A LEGISLATION'S WATERLOO? THE FUTURE OF THE UK'S HUMAN RIGHTS ACT (1998), THE POSSIBLE END OF AN ERA AND THE PROSPECT OF A HOMEGROWN BILL OF RIGHTS

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ABSTRACT

Before the passing of the Human Rights Act 1998 (HRA), fundamental human rights in UK courts were enforced using fundamental common law rights. The enactment of the HRA which focused mostly on Convention rights displaced that movement to a certain uncomfortable degree as evidenced in the cases bothering on national security decided post HRA especially after 9/11. Strasbourg's decision on prisoner voting rights and court-imposed constraints on the power of ministers to deport non-nationals are examples of judicial constraints on the UK that gave rise to the idea that the current human rights law favour "bad people. Little wonder then that sharp critics of the HRA have been calling for its replacement by a new 'Bill of Rights' which will better reflect 'British values,' clearly set out how to interpret legislation and shore up the sovereignty of elected law makers in Parliament. This paper, therefore, examines the HRA's overreach, the reasons for the public outcry against it and the clarion call for a British 'Bill of Rights.' It concludes by concurring that the HRA has outlived its usefulness and that a new 'homegrown' UK human rights scheme which will be more representative and more widely acceptable is long overdue.

INTRODUCTION

Prior to the Human Rights Act (HRA) of 1998, fundamental common law rights were used by UK courts to uphold fundamental human rights, particularly in the 1980s and 1990s. However, the HRA's passage, which mainly addressed Convention rights, somewhat displaced that trend[i] in unprecedented and perhaps, uncomfortable ways as evidenced in the cases decided based on the HRA, and more so, cases bothering on terrorism charges. However, the defence of human rights based on common law was dogged by major criticisms that the identification of common law rights is not straightforward, and may ultimately, be open-ended. Second, and perhaps more significantly, common law rights are severely limited by the status of rights under English law.[ii] This is in contrast to rights enacted by the HRA which create positive obligations (whether absolute or qualified) with which a public authority must comply under s6 of the HRA. On the basis of current legal precedent, common law rights cannot match the positive rights established by the HRA.[iii]

Since the enactment of the HRA, there have also been a number of major momentous cases that hinged on common law rights. (Cases like *R (West) v Parole Board*) [iv] would highlight the tussle between convention rights argued in UK courts and the traditional appeal to common law jurisprudence. In that case, the House of Lords ruled that the requirement for parole boards to provide inmates an oral hearing was based on common law fairness, rejecting arguments based on Articles 5 and 6.

The United Kingdom has a long, illustrious, and rich history of freedom traceable from Magna Carta in 1215, the 1689 Claim and Bill of Rights, and the Slave Trade Act of 1807, down to the 1918 Representation of the People Act.[v] To many people, including members of successive UK governments[vi], the (HRA) which to a large extent, reflected the Convention rights,[vii] has been an added building block on the UK's long tradition of human rights and fundamental freedom. It has equally been a source of a tensed ambivalence between the judiciary and elected parliament, a cause for consternation for many members of the British public, thus raising questions about the age-old stronghold of parliamentary sovereignty and its *sacrosanctissimal* nature.

Judicial attitudes in cases like *Chahal* v *UK*,[viii] *Secretary of State for the Home Department v JJ and Ors*,[ix] *Belmarsh Detainess*[x] and the legal challenges against deporting foreign offenders and terrorist suspects brought questions and concerns about the functionality of the UK's

human rights law to the fore raising both governmental and social consciousness, so much so that proposals towards a revision of the HRA or jettisoning it altogether are now rife. The desire to replace the HRA is driven by a wide range of perceived critical national need to strike a proper balance between rights and responsibilities, individual liberty and the public interest, rigorous judicial interpretation and national security, as well as respect for the authority of elected law-makers.[xi] This means that the HRA is perhaps in its last days as parliament intends to revise and reform the identified flaws in the HRA while replacing it with a modern Bill of Rights; one which 'reinforces the UK's hallowed freedoms under the rule of law, but also one that does not leave the boundaries of the separation of powers between the courts and Parliament in any doubt.'[xii]

This article examines the shortcoming of the HRA and its overreach which elicited reactions from the UK government and the wider UK society, leading to the drive towards its total overhaul; an overhaul which may ultimately mean the demise of the legislation. It highlights the ambivalence surrounding UK rights jurisprudence as dictated by Strasbourg and the need for a more home grown rights regime; one that would preserve parliamentary sovereignty, make more common sense and improve national security law enforcement.

THE HUMAN RIGHTS ACT (HRA 1998)

The link between the person and the state is heavily entwined in constitutional law. Without respect for human rights, democracy will be lacking. The HRA is relevant because of the understanding that underpins it. The European Convention on Human Rights (ECHR), drafted after World War II in an effort to heal Europe from the horrors and bloodshed of the conflict, served as the ancestor of the HRA 1998.[xiii] Though the Convention's primary architects were UK layers, and the UK was the first nation to ratify it,[xiv] it did not immediately form part of the UK legislative scheme. In 1998, the UK government decided to 'bring rights home'[xv] by enacting the HRA which directly gave UK citizens the right to invoke the Convention rights in domestic courts. Consequently, the HRA became the primary means of human rights protection within the UK. However, Individuals reserve the right to bring cases to Strasbourg after exhausting all domestic remedies without a satisfactory outcome.

