the interpretative obligation in s. 3 HRA. The requirement in section 4 ECHRA on Irish Courts to "take due account" of the principles laid down in ECtHR judgments, is similar to the requirement for UK Courts to "take into account" "relevant" judgments of the ECtHR in s. 2 HRA. Section 5 ECHRA relating to declarations of incompatibility has a similar affect as s. 4 HRA, although interestingly s. 5 ECHRA also includes a reference to a possible ex gratia payment for harm suffered as a result of such a provision.

[15] Article 13 ECHR (the right to an effective remedy) itself was not directly incorporated through the HRA, the reasoning being that the HRA was, itself, the method of giving effect to Article 13 ECHR.

iii. UK Courts may make a declaration of incompatibility where, due to primary legislation, a provision of domestic legislation cannot be read compatibly with ECHR rights [s. 4 HRA].[16] This allows the court to indicate where legislation is not compatible with Convention rights, whilst preserving the sovereignty of Parliament, by leaving it to Parliament to take action to remedy such incompatibilities.

iv. There is also a specific power to remedy such incompatibilities (whether identified through a declaration of incompatibility under s. 4 HRA or following a finding of a violation by the ECtHR) through remedial legislation, which can enable fast-tracked legislation in such circumstances [s. 10 and Sch. 2 HRA].

d. **Requiring all public authorities to act compatibly with ECHR rights:** Section 6 HRA provides that it is unlawful for public authorities to act incompatibly with ECHR rights. This provision (including as read with the requirement in s. 3 HRA on those bodies to read legislation compatibly with Convention rights) is responsible for much of the practical enforcement of ECHR rights in the UK. The practical enforcement of this provision requires continued training programmes to ensure that all public authority employees and agents (at national and local levels) are fully aware of these obligations, so that human rights are embedded in practice into policy-making and operational work.

e. **Providing access to a court where human rights have been violated:** Any person who claims that a public authority has not complied with the duty to act compatibly with Convention rights under s. 6 HRA may bring legal proceedings [s. 7 HRA] and may obtain a remedy [s. 8 HRA].

f. **Specific references to freedom of expression and freedom of thought, conscience and religion:** Sections 12 and 13 HRA require a court to have particular regard to the importance, respectively, of freedom of expression and of freedom of thought, conscience and religion in deciding on any relief in a case.

10. Data on UK cases at the ECtHR illustrate the success of the HRA in ensuring effective enforcement of human rights domestically, requiring little recourse to the ECtHR's subsidiary role in enforcing human rights. Recent statistics generally show the UK as having, in recent years, the lowest number of applications brought against it, per capita, of any member state, as well as the lowest number of admissible applications and the lowest number of violations.[17] This is generally credited as being due to the success of the Human Rights Act in allowing effective domestic enforcement of ECHR rights. Civil society groups representing marginalised groups have also emphasised the importance of the HRA in enabling individuals to enforce their rights.

4. Discussions relating to potential reform of the UK Human Rights Act 1998

11. For the last two decades there have been talks about reforming the HRA:

a. Under the Labour Government in 2008-9 there were discussions about a potential Bill of Rights and Responsibilities, to develop better public ownership of a national Bill of Rights (rather than simply incorporation of the ECHR) that would cover both rights and civic responsibilities. However, this never resulted in a Bill.

b. The 2010 Conservative Party Manifesto committed to replacing the HRA with a Bill of Rights. Under the Coalition this led to a Commission, in 2012, which produced a divided report as to whether there should be a Bill of Rights.

c. The Conservative Party's 2015 manifesto committed to "scrap the Human Rights Act and curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain". The proposals were not introduced.

d. The 2019 Conservative Manifesto committed to wide-ranging reforms of aspects of the constitution, stating "[w]e will update the Human Rights Act" to "ensure that there is a proper balance between the rights of individuals, our vital national security and effective government".

