NOTE: COUNCIL OF EUROPE COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS (22 March 2023)

Sanchita Hosali, CEO, The British Institute of Human Rights

Thank you for the invitation to speak. My organisation, the British Institute of Human Rights (BIHR), was formed in 1970, with the express intention of bringing Convention rights into our UK system, so that people could benefit from their legal protections directly. This happened when the UK parliament passed, with cross party support, the Human Rights Act 1998.

UNDERSTANDING THE UK CONTEXT

Before turning to the detail of UK Government's Bill of Rights Bill, it's important to note two context factors to understand it's impact on the protection of Convention rights in the UK.

(1) The aim of the Human Rights Act was to "bring human rights home" and make Convention rights accessible in the UK courts and to help secure a culture of respect for human rights.[1] The latter – which is what BIHR is most concerned with - depends not only on the award of judicial remedies, but also the integration of Convention rights into the decision-making of all our public bodies. These mechanisms for both every day and court-based actions to uphold Convention rights are quite literally scrapped or hamstrung by the Bill.

(2) It is of course within the scope of all Member States to review the way Convention rights are operationalised domestically. However, the Bill is not simply the next step in the UK's journey on ensuring access to Convention rights. The direction of travel is negative. The starting point is that rights have gone too far (too elastic), the UK courts have gone too far and yet also they are shackled by the ECtHR.

Next, it is important to also flag two points on the background to the mess of the process behind the Bill (though there are many other concerns, including having to threaten legal action due to the inaccessible processes for disabled people)[2]. These are important because, whilst internal UK issues, these speak to the questionable evidence base for the Government's proposals to fundamentally change people's access to their Convention rights.

---

[1] "The building of a human rights culture … [depends] not just on courts awarding remedies for violations of individual rights, but on decision-makers internalising the requirements of human rights law, integrating to standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields in fully informed by human rights considerations." JCHR Sixth Report of Session 2002-03, The Case for a Human Rights Commission, HL Paper 67-I/HC 489-I, at para. 2

[2] See further BIHR's briefing, "Human Rights Act reform: nothing about us, without us"

(1) At the end of 2020 the UK Government (under Justice Secretary, Robert Buckland) set up the Independent Human Rights Act Review, to consider how the HRA has been working in practice and whether any changes were needed. This is important because, the consultation before the Bill was in total contravention to the findings of the Independent Review which clearly stated: "The vast majority of submissions received by IHRAR spoke strongly in support of the HRA." As the Chair, Sir Peter Gross, has flagged the Government's consultation, despite the rhetoric of the Justice Secretary, bears no relation to the Independent Review report.[3]

(2) After the panel submitted its extensive Report to the Ministry of Justice, the Justice Secretary changed to Dominic Raab. Rather than publishing this for analysis and consideration, the Justice Secretary released it on the same day as his "consultation" on a "Modern Bill of Rights". The consultation questions are often contradictory or lacking context. And fundamentally the question of whether we should in fact scrap the Human Rights Act and its domestic system on Convention rights, was never asked. It was just assumed that this was happening regardless. The consultation process garnered almost 13,000 responses. These were not made public, but the Government's own analysis of the responses shows how extensively it has ignored the views of the public. There was little to no support for the Bill in principle, nor of the specific provisions the Government is choosing to bring forward in the Bill.[4]

THE BILL OF RIGHTS BILL

Crucially, whilst the catalogue of Convention rights being brought into the Bill remain the same as for the Human Rights Act, this in no ways allays the concern about the level of protection of Convention rights in the Bill. There are at least 3 specific spheres of protection which are fundamentally altered – regressively – from the current HRA scheme:

1. Regressive changes to key domestic legal provisions or duties which operationalise the Convention rights within the UK's system
2. Regressive changes to key Convention principles which impact how the rights are understood and applied domestically
3. Regressive changes to access legal remedies for violations of rights within the UK.

