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A thesis submitted in conformity with the requirements for the degree of Masters of Law
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2012

Abstract

In 1997 the Labour Party introduced the White Paper Rights Brought Home: The Human Rights Bill. Bringing rights home was considered necessary to significantly influence rights conception in the UK and internationally. Rights Brought Home argued that incorporation would allow human rights to become a more prominent feature of society. The Human Rights Act 1998 (HRA) was brought into force with optimism and expectations. However, the war of terror has significantly impacted the way in which rights have been understood and appreciated. National security issues have clashed with Convention rights. There is mounting concern that British judges must blindly follow the rulings established by the European Court of Human Rights. There have been problems of public disengagement and hostility. The HRA is characterized by a story of failure. Understanding the relationship between the war on terror and the HRA is central to human rights development.
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Chapter 1
The Birth of the Human Rights Act 1998

1 Introduction

1.1 The HRA and the Human Rights Insight Project

The introduction of the Human Rights Act 1998 (HRA) into the UK legal system promised to offer a practical solution to the difficulty of rights enforcement at the European Court of Human Rights (ECtHR). Initially, the HRA was seen as a realistic means to accomplish several goals. There was a need to decrease the number of pending British cases to be heard before the ECtHR. The HRA would allow cases on Convention rights to be heard in the UK. The HRA was also meant to have a large cultural and political impact in the UK. The HRA would allow citizens to have their cases heard before British judges and in turn, it was assumed that British judges would influence rights develop across Europe. The HRA was intended to foster the development of a human rights culture in the UK. Yet, this view of the HRA was fundamentally flawed.

More than a decade after the HRA was formally introduced it has been characterized by failure. The failures of the HRA are clearly illustrated through data collected by the Human Rights Insight Project. According to the Human Rights Insight Project, amongst those polled, there is “virtually no awareness of the fact that the Human Rights Act had come into force in British law” and those “who knew of it associated it with something they tended to refer to as “the European Courts”’.¹ There is a clear lack of awareness of the mere existence of the HRA. More importantly, the HRA is not depicted or viewed by the public as British. The HRA fails to help define British national identity or strengthen

¹ Human Rights Insight Project (Ministry of Justice Research Series 1/08, 2008), 2.3.1 (Human Rights Insight Project).
the UK legal system. For instance, the Human Rights Insight Project mentions that those polled believe the EU is a “body which overrides UK sovereignty, the authority of Parliament and the judiciary”. There is great fear that the HRA does not protect rights and is destructive towards British identity. The HRA is associated with limiting the rights of Parliament and by extension, the ability of Parliament to look after the interests of nationals. The HRA is contrary to British political traditions. Furthermore, research conducted by the Human Rights Insight Project confirm that “Human rights were seen to be relevant to individuals – often ethnic minorities – suffering at the hands of and seeking to confront, repressive dictatorial regimes”. The research suggests that the general public does not associate human rights with the UK. There is widespread belief that those who invoke the argument of “human rights” in the UK are “individuals abusing the notion in order to take advantage of the system”. The HRA fails to integrate human rights awareness and knowledge into British society.

The Human Rights Insight Project highlights the failings of the HRA since incorporation. However, the failings of the HRA are also attributable to the environment in which the legislation was introduced. Tony Blair argues that the war on terror will have a political and social impact on UK society and rights conceptions. Blair’s statements to the press reflect the environment in which human rights will be negotiated. For example, Blair states, “Let no one be in doubt. The rules of the game have changed”. Human rights and issues of national security are politicized. The inability of the HRA to effectively

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2 Human Rights Insight Project, supra note 1 at 2.2.2.
3 Human Rights Insight Project, supra note 1 at 2.3.1.
4 Human Rights Insight Project, supra note 1 at 2.3.1.
address a post 9/11 world, which includes issues of national identity and safety, has led to failures. Failures include the unwillingness of the British public to “own” and support the HRA. The HRA is seen as a tool that protects and is taken advantage of by foreigners to the detriment of nationals. The inability of the HRA and the British courts to respond to such criticisms, contributes to the failures of human rights in the UK.

