

# Who Watches the Watchmen? Independent Observers, Constitutional Principles and Democratic Accountability

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## Abstract

This article examines the role, functions, and accountability of independent observers through the lens of constitutional values and principles, including relevant international human rights obligations. Whilst independent observers operate in a wide variety of contexts, vary between trained professionals and volunteers, and abide by different legal regimes and advisory frameworks, the work that they do helps to safeguard common constitutional values and principles. After providing an overview of these values and principles the article focuses on two particular types of observers in the United Kingdom, respectively, election observers and prisoner escort and court custody observers. The article argues that the role of independent observers has always been crucial to promoting transparency and accountability in state institutions and processes, and therefore also safeguarding democracy, the rule of law and the protection of human rights. Nevertheless, these functions have become even more essential in recent years due to evolving and developing challenges which have eroded democratic accountability to some extent. At the same time, ensuring that observers themselves are subject to adequate scrutiny and accountability is essential to ensure their effectiveness.

## Keywords

independent observers – constitutional principles – democracy – human rights – accountability

## 1 Introduction

Amidst mounting concerns of democratic backsliding in the United Kingdom and other states around the world,<sup>1</sup> the erosion of accountability mechanisms and civil liberties is challenging long-held assumptions about the nature and values of democracy. One source of pushback

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<sup>1</sup> See e.g. The Constitution Unit Briefing, 'What is Democratic Backsliding, and is the UK at Risk?' (July 2023) [https://www.ucl.ac.uk/constitution-unit/sites/constitution\\_unit/files/backsliding\\_-\\_final\\_1.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/backsliding_-_final_1.pdf) (accessed 12 July 2023).

against these forces, however, is the role of independent observers, akin to public watchdogs acting as the eyes and ears of the public, who operate in different contexts but similarly help to protect fundamental values which are essential to the rule of law, democracy, and the protection of human rights. Whether professionally trained and qualified, or appointed as volunteers, observers help to ensure transparency and accountability in practical matters where the power of the state is involved, often in circumstances where serious matters of public concern are at stake, which in turn can help to promote fundamental constitutional principles.

At the same time, for their roles to be seen as credible and legitimate, which in turn are essential characteristics for their roles to be effective, ensuring that observers themselves are subject to oversight and accountability is important. It is at this stage that a particular paradox emerges. If we accept that the independence of observers from the very state institutions they are scrutinising is essential for their role to be effective, then ensuring the accountability of observers themselves can be a challenge. As Anne van Aaken and Richard Chambers argue, these are ‘deeply intertwined and partially conflicting principles, since accountability to certain stakeholders also fosters dependence from them’, leading to the conclusion that ‘independence may foster unaccountability’.<sup>2</sup> In other well-known words, who watches the watchmen?

This contribution focuses on two types of independent observers in the United Kingdom in particular – election observers and prisoner escort and court custody observers.<sup>3</sup> These have been chosen for three reasons, first, due to the serious importance of the issues at stake for the impacted individuals and society as a whole, second, because both types of observers comprise professionals and volunteers and therefore some comparisons can be made, and third, because of the author’s personal experience in serving in these positions in some capacity.<sup>4</sup> With the former, the most basic purpose of election observers is to help safeguard the fundamental basis of the UK’s (and most states’) liberal democracy – that is, representative democracy and the

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<sup>2</sup> A van Aaken and R Chambers, ‘Accountability and Independence of International Election Observers’ (2009) 6(2) *International Organizations Law Review* 541, 557.

<sup>3</sup> The terms ‘election observers’ and ‘prisoner escort and court custody observers’ in this article predominantly refers to the deployment of both professional and volunteer observers in the United Kingdom.

<sup>4</sup> I have written this piece in my professional, academic capacity, based on publicly accessible information, but I have been influenced by my own experiences. First, I acted as an independent election observer accredited by the Electoral Commission in the 2018 and 2023 Local Elections in England. For this, I attended numerous polling stations and observed staff and individuals casting their votes under new rules requiring photographic identification. Second, I was appointed as a Lay Observer by the Ministry of Justice in 2021 for a five-year term. The purpose of this Ministerial public appointee role is to monitor the treatment of detained persons being escorted and held in court custody to ensure their welfare.

holding of free and fair elections. With the latter, prisoner escort and court custody observers play a role in monitoring the welfare of individuals deprived of their liberty by the state, in some cases where individuals are awaiting trial and are not yet, if at all, guilty of any crime.

Following this introduction, the second section outlines the rationale for independent observers through the lens of constitutional values and principles, most crucially the rule of law and human rights, but also in light of recent and developing challenges to these established principles which point to declining democratic accountability. The third and fourth sections then examine the specific roles and accountability of election observers and prisoner escort and court custody observers in the UK in order to evaluate their respective contributions. Finally, the fifth section concludes. Ultimately this article argues that the existence of independent observers is increasing in importance given recent and developing challenges to the rule of law and democracy, and that because of this greater use should be made of them in such contexts. At the same time, as the need for independent observers increases, so too does the need for greater recognition of their responsibility and the need for appropriate resourcing and training.

## **2 The Rationale for Independent Observers**

### ***2.1 Constitutional Values and Principles***

Whilst independent observers operate in a great variety of contexts, vary from trained professionals to volunteers, and abide by different legal or advisory frameworks, the work that they do safeguards common fundamental values and constitutional principles. These values and principles simultaneously play an essential role in shaping and influencing constitutions. In one respect, some have even suggested that the very purpose of a constitution is to ‘articulate and preserve a society’s fundamental moral principles’.<sup>5</sup> This may be more obviously apparent and direct in democratic states that allow broad societal political participation in the form of elections and restrictions on arbitrary executive power, but it can also be seen in transparent practices that allow for openness and scrutiny which this article focuses on.

If we consider the very purpose of independent observers, although obvious, their most fundamental task is to observe a certain official process and the conduct of actors at the heart of it, whether they are direct representatives of the state or, as is increasingly common, they

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<sup>5</sup> I Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (Oxford University Press, 2021) 4.

are contracted by the state to perform certain functions traditionally exercised by the state. These actors are required to adhere to a state's human rights obligations and, where private companies are concerned, also demonstrate their corporate social responsibility (CSR) and environment, social and governance responsibilities (ESG). Their activities, to be considered in this article, include things such as issuing or counting ballot papers during an election, or managing a convicted or accused individual in a state detention facility.

In that sense, the first and most immediate value that independent observers help to safeguard is transparency. As the US Supreme Court judge, Justice Louis Brandeis, famously said, 'sunlight is said to be the best of disinfectants'.<sup>6</sup> In that respect, observers can help to identify practices that demonstrate ineffectiveness, neglect or perhaps even illegality, which may otherwise remain hidden from the public eye. This in turn links to accountability, which can be maintained when neglectful or wrongful action is recognised, reported and subsequently remedied. This further helps to preserve and promote public trust and confidence in state institutions. These values are reflected in the United Nations' 16<sup>th</sup> sustainable development goal which strives to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level'.<sup>7</sup>

Collectively, these broad values help to safeguard numerous constitutional principles which are common to all democratic states. As with most intangible and idealistic concepts, however, no universal legal definition of democracy exists and the various regional courts have interpreted the notion in different ways.<sup>8</sup> Insofar as the UK is concerned, the broad concept of 'democracy' and a 'democratic society' underpins much of the content of the European Convention on Human Rights (ECHR) which in tandem with the Human Rights Act (HRA) 1998 serve as the most important human rights legal instruments in the UK.<sup>9</sup> Moreover, the European Court of Human Rights (ECtHR) often refers to the basic principles of 'pluralism,

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<sup>6</sup> LD Brandeis, 'What Publicity Can Do' *Harper's Weekly* 58 no. 2974 (20 December 1914).

<sup>7</sup> UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

<sup>8</sup> J Vidmar, 'Judicial Interpretations of Democracy in Human Rights Treaties' (2014) 3(2) *Cambridge Journal of International and Comparative Law* 532.

<sup>9</sup> The Preamble of the ECHR states that signatories are 'Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend'.

tolerance and broadmindedness’ as ‘hallmarks of a democratic society’.<sup>10</sup> These principles laid the foundations for the Convention after the Second World War to the extent that the Court has stated that democracy ‘is the only political model contemplated in the Convention and the only one compatible with it’.<sup>11</sup>

Underpinning all democracies is the rule of law, where theories sit on a spectrum between two distinct conceptions: formal, procedural or ‘thin’ ones on the one hand, and substantive or ‘thick’ ones on the other. The most basic formal conceptions only address the law’s creation and application – namely, the manner in which the law was promulgated, the clarity of the enacted norm, that it be prospective rather than retrospective, and the fairness of the processes through which it is applied.<sup>12</sup> According to such theories, the purpose of the rule of law is to ensure the stability and predictability of the law, as universal conditions of individual and social prosperity independent from any local context.<sup>13</sup> Here, independent observers undoubtedly provide at least a symbolic means of scrutiny, being able to observe if, and to what extent, procedural laws are complied with, and that the use of power by state officials has a lawful basis.

