Institute for Public Policy Research

DELIVERY vs DELIBERATION

LESSONS IN LAW-MAKING FROM THE LAST PARLIAMENT

Oliver Garner, Marley Morris, Will Knatchbull and **Parth Patel**

October 2024

ABOUT IPPR

IPPR, the Institute for Public Policy Research, is an independent charity working towards a fairer, greener, and more prosperous society. We are researchers, communicators, and policy experts creating tangible progressive change, and turning bold ideas into common sense realities. Working across the UK, IPPR, IPPR North, and IPPR Scotland are deeply connected to the people of our nations and regions, and the issues our communities face.

We have helped shape national conversations and progressive policy change for more than 30 years. From making the early case for the minimum wage and tackling regional inequality, to proposing a windfall tax on energy companies, IPPR's research and policy work has put forward practical solutions for the crises facing society.

IPPR
8 Storey's Gate
London
SW1P 3AY
E: info@ippr.org
www.ippr.org
Registered charity no: 800065 (England and Wales),
SC046557 (Scotland)

CONTENTS

ABOUT THE AUTHORS

Oliver Garner is Maurice Wohl research leader in European rule of law at the Bingham Centre for the Rule of Law.

Marley Morris is associate director for migration, trade and communities at IPPR.

Will Knatchbull is research and programmes officer at the Bingham Centre for the Rule of Law.

Parth Patel is a principal research fellow at IPPR.

ACKNOWLEDGEMENTS

This IPPR project is generously supported by the Legal Education Foundation. We would like to thank the Bingham Centre, which was commissioned to research and draft the two case studies of legislation examined in this report.

At the Bingham Centre, Oliver Garner and Will Knatchbull worked closely with Jan van Zyl Smit; Lucy Moxham and Jeff King provided valuable feedback on earlier drafts of the report. The Bingham Centre's contribution is informed by the Centre's Rule of Law Monitoring of Legislation project, which is currently funded by the Joseph Rowntree Charitable Trust, and builds on Oliver Garner's oral evidence to the House of Commons European Scrutiny Committee and written evidence (co-authored with Dr Julian Ghosh KC) to the Public Bill Committee for the retained EU law (revocation and reform) bill.

ABOUT THIS REPORT

This report meets IPPR's education objective by promoting research on law-making in the last parliament. The report considers the legal position up to the date of the UK general election that took place on 4 July 2024.

Download
This document is available to download as a free PDF and in other formats at:
http://www.ippr.org/articles/delivery-vs-deliberation

Citation
If you are using this document in your own writing, our preferred citation is:
Garner O, Marley M, Knatchbull W and Patel P (2024) *Delivery vs deliberation? Lessons in law-making from the last parliament*, IPPR. http://www.ippr.org/articles/delivery-vs-deliberation

SUMMARY

Few people believe they have a real say in how our society is governed. In the run-up to the EU referendum, the Vote Leave campaign's message of 'take back control' spoke directly to this sense of democratic voicelessness. The return of wide areas of legislative power from EU institutions to UK and devolved parliaments would, the campaign's argument ran, lead to laws that better reflected the interests of people in this country.

But this promise of democratic renewal has gone largely unfulfilled. Across much of the UK's post-withdrawal legislation, the UK government exercised its greater freedoms by centralising power and limiting parliamentary scrutiny, rather than empowering citizens. That is in part because the government sought to trade 'delivery' (actual implementation of its policies through new laws) against 'deliberation' (discussing and scrutinising laws before they are passed) – most strikingly in the 2019–24 period. Over this time, parliament – the institution whose primary function is to represent the public and make laws on its behalf – saw its role in the law-making process markedly diminish.

The result was twofold. First, new laws were often ineffective. Major pieces of legislation in the last parliament failed to meet their intended goals and caused harm while doing so. Without proper consultation and scrutiny, legislation was often poorly designed or needed redrafting or amending, resulting in major U-turns to fix problems to which the government had been repeatedly alerted. This approach to law-making is a tremendous waste of parliamentary time and resources at best and littered with harmful side-effects at worst.

Second, new laws frequently undermined the quality of democracy. The last government proposed legislation that regularly strained constitutional norms, removed crucial rights protections for some of the most vulnerable groups in society, and clashed with international law. It is a peculiarity of UK democracy that detailed scrutiny of laws proposed between 2019 and 2024 was heavily reliant on the House of Lords, an unelected body.

The new government should take a different approach to law-making. If it wants to move away from 'sticking plaster' legislation to pass laws that are effective, robust and enduring, it must learn one of the key lessons from the last parliament: that the appearance of a trade-off between 'delivery' vs 'deliberation' is fundamentally misleading.

This report draws lessons from the experience of the last parliament and sets out proposals for renewing the law-making process. We focus on the learnings from two major pieces of legislation during the last parliament: the Retained EU Law (Revocation and Reform) Act 2023 and the Illegal Migration Act 2023.

- **The Retained EU Law (Revocation and Reform) Act 2023** (REUL Act) is a flagship example of post-Brexit law-making. The Retained EU Law Act gave government ministers extensive powers to revoke and amend retained EU law, the body of EU law transferred to or preserved on the UK statute book.
- **The Illegal Migration Act 2023** was the centrepiece of the previous government's effort to stop the arrival of people travelling in small boats across the English Channel. The act introduced a new duty on the home secretary to 'make arrangements for removal' for all people (other than unaccompanied children) arriving in the UK irregularly.

We explore these case studies across four dimensions in which we argue the law-making process is not working as it should.

First, over recent years, the UK witnessed a growing tendency towards closed and unaccountable law-making. Laws were passed with limited or no public consultation; impact assessments were published late; and legislation was fast-tracked through parliament. The House of Commons sits for significantly fewer days per session and for fewer hours per day on average than in previous decades.

The Retained EU Law Act and the Illegal Migration Act are cases in point. The Illegal Migration Act was passed on a compressed timetable and with very little consultation and engagement with stakeholders before and during its passage. In the case of the Retained EU Law Act, the government U-turned on its plans on the mass repeal of the bulk of retained EU law at a late stage in the parliamentary process, giving little opportunity for proper scrutiny of the change before the law was passed.

Second, there was an excessive use of delegated legislation to make law in critical areas of policy. Delegated legislation is subject to significantly less scrutiny than Acts of Parliament, if any: it cannot usually be amended and it is very rarely rejected. While delegated legislation is justified and necessary for technical issues, the government repeatedly introduced new delegated powers for issues well beyond their normal scope.

For instance, the Retained EU Law Act was described as a 'hyper-skeletal' act introducing wide delegated powers for ministers to change retained EU law. The government initially created an artificial emergency through a 'cliff-edge' date for the automatic repeal of the bulk of retained EU law, which helped them to justify these wide-ranging powers. But after the government's U-turn on blanket repeal, the powers remained.

Third, there were greater pressures on the devolution settlement in the years following the vote to leave the EU. The devolution settlement adds another dimension to democratic law-making in the UK. This means the law-making process needs not only to carefully consider the devolved nations as key stakeholders, but also – under the Sewel Convention – in areas of devolved competence it should do so only with their consent.

But the Retained EU Law Act and the Illegal Migration Act are examples of the worrying trend of the Westminster parliament legislating despite consent being withheld, undermining the Sewel convention. If this trend were to continue, it would pose a risk of a growing breakdown in the UK constitutional settlement.

Fourth, there was a willingness to introduce legislation that failed to give due regard to international law. The UK has a strong historic reputation for contributing to and respecting international law principles. But in the years following the Brexit vote there were repeated cases of government introducing legislation which was in tension with or indeed directly in breach of the UK's international obligations.

The Illegal Migration Act, for instance, risks breaches of the Refugee Convention, the European Convention Against Trafficking, and the UN Convention on the Rights of the Child. The government was unable to confirm it is compatible with the European Convention on Human Rights and the Act disapplies key provisions of the Human Rights Act.

Our system of law-making is under strain. But we argue **there is now an opportunity for a radically improved way to conduct law-making**, which would help to support a more reflective, inclusive democracy and deliver effective, long-lasting laws that effect real change to the country.

Our research points to four necessary shifts.

1. **The law-making process should be open and inclusive**. Important legislative proposals should undergo public consultation and pre-legislative scrutiny. Impact assessments should be published in a timely fashion. And public bill committees should be given enough time to consider the available evidence and engage with a range of stakeholders.
2. **The use of delegated legislation should be carefully circumscribed and scrutinised**. In general, delegated legislation should only be used for technical matters in a limited manner that is subject to oversight; where significant change is proposed, this should be set out in bills, which parliament can debate and amend before they become primary legislation.
3. The **legislative process in Westminster should respect the core principles of the devolution settlement**. In particular, the Sewel Convention should be upheld and strengthened.
4. **Domestic law-making should uphold the UK's obligations under international law**. The government should make a clear commitment to not support any provision of a bill which places the UK in demonstrable breach of its international law commitments.

To deliver on this agenda, we suggest that **the newly proposed Modernisation Committee could be tasked with developing reforms to improve the law-making process**. This could include developing a memorandum of understanding with the government on clear criteria for the use of delegated legislation.

The experiences of the Modernisation Committee could inform future proposals for how select committees function. This could include consideration of whether there is scope for an existing or new committee to examine the rule of law implications of new government bills.

Finally, the Modernisation Committee could explore how parliament could engage with the wider public – for instance, through citizens' juries or other forms of deliberative decision-making – in order to help inform how parliamentarians consider new bills.

In our next report, we will build on these initial proposals to set out a forward-looking agenda for democratising law-making in the new Parliament. This agenda will be based on the principle that delivery and deliberation go together – and that a more reflective, accountable and inclusive law-making process will ultimately help improve the quality and the sustainability of the legislation that enters into the statute book.

1. INTRODUCTION

Few people believe they have a real say in how our society is governed. Surveys in Great Britain show majorities reporting a lack of political influence (Ansell and Gingrich 2022), while only one in three people trust Parliament to act in the best interests of the UK (Patel, Swift and Quilter-Pinner 2023). This sentiment is widely felt but unequally spread. The bottom third of earners are twice as likely to think people like them have "no say in what the government does" compared to the top third (Ansell and Gingrich 2022).

In the run-up to the referendum on European Union (EU) membership, the Vote Leave campaign spoke directly to this sense of democratic voicelessness and political inequality. The argument at the heart of the UK's exit from the EU was to 'take back control' of law-making. The return of wide areas of legislative power from EU institutions to UK and devolved parliaments would, the argument ran, lead to laws that better reflected the interests of people in this country.

This report argues that the promise of democratic renewal has gone largely unfulfilled. Across much of the UK's post-withdrawal legislation, the UK government has exercised its greater freedoms by centralising power and limiting parliamentary scrutiny, rather than empowering citizens. That is in part because the government traded attempts at faster 'delivery' of new laws against 'deliberation' on their content, even in situations where (unlike the Covid-19 pandemic) there was no real emergency. This was especially true during the last parliament (2019 to 2024). In that period, parliament – the institution whose primary function is to represent the public and make laws on its behalf – saw its role in the law-making process markedly diminish.

This manifested in two ways. First, new laws were often ineffective. Major pieces of legislation in the last parliament failed to meet their intended goals and caused harms while doing so. Without proper consultation and scrutiny, legislation was often poorly designed or needed redrafting or amending, resulting in major U-turns to fix problems to which the government had been repeatedly alerted. Recent immigration law is a case in point: the Safety of Rwanda Act is the third major piece of primary immigration legislation in the past two years, and key provisions in the two earlier acts of parliament have either never been commenced or not been used for their intended purpose. This kind of approach to law-making is a waste of parliamentary time and resources at best and leads to harmful side-effects at worst.

Second, the process of law-making undermined the quality of democracy in this country. The last government proposed legislation that strained constitutional norms, disapplied crucial rights protections for some of the most vulnerable groups in society, and clashed with international law. It is a peculiarity of UK democracy that detailed scrutiny of laws proposed between 2019 and 2024 was heavily reliant on the House of Lords, an unelected chamber of parliament.

POST-BREXIT TRENDS IN LAW-MAKING

This paper is concerned with post-Brexit trends in law-making norms and processes – in particular between the period 2019 and 2024 – and puts forward

ways to 'democratise' them. There are four dimensions of democratic depletion which are our focus.

First, over the course of the post-referendum period the process of law-making became increasingly **closed and unaccountable**. Key pieces of legislation were rushed through Parliament under compressed timetables with little opportunity for detailed scrutiny by the Commons. Since 2016, there has been a sharp increase in the number of bills where the second and third reading have taken place on the same day (one definition of expedited legislation) (House of Commons Library 2024). The use of pre-legislative scrutiny was limited in recent parliaments, despite this period coinciding with a range of major legislative reforms (Sargeant and Pannell 2022). There were also deficiencies in key procedural steps in the legislative process – for instance, a failure to publish impact assessments in a timely manner. In a number of critical cases, the government legislated without proper consultation, or through a consultation process which was largely perfunctory, lacking meaningful dialogue with civil society or people most affected by the legal changes being proposed and with only meagre evidence that consultation influenced the content of legislation.

Second, the government made **excessive use of delegated legislation** to give legal effect to important policy decisions. Delegated (or secondary) legislation is typically made by ministers under powers granted through an act of parliament. Unlike parliamentary bills, delegated legislation cannot usually be amended and the opportunities for scrutiny are limited: it is typically either passed through a negative procedure – where it is laid before parliament after being made law and only rejected if either House objects – or an affirmative procedure – where a draft is laid before parliament and is made law once both houses approve (though in practice it is extremely rare for it to be rejected). Delegated legislation can sometimes be used to amend acts of parliament – to enable this, acts have included 'Henry VIII' clauses specifying the scope of amendments ministers can make. These clauses have been used in large numbers and sometimes with an extremely wide scope. The public tend to take a sceptical view of delegated legislation – a poll for the Constitution Unit in 2023 found that 77 per cent of respondents came closer to the view that "parliament should always need to consider and approve changes in the law" over the view that government "should be able to change the law without full scrutiny by parliament" (Renwick and James 2023).