In the following paper, I will attempt to show how the HRA has failed to live up to the objectives outlined in the White Paper Rights Brought Home. First, I will give a brief introduction about the incorporation of the HRA into the UK legal system. Second, I will outline the specific failures including the inability to establish a human rights culture, the inability of British judges to contribute to the development of human rights understanding and the perceived threats to Parliamentary sovereignty. Throughout the paper, I will also explain that these failures are exacerbated by the political situation the HRA encounters in a post 9/11 world. The HRA interpretation has been framed largely by the war on terror and a post 9/11 world. In many ways, the criticisms and failings of the HRA are due to the inability of the HRA to adapt easily to a new set of social and political circumstances.

1.2 Labour and the Human Right Act

The incorporation of the European Convention on Human Rights (ECHR) into the domestic legal system of the UK was a highly political issue. Yet, generally, the public has not opposed the idea of a Human Rights Act or a Bill of Rights. According the House of Commons Research Paper 98/24, a poll conducted by MORI in 1995 “found
that 79% of respondents were in favour of a bill of rights for all of Britain”.⁶ During the 1990s human rights were viewed positively by the public and seen as a means of rights protection for nationals. The public saw the introduction of legislation designed to protect human rights as a mechanism for several important idea. The Economist, in the article “Britain’s Constitution: Why Britain needs a bill of rights” argued, a bill of rights could “nurture a culture of liberty” and “create a judiciary which sees the protection of liberty as one of its primary tasks”.⁷ There was great hope that a bill of rights or human rights act would create a culture of human rights awareness and create a legal system dedicated to human rights protection.

In 1997, the Labour Party began promoting the idea of incorporation. In the White Paper Rights Brought Home: The Human Rights Bill, the case for incorporation was framed largely as a means to solve the practical problems of non-incorporation. In Rights Brought Home, the Labour party argued that the ECHR was not a foreign document. Labour emphasized the ECHR’s British roots. Rights Brought Home maintained, “The United Kingdom played a major part in drafting the Convention”.⁸ Instead of the ECHR being a “European” or “foreign” document impacting the lives of nationals, the Convention was described as a document influenced by British ideas and beliefs. In fact, it was held, the “rights and freedoms which are guaranteed under the Convention are ones with which the people of this country are plainly comfortable”.⁹ Convention rights were aligned to British values.

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⁷ House of Commons Research Paper 98/24, supra note 6 at 22.
⁹ Rights Brought Home, supra note 8 at 1.3.
In addition, Rights Brought Home sought to highlight the impracticalities created by non-incorporation. Rights Brought Home held, that in most of Europe “acceptance of the Convention went hand in hand with its incorporation into their domestic law”.\(^{10}\) Incorporation signaled recognition and approval of the Convention within various countries. It signaled ownership and acceptance of rights. Labour argued, in the UK “it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law”, yet “there has been a growing awareness that it is not sufficient”.\(^{11}\) Relying on the common law to protect rights and freedoms of the Convention was not sufficient to deliver justice or develop a culture of human rights awareness. Rights Brought Home reported a number of statistics that highlighted the amount of time and money, citizens had to endure to have their cases heard before the ECtHR. Rights Brought Home argued, “It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000”.\(^{12}\) Accordingly, rights enforcement may not always be possible or available to a large percentage of the population. Bringing cases before the ECtHR was neither a realistic nor a feasible option for many citizens. Right Brought Home emphasized the problem of access to justice. Incorporation would make rights enforcement a viable option.

Furthermore, not only would incorporation reduce the time and cost for cases, but also “rights will be brought much more fully into the jurisprudence of the courts” and their

\(^{10}\) Rights Brought Home, supra note 8 at 1.4.
\(^{11}\) Rights Brought Home, supra note 8 at 1.4.
\(^{12}\) Rights Brought Home, supra note 8 at 1.14.
interpretation will be more “subtly and powerfully woven into our law”.\(^\text{13}\) Rights Brought Home argued that incorporation would make people more aware of Convention rights and become fully integrated within the legal system. It was believed “through incorporation we are giving a profound margin of appreciation to British courts to interpret the Convention in accordance with British jurisprudence as well as European jurisprudence.\(^\text{14}\) Moreover, having Convention cases heard before British judges, allowed a “distinctively British contribution to the development of the jurisprudence of human rights in Europe”.\(^\text{15}\) By bringing rights home, British judges would be able to incorporate British understanding of human rights into European jurisprudence. British judges could impact how human rights issues are decided or understood throughout Europe. Rights Brought Home suggested, “Our court’s decisions will provide the European Court with a useful source of information and reasoning”.\(^\text{16}\) Consequently, incorporation would remove the practical difficulties of having cases heard before the ECtHR. It would also allow British judges to develop human right conceptions internationally.