[16] It should be noted that a declaration of incompatibility is not available for ordinary secondary legislation as the Courts have the power to quash such legislation, so this power is not needed.
[17] See written evidence from Judge Robert Spano, then President of the European Court of Human Rights and Judge Tim Eicke to the Joint Committee on Human Rights (HRA0011)

e. The Government launched an Independent Human Rights Act Review (IHRAR) in December 2020, chaired by Sir Peter Gross (a retired Court of Appeal judge). The terms of reference tasked the Panel to consider: (1) the relationship between the domestic courts and the European Court of Human Rights (ECtHR); (2) the impact of the HRA on the relationship between the judiciary, executive and Parliament, and (3) whether there is a case for changing the way in which the HRA applies outside the UK. The Panel's Report was published on 14 December 2021, containing detailed analysis. The Report suggested very minor changes to the HRA, noting that "the vast majority of submissions" it received "spoke strongly in support of the HRA."[18]

f. Also on 14 December 2021, the Government published a consultation on human rights act reform, containing ideas for quite significant reforms to human rights protection in the UK, in quite stark difference to what was recommended in the IHRAR Report. [19]

g. On 22 June 2022, the UK Government introduced the Bill of Rights Bill into the House of Commons.[20] The Bill did not progress within Parliament, largely due to changes in political leadership within the Conservative Party. It is likely that the Bill will receive its Second Reading in the House of Commons (which will start the progress of more detailed parliamentary scrutiny of the Bill) in late 2022.

5. The Bill of Rights Bill

12. The Bill of Rights Bill would repeal and replace the Human Rights Act 1998. It would retain the same list of rights in the Schedule to the HRA and many of the provisions are very similar (if not identical) to the HRA. However, there are significant changes that seem to limit the protection of human rights in the UK in some respects. As such, it is a rare example of a Bill of Rights that seems to limit, rather than enhance, a system of rights protection. Rather surprisingly, it contains a number of provisions that do not seem to achieve any meaningful change to the law, but do potentially create a significant amount of confusion or legal uncertainty.

13. The Bill of Rights Bill has also been viewed as contentious from the perspective of devolution given the special role given to the HRA under the devolution settlements of Northern Ireland, Scotland and Wales – as well as the special role of human rights in the Northern Ireland peace process.

14. The major elements of note (and difference to the current HRA) are set out below.

a. It would **delink the interpretation of ECHR rights from the caselaw of the ECtHR** [clause 3 (former s. 2 HRA)]. Clause 3 would replace the current obligation in s. 2 HRA on the UK courts, to "take into account" ECtHR judgments that are "relevant" to the proceedings before them. Instead, clause 3 leaves it open to the UK courts to determine the extent to which they have regard to the ECtHR's caselaw, but does require them to have regard to the text of the relevant ECHR Articles. Clause 3 would also prevent UK courts from interpreting ECHR rights in a way that expands the protection conferred by that right, unless the court has "no reasonable doubt" that the ECtHR would adopt that interpretation. Whilst it is not possible to accurately predict how the UK courts' caselaw will develop in terms of the interpretation of ECHR rights, it is likely that the UK Courts would nevertheless have regard to relevant ECtHR caselaw in determining the scope and application of ECHR rights.[21] However, it will take time for the courts to build up caselaw about the extent to which they should have regard to such caselaw – and there may be a tendency for a less complete engagement with all relevant ECtHR caselaw than at present. These changes therefore present risks of a period of legal uncertainty, as well as risks that UK caselaw and reasoning will become less easy to follow for the ECtHR, with a consequent risk of misunderstandings in the process of formal judicial dialogue between the courts.

b. It would **repeal the interpretative obligation** [s. 3 HRA] that requires the courts and public authorities to read legislation compatibly with the ECHR rights, "so far as it is possible to do so". Following repeal, the existing common law principles of interpretation would still apply and would help

[18] Independent Human Rights Act Review Report.
[19] Consultation Response.
[20] Bill of Rights Bill, as introduced.
[21] This view seems to be shared by Lord Mance when he says "The courts would still be free to take account of such jurisprudence, and the normal presumption would be that Parliament by introducing the Convention rights domestically was intending that they should be given the same effect as they have internationally." He concludes that the Bill's changes to s. 2 HRA in clause 3 would be hardly significant in most cases. The Thomas More Lecture 2022 by Jonathan Mance "The Protection of Rights – this way, that way, forwards, backwards…". Paragraph 20.

to ensure that ambiguous or unspecific provisions of legislation were interpreted so as to be compatible with ECHR rights.[22] However, the repeal of s.3 HRA would reduce the reach of the interpretative obligation to provisions that were ambiguous, uncertain, or unduly general. This would mean that it is likely that more legislation would be interpreted in a way that is incompatible with ECHR rights, possibly requiring more declarations of incompatibility and more pressure on Parliament and Government to dedicate time to resolving such incompatibilities. It also introduces some confusion as to the status of pre-existing interpretations of statute based on s.3 HRA.[23] This further adds to the risks of a period of legal uncertainty following the entry into force of the Bill of Rights.