Delegated legislation was used heavily to make legal changes as part of the Brexit process – and, arguably more justifiably, in the emergency response to the Covid-19 pandemic – but its use has extended beyond these specific circumstances. Moreover, in recent parliaments, the government published a large number of so-called 'skeleton bills', which contain little substance beyond broad principles and instead largely consist of provisions empowering government ministers to enact policy through delegated legislation (DPRRC 2021). Examples of skeletal legislation include the Immigration and Social Security Coordination (EU Withdrawal) Act 2020, the Medicines and Medical Devices Act 2021, and the Strikes (Minimum Service Levels) Act 2023. The Retained EU Law Act (Revocation and Reform) Act 2023, in particular, was described as a 'hyper-skeletal' bill by the chair of the Delegated Powers and Regulatory Reform Committee (House of Lords 2023). The use of delegated legislation diminished Parliament's role in key aspects of the law-making process, making it far harder for parliamentarians to scrutinise and influence the substance of legislation and providing government ministers with a great deal of latitude to make major policy decisions without proper oversight.

Third, the process of legislating for Brexit placed **pressures on the devolution settlement**. While the UK Parliament formally has powers to legislate in all areas for Scotland, Wales and Northern Ireland, under the Sewel convention it is expected to not normally do so in areas of devolved competence, unless it has the consent of the devolved legislatures.[1] Legislative consent has rarely been withheld – between 1999 and 2021, there were over 400 legislative consent motions and consent was not fully given in only 20 cases – but there was an increase in controversies in the years following the Brexit vote (Paun et al 2024).

One of the key areas of tension between Westminster and the devolved administrations over Brexit was about powers repatriated from the EU which are matters of devolved competence, such as agriculture, fisheries and the environment. The Scottish and Welsh first ministers initially argued in 2018 that the EU withdrawal bill constituted a 'power grab' because it prevented the devolved administrations from changing retained EU law unless the change was already within their legislative competence or the UK government passed secondary legislation (an 'order in council') granting them an exception. While the key provisions were in part amended in the final version of the legislation, the contestation over the bill created constitutional tremors that deepened tensions between the UK government and the devolved administrations.

The piece of legislation which has courted the most controversy for devolution is the United Kingdom Internal Market Act 2020. By requiring all devolved administrations to subscribe to key 'market access' principles aimed at ensuring an internal market for goods and services within the UK, the legislation placed practical constraints on their regulatory powers beyond those which were imposed through EU membership. Both the Scottish and Welsh parliaments refused to give their consent to the legislation. The act reflected a broader concern from the devolved administrations about the implications of Brexit for their autonomy to act in devolved areas and a lack of consultation from the UK government over key constitutional issues.

Fourth, the government repeatedly brought forward legislation which **failed to give due regard to the UK's international law obligations**. International agreements have sometimes been viewed as posing undemocratic constraints on elected governments. But we argue that the reverse is the case. For a longstanding democracy such as the UK, which is not burdened by treaties signed by undemocratic rulers, our international obligations are democratically grounded. Indeed, international law can facilitate types of democratic decision-making – for instance, the negotiation and enforcement of free trade agreements, a core tenet underpinning the case for Brexit. Moreover, international law obligations often promote key concepts of liberal democracies, including human rights and fundamental freedoms, which help to ensure governments do not hoard and misuse their powers.

Over the 2019–24 period, government legislation on the Brexit process and on wider policy on issues relating to migration and human rights came into conflict with a number of critical bilateral and multilateral agreements. Recent legislation has tested and arguably breached the boundaries of international law. There were particular controversies over the Northern Ireland protocol (which has now been replaced by the Windsor Framework): former Northern Ireland secretary Brandon Lewis notoriously described the Internal Market bill as breaching international law in "a very specific and limited way". Both the internal market bill and the later Northern Ireland protocol bill sought to disapply some provisions of the protocol and to allow ministers to disapply other parts of the protocol unilaterally (though

1 Although the convention is referenced in the Scotland Act 2016 and the Wales Act 2017, it is not legally binding (see Miller 2017).

ultimately neither the Northern Ireland protocol bill nor the relevant provisions of the internal market bill ever became law).

More recently, the government faced criticism for taking a cavalier approach to pivotal international treaties – including the Refugee Convention and the European Convention on Human Rights (ECHR) – in its efforts to tackle small boat crossings in the Channel. The government was unable to declare that some recent legislation – the Illegal Migration Act and the Safety of Rwanda Act – was compatible with the ECHR. Its Safety of Rwanda Act sought to overrule the judgment of the Supreme Court on a matter of fact, disapplying key parts of the Human Rights Act. The Illegal Migration Act empowered ministers to ignore any interim measures (under rule 39) from the European Court of Human Rights, which would constitute a breach of the Convention. The concept of parliamentary sovereignty was increasingly deployed to justify the overriding of any of the UK's international obligations, despite the international law principle that states cannot use their domestic constitutional doctrines to escape binding obligations.

Over this period, the promise of 'taking back control' was therefore replaced by a tendency towards power-hoarding by government, reducing the ability of parliament to scrutinise, amend and shape legislation, disregarding civil society stakeholders, challenging the careful balance of the devolution settlement, and riding roughshod over the UK's international legal commitments.

MAKING BETTER LAWS

The new government and parliament should take a different approach – one focussed on the highest standards of law-making.

Better quality law-making will resonate with the new prime minister and his desire to put an end to 'sticking plaster politics' (Labour Party 2023). With over 30 legislative priorities announced at the King's Speech, a good law-making process will be critical for passing legislation that deliver on the government's missions.

The temptation of any new government – particularly one with a large majority – may be to pass these bills as quickly as possible, on the basis that deliberation gets in the way of delivery. But the appearance of a trade-off between 'delivery' and 'deliberation' is fundamentally misleading. The observed experience of the last parliament is that sacrificing deliberation comes back to haunt legislators, because without proper scrutiny and debate laws are more likely to be poorly designed for their purposes. Efficient law-making is not the same as effective law-making.

This is the first of two reports on modernising law-making. It draws lessons from the last parliament and sets out strategies to develop more effective laws. We focus on the learnings from processes for two major pieces of legislation during the last parliament: the Retained EU Law (Revocation and Reform) Act 2023 (see box 1) and the Illegal Migration Act 2023 (box 2). In different ways, these pieces of legislation illustrate some of the most concerning developments in law-making in recent years. They also highlight how these deficiencies have impeded the government's efforts to use legislation to meet their objectives.

In the final part of this report, we set out the principles of an alternative approach to law-making after Brexit. This approach will seek to recapture the promise of democratic renewal which was articulated by the campaign to leave. But rather than focus on centralising power in Westminster and Whitehall, our approach will centre on a more open, transparent and inclusive approach to the democratic process – one which respects the core tenets of the rule of law, and which seeks to develop changes to legislation through collaboration and consultation with

civil society and the public. Ultimately, we argue, this approach will mean a more effective, democratically grounded and enduring body of legislation.

BOX 1: THE RETAINED EU LAW (REVOCATION AND REFORM) ACT 2023

The Retained EU Law (Revocation and Reform) Act 2023 (REUL Act) is a flagship example of post-Brexit law-making. Retained EU law (now assimilated law) is the body of EU law which was transferred to or preserved on the UK statute book under the European Union (Withdrawal) Act 2018, in a critical part of the Brexit process. The policy aims of the 2023 Act were to allow for the reform of retained EU law in order to support the government's regulatory, economic and environmental ambitions and to improve the clarity and accessibility of the statute book. This fitted into a broader policy agenda focussed on post-Brexit deregulation to boost economic growth.

The REUL Act gives extensive powers to government ministers to revoke and amend retained EU law. The act was not a necessary part of Brexit; instead it was a voluntary decision to undertake reform of the body of EU law retained in the domestic system that could have been amended through normal means.

In its original form, all EU-derived secondary legislation and retained direct EU legislation would have been automatically repealed by a sunset clause at the end of 2023 unless explicitly preserved by ministers; however, over the course of the bill's passage through parliament, the government chose to reverse course and replaced total sunsetting with the initial partial or full repeal of a specific list of just under 600 pieces of legislation.

BOX 2: THE ILLEGAL MIGRATION ACT 2023

The Illegal Migration Act 2023 was the centrepiece of the previous government's effort to stop the arrival of people travelling in small boats across the English Channel. The act introduces a new duty on the home secretary to 'make arrangements for removal' for all people arriving irregularly on or after 20 July 2023. (The duty does not apply to unaccompanied children until they turn 18.) People can either be removed to their home country if deemed sufficiently safe or alternatively to a safe third country. There are parallel obligations to deem the asylum claims of those who arrive irregularly inadmissible and to refuse them a grant of leave. The act also extends the power to detain individuals and limits their scope to legally challenge removal.

While the act has received royal assent, the core duty to remove was not commenced by the last government before it left office. This was because the government was not able to remove irregular arrivals to Rwanda, which was the only third country where a formal agreement to accept people was in place. The government was expected to implement the duty following the passage of the Safety of Rwanda Act, which overrode the Supreme Court's recent judgment that Rwanda is not a safe country to which to remove asylum seekers, and so paved the way for removals to Rwanda to go ahead. But the change of government and the scrapping of the Rwanda plan now means this duty is unlikely to be brought into force.

2. CLOSED AND UNACCOUNTABLE LAW-MAKING

Over the period since the Brexit vote and up until the end of the last parliament, the UK witnessed a growing tendency towards closed and unaccountable law-making.

In a range of respects, the government resisted scrutiny of its legislative agenda (see Economist 2023 and Sargeant et al 2023). It passed laws in critical areas with limited or no public consultation; failed to publish impact assessments in a timely manner; and increased the use of fast-tracked legislation, often without sufficient justification. The Secondary Legislation Scrutiny Committee critiqued the government's publication of impact assessments for their lateness or for being "been scrambled together at the last minute to justify a decision already taken" (House of Lords Secondary Legislation Scrutiny Committee 2022). The House of Commons sits for significantly fewer days per session and for fewer hours per day on average than in previous decades, while "the share of time spent on government legislation in the [Commons] fell from… 41 per cent in 2005–06 to 20 per cent [between May 2022 and June 2023]" (Economist 2023). Closed and unaccountable law-making perhaps reached its apogee in the autumn of 2019, when the government sought to prorogue Parliament in an attempt to prevent MPs' efforts to rule out the possibility of a no-deal Brexit.

A core principle underpinning the rule of law is an open and transparent legislative process (ODIHR 2024). Relevant documents and impact assessments should be publicly available and easily accessible; members of the public and those most affected should be empowered to participate; and enough time should be given for proper consultation, debate and scrutiny of draft proposals (ibid). Expedited and emergency legislation should be the exception, not the norm. These principles allow for a fairer, more democratic, and more inclusive way of making policy. Conversely, a closed and unaccountable approach to law-making puts the rule of law and democracy at risk.

The bill of rights bill is an example of government failure to properly engage with the findings of pre-legislative consultation. The government established the Independent Human Rights Act Review (IHRAR) to examine the operation of the Human Rights Act, but its own consultation paper for the bill of rights in December 2021 did not fully respond to the IHRAR's final report (Gross 2022). Select committees criticised the government's failure to take into account calls for pre-legislative scrutiny of the bill and for not responding to the positions of both parliamentarians and civil society respondents (Cherry 2022). The ultimate result of this closed and unresponsive attempt at law-making was that the bill was withdrawn after the resignation (for unrelated reasons) of the Justice Secretary who had been promoting it; the bill appeared to lack sufficient wider support from the government to proceed.

Moreover, in a number of cases, the trend towards a closed process of law-making has undermined the effectiveness of the resulting legislation. A key

function of MPs is to debate, scrutinise, and improve laws; by curtailing their scope to do so, there is a risk that the government's own objectives will be hampered (Economist 2023). While the Lords play a critical role in scrutinising legislation – and this role has taken particular importance in recent years – they do not have the same democratic authority as MPs to force changes to bills. The cost of weaker mechanisms for scrutiny in the Commons is reflected in the quality and usability of the legislation which is passed.

2.1 LEGISLATIVE PLANNING AND CONSULTATION

Legislative planning and consultation occur before a bill is introduced in parliament. While such processes take place to some extent within government, there is also scope for the publication of papers in which the government or an independent body (such as the Law Commission) sets out the aims and proposed content of the legislation which is being considered, sometimes including a list of options, and then invites responses. In some cases, a draft bill is published. Pre-legislative scrutiny of draft bills can play an important part in the process of developing effective law. It allows for the detailed examination by a parliamentary select committee of an early draft of a bill – as well as a public consultation focussing on the draft – before a final version is prepared by government (Cabinet Office 2022).

Our two case studies illustrate the variation in the extent to which major bills are preceded by public announcements and consultation. Neither bill was published in draft. However, the Retained EU Law Act emerged after a fairly lengthy process which began with the 'Benefits of Brexit' white paper (HM Government 2022) and included a public consultation on retained EU law. By contrast, the Illegal Migration Act made sweeping changes to an area that had been covered by legislation only one year before in the Nationality and Borders Act 2022. It was not subject to any public consultation before the bill was introduced, nor did it receive any pre-legislative scrutiny from parliamentary committees. This meant that key stakeholders for affected individuals, such as the children's commissioner, were not consulted (de Souza 2023) and were not able to shape the direction of the legislation at the stage when the government would be most open to suggestions.

The lack of pre-legislative planning for the illegal migration bill was further evidenced by the inclusion of 'placeholder clauses', which the government claimed would be replaced with new substantive content at later parliamentary stages. This betrayed a major deficiency in legislative planning: it prevented parliament from being able to exercise its rightful input into the policy direction of the legislation at the right point. This was only exacerbated by the later replacement of these placeholder clauses with delegated powers that were not presented to parliament when the bill was introduced.

