DEMOCRATIC STATE, AUTOCRATIC METHOD: THE REFORM OF HUMAN RIGHTS LAW IN THE UNITED KINGDOM

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Abstract On 22 June 2022 the Bill of Rights Bill to replace the Human Rights Act 1998 was introduced to the United Kingdom (UK) Parliament. Just over a year later, it was withdrawn. This was not a minor update, as claimed by the Conservative government, but a wholesale revision of a fundamental feature of UK constitutional arrangements. Given that the UK has no codified constitution, it is not out of the ordinary for constitutional change to proceed via ordinary Act of Parliament. But what was unusual was the informal methods used by the government in its attempt to push through its bill of rights. Searching for a word or phrase to capture what happened over this time in the UK is difficult, not only because of the absence of a conventional method for constitutional change. Most scholarship focuses on formal rather than informal processes for amendment. The purpose of this article is therefore to make a contribution towards filling this gap by introducing the phrase 'autocratic method' to describe a particular method of constitutional change as opposed to its substance. Using existing scholarship, and examples from other States, a preliminary definition and essential features of the autocratic method are set out. Further detail is gained through a study of the attempted replacement of the Human Rights Act. Whilst the Bill of Rights Bill is no longer going ahead, this episode in UK constitutional history contains important lessons not just for the UK but for any State embarking on a process of constitutional change.

Keywords: human rights law, constitutional law, constitutional reform, autocracy, democracy.

I. INTRODUCTION

The United Kingdom (UK) is one of a small number of countries with no codified constitution[1] and, as a result, the process of constitutional change follows no set, or legally enforceable, pattern. It was only quite recently that stronger protection for human rights was added to the mélange that forms the UK's uncodified constitution. In 1997, the Labour Party government led by

[1] Other States include Israel and New Zealand.

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Prime Minister Tony Blair guided the Human Rights Act 1998 (HRA) through Parliament. From 2000, when the Act came into force, people falling within the jurisdiction of the UK had access to much more effective remedies for violations of their human rights and, after a while, the UK was not quite so frequently embarrassed before the European Court of Human Rights (ECtHR) for its human rights violations.

The honeymoon period for the HRA was brief and, following the attacks in the United States (US) on 11 September 2001, Tony Blair and other government ministers turned on their creation. By 2006 the animosity towards the HRA was such that its abolition and replacement with a new Bill of Rights was adopted as a key policy of the Conservative Party, then the main opposition political party.[2] But these plans did not come to fruition when it was part of a coalition government in 2010 and, by 2015, when the Conservative Party did form a government, promises to repeal the HRA were overshadowed by plans for the 2016 referendum which resulted in the UK leaving the European Union (EU).

With Brexit cleared from the agenda, the Conservative Party, still the party of government, promised in its 2019 election manifesto to 'update the Human Rights Act' to ensure a 'proper balance between the rights of individuals, our vital national security and effective government'.[3] On 22 June 2022 the Bill of Rights Bill,[4] to repeal and replace the HRA, was introduced to Parliament. Following considerable pushback,[5] and the realisation in government that the Bill would not achieve what was promised without the UK also withdrawing from the European Convention on Human Rights (ECHR), in June 2023 it was withdrawn from Parliament without proceeding through any of its parliamentary stages.

Whilst the Bill of Rights Bill will not be going ahead, this does not mean that this episode in UK constitutional history should be dismissed as a subject not worthy of further study. The methods utilised leading up to the Bill's introduction into Parliament were a significant departure from normal practice and, as discussed later in this article, continue to be deployed to secure minor constitutional changes.[6] To allow such a process to be normalised, without critical reflection, makes it far more likely it will be deployed again in support of a major constitutional change such as the much discussed possibility of UK withdrawal from the ECHR.[7]

[2] See further, M Amos, 'Problems with the Human Rights Act and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 ModLRev 883.

[3] Conservative Party, *The Conservative and Unionist Party Manifesto 2019* (Conservative Party, 2019) 48 <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>.

[4] UK Parliament, Bill of Rights Bill <https://bills.parliament.uk/bills/3227>.

[5] See further, Joint Committee on Human Rights, 'Legislative Scrutiny: Bill of Rights Bill, Ninth Report of Session 2022–23' (25th January 2023) HC 611 HL Paper 132, 109.

[6] See, eg, the suspension of various parts of the Human Rights Act 1998 (HRA) by the Illegal Migration Act 2023.

[7] To support the government's immigration reforms, this possibility is once again the subject of serious debate. See further, C Hymas, 'Braverman Refuses to Rule Out Prospect of UK leaving

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It is important to understand that what was proposed in the Bill of Rights Bill was not a minor constitutional amendment or update, as was claimed, but a wholesale revision of a fundamental feature of the UK constitution. For comparable democratic States the process would likely take years and involve methods such as constitutional conventions, widespread public consultation, referenda and special parliamentary majorities. When the Bill was introduced into Parliament in June 2022, with the large majority enjoyed by the Conservative Party in the House of Commons,[8] it was entirely possible that the HRA could have been repealed and replaced in a very short period of time with hardly any meaningful public consultation or serious engagement with the constitutional issues at stake.

Searching for a word or phrase to describe neatly what happened is difficult. At the UK level, with no codified constitution, and hence the lack of a hierarchy of norms, it is almost impossible to describe anything as 'unconstitutional'. Whilst there is a wide and growing literature concerning populist constitutionalism, this research is often conducted at the macro level and it is hard to find a study of a particular constitutional change, traced from its origins, showing not just that the formal change occurred, or was pushed for, but also illustrating the informal methods deployed by a government to achieve this. It is even harder to find a study of the government of a democratic State, such as the UK, employing methods not usually found in a deliberative democracy in order to push through a fundamental constitutional change.

Using the proposed repeal and replacement of the HRA as a case study, the purpose of this article is to fill that gap by introducing the phrase 'autocratic method' to describe a particular method or process of constitutional change as opposed to its substance. It will be shown that the autocratic method is not necessarily always employed in autocracies or semi-autocracies, but, as the HRA example shows, can also be employed in democracies, particularly those, like the UK, with very few rules about constitutional change. Whilst it is unsurprising that autocratic States employ autocratic methods to carry out constitutional change, more unexpected is the fact that such methods are available as tools to manipulate the process of constitutional change in any State.

The article will proceed in four parts. First, the distinction between formal and informal methods of constitutional change is set out. Second, it is explained how informal methods of constitutional change can become autocratic methods. Having established a working definition of 'autocratic method', in the third part, this definition is expanded upon through use of the

ECHR' *The Daily Telegraph* (London, 28 August 2023) <https://www.telegraph.co.uk/politics/2023/08/28/suella-braverman-european-convention-human-rights-migrants/>.

[8] At the time of writing (September 2023), the Conservative Party forms a majority government with a working majority in the House of Commons of 60. <https://members.parliament.uk/parties/commons>.

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example of human rights law reform in the UK. In the final part, informed by the case study, the essential features of the autocratic method are set out.

II. FORMAL AND INFORMAL METHODS OF CONSTITUTIONAL CHANGE

Constitutional change occupies a wide spectrum ranging from the drafting of an entirely new constitution following a significant event, such as revolution or war, to minor tweaks in the wording. With respect to constitutional amendment, the method which must, constitutionally, be utilised will depend on the gravity of the change. It is to be expected that the more basic principles of the constitution are only amendable via a more 'participatory process, which is time-consuming, deliberative and inclusive' whilst the less foundational principles are amended more easily.[9] Methods might include a referendum or special majority in the legislature; a special independent commission may be set up which will spend months, even years, with the help of experts, determining a variety of options from which to choose the best way forward. Where a referendum is to be held, there may be considerable expenditure on public education to make sure that voters are well informed.

In addition to textual change to the wording of a constitution, constitutional change can also arise from the judgments of courts. Macfarlane defines judicial amendment of a constitution as a change that 'cannot reasonably be rooted in the text of the Constitution', that 'appears to fly in the face of the purpose of the relevant constitutional provision or the intent of those that established it' and which defies the 'expectations of the broader political community'.[10] Here the method is that which applies to constitutional legal proceedings such as rules on who has standing to bring a claim, access to justice, what is justiciable and, the US example demonstrates, how judges are appointed to the constitutional court.

