
# United Kingdom of Great Britain and Northern Ireland

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## I. Introduction

The year 2022 saw significant constitutional developments. After 70 years on the throne, Queen Elizabeth II died and was succeeded as monarch by her son Charles. In terms of the exercise of executive power, the United Kingdom has had three Prime Ministers in 2022, which resulted from the internal Conservative party coup to remove Boris Johnson and the shortest serving British Prime Minister, Liz Truss. What does this mean for constitutional law? Considering these events, 2022 ended with a new Prime Minister Rishi Sunak, who now needs to respond to calls for a second Scottish independence referendum, the Northern Ireland Protocol, and the future of the Human Rights Act 1998.

## II. Major Constitutional Developments

### 1. The Fall of Boris Johnson

In the 2021 I·CONnect Global Review of Constitutional Law for the United Kingdom, it ended with a review about the uncertainty as to what would happen to the then Prime Minister Boris Johnson regarding the fall-out of Partygate (whereby 10 Downing Street was the site of the most significant COVID-19 law-breaking during the pandemic). As soon as 2022 began, additional evidence of law-breaking started to emerge, revealing that the Prime Minister, despite informing the House of Commons in December 2021 that there had been no parties, had known about and attended these events at Downing Street. Furthermore, evidence would surface showing the Prime Minister was also drinking with colleagues at these parties. The Metropolitan Police commenced an investigation into the allegations that laws relating to the COVID-19 restrictions had been violated at 10 Downing Street. This coincided with an early version of the report by Sue Gray, a senior civil servant tasked with investigating whether any laws had been breached, being published and was highly critical of the failure of leadership in Downing Street. Subsequently, after a pause in the police investigation, Johnson became the first serving British Prime Minister to be charged with the commission of a criminal offence. Johnson was issued with a £50 fixed penalty notice by the Metropolitan Police. Moreover, the current Prime Minister Rishi Sunak was also issued with a £50 fixed penalty notice.

In response to allegations that Prime Minister Johnson had misled the House of Commons in 2021, the Commons Select Committee of Privileges issued an interim report that was highly critical of Johnson. The position of Prime Minister not only depends on government enjoying the confidence of the House of Commons but also to command the confidence of their own MPs. This appeared not to be the case for Boris Johnson, even though he achieved a large majority in the House of Commons at the December 2019 general election. Johnson survived a Conservative party MP vote of confidence in June 2022. It is significant to note that this vote of confidence is not the same as a vote of confidence in the House of Commons in which every MP gets to vote. However, it was not until Johnson was seen as mishandling the subsequent allegations of sexual miscon-

duct against Conservative MP Chris Pincher and his prior knowledge of Pincher's past conduct before appointing him to the government that Johnson was ousted as leader of the Conservative party. Considering that many of his senior ministers resigned in protest in July 2022, Johnson had no choice but to resign as Prime Minister as he could not form a government.

So far, the fact that Johnson was accused of misleading the House of Commons was an important constitutional crisis, even if his own party's decision to remove him was driven by internal party politics. However, prior to his resignation as Prime Minister, there was a real concern that Johnson might advise the Queen to use her prerogative power to dissolve Parliament, thereby allowing Johnson to remain in office until the new Parliament met after the general election had been held. This would present a major constitutional crisis, as although Johnson was Prime Minister and his party commanded a strong majority in the House of Commons, Johnson did not have the confidence of his own party. As a constitutional monarch, the Queen was expected to follow the advice of her Prime Minister. To refuse to comply with a request, even if the Prime Minister in question had questionable support within his own party, would lead to a constitutional crisis.