c. **Great weight to certain considerations:** A number of provisions would give "great weight" to specific rights or considerations. Many of these seem capable of being subsequently interpreted by the UK Courts in a way that is compatible with ECHR rights. However, they may also risk interpretations that tend to skew the balancing exercise in favour of particular considerations and may, if skewed too far, risk an unbalanced and thus non-compliant application of ECHR rights.

i. **Free speech:** Clause 4 would require "great weight" to be given to the importance of protecting freedom of speech. It is unclear whether these provisions would be interpreted in a way that would risk an unbalanced application of human rights in practice. It would still be possible, for example, for great weight to be accorded to free speech, whilst nonetheless still attaching appropriate weight to other rights e.g. the right to private life in any balancing exercise. Indeed that has been the impact of the current duty to "have particular regard to the importance" of freedom of expression in s. 12 HRA. Therefore, whilst the clause might be interpreted so as to produce an imbalance between different Convention rights, one might expect that it would be construed in a way that complies with the correct balancing exercise, albeit with an effort to highlight the importance of free speech as an important right within the UK's margin of appreciation.

ii. **Public protection:** Clause 6 would require "the greatest possible weight" to be given to the importance of reducing the risk to the public from persons who have been given custodial sentences. This clause would seem to apply principally in relation to decisions relating to licensing for offenders on parole, and decisions relating to segregation of certain prisoners due to risk. Arguably great weight is already given to the importance of public protection when making such decisions. It is therefore unclear whether clause 6 would make a difference in practice. However, if it were to be interpreted so as to shift the balancing exercise in a way that prevented an ECHR-compliant interpretation, then it could be problematic.

d. **Positive obligations:** The Bill would reduce the ability of UK courts to enforce positive obligations on the state to protect human rights. Clause 5 would prohibit the UK courts from applying any new positive obligations developed by the ECtHR caselaw after the enactment of the Bill of Rights. This provision seems to run clearly counter to the living instrument doctrine. It would freeze the development of positive obligations, through the living instrument doctrine, such that, in time, any new positive obligation could not be directly enforced in the UK without amendment to UK legislation. Clause 5 would also require the Courts, in applying any existing positive obligations, to give "great weight" to avoiding specific concerns, including the need to avoid having an impact on the ability of any public authority to perform its functions, to avoid an interpretation that would determine police operational priorities or would require an unreasonable standard of inquiry or investigation, or would conflict with issues relating to allocation of resources.[24] This element of clause 5 would restrain the application of

[22] For example, the principle set out in *ex parte Brind* that where there is any ambiguity or uncertainty, statute should be interpreted in a way that is compliant with the UK's international obligations; or the principle of legality (*ex parte Simms*) that fundamental rights cannot be overridden by general or ambiguous words.

[23] There is a new power in clause 40 for the Secretary of State to 'preserve' interpretations that the UK courts have made using the interpretative obligation under s.3 HRA. However, there is significant confusion as to how many such s.3 HRA interpretations the UK Courts have made under the HRA and what their content was – not least as there is no central list of such interpretations and because some judgments are not clear as to whether the court relied solely on s.3 HRA in reaching its interpretation.

[24] The examples given in the Government supporting documentation to support the inclusion of this clause tend to relate more to the application of Convention rights by UK authorities rather than a problem with the law, or positive obligations, themselves. For example, much is made of the extent of police resource dedicated to Osman warnings in respect of criminal gang members (these are warnings from the police that an individual's life may be at risk). The complaint is that too much resource is dedicated to giving such warnings to gang members during gang conflicts. However, this relates in part to how the police have chosen to apply their positive Article 2 duties, rather than an inherent problem with positive obligations, leading some commentators to suggest that clause 5 is hitting the wrong target and is merely creating further problems.

existing positive obligations in UK domestic law. Clause 5 seems to encourage a more limited application of positive obligations that that set out in the caselaw of the ECtHR, so could limit the application of positive obligations in the UK. There is a significant risk that this provision would therefore result in the need for litigation before the ECtHR in order for individuals to enforce their rights, and an increase in adverse judgments against the UK in the ECtHR.