The central provision of the HRA is found in s.6 (1) which makes it unlawful for any public authority, including a court, to act in a way incompatible with a Convention right. Per Lord

Bingham, the court decides if an action is incompatible with a Convention right by looking at s.2(1) which says that domestic courts 'must take into account' any judgment, decision or opinion of the Strasbourg institutions.[xvi] His interpretation incidentally gave the impression that Strasbourg decisions are binding. This was confirmed in the House of Lord's decision in *R (Ullah) v Special Adjudicator*[xvii] and generated what Lord Kerr described as '*Ullah* style reticence.'[xviii] Authors like Murray Hunt would argue in his innovative book[xix] that the time had come for judicial recognition of an obligation to construe domestic law in conformity with international rights norms.

Lord Irvin[xx] adamantly refuted this approach and argued that excessive preoccupation with this consideration has led the courts into error.[xxi] The traditional position is that UK courts must take account of Strasbourg jurisprudence. But judges have conducted themselves in ways that seem to suggest that UK courts must be bound by Strasbourg decisions. Irvin's view, therefore, was to the effect that 'take account of' is not the same as 'follow', 'give effect to', or 'be bound by.' 'Judges are not bound to follow the Strasbourg Court; they must decide the case for themselves.'[xxii] S.2(1) of the HRA meant that the domestic Courts always have a choice.[xxiii] This, however, does not suggest in any way, the discountenancing of Strasbourg's contribution to human rights protection in the UK legal order.

A striking feature of the HRA is that it makes it possible for individuals to seek a remedy against an executive when their Convention rights are violated. In this regard, it became a major way of framing freedom against Control Orders and the actions of the executive. The Constitution Committee Report of 2006 observed that it was always clear that the HRA 'would have constitutional importance.' Quoting Professor Malleson,[xxiv] per the 2006 report, 'senior judges are now required to police constitutional boundaries and determine sensitive human rights issues in a way which would have been unthinkable forty years ago.'[xxv]

The UK's national security as well as parliamentary supremacy however, came under intense constitutional challenge with the courts' application of the principles and provisions of the HRA leading to tensions between the executive and judiciary. However, such tensions 'are to be managed and kept in proportion if public confidence is to be maintained in the independence of the judiciary and the integrity of government.'[xxvi] Lord Mackey observes that 'a certain degree of tension between the judiciary and the executive is inevitable and healthy' and that at the present, there was 'in fact quite a good relationship;… the relationship is not in crises or anything of that sort.'[xxvii] In the *Belmarsh* case, Lord Goldsmith, the Attorney-General,

however argued that the role of the judges in reviewing the legislation was undemocratic; a charge rejected by Lord Bingham.

Lord Bingham insists that 'the 1998 Act gives the courts a very specific, wholly democratic mandate.'[xxviii] The courts are themselves charged by the Human Rights Act with responsibility from which they cannot abdicate, for ensuring proper protection of the Convention rights.[xxix] Though a declaration of incompatibility (as in *Belmarsh*) tends to undermine the moral legitimacy of the legislation and leads to pressure on the government to introduce amending legislation,[xxx] it does not however, make the legislation invalid and does not affect people's legal rights and liabilities.[xxxi] Ultimately, the doctrine of parliamentary sovereignty, the principle that rights are residual and the traditional status the common law accords to rights all combine to limit their impact.[xxxii]

A reading of the Act itself and its resultant case law perhaps, proves Lord Bingham right. There was a problem, nonetheless. It continued to force the UK to a choice between very critical national security exigencies and the protection of individual rights of (terrorist) suspects and other offenders seeking legal protection under the HRA. It was often a choice between moral demands and legal imperatives, thus testing and ultimately exhausting the UK's moral stamina and endurance under the heavy weight of of human rights schemes dictated by the ECHR. Thus, there is no doubt that the HRA did have 'constitutional importance.' Its constitutional importance, albeit socially problematic, is one reason, among others, that the HRA is most likely seeing its last days.

The introduction of the HRA was heralded as a momentous event in the history of the protection of rights in the UK. According to Lord Steyn, 'the effect of the HRA was to transform the UK into a rights-based democracy wherein the judiciary is the guardian of the ethical values protected.'[xxxiii] Arguably, this seems to have played out so well in the UK legal domain. But it wasn't long before it became clear that the HRA had become an Achilles heel in the government's effort to protect the UK society from terrorists and other offenders. Thus, the story is different today; not only on account of the effects of *JJ*, *Belmarsh*, *Chahal*, and other cases, but also as other difficult cases on family,[xxxiv] immigration, childcare, etc. were decided using the provisions of the HRA. Often in these cases, the courts felt hamstrung by the demands of the HRA's legal provisos, prompting a parliamentary move towards its replacement with a British 'Bill of Rights.' Consultations are currently on with the view to garnering a consensus on the way to building a new rights bill that would be widely acceptable.