Substantive conceptions build upon these formal and procedural requirements as the core rule of law principles,<sup>14</sup> but, in addition, require the law to embody particular values of justice, morality or human rights.<sup>15</sup> In that respect, one of Lord Bingham’s sub-principles in his celebrated account of the rule of law was that the law must afford adequate protection of fundamental human rights.<sup>16</sup> It is here that we can further recognise the work of independent observers.

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<sup>10</sup> See e.g. *Handyside v United Kingdom* App. no. 5493/72 (ECHR, 7 December 1976) para 49; *SAS v France* App. no. 43835/11 (ECHR [GC], 1 July 2014) para 128; *Leyla Şahin v Turkey* App. no. 44774/98 (ECHR [GC], 10 November 2005) para 108.

<sup>11</sup> *Christian Democrat People’s Party v Moldova* App. no. 28793/02 (ECHR, 14 February 2006) para 63; *Church of Scientology Moscow v Russia* App. no. 18147/02 (ECHR, 5 April 2007) para 74.

<sup>12</sup> P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) 4 *Public Law* 467.

<sup>13</sup> J Raz, ‘The Law’s Own Virtue’ (2019) 39(1) *Oxford Journal of Legal Studies* 1, 2. See also J Raz ‘The Rule of Law and its Virtue’ in J Raz (ed.) *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 210–229.

<sup>14</sup> See e.g. FA Hayek, *The Road to Serfdom* (Routledge, 1944) 54; L Fuller, *The Morality of Law* (Yale University Press, 1969) 38–39; M Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) 74(5) *Southern California Law Review* 1307, 1313.

<sup>15</sup> R Dworkin, *A Matter of Principle* (Oxford University Press, 1985).

<sup>16</sup> Lord Bingham, ‘The Rule of Law’ (2007) 66(1) *Cambridge Law Journal* 67, 75.

Election observers, for example, play a role in safeguarding the rights of citizens to enjoy free and fair elections. In this regard, Article 21(3) of the Universal Declaration of Human Rights (UDHR) 1948 states:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.<sup>17</sup>

Comparable language or language with similar obligations is used in other instruments such as the International Covenant on Civil and Political Rights (ICCPR) 1966,<sup>18</sup> the ECHR 1950,<sup>19</sup> the American Convention on Human Rights (ACHR) 1969,<sup>20</sup> and the African Charter on Human and Peoples Rights (ACHPR) 1981.<sup>21</sup> It is also argued that election observers, particularly those deployed on official missions, have a broader remit to consider the protection of other fundamental rights of a political nature. As a leading United Nations handbook on elections states, the right to participate in free and fair elections ‘is intrinsically linked to a number of basic rights, the enjoyment of which is crucial to a meaningful electoral process’.<sup>22</sup> These include, but are not limited to, the rights to freedom of opinion and expression protected in Article 19 of the UDHR, and the freedom of peaceful assembly and association protected in Article 20 of the UDHR. Comparable language or language with similar obligations can be seen in other international treaties.<sup>23</sup>

The second type of independent observer – prisoner escort and court custody observers – have the potential to play a role in safeguarding many more human rights given the severity of the circumstances for affected individuals. First, as individuals are being detained, the rights of people to liberty and the prohibition of arbitrary arrest are directly relevant. In this regard, Articles 3 and 9 of the UDHR provide a range of related rights, respectively ‘the right to life,

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<sup>17</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

<sup>18</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art 25(b).

<sup>19</sup> Art 3 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952 (adopted 4 November 1950, entered into force 3 September 1953) (ECHR).

<sup>20</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) Art 23(1)(b).

<sup>21</sup> African Charter on Human and Peoples Rights (adopted 1 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR) Art 13(1).

<sup>22</sup> UN Office of the High Commissioner for Human Rights, ‘Monitoring Human Rights in the Context of Elections’ in *Manual on Human Rights Monitoring* (2011) 9.

<sup>23</sup> ICCPR Arts 19 and 21; ECHR Arts 9, 10 and 11; ACHR Arts 13, 15 and 16; and ACHPR Arts 9, 10 and 11.

liberty and the security of person’, and that ‘no one shall be subjected to arbitrary arrest, detention or exile’. Comparable language or language with similar obligations can be seen in other international treaties.<sup>24</sup> Going further, as it is widely recognised that people deprived of their liberty are particularly vulnerable to ill-treatment,<sup>25</sup> these observers also have a role to ensure that the prohibition of torture and other forms of ill-treatment is observed. Article 5 of the UDHR provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and comparable language or language with similar obligations can be seen in other international treaties.<sup>26</sup> Finally, given that individuals in detention may only be suspects prior to conviction at this stage, the right to a fair trial and the presumption of innocence is also paramount. Article 11(1) of the UDHR provides a basic foundation here, that ‘everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence’, and more substantive obligations and rights for defendants can be seen in other international treaties.<sup>27</sup>

Common to these different contexts, the prohibition of discrimination in the implementation of substantive rights is also vital. Whilst some international instruments limit this to the scope of the rights specifically outlined in the instrument, some instruments go further and impose a broader positive obligation on states. In that regard, Article 2 of the UDHR first provides a narrow prohibition of discrimination limited to the rights contained in the UDHR, before Article 7 which provides a much broader and comprehensive notion:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

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<sup>24</sup> ICCPR Art 9(1); ECHR Art 5; ACHR Art 7; and ACHPR Art 6.

<sup>25</sup> See e.g. National Preventive Mechanism, Optional Protocol (OPCAT) <https://www.nationalpreventivemechanism.org.uk/opcat/opcat/> (accessed 12 July 2023); Monitoring Places of Detention, Third Annual Report of the United Kingdom’s National Preventive Mechanism (1 April 2011-31 March 2012, Cm 8558) 7.

<sup>26</sup> ICCPR Art 7; ECHR Art 3; ACHR Art 5(2); and ACHPR Art 5.

<sup>27</sup> ICCPR Art 14; ECHR Art 6; ACHR Art 8; and ACHPR Art 7.

A similar approach is taken in the ICCPR and the ACHPR,<sup>28</sup> with provisions in each instrument also framing the obligation as a general duty, but a narrower rights-focused prohibition of discrimination is provided in the ECHR and ACHR.<sup>29</sup>

Further international treaty obligations are relevant here, for example, the Convention on the Elimination of All Forms of Racial Discrimination 1965 guarantees to everyone, without distinction or discrimination, their ‘political rights, in particular the rights to participate in elections — to vote and stand for election – on the basis of universal and equal suffrage’,<sup>30</sup> and the Convention on the Elimination of All Forms of Discrimination against Women 1979 guarantees women’s right to participate in political life and elections on the same basis as men.<sup>31</sup>

With discrimination in mind, the intersection of the right to vote and the treatment of detained persons has generated one of the most debated human rights controversies in the UK in recent years, namely, the ban on prisoners being able to vote in elections. Prior to 2018, the UK’s position was strict but a series of critical judgments from the ECtHR placed mounting pressure on the UK Government to relax the general, automatic and indiscriminate restriction on all convicted prisoners being able to vote.<sup>32</sup> Following reforms in November 2018, the Committee of Ministers of the Council of Europe closed the supervision of these cases by adopting a final resolution.<sup>33</sup> Thus, whilst the blanket ban no longer applies, only a limited range of prisoners are able to vote, including those held on remand or awaiting trial or sentencing, civil prisoners who are detained for failing to pay fines or debts or contempt, and offenders on home detention curfew or released on temporary licence.<sup>34</sup> As such, certain prisoners are now able to vote by proxy or post though not from prison, and also, if their conditions of release allow it, in person at a polling station. Observers will therefore have a role to play in ensuring that prisoners who are entitled to vote are able to.

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<sup>28</sup> ICCPR Arts 2 and 26; and ACHPR Arts 2 and 28.

<sup>29</sup> ECHR Art 14; and ACHR Art 1.

<sup>30</sup> Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 UNGA Res 2106 (XX)) (CERD) Art 5(c).

<sup>31</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979 UNGA Res 34/180) (CEDAW) Art 7.