e. **Role of Parliament:** The Bill seeks to enhance the role of Parliament (over the Courts) in relation to striking the balance in respecting human rights, whilst seeming to weaken the ability of Parliament to secure information from the executive in relation to human rights compatibility of draft legislation:

i. Clause 7 requires the Courts to accept that Parliament, in legislating, has decided that the legislation strikes an appropriate balance between the relevant rights and policy considerations (and requires the courts to "give the greatest possible weight" to the principle that decisions about such balances are properly made by Parliament). The UK Courts currently do accord Parliament significant respect for its role in striking a balance in policy determinations.[25] It may therefore be considered that clause 7 will make little difference to the approach already taken by the courts. However, it could prove problematic in cases where this might impede the courts' ability to undertake an effective assessment of compatibility. This is all the more worrying given that this clause would also seem to apply in matters relating to liberty, equality of treatment, fair process where the courts have significant competence. Concerns have been expressed that this belies a more worrying attitude that the "rule of law means no more than always giving effect to Parliamentary sovereignty" – whereas such as approach would risk making "Parliament the only decisive arbiter of fundamental rights in am circumstances".[26] Such an approach could cut across common law principles that pre-existed the HRA and would seem to confuse rule by law with rule of law.

ii. The Bill repeals s. 19 HRA (which requires the Government Minister responsible for a Bill to make a statement as to whether or not the Minister considers the Bill to be compatible with Convention rights). This arguably weakens the ability of Parliament to require transparency from the Government. Whilst the Government argues that it could still provide Parliament with such analysis, removing the legal obligation on the Minister to make a statement is unlikely to improve the timing, transparency and quality of analysis provided.

iii. Under clause 25, the Bill would require the Secretary of State to notify Parliament of an adverse ECtHR judgment against the UK or unilateral declaration by the UK Government. In practice, this happens at present informally through exchanges between officials. Such an increase in transparency and information is positive. However, some concerns have been expressed that this clause may be designed to seek to increase conflict between Parliament and the ECtHR, such as the difficulties relating to the implementation of the *Hirst v UK* case relating to prisoner voting.

f. **Deportation:** The Bill contains provisions in relation to two specific types of legal challenges relating to deportation. At present the UK's legal framework governing deportation has been held by the ECtHR to be ECHR-compliant, given that it allows for an individual assessment of proportionality to be made, even if the balance is more in favour of deportation when dealing with deportation decisions relating to offenders receiving custodial sentences of over 12 months.[27] Whilst both clauses 8 and 20 are rather specific and unlikely to have a significant impact in and of themselves, there are concerns that, if accompanied by further changes in sectoral law relation to immigration or deportation appeals, they may shift the balance too far and may thus not ensure the respect for the human rights of those being deported (and their families):

i. Clause 8 seeks to reduce the ability of a 'foreign national offender' (non-British national sentenced to more than 12 months' imprisonment) to rely on the right to family and private life (Article 8 ECHR) when challenging the compatibility of deportation legislation (NB This does not affect the ability to challenge the deportation decision itself). Effectively, such a challenge to the compatibility of legislation could only be brought if it would require the public authority to act in a way that would result in "manifest harm" to a member of the deportee's family that is so "extreme"

[25] See, for example, the recent Supreme Court judgment in R (SC, CB and 8 children) v Secretary of State for Work and Pensions [2021] UKSC 26.
[26] The Thomas More Lecture 2022 by Jonathan Mance "The Protection of Rights – this way, that way, forwards, backwards…". Paragraph 31.
[27] Unuane v UK (80343/17) 20 November 2020.

that it would override the "paramount" public interest in deportation. As the currently legal framework is considered to be compatible with ECHR rights, clause 8 has little current purpose. However, if the current legal framework is changed, then clause 8 could prevent meaningful review of that legislation and could tip the balance too far away from the proper balancing exercise required by Article 8 ECHR.

ii. Clause 20 seeks to limit a court's power to allow appeals by a "foreign criminal" against deportation on grounds that would question to nature of assurances relating to the right to a fair trial. This provision is limited to "deportation with assurances" cases (i.e. cases when a person is being deported, and in order to ensure that deportation is compliant with the ECHR, the foreign State has made assurances that it would respect the human rights of the person being deported) that relate to the right to a fair trial (the relevant test of which is "flagrant denial of justice" in relation to deportation cases). Most deportation with assurances cases relate to Article 3. The practical impact of this provision is therefore rather limited. However it would prevent domestic courts from seeking to reassess the credibility of a foreign State's assurances in relation to the right to a fair trial. Any such challenges would therefore need to be made to the ECtHR.