THE HRA 1998 REVIEWED

While there is a general judicial support for the ECHR, some are quick to criticise the perception that domestic courts are 'merely agents or delegates of the ECHR and Council of Europe.'[xxxv] Lord Steyn's observation in *R (Anufrijeva) v Secretary of State for the Home Department*[xxxvi] that 'the Convention is not an exhaustive statement of fundamental rights under our system of law' highlights the reticence towards the Convention rights represented by the HRA. Analogously, Lord Hoffmann's dictum in *Simms*[xxxvii] applies to fundamental rights beyond the parameters of the Convention.

Pinto-Duschinsky believes that judicial protection of rights imposes constraints on political decision-making that are incompatible with democratic principles.[xxxviii] Strasbourg's decision on prisoner voting rights[xxxix] and court imposed constraints on the power of ministers to deport non-nationals are examples of such constraints and they give rise to the idea that the current human rights law favour 'bad people.'[xl] The House of Lord's official position and the principle that under the HRA, the domestic courts should mirror Strasbourg jurisprudence does not help matters. Nevertheless, the fundamental test for any democracy is its ability to accord basic rights even to those who would deny even the most basic of rights to others – the right to life.[xli] These include suspected terrorists.

While the HRA has been favourably viewed by academics like Gardbaum[xlii] and judges like Lord Dyson,[xliii] it has continued to receive criticisms fueled by an unfavourable media narrative which portrays human rights law as being excessively in favour of the rights of minorities at the expense of public interest and/or national security.[xliv] High ranking figures like Lord Hoffmann[xlv] and David Cameron,[xlvi] were sharp critics of the HRA, calling for its replacement by a new 'Bill of Rights' which will better reflect 'British values.' According to Cameron, 'this is necessary in order to define the core values which give us our identity as a free nation while facilitating a hard-nosed defence of security and freedom.'[xlvii] This obviously implies that the HRA is not 'hard-nosed' enough and so, a domestic Bill of Rights is needed to fill the gap. Donald, Gordon and Leach[xlviii] in their report on The UK and the European Court of Human Rights suggest that much of this commentary has been inaccurate or distorted.[xlix]

Mark Elliot[l] contends that in its recently published Report, the Commission on a Bill of Rights[li] advances very limited, inchoate proposals that are essentially superficial in nature as the report fails to grapple with the fundamental question that would naturally fail to be confronted as part

of a serious debate about the future and direction of human rights protection in the UK.[lii] Such a submission raised a doubt if the legislation will ever be adopted.[liii] It also suggested that a Bill of Rights may after all, be nothing but a cosmetic shift from one (HRA) to another if adopted, and may further suggest a greater antipathy towards the entire human rights project. Just about a decade down the road, it is clear that the HRA may not survive much longer as parliamentary processes are well in advanced stages towards the advancement of a home grown 'Bill of Rights' that will hopefully be more representative and reflect a more widely acceptable human rights scheme in the UK.

Criticisms of the HRA have been rife, particularly regarding how it has been interpreted by UK Judges on the basis that it has linked UK law so closely to the Strasbourg case-law and stunted the development of a 'home grown' domestic rights jurisprudence. This arguably is a valid criticism considering that Lord Irvin would say on introducing the Human Rights Bill to Parliament that '…the Human Rights Act will allow British Judges for the first time to make their own distinctive contribution to the development of human rights in Europe.'[liv] In this respect, if the HRA is seen not to be meeting this ideal of an aspiration to Strasbourg's jurisprudence, then it falls to criticism. But, as a sovereign nation, should UK law be bound to what is sometimes a detrimental aspiration to the European Council's idea of law and human rights?

Lord Irvine launched a lengthy attack on how the courts have been applying the HRA. Due to the courts' misinterpretation of section 2 of the HRA which governs the prominence given to Strasbourg jurisprudence, human rights law developed on false premise.[lv] For Lord Irvine, 'British courts have been slavishly following the jurisprudence of the European Court of Human Rights and misinterpreting the Human Rights Act (HRA) and he called for a more critical approach to Strasbourg jurisprudence. He said it was the 'constitutional obligation' of judges to reject Strasbourg judgements they felt were faulty in favor of their own verdicts and urged the top court to reevaluate its relationship with Strasbourg.[lvi] 'The domestic courts have strayed considerably from giving effect to parliament's intention,' he claimed. Judges wrongly believe they are 'essentially subject' to the Strasbourg court due to the system of binding precedent, which requires lower courts to obey the rulings of those above them.[lvii]

Irvine's comments echo admissions by the senior judiciary that UK courts are too strict in following ECHR case law.[lviii] Irvine drew attention to a 2009 House of Lords ruling that undermined the government's use of control orders.[lix] Although he thought the court's ruling

in the case was incorrect and detrimental to Britain's national interest, he criticized Lord Hoffmann's line of reasoning in the case,[lx] which was decided on the premise that the court had to follow an ECHR case. The former Lord Chancellor also praised the House of Lord's controversial decision in the case of *Horncastle*,[lxi] where they declined to follow Strasbourg for the first time, effectively asking the court to think again.