<sup>32</sup> *Hirst v United Kingdom (No. 2)* App. no. 74025/01 (ECHR, 6 October 2005); *Greens and M.T. v United Kingdom* App. no. 60041/08 (ECHR, 23 November 2010); *Firth and Others v United Kingdom* App. no. 47784/09 (ECHR, 12 August 2014); *McHugh and Others v United Kingdom* App. no. 51987/08 (ECHR, 10 February 2015); *Millbank and Others v United Kingdom* App. no. 44473/14 (ECHR, 30 June 2016).

<sup>33</sup> Committee of Ministers, Resolution CM/ResDH(2018)467 (6 December 2018).

<sup>34</sup> Representation of the People Act (RPA) 1983 s.3.

Finally, turning to the UK specifically, the HRA 1998 gives effect to the vast majority of rights contained in the ECHR, meaning it is often described as a ‘constitutional statute’. According to Lord Justice Laws, a ‘constitutional statute’ such as the HRA 1998 conditions the ‘legal relationship between citizen and State in some general, overarching manner’ or ‘enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights’.<sup>35</sup> Thus the HRA has become the principal instrument for imposing obligations on public authorities in the UK as well as giving individuals a right of remedy. As will be discussed in the next section, however, the future of the HRA 1998 and the UK’s commitment to the ECHR remains somewhat uncertain.

## ***2.2 Democratic Backsliding and Legislative Reforms***

Despite their traditionally sacrosanct nature in the UK and other liberal democracies, the values and principles just discussed have been subject to increasing challenges pointing to declining constitutional standards and accountability. With respect to democratic backsliding, an abundance of literature on this issue already exists principally in the fields of sociology and political science, but also increasingly in interdisciplinary legal research. For example, recent developments in Europe have attracted much attention with rising populism and challenges to liberal democratic constitutionalism, most notably in Hungary and Poland.<sup>36</sup> A deeper examination of the notion of democratic backsliding is beyond the scope of this article, in part owing to what Fabio Wolkenstein argues is a somewhat unclear understanding of what the term actually means.<sup>37</sup> Indeed, with some exceptions,<sup>38</sup> much existing literature does not attempt to define the term but instead simply describes the practices in question. Thus, for the purposes of this article, the notion of democratic backsliding is simply understood to convey the process of regression from established democratic norms and values.

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<sup>35</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at [62]. See also *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [66]; *R (Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 at [120].

<sup>36</sup> See J Eisler et al, ‘The Pendulum Swings Back: New Authoritarian Threats to Liberal Democratic Constitutionalism’ (2022) 11(1) *Global Constitutionalism* 1; F Wolkenstein, ‘European Political Parties’ Complicity in Democratic Backsliding’ (2022) 11(1) *Global Constitutionalism* 55.

<sup>37</sup> F Wolkenstein, ‘What is Democratic Backsliding?’ (2022) *Constellations* 1 <https://onlinelibrary.wiley.com/doi/10.1111/1467-8675.12627> (accessed 12 July 2023).

<sup>38</sup> See e.g. S Haggard and R Kaufman, *Backsliding: Democratic Regress in the Contemporary World* (Cambridge University Press, 2021); N Bermeo, ‘On Democratic Backsliding’ (2016) 27(1) *Journal of Democracy* 5.

Globally, the World Justice Project has recently reported that the rule of law has declined in most countries for the fifth year in a row.<sup>39</sup> In 2022, for example, the rule of law declined in 61% of countries, with respect for fundamental rights being the worst affected issue as two-thirds of all countries saw a decline. The Project also points to consistent authoritarian trends between 2017-2022 in a majority of countries, such as a reduction of checks on government powers including oversight by the judiciary, legislature, and media.

In the UK, recent legislative reforms and developments have engaged matters concerning the rule of law, accountability, democracy and human rights, all of which have increased the power of the executive or otherwise limited measures of scrutiny. For example, the Overseas Operations (Service Personnel and Veterans) Act 2021 has imposed a statutory presumption against the prosecution of soldiers for alleged offences committed in the course of duty which occurred more than five years prior,<sup>40</sup> as well as introducing additional hurdles and time limits for bringing a criminal or civil case.<sup>41</sup> On a similar note, the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 allows for a ‘Criminal Conduct Authorisation’,<sup>42</sup> essentially authorising conduct which would otherwise amount to a crime and thus guaranteeing immunity for undercover agents who break the law in the conduct of their role.

In April 2022, a package of constitutionally significant Acts received Royal Assent on the same day. This included the Elections Act 2022 which has reduced the independence of the UK’s elections watchdog – the Electoral Commission – and introduced voter identification requirements for polling station voting;<sup>43</sup> the Judicial Review and Courts Act 2022 which has reformed the scope and availability of remedies;<sup>44</sup> the Nationality and Borders Act 2022 which has reformed resettlement routes, as well as introducing offshore refugee processing facilities and the possibility to revoke citizenship without notice;<sup>45</sup> and the Police, Crime, Sentencing and Courts Act 2022 which allows the police to impose significant restrictions upon static

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<sup>39</sup> World Justice Project, Rule of Law Index <https://worldjusticeproject.org/rule-of-law-index/> (accessed 12 July 2023).

<sup>40</sup> Overseas Operations (Service Personnel and Veterans) Act 2021 s.2. This presumption does not, however, apply to genocide, crimes against humanity, and war crimes (Schedule 1 to the Act).

<sup>41</sup> *Ibid.* Parts 1 and 2.

<sup>42</sup> Covert Human Intelligence Sources (Criminal Conduct) Act 2021 s.1.

<sup>43</sup> Elections Act 2022 Part 3 and Schedule 1 respectively. See B Stanford, ‘No ID, No Vote. Voter ID Comes to Great Britain’ *LSE Politics and Policy Blog* (23 November 2022) <https://blogs.lse.ac.uk/politicsandpolicy/no-id-no-vote-voter-id-comes-to-great-britain/> (accessed 12 July 2023); ‘The Elections Bill: The Arrival of Voter ID (and a Whole Lot More)’ (2021) 26(2) *Coventry Law Journal* 46.

<sup>44</sup> Judicial Review and Courts Act 2022 ss.1-2 respectively.

<sup>45</sup> Nationality and Borders Act 2022 Part 2; Schedule 4; and s.10 and Schedule 2 respectively.

protests, for example with start and finish times as well as maximum noise limits.<sup>46</sup> Further reforms include the Public Order Act 2023, passed in May 2023, which has introduced new criminal offences concerning protest such as ‘locking on’ and obstructing major transport works, as well as expanding police powers of stop and search and the ability to ban people from participating in protests.<sup>47</sup>

The UK Government has also been edging closer towards a conflict with the ECtHR with respect to the deportation of illegal migrants and failed asylum seekers in particular. The Illegal Migration Act 2023, passed in July 2023, goes even further than the Nationality and Borders Act 2022 and, once its main provisions enter into force, effectively removes the right to access refugee protection in the UK for people who enter the UK illegally or via a ‘safe country’, even if victim of modern slavery, as their claims are deemed inadmissible for the purpose of an asylum claim.<sup>48</sup> An obligation has also been placed on the Home Secretary to deport people in this position to their country of origin or a safe country such as Rwanda,<sup>49</sup> which can only be challenged if the person can argue they face ‘a real, imminent and foreseeable risk of serious and irreversible harm’ such as death or torture.<sup>50</sup> Further grounds of appeal can only be invoked after the person has been deported. Also controversial is a new power for the Home Secretary to disregard interim measures issued by the ECtHR,<sup>51</sup> such as one issued in June 2022 to prevent a deportation flight to Rwanda. As a result, the Act has drawn fierce criticism for placing the UK in the position of potentially violating its obligations under the 1951 Refugee Convention and the principle of non-refoulement if people are deported to a place where they will face ill-treatment, as well empowering a Minister to defy the orders of the ECtHR.

At the time of writing, many of the most controversial provisions of the Act have not yet entered into force due to the ongoing litigation concerning the legality of the UK’s plan to deport such people to Rwanda. This follows a Court of Appeal judgment in June 2023 which found that an agreement for this purpose between the UK and Rwanda – the Migration and Economic Development Partnership – was unlawful due to shortcomings in Rwanda’s own asylum

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<sup>46</sup> Police, Crime, Sentencing and Courts Act 2022 Part 3.

<sup>47</sup> Public Order Act 2023 s.1; s.6; ss.10-11; and Part 2 respectively.

<sup>48</sup> Illegal Migration Act 2023 s.5.

<sup>49</sup> *Ibid.* s.2.