The retained EU law bill, on the other hand, was subject to legislative planning and consultation. Yet its content differed substantially from the government proposals originally made in the white paper. While the government in January 2022 initially proposed accelerated powers to "allow retained EU law to be amended in a more sustainable way", the bill in September 2022 instead proposed a general revocation of all secondary retained EU law, alongside executive powers to preserve or restate retained EU law as 'assimilated law'. The Retained EU Law Act may – unlike the Illegal Migration Act – have involved consultation and engagement with stakeholders early in the law-making process. However, it is less clear that this consultation was meaningful and that it helped to feed into the final shape of the bill.

2.2 THE COMMONS STAGES: EXPEDITED TIMETABLE AND CURTAILED SCRUTINY

All government bills must go through a series of stages before they become law. Each stage of the parliamentary process has a specific purpose (UK Parliament 2024).

- **First reading** simply involves the publication of the bill in the house where it is to be considered (usually the House of Commons first and then the House of Lords, but sometimes this order is reversed).
- **Second reading** provides the opportunity to debate the main principles and themes of the bill.
- During **committee stage**, there is detailed line-by-line examination of the bill and amendments are proposed, either by a committee set up to consider the bill (a 'public bill committee'), or by the whole house ('committee of the whole house').
- During **report stage**, parliamentarians can consider these amendments and suggest their own.
- **Third reading** is the stage at which the house holds its final debate and vote on the bill.
- The process is then **repeated** in the other house, which may make its own amendments.
- If so, the respective houses then engage in consideration of each other's amendments, a process known as **'ping-pong'** in which the House of Lords almost always gives way to the elected chamber when it insists on particular provisions.

In contrast to other Brexit legislation, such as the EU (Future Relationship) Act (Fox 2020), the retained EU law bill underwent a standard parliamentary timetable with nine months from first reading to royal assent. The illegal migration bill, in contrast, had an expedited timetable of ten weeks with report stage and third reading in the Commons on the same day. The Joint Committee on Human Rights launched its inquiry on the bill on 16 March 2023, which allowed for some scrutiny during the Commons stages (Joint Committee on Human Rights 2023). But ultimately the legislation did not give sufficient time for consultation and parliamentary debate.

The government justified its haste in passing the illegal migration bill by reference to its emergency priority to 'stop the boats' crossing the English Channel (Sunak 2023). On the other hand, the retained EU law bill created an artificial emergency by establishing a sunset clause of the end of 2023 for the mass revocation of secondary retained EU law. Ironically, by allowing for sufficient time for parliamentary consideration, the government reduced the time available for ministers to prevent retained EU law from being revoked before the deadline at the end of 2023. This looming deadline contributed to the U-turn in May 2023, when the architecture of the legislation was reversed during the Lords stages of the bill (Badenoch 2023).

A core principle of the rule of law is that "[e]vidence-based impact assessments should be made early" in the law-making process (ODIHR 2024). This should typically happen at first reading. However, the illegal migration bill as introduced was not accompanied by an equality impact assessment, an economic impact assessment, or a child's rights impact assessment.[2] The only assessment published during the Commons stages was the equality impact assessment and this came on the last day of Commons consideration at third reading. Therefore, MPs could not take this information into account during their scrutiny of the general principles at second reading, nor for the detailed line-by-line scrutiny during committee stage

2 These were only published in April, June, and July 2023 respectively.

or the proposal of amendments during report stage. Parliament was side-lined by not being given sufficient information to fully fulfil its law-making role.

During committee stage, the public bill committee for the retained EU law bill received a broad range of public responses from unions, business federations, environmental NGOs, and a wide array of civil society.[3] The written evidence raised broad concerns over the lowering of regulatory standards, the diminution of individual rights, the democratic costs of transferring legislative powers to ministers, divergence between the devolved regions, and negative consequences for the judiciary (UK Parliament 2023). By contrast, the illegal migration bill was scheduled for consideration by a Committee of the Whole House in only two days, without such extensive opportunities for external evidence (White 2023).

While scope for input was made for the retained EU law bill, the government nevertheless did not respond adequately to the concerns expressed – such as over the scope of executive powers – which meant in practice it had limited material impact. In both case studies, the proposed amendments to the bills from parliamentarians ultimately did little to shape the legislation during the Commons stages.

Moreover, the government made substantial amendments to the illegal migration bill at report stage, meaning that the Joint Committee on Human Rights (JCHR) was unable to receive written evidence on these changes for scrutiny during committee stage. Something similar happened with the retained EU law bill: major amendments were made late in the process during the Lords stages, leaving limited opportunities for parliamentarians and stakeholders to input.

2.3 THE LORDS STAGES AND PING-PONG: RESISTANCE TO AMENDMENTS

Unlike the Commons, the House of Lords can avoid the problems of expedited timetables. This is because it is in control of its own procedure for timetabling the first reading, second reading, committee stage, report stage, and third reading (Evennett 2023).

Both case study pieces of legislation attracted sustained criticism in the upper chamber. The House of Lords proposed a number of amendments in each case which led to 'ping pong' with the House of Commons.

The House of Lords made 20 amendments to the illegal migration bill. These would have addressed some of the biggest threats posed to international law by the bill, removed its retrospective effect, and maintained protection for vulnerable groups including children, trafficking victims, and LGBTQI+ people (Gower and McKinney 2023). The government made concessions that included in part removing the retrospective application of the duty of removal, and further protections relating to the detention of unaccompanied children and pregnant women (Donald and Grogan 2023).

The Lords also made amendments to the retained EU law bill. These included the obligation to update the government dashboard of retained EU law and publish a report to parliament every six months until 2026 with a summary of the dashboard data and an outline of future plans (Noakes and Callanan 2023). This was accepted by the government and became section 17 of the act. There were further amendments which were rejected by the government: they included a requirement for a joint committee of both houses to provide scrutiny before any use of the delegated powers in the act (Lisvane et al 2023), and a requirement for a minister to lay before both houses a draft revocation list that

3 98 submissions of written evidence, and 23 expert witnesses during two of the eight sittings of the committee.

would need to have been approved for any retained EU law on the list to be revoked (Chapman 2023).

In a major U-turn, a schedule to the retained EU law bill specifying around 600 pieces of retained EU law to be revoked was introduced at the House of Lords report stage. This softened the bill's impact, given it had previously proposed to automatically sunset several thousand pieces of EU law, unless ministers chose to retain them. The U-turn came very late in the parliamentary process, when the bill was about three-quarters of the way through its normal stages. Report stage in the House of Lords is not the appropriate moment for such a major change to the architecture of a bill, which should be considered at the very start of the legislative process. Moreover, this late introduction risked excluding the House of Commons from scrutinising the change altogether, as without ping-pong the bill would not have returned to the Commons.

This U-turn prevented the risks to legal stability posed by the original version of the bill. But the late introduction of the repeal schedule meant that there was not enough time for parliament or stakeholders to have input on the content of the retained EU law that would be revoked. In fact, the revocations were criticised as superfluous given that many targeted laws which had already expired or were no longer in operation or relevant to the UK (House of Commons European Scrutiny Committee 2023). Only two substantive policy changes with justifications were publicised by the government (HM Government 2023). The use of governmental capacity to identify and revoke these 600 pieces of legislation appears to have been an arbitrary exercise, rather than one guided by a clear policy rationale.

2.4 THE POST-LEGISLATIVE PHASE: THE EXERCISE OF SCRUTINY MECHANISMS

Both case study pieces of legislation establish post-legislative reporting and consultation requirements. The Retained EU Law Act requires the government to publish a parliamentary report on the revocation and reform of retained EU law every six months until 23 June 2026. The Illegal Migration Act obliged the Home Office, within three months of the act coming into force, to begin consultations with local authorities on regulations specifying the maximum number of people who can come to the UK each year via safe and legal routes.[4]

The Illegal Migration Act also created an obligation for the secretary of state to prepare and publish a report on safe and legal routes within six months after the act was passed. The report was published on 11 January 2024, but did not propose any new safe and legal routes to the UK (Home Office 2024).

However, both these reporting mechanisms have their limits. The then chair of the European Union Scrutiny Committee raised concerns about the first retained EU law report, noting that it gave an 'incomplete picture' of relevant policy areas and there was a lack of clarity about the reform process (Cash 2024). The reporting requirements for the Illegal Migration Act, on the other hand, do not relate to the central provisions of the bill – including the duty to remove irregular arrivals – which for the most part have never been commenced.

2.5 SUMMARY

The shortcomings in the law-making process for the Retained EU Law Act and the Illegal Migration Act meant that stakeholders and legislators could not entirely fulfil their roles at the different stages of the parliamentary process. Yet these

4 This consultation has been concluded; the government had originally committed to producing a consultation summary report and draft regulations before the summer recess, but this plan has changed due to the general election and change in government.

shortcomings in deliberation have not been offset by gains in the delivery of the government's policy aims. The Retained EU Law Act led to the revocation of largely superfluous retained EU law after the government's late U-turn on the sunset clause for blanket repeal of secondary retained EU law. On the other hand, the lack of consultation and engagement with stakeholders before and throughout the passage of the Illegal Migration Act saw many of its provisions not being brought into force.

3.
THE GROWING USE OF DELEGATED LEGISLATION

Delegated or secondary legislation is law that is typically made by government ministers through powers granted by acts of parliament. Terms such as 'statutory instrument', 'order in council' or 'regulations' usually refer to delegated legislation, which can take many different forms. Delegated legislation is subject to significantly less scrutiny than acts of parliament, if any – the level of scrutiny is set by the legislation granting the powers (Kelly 2016). Furthermore, it cannot usually be amended and it is very rarely rejected (Judge 2022). Unlike several other comparable liberal democracies, the UK's unwritten constitution places no formal and readily identifiable constraints on the powers that can be delegated to ministers.

Delegated legislation is most often made through the **negative procedure**, where a law is signed by a minister and then laid before parliament. Either house may pass a motion to annul it within a specified period. However, such motions very rarely find sufficient parliamentary support.

On the other hand, some delegated legislation is made by the **affirmative procedure**, in which a draft is laid before parliament for approval by both houses. This allows for more scrutiny – most of the time in the Commons, MPs will debate the legislation for up to 90 minutes in delegated legislation committees before an approval motion is then voted on. In practice, however, instruments laid through the affirmative procedure are rejected only in exceptional circumstances (Marshall 2020).

In a modern democracy, in which regulation can be highly technical and complex, it is reasonable that some areas of law are delegated to ministers. It is simply not feasible for parliamentarians to consider every proposed legislative change in detail. However, concerns about the appropriate use of delegated powers increased in the post-referendum period as the government introduced sweeping provisions in acts of parliament empowering ministers to make delegated legislation in a range of critical policy areas.

Most prominently, ministers made heavy use of delegated legislation in relation to Brexit and the Covid-19 pandemic. (The latter was arguably more justified given the need for urgent action to deal with a public health emergency). The most extreme example of this trend is so-called 'skeleton' bills, which contain little actual content and are largely comprised of various provisions enabling ministers to enact delegated legislation to determine policy (Economist 2023).

This expanding use of delegated legislation is a clear threat to democracy and the rule of law. A core principle of the rule of law is that the process of making legislation should be subject to scrutiny by a democratically elected body (ODIHR 2024). While delegation may be appropriate in some cases, these powers should be constrained. The overuse of delegated legislation risks weakening the power of democratically elected MPs and removing vital safeguards on government action.

There is also a straightforward practical argument for the prudent use of delegated legislation. Parliamentary scrutiny can play a valuable role in improving the

effectiveness of law-making. In the case of delegated legislation, the process of making law is largely the responsibility of ministers and their officials. This means that it does not benefit from the insights of MPs and peers, who in turn are more likely to be engaged with a wider set of civil society stakeholders and members of the public. Such an approach therefore runs a higher risk of errors, omissions, and misjudgements. This could ultimately mean that legislation needs to be amended or reversed in future, wasting time and undercutting the government's overarching policy objectives.

3.1 THE TREND OF "SKELETON LEGISLATION": STATUTORY DUTIES VS DISCRETION

The Retained EU Law Act continued a trend of post-Brexit 'skeleton legislation' (Brown 2021). The original bill was so devoid of substance on the repeal and reform of retained EU law that it was called "hyper-skeletal" by the chair of the Delegated Powers and Regulatory Reform Committee (House of Lords 2023). The mass repeal sunset clause meant that delegated powers would have been the only way to preserve any secondary retained EU law. However, as discussed in the previous chapter, the government U-turned on the sunset clause during the Lords stages and instead included a schedule of just under 600 explicit repeals.

The illegal migration bill, by contrast, had flesh on its bones from the outset. The legislation imposes a clear statutory duty upon the secretary of state to make arrangements for removal of irregular arrivals. However, the act still creates delegated powers providing discretion to ministers over many aspects concerning the execution of this duty. These affect the rights of some of the most vulnerable persons in society and the international obligations of the UK.

3.2 THE SCOPE AND CONSEQUENCES OF THE DELEGATED POWERS IN THE ACTS: DOMESTIC LAW-MAKING AND INTERNATIONAL LAW-BREAKING?

The Retained EU Law Act contains broad law-making powers concerning the modification of retained EU law. These include:

- the power to determine that a piece of retained EU law should not be included in the repeal schedule (section 1)
- the power to reverse the abolition of the supremacy of EU law in relation to specific pieces of retained EU law (section 7)
- the power to revoke any piece of secondary retained EU law and replace it with provisions which the relevant national authority (including ministers and/or devolved governments) considers appropriate and which achieve the same or similar objectives (section 14).

The Illegal Migration Act also creates a wide range of delegated powers on issues including:

- the power to add other exceptions to the duty to remove (section 4);
- the power to amend the list of safe countries to which people can be removed (section 7)
- the power to determine the circumstances and time limits for the detention of unaccompanied children (section 11)
- the power to suspend and revive the disapplication of modern slavery provisions (section 26)
- the power to make provisions about the meaning of 'serious and irreversible harm' (section 40).