Judges on their part have been criticised for purportedly seizing on the HRA as an avenue for introducing their own utopic constructs of human rights, often under the shield of the interpretative powers given to the courts by sections 3 and 4 of the HRA. This is a charge of the most serious kind as it would mean a clear departure from the obligation to give effect to parliamentary legislations and an undermining of parliamentary sovereignty. Lord Bingham however, utterly rejects the criticism that the judges have in any systematic, routine or deliberate way exceeded their brief under the Act. In his view, 'it is a criticism which portrays a misunderstanding of the Act, its subsequent history, or both.'[lxii] Furthermore, the fundamental premise of the Act is that Parliament is sovereign.[lxiii] Bingham insists that an examination of case law will show that the allegation against judges is unfounded and unwarranted with the *JJ* case as a case in point.[lxiv] Moreover, giving courts the power to protect individual rights arguably strengthens democracy, protects disenfranchised minorities and provides a counterbalance to the dominance of the executive over Parliament.[lxv] The courts, Bingham thinks, have acquitted themselves with honour and successful governments have complied with the courts' decisions no matter how unpalatable.[lxvi]

THE IMBROGLIO WITH SECTION 3 OF THE HRA

The core of the British unwritten constitution is the balance maintained between how Parliament passes laws and how those laws are interpreted by the courts. Government's proposal for the replacement of the HRA casts the debate about section 3 in terms of fundamental constitutional principle. Section 3 (the duty to interpret legislation compatibly with Convention rights) and section 4 (the power to make a declaration of incompatibility) have given rise to much debate. Government's view is that 'the Act, as it has been applied in practice, has moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament.'[lxvii]

Due to its great potential to alter substantially the meaning of primary legislation, Section 3 compels the court to expand the scope of its interpretive duty beyond what is appropriate for an unelected body. Whereas it is the role of the court to make a declaration of incompatibility if a legislation is found incompatible with human rights and the Convention rights, it is Parliament's place to decide on how to address the said incompatibility. It is the governments' belief that courts have overreached its bounds in this regard, in the sense that section 3 has resulted in an expansive approach with courts adapting legislation.[lxviii] Thus, a less expansive interpretive duty would provide greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues.[lxix] This is what makes imperative the search for an alternative provision to replace section 3; one which clearly sets out how to interpret legislation and would shore up the sovereignty of elected law-makers in Parliament.

THE CASE FOR REFORMING UK HUMAN RIGHTS LAW

Those who wanted the HRA replaced had what they considered good reasons but the defenders of the HRA were not balking. With the *Chahal*[lxx] case and other similar cases still looming at the time, and the HRA 1998 coming just before 9/11 happened, Conservative MPs like David Cameron believed that the HRA was hamstringing law enforcement. But as Baroness Kennedy and Phillipe Sands contended, the hostility towards the HRA is not as widespread as it is suggested; often it is premised on 'misinformation' and steps can be taken to address such issues of perception without revisiting the current legislation.[lxxi]

On closer study, it becomes clear that a large portion of what appears to be a British backlash against the 'human rights culture' in decision-making is founded on erroneous information about the purported consequences of the new Human Rights Act.[lxxii] The government's review of the implementation of the HRA has highlighted a series of 'myths and misconceptions' about the Act. Stories like the one of the prisoner who argued that being denied access to some publications constituted cruel and degrading treatment have been repeated so often that they have begun to become associated with the idea of upholding human rights in general.[lxxiii] It is believed that stories that present the HRA as 'a nutter', 'crazy legislation', or 'barmy laws' on closer inspection turn out to be sensationalist. Incidentally, such beliefs have gained foothold

in the UK social and political space and have reached a point of no return.[lxxiv] This is why despite such perceived myths, the government and the public continue to make the case for the reform of the UK's human rights law.

Professor Conor Gearty[lxxv] was one of the strongest opponents of the HRA. At the time, his concern was with the importance of preserving Parliament as the main source of human rights protection in the UK and for that, he emphasized traditional civil libertarian principle (promoting and protecting political freedom) over what he saw as the vaguer language of human rights which belonged to politics but not law.[lxxvi] He later became one of the HRA's greatest defenders as the quote below suggests:

> …The Act stands for something greater than the mere bringing home of the 1950 European Convention that its legislative promoters at the time (with shrewd modesty) declared it to be. These days, it is at the very centre of what it means to be progressive in Britain, in politics as much as in law. It is the flagship of a way of thinking, a bold assertion of an international identity that is rooted in a shared belief in the dignity of all. To attack the HRA is not just to assault the rights set out within it: it is to challenge a set of beliefs that all those committed to the human progress now find best expressed in the language of human rights.[lxxvii]

Gearty's view demonstrates that the HRA was able to win hearts even among its greatest former opponents, meaning that many in the UK believed the HRA was here to stay. As Straw would put it, 'the HRA is here to stay. It has become a central plank in our constitution. When we in the UK finally apply ourselves to producing a single written text for our constitution, the Act will have a pride of place.'[lxxviii] While folks like Straw didn't have the 'Nostradamus privilege' of seeing the future, they believed that the HRA could gain a wider acceptance if it is expanded to include social, cultural, economic and labour rights as well as the right to trial by jury, and where possible, environmental rights.