However, there were reservations about whether incorporation of the Convention was compatible with British legal traditions. There existed deep concern about the challenge to Parliamentary sovereignty, due to incorporation. Lord Kingsland maintained that incorporation could allow judges to create legislation. This would be contrary to the political and democratic process. According to Lord Kingsland, incorporation would

\(^\text{16}\) Rights Brought Home, *supra* note 8 at 1.18.
allow judges to state, “their own view about what the convention says”, which would be “initiating new legislation”. There was fear that judges would gain too much power through incorporation. It would threaten the separation of powers document. Such a situation could threaten the unique British concept of Parliamentary sovereignty.

Despite some hesitation towards incorporation, the development of a human rights act was largely supported. The Labour Party believed that incorporation would allow nationals to bring cases before UK judges and spark a human rights culture. British judges would be highly influential in the development of human rights laws and protection abroad. However, at the very beginning incorporation was a political decision. The public was rarely mentioned, except through polls and statistics. The general public was not included into the incorporation debate. For instance, in Rights Brought Home it was suggested that creating a Parliamentary Committee on human rights would be important. Rights Brought Home stated, that the Committee could “conduct enquiries on a range of human rights issues relating to the Convention, and produce reports to assist the Government and Parliament in deciding what action to take”. There was a strong focus on the need of Parliament to play a leading role in rights protection. Very little attention was paid in creating a similar Committee to educate the public on what and how incorporation would impact the lives of nationals. Consequently, the HRA has become an abstract concept for many people, that neither protects nor enforces their human rights.

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17 House of Commons Research Paper 98/24, supra note 6 at 27.
18 Rights Brought Home, supra note 8 at 3.7.
19 Rights Brought Home, supra note 8 at 3.6.
Chapter 2
The Failures

2 Why the HRA Failed

2.1 The inability to nurture a human rights culture

One of the goals of the HRA was to create a culture of human rights in the UK. Judges were meant to engage and decide issues that were fundamentally important to human right conceptions across Europe. However, the implementation of the HRA has had the opposite effect. Section 2(1) is a prime example of the failure of the HRA to initiate human rights awareness. The interpretation that British judges have given to section 2(1) of the HRA contributes to a number of failures. Section 2(1) holds, “A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights…whenever made or given, so far as in the opinion of the court or tribunal it is relevant to the proceedings in which that question has arisen”.  

Under section 2(1), judges have a duty to take notice of ECtHR judgments. Section 2(1) is “designed as a constitutional measure to modernize and democratize the political system and lead to culture change beyond the courts.” Yet, UK courts and the House of Lords have interpreted section 2(1) as a duty to follow the rulings given in Strasbourg. The House of Lords argue that the role of British judges is to follow Strasbourg, except under extraordinary circumstances. This has not led to a cultural change in society.

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21 Klug and Wildbore, supra note 14 at 623.
The interpretation of section 2(1) is in conflict with the arguments for incorporation. In the White Paper Rights Brought Home, the Labour Party argued, that incorporation would allow Britain to shape rights development across Europe. Labour claimed that incorporation would allow British judges to play a fundamental role in rights advancement in Europe. The HRA would give British judgments credibility and prominence. British judges would be dealing explicitly with Convention rights. In fact, Rights Brought Home maintained, “British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe”.\(^{22}\) In contrast, without incorporation, British influence would be minimal. The UK would be reduced to following the directions of the ECtHR. Rights Brought Home claimed, “United Kingdom judges have a very high reputation internationally, but the fact that they do not deal in the same concepts as the European Court of Human Rights limits the extent to which their judgment can be drawn upon and followed”.\(^{23}\) Rights Brought Home emphasized the reputation of British judges. Incorporation was presented as a mechanism to increase British role in legal development. Moreover, it was emphasized that only when UK cases mirrored a case in the ECtHR would it be appropriate to directly apply Strasbourg findings, but “the courts will often be faced with cases that involve factors perhaps specific to the United Kingdom… it is important that our courts have the scope to apply that discretion so as to aid in the development of human rights law.”\(^{24}\) Yet, section 2(1) HRA has had to opposite effect.

\(^{22}\) Rights Brought Home, supra note 8 at 1.14.
\(^{23}\) Rights Brought Home, supra note 8 at 1.18.
\(^{24}\) Klug and Wildbore, supra note 14 at 624.
2.2 R (Ullah) v Special Adjudicator

*R (Ullah) v Special Adjudicator* represents the approach the House of Lords adopts when section 2(1) is involved. *Ullah* involved Article 9 and Article 3 of the Convention. Article 3 is an absolute right against “torture and inhuman or degrading treatment or punishment”.