Formal methods for change will be set out in the constitution itself, in associated legislation, or in the rules for bringing a constitutional claim. However, these formal methods are only the first step along the road to change.[11] A realistic assessment of how a constitution is changed will also include informal methods such as a campaign for, or against, a particular feature of a constitution. Presidential candidates, political parties, governments, scholars, think tanks, international organisations and non-governmental organisations (NGOs) may all have a view, frequently expressed, on why the constitution should change. Social media and

[9] Y Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty' in R Albert, X Contiades and A Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2019) 46.

[10] E Macfarlane, 'Judicial Amendment of the Constitution' (2021) 19 ICON 1894, 1924.

[11] DJ Galligan, 'The Paradox of Constitutionalism or the Potential of Constitutional Theory' (2008) 28 OJLS 343, 354–5.

traditional media will be used to get the message across. These arguments are absorbed in a wider context, with prevailing ideologies and religious beliefs all playing a part. Timing can be important; change may be sought during a recession, a pandemic or where war is threatened.

A recent example from the UK is the long debate which took place over Brexit. Whilst the formal method to reach the decision on leave, or remain, was the 2016 referendum, both sides to the debate utilised informal methods to influence the formal process including harnessing the prevailing ideologies of nationalism and sovereignty, and making exaggerated claims about the impacts of the two options. Members of the government were allowed a 'free vote' and some, including the then Prime Minister David Cameron, campaigned for the UK to remain in the EU whilst others openly campaigned for leave.

There is a large and growing scholarship on methods of constitutional change[12] but despite an awareness that it is important to be attentive to both formal and informal methods,[13] most discussion is focused on the formal method. For example, Tushnet does not think it is valuable to consider informal, or procedural, methods. He sees criticisms of the use of particular informal methods as substantive objections to particular constitutional changes without any examination of whether or not the constituent power has 'really' been exercised.[14] He does have a point, but it is possible to separate substance and process and, provided that this is carefully done, a study of the informal method has much to offer, not least an indication that a State has become, according to Tushnet and Bugarič, 'anti-constitutional'.[15]

Others have been less dismissive. In her work on the 2014 Libyan Constitutional Drafting Assembly (CDA), Updike Toler reports that 18 contemporary and historical constitutional drafting processes were compared in an effort to guide the CDA in setting its own procedure.[16] She observes that 'process matters in its ability to legitimise or delegitimise a constitution' and that 'one of the most important findings of this study is that abiding by the constitution-making plan' makes for a 'successful constitutional outcome'.[17] Most importantly, she concludes that 'constitutional success'[18] involves mechanisms for substantial and meaningful public participation. This must be 'preceded by unbiased civic education, helping the public to

[12] See, eg, Albert, Contiades and Fotiadou (eds) (n 9).

[13] R Albert, 'The State of the Art in Constitutional Amendment' in Albert, Contiades and Fotiadou (eds) (n 9) 19.

[14] M Tushnet, 'Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power' (2015) 13 ICON 639, 653.

[15] M Tushnet and B Bugarič, *Power to the People Constitutionalism in the Age of Populism* (OUP 2021) 11.

[16] L Updike Toler, 'Mapping the Constitutional Process' (2014) 3 CJICL 1260.

[17] ibid 1262.

[18] Defined to include: acceptance contemporaneously and over time; frequency and extent of amendments; and longevity, ibid 1268.

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know how to participate and what their constitutional options are'.[19] Also important is presenting the public with real choices and the inclusion of experts, elites from all political parties, factions and minorities in the drafting process.[20]

Some have observed that the process of constitutional change can 'exceed acceptable limits', that it is important to know that there are limits,[21] and that often we only know that a certain line has been crossed with the benefit of hindsight.[22] Dixon and Landau describe how 'would-be authoritarians often work within the existing legal framework' although their focus is not on *how* this happens but on how it might be addressed utilising the doctrine of unconstitutional constitutional amendment.[23] Dixon and Uhlmann[24] have defined a 'weak-form unconstitutional constitutional amendment doctrine', a close relative of formal procedural limits,[25] which 'can increase the political costs, or simply time and opportunity costs, for proponents of enacting certain kinds of antidemocratic constitutional change'.[26] But again, their focus is on addressing the problem rather than identifying how the problem has arisen.

III. FROM INFORMAL METHOD TO AUTOCRATIC METHOD

It is no secret that whilst complying with the formal rules about constitutional change, both sides to a debate will employ informal methods such as media campaigns, celebrity endorsement or high-profile speeches to persuade others to their position. There is nothing wrong with that and, of course, in States where freedom of expression is enjoyed, this is to be expected. There are so many types of informal method that it is useful to employ a spectrum to organise these. At one end is the 'democratic method' where both sides to the debate employ informal methods and one side is not privileged with enormous resources, legitimacy or some other advantage. At the other end is the 'autocratic method'.

The word 'autocratic' conjures up particular ideas and, when used to label government methods in democratic States, such as the UK, can lead to accusations of over-dramatisation. At this point it is therefore important to set

[19] ibid 1272. Two problem constitutions she points to are Morocco, where the public received propaganda from the King rather than information concerning constitutional choices; and Iraq where the information was less biased but failed to focus on significant constitutional issues, ibid 1274.

[20] ibid 1281. See also M Kuo, 'Against Instantaneous Democracy' (2019) 17 ICON 554.

[21] GJ Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 ICON 460, 486.

[22] W Sadurski, 'Constitutional Democracy in the Time of Elected Authoritarians' (2020) 18 ICON 324, 326.

[23] R Dixon and D Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 ICON 606, 607. See also D Landau and R Dixon, 'Constraining Constitutional Change' (2015) 50 WakeForestLRev 859.

[24] R Dixon and F Uhlmann, 'The Swiss Constitution and a Weak-form Unconstitutional Amendment Doctrine?' (2018) 16 ICON 54, 55–6.

[25] ibid.

[26] ibid 66.

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out a preliminary definition. In formulating this definition, it has been useful to consider the process of constitutional change in autocratic and semi-autocratic States.[27] Particularly striking is Bui's description of the process in Laos:

> The Party closely controls the amendment process to make sure that constitutional evolution is circumscribed within the possible boundaries. The process and the substances of constitutional amendment are closely tied to the Party's process of making political decisions, plans, and visions. The party decision was incorporated in the amended constitution; important changes to the constitution were approved by the Party in advance; the constitutional amendment bodies were responsible for not only proposing constitutional amendments but also preparing the Party's political report; and the amended constitution is the base for implementing the Party's long-term plan of socio-economic development. The amendment power is, therefore, constrained by the Party.[28]

If the word 'government' is substituted for 'Party', Bui is actually describing what is possible in any State, autocratic or democratic, should a powerful government choose to manipulate a process of constitutional change.

Building on Bui's description, a preliminary definition is as follows: the autocratic method is an informal method of constitutional change, carefully designed by a government (in any State, democratic or autocratic) to deliver a constitutional change which will assist it in the continued consolidation or maintenance of power. This method is used because there is a risk that a more democratic method will not deliver the outcome desired. The autocratic method ensures that the scales are weighted heavily in favour of the government's position and that the change will occur whatever the formal process for constitutional change which has to be utilised. The autocratic method is different from Scheppele's descriptive term 'autocratic legalism'[29] and Bermeo's term 'democratic backsliding'.[30] Whilst the starting point is also a government seeking to change the constitution to consolidate or maintain power, the focus is on the informal methods which are employed to achieve this goal.

Whilst the autocratic method might deliver an outcome which is objectively in the public interest or for the public good, its core purpose is to help a government to deliver a constitutional change which will result in the continued consolidation or maintenance of power. For autocrats, it is a useful toolbox. However, when utilised in a democratic State, whilst it may not immediately signal the 'demise of liberal constitutionalism'[31] it is not a

[27] On authoritarian constitutionalism, see generally, T Ginsburg and A Simpser (eds), *Constitutions in Authoritarian Regimes* (CUP 2014).

[28] NS Bui, 'Constitutional Amendment in Laos' (2019) 17 ICON 756, 779. See also V Paskalev, 'Bulgarian Constitutionalism: Challenges, Reform, Resistance and … Frustration' (2016) 22 EPL 203; and M Tushnet, 'Authoritarian Constitutionalism' (2015) 100 CornellLRev 391.