Gearty and Straw were of a shared belief that the HRA was worth defending because it stands for an ideal at a time when there are few ideals - about a belief in the importance of us all regardless of our status, background, wealth and mental capacities.[lxxix] Whereas, this appears a convincing way of conceptualizing it, opponents of the Act and conservatives argue that while

the age-old human rights tradition of the UK must be respected, national security must trump all other considerations. For them, care must also be taken to ensure that judges do not use the HRA as a vehicle to thwart the will of the people represented in Parliament. But as future national security and immigration cases mounted, time was beginning to run out on the HRA.

Although the UK government agrees with the fundamental rights outlined in the Convention that the UK ratified in 1950 and wishes to enhance the British long history of upholding human rights, it considers the current framework for the implementation of human rights to be inadequate. Specifically, the government observed

> [t]he growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest; the creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline; public protection put at risk by the exponential expansion of rights without proper democratic oversight; and public policy priorities and decisions affecting public expenditure shift from parliament to the courts, creating a democratic deficit.[lxxx]

These challenges have hampered the UK's ability to effectively protect human rights and have eroded public confidence in the Act. As a result, the majority of the 2012 Commission on a Bill of Rights concluded that:

> [e]ven the most enthusiastic advocates of the UK's present human rights structures accept that, there is a lack of public understanding and 'ownership' of the Human Rights Act. If that is true of the Human Rights Act… it is equally, if not even more, evident in relation to the European Convention on Human Rights and the European Court of Human Rights with the result that many people feel alienated from a system that they regard as 'European' rather than British. In the view of [the majority on the Commission] it is this lack of 'ownership' by the public which is the most powerful argument for a new constitutional instrument.[lxxxi]

The lack of public understanding and the erosion of public confidence in the HRA is seen clearly in such headlines as this from the *The Sunday Telegraph* of 14 May 2006:

'The ~~Human~~ Criminals Rights Act 1998'

effectively branding the Human Rights Act 'the refugee of terrorists and scoundrels'[lxxxii] Another UK newspaper, *The Sunday Telegraph* had the heading: 'Give us back our rights.' It read:

The Afghans who hijacked a civilian airliner are rewarded with a judgment that they are entitled to stay in Britain at the taxpayers' expense. Foreign terrorists who reportedly plot the murder of hundreds of British civilians cannot be deported back to their countries of origin, nor may they be detained here. Murderers and rapists are entitled to have any decision to keep them in prison reviewed by a judicial hearing, at which they must be represented by a lawyer – and as a result, an intimidated Probation service frees killers who go on to murder fresh victims. The British public is increasingly worried by judgments whose effect is to rank the 'rights' of criminals higher than those of law abiding citizens. As a result, the whole notion of human rights is becoming discredited. Rather than basic protections against arbitrary power, 'human rights' are now seen as legal fictions that prevent the police, the intelligence services and other government agencies from doing what they believe needs to be done in order to safeguard the nation.[lxxxiii]

According to *The Sun* newspaper online report, 'Thousands of Sun readers have voted to scrap the Human Rights Act.'
Nearly 35,000 rang our You The Jury hotline within 24 hours to back our call for an end to the interests of killers, rapists and pedophiles coming ABOVE those of victims. The crazy legislation has led to many dangerous criminals being freed to re-offend. Others have used the barmy laws to gain perks and pay-outs.[lxxxiv]

CONTINUING CALLS FOR A BILL OF RIGHTS

The call for a UK Bill of Rights by citizens and politicians alike is not a new phenomenon. From the 1960s onwards, calls grew from across the political spectrum for a domestic Bill of Rights alongside the continental legal instruments, so that infringements of people's human rights could be considered by the domestic courts. From the 1960s to the 1990s, parliamentarians and peers from all the major political parties tried to introduce such bills, including Lord Lester, Lord Wade, and Sir Edward Gardner MP. Both the manifestos of the

Conservative Party in 1979[lxxxv] and the Labour Party in 1992[lxxxvi] alluded to the idea of a Bill of Rights.[lxxxvii]

With the entering into force of the Convention, there were discussions around incorporating the Convention into UK law. Some came to the conclusion that it should not.[lxxxviii] Despite the passing of the HRA in 1998 and its coming into force in 2000 with the attendant feasibility of filing cases against alleged violators of the Convention's specific rights in domestic courts for the first time, there were still calls for reform. David Cameron, MP for example, in 2006, called for the Human Rights Act to be replaced with 'a modern British Bill of Rights 'to define the core values which give us our identity as a free nation.'[lxxxix] As part of their proposals for a written constitution, the Liberal Democrats called for a Bill of Rights around the same time.[xc] The Gordon Brown administration at the time also saw a Bill of Rights as a logical continuation of the HRA and released two green papers in 2007 and 2009 with proposals for one.[xci] The cross-party Joint Committee on Human Rights published a report in 2008 urging the UK to enact its own 'Bill of Rights and Freedoms.' This diversity of recommendations on how to approach a Bill of Rights demonstrates the wide range of opinions regarding what should be considered a human right and how it should be properly implemented in UK law.[xcii]