2. The Financial Times had later reported that:

"For the Queen to reject an election request outright would have prompted a full-blown constitutional crisis and put the monarch in the most perilous position of her reign. One senior Whitehall figure said: 'It was a question that couldn't be put to the Queen because the Queen would have to say 'yes.' The PM cannot ask the question to which she ought to say 'no' by the convention…' As Johnson's grip on power became more precarious, one senior Whitehall insider said of the moment: 'If there was an effort to call an election, Tory MPs would have expected Brady to communicate to the palace that we would be holding a vote of confidence in the very near future and that it might make sense for Her Majesty to be unavailable for a day.' Another senior official confirmed it would be politely communicated to Downing Street that Her Majesty 'couldn't come to the phone' had Johnson requested a call with the intention of dissolving parliament. One Johnson ally said he knew it was a fruitless idea too, that 'the palace would have wanted to see if there were others who could command confidence instead of accepting his call.'"[1]

Fortunately, this was never put to the test and the monarch was kept clear of internal party politics. Any observations about the monarch's involvement remains speculative. Nonetheless, it is evidence of the monarch's powers and how a monarch could be forced to make a difficult decision when prompted by their Prime Minister. In the end, Johnson was replaced as Prime Minister by Liz Truss MP in September 2022. Liz Truss was only Prime Minister for 49 days and was succeeded by Rishi Sunak MP, who became the United Kingdom's first non-white Prime Minister.

3. The Death of Elizabeth II and the Accession of Charles III

The United Kingdom is a constitutional monarchy, and the death of Queen Elizabeth II in September 2022 was a significant constitutional moment in the United Kingdom and in the other realms where she served as Queen. Following her death, her eldest son, Prince Charles ascended to the throne as King Charles III. For quite some time, there has been some concern over Charles' ability to conform to the role of a constitutional monarch and a fear that he might push the boundaries of what is now seen as appropriate. Charles had previously made plans to attend the 27th UN Climate Change Conference at Sharm el-Sheikh in Egypt and deliver a speech, which he could do in his capacity as the Prince of Wales. The new Prime Minister Liz Truss was reported in the press as having advised that the King should not now give the speech.[2] The King was reported to be "personally disappointed" and that "[t]he Queen gave an entirely non-political address at the Cop last year … It sounds like he is not being given the choice. That is an error of judgement on the part of the government." The former Labour minister, Lord Andrew Adonis, expressed his criticism on social media by stating, "The breakdown in relations between Truss and Charles - something that never happened between his mother & any of her 16 prime ministers - is of huge constitutional significance. I'm not a supporter of an activist monarchy, but unwise of her to ban him speaking on climate change" (Twitter, 1 October 2022).

The high-profile disgrace of Prince Andrew, the Duke of York, and the decision of Prince Harry, the Duke of Sussex to step back from royal duties, led to public calls for removing the Dukedoms from the two Princes. On November 18th, 2022, there was a proposed amendment by Lord Berkeley to the Counsellors of State Bill to remove Princes Andrew and Harry as Counsellors of State. In accordance with the Regency Act 1937, both Andrew and Harry were among the four members of the royal family authorized to deputize for the King as a Counsellor of State. However, following these public calls for removing the two Princes, King Charles requested that two additional members of his family be created Counsellors of State for their lifetimes (HRH Princess Anne, The Princess Royal, and HRH Prince Edward, The Earl of Wessex). This was achieved by section 1 of the Counsellors of State Act 2022. Commenting on the importance of having available Counsellors of State, Craig Prescott has observed that "This reflects how the monarch, as head of state, remains a central part of the UK's constitutional arrangements. It is pivotal to the machinery of government that the royal authority is always available to grant the final, formal legal approval to a wide range of decisions made by government and parliament."[3]

4. Restoration of the prerogative power to dissolve Parliament

Historically, the monarch had the prerogative power to dissolve Parliament and to bring about a general election. The dissolution of Parliament could, as a matter of constitutional convention, only be exercised upon the request of the Prime Minister. Subject to the statutory requirement that an election took place at least every five years, the Prime Minister had considerable discretion in determining when to advise the mon-

arch to dissolve Parliament and hold a general election. This discretion could allow the Prime Minister to call for an election at a time that favoured their own party. The Fixed-term Parliaments Act 2011 removed the monarch's power to bring about a dissolution of Parliament and created a fixed five-year lifetime for each Parliament. This meant that subject to the exceptions in the Act, there could be no early general election. It was intended to remove the Prime Minister's discretion and safeguard the workability of the then coalition government. Early general elections did take place whilst the Fixed-term Parliaments Act 2011 was law. In 2017, the exception under the Act was used, and the decision to hold an election was voted for by MPs. In 2019, Parliament created specific legislation to hold a general election, thereby avoiding the need to get the super-majority as outlined in the Fixed-term Parliaments Act 2011.