[29] KL Scheppele, 'Autocratic Legalism' (2018) 85 UChiLRev 545.

[30] N Bermeo, 'On Democratic Backsliding' (2016) 27 JDemocr 5.

[31] Tushnet and Bugarič (n 15) 213.

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positive sign. The main purpose of the process is to secure the will of the government, not the will of the people. In short, the constituent power is not 'exercised by the people in any true sense, but instead by a few'.[32] The autocratic method also fails Tushnet and Bugarič's first element of 'thin constitutionalism' which requires that majority preferences be reliably determined[33] and generates problems of legitimacy and stability. Both Updike Toler[34] and Okubasu[35] stress that if the people, including those who oppose the change, are not meaningfully involved, there will be no long-term acceptance or stability. Constitutional change will become part of ordinary politics, changed back and forth depending on which political party happens to be in power.

The autocratic method, whilst not labelled as such, has clearly been employed by numerous governments and, from the scholarship, it is possible to find some common features. Okubasu[36] observes in his study of the process of constitutional change in African States that the starting point is often the conflation of normal politics and constitutional politics, with promises about constitutional change placed in election manifestos.[37] The change will be 'made in the name of the people though without their meaningful involvement' and the constitution will be presented 'as the cause of the problem that should ordinarily be addressed by normal politics'. The process of change will be 'initiated and controlled by the ruling administration' and the fact that the constitution is being amended will be trivialised.[38]

An example is the election to take place in South Africa in 2024 where amendment of Section 25 of the Constitution, the right to property, is highly likely to be an election issue.[39] Many have predicted that the ruling African National Congress (ANC) party will have to form a coalition with the Economic Freedom Fighters (EFF) party to retain power. The EFF is of the view that the Expropriation Bill, passed by the National Assembly in 2022 and now before the National Council of Provinces, does not go far enough in permitting the expropriation of land for redistribution without compensation. The ANC government's attempt to amend the constitution failed when it did not get the required two-thirds majority.

A further example, already underway, are the judicial reforms proposed by the government in Israel. Israel's coalition government was sworn in on 2 January 2023 following an agreement reached between the Likud party and five other parties. Its plans for the judiciary include: empowering parliament

[32] Galligan (n 11) 354–5.
[33] Tushnet and Bugarič (n 15) 11.
[34] Updike Toler (n 16).
[35] D Okubasu, 'The Implication of Conflation of Normal and "Constitutional Politics" on Constitutional Change in Africa' in Albert, Contiades and Fotiadou (eds) (n 9).
[36] ibid 329.
[37] ibid 332.
[38] ibid 331.
[39] D Kotze, 'South Africa Votes in 2024: Could a Coalition Between Major Parties ANC and EFF Run the Country?' (*The Conversation*, 24 April 2023) <https://theconversation.com/south-africa-votes-in-2024-could-a-coalition-between-major-parties-anc-and-eff-run-the-country-204141>.

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(Knesset) to overrule Supreme Court decisions by simple majority; granting the government a decisive say over who becomes a judge, including in the Supreme Court; and removing the legal obligation on Ministers to obey the advice of their legal advisers.[40] Prime Minister Netanyahu has repeatedly claimed that he received a mandate in the November 2022 election to enact the reforms.

Prevailing ideologies such as nationalism and populism are part of the method as these provide support for change. Populism is particularly useful, as Tushnet and Bugarič demonstrate, and might involve: deploying a charismatic 'leader for change'; adopting a 'non-institutionalised' notion of the people; and criticism of apex courts, judicial review and human rights.[41] Their examples include Salvini's attacks on Italian judges who challenged his anti-immigration policies;[42] and Austria's Kurz who took a 'draconian and punitive' approach to refugees from the Middle East.[43] Similarly, in his study of Poland and Hungary, Szente identifies the primary and secondary criteria of 'populist constitutionalism' to include anti-elitism, anti-institutionalism, anti-globalism, anti-pluralism, extreme majoritarianism and the 'intolerance of or discrimination against certain minorities'.[44]

Uitz has described how anti-globalism has played a strong role in supporting constitutional reforms in Hungary. She notes that Hungarian constitutional and political actors do not question the validity of European minimum standards, but 'start from the premise that these standards should not apply to them' and observes that there is a pride in national uniqueness, 'even in the face of outright European disapproval'.[45] Nostalgia for 'better days' is also a feature of the autocratic method. For example, Chávez, in the process of creating the 1999 Venezuelan constitution, spoke of 'restoring the past, of re-founding Bolivar's Republic'.[46]

Once the process is underway, the government controls official information about the impact of the change. Even if a referendum is used, this is manipulated and controlled.[47] There is a lack of public education and what information is provided by government is inaccessible to the general public or biased in favour of the desired reform. For example, Mushkat argues that the proposals for judicial reform in Israel are not well thought out and she is uneasy 'about the analytical shallowness of the discourse revolving around such a fundamental and crucial policy issue'. She states that she has not seen a 'single reference to theories of legal policy reform and how the current Israeli government

[40] R Berg, 'Israel Judicial Reform Explained: What is the Crisis About?' (*BBC News*, 11 September 2023) <https://www.bbc.co.uk/news/world-middle-east-65086871>.

[41] Tushnet and Bugarič (n 15) ch 2. [42] ibid 126. [43] ibid 128.

[44] Z Szente, 'The Myth of Populist Constitutionalism in Hungary and Poland: Populist or Authoritarian Constitutionalism' (2023) 21 ICON 127, 136–40.

[45] R Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 ICON 279, 295–6.

[46] J Braver, 'Revolutionary Reform in Venezuela' in Albert, Contiades and Fotiadou (eds) (n 9).

[47] See further, S Tierney, *Constitutional Referendums* (OUP 2014) 23–7; and M Qvortrup and L Trueblood, 'The Case for Supermajority Requirements in Referendums' (2023) 21 ICON 187–204.

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proposals fare, substantively and structurally, in that light' and comments on the absence of input from some 'high-level independent or semi-independent bodies' such as a law commission, which is to be expected in a democracy.[48]

Finally, even though there might be pushback from interest groups, opposition parties or the general public against what is proposed, governments press on regardless. For example, since the start of 2023 large weekly protests across Israeli cities have been held by those opposed to the government's reform plans.[49] A number of military reservists have protested by refusing to report for duty.[50] There have also been counterprotests, and in April 2023 it was reported that tens of thousands rallied in Jerusalem in support of the government's plans.[51] In response to the protests, parts of the reform bill were delayed, in an attempt to seek a compromise, but not withdrawn.[52] In July 2023 the Knesset passed a part of the reform package, removing the ability of the Supreme Court to strike down 'unreasonable' government decisions. A challenge to the legislation is currently before the Supreme Court.[53]

IV. HUMAN RIGHTS LAW REFORM IN THE UNITED KINGDOM: THE BILL OF RIGHTS BILL

Having introduced a preliminary definition of the autocratic method and some of its features gathered from the experience of other States, the next step is to expand on this through a study of the attempt to repeal and replace the UK's HRA with the Bill of Rights Bill. Rather than a simple 'update' to the HRA as promised in the election manifesto, what was contained in the Bill was a wholesale repeal and replacement of the HRA with what the government labelled a 'modern Bill of Rights'.[54] What was set out in the Bill made fundamental and regressive changes to human rights protection.[55] For example, whilst the UK would remain a Contracting State to the ECHR, clause 1(3) provided that judgments, decisions and interim measures of the ECtHR 'are not part of domestic law' and 'do not affect the right of

[48] R Mushkat, 'Israel's Judicial Reform: Where is the Analytical Context?' (*IACL-AIDC Blogs*, 7 February 2023) <https://blog-iacl-aidc.org/2023-posts/2023/2/7/israels-judicial-reform-where-is-the-analytical-context>.

[49] Berg (n 40).

[50] ibid.

[51] Y Knell, 'Israel: Huge Rally Pushes Back at Judicial Reform Protests' (*BBC News*, 28 April 2023) <https://www.bbc.co.uk/news/world-middle-east-65413814>.

[52] B McKernan, 'Israel: Netanyahu Announces Delay to Judicial Overhaul Plan' *The Guardian* (London, 27 March 2023) <https://www.theguardian.com/world/2023/mar/27/israel-netanyahu-judiciary-plans-halt>.