g. **Overseas Military Operations:** Clause 14 would remove the ability of victims of human rights breaches arising from an overseas military operation from being able to enforce their rights under the Convention. However, this clause could not be brought into force ('commenced') unless the Minister was satisfied that it was compatible with the UK's human rights obligations [clause 39]). Extra-territorial jurisdiction in a conflict situation outside of the European territorial space has been viewed as controversial due to practical challenges in ensuring human rights in an area over which a State has limited, if any, control, and due to the differences between international human rights law and the *lex specialis*, international humanitarian law. However, given the ECtHR's caselaw on Article 1 relating to "extra-territorial jurisdiction", it is clear that clause 14 would not be compatible with the UK's obligation to provide a mechanism for access to an effective remedy (Article 1, 13 ECHR etc) in respect of breaches of a Convention right. It is notable that the Independent Human Rights Act Review[28] and the UK Government's consultation paper[29] both seem to suggest that the UK Government may wish k to start a debate relating to the extent of jurisdiction under Article 1 ECHR in relation to overseas military operations, given Including within primary legislation a provision such as clause 14, that, if brought into force, would breach the UK's international law obligations under the European Convention on Human Rights, is deeply problematic in terms of respect for the rule of law and for human rights.

h. **Interim Measures:** Interim measures are designed to prevent irreparable damage in a case pending before the ECtHR and are issued by the ECtHR where it considers that there is an "imminent risk of irreparable damage" that would either prevent an applicant bringing a claim or render that claim pointless. Interim measures are not explicitly mentioned in the ECHR and are not binding on States under Article 46(1) ECHR (which relates solely to final judgments). However, the ECtHR has developed caselaw and practice under which interim measures issued under Rule 39 of the ECtHR Rules are binding as a matter of international law (under Article 34 ECHR as interpreted by the ECtHR).[30] Article 34 ECHR has not been incorporated into UK domestic law and therefore the obligation to comply with interim measures has arguably not been incorporated as a matter of domestic law.[31] However, the UK Government has procedures in place to comply with interim measures as a matter of international law. The UK Government seems to accept that interim measures are binding as a matter of international law, notwithstanding some political opinions expressed on this topic. Clause 24 would provide that no account should be taken of any interim measures "for the purposes of determining the rights and obligations under domestic law" of a public authority or any other person. This provision could be read

[28] Chapter 8, Independent Human Rights Act Review Report, which concluded that the extra-territorial and temporal scope of the ECHR was "troublesome" and should to be addressed by a "national conversation" relating to the application of law in situations of armed conflict, together with "Governmental engagement" with ECHR States on "reform of the Convention" to develop a "new Protocol to the Convention setting out a clear, logically coherent; well thought-out approach to its territorial and temporal scope, together with the Convention's relationship with IHL".

[29] The UK Government's consultation paper stated that "it is clear from the travaux préparatoires to the Convention that the drafters intended the Convention to apply only to States parties' territories". The Government argued that "the extension of human rights law to armed conflict has … created considerable legal and therefore operational uncertainties for our armed forces".

[30] *Mamatkulov and Askarov v. Turkey* (2005).

[31] Although a recent domestic judgment suggested otherwise, by referring to the interim measures granted by the ECtHR. This related to interim measures from the ECtHR in the case of *K.N. v. the United Kingdom* (no. 28774/22) on 14 June 2022 concerning an Iraqi asylum-seeker facing imminent removal to Rwanda. In this case, the ECtHR indicated to the UK Government that the applicant should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings. The UK Government has, so far, respected this interim measure.

as a sort of strong assertion of dualism, indicating no real change to the UK's future conduct in respecting interim measures. However, there are concerns that it could indicate a different approach, and optically it has caused confusion as to whether this is some assertion that the UK would not comply with interim measures. Former judge at the UK Supreme Court, Lord Mance, has said that "it is extraordinary to see legislation proposing to forbid any domestic court in future taking any account of any interim measure issued by the ECtHR".[32] The clause seems to achieve little other than creating confusion and suggesting a potential disregard for the rule of law.