The Fixed-term Parliaments Act 2011 was repealed by the Dissolution and Calling of Parliaments Act 2022. Interestingly, from a constitutional perspective, section 2 of the Act revived the monarch's prerogative power to dissolve Parliament. In light of the litigation surrounding the Prime Minister's advice to Queen Elizabeth II to prorogue Parliament in 2019, section 3 of the Act is clear that this prerogative power is non-justiciable and that "A court or tribunal may not question— (a) the exercise or purported exercise of the powers referred to in section 2, (b) any decision or purported decision relating to those powers, or (c) the limits or extent of those powers." The Act is clear in section 4 that "If it has not been dissolved earlier, a Parliament dissolves at the beginning of the day that is the fifth anniversary of the day on which it first met."

### 5. Bill of Rights Bill

In June 2022, Dominic Raab MP, the Lord Chancellor, introduced the Bill of Rights Bill to the House of Commons. The Bill has yet to receive its second reading in the House of Commons. The Bill would repeal the Human Rights Act 1998 and has been criticized by academics and former judges.

## III. Constitutional Cases

### 1. *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 of the Scotland Act 1998* [2022] UKSC 31: Scottish independence referendum

The issue presented to the Supreme Court was whether the Scottish Parliament, created by the Scotland Act 1998, could legislate for the holding of a referendum on Scottish independence. The key question was whether under paragraph 64 of Schedule 6 of the Scotland Act 1998, the Scottish Parliament had this power – i.e., was within the devolved competence of the Scottish Parliament. In 2014, the initial independence referendum that took place had been agreed following the Edinburgh Agreement in October 2012 between the then Prime Minister David Cameron and the then First Minister Alex Salmond. The agreement required the United Kingdom's government to introduce an Order in Council, which needed to be approved by the monarch at a Privy Council meeting. The Order in Council would give the Scottish Parliament the competence to legislate for the 2014 referendum. The Scottish Parliament proposed a Scottish Independence Referendum Bill which would ask the Scottish electorate, "Should Scotland be an independent country?" The Lord Advocate referred the Scottish Independence Referendum Bill to the Supreme Court on the basis that it was a devolution issue and touched upon a reserved matter, which falls under the authority of the United Kingdom Parliament, that of the union between England and Scotland (Act of Union 1706 and 1707). The Supreme Court accepted that the matter was a devolution issue and as it referred to a reserved matter (the union), the Scottish Parliament did not have the legal competence to legislate to hold such a proposed referendum. The Supreme Court was clear that "In this case, the purpose which is apparent on the face of the Bill is also what the Bill is really about. The purpose of the Bill is to hold a lawful referendum on the question whether Scotland should become an independent country. That question evidently encompasses the question whether the Union between Scotland and England should be terminated, and the question whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom" ([77]). The central issue was even if the proposed referendum was advisory and would not require independence to take place as a matter of law, it had political consequences: "the result of a lawfully held referendum is a matter of importance in the political realm, even if it has no immediate legal consequence" ([79]).

The Supreme Court referred to *R (on the application of Miller) v Secretary of State for Exiting the European Union (Miller No.1)* [2017] UKSC 5, where the Supreme Court had been clear that although "[the Brexit] referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance" ([124]). In the present case, the Supreme Court was clear that, "[a] clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union, depending on which view prevailed, and support or undermine the democratic credentials of the independence movement. It would consequently have important political consequences relating to the Union and the United Kingdom Parliament" ([81]). It is important to appreciate that the Scottish government, comprised of the Scottish National Party and the Scottish Greens, both of which supported independence, made the decision to unilaterally achieve a second referendum through the Scottish Parliament without the agreement of the United Kingdom government. This decision was spurred on by the refusal of the United Kingdom government to allow a second referendum to take place.