1. Regression in the domestic operationalisation of Convention rights

Currently, under section 2 of the Human Rights Act, there is a legal duty on UK courts to take into account (not be bound by) the case law of the European Court of Human Rights (ECtHR) case law into account in domestic application. The Independent Review

[3] See further Raab's bill won't work - by Joshua Rozenberg (substack.com)
[4] See further "Rights Removal Bill: How did we get here?"

and the public consultation (according to the Government analysis) supported retaining this legal duty in our domestic protection of Convention rights.[5] However, Clause 3[6] of the Bill of Rights Bill removes this duty. It specifically states that UK courts can interpret the rights in the Bill differently, but not more expansively (so not in a way that provides more protection), than the ECtHR. The Bill seeks to 'freeze' our human rights protection in time, and, if anything, take them backwards. This will allow a lower protection than at the ECtHR, putting the UK courts out of step with developments at the ECtHR, and actively prevents higher protection of rights. There will likely be an increase in the number of people having to take a case to the ECtHR, moving backwards to a two-tier system with human rights accountability only for those who have the resource, exactly what our HRA was designed to avoid. It also risks giving confidence to countries with growing reputations for not respecting human rights.

Currently section 3 of the Human Rights Act places a legal duty on courts and public authorities to apply all UK law compatibly with Convention rights so far as possible. The Independent Review and the public consultation explicitly support the retention of this legal duty. However, the Bill of Rights Bill completely scraps the duty to apply other laws compatibly with Convention rights. This is one of the most alarming aspects of the Bill for BIHR, because this duty is not simply about courts but is also a duty on the bodies that wield governmental powers, such as healthcare, police, education, housing, and others. This has a profound impact on whether people in the UK to benefit from their Convention rights, not simply as a matter of remedy via the courts once rights have been breached, but to also prevent the decisions, actions, omissions, and policies which breach rights in the first place. Without this duty we lose a key safeguard for ensuring Convention-compliant applications of the law in people's everyday lives, often when they are at the risk of being subjected to the impact of arbitrary laws like mental health detention.

Kirsten's story, a parent who advocated for improved practice and protection of the rights of her autistic child, who was subjected to severe restraints and treatment in mental health settings. Kirsten has shared: "The Mental Health Act gave legal powers to put my child in a seclusion cell for weeks at a time…to put my child in metal handcuffs, leg belts and other forms of mechanical restraints … to transport him in a cage from one hospital to another … As a parent, the Human Rights Act gave me the legal framework to challenge decisions. This was so important for me as a parent facing the weight of

[5] IHRAR: scrapping section 2 "would result in there being no formal link between the HRA and the Convention. While the UK remains a party to the Convention, this option has nothing to commend it". The public consultation: 56% there should be no change to section 2, and 20% thought neither of the proposed options for change should be used.

[6] Clause 3 Interpretation of the Convention rights (1) The Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection with the Convention rights. (2) A court determining a question which has arisen in connection with a 15 Convention right— (a) must have particular regard to the text of the Convention right, and in interpreting the text may have regard to the preparatory work of the Convention; (b) may have regard to the development under the common law of any 20 right that is similar to the Convention right; (c) must comply with sections 4 to 8. (3) A court determining a question which has arisen in connection with a Convention right— (a) may not adopt an interpretation of the right that expands the protection 25 conferred by the right unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it; (b) 30 subject to paragraph (a), may adopt an interpretation of the right that diverges from Strasbourg jurisprudence. (4) Subsection (3)(a) does not prevent a court from adopting an interpretation of a Convention right where it does so as a result of complying with section 4 (freedom of speech). (5) 35 Evidence is to be given for the purposes of this section in proceedings before any court in such manner as may be provided by rules.

professionals who seemed to have so much power over mine and my son's lives." This would not be possible with section 3 of the Human Rights Act.

The loss of this duty also further reduces people's access to the courts to ensure the legal protection of the Conventions rights as "living", applied by the courts in a way reflective of the times.

2. Regression on key principles of the Convention's functioning in the UK

Universality: the Bill, through a number of measures (restricting rights in immigration,[7] hurdles to access to justice, and expansive behaviour considerations) attacks the idea that our human rights are for everyone, creating different levels of protection or access to justice for different groups of people.