In 2010, a commission was established to look into the possibility of creating a British Bill of Rights, according to the Coalition Agreement. In 2011 and 2012, this Commission held two consultations to determine whether the UK should have a Bill of Rights and how it may be structured. In the following year's report, 'A UK Bill of Rights? The Choice Before Us,' the majority of the Commission's members came to the conclusion that there was a compelling case for a UK Bill of Rights. The government's 2019 manifesto pledged to overhaul the HRA passed by the then Labour government in 1998 and to restore common sense to the application of human rights in the UK:

> …We will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights ('the Convention'). The Bill of Rights will protect essential rights, like the right to a fair trial and the right to life, which are a fundamental part of a modern democratic society. But we will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society.

In keeping with the government's 2019 manifesto to update the HRA, an independent Panel was constituted to conduct the Independent Human Rights Act Review (IHRAR). The Panel

was mandated to 'examine the framework of the Human Rights Act, how it is operating in practice, and whether any change is required,' with a particular emphasis on two major issues: the relationship between domestic courts and the Strasbourg Court and the effect of the HRA on the relationship between the judiciary, the executive, and the legislature. The government is now collecting feedback on its ideas for a Bill of Rights, which will reinforce the UK's long and historic legacy of protections, drawing on earlier consultations, notably the IHRAR.

THE UK'S ARRANGEMENTS WITH THE EU ON RIGHTS PROTECTION AFTER BREXIT

As is deducible from the foregoing, ideas for a British Bill of Rights were created in the years leading up to the referendum on the UK's membership in the European Union in 2015 and 2016. There were concerns about the UK's continued commitment to her obligations under the convention post Brexit in 2020. The Northern Ireland Protocol to the Withdrawal Agreement[xciii] had to include an assurance that the UK's withdrawal from the EU would not lead to an erosion of rights and would not affect the UK's commitment to the safeguarding of rights and equal opportunity. Similarly, the EU and UK Trade and Cooperation Agreement (TCA),[xciv] includes commitments to a continued upholding of the principles of democracy, the rule of law, respect for human rights, and its shared commitment to these values. In this way, the UK's pledge to remain faithful to the Conventions continues to be reaffirmed. Through an improved framework that offers more legal clarity and upholds her constitutional ideals, the UK's plans for a Bill of Rights promise to guarantee that human rights will continue to be properly protected in Northern Ireland and throughout the rest of the UK. July 2022 Consultation outcome.

CONCLUSION

It is clear that the HRA has been blamed by its critics for giving undue advantage to people who seek to take advantage of the the UK's human rights law for the evasion of the legal consequences of their criminal acts, for allowing prisoners to vote,[xcv] for stopping Britain from

deporting terror suspects,[xcvi] hindering UK soldiers in Afghanistan[xcvii] and allowing European rulings to overrule UK courts. This, no doubt, has fanned the call for the scrapping of the HRA and to replace it with a British Bill of Rights. In the circumstance, replacing the HRA appears the desirable thing to do since that most reflects the general will of a wide range of the UK public. Care must however, be taken not to subjugate human rights as a condition for securing the nation. There must always be a balance; a balance without which the UK risks a backlash or a return to autocracy.

In concluding, there is a curious wondering if it is the inability to strike the required balance or the predicted backlash that is slowly unfolding in the current move towards the discarding of the HRA. On the other hand, it appears like something of a reverse backlash unfolding; reverse in the sense that rather than such emergency orders and HRA opponents getting the axe, the HRA is now the vulnerable victim standing precariously at the door of extinction. Whether a new British Bill of Rights will put an end to the testy relationship between UK courts and Strasbourg, shore up parliamentary sovereignty and calm the nerves of the public who think that the human Rights Act is now 'Criminals Rights Act,' only time will tell. It is apparent nevertheless, that the HRA has outlived its usefulness in the view of many UK citizens. The stage is certainly set for a new British Bill of Rights and the HRA is unfortunately counting its days.

ENDNOTES

[i] Richard Clayton QC, 'The Empire Strikes Back: Common Law Rights and the Human Rights Act' (2015) Public Law.

[ii] Ibid. 6

[iii] Ibid. 3

[iv] *R (West) v Parole Board* [2005] 1 All ER 755.

[v] https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation#fnref:14> accessed August 29, 2022.

[vi] Ibid.

[vii] European Convention on the Protection of Human Rights (ECHR).

[viii] *Chahal* v *UK* [1996] 23 EHRR 413.

[ix] *Secretary of State for the Home Department v JJ and Ors* [2007] UKHL 45.

[x] *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

[xi] Richard Clayton QC, 'The Empire Strikes Back: Common Law Rights and the Human Rights Act' (2015) Public Law.

[xii] See <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation#fnref:14> accessed August 29, 2022.