<sup>50</sup> *Ibid.* s.42.

<sup>51</sup> *Ibid.* s.55.

system.<sup>52</sup> As such, the future of this agreement and the Illegal Migration Act itself is still uncertain, with the Supreme Court soon expected to hear the case following the Government's appeal. Nevertheless, with such significant reforms to UK migration and deportation policy, it might be necessary to not only extend the mandate of independent detention observers to facilities in third countries such as Rwanda, but also more fundamentally to reconsider the extent of the UK's extraterritorial human rights obligations.

The future of the HRA 1998 has also been subject to fierce debate for at least 15 years with successive Governments threatening its reform or replacement with a so-called British Bill of Rights. In June 2022, the Bill of Rights Bill was introduced with the purpose of repealing and replacing the HRA 1998,<sup>53</sup> drawing much criticism for the likely reduction of effective human rights protection. According to the Government, 'mission creep has resulted in human rights law being used for more and more purposes, with elastic interpretations that go way beyond anything that the architects of the [European] Convention had in mind', whilst the new Bill will 'reinforce our tradition of liberty whilst curtailing the abuses of human rights, restoring some common sense to our justice system, and ensuring that our human rights framework meets the needs of the society it serves'.<sup>54</sup> However, with Cabinet reshuffles as well as political and economic crises in the UK and beyond dominating the agenda and either resetting Government priorities or stalling progress, plans to progress the Bill were formally dropped in June 2023.<sup>55</sup>

Whilst each of these matters address a particular and specific issue, the mechanisms being subject to review and reform are all essential as they contribute to the safeguarding of democracy. Most importantly they all engage the rule of law – a fundamental constitutional principle of even greater importance in the absence of a codified constitution – in the sense that they all in some way help to ensure transparency, accountable government and some means of scrutiny. In the face of such challenges, the role of independent observers must now be considered.

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<sup>52</sup> *R (AAA and others) v Secretary of State for the Home Department* [2023] EWCA Civ 745. This overturned the High Court's earlier decision in [2022] EWHC 3230 (Admin).

<sup>53</sup> UK Parliament, Bill of Rights Bill <https://bills.parliament.uk/bills/3227> (accessed 12 July 2023). This Bill was at the Second Reading stage in the House of Commons at the time of writing.

<sup>54</sup> Ministry of Justice, Bill of Rights: Bill documents, Policy Paper (22 June 2022) <https://www.gov.uk/government/publications/bill-of-rights-bill-documents> (accessed 12 July 2023).

<sup>55</sup> J Hyde, 'Raab's Bill of Rights Officially Killed Off' *Law Society Gazette* (27 June 2023) <https://www.lawgazette.co.uk/news/raabs-bill-of-rights-officially-killed-off/5116465.article> (accessed 12 July 2023).

## 3 Election Observation

### 3.1 Purpose, Powers and Principles

Arguably the most globally recognised and well-established form of independent observer practice concerns the conduct and management of elections. Such is the value placed on a state's ability to observe and promote democracy, underpinned by the holding of free and fair elections, it is even a stated condition for membership of certain regional organisations such as the European Union and the North Atlantic Treaty Organization.<sup>56</sup> The status and credibility of election observation is thus integral to the overall credibility of an elected government.

In the UK, the importance of election observers was particularly demonstrated in the passage of the Elections Act 2022. Whilst section 1 of the Act introduced the requirement for voter identification, the substance of the new law is contained in Schedule 1. The new requirements were put to the test for the first time on 4 May 2023 in the English Local Elections which involved 230 councils. Nationally, according to the BBC, data from 160 councils shows that 26,165 individuals were initially refused a ballot paper for lacking adequate identification.<sup>57</sup> Of those, 16,588 later returned with accepted identification whereas 9,577 did not. Overall, data from these councils shows that the percentages of people turned away were generally less than 1%. Echoing these figures to some extent, observations and data recorded by the organisation Democracy Volunteers – which deployed more than 150 observers around the country – shows that 1.2% of all voters observed were turned away due to a lack of accepted identification, with the majority of these being from ethnic minorities.<sup>58</sup> Whilst the risk of voter identification laws disenfranchising marginalised groups was commented on and discussed before the Bill's passage,<sup>59</sup> the evidence now being established of its disproportionate impact on ethnic minorities raises even more concerns in light of the prohibition of discrimination in various human rights instruments as well as the Convention on the Elimination of All Forms of Racial Discrimination 1965 already discussed.

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<sup>56</sup> The 'Copenhagen Criteria' requires accession states to have *inter alia* 'stable institutions guaranteeing democracy'. See European Commission, Conditions for Membership [https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership\\_en](https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership_en) (accessed 12 July 2023); North Atlantic Treaty Organization, Study on NATO Enlargement (3 September 1995) [https://www.nato.int/cps/en/natohq/official\\_texts\\_24733.htm](https://www.nato.int/cps/en/natohq/official_texts_24733.htm) (accessed 12 July 2023).

<sup>57</sup> BBC, 'Local Elections 2023: Thousands Didn't Vote Due to ID Rule, Data Shows' (20 May 2023) <https://www.bbc.co.uk/news/uk-politics-65602231> (accessed 12 July 2023).

<sup>58</sup> Democracy Volunteers, Final Report – English Local Elections 2023 (12 May 2023) <https://democracyvolunteers.org/final-report-english-local-elections-2023/> (accessed 12 July 2023).

<sup>59</sup> B Stanford, 'Compulsory Voter Identification, Disenfranchisement and Human Rights: Electoral Reform in Great Britain' (2018) 1 *European Human Rights Law Review* 57.

As noted earlier, the right to free and fair elections is safeguarded in numerous international and regional human rights instruments. The UN has a significant role at the global level, whilst regionally the European Union (EU), Council of Europe (CoE), and Organisation for Security and Co-operation in Europe (OSCE) all have a role to play in observing elections in Europe and beyond. At the global level, beginning with the UN, the most well-known and influential instrument despite its non-binding nature is the Declaration of Principles for International Election Observation,<sup>60</sup> published in 2005 after a multi-year process involving more than 20 intergovernmental and international nongovernmental organisations concerned with election observation around the world. This set of 24 principles defines international election observation as:

the systematic, comprehensive and accurate gathering of information concerning the laws, processes and institutions related to the conduct of elections and other factors concerning the overall electoral environment; the impartial and professional analysis of such information; and the drawing of conclusions about the character of electoral processes based on the highest standards for accuracy of information and impartiality of analysis.<sup>61</sup>

The principles first outline the importance of genuine democratic elections as ‘an expression of sovereignty, which belongs to the people of a country, the free expression of whose will provides the basis for the authority and legitimacy of government’.<sup>62</sup> The principles then proceed to detail the expectations of election observation, emphasising the importance of human rights but also the respect for state sovereignty.

In the UK, electoral observation has a statutory basis under the Political Parties, Elections and Referendums Act (PPERA) 2000 and is carried out by a combination of individuals and organisations, generally on a voluntary basis, and the Electoral Commission which was itself established by the PERA 2000 as the UK’s elections watchdog.<sup>63</sup> Complicating matters somewhat, the Electoral Office for Northern Ireland and its Chief Electoral Officer has

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<sup>60</sup> Declaration of Principles for International Election Observation (GA Res 27 October 2005).

<sup>61</sup> *Ibid.* para 4.

<sup>62</sup> *Ibid.* para 1.

<sup>63</sup> Political Parties, Elections and Referendums Act (PPERA) 2000 s.1.

responsibility for some matters in Northern Ireland such as voter registration and to act as returning officer, but the Electoral Commission retains responsibility for most electoral law matters. The Act provides for the rights of representatives of the Electoral Commission to attend elections and referendums,<sup>64</sup> as well as individuals and organisations who are accredited with the Electoral Commission.<sup>65</sup> By means of example, for the recent May 2023 Local Elections in England, the Electoral Commission deployed a relatively small team of approximately 20 staff and Commissioners to 24 councils, albeit on a strategically targeted basis.<sup>66</sup> Whilst undoubtedly a small sample size in light of the 230 councils involved in the elections, not to mention the thousands of voters turned away for lacking identification, this deficiency was offset by the obligation placed on councils to monitor and record statistics of people rejected at polling stations. In contrast, one of the largest non-profit organisations working on electoral matters, Democracy Volunteers, deployed more than 150 observers across 118 councils, attending 879 polling stations.<sup>67</sup>

As such, the observation of elections in the UK is undertaken by a combination of volunteers in the form of accredited individuals and organisations, and professionals in the form of representatives of the Electoral Commission, each bringing their own particular strengths and advantages. The former, by means of accredited volunteers, accounts for a much greater frequency of deployments on a large and national scale, whereas the latter, official watchdog body, conducts observations on a much less frequent basis pursuant to a more targeted, risk-based approach.