Proportionality: the Bill seeks to direct UK courts on how to make this assessment, assuming that where parliament has passed a law the balance has been struck, moving away from the need to look at a person's individual situation.

Positive obligations: the Bill will effectively destroy this vital duty at the heart of safeguarding people's Convention rights. Firstly it will prevent new duties on Government and public bodies to step in and protect people's rights. During the pandemic, at BIHR, we saw how important positive obligations were in securing protections for healthcare staff, support for people in vulnerable situations, and accountability for failures. It will also unravel positive obligations that have already been established, including the accountability of police when they fail to protect the rights of victims of crime. It Is also important to flag here how Government rhetoric focuses on the one example of police issuing "risk to life notices" (Osman warnings) to those involved in criminal gang activities, essentially describing this as a waste of resources. Of course, this exposes the universality point again, whilst also failing to acknowledge that such notices may be issued in other situations, and that they are issued under police guidance not the HRA itself, which can be changed without gutting the HRA and positive obligations.[8] The justifications for undoing positive obligations to protect Convention rights are unfounded, and the impact would be devastating.

Living instrument: as noted, it is clear that the Bill seeks to de-couple the UK from the European Court of Human Rights so far as possible and focus on interpreting the rights based on literal text (written in 1950) not what it means today.

[7] UK parliament's Human Rights Committee: the Bill of Rights Bill "essentially extinguishes the essence of Article 8 rights" for some individuals who are being deported https://committees.parliament.uk/publications/22880/documents/167940/default/

[8] The UK Government fails to acknowledge that positive obligations provide a whole range of protection for Convention rights at everyday operational levels. This includes enabling victims of crime to hold authorities to account for failing to protect them (the Justice Secretary has sought to deny this in the leading UK case of Metropolitan police v DSD and another despite it being very clear that positive obligations were key to holding the police to account). And in terms of BIHR's work, positive obligations are vital in supporting healthcare and social work staff to take action to protect the lives of people at risk of harming themselves or from others.

Margin of appreciation: the Government frequently suggests the Bill is availing itself of this principle. However, the margin is about the European Court recognising areas where states do not agree and allowing flexibility on national implementation on the issue concerned. It is not a carte blanche for governments to attempt to unilaterally redefine their international legal obligations under human rights laws.

Interim measures: Clause 24[9] of the Bill essentially states UK courts should take no notice of ECtHR interim measures, which are of course temporary orders to stop any state action until domestic (and ECtHR) legal hearings on that action have been completed – a standard rule of law requirement. This clause was a somewhat extraordinary addition to the Bill. There was no mention of Interim Measures in either the Independent Review of the nor the public consultation. But a mere 8 days before the Bill was published Interim Orders were issued by ECtHR requesting the UK Government cease its removal of people under the controversial Rwanda removals policy until all legal challenges have taken place. This seems to be an attempt to unilaterally change the UK's international legal obligations through domestic legislation – that is not how the Convention system works.

3. Regression on the right to an effective remedy

All of the above shows the risks for securing people's Convention rights under the Bill. There are additional hurdles the Bill creates to seeking access to justice, calling into question its compatibility with the Article 13 right to an effective remedy. In particular the creating of an additional permissions stage for domestic legal action[10] which will make holding the state to account in the UK harder and is therefore likely to lead to more cases going to the ECtHR, as the Government's own Impact Assessment acknowledges at paragraph 19.[11] Additionally, Clause 18(5a) of the Bill changes the nature of awarding remedies for breaching of Convention rights because the Government has said specifically that the Bill "will enshrine a set of principles in statute for awarding damages independent of that of the Strasbourg Court." This includes requiring consideration of a person's past conduct, regardless of whether it is related to the case being heard. Courts will also have to give "great weight" to the importance of minimising the impact that any potential award of damages would have on the public authority that has breached Convention right. This essentially risks removing any financial incentive to not breach rights.[12] This takes us back to the issue of

[9] Clause 24 Interim measures of the European Court of Human Rights 25 (1) For the purposes of determining the rights and obligations under domestic law of a public authority or any other person, no account is to be taken of any interim measure issued by the European Court of Human Rights. (2) 30 Subsection (3) applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of a Convention right. (3) The court may not have regard to any interim measure issued by the European Court of Human Rights.