The Scottish First Minister, Nicola Sturgeon, was clear that the Supreme Court should not be criticized for the outcome (as had been

the case with *Miller (No.1)*). Sturgeon stated that "However, we must be clear today that the Supreme Court does not make the law – it interprets and applies it. If the devolution settlement in the Scotland Act is inconsistent with any reasonable notion of Scottish democracy – as is now confirmed to be the case – that is the fault of Westminster lawmakers, not the justices of the Supreme Court… That is a hard pill for any supporter of independence – and surely indeed for any supporter of democracy – to swallow." Professor Michael Gordon observed, that "The decision, however, also exposes a clash between the UK's constitutional law and the democratic mandate obtained by the Scottish National Party to hold a further vote on Scottish independence. That clash is not of the supreme court's making, but is a central feature of the UK's statutory devolution arrangements."[4] Matthew Psycharis and Alistair Mills were clear that, "The Supreme Court's decision, despite its broader constitutional context and political significance, does not constitute a major development in the devolution jurisprudence. It constitutes an exercise in statutory interpretation, applying established principles, and reaching an unsurprising answer on the merits.'[5]

### *2. Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32

The Abortion Act 1967 allowed access to abortion services in England, Wales, and Scotland. It did not decriminalize abortion in mainland Britain, but rather made it legal to obtain an abortion within a particular temporal period. The Abortion Act 1967 did not apply to Northern Ireland. There was no scope to obtain abortion legally with Northern Ireland; those seeking access an abortion services would have to travel to mainland United Kingdom. The position in Northern Ireland was challenged before the Supreme Court *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* (Northern Ireland) [2018] UKSC 27. It is important to clarify that the competence to legislate to amend the law regarding abortion was a devolved matter that was for the Northern Ireland Assembly, rather than the United Kingdom Parliament. The Supreme Court ruled that if the applicants had standing (which they did not in the present case), the Supreme Court would have made a declaration of incompatibility under section 4 of the Human Rights Act 1998. This is because the law in Northern Ireland was not compatible with the United Kingdom's obligations under the European Convention on Human Rights. The issue in Northern Ireland was that the Northern Ireland Executive was suspended and that the Secretary of State for Northern Ireland was responsible in the interim. Consequently, no new Northern Irish legislation could be created during the suspension of the Executive. In response, the United Kingdom Parliament legislated for this devolved matter and enacted the Northern Ireland (Executive Formation etc) Act 2019. One of the provisions, section 9, brought the law relating to abortion in line with the rest of the United Kingdom. In *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, the Supreme Court unanimously agreed that legislation enacted by the Northern Ireland Assembly, which was The Abortion (Safe Access Zones) (Northern Ireland) Bill, was within the legislative competence of the Northern Ireland Assembly. Ultimately, the Court determined that the legislation was not in incompatible with the European Convention on Human Rights.

The Bill was intended to protect the rights of women to access abortion services without having to fear intimidation by protesters. Those who opposed the Bill argued that the safe access zones which the Bill would create, amounted to a "violation of any protesters" rights under Article 9 (Thought, Conscience and Religion), Article 10 (Freedom of Expression) and Article 11 (Freedom of Assembly and Association) of the European Convention on Human Rights. In light of the high-profile roll back of abortion rights in the United States, there is a concern about a global push to roll back on these rights within Europe. Lawful access to abortion services was only made possible in Ireland because of a referendum being held, whereby a majority of the electorate supported amending the law. Northern Ireland found itself at odds with the rest of the United Kingdom and Ireland. As a result, the *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 represented an important legal challenge regarding women's access to abortion without facing intimidation from protestors.