Like the Retained EU Law Act, the legislation contains a general Henry VIII clause allowing it to 'make provision consequential on this Act'. This means that ministers

have the power to make amendments to other legislation – including primary legislation – which are necessary to implement the Illegal Migration Act.

To uphold the rule of law, the delegation of law-making power should be possible only in certain explicitly defined circumstances and subject to parliamentary or judicial control (ODIHR 2024). Yet the delegated clauses in both acts create concerns for principles of democratic law-making. The powers over retained EU law are widely formulated without a clear and precise definition of the scope – for example, powers to restate laws 'to any extent' in section 12 and to replace any secondary retained EU law with provisions that the executive 'considers to be appropriate and to achieve the same or similar objective' in section 14. This creates discretion for the government to shape the policy direction on these laws, going beyond what was agreed during EU membership and with minimal parliamentary input.

The government justified these powers on the basis of 'legislative dynamism' – ie making it 'easier' for ministers to amend or repeal the 'large volume' of secondary retained EU law 'without the need for primary legislation', which would take up too much parliamentary time. It was also argued that restatement powers are beneficial for improving clarity, accessibility, and certainty of the law (Cabinet Office 2023). However, the main reason these powers were originally needed to ensure legal certainty was the cliff-edge sunset clause in the bill (that was eventually scrapped). This means parliament could have gradually reformed retained EU law at its leisure – through the normal combination of primary legislation followed by secondary legislation on technical matters – without the need for such exceptionally wide-ranging law-making powers.

In the case of the Illegal Migration Act, there is a power to suspend and revive the disapplication (ie removal) of modern slavery protections. Under the Illegal Migration Act, modern slavery laws do not apply to people subject to the duty to remove for a two-year period, at which point this disapplication is suspended. But the act gives the secretary of state the discretion to override this sunset clause and to either reinstate protections for modern slavery victims early or to extend the disapplication beyond the two-year period (for a maximum of 12 months at a time).[5]

The justification for this approach is that removing modern slavery protections is a 'significant step' and can only be justified under the 'exceptional circumstances' of current small boat crossings. It should therefore last only two years unless the home secretary is "satisfied that the exceptional circumstances continue to apply" (Home Office 2023b). But the legislation leaves the determination of the existence of the emergency to the executive rather than parliament. Regardless of how pressing an emergency may be, parliament should be fully involved in the determination of protections for the most vulnerable in society.

Another important example in the Illegal Migration Act where parliament is at risk of being side-lined is the power for the secretary of state to define the meaning of "serious and irreversible harm", affecting how the courts interpret this phrase. This could be particularly egregious as serious harm suspensive claims are one of the only exceptions from the almost blanket inadmissibility of legal claims in the act. Moreover, this power could also affect legal certainty and the protection of rights.

5 There are also equivalent powers to revive the disapplication of protections if they have been reinstated.

3.3 CONDITIONS IMPOSED UPON DELEGATED CLAUSES: LIMITED OR UNLIMITED EXECUTIVE POWER?

Despite the concerns raised in the previous section, both case studies do place some limits on the delegation of power to the executive.

For instance, in the case of the Retained EU Law Act, there is a power for relevant national authorities (eg a minister or devolved government) to 'restate' retained EU law using different words or concepts. This power allows any restatement to make changes to the law for the following purposes: to resolve ambiguities; to remove doubts or anomalies; or to facilitate improvement in the clarity or accessibility of the law. But the executive still has a good deal of discretion in using this power, because changes only need to be considered 'appropriate' for the purposes listed, rather than meet a stricter standard (such as allowing only changes considered 'necessary' for these purposes).

The Retained EU Law Act also imposes restrictions upon what the powers of revocation and replacement may do, including not imposing taxation or establishing a public authority. For instance, there is an instruction that no provisions can be made unless the relevant executive considers that "the overall effect of the changes… does not increase the regulatory burden" (section 14). While this is on the face of it a constraint on the government's law-making powers, concerns have been raised that it could be instrumentalised to weaken social, environmental, and regulatory standards.

In the case of the Illegal Migration Act, there are also conditions limiting delegated powers – for instance, conditions under section 7 which limit the secretary of state's power to amend the list of safe countries for the purposes of removal, such as having regard to all the circumstances of the country and to information from appropriate sources. However, ministers still have significant discretion to add countries under this provision if they are 'satisfied' that there is in general no serious risk of persecution and removal would not breach the UK's human rights obligations.

Another way in which acts of parliament can limit delegated powers is to establish sunset clauses for their expiry (see ODIHR 2024). For instance, the power to restate retained EU law in the Retained EU Law Act is sunsetted at the end of 2023 under section 11, and the powers to restate assimilated law or reproduce sunsetted rights and to revoke or replace retained EU law are sunsetted on 23 June 2026 under sections 12 and 14. However, the powers to update assimilated law in response to changes in technology or scientific understanding and to remove or reduce burdens are not subject to any sunset, reflecting their longer-term policy remit.

By contrast, the powers in the Illegal Migration Act are not subject to sunset clauses.[6] This is despite claims that the government was responding to a small boat 'emergency'. On this basis, it would arguably have been more appropriate to ensure any new delegated powers were needed for a limited period only, in order to deal with what the government saw as a temporary 'emergency'.

3.4 THE SCRUTINY EXERCISED OVER DELEGATED POWERS AND REGULATIONS ISSUED UNDER THE ACTS

Both case study acts of parliament establish scrutiny mechanisms for delegated legislation. Schedule 5 of the Retained EU Law Act outlines the procedure for making regulations under the Act and the applicable scrutiny mechanisms. Section 65 of the Illegal Migration Act lists the regulations where

6 As noted above, the disapplication of modern slavery protections in the Illegal Migration Act are subject to a sunset mechanism. However, the Act also includes delegated powers which can be used to override the sunset.

the affirmative procedure must be used. This to some extent reflects the government's awareness of concerns raised during and after the passage of both pieces of legislation.

The Delegated Powers and Regulatory Reform Committee recommended during the passage of the illegal migration bill that the affirmative resolution procedure should apply to powers over the detention of unaccompanied children and the power to make exceptions from the removal duty (House of Lords Delegated Powers and Regulatory Reform Committee 2023). The government accepted both of these recommendations, which means that parliament must actively approve regulations on these sensitive subject matters.

However, the government rejected a further recommendation on the power of the secretary of state to issue guidance on when there are 'compelling circumstances' which make it necessary for potential victims of modern slavery to stay in the UK to assist with investigations. The recommendation was that this should be subject to the draft negative procedure, but the government responded that the normal position is that government guidance should not be subject to parliamentary scrutiny (ibid).

Under the Retained EU Law Act, the Secondary Legislation Scrutiny Committee and the European Statutory Instruments Committee have a 'sifting' function when regulations are proposed under the negative resolution procedure. They exercised this function to recommend that the scrutiny of regulations on fundamental rights and freedoms in data protection should be upgraded to the affirmative procedure.[7] In making the recommendation, the European Statutory Instruments Committee argued that without further analysis it was unclear whether or not the regulations could lead to an erosion of rights (House of Commons European Statutory Instruments Committee 2023). The minister accepted this recommendation, demonstrating that the post-legislative scrutiny functions for Parliament can work effectively.

The fears that the widely drawn delegated law-making powers in the Retained EU Law Act may be used for extensive policy change have not yet been borne out – 20 sets of regulations were issued using the delegated powers in the Act up to the end of 2023 and only 10 provided for substantive divergence (DBT 2024). In fact, the regulatory changes have been criticised in some quarters for not moving fast enough (Cash 2024). This may be seen as encouraging for democratic law-making as the executive has not abused the powers to go beyond technical changes to retained EU law. Instead, primary legislation such as the Financial Services and Markets Act 2023 has been used for such major reform.

One issue where delegated legislation has been important relates to directly effective EU rights. These were EU-derived rights (including rights from EU treaties) which individuals could rely on in the UK courts. Directly effective EU rights are repealed under section 2 of the Retained EU Law Act. This created a need to act in order to preserve the operation of certain directly effective rights – nine of the regulations issued up to the end of 2023 were intended to preserve retained EU law, including seven arising from the decision to sunset the operation of directly effective rights (DBT 2024). Of course, this would not have been necessary had the decision to engage in blanket repeal of directly effective rights been reversed, as with the general sunset of all secondary retained EU law. There is a danger that unknown yet important directly effective rights were accidentally revoked at the end of 2023 without being preserved.

7 The Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023 proposed to change the reference point from EU law, with its specific right to data protection in Article 8 of the EU Charter of Fundamental Rights, to the European Convention of Human Rights, in which data protection is only covered by the general right to private life in Article 8.

3.5 SUMMARY

Delegated legislation is compatible with principles of good law-making when it is limited to specific technical issues. By contrast, the Retained EU Law Act creates wide law-making powers for the executive allowing them to determine policy with minimal parliamentary involvement. The government created an artificial emergency through its sunset date for the repeal of all secondary retained EU law, thereby helping to justify these wide-ranging powers; however, even when this emergency was reversed through the U-turn on blanket repeal, the powers remained.

The Illegal Migration Act, on the other hand, was passed in response to a perceived 'emergency' of people arriving in small boats. Its powers provide discretion to the executive over the rights of vulnerable persons including victims of modern slavery. Many of these powers are not sunsetted for a date after which the apparent 'emergency' has been resolved (or where there is a sunset mechanism this can be easily extended). The danger is a drip effect in which delegation of policymaking to the executive after legislation is passed becomes the new normal in UK law-making.

4. PRESSURES ON THE DEVOLUTION SETTLEMENT

Devolution is a fundamental part of the UK constitution. Since the late 1990s, a wide range of legislative powers have been transferred to devolved parliamentary bodies in Wales, Scotland, and Northern Ireland.[8] While devolution does not formally prevent the UK parliament from legislating in areas of devolved competence, under the Sewel convention it normally does so only with the consent of the devolved parliaments.

The normal process is as follows. Where a devolved administration believes that a UK bill's provisions affect a devolved area of competence or alter the competence of a devolved legislature or executive, it submits a 'legislative consent memorandum' to the legislature. A designated committee then scrutinises the memorandum and takes a view on whether to give consent or not. Typically, the government then tables a legislative consent motion for the legislature to vote on (Cowie 2018).

The devolution settlement has been under greater pressure in the years following Brexit. Traditionally, the devolved legislatures have rarely withheld their consent for bills on the basis that any concerns tend to be managed between governments in advance. However, in the years following the vote to leave the EU, there were more disputes over UK legislation which impact devolved competences (Paun et al 2024). The Scottish and Welsh legislatures withheld their consent to 13 and 14 acts of parliament respectively in the last parliament, compared to a total of two and six acts respectively in all the preceding parliaments from 1997 to 2019 put together (ibid)..[9] Northern Ireland faced its own particular challenge, with fractures over the Northern Ireland protocol (now known as the Windsor Framework) in the EU-UK Withdrawal Agreement seeing the assembly and executive being suspended for much of the last five years.

These new pressures on the devolution settlement pose significant risks to the democratic process. The Sewel convention is critical for upholding the credibility and capability of the devolved administrations and ensuring that they are not subject to arbitrary interference in devolved competences by the UK parliament. The practice of legislating in contravention of the Sewel convention undermines not only the rule of law principle that all relevant stakeholders should be heard in the law-making process, but also may threaten the principle that the creation of legislation should cohere with constitutional requirements (ODIHR 2024).[10]

Protecting the devolution settlement is also vital for effective law-making: close and collaborative relations between the different parliaments help to ensure that their legislation is consistent and coherent. It also means that UK legislation and

8 Respectively, the Welsh parliament (or the Senedd Cymru), the Scottish parliament, and the Northern Ireland assembly.

9 Most prominently, the Scottish and Welsh parliaments refused to give their consent to the Internal Market Act 2020 on the grounds that it restricted their devolved powers by imposing 'market access' principles to facilitate the free flow of goods and services around the UK.

10 The status of unwritten constitutional conventions as flexible and less rigid than rules found in written constitutions means that the conclusion that such a practice is illegal or unconstitutional may not be as obvious as for other constitutional systems.

policy are better placed to take into account the needs and circumstances of the devolved nations.

4.1 SCOTLAND: WITHHOLDING LEGISLATIVE CONSENT AMID VOCAL CRITIQUE

The Retained EU Law Act and the Illegal Migration Act differ in their relationship to devolution. Nationality, immigration, and asylum are matters that are reserved for the Westminster parliament (DLUHC et al 2020). Nevertheless, devolved ministers have asserted to the UK government that migration could still affect devolved competences (Scottish Minister for Culture et al 2022).

By contrast, retained EU law concerned all areas of the legal system affected by EU membership, including devolved competences. During the Brexit debate, there were particular tensions between the UK and devolved governments over areas of retained EU law which intersected with devolved competences – including claims that the UK government was engaged in a 'power grab' by placing blockages on the flow of former EU powers to the devolved legislatures in areas where they in principle had responsibility under the devolution settlement.

In the case of the Retained EU Law Act, the Scottish government decided that a legislative consent memorandum was necessary.[11] The Scottish parliament's concerns over the implications of the bill, including its deregulatory agenda, led them to withhold legislative consent on 23 February 2023 (McGill 2023a) and again on 8 June 2023 (McGill 2023b 2022). After the U-turn on the bill's mass revocation, the Scottish government lodged a supplementary legislative consent memorandum in May 2023 which criticised the UK government for not giving it advance notice of the schedule of retained EU law to be revoked and not enough time to properly review it. Nevertheless, the Scottish government still found nine instruments in the schedule which it argued should not be included in the sunset list – these concerns were not taken on board by Westminster before the act came into force (Scottish Government's Cabinet Secretary for the Constitution, External Affairs and Culture 2023).