[xiii] The ECHR is an international treaty drawn up within the Council of Europe, which

was established in Strasbourg in 1949 in the course of the first post-war attempt to

unify Europe. The Council of Europe was established in 1949 to bring the European countries together and to promote respect for rights and the rule of law. It should be distinguished from the European Union (EU).
[xiv] The Convention was drawn up in 1950 under the EC, and the UK was the first country to ratify it in 1951.
[xv] 'Rights Brought Home: The Human Rights Bill', (1997) Cm 3782.
[xvi] Tom Bingham, 'The Human Rights Act: A View from the Bench' (2010) 6 EHRLR 571.
[xvii] *R (Ullah) v Special Adjudicato* [2004] UKHL 26.
[xviii] This is a principle developed by Lord Bingham, which set out the interpretation that courts should follow relevant Strasbourg jurisprudence, except in special circumstances. This principle has led British Judges to abstain from deciding cases for themselves simply because it may cause difficulties for the UK on the international law plane.

[xix] Using Human Rights Law in the English Courts (London: Hart Publishing, 1997)

[xx] Former UK Lord Chancellor.
[xxi] For example, AF v Secretary of State for the Home Department [2009] 3 WLR 74.
[xxii] Lord Irvine, 'A British Interpretation of Convention Rights,' A lecture delivered at the Bingham Centre for the Rule of Law, 14 December 2011. <http://www.ucl.ac.uk/laws/judicial-institute/docs/Lord_Irvine_Convention_Rights_dec_2012.pdf> accessed October 20, 2022.
[xxiii] Ibid.
[xxiv] Professor of Law, Queen Mary University, London.
[xxv] Select Committee on the Constitution, Sixth Report of 2006/07, para 33.
[xxvi] Ibid. para 37.
[xxvii] Ibid. para 35.
[xxviii] *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 [42].
[xxix] See *International Transport Roth Gmbh v Secretary of State for the Home Department* [2003] QB 728 [26-29], [54]; Opinion 1/2002 of the Council of Europe Commissioner for Human Rights (Comm. DH 92002) 7, August 28, 2002; Eighteenth Report (Session 2003-2004) of the Joint Parliamentary Committee on Human Rights (HL Paper 158, HC 713), July 21, 2004, paras 15-23.
[xxx] David Feldman, 'House of Lords on Anti- Terrorism, Crime and Security Act 2001 in *A and Others v Secretary of State for the Home Department*. Terrorism, Human Rights and their Constitutional Implications' (2005) ECLR 2.
[xxxi] Ibid. p 3.
[xxxii] Richard Clayton QC, 'The Empire Strikes Back: Common Law Rights and the Human Rights Act' (2015) Public Law. P. 10.
[xxxiii] Lord Steyn, 'Laying the Foundations of Human Rights Law in the United Kingdom' (2005) EHRLR 349.
[xxxiv] *Bellinger v Bellinger* [2003] UKHL 21; *Ghaidan v Godin-Mendoza* [2004] UKHL 30.
[xxxv] https://www.theguardian.com/law/2011/dec/14/lord-irvine-human-rights-law> accessed September 6, 2022.
[xxxvi] *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 [27].
[xxxvii] *R v Secretary of State for the Home Department Ex Parte Simms* [1999] UKHL 33.

[xxxviii] M. Pinto-Duschinsky, 'Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK,' (Policy Exchange, London 2011).
[xxxix] *Hirst (No 2) v UK* (App No 74025/01) (2006) 42 EHRR 41.
[xl] *Othman (Abu Quatada) v UK* (App No 8139/08) **(2012) 32 BHRC 62.**
[xli] Jack Straw, 'The Human Rights Act: Ten years On' (2010) 6 EHRLR 579.
[xlii] Stephen Gardbaum, 'How Successful and Distinctive is the HRA? An Expatriate Comparatist's Assessment' (2011) M.L.R 195.
[xliii] Lord Dyson, 'What is Wrong With Human Rights?,' Address at Hertfordshire University, November 3, 2011, <http://www.supremecourt.gov.uk/docs/speech_111103.pdf.> accessed December 3, 2021.
[xliv] Colm O'Cinneide, Human Rights and the UK Constitution (The British Academy, London 2012) p 22.
[xlv] A former Law Lord.
[xlvi] Former UK Prime Minister.
[xlvii] David Cameron, 'Balancing Freedom and Security – A Modern British Bill of Rights' (Speech to the Centre for Policy Studies, London, June 26, 2006).
<http://www.theguardian.com/politics/2006/jun/26/conservatives.constitution> accessed December 10, 2021.
[xlviii] A. Donald, J. Gordon and P. Leach, The UK and the European Court of Human Rights, Equality and Human Rights Commission Report No. 83 (London: EHRC, 20012).
[xlix] A discussion and evaluation of this claim is found in subsequent subheadings below.