[53] B McKernan, 'What is Israel's Judicial Overhaul About and What Happens Next?' *The Guardian* (London, 12 September 2023) <https://www.theguardian.com/world/2023/jul/24/what-is-israel-judicial-overhaul-vote-about-what-happens-next>.

[54] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights. A Consultation to Reform the Human Rights Act 1998* CP 588 (December 2021) 3 <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/supporting_documents/humanrightsreformconsultation.pdf>.

[55] Something that Albert would describe as 'constitutional dismemberment'. See R Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 YaleJIntlL 1.

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Parliament to legislate' in direct breach of the UK's obligations under Article 46 of the ECHR to 'abide by the final judgment' of the ECtHR 'in any case to which they are parties'.[56] The interpretative duty contained in Section 3 of the HRA was not to be included[57] and all that a court could do where an Act of Parliament was incompatible with Convention rights was to issue a declaration of incompatibility.

A new permission stage limited Bill of Rights claims to those who had suffered 'significant disadvantage'.[58] Controls were placed on courts contemplating an award of damages including the need to 'give great weight to' the importance of minimising the impact of such an award on the ability of the public authority to perform its functions.[59] Cryptically, courts were instructed to refrain from expanding human rights protection unless there was 'no reasonable doubt' the ECtHR would adopt the same interpretation.[60] Winding back human rights protection from the standards set by the ECtHR was expressly permitted.[61] For courts evaluating an Act to determine if an interference with a qualified right was proportionate, there were numerous instructions including clause 7 which provided that a court 'must' regard Parliament as 'having decided, in passing the Act, that the Act struck an appropriate balance' between policy aims and Convention rights, and 'give the greatest possible weight' to the principle that 'decisions about how such a balance should be struck are properly made by Parliament'.

Courts were prohibited from developing the law of positive human rights obligations, a core part of national and international human rights jurisprudence. Clause 5 froze this jurisprudence at the point in time the Bill came into force with no 'post-commencement' developments possible. Even when applying the existing law of positive obligations, courts were instructed to give 'great weight' to avoiding an impact on the ability of the public authority to perform its functions.[62] Persons convicted and subject to a custodial sentence[63] and foreign nationals who had committed crimes and were subject to deportation[64] were singled out for an express reduction in rights protection. Going much further than the Overseas Operations Act 2021, clause 13 completely removed the rights of the victims of human rights violations by the UK armed forces abroad.[65]

In most, if not all, liberal democracies, were the government to propose such far-reaching changes to a national bill of rights, it would be necessary to satisfy

[56] Bill of Rights Bill (n 4). See also cl 24 which provided that interim measures issued by the ECtHR do not determine the rights and obligations of a public authority.

[57] Bill of Rights Bill ibid. In cl 40 the government was given the power to amend, by regulation, primary legislation previously subject to a sec 3 HRA interpretation.

[58] Bill of Rights Bill ibid, cl 15. [59] ibid, cl 18. [60] ibid, cl 3(3)(a).

[61] ibid, cl 3(3)(b), unless it is necessary to comply with cl 4 which grants enhanced protection to freedom of speech. [62] Bill of Rights Bill ibid, cl 5(2). [63] ibid, cl 6(2).

[64] ibid, cls 8, 20.

[65] ibid, cl 13. The rights of families to bring proceedings in UK courts where the victim is deceased were also removed.

the most serious formal methods for constitutional change such as a referendum or special majority in the legislature or both. Informal methods would be plural, likely involving expert research, specially established investigatory institutions and a long period of public consultation seeking consensus. Cross-party agreement might be sought and members of government may be permitted a free vote in order to campaign for one side of the debate or the other. In the UK there are no set procedures requiring informed consultation prior to constitutional change and a recurring complaint is that the method is 'an inconsistent and democratically deficient mix of processes selected by the executive'.[66] However, with its Bill of Rights Bill, the government broke new ground. Whilst the formal method, repeal and replacement of the HRA via an ordinary Act of Parliament, was in keeping with UK constitutional practice, the informal method utilised was a decisive shift along the spectrum from the democratic to the autocratic method.

Most of the elements of the preliminary definition outlined above were present. After a long campaign, in and out of office, the government itself was the main proponent for change. What was proposed had not been a major or even minor topic for discussion in any other fora such as the scholarly literature. It had not been called for by NGOs or international institutions and it was not part of the policy proposals of any other major political party.[67] With the government itself pushing for change, the scales were heavily weighted in its favour and the process designed to deliver the outcome it wanted—electoral advantage and a reduction in oversight and an increase and consolidation of power.

But rather than just a populist-driven campaign for change, the UK government also took a number of preliminary steps accompanying, and supporting, its Bill of Rights Bill in an attempt to confer on it legitimacy it would not otherwise have. It is these steps which make the UK case study particular interesting and a useful addition to the features of the autocratic method already identified from the experience of other States. In the following sections the description of the informal method utilised is divided into three parts: election promises; the government's arguments for reform; and procedural steps prior to the introduction of the Bill of Rights Bill into Parliament.

V. ELECTION PROMISES

Following the events of 11 September 2001, and the Labour government's own attacks on the HRA, it was clear to all UK political parties that the protection of

[66] I Cram, 'Amending the Constitution' (2016) 36 LS 75, 84.

[67] It has been a feature of the policies of the UK Independence Party since its founding in 1993 although this party currently has no members of parliament in the House of Commons. The Labour government released a consultation paper on a bill of rights in 2009 but did not make the repeal and replacement of the HRA with a bill of rights a manifesto commitment for the 2010 general election.

human rights was an issue the electorate was interested in, or that it could at the very least be manipulated in that direction. The Conservative Party in particular capitalised on the electoral salience of the issue and in 2006 its then leader David Cameron promised to repeal the HRA and replace it with a bill of rights because the HRA had 'introduced a culture that has inhibited law enforcement and the supervision of convicted criminals' and blocked the deportation of terrorist suspects.[68] In 2009 added to these criticisms was the view that the HRA had failed to protect against the erosion of historic liberties and may have even provided a 'veneer of respectability',[69] allowing Parliament and the courts to encroach on areas such as freedom of expression whilst claiming to be achieving a proportionate outcome.

The repeal of the HRA and its replacement with a bill of rights was a key feature of Conservative Party election manifestos in 2010 and 2015. Its 2014 consultation paper[70] and leaked plans for a British Bill of Rights in 2015[71] both have features which were eventually reflected in the Bill of Rights Bill, including the reassertion of Parliamentary sovereignty over human rights issues, the distancing of the UK from the ECtHR, and the limitation of human rights for various groups including prisoners and foreign nationals. Only the current 2019 manifesto promise is less strident with the promise simply to 'update' the HRA.

But similar to what Okubasu[72] has described in relation to African States, this is fairly usual practice in the UK. Political parties will set out a proposal for constitutional change in their manifesto prior to a general election although it may not be made clear to voters that what is proposed is actually a constitutional change. Following the election, should that party secure a majority in the House of Commons (the lower house of the legislature), and form a government, they will proceed to give effect to their constitutional promises using Acts of Parliament. One of the most significant periods of constitutional change via Act of Parliament followed the election of the Labour Party, led by Tony Blair, in 1997, including the passage of the HRA.[73] There is no need to ensure that constitutional change is preceded by 'any special inquiry or process of public debate'[74] and UK law reform commissions play no role in constitutional law reform given such projects

[68] David Cameron, speech at the Centre for Policy Studies, 26 June 2006 as reported in W Woodward, 'Cameron Promises UK Bill of Rights to Replace Human Rights Act' *The Guardian* (London, 26 June 2006) <https://www.theguardian.com/politics/2006/jun/26/uk.humanrights>.

[69] A Travis, 'Cameron Pledges Bill to Restore British Freedoms' *The Guardian* (London, 28 February 2009) <https://www.theguardian.com/politics/2009/feb/28/conservatives-human-rights>.

[70] Conservative Party, *Protecting Human Rights in the UK* (Conservative Party 2014).

[71] T Shipman, 'Human Rights Law to be Axed; British Bill of Rights Revealed' *The Sunday Times* (London, 8 November 2015).