The Retained EU Law Act came into force despite the Scottish parliament's withholding of legislative consent. The Scottish government further stated that it opposed the act after it came into force, arguing that it "puts vital protections at risk, threatens to undermine the devolution settlement, and was imposed without the legislative consent of the Scottish parliament" (Scottish Government 2024).

The Illegal Migration Act, by contrast, is largely about areas of reserved competence, though the legislation has some limited overlap with devolved areas – in particular, the Scottish government highlighted that it contains provisions restricting the powers of devolved ministers in relation to human trafficking victims. However, the Scottish parliament's presiding officer did not regard this as being sufficient to fulfil the test needed to lodge a legislative consent memorandum following a debate in the Scottish parliament on 27 June 2023 (Scottish Parliament 2023).

4.2 WALES: A MORE EXPANSIVE APPROACH TO DEVOLVED COMPETENCE?

In contrast to Scotland, the Welsh Senedd and government decided that both of our case study acts qualified for legislative consent memorandums.

11 Defined as: "chang[ing] the law on a 'devolved matter' (an area of policy which the UK Parliament devolved to the Scottish parliament in the Scotland Act 1998); or altering the 'legislative competence' of the Scottish parliament (its powers to make laws) or the 'executive competence' of Scottish ministers (their powers to govern)".

For the illegal migration bill, the Welsh government laid the legislative consent memorandum before the Senedd on 31 March 2023, in relation to the transfer and accommodation of unaccompanied children in Wales (Welsh Minister for Social Justice 2023). The Welsh government justified this on the basis that the clauses related to decisions on social care, which is a Welsh competence (ibid). The Welsh government issued a further legislative consent memorandum on 26 May 2023 in relation to amended and new clauses of the bill on removals of unaccompanied children and age assessments (see Welsh Parliament Equality and Social Justice Committee 2023).

For the retained EU law bill, the Welsh government laid a legislative consent memorandum on 3 November 2022 before the Senedd on the basis that it modified the legislative competence of the Senedd and the executive competence of Welsh ministers (Welsh Counsel General and Minister for the Constitution 2022).

The Senedd withheld consent for both bills. The Welsh minister for the constitution suggested that the powers in the retained EU law bill, even those given to devolved authorities, should not be given to any government, but that Wales would have to exercise them in order to maintain standards (see Welsh Parliament Legislation, Justice and Constitution Committee 2023). He also raised concerns that the condition not to impose regulatory burdens in section 15 of the act could see a fall in standards (ibid). The memorandum further indicated that the Welsh government may not have been sufficiently engaged as a relevant stakeholder in pre-legislative discussions by Whitehall (ibid).

On the illegal migration bill, the Welsh government recommended the Senedd withhold consent, arguing that the bill's provisions affecting Welsh social care did 'not recognise the devolved context' and risked compromising Welsh policy and the assembly's legislative competence on looked after children (Welsh Minister for Social Justice 2023). The reasons given also covered concerns about the bill going beyond those directly relevant to devolved competences – they spoke to concerns about compatibility with the European Convention on Human Rights, as discussed further in the next chapter.

4.3: NORTHERN IRELAND: ABSENCE OF THE ASSEMBLY AND THE EXECUTIVE

Unlike Scotland and Wales, the Northern Ireland assembly and executive were not operational from May 2022 to February 2024.[12] The assembly was therefore unable to give its legislative consent to either the retained EU law bill or the illegal migration bill. Instead, during the passage and the implementation of these pieces of legislation, authorities in Northern Ireland engaged through civil servants, litigation, and the role of quasi-governmental monitoring authorities. Expert evidence provided to the Public Bill Committee for the retained EU law bill indicates that, despite the absence of the assembly and the executive, devolved departments and civil servants were still preparing for the effects of the legislation by identifying retained EU law (HC Deb 8 November 2022).

The role of the Northern Ireland Human Rights Commission (NIHRC), established by the Belfast (Good Friday) Agreement, has been particularly impactful. The NIHRC made a submission to the House of Lords in May 2023 stating that it was "gravely concerned that the current draft of the [illegal migration] bill will add to the significant regression of human rights protection to refugees, people seeking asylum and migrants" (NIHRC 2023).

12 The power-sharing arrangements under the Northern Ireland Act 1998 fell apart after the Democratic Unionist Party refused to nominate a speaker of the assembly in protest against the Northern Ireland protocol (now the 'Windsor Framework') after the 8 May 2022 election.

The NIHRC went on to challenge the legality of the Act before the Northern Ireland high court (Wilkins 2023). On 13 May 2024 the first court judgment concerning the Illegal Migration Act was delivered (in re NIHRC and JR 295 (Illegal Migration Act 2023), hereafter 're NIHRC'). The Northern Ireland court disapplied several provisions of the Illegal Migration Act because of their diminution of rights guaranteed by the Good Friday Agreement, which are in turn protected by the Windsor Framework.[13] The court also issued a declaration of incompatibility under the Human Rights Act 1998 for violation of ECHR rights.

This judgment, if not overturned on appeal, means that the core provisions of the legislation will not have effect in Northern Ireland regardless of whether they have been commenced or not, and so the Act risks the fragmentation of asylum rules between one devolved jurisdiction and the rest of the UK. The deficiencies in the law-making process therefore undermined the government's objective of establishing a new system for responding to irregular migration for the whole of the UK.

4.4 SUMMARY

The devolution settlement adds a significant dimension to democratic law-making in the UK. This means the law-making process needs not only to carefully consider the devolved nations as key stakeholders, but also – where relevant – under the current settlement it should do so with their consent. Yet the Retained EU Law Act and the Illegal Migration Act are examples of the worrying trend of the Westminster Parliament legislating despite consent being withheld, undermining the Sewel convention. If this trend were to continue, it would pose a risk of a growing breakdown in the UK constitutional settlement.

13 Section 7A of the European Union (Withdrawal) Act 2018 requires the court to disapply provisions that are inconsistent with the withdrawal agreement.

5. THE FAILURE TO GIVE DUE REGARD TO INTERNATIONAL LAW

International law concerns a range of issues which extend beyond state boundaries and which are considered of international significance – covering topics such as human rights, migration, trade, security, and climate action (House of Commons 2020). The international obligations that we discuss in this chapter are all underpinned by treaties which states voluntarily enter into with each other.[14] These can be the product of decades of careful consideration and negotiation, in many cases with the UK playing a critical part (see Frantziou 2013).

The principle of parliamentary sovereignty and the UK's dualist system mean that parliament can make domestic law as it wishes, even if in conflict with international treaties to which the UK has subscribed (see Lloyd-Jones 2018, Mance 2017). Domestic law cannot, however, exempt the UK from its international obligations or rectify a breach of them.

There is both a principled and practical case for adhering to international law. As a foundational principle, the rule of law generally requires international obligations to be upheld (Bingham 2010). Observance of international human rights is particularly important, as this underpins a well-functioning democracy (ODIHR 2024). Moreover, from a practical perspective, disregarding international law obligations risks damaging the UK's standing on the world stage and makes it harder to work effectively with international partners on issues of joint interest (Mandel 2020).

In the years following the vote to leave the EU – and in particular in the 2019–24 parliament – there were a number of high-profile cases of the government introducing legislation which was in tension with or indeed directly in breach of the UK's international obligations. As noted in the introduction, former Northern Ireland secretary Brandon Lewis infamously described certain provisions of the internal market bill – allowing ministers to disapply parts of what was then the Northern Ireland protocol – as breaching international law "in a very specific and limited way" (HC Deb 8 September 2020). The Northern Ireland protocol bill attempted to do something similar, but with a purported justification in international law, in the form of article 16 of what is now the Windsor Framework,[15] which was roundly criticised by commentators and parliamentarians (see for example Elliott 2022, Melo Araujo 2022).

There are multiple other examples from recent years. The provision of an effective domestic remedy for interferences with rights (article 13 ECHR) was put at risk by the Bill of Rights bill 2022 (JCHR 2023). Concerns have been raised that protestors'

14 International law also contains obligations deriving from other sources, such as customary international law, which are important but are not discussed here, although if the UK were to withdraw from any of the treaties we mention, some of the same obligations may remain in place as customary obligations.

15 Article 16 allows either party to unilaterally take appropriate safeguard measures where there are serious economic, societal or environmental difficulties. These measures must be limited in scope and duration to what is strictly necessary in order to remedy the situation.

ECHR rights are undermined by the Police, Crime, Sentencing and Courts Act 2022 and the Public Order Act 2023. And successive acts of parliament aiming to stop people arriving in small boats from seeking asylum in the UK have come into conflict with both the Refugee Convention and the ECHR, as well as other international agreements such as the Convention on Action against Trafficking in Human Beings.

5.1 THREATS TO EU-UK OBLIGATIONS

In different ways, both case studies have implications for the UK's obligations under its agreements with the EU.

The Illegal Migration Act has come into conflict with the Windsor Framework, which governs the post-Brexit arrangements for Northern Ireland (and which updated the Northern Ireland protocol). The main effects of the Illegal Migration Act were disapplied in Northern Ireland by a judgment of the Belfast high court on 13 May 2024 (Re NIHRC). The court found that key sections of the Act led to the diminution of certain rights which are safeguarded in Northern Ireland through article 2 of the Windsor Framework.

The Retained EU Law Act also raises questions about the UK's respect for the obligations in its recent agreements with the EU, including the Withdrawal Agreement, the accompanying Windsor Framework, and the Trade and Cooperation Agreement (House of Lords Select Committee on the Constitution 2023a).

The Windsor Framework requires certain provisions of EU law to remain in force and for rights protections not to be diminished in Northern Ireland (article 2 of the Windsor Framework). These provisions are given continued domestic legal validity as 'relevant separation agreement law', which is distinct from, and has supremacy over, 'assimilated EU law' (see Williams 2020). As explained earlier, the Retained EU Law Act gives the government wide powers to revoke and amend assimilated EU law. Although revoking assimilated EU law does not repeal 'relevant separation agreement law', it does not seem that parliament considered whether revoking these laws might have an effect on how this law operates and the implications for the Windsor Framework. This reflects a carelessness towards the UK's international obligations resulting from Brexit.

The Retained EU Law Act also poses potential threats to the Trade and Cooperation Agreement (TCA). Under the TCA, the UK agreed to maintain a 'level playing field' with the EU on certain standards (including subsidies, competition policy and labour and environmental protections) (Trade and Cooperation Agreement 2021).

The obligations of the TCA are incorporated into the domestic legal order in a manner analogous to 'relevant separation agreement law' (see Williams 2021). However, given how broadly the 'level playing field' is defined in the TCA, it is not clear how it applies to domestic law. Under the European Union (Future Relationship) Act 2020 (EUFRA), existing domestic law has effect with such modifications that are required for the purposes of implementing the relevant obligations under the TCA.[16] But this only relates to domestic law existing at the time of the TCA coming into effect (Williams 2021). The Retained EU Law Act came after this so it is possible that EUFRA does not protect against potential changes to assimilated EU law that would undermine the UK's commitments to the EU. This is particularly concerning given that revoking assimilated EU law could directly undermine the 'level playing field' with the EU – for example, through weakening EU-derived labour or environmental protections.

16 This only applies where provisions of the TCA are "not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement".

The Retained EU Law Act does not require its powers to be used in a way which is consistent with the 'level playing field' in the TCA, leaving open the possibility that they will be used to breach the UK's obligations. In fact, the act further leaves open this possibility by requiring that the powers cannot be used to impose any new regulatory burdens – in effect creating a presumption in favour of deregulation (sections 14(5) and 16). This means that, at the domestic level, there is no legal obligation to maintain these laws in force in order to comply with the 'level playing field'.

5.2 THREATS TO OBLIGATIONS CONCERNING REFUGEES, HUMAN TRAFFICKING, AND CHILDREN

There are wide-ranging concerns over the implications of the Illegal Migration Act for the UK's obligations concerning refugees, victims of human trafficking, and the rights of children. The Illegal Migration Act endangers compliance with two major principles of the Refugee Convention: non-refoulement and non-penalisation.

The principle of non-refoulement guarantees that no one, regardless of their migration status, is returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment, or other irreparable harm (OHCHR 2018).[17] Under the removal duty, if a person is a national of, or has obtained a passport from an EEA country, Albania, Switzerland, India or Georgia, they may be removed to that country – unless they can argue they are covered by a very narrow exception that applies where they make a protection or human rights claim and the secretary of state considers there are exceptional circumstances that prevent their removal.[18] The narrowness of the exception will likely prevent consideration of persons' individual circumstances as required by the Convention.

A person who is not a national of one of these countries and who raises a protection or human rights claim cannot be removed to their home country (a country of which they are a national or from where they have a passport or other identity document) but can be sent to a safe third country (referring to either a country from where they embarked for the UK or where there is reason to believe they will be admitted). This country must be on a list of 'safe countries' in schedule 1 of the act. This list includes Rwanda – as well as India, Mongolia, Kosovo and Mauritius, which are not signatories to the Refugee Convention.

The act could see individuals removed to a country that is generally safe but not safe for them due to their individual circumstances. Asylum and human rights claims by people arriving irregularly are deemed automatically inadmissible: the lack of any individual safeguards and substantive assessment of claims for those liable to removal risks breaching the principle of non-refoulement (JCHR 2023).[19] In fact, the Northern Ireland high court found that the provisions led to a diminution of the right of non-refoulement found in the Refugee Convention, which EU member states – and Northern Ireland via the Windsor Framework – are bound to respect through the EU Qualifications Directive (Re NIHRC). It also found that removals without asylum cases being individually determined led to diminution in the rights found in the EU Asylum Procedures Directive (ibid).

17 The obligation to protect asylum seekers from refoulement was accepted by the UK as part of the United Nations 1951 Convention relating to the Status of Refugees and its 1967 protocol ("Refugee Convention"). The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (UNCAT) and the United Nations International Covenant on the Civil and Political Rights of 1966 (ICCPR) also contain relevant obligations.