The case involved balancing competing Convention rights. Lord Bingham made several important points, regarding balancing rights and specifically the role of the judiciary when interpreting section 2(1).

Lord Bingham stated that under the HRA, section 2(1) required British courts to “take into account” the decisions of the ECtHR. Lord Bingham maintained, “While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence from Strasbourg”. Therefore, when no special circumstance or special facts exist that differentiate a UK case from established Convention case law UK judges must follow Strasbourg.

According to Lord Bingham in *Ullah*, ECtHR rulings should be considered authoritative. Lord Bingham construes section 2(1) duty to take account as tantamount to Strasbourg setting precedent, which the UK has a duty to follow. It is an acknowledgment that the Convention is an international instrument, “the correct interpretation of which can be authoritatively expounded by the Strasbourg court”. According to Lord Bingham, due to the ECHR international standing, the ECtHR is authoritative unless there are exceptional factual circumstances. Finally, Lord Bingham argued, “The duty of national

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26 *R (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* (2004), 26 UKHL at para 20 (Ullah).
27 Klug and Wildbore, *supra* note 14 at 624.
28 *Ullah, supra* note 26 at para 20.
courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”.29 In Ullah, the House of Lords maintain that European case law will affect UK jurisprudence. Lord Bingham suggests that it is possible for UK courts to provide more rights than the ECtHR, but UK judges must not provide fewer rights. The ECtHR, sets the rights protection standards. Thus, section 2(1) combined with Lord Bingham’s interpretation does not seem to provide the UK with an effective role to shape rights development. Lord Bingham’s interpretation of section 2(1) creates an obligation to respect and follow the judgments of the ECtHR.

Such an approach fails to understand the purpose behind section 2(1). Such an approach fails to understand the flexibility inherent in section 2(1) and leads judges into following precedents, which do not exist.30 Judges are not actively engaging in a discussion about human rights. Accordingly, Ullah diminishes the interpretative role of British judges. By reducing the interpretative role of judges, it is difficult to foster a culture of human rights. Judges are unable to having a meaningful impact on rights interpretation or enforcement.

In addition, section 2(1) analysis must take account of the war on terror’s affect on the political and cultural environment. Due to the fact that courts must take account of the rulings in Strasbourg and Convention rights, the British court have been “far less deferential” to the executive on issues of national security.31 The interpretation of section 2(1) does not allow for the UK to address national security issues that are unique to the

29 Ullah, supra note 26 at para 20.
31 David McKeever, “The Human Rights Act and ant-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?” (2010) P.L. 110 at 131 (McKeever).
UK. The UK must meet the rights protection standards set by Strasbourg. There have been calls for reinterpreting the HRA to reflect a “common-sense balance between civil liberties and the protection of public security”.\textsuperscript{32} By interpreting section 2(1) as an obligation to follow, the courts and HRA have failed to create interest in human rights.

2.3 N v Secretary of State for the Home Department

Moreover, in \textit{N v Secretary of State for the Home Department}, the issue of section 2(1), also known as comity was again raised. N was an asylum seeker. The House of Lords again were bound by section 2(1) of the HRA and had to take into account Strasbourg jurisprudence.

Following ECtHR case law, the House of Lords concluded several appoints on the UK’s relationships with the Strasbourg court. First, Lord Hope expanded on the issue of comity. Lord Hope described the Convention as a “living instrument”\textsuperscript{33} The real question according to Lord Hope was whether “the enlargement is one which the contracting parties would have accepted and agreed to be bound by”.\textsuperscript{34} The issue is one of uniformity and consistency across contracting states bound by the Convention. Any interpretation of Convention rights must take into account whether such a right can be universally accepted. Such a task is best left up to Strasbourg. The House of Lords in \textit{N}, believes that the UK should not be deciding issues that can have ramifications on other states’ understanding of Convention rights. For Lord Nicholls, the task of UK judges was

\textsuperscript{32} Helen Fenwick, “The Human Rights Act or a British Bill of Rights: creating a down-grading recalibration of rights against the counter-terror backdrop?” (2012) P.L 468 at 471 (Fenwick).