[72] Okubasu (n 35).

[73] Including the Scotland Act 1998, Government of Wales Act 1998, Northern Ireland Act 1998 and the Human Rights Act 1998. See further, R Brazier, 'New Labour, New Constitution?' (1998) 49 NILQ 1.

[74] D Shell, 'Constitutional Reform—the Constitution Unit Reports' [1997] PL 66.

may endanger their non-partisan status and, it has been claimed, put their existence in jeopardy.[75]

VI. THE GOVERNMENT'S ARGUMENTS FOR REFORM

A. Sovereignty, Nationalism and Nostalgia

As described above, also to be expected where the autocratic method is used is a government campaign in support of the constitutional change utilising nationalist and populist ideology with the unchanged constitution presented as the cause of numerous problems. This was also reflected in the UK government's arguments for its Bill of Rights Bill. The Ministry of Justice (MOJ) released a consultation paper on the Bill in which it was stated that the objective was to 'mitigate the incremental expansion of rights' driven by the ECtHR and to promote a more 'autonomous approach to human rights' in line with common law principles.[76] Regaining parliamentary sovereignty over human rights was presented as imperative: 'where Parliament has expressed its clear will on complex and diverse issues relating to the public interest, this should be respected'.[77]

Hand in hand with these objectives, in the consultation paper a strong focus on nationalism and suspicion of international law and institutions was also expressed. The Bill of Rights Bill was about the UK developing its own human rights jurisprudence 'centred, first and foremost, around our own unique history, legal traditions and constitution'.[78] According to the MOJ, the ECtHR had gone 'beyond the rights set out in the Convention'[79] and 'undermined' the UK Supreme Court.[80] National courts were presented as 'better placed than international courts to determine our laws' not least because of the 'training, calibre, experience, outlook and legitimacy of our senior judiciary'.[81] But, despite this, the national judiciary was also criticised and it was promised that the Bill of Rights would redress the 'democratic deficit'[82] and ensure a 'check on the expansion and inflation of rights without democratic oversight and consent'.[83] Judges, it was promised, would no longer be permitted to amend legislation contrary to the express will of Parliament.[84]

Nostalgia for better days was an express feature of the government's plans and, in the MOJ consultation paper, frequent positive reference was made to

[75] S Kenny, 'The Law Commissions: Constitutional Arrangements and the Rule of Law' (2019) 39 OJLS 603, 623. This is in contrast to law commissions in South Africa, New Zealand and Australia. See further, E Albanesi, 'Beyond the British model. Law Reform in New Zealand, Australia, Canada, South Africa and Israel' (2018) 6 TPLeg 153.

[76] Ministry of Justice (n 54) 59. See Bill of Rights Bill (n 4) cls 1, 2, 3.

[77] Ministry of Justice ibid 80. See Bill of Rights Bill ibid, cls 1, 7.

[78] Ministry of Justice ibid 23. See Bill of Rights Bill ibid, cl 3.

[79] Ministry of Justice ibid 29.

[80] ibid 60.

[81] ibid 60. See Bill of Rights Bill (n 4) cls 1, 3, 7.

[82] Ministry of Justice ibid 52.

[83] ibid 5.

[84] ibid 68. See Bill of Rights Bill (n 4) cls 1, 10.

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the 'long, proud, and diverse history of freedom' in the UK[85] and how the development of the common law had been stifled by the current human rights law framework.[86] Originalism was also a feature, with express criticism of the ECtHR's living instrument doctrine[87] and the suggestion that the starting point for the courts' interpretation of human rights should be the 'text of the rights themselves' with recourse to the *travaux préparatoires* of the Convention where needed.[88]

B. A Populist Agenda—Punishing 'Enemies' who Benefit from the Unchanged Constitution

In addition to promoting ideas of sovereignty, nationalism and nostalgia, during the campaign for the Bill of Rights there was also use of the populist technique of portraying constitutional change as punishment. The Conservative Party's campaign against the HRA, in and out of office, has consistently identified 'enemies' who benefit from the HRA and who will be brought into line by its repeal. This was continued in the MOJ consultation paper where all of the usual populist targets were deployed.

National judges, judges of the ECtHR and lawyers for human rights claimants were criticised. It was claimed that lawyers bring 'unmeritorious' claims requiring 'substantial amounts of taxpayers' money to defend them';[89] that national judges have made the law 'uncertain'[90] and diluted the impact of legislation intended by Parliament;[91] and that the ECtHR and national courts have made it difficult for the government to deport foreign offenders, engaged the government in 'costly litigation' and put the public at 'additional risk'.[92] Problematic judgments, and therefore judges, were presented including *Ziegler*[93] where the Supreme Court 'enabled a group of protesters to disrupt the rights and freedoms of the majority';[94] *Rabone*[95] where the Supreme Court created 'operational difficulties for medical practitioners on the front line';[96] and *Carmichael*[97] where the Supreme Court 'ruled against the legislation enacted by Parliament' even though 'questions of economic and social policy should generally be left to elected law-makers'.[98]

Such attacks have also been a consistent part of the government's wider narrative. For example, in a speech to the Conservative Party Conference in October 2020, then Home Secretary Priti Patel said that among those defending the 'broken' immigration appeals system were 'do-gooders' and

[85] Ministry of Justice ibid 3. [86] ibid 9. [87] ibid 17.
[88] ibid 59. See Bill of Rights Bill (n 4) cl 3. [89] Ministry of Justice ibid 36.
[90] ibid 36. [91] ibid 63. [92] ibid 45.
[93] *Director of Public Prosecutions v Ziegler* [2021] UKSC 23.
[94] Ministry of Justice (n 54) 39.
[95] *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2.
[96] Ministry of Justice (n 54) 39.
[97] *R. (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58.
[98] Ministry of Justice (n 54) 48.

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'leftie lawyers'.[99] Former Prime Minister Boris Johnson at the same conference stated that he would stop the whole criminal justice system 'from being hamstrung by what the Home Secretary would doubtless and rightly call the lefty human rights lawyers and other do-gooders'.[100] In 2022, Attorney General Suella Braverman, in an interview with *Conservative Home*, said that there was a lot 'more red meat for the Tory faithful' which included dealing with creations like the HRA 'which has built up a whole industry of people who make their living from rights-based claims'.[101]

Numerous others were portrayed in the MOJ consultation paper as using the HRA to their benefit and thereby placing the safety of everyone at risk and wasting taxpayers' money. These included: foreign nationals resident in the UK who have committed crimes; prisoners; those affected by gang-related violence or with links to organised crime;[102] victims of human rights violations by UK armed forces abroad;[103] benefit recipients and those in the care of the State;[104] non-citizens subject to immigration control such as those on a student visa;[105] failed asylum seekers;[106] and, somewhat surprisingly, the 'small number of private companies, with significant influence over what appears online'.[107]

VII. THE PROCESS: INFORMAL METHODS LEADING TO THE BILL OF RIGHTS BILL

The informal methods described above and utilised by the government to encourage support for its Bill of Rights Bill are in keeping with the core elements of the autocratic method already identified. A promise to reform human rights law has been a consistent policy and manifesto promise from the Conservative Party in successive general elections; to support reform, the ideologies of nationalism, sovereignty and nostalgia have been deployed; and populist attacks on judges, lawyers, migrants and asylum seekers, who are portrayed as benefiting from the HRA, have been a consistent feature.

But where the UK departs from the experience of many other States is with respect to the additional steps which were taken against this backdrop. As already noted, there is no set method for constitutional change in the UK. There is no need for public consultation, an official inquiry or a report from a law reform commission. The UK constitution is indeed, as Shell notes, 'whatever the government of the day can get away with' and change can be

[99] P Patel, '2020 Speech at Conservative Party Conference (*Political Speech Archive*, 5 October 2020) <https://www.ukpol.co.uk/priti-patel-2020-speech-at-conservative-party-conference/>.

[100] H Banks, 'In Full: PM Boris Johson's Tory Conference Speech' (*City AM*, 6 October 2020) <https://www.cityam.com/in-full-pm-boris-johnsons-tory-conference-speech-in-full/>.