### ***3.2 Oversight and Accountability***

Turning to the issue of oversight and accountability, as noted above, the involvement of observers in an electoral process has the potential to raise many politically sensitive issues. This is because the opinions and findings of observers can impact the perceived legitimacy of elected leaders and governments. As such, election observers are subject to a significant array of soft law regulation and guidance, particularly when deployed on official international observation missions.<sup>68</sup>

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<sup>64</sup> *Ibid.* s.6A.

<sup>65</sup> *Ibid.* ss.6C and 6D.

<sup>66</sup> Data supplied via email by Mel Davidson, Head of Support and Improvement, Electoral Commission (5 July 2023).

<sup>67</sup> Democracy Volunteers (n 58).

<sup>68</sup> van Aaken and Chambers (n 2).

In that respect, the UN Declaration of Principles for International Election Observation was supplemented by a Code of Conduct for International Election Observers.<sup>69</sup> This is based on a series of 12 basic requirements which include the need to respect sovereignty and international human rights; to respect the laws of the country and the authority of electoral bodies; to respect the integrity of the international election observation mission; to maintain strict political impartiality at all times; to not obstruct election processes; to provide appropriate identification; to maintain accuracy of observations and professionalism in during conclusions; to refrain from making comments to the public or the media before the mission speaks; to cooperate with other election observers; to maintain proper personal behaviour; to investigate violations of the Code; and to pledge to follow the Code. Multiple organisations in Europe are also involved in election observation and their observers are subject to similar expectations and codes of conduct. For example, the Commission of the EU issued a Communication in 2000 noting the fundamental principles of independence, impartiality, consistency, a long-term approach and professionalism,<sup>70</sup> and both the Parliamentary Assembly of the CoE and the Office for Democratic Institutions and Human Rights of the OSCE conducts observations in participating states, requiring observers to abide by the same 2005 Code of Conduct for International Election Observers just discussed.<sup>71</sup>

Given the consequences for the legitimacy of elections and the eventual winners, it is not surprising that the effectiveness of election observers has received particular attention in the context of international observation missions. In that respect, international election monitoring and observation has been described as the ‘primary tool of democracy promotion’.<sup>72</sup> The issue has attracted much attention in developing and transitional countries,<sup>73</sup> especially those

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<sup>69</sup> Code of Conduct for International Election Observers (GA Res 27 October 2005).

<sup>70</sup> Communication from the Commission on EU Election Assistance and Observation COM(2000) 191 final (11 April 2000).

<sup>71</sup> Guidelines for the Observation of Elections by the Parliamentary Assembly AS/Elect (2019) 5 (20 August 2019); OSCE Office for Democratic Institutions and Human Rights, *Election Observation Handbook* (Sixth Edition, 2010). See also C Binder, ‘International Election Observation by the OSCE and the Human Right to Political Participation’ (2007) 13(1) *European Public Law* 133.

<sup>72</sup> JG Kelley, *Monitoring Democracy: When International Election Observation Works, and Why it Oftens Fails* (Princeton University Press, 2012) 3.

<sup>73</sup> See e.g. M Mohee, ‘Electoral Governance and Human Rights Amid Pandemics in Africa: Key Lessons from the Early Covid-19 Experience’ (2021) 65(2S) *Journal of African Law* 209; M Wiebusch et al, ‘The African Charter on Democracy, Elections and Governance: Past, Present and Future’ (2019) 63(1Supp) *Journal of African Law* 9.

emerging from conflict,<sup>74</sup> where the legitimacy of the eventual victor often hinges upon the perceived legitimacy of the election process itself. In the context of OSCE election observation missions, though arguably applicable in a much broader context, Christina Binder has suggested that three factors limit or challenge the effectiveness of such missions.<sup>75</sup> These include, first, the political situation in the country, such as a lack of political will from the incumbent government to improve or respond to recommendations; second, intra-organisational problems, such as a lack of effective mechanisms to monitor the implementation of recommendations, internal political opposition, or selectivity of deployments; and third, inter-organisational problems, such as a lack of cooperation between different international organisations with a similar remit.

In the UK, the PPERA 2000 contains the most relevant provisions governing the role of observers, whether accredited individuals or organisations such as Democracy Volunteers. The Act confers powers on the relevant officer to limit the number of observers present at relevant proceedings, for example a presiding officer at a polling station, as well as a power to cancel an observer's right to attend if the observer commits misconduct.<sup>76</sup> Furthermore, the Electoral Commission is obliged to prepare a Code of Practice,<sup>77</sup> which sets out the standards and expectations of accredited observers.<sup>78</sup> This reflects the UN 2005 Code of Conduct and includes the requirements to respect the laws of the United Kingdom and the authority of electoral bodies; to maintain strict political impartiality at all times; to abide by the requirements of secrecy; to not obstruct electoral processes; to provide appropriate identification; to maintain accuracy of observations and professionalism in drawing conclusions; and to maintain proper personal behaviour.<sup>79</sup> If an observer fails to abide by these standards of behaviour, or is found or reported guilty under the Representation of the People Act (RPA) 1983 or any other electoral legislation in the UK of a corrupt or illegal electoral practice anywhere in the UK, their accreditation with the Electoral Commission (and accompanying rights of access) can be revoked.

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<sup>74</sup> R Lappin, 'Why Observe Elections? Reassessing the Importance of Credible Elections to Post-Conflict Peacebuilding' (2009) 41(2) *Peace Research* 85.

<sup>75</sup> Binder (n 71) 152-156.

<sup>76</sup> PPERA 2000 s.6E.

<sup>77</sup> *Ibid.* s.6F.

<sup>78</sup> Electoral Commission, Electoral Observation at United Kingdom Elections and Referendums Code of Practice for Electoral Observers (HC 1824 Scotland ELC/2018/02) [https://www.electoralcommission.org.uk/sites/default/files/electoral\\_commission\\_pdf\\_file/Code-of-practice-for-electoral-observers-Web.pdf](https://www.electoralcommission.org.uk/sites/default/files/electoral_commission_pdf_file/Code-of-practice-for-electoral-observers-Web.pdf) (accessed 12 July 2023).

<sup>79</sup> *Ibid.* paras 3-3.23.

One of the most significant legal obligations that observers must abide by includes, most importantly, the secrecy of the ballot. In this respect the RPA 1983 prohibits a wide range of conduct at polling and counting stations, including, but not limited to, interfering with a voter who is recording their vote; obtaining information about the candidate a voter will vote or has voted for; communicating whom a voter will vote or has voted for, or any unique identifying marks on a ballot paper; or inducing a voter to show their ballot paper after voting in order to identify the candidate voter for.<sup>80</sup> If a person contravenes any of these restrictions they may be liable on summary conviction to a fine or to imprisonment for up to 6 months.<sup>81</sup>

Pursuant to its statutory duties, the Electoral Commission also leads in raising awareness and training involved stakeholders such as electoral administrators and independent observers. For example, in advance of the May 2023 Local Elections in England, the Electoral Commission provided some basic training for accredited observers via online briefings and the dissemination of further guidance online.<sup>82</sup>

The task of determining whether an observer body is genuinely independent and accountable cannot be undertaken without considering the issue of their sponsorship and funding. Whilst the PPERA and other UK legislation does not address the issue of observer funding or sponsorship directly, other than general charity law, the various soft law instruments already discussed seek to address this gap. In that respect, the 2005 Declaration of Principles for International Election Observers requires members of international election observer missions to be ‘free from any political, economic or other conflicts of interest that would interfere with conducting observations accurately and impartially and/or drawing conclusions about the character of the election process accurately and impartially’ and the 2005 Code of Conduct obliges observers to report any conflicts of interest they may have.<sup>83</sup> However, with respect to individuals and organisations accredited by the Electoral Commission to carry out observation work in the UK, ascertaining the source and extent of funding is an extremely difficult task. On the one hand, it is simply not possible to account for all individuals who are accredited and

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<sup>80</sup> RPA 1983 s.66(3) (as amended).

<sup>81</sup> *Ibid.* s.66(6).

<sup>82</sup> Electoral Commission, Guidance for Electoral Observers in England <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/observing-elections-and-referendums/guidance-and-feedback-observing-elections/guidance-electoral-observers-england> (accessed 12 July 2023).