\textsuperscript{33} \textit{N v. Secretary of State for the Home Department} (Terrence Higgins Trust Intervening) (2005), 31 UKHL at para 21 (N v. SSHD).

\textsuperscript{34} N v. SSHD, \textit{supra} note 33 at para 21.
to “analyse the jurisprudence of the Strasbourg court” and it was up to Strasbourg to decide if the case law was out of touch with “modern conditions and to determine what further extensions, if any, are needed”. Accordingly, it is up to Strasbourg to determine how and when Convention rights should be extended. Strasbourg is best placed to consider how Convention rights, if expanded, will impact individual States and whether such expansion will be tolerable. Section 2(1) of the HRA, applied by the House of Lords, allows ECtHR chief responsibility in interpretation of Convention rights. The House of Lords expresses reservations about interpreting human rights in a manner different than Strasbourg. The House of Lords fear the ramifications it’s interpretations will have internationally. The House of Lords argue that the UK lacks jurisdiction to make such interpretations.

Yet, a duty to follow does not take into account the unique aspects of British society. It also does not actively engage with rights at issue. By insisting that the ECtHR has the prime interpretative responsibility, British judges have not construed obligations to meet modern British needs. British judges have failed to use the HRA to appropriately balance the individual and the community. This is especially problematic when the British public believes that the HRA is constantly taken advantage of by criminals, asylum seekers, the undeserving or the “other”. For instance, the public believes that the HRA is out of touch with modern perceptions about rights. This is a direct result of the interpretation given to section 2(1) and the prominence given to the Strasbourg court. According to The Sun, “nearly half of those asked between the ages of 18-24 years old – 48 per cent –

35 N v. SSHD, supra note 33 at para 25.
“believe it is time for change”. The British public wants more control over human rights development.

2.4 Secretary of State for the Home Department v AF

Furthermore, there have been concerns that the HRA does not take appropriate account of the need to balance liberty with security. For instance, the case of Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) (Appellant) and another (Appellant) and one other action, involved control orders and Article 6 of the Convention. Section 2(1) was an obstacle. Lord Hoffman reiterated the principles stated in Ullah and N. Lord Hoffman argued, “I agree that the judgment of the European Court of Human Rights (ECtHR) in A v United Kingdom (Application No 3455/05) requires these appeals to be allowed. I do so with very considerable regret, because I think that the decision of the ECtHR was wrong”. Lord Hoffman’s statements reveal that British judges must follow the precedent established by the ECtHR, even when there is a strong belief amongst members of the judiciary that the Strasbourg ruling is not appropriate and flawed. This gives the impression to the public that the UK courts must blindly follow the decisions given in Strasbourg, despite reservation or disagreement. It also gives the impression that national security interests of the UK are secondary. The courts do not give the unique national security interests of the UK prominence. Incorporation was promoted as the ability of UK judges to influence the development of human rights.

Following Lord Hoffman’s comments in AF, that clearly has not been the case. Section

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37 Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action (2009), 28 UKHL at para 70 (SSHD v AF).
2(1), as interpreted by the House of Lords gives the ECtHR prominence. Lord Hoffman also argued, “section 2(1)(a) of the Human Rights Act 1998 requires us only to “take into account” decisions of the ECtHR” yet to “reject such a decision would almost certainly put this country in breach of the international obligations which it accepted”.38 The use and interpretation of section 2(1) of the HRA by the House of Lords has not led to the spread of British value across Europe. Instead the decisions by the House of Lords have led the public to believe that Strasbourg ultimately decides UK cases. For the public, it is Strasbourg jurisprudence that ultimately impacts domestic law. Such rulings fail to establish a culture of rights, developed by British nationals. There is no ownership of rights. Such an approach fosters the belief that a “domestic court giving effect to the judgment of an international court remains an alien concept”.39 It fosters the idea that human rights, understood and applied in the UK, is foreign and not representative of British society. Moreover, the approach advocated by the House of Lords fails to realize the “need to develop a genuinely domestic law of human rights which stands independently of, although largely consistent with, protection of rights at a European level”.40 It is important for British judges to not mirror the judgments of the ECtHR. British judges should develop a distinctly British approach to human rights issues, in order to foster a culture of human rights and to ensure that human rights do meet the unique conditions of British society.