[101] A Gimson and P Goodman, 'Interview: Braverman Says that What May Emerge from Russia "Is a Basis for Charges of Genocide"' (*Conservative Home*, 20 May 2022) <https://www.conservativehome.com/highlights/2022/05/interview-braverman-says-that-what-may-emerge-from-russia-is-a-basis-for-charges-of-genocide.html>.

[102] Ministry of Justice (n 54) 35–6, 40, 42, 43. [103] ibid 43–4. [104] ibid 47–51.
[105] ibid 49. [106] ibid 82. [107] ibid 62.

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achieved 'by whatever means the government of the day finds it can use'.[108] However, in an effort to build support and legitimacy for its Bill of Rights Bill, the Government also embarked on a process which, at least on the surface, looked like genuine bi-partisan engagement with the issues raised. Closer examination reveals that what in fact occurred was a deeply flawed investigation and consultation exercise. Nevertheless, the various steps in the process add an interesting dimension to the understanding of the autocratic method and each stage is examined in more detail below.

A. Generating Support and Legitimacy from the Work of Think Tanks

The first step in the process building towards the Bill of Rights Bill was the long-running attempt by the government, in particular former Minister for Justice Dominic Raab, to back up its plans with research, empirical data and other scholarly work. However, as revealed by the evidence contributed to the Independent Human Rights Act Review (IHRAR), the majority of constitutional law and human rights scholars working in the UK are in support of keeping the HRA as it is. Rather than relying on peer-reviewed research, for some time the government has taken inspiration for its plans from the work of think tank Policy Exchange and its long-running 'Judicial Power Project'. Started in 2015, the focus of the Project is the 'proper scope of the judicial power within the constitution' given that, it is claimed, 'judicial overreach increasingly threatens the rule of law and effective, democratic government'.[109]

In various Policy Exchange reports published as part of the Project these themes are common. The ECtHR is described as 'judicially inflated';[110] and courts are said to have 'no constitutional function' entitling them to intervene in the relationship between Parliament and government.[111] Any expansion in judicial power is described as 'a striking departure from the common law tradition' that 'imperils parliamentary democracy and the rule of law'.[112] Government is urged to 'take back control' from the ECtHR; limit the extra-territorial application of the HRA; exercise to the fullest extent the UK's margin of appreciation; and reject any convention that Parliament must change the law after a HRA declaration of incompatibility.[113] Most of these proposals found their way, in some form, into the Bill of Rights Bill.

[108] Shell (n 74) 66. [109] Judicial Power Project, 'About the Judicial Power Project' <https://judicialpowerproject.org.uk/about/>.

[110] J Finnis and S Murray, *Immigration, Strasbourg, and Judicial Overreach* (Policy Exchange 2021) 107.

[111] S Laws, *How to Address the Breakdown of Trust Between Government and Courts* (Policy Exchange 2021) 10.

[112] R Ekins and G Gee, *Reforming the Lord Chancellor's Role in Senior Judicial Appointments* (Policy Exchange 2021) 10.

[113] R Ekins, *Protecting the Constitution* (Policy Exchange 2019).

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Basing its proposals on the work of Policy Exchange with its numerous glossy publications and slick website, the government attempted to grant some scholarly legitimacy to its plans. However, this is clearly not unbiased research from the pages of peer-reviewed publications. Rather than a university or a research institute, Policy Exchange is a think tank which struggles with transparency. It describes itself as the 'UK's leading think tank' on a mission 'to develop and promote new policy ideas which deliver better public services, a stronger society and a more dynamic economy'.[114] Others describe it as 'right wing' with close links to the Conservative Party and the Government.[115] Questions have been consistently raised over its source of funding with little information revealed.[116] In its 2016 report, Transparify awarded it zero, the lowest rating for financial transparency, stating that it was unable to discover 'who bankrolls their research and advocacy' and that it was one of four think tanks in the UK that still considered it 'acceptable to take money from hidden hands behind closed doors'.[117]

B. A Misleading Manifesto Commitment

The second step in the process leading to the Bill of Rights Bill was the commitment in the 2019 Conservative Party election manifesto. Whilst there were clear commitments in the 2010 and 2015 Conservative Party election manifestos to repeal the HRA and replace it with a Bill of Rights, the commitment in 2019 was only to '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'.[118] This was not a promise to repeal the HRA and replace it with something fundamentally different.

Accompanying this was the promise that in the first year of government a 'Constitution, Democracy & Rights Commission' would be set up to 'examine these issues in depth, and come up with proposals to restore trust in our institutions and how our democracy operates'.[119] For those unsure of what an 'update' to the HRA might entail, some reassurance might have been found in this promise. It may have even encouraged the assumption that the

[114] Policy Exchange, 'About Policy Exchange' <https://policyexchange.org.uk/about/>.

[115] G Monbiot, 'No 10 and the Secretly Funded Lobby Groups Intent on Undermining Democracy' *The Guardian* (London, 1 September 2020) <https://www.theguardian.com/commentisfree/2020/sep/01/no-10-lobby-groups-democracy-policy-exchange>.

[116] G Monbiot, 'Who Drives the So-called Thinktanks Crushing Democracy for Corporations?' *The Guardian* (London, 13 September 2011).

[117] Transparify, *How Transparent are Think Tanks about Who Funds Them 2016?* (Transparify, 29 June 2016) <https://www.transparify.org/publications-main>. See also B Quinn, 'UK Thinktanks Urged to be Transparent about Funding as $1m US Donations Revealed' *The Guardian* (London, 4 August 2023) <https://www.theguardian.com/politics/2023/aug/04/uk-thinktanks-urged-to-be-transparent-about-funding-as-1m-us-donations-revealed>.

[118] Conservative Party Manifesto 2019 (n 3).

[119] ibid.

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constitution would not be altered without detailed consideration of the implications. But neither promise was supplemented by anything further, such as a more detailed policy paper or recommendations for further reading and the Commission was never set up although, as discussed below, the IHRAR was. In short, whilst HRA reform was an election issue, the electorate did not vote for the HRA to be repealed and replaced with far weaker protection for their human rights.

C. A Limited Inquiry into the Case for Reform

Following the Conservative party win at the 2019 election, the third step in the process leading to the Bill of Rights Bill got underway and, for a time, it seemed that this fundamental constitutional change might be approached with the seriousness it deserved. As already noted, the promised Constitution, Democracy & Rights Commission was never established but the IHRAR was launched by the MOJ in December 2020 to consider 'how the Human Rights Act is working in practice and whether any change is needed'.[120]

Measured against the most rigorous way to deliver this brief, the Independent Review had a number of problems from the outset. Despite the width of the stated purpose of the Review, its terms of reference were much narrower, focusing only on the impact of the HRA on relations between the judiciary, the legislature and the executive.[121] Only two 'overarching' themes were permitted. The first was the relationship between domestic courts and the ECtHR (including Section 2 of the HRA); the second was the impact of the HRA on the relationship between the judiciary, the executive and the legislature. Here Sections 3 and 4 of the HRA were relevant but some other issues were also included: the remedies available to courts when considering challenges to designated derogation orders; how courts deal with subordinate legislation incompatible with Convention rights; the extra-territorial effect of the HRA; and the remedial order process set out in Section 10 of the HRA.

The IHRAR review panel was established and whilst ostensibly independent, there were a number of problems. The Review was funded and hosted by a government department, the MOJ. The terms of reference were not determined by the panel itself but by government. Panel members were appointed by government and had no specialist expertise in human rights law although it was possible for the panel to call for expert evidence.[122]

[120] Ministry of Justice, 'Guidance: Independent Human Rights Act Review' (7 December 2020) <https://www.gov.uk/guidance/independent-human-rights-act-review>.

[121] Ministry of Justice, *Independent Human Rights Act Review: Terms of Reference* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953347/human-rights-review-tor.pdf>.

[122] Contrast the creation in April 2021 of the Presidential Commission on the Supreme Court of the US comprised of a bipartisan group of experts on the Court and the Court reform debate.