<sup>83</sup> Declaration of Principles for International Election Observation (n 60) para 6; Code of Conduct for International Election Observers (n 69).

choose to practice election observation alone, for example, academics employed by a higher education institute. On the other hand, with respect to volunteer organisations, Democracy Volunteers do not receive state funding and instead rely on donations from the public and grants from organisations such as the Joseph Rowntree Reform Trust and the Andrew Wainwright Reform Trust.<sup>84</sup>

In contrast, the Electoral Commission, as the statutory body tasked with overseeing electoral law in the UK, is funded and overseen by the UK Parliament, Scottish Parliament and the Welsh Senedd, whilst the Electoral Office for Northern Ireland is funded by the UK Government's Northern Ireland Office and HM Treasury, drawing some criticism for its vulnerability to political control and comparative lack of Parliamentary oversight. Being subject to imperatives of financial transparency, the Electoral Commission's budget for 2022/23 drew operational spending of £25.16 million and total spending plans of £28.55 million, which are marginally higher figures than those planned for 2023/24 and 2024/25, predominantly due to costs involved in implementing the introduction of voter ID in May 2023.<sup>85</sup> The operational independence of the Commission has, however, been seriously challenged by the recently passed Elections Act 2022 which had the purported aim of making UK elections remain secure, fair, modern, inclusive and transparent.

First, the Act has introduced a 'Strategy and Policy Statement', drafted by the Secretary of State after consulting the Commission, the Speaker's Committee and the Levelling Up, Housing and Communities Committee, and the Statement is itself subject to the approval of Parliament. This Statement will determine the 'strategic and policy priorities' of the Government relating to elections and, crucially, the 'role and responsibilities' of the Commission in enabling the Government to meet these priorities.<sup>86</sup> Moreover, the Act imposes an obligation on the Electoral Commission to have regard to this Statement when carrying out its duties. Second, the Act will allow the Speaker's Committee – a House of Commons committee chaired by the Speaker – to 'examine the performance' of the Commission with

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<sup>84</sup> Democracy Volunteers, Finance <https://democracyvolunteers.org/about-us/finance/> (accessed 12 July 2023).

<sup>85</sup> Electoral Commission, Managing Our Costs <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/about-us/our-plans-and-priorities/corporate-plan-2022/23-2026/27/9-managing-our-costs> (accessed 12 July 2023).

<sup>86</sup> Elections Act 2022 s.16. For the Statement see House of Commons Levelling Up, Housing and Communities Committee, Revised draft Electoral Commission Strategy and Policy Statement (19 June 2023) <https://www.gov.uk/government/publications/revised-draft-electoral-commission-strategy-and-policy-statement> (accessed 12 July 2023).

respect to its fulfilment of the Statement.<sup>87</sup> This Committee is a statutory body, established by PPERA 2000, which currently has nine members. Whilst the composition of the Committee has historically been politically balanced,<sup>88</sup> five out of nine political members of the present Committee are Conservative Party Members of Parliament, thus giving a clear controlling stake to the party of Government.<sup>89</sup> Third, the Act has stripped the Commission of its powers to initiate criminal proceedings in England and Wales, leaving the Crown Prosecution Service as the sole body able to do so.<sup>90</sup> This comes in the wake of several high-profile examples where the Commission has investigated the former Prime Minister, Boris Johnson, for the refurbishment of his private flat at 11 Downing Street, as well as the imposition of fines against the ‘Vote Leave’ organisation for breaking spending limits during the EU Referendum campaign.<sup>91</sup>

Given the significant impact of the Act on its operational independence, the Electoral Commission unsurprisingly commented publicly. On the first issue – the Strategy and Policy Statement – the Commission stated:

The introduction of a Strategy and Policy Statement which enables the government to set the strategic direction for the work of the Commission is not consistent with the role that an independent Commission plays in a healthy democracy. This independence is fundamental to maintaining confidence in our electoral system.<sup>92</sup>

Other bodies have similarly stressed the importance of independent election monitoring bodies and the need for them to be protected from Government control. For example, in its recent report on regulating election finance, the influential Committee on Standards in Public Life expressed similar sentiments, noting their belief in ‘the value of an independent regulator,

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<sup>87</sup> Elections Act 2022 s.17.

<sup>88</sup> A Renwick and C Kincaid, ‘Why We Need an Independent Electoral Commission’ *The Constitution Unit* (7 October 2020) <https://constitution-unit.com/2020/10/07/why-we-need-an-independent-electoral-commission/> (accessed 12 July 2023).

<sup>89</sup> UK Parliament, Speaker’s Committee on the Electoral Commission <https://committees.parliament.uk/committee/144/speakers-committee-on-the-electoral-commission/> (accessed 12 July 2023).

<sup>90</sup> Elections Act 2022 s.19.

<sup>91</sup> R Merrick, ‘Electoral Commission to be Stripped of Power to Prosecute after Probe into Boris Johnson’s Flat Makeover’ *The Independent* (18 June 2021).

<sup>92</sup> Electoral Commission, A Strategy and Policy Statement for the Electoral Commission (5 July 2021) <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/elections-bill/a-strategy-and-policy-statement-electoral-commission> (accessed 12 July 2023).

insulated from political pressures and at arm's length from the government',<sup>93</sup> whilst the House of Commons Committee on Levelling Up found that no Statement was even necessary in the first place, and that it should be fundamentally rewritten to stress the Electoral Commission's independence from Government.<sup>94</sup> Turning to the third sector, Unlock Democracy criticised the Statement as it meant the Government would now be 'directing the Commission's work and identifying its priority functions' which would be completely incompatible with the claim that the Commission remained operationally independent.<sup>95</sup> Beyond the UK's particular framework, the Office of the United Nations High Commissioner for Human Rights has expressed similar views, stressing the importance of 'independent electoral management bodies and procedures to deal with electoral disputes',<sup>96</sup> and the need for 'an impartial and independent election management body exempt from provisions leading to discriminatory treatment, political bias or government pressure'.<sup>97</sup>

Clearly, providing for the oversight and accountability of election observers has received significant attention in the past several decades. The global standing of the UN Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers arguably reflects the status of election observers as the most well-established type of independent observers. Whilst only holding soft law status, the principles contained in these instruments are subject to a great deal of respect and replication in regional organisations and states. Taking the UK as an example, binding legal instruments such as PPERA 2000 and the RPA 1983 take these universal principles further and impose significant legal obligations on election observers. Whilst the regulation of election observation and the practice of observers appears to be robust, the operational independence of the chief elections watchdog in the UK – the Electoral Commission – has been seriously jeopardised by the passing of the Elections Act 2022.

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<sup>93</sup> Committee on Standards in Public Life, 'Regulating Election Finance: A Review by the Committee on Standards in Public Life' (July 2021) 6.

<sup>94</sup> House of Commons Levelling Up, Housing and Communities Committee, 'Draft Strategy and Policy Statement for the Electoral Commission' (2022-23, HC 672).

<sup>95</sup> Letter from Tom Brake, Director of Unlock Democracy, to Clive Betts MP, Chair of the Levelling Up, Housing and Communities Select Committee (26 August 2022) <https://committees.parliament.uk/publications/30196/documents/174929/default/> (accessed 12 July 2023).

<sup>96</sup> UN Office of the High Commissioner for Human Rights (n 22) 11.

<sup>97</sup> *Ibid.* 12.

## 4 Prisoner Escort and Court Custody Observation

### 4.1 Purpose, Powers and Principles

The importance of independent observers in the prisoner escort and court custody context can be seen not just because of the immediacy and severity of the deprivation of liberty at the hands of the state, but also more alarmingly the number of high-profile incidents and deaths in custody. Recent statistics in the UK show, for example, that there were 322 deaths in prison custody in the 12 months to March 2023, an increase of 12% from the previous year.<sup>98</sup> There is also evidence of racial inequalities in these statistics. A recent report issued by Inquest, a UK based charity working on state-related deaths, suggested that whilst the deaths of racialised people in custody are not disproportionate to the prison population, they are among some of the most contentious, violent and neglectful.<sup>99</sup>

As discussed earlier, the right to liberty and the prohibition of arbitrary detention is safeguarded in numerous international and regional human rights instruments. The deployment of observers to places of detention, however, is linked to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984,<sup>100</sup> but more specifically the Optional Protocol 2002 (OPCAT) which seeks to ‘establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty’.<sup>101</sup>

This instrument, ratified by the UK in December 2003, requires states to establish a ‘national preventive mechanism’,<sup>102</sup> and to allow visits ‘to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’.<sup>103</sup> In the UK the scope

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<sup>98</sup> Ministry of Justice, *Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to March 2023 Assaults and Self-harm to December 2022* (27 April 2023) <https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-december-2022/safety-in-custody-statistics-england-and-wales-deaths-in-prison-custody-to-march-2023-assaults-and-self-harm-to-december-2022#deaths-12-months-to-march-2023> (accessed 12 July 2023).