There had been calls to include the right to an abortion within the proposed Bill of Rights (which is intended to repeal the Human Rights Act 1998), and the Lord Chancellor, Dominic Raab, rejected this proposal, informing the House of Commons that the law was "settled in UK law in relation to abortion, it's decided by members across this house. It's a conscience issue, I don't think there's a strong case for change… [and] What I would not want to do, is find ourselves, with the greatest respect, in the US position where this is being relitigated through the courts rather than settled as it is now settled."[6]

### *3. R (on the application of Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11

The decision in *R (on the application of Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11 concerned the introduction of a pilot order to ten local authorities, which required voters in local elections to provide voter identification to cast a ballot. This was not a prior requirement for anyone voting in a local or general election. The pilot orders were made by the Minister for the Cabinet Office using the powers conferred by section 10 of the Representation of the People Act 2000. Section 10 is concerned with Pilot schemes for local elections in England and Wales. Importantly, subsection (1) stated that, "Where— (a) a relevant local authority submit to the Secretary of State proposals for a scheme under this section to apply to particular local government elections held in the authority's area, and (b) those proposals are approved by the Secretary of State, either— (i) without modification, or (ii) with such modifications as, after consulting the authority, he considers appropriate, the Secretary of State shall by order make such provision for and in connection with the implementation

of the scheme in relation to those elections as he considers appropriate (which may include provision modifying or disapplying any enactment).” Whilst subsection (2) stated that ‘A scheme under this section is a scheme which makes, in relation to local government elections in the area of a relevant local authority, provision differing in any respect from that made under or by virtue of the Representation of the People Acts as regards one or more of the following, namely— (a) when, where and how voting at the elections is to take place; (b) how the votes cast at the elections are to be counted; (c) the sending by candidates of election communications free of charge for postage.” The Supreme Court found that the introduction of the requirement for voter identification was not introduced for an unlawful purpose in accordance with subsection (1) or made ultra vires for the purpose in accordance with subsection (2).

Giving judgment on behalf of the Supreme Court, Lord Stephens was clear about the significance of the identification requirement to the appellant, who “believes that voter identification requirements in elections will serve to disenfranchise the poor and vulnerable who already struggle to have their voices heard.” Lord Stephens also observed that “[t]he background material [which had been considered by the Supreme Court] following the RPA 2000 demonstrates growing concerns as to voter fraud which provides the context in which the ten Pilot Orders were proposed by the participating local authorities and were made by the respondent.” This issue of the integrity of the election and the need to prevent possible voter fraud was a reason for introducing the Pilot Orders. Dismissing the argument by the appellant that the need for voter identification would deter people from voting, Lord Stephens observed, “I do not agree with [the appellant’s] second proposition that voter identification requirements necessarily do not encourage some persons to vote. I believe that if persons have confidence in the electoral system by the elimination or reduction in voter fraud then they might be encouraged to vote by virtue of their increased confidence in the electoral process.”
Commenting on the Supreme Court’s decision and the enactment of the Elections Act 2022 which introduced compulsory voter identification, Ben Stanford observed, “Given the scarcity of voter impersonation in UK elections, the necessity of such an expensive reform can be seriously questioned, whilst the potential negative impact on voter turnout and the risk of widespread disenfranchisement, particularly of minority groups, remains a serious concern. Moreover, there is a strong case for prioritising the reform of other areas of electoral law such as voter registration and party funding as a matter of urgency, as well as British democracy and constitutional issues more generally, which have been rocked by recent allegations of sleaze and declining standards” (see B Stanford, ‘R (on the application of Coughlan) v Minister for the Cabinet Office: electoral law - voter identification - pilot schemes - right to vote - Representation of the People Act 2000 - Elections Act 2022’ (2022) 27(1) *Coventry Law Journal* 126).

### *4. R (on the application of The Project for the Registration of Citizens) v Secretary of State for the Home Department* [2022] UKSC 3