18 This includes where the country is derogating (if a signatory) from its ECHR obligations or (if an EU member state) where it is subject to an 'article 7 of the Treaty on European Union' procedure and it is determined there is a clear risk that it is seriously breaching the EU's values.

19 The principle of non-refoulement applies to removals to third countries that may not be safe as well as countries of origin.

The act also undermines the non-penalisation principle (article 31 of the Refugee Convention), which says that states must not impose penalties on refugees on account of their illegal entry or presence after coming directly from a territory where their life or freedom was threatened. The Illegal Migration Act takes a literal interpretation of the phrase 'coming directly', excluding from it any person who passed through or stopped in another country outside the UK where their life and liberty were not threatened. However, as the Joint Committee on Human Rights noted, the government interpretation is inconsistent with the position of the UN Refugee Agency (UNHCR) and the current precedent of domestic courts. In 1999 in the case of R (Adimi and others) the Divisional Court held that, "any merely short-term stopover en route to such intended sanctuary cannot forfeit the protection of the article". The majority of the House of Lords followed this in R v Asfaw in 2008. The government has therefore taken an exceptionalist approach to its interpretation of international refugee law.

The Illegal Migration Act also risks infringing the UK's obligations to protect vulnerable victims of trafficking. It does this by disapplying modern slavery protections for those who are subject to the removal duty and a positive reasonable grounds decision.[20] These modern slavery protections give effect to the European Convention Against Trafficking (ECAT). The combination of the disapplication and the removal duty would likely infringe the UK's obligation under article 10(2) of ECAT to adopt necessary measures to identify victims and to ensure that people who receive a positive reasonable grounds decision will not be removed until the identification process has been completed (JCHR 2023).

The act may also breach the UK's obligation under ECAT to conduct individual assessments concerning certain factors, particularly safety, before any victim is returned to their home country (article 16 ECAT). The removal duty in the act may also prevent victims from disclosing what has been done to them, as it provides only a limited exception for those cooperating with investigations and does not accord victims the full benefit of a 30 day recovery and reflection period as envisaged by ECAT. This makes it difficult to gather evidence and prove an offence, potentially breaching the UK's obligation under article 27 of ECAT to investigate and prosecute the perpetrators of human trafficking (MSHRPEC 2023). The act also disapplies the pre-existing duty on the secretary of state to grant limited leave to remain to confirmed victims of trafficking in certain circumstances, risking a breach of the obligation to issue residence permits to victims in certain circumstances under article 14 of ECAT (JCHR 2023).

The concerns that the act may breach ECAT were borne out in the reasoning of the Northern Ireland high court in its 13 May 2024 judgment. It found a diminution of rights, because the disapplication in certain cases of the duty to provide assistance and support breaches the EU Trafficking Directive (which was intended to give effect to ECAT at the EU level) (Re NIHRC).

The Illegal Migration Act provides a power (although not a duty) to the secretary of state to make arrangements for the removal of unaccompanied children. If used to remove unaccompanied children, it risks breaching articles 3 and 22 of the UN Convention on the Rights of the Child (UNCRC) (JCHR 2023). It further undermines compliance with the UNCRC by eroding legal safeguards, such as by blocking routes to challenge age assessments where children have mistakenly been found to be over 18 (House of Lords Select Committee on the Constitution 2023b, JCHR 2023).

The high court in Northern Ireland found a diminution of rights for children. The duty to remove applies to all accompanied children by default, counter to the

20 This is a decision made that "there are reasonable grounds to believe that the person is a victim of slavery or human trafficking".

obligation in the EU Qualification Directive to take into account the best interests of the child as a primary consideration (Re NIHRC). Similarly, for unaccompanied children, the court found a diminution in the right under the EU Dublin III Regulation to an in-country assessment, where again the best interests of the child are required to be a primary consideration, in line with the UNCRC (ibid).

5.3 THREATS TO GENERAL HUMAN RIGHTS OBLIGATIONS

The Illegal Migration Act poses serious threats to the UK's compliance with the ECHR (JCHR 2023). It seeks to make legal claims relying on the ECHR generally inadmissible. The then home secretary Suella Braverman declared that she was unable to make a statement under section 19 of the Human Rights Act that the provisions of the bill were compatible with Convention rights. The Northern Ireland high court judgment of 13 May 2024 saw the risk materialise with the issuing of a declaration of incompatibility under section 4 of the Human Rights Act 1998, stating that various provisions in the act breached ECHR obligations (Re NIHRC).[21]

Under the act, there are only two limited ways in which people subject to a removal notice can bring a 'suspensive claim' (ie a legal challenge against a removal decision which, while ongoing, suspends their removal from the UK). Individuals can bring a suspensive claim within eight days of being served notice, either because they would be at risk of 'serious and irreversible harm' or on the basis that they do not meet the factual conditions for the duty to remove to apply (for instance, they did not come to the UK irregularly). Commentators have pointed out that by limiting the domestic courts' jurisdiction in this way, the UK could be placed in breach of numerous international obligations under the ECHR (JCHR 2023). The Northern Ireland high court found that the strict limits on suspensive claims meant that they are not sufficient to prevent breaches of the article 3 ECHR right against torture, inhuman or degrading punishment that could result from removals under the act.

The Illegal Migration Act's creation of a power to detain a person if they are subject to the duty to remove (or the officer suspects they are) also jeopardises the UK's obligations under article 5 ECHR (right to liberty) (JCHR 2023). People may be detained under this power "for such period as, in the opinion of the secretary of state, is reasonably necessary to enable the examination or removal to be carried out" (section 12(1)(b)). Under the act, detainees will be deprived of the ability to apply for immigration bail or judicial review for a period of 28 days (section 13). The only exceptions to this are if the decision maker "has acted in bad faith or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice".

The right to a writ of habeas corpus[22] – a means of protecting against unlawful imprisonment – is not affected by the Illegal Migration Act. A writ of habeas corpus can be obtained when "someone is detained without any authority, or the purported authority is beyond the powers of the person authorising the detention and so is unlawful" (R v Secretary of State for the Home Department, ex parte Cheblak). But as the act is drafted to include broad powers of detention, it will be hard to meet this condition in practice (House of Lords Select Committee on the Constitution 2023b).

21 The court explained at paragraph 176 that the declaration "is a discretionary remedy which… [is] often regarded as 'a measure of last resort'". The declaration, unlike the disapplication under the EU (Withdrawal) Act 2018, applies at the level of UK law as a whole, although it does nothing to affect the validity or effect of the relevant provisions.

22 Or, in Scotland, an application for suspension and liberation.

5.4 THREATS TO THE AUTHORITY OF INTERNATIONAL COURTS

The Illegal Migration Act also interferes with the UK's compliance with interim measures of the European Court of Human Rights (ECtHR). Interim measures are emergency orders issued by the ECtHR where there is "imminent risk of irreparable damage". Where an interim measure is issued relating to an intended removal under the Illegal Migration Act, the minister has discretion under the act to decide whether the removal duty still applies (section 55(2)). If the minister decides that the duty still applies, then the courts must not pay regard to the interim measure. This provision was drafted in reaction to an interim measure which prevented the first flight to Rwanda from taking off in June 2022 (ECHR 2022).

This power, depending on how it is used, may undermine the authority of the ECtHR and risk breaching the UK's obligation under article 34 ECHR to not hinder in any way the right of individuals to apply to the Strasbourg court. It may also contribute to legal uncertainty by making the implementation of interim measures dependent upon government discretion.

Finally, the act also interferes with the UK's domestic architecture for implementing and adjudicating upon Convention rights. It is the first act of parliament to specifically disapply section 3 of the Human Rights Act, which requires the courts to interpret legislation as far as possible as being compatible with the ECHR. A joint briefing by multiple civil society organisations argued that "[s]uspending a key element of the... human rights protection system for... [an] unpopular minority is an attack on the basic principle of equality before the law" (Liberty et al 2023). The House of Lords Constitution Committee noted that "[i]t is difficult to predict how [this] will be interpreted by the courts" (House of Lords Select Committee on the Constitution 2023b). Were it to be implemented, the disapplication may lead to more direct claims by individuals to the ECHR for the violation of Convention rights.

5.5 SUMMARY

The UK has a strong historic reputation for contributing to and respecting international law (Allott 2023, Grieve 2013). Those in government have typically been sensitive to this and acted accordingly (Knatchbull 2023). However, in the years following the EU referendum ministers showed a willingness to introduce legislation that was openly, obviously, or extremely likely to be in breach of international law. The Retained EU Law Act and the Illegal Migration Act demonstrate how a wider culture of indifference to international law set in. The end result was a situation where ministers were given powers to flout international law and the government adopted heterodox interpretations of fundamental international obligations, including on the protection of human rights.

6. CONCLUSION AND POLICY IMPLICATIONS

This report has reflected on some of the key problems for the law-making process in the last parliament. It has focussed on the passage of two flagship acts of parliament: the Retained EU Law (Revocation and Reform) Act 2023 and the Illegal Migration Act 2023. We have argued that the manner in which the two bills were introduced and then put onto the statute book fell far short of best practice in democratic law-making.

This approach to law-making sought to privilege delivery over deliberation in parliament – but ultimately sacrificed both. An insufficient attention to deliberation resulted in legislation which undermined some of the key tenets of the rule of law, including posing serious threats to international and human rights law. Moreover, in a number of cases legislation also proved to be of limited effectiveness, with key provisions not being well designed to achieve their objectives and the government declining to bring some parts into effect.

Our critique of the law-making process has identified four areas of democratic depletion.

1. Law-making in parliament became increasingly closed and unaccountable.
2. The government concentrated its power through the excessive use of delegated legislation.
3. Laws were routinely passed in areas of devolved competence despite legislative consent being withheld by the devolved legislatures.
4. A series of government bills failed to give due regard to the UK's international law obligations.

The new parliament provides a fresh start to learn the lessons from recent trends. There is now an opportunity for a radically improved way to conduct law-making, which would help to support a more reflective, inclusive democracy and deliver effective, long-lasting laws that effect real change to the country. In this concluding chapter, we point to four shifts that would begin to address the four dimensions of democratic depletion examined in the report.

First, **the law-making process should be open and inclusive**. The new parliament offers the opportunity for government ministers – in particular the leader of the Commons – to embed a different culture based on respect for the rule of law and for the principles of democracy and transparency. In practice, this means that bills should be timetabled to allow for an appropriate period for meaningful public consultation and parliamentary scrutiny. Important legislative proposals should be published as draft bills. They should undergo public consultation and pre-legislative scrutiny by parliamentary select committees, with which the government should engage in good faith. Impact assessments should be published in a timely fashion ahead of key debates and votes. And public bill committees should be given enough time to consider the available evidence and engage with a range of stakeholders, including those directly affected by the legislation being proposed.

Second, **the use of delegated legislation should be carefully circumscribed and scrutinised**. In general, delegated legislation should only be used for technical matters in a limited manner that is subject to oversight; where significant change is proposed, this should be set out in bills, which parliament can debate and amend before they become primary legislation. By the same token, the use of 'skeleton' bills which give undefined and wide-ranging delegated powers to ministers, often without sunset clauses, should end. Where delegated legislation continues to be used, it should be subject to proper parliamentary scrutiny.

Of course, working out which content should be set out in primary or delegated legislation is likely to be a complex matter of dispute; for this reason, we recommend that serious consideration is given to the Hansard Society's idea of a 'concordat' between government and parliament. This would include a set of criteria on the use of delegated legislation, in order to draw a clearer line between primary and secondary legislation (Hansard Society 2023).[23]

Third, the **legislative process in Westminster should respect the core principles of the devolution settlement**. In particular, the Sewel Convention – under which the UK parliament should not in general legislate in areas of devolved competence without the devolved legislatures' consent – should be upheld and strengthened. Legislation which could touch on areas of devolved competence should be discussed with the relevant devolved bodies at an early stage to seek to avoid potential conflicts. The government's proposed Council of the Nations and Regions could be a forum for such deliberation. The Institute for Government has also suggested the idea of a 'devolution statement' at the point of laying a new bill, setting out the government's view on whether the bill affects areas of devolved competence, whether it is expected to secure legislative consent, and how it seeks to settle any disagreements with the devolved legislatures (Paun and Shuttleworth 2020). This proposal too should be considered as a route to improving the way in which Westminster law-making respects the devolution settlement.

Fourth, **domestic law-making should uphold the UK's obligations under international law**. The government should make a clear commitment not to support any provision of a bill which places the UK in demonstrable breach of its international law commitments. This would enshrine statements made in favour of consistent international law compliance by the new foreign secretary while in opposition (Lammy 2023). Sufficient time should be given for the Joint Committee on Human Rights to comprehensively scrutinise bills which may have implications for the UK's international human rights obligations. Future consideration could be given to proposals that would impose greater obligations upon ministers to confirm compliance with international law when bringing forward legislation.

These changes, however, will not come about on their own. To deliver them meaningfully and sustainably, **the newly proposed Modernisation Committee could be tasked with developing reforms to improve the law-making process**. This could include developing a memorandum of understanding with the government on clear criteria for the use of delegated legislation, in line with the above recommendation, as well as proposals on improving pre-legislative scrutiny, upholding the Sewel convention, and ensuring government bills are compatible with international law.

The experiences of the Modernisation Committee could inform more ambitious proposals in the future for how select committees function, including new powers to more effectively examine legislation and question witnesses. This could include consideration of whether there is scope for an existing or new committee – for

23 A similar proposal for a 'memorandum of understanding' between government and parliament has been made recently by the UK Governance Project (UK Governance Project 2024).

instance, a joint committee with members of the Commons and the Lords, similar to the Joint Committee on Human Rights – to examine the rule of law implications of new government bills.[24]

Finally, the Modernisation Committee could explore under what conditions it might be appropriate for parliament to engage with the wider public on areas of legislation – for instance, through citizens' juries or other forms of deliberative decision-making – in order to help inform how parliamentarians consider new bills. Such a proposal would require detailed work by the committee to design and operationalise in practice. But in principle, it could be an important part of opening up the democratic process to the wider public, giving more people outside of parliament a chance to actively contribute in a different way to the legislative process.