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The call for evidence was launched on 13 January 2021 and closed on 3 March 2021. Over 150 'excellent responses from a large number of individuals and a variety of groups with wide-ranging interests and views'[123] were received and the responses were published on the website with the promise that these will 'help inform' the report. The panel also held seven 'roadshows' at various locations around the UK (although due to the pandemic, none of these was held in person) and 15 roundtables (although details of the latter were not given on the website). The majority of submissions illustrated the depth of theoretical and practical engagement which has developed over the past 23 years and the overwhelming majority were in support of no change to the HRA. Those in support of fundamental change were a small homogeneous group mostly connected to Policy Exchange.[124]

The Review Panel reported in December 2021[125] and its report was a genuine exercise in law reform albeit one only partially conducted due to the limited terms of reference. Its recommendations for changes to the HRA were limited, and importantly nothing that it recommended would have resulted in a reduction in human rights protection such as was proposed in the Bill of Rights Bill.

D. Undermining and Disregarding the Review Exercise with an Alternative Report

The third stage of the process leading to the Bill of Rights Bill, the report of the IHRAR, clearly did not go to plan. Despite the limited terms of reference, and questions over the Panel's independence from government, it produced a well-researched and rigorous report but not a report which supported the Bill of Rights Bill. It was therefore necessary for the government to implement the fourth stage of the process. This stage had two parts: undermining and disregarding the review exercise; and producing an alternative report, styled as a consultation.

On the same day that the IHRAR report was published, the MOJ published its bill of rights consultation paper claiming that it had been 'informed' by the work of the IHRAR[126] despite the fact that the approaches taken in the reports were fundamentally different. Sir Peter Gross, IHRAR panel chair, explained the panel's approach in his evidence to Parliament's Justice Committee:

[123] IHRAR, *Call for Evidence Responses* <https://www.gov.uk/guidance/independent-human-rights-act-review>.

[124] See, eg, submission of Finnis and Murray (n 110) which was not in answer to the review questions but a report on immigration published by Policy Exchange; submission of the Judicial Power Project which was also not in answer to the review questions; and the submission of the Society of Conservative Lawyers which did, in part, focus on the review questions.

[125] UK Government, *The Independent Human Rights Act Review* CP 586 (December 2021) <https://assets.publishing.service.gov.uk/media/61b8531c8fa8f5037778c3ae/ihrar-final-report.pdf>.

[126] Ministry of Justice (n 54) 3.

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> We looked at it in an objective way. We adopted an evidence-based approach. We were tasked under the written ministerial statement to do it independently and thoroughly and we sought to do just that. We had no preconceptions. We did not start with the answers because we did not know what they were, which is probably a healthy place to start. We were not party political. … we wanted to get views from as wide a spectrum of opinion as we could.[127]

By contrast, the MOJ consultation paper was not objective or evidence based. It was essentially a brazen attempt to manipulate a process of constitutional change. Numerous assumptions, not based in evidence, were presented as fact. For example, the promise to 'restore common sense' to the application of human rights;[128] the promise to 'reverse the mission creep' that has meant human rights law 'being used for more and more purposes', with 'little regard for the rights of wider society';[129] the stated need to put a 'check' on the 'expansion and inflation of rights without democratic oversight and consent';[130] the allegation that 'spurious cases' undermine public confidence in human rights;[131] and the allegation that courts use human rights law to impose positive obligations on public authorities without 'proper democratic oversight'.[132]

Veracity, misdirection and missing information were a problem throughout. For example, human rights judgments were reported selectively with important aspects missing. The judgment of the ECtHR in *Othman v UK*[133] was described as the first time the right to a fair trial was used to 'defeat a deportation order'[134] rather than a judgment which established that the admission of evidence obtained by torture in a criminal trial would be a flagrant denial of justice. HRA case law received similar treatment. The judgment of the UK Supreme Court in *Rabone*,[135] where a voluntary psychiatric patient committed suicide whilst on medically approved home leave, was presented as creating 'operational difficulties for medical practitioners'[136] rather than as an important development in mental health law. Human rights law was presented as imposing 'overly prescriptive' obligations on the police[137] with no reference to important judgments, such as *DSD*,[138] where police failings were so serious that a perpetrator of rape and sexual assault carried on attacking women for many years longer than if police had actually complied with the obligations. Some human rights claims were discussed with the explanation that although the claims were unsuccessful, 'the fact that they can be brought at public expense serves to undermine public confidence in the Human Rights Act'.[139]

[127] House of Commons, 'Oral Evidence: Human Rights Act Reform' (1 February 2022) HC 1087. [128] Ministry of Justice (n 54) 5. [129] ibid. [130] ibid. [131] ibid 6. [132] ibid. [133] *Othman (Abu Qatada) v the United Kingdom* App No 8139/09 (ECtHR, 17 January 2012). [134] Ministry of Justice (n 54) 29. [135] *Rabone* (n 95). [136] Ministry of Justice (n 54) 39. [137] ibid 43. [138] *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11. [139] Ministry of Justice (n 54) 36.

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Clarity and accessibility were also a problem throughout the 118-page document. Even though a three-page summary was provided, this was far from clear, accessible or easy to understand for anyone, even those with legal training. For example, it was stated that the Bill of Rights will 'retain all the substantive rights currently protected under the Convention' with no explanation of what these rights are.[140] It was also stated that domestic courts will be empowered 'to apply human rights in the UK context' but the ability to impose positive obligations 'without proper democratic oversight' will be restrained, with no further explanation.[141] Balance was absent, with only the government's position in relation to each proposal presented. On some issues it was necessary to consult the 580-page report of the IHRAR as well. Chapter 3 was particularly inaccessible to the non-specialist and included a discussion of the 'living instrument doctrine' the '*travaux préparatoires*' to the ECHR, the ECtHR being 'mirrored' in the UK, the 'extraterritorial' scope of the ECHR and the rise of 'positive obligations'.[142]

The public interest was rarely mentioned apart from frequent claims, unsupported by evidence, that the HRA has not operated in the public interest[143] and the proposal to place more duties on courts to consider the public interest in their decision making.[144] The only time it was claimed that a proposal would be in the public interest was the assertion that 'the public interest is overwhelmingly assisted by protection for freedom of expression and in a free and vibrant media'.[145] An impact assessment was provided in a separate document[146] although for the majority of proposals it was concluded that 'it has not been possible to monetise the benefits of these proposals' as 'the primary benefits to this option relate primarily to issues of constitutional governance'.[147] There was reference to the creation of: legal uncertainty; transitional implementation costs (such as training for courts and tribunals); increased use of Parliamentary time (through more declarations of incompatibility); more litigation in domestic courts; more cases going to the ECtHR; and increased costs for the justice system through the use of permission stages. However, all of these concerns were played down and, whilst very genuine problems, had very little role in the ongoing debate.

[140] ibid 6.
[141] ibid 6.
[142] After lobbying by numerous NGOs, an easy-read version was eventually produced. The evidence base is similarly poor but the simplification of the message makes for interesting reading: Ministry of Justice, 'Human Rights Act Reform: a Modern Bill of Rights' (Ministry of Justice, 2022) <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/>.
[143] Ministry of Justice (n 54) 35, 36, 40, 52.
[144] ibid 83–5.
[145] ibid 62.
[146] Ministry of Justice, *Draft Bill of Rights Impact Assessment* (19 June 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1084545/bill-of-rights-impact-assessment.pdf>.
[147] ibid 3.

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E. Ignoring Consultation Feedback

The fifth and final stage leading to the Bill of Rights Bill was the confirmation that consultation feedback would be largely ignored. The MOJ report, as discussed above, was open for consultation and, on the same day that the Bill of Rights Bill was introduced to Parliament the results of that consultation were published.[148] In all, 12,873 responses were received 'from members of the public, academics, think tanks, legal professionals and law firms, non-governmental organisations and charities, among others'[149] although these are not published. An overwhelming majority of submissions argued for no change to the HRA.