i. **Trial by jury**: Clause 9 provides that one of the ways in which the right to a fair trial (Article 6 ECHR) is secured in the UK includes trial by jury. Whilst this provision recognises the current status of jury trials, as protected in legislation, it does not create a right to jury trial nor alter the right to jury trial. Whilst jury trial exists in all three jurisdictions in the UK, it is not available for all offences.[33] Clause 9 therefore seems to achieve little, but arguably does no harm.[34]

j**.** **Litigation:** A number of provisions seek to limit access to litigation or to damages for those bringing challenges based on human rights violations:

i. **"Significant disadvantage"**: Clause 15 would introduce a new permissions stage before proceedings could be brought based on the Bill of Rights. This would require the applicant to be a victim, and to have suffered a "significant disadvantage" (unless there was an "exceptional public interest" in the case being brought). Given that vexatious or scurrilous claims can already be disposed of by the Courts, there seems little need for this provision, which might limit some valid claims that did not reach the threshold of "significant disadvantage". Whilst this test is arguably similar to the test applied by the ECHR itself as a subsidiary organ for the enforcement of human rights (at least following Protocols 14 and 15), it is arguably not appropriate for domestic courts to adopt such a limited approach to the enforcement of human rights. As Lord Mance said, such an approach "ignores the difference between first instance access to justice and review jurisdiction".[35]

ii. **Damages:** Clause 18 provides that damages in respect of a human rights violation should be necessary to provide a remedy that is "just and appropriate". However, clause 18 would also prohibit a court from awarding an amount of damages that would be greater than the amount which the court believe the ECtHR would award. It also specifies matters to be taken into account in assessing damages, including taking into account the Applicant's conduct. There are concerns that this goes against the spirit of the principle that human rights are universal. As Lord Mance set out "it is wrong in principle that otherwise appropriate compensation for an established breach of human rights should be restricted by public authority please, let alone from the public authority responsible, that proper compensation would impact their ability to perform their functions".[36] The UK Government argues that this is merely reflecting the caselaw of the ECtHR, however, it seems to go beyond that caselaw, not least given the infrequency with which such an approach is applied by the ECtHR.[37] Further, clause 18 would require courts to consider the impact on the defendant public authority of awarding damages. This approach seems to move away from the principles applied by the ECtHR in deciding on damages, and would risk applicants needing to apply to the ECtHR for an appropriate level of just satisfaction.

k. **Greater protection for journalistic sources:** Clause 21 would amend section 10 of the Contempt of Court Act 1981 to make it even more difficult for the courts to require disclosure of journalistic sources. The present test for disclosure of a journalist's sources is that it be "necessary" in the interests of justice, national security or the prevention of crime of disorder. This amendment would additionally require there to be "exceptional and compelling reasons" why the disclosure is in the public

[32] The Thomas More Lecture 2022, paragraph 22.

[33] Jury trial is not available for summary-only offences in any of the jurisdictions. In respect of either way offences, it is only available if the defendant is tried in the Crown Court (High Court in respect of Scotland). Moreover, whereas the defendant can elect a jury trial for either way offences in England, Wales and Northern Ireland, in Scotland it is the public prosecutor that decides.

[34] Of note, the Joint Committee on Human Rights of the UK Parliament, in a Letter, has suggested that the Government should use the opportunity of a Bill of Rights to add further rights, such as Article 13 ECHR (right to an effective remedy), as well as the right to protest, incorporation of the UN Convention on the Rights of the Child, and a right to seek asylum.

[35] The Thomas More Lecture 2022, Paragraph 35.

[36] The Thomas More Lecture 2022, Paragraph 36.

[37] This principle is derived principally from the case of *McCann v UK* in which the ECtHR declined to award damages in respect of terrorist suspect that were killed whilst actively pursuing a plot to plant a bomb in Gibraltar.

interest, giving "great weight" to the public interest in protecting journalistic sources. This clause reflects the threshold of 'overriding requirement in the public interest' in the *Goodwin v. UK* ECtHR caselaw and is broadly positive in terms of protecting journalistic sources and the right to freedom of expression.

6. Commentary in relation to the Bill of Rights Bill

15. There has been significant criticism and scepticism of the Bill of Rights Bill, with most if not all civil society organisations in the UK expressing significant concern and opposition to it, many referring to it as a "rights removal bill.[38] Some of the clauses seem likely to have little real impact, but would arguably create legal uncertainty and potential barriers to enforcing human rights. Other clauses are more obviously problematic, such as those placing limits on the enforcement of positive obligations, or of violations of human rights relating to overseas military conflicts. Taken together, the provisions are likely to increase the number of adverse ECtHR judgments against the UK, and to increase the numbers of declarations of incompatibility, requiring legislative action to resolve them. Given the potentially misleading natures of some of the provisions (e.g. the clause relating to interim measures) and the overall increase in adverse judgments, it is likely that the main impact of the Bill will be to impede the enforcement of human rights in the UK and to increase tensions between the ECtHR and those seeking to enforce human rights, and those who are less inclined to seek to respect the rules-based international order – likely leading to increased political tensions relating to human rights.