In our next report, we will build on these initial proposals to set out a forward-looking agenda for democratising law-making in the new parliament. Learning the lessons from recent years, we will aim to put forward reforms to improve parliamentary scrutiny and accountability, ensure checks and balances on executive power, integrate forms of participatory democracy into law-making, and increase the influence of disempowered communities in the legislative process. This agenda will be based on the principle that delivery and deliberation go together – and that a more reflective, accountable and inclusive law-making process will ultimately help improve the quality and the sustainability of the legislation that enters into the statute book.

24 The Institute for Government and the Bennett Institute for Public Policy proposed a similar idea of a Parliamentary Committee on the Constitution in their recent review of the UK constitution (Sargeant et al 2023).

REFERENCES

All Party Parliamentary Group on the Rule of Law (2023) 'The Retained EU Law (Revocation and Reform) Bill and the Rule of Law – meeting report', 21 February 2023. https://binghamcentre.biicl.org/documents/2136_meeting_report_appg_rule_of_law_meeting_on_reul_bill_21_february_2023_28.pdf.

Allott P (2023) 'Britain and the Future of International Law', *British Yearbook of International Law*, 0(0): 1-11. Britain and the Future of International Law | British Yearbook of International Law | Oxford Academic (oup.com).

Ansell B and Gingrich J (2022) 'Political inequality', Institute for Fiscal Studies. https://ifs.org.uk/publications/political-inequality

Badenoch K (2023) 'Britain is taking back control of its laws from the EU', *Telegraph*, 10 May. https://www.telegraph.co.uk/news/2023/05/10/britain-is-taking-back-control-of-its-laws-from-the-eu/.

Bingham T (2010) *The Rule of Law*, Penguin Books

Brown T (2021) 'Skeleton bills and delegated powers', House of Lords Library In Focus, 21 December 2021. https://lordslibrary.parliament.uk/skeleton-bills-and-delegated-powers/.

Butchard P (2020) 'Principles of International Law: a brief guide', House of Commons Library, 21 September 2020. https://researchbriefings.files.parliament.uk/documents/CBP-9010/CBP-9010.pdf .

Cabinet Office (2022) 'Guide to Making Legislation'. https://assets.publishing.service.gov.uk/media/62fe365fe90e0703e1bb4844/2022-08_Guide_to_Making_Legislation_-_master_version__4_.pdf

Cash W (2024) 'Retained EU Law Parliamentary Report June 2023 – December 2023', letter to Rt Hon Kemi Badenoch MP Secretary of State for Business and Trade European Scrutiny Committee. https://committees.parliament.uk/publications/43047/documents/214070/default/

Chapman J (2023) 'Retained EU law (Revocation and Reform) Bill - Amendments to be moved on report', HL Bill 117(a), 9 March 2023. https://bills.parliament.uk/publications/50226/documents/3105.

Cherry J (2022) 'Letter to the Deputy Prime Minister Rt Hon Dominic Raab MP on behalf of the Joint Committee on Human Rights', 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default/.

Cowie G (2018) 'Legislative consent: what, why and how?', House of Commons Library, 13 April 2018. https://commonslibrary.parliament.uk/legislative-consent-what-why-and-how/.

Dawson J and McKinney CJ (2023) 'Safety of Rwanda (Asylum and Immigration) Bill 2023-24'. House of Commons Library Research Briefing Number 9918, 8 December 2023. https://researchbriefings.files.parliament.uk/documents/CBP-9918/CBP-9918.pdf

Delegated Powers and Regulatory Reform Committee [DPRRC] (2021) 'Democracy Denied? The urgent need to rebalance power between Parliament and the Executive', House of Lords. https://publications.parliament.uk/pa/ld5802/ldselect/lddelreg/106/10602.htm

Department for Business and Trade [DBT] (2024) 'Collection – REUL (Revocation and Reform) Act 2023 statutory instruments', 22 April 2024. https://www.gov.uk/government/collections/reul-revocation-and-reform-act-2023-statutory-instruments.

Department for Levelling Up, Housing and Communities, Office of the Secretary of State for Scotland, Office of the Secretary of State for Scotland, Office of the Secretary of State for Wales, Northern Ireland Office, and Cabinet Office (2020) 'Guidance on devolution', Published 20 February 2013, last updated 28 September 2020. https://www.gov.uk/guidance/guidance-on-devolution.

de Souza R (2023) 'A letter from the Children's Commissioner for England to the Home Secretary on the terms of the Illegal Migration Bill', 13 March 2023. https://www.childrenscommissioner.gov.uk/news/letter-to-the-home-secretary-on-the-illegal-migration-bill/.

Donald A and Grogan J (2023) 'The Illegal Migration Bill', UK in a Changing Europe Explainer, 18 July 2023. https://ukandeu.ac.uk/explainers/the-illegal-migration-Bill/.

ECHR (2022) ' The European Court grants urgent interim measure in case concerning seeker's imminent removal from the UK to Rwanda', Press Release, ECHR 197 (2022), 14 June 2022. https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7359967-10054452&filename=Interim%20measure%20granted%20in%20case%20concerning%20asylum-seeker%E2%80%99s%20imminent%20removal%20from%20the%20UK%20to%20Rwanda.pdf

Economist (2023) '"Lawmaking in Britain is becoming worse", Britain – Do not pass go', 7 November 2023. https://www.economist.com/britain/2023/11/07/lawmaking-in-britain-is-becoming-worse?

Elliott M (2021) 'Legal exceptionalism in British Political discourse: International law, parliamentary sovereignty and the rule of law', *Public Law Blog*, 10 October 2021. https://publiclawforeveryone.com/2021/10/10/legal-exceptionalism-in-british-political-discourse-international-law-parliamentary-sovereignty-and-the-rule-of-law/.

Elliott M (2022) 'The Northern Irish Protocol Bill', *Public Law for Everyone Blog*, 13 June 2022. https://publiclawforeveryone.com/2022/06/13/the-northern-ireland-protocol-bill/.

Evennett H (2023) 'Fast-tracking legislation', House of Lords Library In Focus, 12 September 2023. https://lordslibrary.parliament.uk/fast-tracking-legislation/

Fox R (2020) 'Expediting of the European Union (Future Relationship) Bill through Parliament: five issues', Hansard Society briefing, 29 December 2020. https://www.hansardsociety.org.uk/publications/briefings/expediting-of-the-european-union-future-relationship-bill-through-parliament.

Frantziou E (2013) 'Human Rights and British Values: The Role of the European Convention on Human Rights in the UK Today', UCL Policy Briefing. https://www.ucl.ac.uk/public-policy/sites/public_policy/files/migrated-files/European_Convention_on_Human_Rights.pdf

Gower M and McKinney CJ (2023) 'Illegal Migration Bill: Lords stages and amendments', House of Commons Library Research Briefing Number CBP-9832, 7 July 2023. https://commonslibrary.parliament.uk/research-briefings/cbp-9832/

Grieve D (2023) 'Britain and the International rule of Law', speech at Chatam House, 3 July 2013. Britain and the International Rule of Law - GOV.UK (www.gov.uk).

Gross P (2022) 'The Independent Human Rights Act Review ("IHRAR") and Beyond', ALBA Keynote Lecture, 10 November 2022. https://www.scribd.com/document/606654782/The-Independent-Human-Rights-Act-Review-and-Beyond

Hansard Society (2023) 'Proposals for a New System for Delegated Legislation: A Working Paper', 6 February 2023. https://www.hansardsociety.org.uk/publications/reports/proposals-for-a-new-system-for-delegated-legislation-a-working-paper

HC Deb Retained EU Law (Revocation and Reform) Bill (Second sitting) (2022) Examination of witnesses, Hansard, 8 November 2022, https://hansard.parliament.uk/Commons/2022-11-08/debates/f42a4279-8a37-4247-8733-6eb9c93e66f8/RetainedEULaw(RevocationAndReform)Bill(SecondSitting).

HC Deb (8 September 2020) 'Northern Ireland Protocol: UK Legal Obligations', vol. 679, col. 509. https://hansard.parliament.uk/commons/2020-09-08/debates/2F32EBC3-6692-402C-93E6-76B4CF1BC6E3/NorthernIrelandProtocolUKLegalObligations.

HM Government (2022) 'The Benefits of Brexit: How the UK is taking advantage of leaving the EU', policy paper, January 2022. https://assets.publishing.service.gov.uk/media/620a791d8fa8f54915f4369e/benefits-of-brexit.pdf.

HM Government (2023) 'Guidance – Schedule of retained EU law', 17 May 2023. https://www.gov.uk/government/publications/schedule-of-retained-eu-law.

Home Office (2023a) 'Illegal migration Bill – European Convention on Human Rights Memorandum', policy paper. https://www.gov.uk/government/publications/illegal-migration-bill-overarching-documents

Home Office (2023b) 'Illegal Migration Bill – Delegated Powers Memorandum', policy paper. https://www.gov.uk/government/publications/illegal-migration-bill-overarching-documents

Home Office (2024) *Report on safe and legal routes (section 61 Illegal Migration Act 2023).* https://www.gov.uk/government/publications/safe-and-legal-routes

House of Commons European Scrutiny Committee (2023) 'Oral evidence: Retained EU Law: The progress and mechanisms of reform, HC 376', 6 December 2023. https://committees.parliament.uk/oralevidence/13969/pdf/.

House of Commons European Statutory Instruments Committee (2023) 'Seventh Report of Session 2022-23 Drawing attention to: Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023', 17 October 2023. https://committees.parliament.uk/publications/41716/documents/206623/default/.

House of Lords (2023) 'Lords Committees condemn EU Retained Law Bill as a ministerial power grab', media notice. https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/2023/february-2023/lords-committees-condemn-eu-retained-law-bill-as-a-ministerial-power-grab/.

House of Lords Delegated Powers and Regulatory Reform Committee (2023) 'Illegal Migration Bill: Government Response – 37th Report of Session 2022-23, HL Paper 222', 26 June 2023. https://publications.parliament.uk/pa/ld5803/ldselect/lddelreg/222/22203.htm.

House of Lords Secondary Legislation Scrutiny Committee (2022) 'Losing Impact: why the Government's impact assessment system is failing Parliament and the public – 12th Report of Session 2022-23', HL Paper 62, 10 October 2022. https://committees.parliament.uk/publications/30141/documents/174647/default/

House of Lords Select Committee on the Constitution (2023a) 'Retained EU Law (Revocation and Reform) Bill', 13th Report of Session 2022-23, HL Paper 151, 17 February 2023. https://publications.parliament.uk/pa/ld5803/ldselect/ldconst/151/15102.htm

House of Lords Select Committee on the Constitution (2023b) 'Illegal Migration Bill', 16th Report of Session 2022-23, HL Paper 200, 19 May 2023. https://publications.parliament.uk/pa/ld5803/ldselect/ldconst/200/20002.htm

Ipsos (2023) 'Trust in politicians reaches its lowest score in 40 years', news article. https://www.ipsos.com/en-uk/ipsos-trust-in-professions-veracity-index-2023.

Joint Committee on Human Rights [JCHR] (2023) *Legislative Scrutiny: Illegal Migration Bill,* HMSO (HC 1241). https://committees.parliament.uk/publications/40298/documents/196781/default/.

Judge I (2022) '1622 The King's Prerogative – 2022 The Prime Minister's Prerogative', The Selden Society and Four Inns of Court Annual Legal History Lecture, 1 November 2022. https://www.middletemple.org.uk/selden-society-and-four-inns-court-annual-legal-history-lecture-1-nov-2022

King's College London [KCL] Policy Institute (2023) 'Trust in trouble? UK and international confidence in institutions', presentation, The UK in the World Values Survey. https://www.kcl.ac.uk/policy-institute/assets/confidence-in-institutions.pdf

Kelly R (2016) 'House of Commons Background Paper: Statutory Instruments', House of Commons Library research briefing Number 06509, 15 December 2016. https://commonslibrary.parliament.uk/research-briefings/sn06509/

Knatchbull W (2023) 'How should the Lord Chancellor and the law officers safeguard the rule of law within government?', Constitution Unit Blog. https://constitution-unit.com/2023/03/31/how-should-the-lord-chancellor-and-law-officers-safeguard-the-rule-of-law-within-government/

Labour Party (2023) 'A 'Mission-Driven Government to End 'Sticking Plaster Politics'', Labour Party. https://labour.org.uk/wp-content/uploads/2023/02/5-Missions-for-a-Better-Britain.pdf

Lammy D (2023) Speech transcript at 'The Importance of the International Rule of Law', Bingham Centre for the Rule of Law. https://binghamcentre.biicl.org/events/1430/the-importance-of-the-international-rule-of-law

Liberty, Public Law Project, Bonavero Institute of Human Rights, Amnesty International and Immigration Law Practitioners' Association (2023) 'The Illegal Migration Bill: Constitutional Implications', 22 May 2023. The-Illegal-Migration-Bill-Constitutional-Implications.pdf (libertyhumanrights.org.uk)

Lisvane R, Ludford S, Bach W, and Hodgson R (2023) 'Retained EU Law (Revocation and Reform) Bill: Amendment 141A – Fourth Marshalled List of Amendments to be moved in Committee of the Whole House', HL Bill 89, 2 March 2023. https://bills.parliament.uk/publications/50089/documents/3058.