[10] This "will place responsibility on the claimant to demonstrate that they have suffered a significant disadvantage before a human rights claim can be heard in court. If a claimant cannot demonstrate that they have suffered a significant disadvantage, a claim could still proceed if a court considers there is a highly compelling reason to do so on the grounds of exceptional public interest.

[11] Impact Assessment on Draft Bill of Rights Bill; para 179

[12] The kind of example we see our work where this could have detrimental effects on people's right to an effective remedy could include an autistic person who is regularly restrained and secluded in hospital which amounts to inhuman treatment (protected by Article 3,

universality of Convention rights being undermined, reducing the role of the independent judiciary in Convention rights cases, alongside the UK Government again wanting to mark their own work.

THE OVERALL IMPACT OF THE BILL OF RIGHTS BILL: Regressing Convention rights in the UK

It is BIHR's strongly held belief – based on legal expertise and over two decades of work on the frontline of Convention rights implementation in the UK – that the Bill of Rights Bill can only be considered a regressive step. The superficial veil of simply transposing the same list of Convention rights from the Human Rights Act into the Bill cannot be allowed to obscure the fact that the very meaning, application and access to Convention rights will be significantly reduced.

This is a view shared across the sector of human rights organisations in the UK, and wider civil society; we are currently working as an informal grouping of over 200 groups representing the interests of people and issues across a varied spectrum.

It is also important to flag that the condemnation of this Bill also extends to the UK parliamentary committee on Human Rights, and the devolved Governments of the UK's nations. The complexity of this Bill at a devolved level, in Scotland and Wales[13], and in Northern Ireland in terms of the Peace Process, have not been dealt with in any meaningful way by the Government.[14]

Before I turn to the Illegal Migration Bill, I want to be clear, the sense that this Bill of Rights Bill has been paused or kicked into the long grass is a level of complacency that cannot be allowed to take route. This Bill is on the parliamentary timetable, it can move to the next legislative stage at any moment. It is a live Bill. The danger to the legal protection of people's Convention rights in the UK remain unless and until the Bill is specifically withdrawn by the Justice Secretary.

HRA) who may well fight against the staff who are restraining them. Under the Bill this would mean they would be entitled to a lower level of damages.

[13] On the 1 March 2022 the Scottish and Welsh Governments wrote to the Justice Secretary saying plans to replace the Human Rights Act with a Bill of Rights is an "ideologically motivated attack on freedoms and liberties … the interests of the peoples of Scotland and Wales are best protected by retaining the Human Rights Act in its current form. The proposals for a "modern Bill of Rights" … [are] unwelcome and unnecessary … the Human Rights Act is fundamental to each of the devolution settlements of the UK."

[14] The UK Parliament's Human Rights Committee has taken several actions to review the UK Government's plans and the Bill, based on extensive evidence through calls for submission, public evidence sessions and surveys. On 17 January 2023, the Committee released its Legislative Scrutiny report on the Bill of Rights Bill, and concluded: "The Bill of Rights Bill not only lacks support but has caused overwhelming and widespread concern … The outcomes of the Government's consultation, independent review, and our own inquiries on the Bill of Rights Bill have not been incorporated into the Government's proposals … the Northern Ireland Human Rights Commission has pointed out the potential impact on the Good Friday Agreement … The Bill will introduce large scale uncertainty as the courts grapple with a new, complex, regime. Far from increasing understanding, matters will end up being litigated in order to gain clarity. This does not bode well. Human rights instruments, such as the HRA, are constitutional statutes, which should provide stability to citizens and the courts. They should be easily understood and accessible to all in order to endure. Indeed, we do not think this is a Bill of Rights at all, and recommend that the title of the Bill is changed accordingly. In any case, the Government should not proceed with this Bill: it weakens rights protections, it undermines the universality of rights, it shows disregard Legislative Scrutiny: Bill of Rights Bill 11 for our international legal obligations; it creates legal uncertainty and hinders effective enforcement; it will lead to an increased caseload in Strasbourg; and will damage our international reputation as guardians of human rights."