<sup>99</sup> Inquest, ‘Deaths of Racialised People in Prison 2015 – 2022: Challenging Racism and Discrimination’ (12 October 2022) <https://www.inquest.org.uk/report-deaths-of-racialised-people-in-prison-2015-2022> (accessed 12 July 2023).

<sup>100</sup> UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46) (CAT).

<sup>101</sup> Optional Protocol to the CAT (adopted 18 December 2002 UNGA Res 57/199) (OPCAT) Art 1. See generally R Murray et al, *The Optional Protocol to the UN Convention Against Torture* (Oxford University Press, 2011).

<sup>102</sup> OPCAT Art 3.

<sup>103</sup> *Ibid.* Art 4(1).

of this mandate is extensive and includes prisons and young offender institutions, police custody, escort and court custody, the detention of children in various contexts, as well as detention for specific purposes or contexts such as under the Terrorism Act 2000, health and social care, immigration, the military and customs. Such is the breadth of this mandate, the UK's approach to the NPM is the deployment of 21 statutory bodies, which compared to other states has been described as 'unusual in its composition – in terms of quantity, breadth and experience of its members'.<sup>104</sup>

For prisoner escort and court custody in England and Wales, Lay Observers and HM Inspectorate of Prisons (HMIP) are the relevant observer bodies. Beginning with Lay Observers, who are appointed by the Secretary of State for Justice as volunteer members of the public, their role is to monitor the welfare of detained persons held in court custody. This has a statutory basis under the Criminal Justice Act 1991 which provides that the role of such observers is to 'inspect the conditions in which prisoners are transported or held in pursuance of the arrangements and to make recommendations to the Secretary of State'.<sup>105</sup> According to the latest statistics, in the 2021-22 reporting year, Lay Observers carried out a total of 1120 visits to court custody facilities with over 6700 detained persons being recorded, over 70% of whom were directly interviewed by the attending Observer.<sup>106</sup>

HMIP have a somewhat more expansive role, not just being tasked with the inspection of prisons, but like Lay Observers also court cells and vehicles used for transporting prisoners. This has a statutory basis under the Prison Act 1952, which provides that the Chief Inspector is responsible for arranging the inspection of 'areas of the Crown Court, county courts and magistrates' courts where prisoners are detained in custody' and 'any vehicle used to transport prisoners in custody to and from the Crown Court, county courts or magistrates' courts' and to report to the Secretary of State.<sup>107</sup> According to the latest HMIP Inspection Framework, the organisation carries out a minimum of three court custody inspections each year,<sup>108</sup> with the

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<sup>104</sup> J Laing and R Murray, 'Lay Visitors in Places of Detention in the UK: Evaluating Compliance with the UN Optional Protocol to the Convention Against Torture (OPCAT)' (2020) 5 *European Human Rights Law Review* 472, 474.

<sup>105</sup> Criminal Justice Act 1991 s.81(1)(b).

<sup>106</sup> Lay Observers Annual Report 2021-2022 (January 2023) <https://layobservers.org/reports/> (accessed 12 July 2023) para 5.5.

<sup>107</sup> Prison Act 1952 s.5A(5C) (as amended).

<sup>108</sup> HM Inspectorate of Prisons, Inspection Framework (March 2023) <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2023/04/Inspection-framework-2023.pdf> (accessed 12 July 2023) para 3.2.

most recent report at the time of writing covering court custody facilities in Bedfordshire, Hertfordshire and Cambridgeshire.<sup>109</sup>

As such, like election observation, the observation of prisoner escort and court custody facilities in the UK is undertaken by a combination of volunteers in the form of Lay Observers and professionals in the form of HMIP, each bringing their own particular strengths and advantages. The former, by means of volunteers, accounts for a much greater frequency of visits on a small and localised scale, whereas the latter, official body, conduct visits on a much less frequent basis but on a more intensive scale.

#### ***4.2 Oversight and Accountability***

Turning again to the issue of oversight and accountability, the UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) has provided guidance to states regarding the establishment and expectations of a state's national preventive mechanism.<sup>110</sup> This provides, for example, that the operational independence of the NPM should be guaranteed,<sup>111</sup> and that the effectiveness of the NPM should be subject to regular appraisal by both the state and the NPM itself.<sup>112</sup> In terms of the creation of the NPM, the Guidance provides that it should be identified by an open, transparent and inclusive process,<sup>113</sup> and that individuals should not be appointed if they have a conflict of interest.<sup>114</sup> In terms of the NPM itself, the Guidance provides that it should carry out all aspects of its mandate in a manner which avoids actual or perceived conflicts of interest,<sup>115</sup> and that the NPM and its members and staff should regularly review their working methods and undertake training to enhance their ability to exercise their responsibilities.<sup>116</sup>

In the UK, the oversight and accountability of court custody and escort observers is provided for in several ways. Beginning with Lay Observers, new recruits undergo mandatory training

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<sup>109</sup> HM Inspectorate of Prisons, Report on an Inspection Visit to Court Custody Facilities in Bedfordshire, Hertfordshire and Cambridgeshire (27 February – 11 March 2023) <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2023/05/Beds-Herts-and-Cambs-courts-web-2023.pdf> (accessed 12 July 2023).

<sup>110</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms CAT/OP/12/5 (9 December 2010).

<sup>111</sup> *Ibid.* para 8.

<sup>112</sup> *Ibid.* para 15.

<sup>113</sup> *Ibid.* para 16.

<sup>114</sup> *Ibid.* paras 18-19.

<sup>115</sup> *Ibid.* para 30.

<sup>116</sup> *Ibid.* para 31.

and shadow experienced observers for a number of visits to court custody facilities before being authorised to conduct visits alone. The reports completed by individual Lay Observers following their visits are analysed and compiled into annual reports which are made public.<sup>117</sup> Individual Lay Observers are accountable to a National Council,<sup>118</sup> subject to the Official Secrets Act 1989 and Data Protection Act 2018, and must adhere to a Compact and Code of Conduct which reflect the seven principles of public life popularly known as the ‘Nolan Principles’. This includes selflessness, integrity, objectivity, accountability, openness, honesty, and leadership.<sup>119</sup> Given the range of stakeholders involved in the daily management of court custody environments, Lay Observers also operate with a number of shared protocols and memoranda of understanding with different agencies. For example, a shared protocol with the Ministry of Justice (MoJ) clarifies that Lay Observers are ‘operationally independent of, though sponsored by, the [Ministry of Justice]’ and that the Secretary of State for Justice is accountable to Parliament for ‘the policies, decisions and actions of this Department’ including matters relating to the performance of the Lay Observers.<sup>120</sup>

Turning to HMIP, their reports are much more varied in nature, in accordance with their more wide-ranging role and include thematic reports, annual reports, and specific prison and court custody facility reports.<sup>121</sup> Like Lay Observers, HMIP operates in regular cooperation with different agencies pursuant to shared protocols and memoranda of understanding. The Prison Act 1952 sets out the HMIP Chief Inspector’s further powers and duties to cooperate and consult with other criminal justice inspectorates and other bodies in this respect, including the obligation to prepare an inspection programme and inspection framework on which the Secretary of State and other specified bodies must be consulted, and to act jointly with other public authorities and criminal justice inspectors when appropriate.<sup>122</sup>

For example, similar to Lay Observers, a shared protocol with the MoJ clarifies that the independence of HMIP is a prerequisite for its inclusion as one of the bodies designated to the

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<sup>117</sup> See e.g. Lay Observers Annual Report 2021-2022 (n 106).

<sup>118</sup> Lay Observers, National Governance <https://layobservers.org/national-governance/> (accessed 12 July 2023).

<sup>119</sup> Committee on Standards in Public Life, The Seven Principles of Public Life (31 May 1995) <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2> (accessed 12 July 2023).

<sup>120</sup> Protocol Between The Ministry of Justice as the Department and The Lay Observers’ National Council (4 May 2021) <https://s3-eu-west-2.amazonaws.com/layobservers-prod-storage-nu2yj19yczbd/uploads/2021/05/FINAL-Lay-Observers-MOJ-protocol-signed.pdf> (accessed 12 July 2023).

<sup>121</sup> HM Inspectorate of Prisons, Our Reports <https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/> (accessed 12 July 2023).