In *R (on the application of The Project for the Registration of Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, the Supreme Court was asked about the legality of the registration fee requirement for a British born child to be registered as a British citizen. Such a right was granted by the British Nationality Act 1981.The appellants had argued that this Act “was a constitutional settlement which conferred a statutory entitlement to citizenship.” Additionally, this right “is an important right which gives a person the right to live in the United Kingdom and a right to take part in its political life, including by voting in general elections and other elections” ([21]). The Secretary of State had the power to determine the fee under the Immigration Act 2014. It was argued that the cost of the registration fee was too much and therefore prevented the child from exercising their right to be registered as a British citizen. As Lord Hodge observed, having British citizenship “can contribute to one’s sense of identity and belonging, assisting people, and not least young people in their sensitive teenage years, to feel part of the wider community. It allows a person to participate in the political life of the local community and the country at large” ([21]). The Supreme Court was clear that the matter before the court was one of statutory interpretation, and it also stated that the issue of whether such a fee should be charged was a question for politicians rather than judges: “The appropriateness of imposing the fee on children who apply for British citizenship under section 1(4) of the 1981 Act is a question of policy which is for political determination. It is not a matter for judges for whom the question is the much narrower one of whether Parliament has authorised the Secretary of State to set the impugned fee at the level which it has been set” ([51]). This is an important decision as although Lord Hodge was clear that citizenship was an important right and had clear benefits, the issue of whether there should be a registration fee imposed to require the citizenship that the appellant was entitled to under the British Nationality Act 1981, was not something for the Supreme Court to decide on. It is important to note that the matter was simply one of statutory interpretation. Ultimately, the Court refrained from giving an opinion about the rights and wrongs of the fee as this was something for politicians to determine.

## IV. Looking Ahead

2023 promises to be another eventful year for Constitutional Law within the United Kingdom of Great Britain and Northern Ireland. There have been negotiations between the United Kingdom and the European Union on Northern Ireland and a Supreme Court decision about the lawfulness of the Northern Ireland Protocol (*Allister v Secretary of State for Northern Ireland* [2023] UKSC 5 which explored *inter alia* the compatibility of the Protocol with the Acts of Union 1800). Regarding the continuing fall-out from Partygate, former Prime Minister Boris Johnson has recently given evidence to the Committee of Privileges as part of its investigation into whether he misled the House of Commons, and the outcome of the Committee’s investigation is expected soon.

## V. Further Reading

M Gordon, 'UK supreme court rules Scotland cannot call a second independence referendum – the decision explained' The Conversation, 23 November 2022, available at: https://theconversation.com/uk-supreme-court-rules-scotland-cannot-call-a-second-independence-referendum-the-decision-explained-194877.

S Payne, 'In the Bunker: Boris Johnson's last stand' Financial Times, 18 November 2022, available at: https://www.ft.com/content/e6d6c253-45a1-4c53-9621-405e2e1507e6_).

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K Szopa, 'Triumph for Abortion Rights, or a Trojan Horse? The Abortion Services (Safe Access Zones) (Northern Ireland) Bill and Proportionality Assessment', U.K. Const. L. Blog (13th February 2023), available at: https://ukconstitutionallaw.org/2023/02/13/karolina-szopa-triumph-for-abortion-rights-or-a-trojan-horse-the-abortion-services-safe-access-zones-northern-ireland-bill-and-proportionality-assessment/.

References

1 See S Payne, 'In the Bunker: Boris Johnson's last stand' Financial Times, 18 November 2022, available at: https://www.ft.com/content/e6d6c253-45a1-4c53-9621-405e2e1507e6_

2 See: The Guardian, 'King Charles abandons plans to attend COP27 following Liz Truss's advice' (2022) https://www.theguardian.com/uk-news/2022/oct/01/king-charles-abandons-plans-to-attend-cop27-following-liz-trusss-advice

3 See C Prescott,' The Counsellors of State Bill: an elegant solution, but a temporary one', The Constitution Unit, 24 November 2022, available at: https://constitution-unit.com/2022/11/24/the-counsellors-of-state-bill-an-elegant-solution-but-only-for-now/.

4 M Gordon, 'UK supreme court rules Scotland cannot call a second independence referendum – the decision explained' The Conversation, 23 November 2022, available at: https://theconversation.com/uk-supreme-court-rules-scotland-cannot-call-a-second-independence-referendum-the-decision-explained-194877.

5 M Psycharis and A Mills, 'The Scottish Parliament, the Supreme Court, and an Independence Referendum?' (2023) Judicial Review.

6 See: https://www.theguardian.com/politics/2022/jun/29/dominic-raab-says-right-to-abortion-does-not-need-to-be-in-bill-of-rights