A FINAL WORD ON THE WIDER UK CONTEXT

We are living through extraordinary times in the UK. The Bill of Rights Bill follows a range of legislation which has restricted people's fundamental Convention rights and this the Illegal Migration Bill introduced on 7th March. It takes some of the worst parts of the Bill of Rights Bill, puts them into migration law, with additional extreme measures that would set the UK on a collision course with the ECtHR. It would be quite extraordinary, should the Illegal Migration Bill pass in any form that it currently resembles, for it to not be significantly challenged in the UK courts and the ECtHR. In particular:

The Illegal Migration Bill replicates dangerous elements of the Bill of Rights Bill:

- The Government has stated the Bill does not meet the test of being compatible with people's Convention rights. (The legal duty on governments to complete this compatibility review is removed in the Bill of Rights Bill).
- Undermining the universality of human rights, creating a whole class of people who will be outside the scope of legal challenge to state action.
- Explicitly prevents the application of its provisions being applied compatibly with people's Convention rights by removing the duty under section 3 HRA (which, as I've noted, the Bill of Rights Bill seeks to scrap).
- compromising the UK's relationship with the Council of Europe by ignoring interim measures (Rule 39) of the European Court of Human Rights (ECtHR)[15]

Numerous specific human rights concerns raised by Clauses (updated guide):

- Article 3 the right to be free from torture and inhuman or degrading treatment: Clause 5 is likely to increase legal challenges by setting an "exceptional circumstances" test for challenging some removals on human rights grounds. Clauses 40 and 48 together ignore the positive obligation to carry out an effective investigation into Article 3 claims by preventing judicial review in some cases.

- Article 4 the right to be free from slavery: Clause 21 ignores the protective duty by removing modern slavery protections for people even with reasonable grounds to believe they are a survivor of trafficking. Clause 22 likely breaches the duty to "assist victims in their physical, psychological and social recovery" by removing support from trafficking survivors.

[15] Specifically, Clause 49(1) of the Illegal Migration Bill sets conditions on how the UK will comply with Rule 39 Orders. Domestic legislation like this Bill, cannot change international law, which is agreed to by a number of countries through and organisations like the Council of Europe. The UK Government cannot say that it will remain within a system of human rights protection like the Convention, whilst also unilaterally changing the rules on when it will and will not comply with those international obligations.

- Article 5 the right to liberty: Clause 7 gives transport operators (like airlines) powers to detain people under Home Office orders. Clause 11 and Clause 13 together risk unlawful, arbitrary detention by granting sweeping powers of detention where courts can't grant bail for at least 28 days. Clause 13 prevents judicial review of detention decisions although the Home Office confusingly says people can rely on the writ of habeas corpus (an ancient type of legal proceeding in English common law) which must either fall short or render the clause pointless. Clause 8 together with Clause 11 risks arbitrary detention and discrimination by association by allowing the Home Office to detain partners, children, adult dependent relatives, and parents.

- Article 7 No punishment without law: Clause 2 risks this by applying the rules from the date of the Bill's introduction rather than from when they would become law.

- Article 13 the right to an effective remedy: Clause 4 risks preventing effective and practical remedies by requiring the Home Secretary to arrange to remove people even if they have made an application for judicial review. Clause 4 removes the right of appeal by declaring asylum claims of people who meet the Bill's criteria as "inadmissible" rather than refused.

- Article 14 the right to be free from discrimination: Clause 5 discriminates between people seeking asylum of different nationalities by setting a higher bar to prevent removal for some. Clause 8 discriminates by association by saying people can be removed based on how their partner, parent (if they're a child) or minor child arrived in the UK Clause 16 discriminates between unaccompanied asylum-seeking children and other children in Local Authority care by allowing the Home Office to take them out of the Authority's care.