<sup>122</sup> Schedule A1 to the Prison Act 1952.

UK's NPM, and that the Secretary of State for Justice is accountable to Parliament for 'the policies, decisions and actions of this Department' including matters relating to the discharge of functions under the remit of HM Chief Inspector of Prisons.<sup>123</sup>

Whether prisoner escort and court custody observers have a positive impact in their roles is subject to considerable debate. Matters are complicated given the issue of privatisation and the increasing number of stakeholders involved in the delivery of criminal justice, prisoner escort and court custody services, an issue common to many frontline services in the UK in recent years. In that respect, the first privately ran prison opened in the UK in 1992 and the number has steadily increased since then.<sup>124</sup> In terms of prisoner escort and court custody services, matters are even more complex with an increased number of actors involved.<sup>125</sup>

First, the Prisoner Escort and Custody Service (PECS) is tasked with the safe, decent, secure and timely transfer of prisoners and detainees to and from courts, and to oversee their care and security whilst in the court custody area or in the dock. PECS has been managed by private sector providers since 1994, with GEOAmey currently holding responsibility for the North of England, Wales and Scotland and Serco covering the South of England. The most recent contracts, issued by the Ministry of Justice in 2020 for a period of 10 years, were negotiated in accordance with public sector procurement directive 2014/24/EU,<sup>126</sup> which requires contractors and subcontractors to comply with all applicable EU and national environmental, social and labour law, collective agreements and any relevant international obligations. The performance of the two companies is monitored through monthly Contract Management Review meetings. Going further, Serco regularly publish reports detailing how they work and adhere to their ESG responsibilities, which includes respecting human rights.<sup>127</sup>

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<sup>123</sup> Protocol Between The Ministry of Justice as the Department and HM Chief Inspector of Prisons (10 October 2019) <https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2019/10/Updated-MOJ-Protocol-October-2019.pdf> (accessed 12 July 2023).

<sup>124</sup> GG Grimwood, Prisons: The Role of the Private Sector (House of Commons Library SN/HA/6811 30 January 2014).

<sup>125</sup> See T Coates and C Medhurst, 'Keeping Court Custody Suites Safe' *Inside HMCTS* (20 January 2021) <https://insidehmcts.blog.gov.uk/2021/01/20/keeping-court-custody-suites-safe/> (accessed 12 July 2023).

<sup>126</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

<sup>127</sup> Serco, Environment, Social and Governance at Serco: Report 2022 <https://www.serco.com/essg> (accessed 12 July 2023).

Adding further complexity, PECS itself is managed by HM Prisons & Probation Service on behalf of HM Courts and Tribunals Service which holds overall responsibility for a safe, decent, secure court custody environment. Such is the complexity of the multi-agency approach to managing detainees in court custody, the organisation Lay Observers has highlighted the serious lack of cohesion and interconnection between the agencies involved which adversely impacts on the treatment of detainees.<sup>128</sup>

The deployment of observers to similar institutions, namely prisons, has attracted much more academic scrutiny which can be of further assistance here. For example, Jane Andrew has commented that ‘accountability has never been framed in terms of accountability of regimes of punishment and prisons generally, and has instead had an overt focus on the critique of private operation of penal establishments’.<sup>129</sup> Going further, James Roffee has suggested that this emphasis on efficiency and procedural accountability has complicated the dilemmas of inflicting punishment within state institutions,<sup>130</sup> leading to a focus on process rather than outcome, and technical accountability mostly concerned with data and statistics to the detriment of deeper and more meaningful analysis.

With respect to observers attending prisons more generally, research paints a picture of mixed success.<sup>131</sup> Historically, there were concerns about the visibility, relevance and independence of observers with inmates having little confidence in their effectiveness.<sup>132</sup> More recently, despite positive reforms in this area, Roffee has suggested that there is some role confusion and in particular that whilst the use of volunteers is ‘appropriate to performing monitoring functions that act to enhance intelligent accountability; however...volunteers are ineffective for the purposes of improving technical accountability’.<sup>133</sup> This is largely due to a lack of expertise and expectations that exceed their level of training and knowledge. As such, Roffee

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<sup>128</sup> National Preventive Mechanism, Monitoring Places of Detention: 13<sup>th</sup> Annual Report of the United Kingdom’s National Preventive Mechanism 2021/22, 46.

<sup>129</sup> J Andrew, ‘Prison Privatization: The (Ir)relevance of Accounting’ (2010) 10 *Accounting and the Public Interest* 122.

<sup>130</sup> JA Roffee, ‘Accountability and Oversight of State Functions: Use of Volunteers to Monitor Equality and Diversity in Prisons in England and Wales’ (2017) Jan–March *Sage Open Journals* 1, 2.

<sup>131</sup> See especially Roffee (n 130); Laing and Murray (n 104); N Padfield, ‘Monitoring Prisons in England and Wales: Who Ensures the Fair Treatment of Prisoners?’ (2018) 70 *Crime, Law and Social Change* 57.

<sup>132</sup> C Martin and D Godfrey, ‘Prisoners Views of Boards of Visitors’ (1994) 34(3) *The British Journal of Criminology* 358.

<sup>133</sup> Roffee (n. 130) 3.

argues that ‘members require better training, and clearer communications concerning expectations from their reporting functions’.<sup>134</sup>

Returning to the issue of sponsorship and the funding of observer bodies, the budgetary situation for Lay Observers reflects their status as an unpaid volunteer-based organisation sponsored by the MoJ. As Lay Observers do not have a specific accounting officer with financial responsibilities, the Permanent Secretary of the MoJ is instead responsible for this, with the Lay Observers Head of Secretariat accounting to the Permanent Secretary with respect to the actual use of resources.<sup>135</sup> Similarly, HMIP lack an accounting officer with financial responsibilities and so the Permanent Secretary of the MoJ is instead responsible, with HMIP then accounting to the Secretary with respect to the actual use of resources. In contrast to Lay Observers, however, the professional organisation HMIP draws a significant budget and is mostly funded by the Ministry of Justice and, to a lesser extent, the Home Office. Again, owing to the need for financial transparency, a budget of just over £5.5 million was proposed and published for 2022/23.<sup>136</sup>

Ultimately, the mechanisms of providing oversight and accountability for prisoner escort and court custody observers facilities in the UK are much more complex and interconnected than those for election observers discussed earlier. On the one hand, this is because of the range of clear legal commitments contained in international treaties to protect against arbitrary detention and ill-treatment, imposing binding obligations on state parties, which in turn trickle down through the apparatus and structures of government and eventually enter into the remit of observers. On the other hand, the number of stakeholders involved in prisoner escort and court custody facilities means that meeting these obligations becomes the responsibility of a number of actors, often resulting in overlapping areas of accountability.

## **5 Conclusion**

This article has examined the roles and functions of independent observers through the lens of constitutional values and principles, including relevant international human rights obligations. In the face of recent democratic backsliding, observers have undoubtedly acted as a source of

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<sup>134</sup> *Ibid.*

<sup>135</sup> Protocol Between The Ministry of Justice as the Department and The Lay Observers’ National Council (n 120) para 6.

<sup>136</sup> HM Inspectorate of Prisons, Business Plan 2022-23 (March 2022) 11.

pushback by acting as the eyes and ears of the public when state power is concerned. It has been suggested that, despite their different agendas and status, observers all contribute to ensuring transparency and accountability in Government, and therefore also have a role to play in ensuring compliance with constitutional principles such as democracy, the rule of law and the protection of human rights. At the same time, whilst maintaining the independence of observers is critical for their roles to be seen as credible, it is also clear that observers themselves must be (and are) subject to varying degrees of oversight which is essential to their roles being accepted as legitimate. These qualities are in themselves arguably a prerequisite for observers to be able to perform their roles effectively, as without clear expectations and accountability there can be no trust or legitimacy.

The recent issues and developments in the UK explored in this paper, including those concerning electoral administration and people held in custody, have highlighted how important it is to have independent observers. Policymakers and governments would do well to heed the words of Jeremy Bentham, quoted extensively by Lord Shaw in an early 20<sup>th</sup> century case concerning the nullity of a marriage, but most celebrated for the notion of open justice. Lord Shaw quoted Bentham who wrote that ‘[i]n the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice’.<sup>137</sup> Whilst principally concerning the right to a fair trial, the principle can equally apply to good governance and respect for the rule of law and human rights. Ultimately, as the need for independent observers and their contribution to democratic accountability increases, so too does the need for their appropriate resourcing and training, as well as the need for their own adequate oversight.

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<sup>137</sup> *Scott v Scott* (1913) AC 417, 477.