[l] Reader in Public Law, Faculty of Law, University of Cambridge.
[li] An independent Commission established by the UK Government on March 18, 2011, they concluded their work, submitted final report on December 18, 2011 and the became *functus officio*.
[lii] Mark Elliot, 'A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights' (2013) 7 Legal Studies Research Paper Series, University of Cambridge p.1.
[liii] Ibid [8.38-8.42].
[liv] Hansard HL, 3 November 1997, col 1227.
[lv] https://www.theguardian.com/law/2011/dec/14/lord-irvine-human-rights-law>accessed September 12, 2022.
[lvi] Ibid.
[lvii] Ibid.
[lviii] https://www.theguardian.com/law/2011/nov/15/uk-courts-european-human-rights-rulings>accessed September 7, 2022.
[lix] *Secretary of State for the Home Department v. AF* [2009] UKHL 28.
[lx] Judgments - *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and Another (Appellant) and one Other* [2009] UKHL 28

[lxi] *R v Horncastle & Others* [2009] UKSC 14.

[lxii] Tom Bingham, 'The Human Rights Act: A View from the Bench' (2010) 6 EHRLR 570.
[lxiii] Ibid.
[lxiv] *Secretary of State for the Home Department v JJ* [2007] UKHL 45.
[lxv] Tom Hickman, 'In Defence of the Legal Constitution' (2005) 55 (4) UTLJ 981-1022.
[lxvi] Tom Bingham, 'The Human Rights Act: A View from the Bench' (2010) 6 EHRLR 757.
[lxvii] https://ukconstitutionallaw.org/2022/01/14/richard-clayton-qc-the-governments-new-proposals-for-the-human-rights-act-part-3-an-assessment/> accessed September 9, 2022; Paragraph 233 at https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation#fn:134> accessed September 9, 2022.
[lxviii] *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557
[lxix] https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation#fn:134> accessed September 9, 2022.
[lxx] *Chahal v United Kingdom* [1996] 23 EHRR 413.
[lxxi] Helena Kennedy and Phillipe Sands, 'In Defense of Rights,' in Report of the Commission on a Bill of Rights (2013), p. 226.
[lxxii] Andrew Clapham, *Human Rights: A very Short Introduction* (Oxford: OUP 2007) 2.
[lxxiii] Ibid. pp. 2 - 3.
[lxxiv] Ibid. p. 4.
[lxxv] Professor of Human Rights Law, London School of Economics.
[lxxvi] Conor Gearty 'Human Rights Act: An Academic Sceptic Changes his Mind but not his Heart' (2010) 6 EHRLR 582.
[lxxvii] Ibid.
[lxxviii] Jack Straw, 'The Human Rights Act: Ten years On' (2010) 6 EHRLR 579.
[lxxix] Conor Gearty 'Human Rights Act: An Academic Sceptic Changes his Mind but not his Heart' (2010) 6 EHRLR 588.
[lxxx] 'A UK Bill of Rights? The Choice Before Us', (Volume 1, December 2012) 29.

[lxxxi] Ibid.

[lxxxii] See *The Sunday Telegraph*, May 14, 2006.
[lxxxiii] Andrew Clapham, *Human Rights: A very Short Introduction* (Oxford: OUP 2007) p. 3.
[lxxxiv] Ibid.
[lxxxv] See https://www.margaretthatcher.org/document/110858> accessed September 9, 2022.
[lxxxvi] http://www.labour-party.org.uk/manifestos/1992/1992-labour-manifesto.shtml> accessed September 9, 2022.
[lxxxvii] Joint Committee on Human Rights, 'A Bill of Rights for the UK?', Twenty-ninth Report of Session 2007-08 (HL165-1; HC150-1).
[lxxxviii] See for example, Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1993) Public Law 59.
[lxxxix] Speech to the Centre for Policy Studies (26 June, 2006). https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation#fn:10>accessed September 9, 2022.

[xc] For the People, By the People', Liberal Democrat Policy Paper 83 (August, 2007).
[xci] The Governance of Britain', CM7170 (July, 2007); and 'Rights and Responsibilities: Developing our Constitutional Framework', CM7577 (March, 2009).
[xcii] Joint Committee on Human Rights, 'A Bill of Rights for the UK?', Twenty-ninth Report of Session 2007-08 (HL165-1; HC150-1).

[xciii]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950601/Northern_Ireland_Protocol_-_Command_Paper.pdf> accessed September 11, 2022.
[xciv] https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en> accessed September 11, 2022.
[xcv] The European Court of Human Rights in 2005 ruled that the UK was in breach of Article 3 of Protocol No 1 of the European Convention on Human Rights in relation to prisoner voting rights. The issue remained unresolved for over a decade. In December 2017 the UK Government came up with proposals that the Council of Europe said were sufficient to signify compliance with the 2005 ruling. The Council finally closed the case in September 2018.
[xcvi] When the UK wanted to deport the radical Islamist cleric Abu Qatada to Jordan to face trial on terrorism charges, the European Court of Human Rights blocked the move. Judges feared that evidence obtained by torture would be used against him. Ministers in the UK fought a long and expensive legal battle until the cleric finally agreed to drop his case. He was eventually flown to Jordan in July 2013 and has now been cleared of terror charges.
[xcvii] The Ministry of Defence has had more than 1,000 damages claims made against it for breaching human rights during conflicts overseas. Some challenges are from former enemies on the battlefield. Others have been brought by the families of soldiers who have died on active service or during training. All this takes time and cost money. Some say it undermines the ability of the forces to do their job and keep the UK safe.