Lloyd-Jones D (2018) 'General Principles of Law in International Law and Common Law', speech at the Conseil d'Etat, Paris, France, 18 February 2018. supremecourt.uk/docs/speech-180216.pdf

Mance J (2017 'International Law in the UK', speech at, King's College London, 13 February 2017. https://www.supremecourt.uk/docs/speech-170213.pdf

Mandel R (2020) 'Breaching International Law Comes at a Price', Chatham House. https://www.chathamhouse.org/2020/10/breaching-international-law-comes-price

Marshall J (2020) 'Secondary legislation: How is it scrutinised?', Institute for Government Explainer, 19 May 2020. https://www.instituteforgovernment.org.uk/explainer/secondary-legislation-scrutiny

McGill D (2023a) Letter from the Clerk/Chief Executive of the Scottish Parliament to the House of Commons Clerk of the House 'Legislative Consent: Retained EU Law (Revocation and Reform) Bill – UK Legislation', 23 February 2023. https://bills.parliament.uk/publications/49999/documents/3017

McGill D (2023b) Letter from the Clerk/Chief Executive of the Scottish Parliament to the Clerk of the House of Commons 'Legislative Consent: Retained EU Law (Revocation and Reform) Bill – UK Legislation', 8 June 2023. https://publications.parliament.uk/pa/bills/cbill/58-03/0319/ScotlandLegConsentMotion08June.pdf

Melo Araujo B (2022) 'An analysis of the Government's defence of the Northern Ireland Protocol Bill under international law', Northern Ireland Legal Quarterly, 73(2): 89-118. https://pureadmin.qub.ac.uk/ws/portalfiles/portal/382037840/NILQ_Paper_Final.pdf

Miller v Secretary of State for Exiting the European Union [2017] UKSC 5. https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf

Modern Slavery and Human Rights Policy and Evidence Centre [MSHRPEC] (2023) written evidence to the Joint Committee on Human Rights' inquiry on the Illegal Migration Bill HC1241 (IMB0011), 21 April 2023. https://committees.parliament.uk/writtenevidence/119864/pdf/.

National Centre for Social Research [NatCen] (2024) 'With Brexit, does the UK now have more control, less control, or the same amount of control over its own affairs as it would have otherwise?', poll results, What UK Thinks. https://www.whatukthinks.org/eu/questions/with-brexit-does-the-uk-now-have-more-control-less-control-or-the-same-amount-of-control-over-its-own-affairs-as-it-would-have-otherwise/.

Noakes S and Callanan M (2023) 'Retained EU Law (Revocation and Reform) Bill: Amendment No 1 – Marshalled List of Amendments to be moved on Third Reading', HL Bill 139, 19 May 2023. https://bills.parliament.uk/publications/51230/documents/3452.

Northern Ireland Human Rights Commission (2023) 'Northern Ireland Human Rights Commission submission to House of Lords on the Illegal Migration Bill', 16 May 2023. https://nihrc.org/publication/detail/submission-to-the-house-of-lords-on-the-illegal-migration-bill.

Office of the High Commissioner for Human Rights [OHCHR] (2018) 'The principle of non-refoulement under international human rights law', policy brief. ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf (ohchr.org)

Office for Democratic Institutions and Human Rights [ODIHR] (2024) *Guidelines on Democratic Lawmaking for Better Laws*, Organization for Security and Co-operation in Europe [OSCE]. https://www.osce.org/files/f/documents/a/3/558321_3.pdf

Organisation for Economic Co-operation and Development [OECD] (2022) 'Building Trust to Reinforce Democracy Summary brief presenting the main findings from the OECD Trust Survey', briefing. https://www.oecd.org/governance/trust-in-government/oecd-trust-survey-main-findings-en.pdf

Paun A, Sargeant J, Nicholson E, Rycroft L, Allen B and Byrne G (2024) 'Sewel convention', Institute for Government Explainer, 25 July 2024. https://www.instituteforgovernment.org.uk/explainer/sewel-convention.

Paun A and Shuttleworth K (2020) *Legislating by consent: How to revive the Sewel convention*, Institute for Government, 16 September 2020. https://www.instituteforgovernment.org.uk/publication/report/legislating-consent-how-revive-sewel-convention

Priddy S, Bosworth J and Searle C (2024) 'Expedited legislation: Public bills receiving their second and third readings on the same day in the House of Commons', House of Commons Library, 9 April 2024. https://commonslibrary.parliament.uk/research-briefings/sn04974/.

R (Adimi and others) v CPS and Secretary of State for the Home Department [2001] England and Wales High Court QB 667

R v Asfaw [2008] UK House of Lords 31

R v secretary of State for the Home Department ex p Cheblak [1991] Court of Appeal 1 WLR 890

Re NIHRC and JR925 Application in the matter of the Illegal Migration Act 2023 [2024] High Court of Justice in Northern Ireland 35

Renwick A and James L (2023) 'The public wants parliament to have a central role in legislation, so why does the Retained EU Law Bill enhance the legislative power of ministers?', Constitution Unit Blog. https://constitution-unit.com/2023/02/12/the-public-wants-parliament-to-have-a-central-role-in-legislation-so-why-does-the-retained-eu-law-bill-enhance-the-legislative-power-of-ministers/

Russell M, White H and James L (2023) 'Rebuilding and renewing the constitution: Options for reform', UCL Constitution Unit and Institute for Government, July 2023. https://www.instituteforgovernment.org.uk/sites/default/files/2023-07/rebuilding-and-renewing-the-constitution.pdf

Sargeant J, Coulter S, Pannell J, McKee R and Hynes M (2024) 'Review of the UK Constitution: Final report', Bennett Institute for Public Policy and Institute for Government, June 2024. https://www.instituteforgovernment.org.uk/sites/default/files/2024-06/review-uk-constitution-final-report.pdf

Sargeant J and Pannell J (2022) *The legislative process: How to empower parliament*, Bennett Institute for Public Policy and Institute for Government. https://www.instituteforgovernment.org.uk/publication/legislative-process-empower-parliament

Sargeant J, Pannell J, McKee R and Coulter S (2023) 'Review of the UK Constitution: Final report', Bennett Institute for Public Policy and Institute for Government, 19 September 2023. https://www.instituteforgovernment.org.uk/publication/final-report-review-uk-constitution

Scottish Government (2024) 'Policy Europe – Assimilated law (Retained EU Law)'. https://www.gov.scot/policies/europe/retained-eu-law/

Scottish Government's Cabinet Secretary for the Constitution, Europe, and External Affairs (2023) 'Supplementary Legislative Consent Memorandum – Retained EU Law (Revocation and Reform) Bill', LCM-S6-29a, session 6 (2023). https://www.parliament.scot/-/media/files/legislation/bills/lcms/retained-eu-law-revocation-and-reform-bill/supplementary-legislative-consent-memorandum.pdf

Scottish Government's Minister for Culture, Europe and International Development, Welsh Government's Minister for Social Justice, and the Northern Ireland Executive's Minister for the Economy (2022) 'Labour shortages and migration: joint letter to Kevin Foster MP', 15 February 2022. https://www.gov.scot/publications/labour-shortages-and-migration-joint-letter-to-kevin-foster-mp/.

Scottish Parliament (2023) 'Official Report – Meeting of the Parliament, Tuesday 27 June 2023, Session 6', 27 June 2023. https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15396.

Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee (2023) 'Legislative Consent Memorandum for the Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation)', SP Paper 318, 1st report, 2023 (Session 6), 15 February 2023. https://bprcdn.parliament.scot/published/CEEAC/2023/2/15/97a5c192-b398-47a4-a6b5-3a084387cd49/CEEACS062023R1.pdf

Sharpe A (2024) 'Report on Safe and Legal Routes – Statement made on 11 January 2024 by the Parliamentary Under-Secretary of State, Home Office', House of Lords, 11 January 2024. https://questions-statements.parliament.uk/written-statements/detail/2024-01-11/HLWS176.

Steele T (2023) 'The State We're In: Addressing Threats & Challenges to the Rule of Law', JUSTICE, September 2023. https://files.justice.org.uk/wp-content/uploads/2023/08/31123029/JUSTICE-The-State-Were-In-Addressing-Threats-Challenges-to-the-Rule-of-Law-September-2023.pdf.

Sunak R (2023) 'PM statement on the Stop the Boats Bill: 7 March 2023'. https://www.gov.uk/government/speeches/pm-statement-on-the-stop-the-boats-bill-7-march-2023.

Torrance D (2020) 'EU powers after Brexit: "Power grab" or "power surge"?', House of Commons Library Insight, 29 July 2020. https://commonslibrary.parliament.uk/eu-powers-after-brexit-power-grab-or-power-surge/.

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part [TCA] (2021). Official Journal of the European Union, 30 April 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.149.01.0010.01.ENG&toc=OJ%3AL%3A2021%3A149%3ATOC

UK Governance Project (2024) 'Governance Project – Final report', February 2024. https://www.ukgovernanceproject.co.uk/wp-content/uploads/2024/02/Governance-Project-Final-Report-31.1.24.pdf

UK Parliament (2023) 'Retained EU Law (Revocation and Reform) Act 2023 – Publications – Written evidence', 9 November 2022 – 30 November 2022. https://bills.parliament.uk/bills/3340/publications.

UK Parliament (2024) 'How does a bill become a law?', webpage. https://www.parliament.uk/about/how/laws/passage-bill/

UN High Commissioner for Refugees [UNHCR] (2017) 'Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee convention', 15 March 2017. https://www.refworld.org/reference/confdoc/unhcr/2017/en/120265

Welsh Counsel General and Minister for the Constitution (2022) 'Legislative Consent Memorandum – The Retained EU Law (Revocation and Reform) Bill', 3 November 2022. https://senedd.wales/media/wu0fwcny/lcm-ld15434-e.pdf

Welsh Minister for Social Justice (2023) 'Legislative Consent Memorandum – Illegal Migration Bill', 31 March 2023. https://senedd.wales/media/y1pndlk0/lcm-ld15778-e.pdf

Welsh Parliament Equality and Social Justice Committee (2023) 'Legislative Consent: Illegal Migration Bill', 19 June 2023. https://senedd.wales/media/qy5i5loc/cr-ld15902.pdf

Welsh Parliament Legislation, Justice and Constitution Committee (2023) 'The Welsh Government's Legislative Consent Memoranda on the Retained EU Law (Revocation and Reform) Bill', February 2023. https://senedd.wales/media/3fcc3eks/cr-ld15687-e.pdf

White H (2023) 'Illegal Migration Bill highlights how expectations of legislative scrutiny have plummeted', Institute for Government Comment, 13 March 2023. https://www.instituteforgovernment.org.uk/comment/illegal-migration-bill-legislative-scrutiny.

Wilkins S (2023) 'Northern Ireland Human Rights Commission issues challenge to Illegal Migration Act 2023', Doughty Street Chambers, 4 October 2023. https://www.doughtystreet.co.uk/news/northern-ireland-human-rights-commission-issues-challenge-illegal-migration-act-2023

Williams J (2020) 'Relevant separation agreement law: A guide for the perplexed', *EU Relations Law Blog*. https://eurelationslaw.com/blog/relevant-separation-agreement-law-a-guide-for-the-perplexed

Williams J (2021) 'Relevant Relationship Agreement Law: A guide for the perplexed', *EU Relations Blog*. https://eurelationslaw.com/blog/relevant-relationship-agreement-law-a-guide-for-the-perplexed

Vote Leave (2016) 'Why Vote Leave', webpage. http://www.voteleavetakecontrol.org/why_vote_leave.html

ANNEX 1: FURTHER DETAILS OF CASE STUDY ANALYSIS

This report is based on a case study analysis of two major pieces of legislation, in each case considering both the parliamentary process that the bill underwent as well as key challenges surrounding implementation once it became an Act of Parliament. As far as the parliamentary process is concerned, the wider findings of the Bingham Centre's Rule of Law Monitoring of Legislation project – which published over 30 reports during its first phase (2020-2022) – provide relevant background (Bingham Centre for the Rule of Law 2024).

This report engages with many problems and issues that have been examined in the publications of other organisations and groups working on democratic law-making. JUSTICE'S *The State We're In* takes a broad approach to assessing the state of the rule of law and democracy over the last five years, including a section on legality and law-making (Steele 2023). A similarly broad but more constitutional perspective – which encompasses further issues such as devolution in the territorial constitution – is taken in *Rebuilding and renewing the constitution: Options for reform*, a joint report by the UCL Constitution Unit and the Institute for Government (Russell et al 2023). The Institute for Government and the Bennett Institute for Public Policy have also published a review of the UK constitution that engages with issues of democratic law-making in its sections on embedding constitutional acts and improving constitutional scrutiny (Sargeant et al 2023). The UK Governance Project has issued a more targeted report which examines delegated legislation and the functioning of the House of Commons among other topics (UK Governance Project 2024).

All these reports have set out important recommendations for reforming the law-making process. The present report takes a slightly different approach, which seeks to add to this body of work through the case studies it presents. It isolates four areas of democratic depletion and illustrates these through a detailed and focussed analysis of two prominent acts of parliament from 2023.

ANNEX 2: GUIDELINES ON DEMOCRATIC LAWMAKING PUBLISHED BY THE OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (ODIHR)

The analysis in this report draws on guidelines on democratic lawmaking published on 16 January 2024 by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE). The OSCE is a multilateral organization composed of 57 participating states from North America, Europe and Asia which promotes stability, peace, and democracy.

The objective of the OSCE's ODIHR guidelines on democratic lawmaking is 'to achieve high-quality laws, based on the rule of law and human rights'. The guidelines were developed by academics, legislators, political advisors, and civil society actors. Part II proposes 17 principles under the headings of 'Prerequisites for Democratic Lawmaking and Better Laws', 'The Process of Making Laws', 'The Content of Laws', and 'The Form of Laws'. This report utilises these guiding principles in its assessment of the two case study acts of parliament across the four areas of democratic depletion we have identified.

GET IN TOUCH

For more information about the Institute for Public Policy Research, please go to www.ippr.org

You can also call us on +44 (0)20 7470 6100, e-mail info@ippr.org or tweet us @ippr

Institute for Public Policy Research
Registered Charity no. 800065 (England & Wales), SC046557 (Scotland), Company no, 2292601 (England & Wales)