16. There have been doubts expressed as to whether the Bill complies with the ECHR. Lord Pannick QC has said "No serious person can sensibly suggest that the proposed Bill of Rights complies with the European Convention on Human Rights".[39] This is particularly so when it comes to clause 5 relating to positive obligations, or clause 14 concerning overseas military operations.

17. Lord Mance has noted a number of pertinent concerns with provisions of this Bill, whilst highlighting the important role to be played by the rule of law, alongside parliamentary sovereignty, as the two pillars of British democracy. He notes concerns that the Bill seems to "require or influence to courts to 'diverge more freely' from Strasbourg", expressing concerns that "At the international level the Bill would change this country's relationship with the ECHR and with the ECtHR in particular".[40]

18. Sir Peter Gross, who chaired the IHRAR Panel's work, has said "Typically, a bill of rights reflects fundamental, enduring values and is an uplifting document, requiring and commanding wide-ranging consensus. The Bill of Rights Bill is not a bill of rights. Labelling it as such only serves to encourage cynicism".[41]

7. Preliminary conclusions and proposals for further work

19. It is important to recognise the central importance of the principles of subsidiarity and margin of appreciation in terms of how member states choose to give effect to their obligations as parties to the European Convention on Human Rights, as well as to recognise the different constitutional legal systems of the Council of Europe member States. Nonetheless, all States can benefit greatly from learning more about each-other's systems for giving effect to human rights protected under the European Convention on Human Rights.

20. The UK's system under the Human Rights Act 1998 for giving effect to the human rights protected under the ECHR is clearly an effective one, given that the vast majority of human rights concerns are being adequately addressed at the domestic level, with the benefits of greater understanding of domestic laws, practices and sensitivities that treatment at the domestic level implies. As a result the UK has one of the lowest number of findings of ECHR violations by the ECtHR in relation to population. Elements of the HRA that are particularly interesting in achieving this result relate to the relationship between the domestic caselaw and the ECtHR caselaw; the obligation on public authorities to act compatibly with ECHR rights; and the obligation to read legislation, so far as it is possible to do so, compatibly with the ECHR rights. Whilst there is no legal requirement on the UK to retain this method for giving effect to human rights, it would be a pity to lose a system that is obviously working so well as a model, also for other countries, for effective enforcement of human rights at the national (rather than international) level. It may be asked what sort of a precedent this sets internationally for the respect of human rights, and the rule of law – including respect for international law.

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[38] See, for example statements by Equally Ours, Amnesty International, Liberty.
[39] In oral evidence to the Joint Committee on Human Rights of the UK Parliament.
[40] The Thomas More Lecture 2022, paragraph 44.
[41] "The Independent Human rights Act Review (IHRAR) and beyond", speech by Sir Peter Gross, November 2022.

21. The purpose of my future report will not be to try to seek to force any State to adopt a particular model of domestic human rights protection or method for giving effect to the rights protected under the ECHR. However, I would like my Report to reflect on elements within the UK's Human Rights Act that have been effective in enabling the enforcement of human rights at the national level, and which may be of interest to other States. My Report will also consider the extent to which elements of the proposed changes may alter this effectiveness, or may pose challenges from the perspective of individuals being able to enforce their human rights in the UK without needing recourse to the European Court of Human Rights in Strasbourg. I consider that certain clauses in the Bill of Rights will require a particular focus, including (i) the compatibility of clause 5 and the respect for positive obligations; (ii) the compatibility and justification for clause 14 relating to overseas military operations; and (iii) the justification and intended impact of clause 24 relation to interim measures. I will consider the risks of a period of legal instability and uncertainty that may be created while the national courts seek to interpret and apply the new provisions in the Bill of Rights and what that might mean for effective enforcement of human rights. I will also consider the need to improve tools for better explaining what the ECHR and the HRA have achieved so far, including for the UK, and how these achievements can best be preserved and further developed.

22. In order to continue my work on the report, I would like to seek the committee's authorisation to organise a hearing with up to three experts, with expertise on the topic of the enforcement of human rights in the UK. I would also like to seek the committee's authorisation to organise a fact-finding visit to the United Kingdom.