For example, in relation to Section 2 of the HRA, 56 per cent of respondents preferred no change from the current framework;[150] 64 per cent of respondents preferred no change from how the UK Supreme Court is currently referred to in the HRA (not at all);[151] in relation to freedom of expression, 74 per cent of respondents stated that no change was required to Section 12 of the HRA;[152] 90 per cent rejected the qualification of 'significant disadvantage' to bring a claim;[153] 70 per cent of respondents stated that no change was required to Section 8 of the HRA (remedies);[154] in relation to Section 3 of the HRA, 79 per cent preferred no change;[155] in relation to deportation and human rights, 77 per cent believed that no change was required;[156] and in relation to responding to adverse Strasbourg judgments, 87 per cent proposed that nothing should be done.[157]

The feedback on the proposal to limit positive obligations was overwhelmingly in favour of no change.[158] The government's response, typical of its responses on other issues, was that it had examined the 'sentiment' given in responses to this question, but would proceed with limiting positive human rights duties nonetheless.[159]

VIII. THE ELEMENTS OF THE AUTOCRATIC METHOD

As defined earlier in this article, the autocratic method is an informal method, carefully designed by a government (whether it be autocratic or democratic) to deliver a constitutional change which will usually assist it in the continued consolidation or maintenance of power. The process adopted by the UK government for the repeal and replacement of the HRA with a Bill of Rights was a clear illustration of the method in practice making it possible to confirm the definition and expand on the elements of the method already

[148] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights. Consultation Response* CP 704 (June 2022) <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/results/modern-bill-rights-consultation-response.pdf>. [149] ibid 7. [150] ibid 12. [151] ibid 14. [152] ibid 15–16. [153] ibid 18. [154] ibid 19. [155] ibid 23. [156] ibid 31. [157] ibid 34. [158] ibid 20. [159] ibid 21. Its response to the overwhelming feedback that there should be no tampering with the proportionality test was similar, ibid 30.

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familiar from what has taken place in numerous other States where the informal method has tipped over into the autocratic method.

The starting point occurs long before the formal process of change gets underway. With normal politics and constitutional politics conflated, constitutional change is trivialised and becomes something that political parties use during elections to capture votes. Promises about constitutional change are contained in election manifestos although these may be misleading and will not provide any informative detail concerning the gravity of the change, or its real consequences. The constitution is presented as the cause of particular problems, such as immigration or unjustified public expenditure, which can only be solved if the constitution is changed.

Once power is acquired, the process of change is initiated by the government itself based on its manifesto commitment. There may be a practice run where the method is tested before a more serious change is attempted. Hardly anyone, apart from government, will be advocating for the change and it will argue that it has a mandate for change, in the name of the people, based on its manifesto commitment. The reports of think tanks and other seemingly expert institutions will be employed to enhance the legitimacy of arguments for change and only the voices of scholars who present arguments in support of change will be utilised. A closer look will often reveal that the scholars have ties to the think tank and that the think tank has close ties to the government. The views of established and independent international institutions, such as the ECtHR, will be mocked and portrayed as a threat to national sovereignty.

Prevailing ideologies are harnessed to support the change including sovereignty and nationalism which will encompass suspicion of and hostility towards international law and institutions. Populist approaches are particularly effective and may involve a charismatic leader advocating for the change and criticism of the nation's highest court, judges and lawyers. Judges and lawyers will be identified as 'left-wing' or worse, as 'enemies of the people', who benefit, undeservedly, from the unchanged constitution and who will be brought into line by change. Other enemies will often include migrants and asylum seekers, prisoners and benefit recipients. There may be a wider narrative as well where members of these groups are consistently attacked and undermined by government. Nostalgia and originalism are also important and there may be a promise to return to the original text or original state of the constitution.

Information about the proposed constitutional change is tightly controlled by government starting with the manifesto commitment. Government will manage official research into the change through the provision of resources. Some sort of independent review may be conducted but its terms of reference, and funding, will be limited and its findings, should these be unsupportive of the government's position, will be ignored or overshadowed by government research released at the same time. Official government research will be

complex, inaccessible and of limited veracity with conclusions not based on evidence. A public consultation may take place, but the feedback from any consultation, should it not be supportive of change, will be ignored.

These informal autocratic methods will lead up to the formal method for change, whatever that may be. Following on from the use of the autocratic method, it is easy to see how a referendum result would be in the government's favour. Where there is no referendum and, as in the usual case in the UK, a proposed constitutional change must progress as a Bill through the legislature, success will depend on how effective the formal method is at overcoming the benefit for the government's position delivered by the autocratic method.

The UK government's Bill of Rights Bill failed not because it was rejected by the House of Commons, or the House of Lords, but because the government withdrew it. Whilst the Bill's progress was not helped by the resignation of its sponsor, former Minister for Justice Dominic Raab, more likely was the fact that the Bill was not going to deliver a constitutional change which would assist the government in the continued consolidation or maintenance of power. Without a commitment also to de-ratify the ECHR, the Bill would not deliver what was promised regarding national sovereignty or an increase in the power of the executive over the courts.

However, this does not mean that the autocratic method does not work in the UK context, or will not be used again. For example, the Illegal Migration Act 2023[160] became law on 20 July 2023 having passed rapidly through all of its parliamentary stages. The purpose of the Act is to create a scheme whereby anyone arriving illegally in the UK will be 'promptly removed to their home country or to a safe third country to have any asylum claim processed'. The Government Minister introducing the Bill was, unusually, unable to make a HRA Section 19 statement that the provisions of the Bill were compatible with the Convention rights as given effect by the HRA.

Whilst not as fundamental as that which was proposed in the Bill of Rights Bill, the Act does alter current constitutional arrangements, with various parts of the HRA suspended from operation in relation to the Act. Section 3 of the HRA, the interpretative duty, does not apply to the Act;[161] with some exceptions, individuals are to be removed without a HRA claim being heard;[162] and Section 55 provides that a Minister may ignore an interim measure from the ECtHR and remove an individual from the UK. In short, the Act suspends human rights law for a category of people and places the UK's membership of the ECHR system in jeopardy, with no manifesto promise, independent review exercise, consultation or other process having taken place. During the passage of the Bill through Parliament, government ministers once again invoked national sovereignty, attacked migrants and asylum seekers, and

[160] Illegal Migration Act 2023 <https://www.legislation.gov.uk/ukpga/2023/37/enacted>.
[161] ibid, sec 1(5).
[162] ibid, sec 5.

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criticised judges. The *Sunday Times* reported in February 2023 that if judges at the ECtHR rule that the Act is unlawful, the Prime Minister is 'open to withdrawing from the Convention'.[163]

In 1990 Brazier suggested that to get away from 'party political rhetoric' what the UK needed was a permanent Constitutional Commission with the status of a standing Royal Commission—to consider and report on any constitutional provisions in need of clarification or reformulation; and to consider any aspect of the UK constitution referred to it by a Minister to report on whether and if so how it might be reformed.[164] In its 1996 report, *Delivering Constitutional Reform*,[165] the Constitution Unit set out its recommendations for the process of constitutional reform in the UK. These included: ensuring broad public and cross-party consultation; planning the legislative programme in advance; putting a minister in charge of constitutional reform; co-ordinating input from all interested departments; and allowing sufficient time for constitutional bills in Parliament. Neither suggestion has ever been acted upon and with the Labour Party likely to include in its 2024 election manifesto proposals for significant constitutional reform, including House of Lords reform,[166] the prospects for removing constitutional issues from the election cycle are remote.

IX. CONCLUSION

Research for this article started with the assumption that there would already be a large scholarship on informal methods for constitutional change, but this is not the case. Whilst much information is available, it is scattered, country specific and there is a tendency to place everything under the umbrella of populism when what is actually taking place is far more complex. This is despite the fact that in many States, both autocratic and democratic, formal methods for constitutional change are often very heavily influenced by the use of informal methods. This article brings together existing scholarship and consolidates and expands on it through the UK example of repeal and replacement of the HRA. It is hoped that the definition of the autocratic method set out, and the explanation of its essential features, will become a useful descriptive label for a particular process of constitutional change and encourage more scholarship on this important topic.

Whilst the UK may never have a codified constitution, or an agreed mechanism for constitutional reform, at the very least it is important to

[163] T Shipman, 'Sunak's Threat to Pull UK out of the ECHR' *The Sunday Times* (London, 5 February 2023).

[164] R Brazier, 'The Machinery of British Constitutional Reform' (1990) 41 NILQ 227, 243.

[165] The Constitution Unit, *Delivering Constitutional Reform* (The Constitution Unit 1996).

[166] Labour Party, *A New Britain: Renewing our Democracy and Rebuilding our Economy. Report of the Commission on the UK's Future* (Labour Party, 2022) <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>.

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recognise when the autocratic method has been utilised in an effort to secure constitutional change. In doing so, efforts to restore the balanced debate on such issues to be expected in a deliberative democracy may be encouraged.