Moreover, the ideas set out by Lord Hoffman in AF, leads to criticisms that the HRA seeks to protect the rights of terrorists and criminals ahead of UK society. In a post 9/11

38 SSHD v. AF, supra note 37 at para 70.
39 Wicks, supra note 30 at 413.
40 Ibid.
world, the decision in *AF* and beliefs expounded by Lord Hoffman, do not create public confidence about the ability of the HRA to protect nationals from terrorism and security threats. The HRA and the judiciary are unable to protect British nationals. The interpretation of section 2(1) causes deep concern about the issue of precedent. Aileen Kavanagh argues that the “House of Lords interpretation of s 2 gives Strasbourg jurisprudence the same status or precedential weight as the House of Lord’s own precedent” going beyond the idea of taking into account.\(^{41}\)

Such controversial decisions and adherence to the rulings of the ECtHR, creates both criticisms and a negative views of human rights. Recently in *The Guardian* Lord Irvine spoke about the decision by the Supreme Court (formerly the House of Lords) to follow Strasbourg decisions. Lord Irvine, the former Lord Chancellor, argues that such decisions by the Supreme Court have a damaging effect to public perception. Lord Irvine claims, such decisions creates the impression that members of the Supreme Court are “merely agents or delegates of the ECHR and Council of Europe”.\(^{42}\) Lord Irvine seeks to re-establish and re-interpret the Supreme Courts relationship with the ECtHR. In fact, Lord Irvine argues that UK judges must base decisions on their own understanding of the law. Lord Irvine claims that it is the “constitutional duty of judges to reject Strasbourg decisions they feel are flawed in favour of their own judgments”.\(^{43}\) This will be a stricter reading of section 2, which requires judges to “take into account” the jurisprudence of the ECtHR. Lord Irvine’s approach allows for discussions to take place about the correct

\(^{41}\) Klug and Wildbore, *supra* note 14 at 624.


\(^{43}\) Wolf-Robinson and Bowcott, *supra* note 42.
reading and balancing of Convention rights. It will also allow rights “to be assessed within context of British society and government, with reference to it priorities, needs and desires. This is specifically contrary to the principles established under *Ullah* and *N.*

Lord Irvine’s comments are not unique. Supreme Court judges have also criticized the approach taken, to follow Strasbourg jurisprudence except in exceptional circumstances. During a Parliamentary committee, Lord Phillip (President of the Supreme Court) maintains that when taking into account the decisions of the ECtHR UK judges “have a tendency to be too strict”. Section 2(1) has failed to allow British judges to contribute to the discussion of human rights enforcement. Lord Judge claims, “There’s been a tendency to follow much more closely than we should”. Such statements by senior members of the Supreme Court seem to signal, changes in the approach to Convention rights. It is about redefining the UK’s relationship with the Strasbourg courts. The Supreme Court will be seeking to move away from ECtHR rulings, when necessary. This seems to answer critics and allows for the UK to be much a more influential source of human rights development.

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44 Wicks, *supra* note 30 at 413.
46 Bowcott, *supra* note 45.
Chapter 3
Public Disengagement

3  Public misunderstanding of key HRA sections

3.1  Section 3: Source of confusion

Consistent with the fears that the British courts have become “Europeanized”, there is great fear about the status of Parliamentary sovereignty. These fears become particularly evident when discussing section 3 and section 4 of the HRA. According to section 3 “so far as it is possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights”.\footnote{The HRA 1998, supra note 20 at s. 3.} Section 3 allows the courts to interpret Parliamentary legislation, in order to achieve Convention compatibility. Yet, section 3 is subject to controversy. Critics argue that section 3 does not maintain the boundaries between the roles of Parliament with the role of the judiciary. The judiciary appears to be given more power to influence policy issues. For example, \textit{R v A (No 2)}, involved section 41 of the Youth Justice and Criminal Evidence Act 1999, and the right of the complainant to not be cross–examined about her previous sexual relationship with A.\footnote{\textit{R v. A (No 2)} (2001), 2 CR at para 2 (\textit{R v. A}).} However, at the House of Lords, it was held that in “applying section 3 of the Human Rights Act 1998,” the “test of admissibility was whether the evidence (and the questioning relating to it) was so relevant to the issue of consent as to make its exclusion endanger the fairness of the trial under Article 6”.\footnote{\textit{R v. A}, supra note 48 at para 46.} Critics argue, that such a reading by the House of Lords is equivalent to determining policy decisions and is interference with the democratic system. Critics state that the decision in \textit{R v A}
(No 2) “amounted to “judicial overkill” or “judicial override”, where the judges effectively “re-wrote” the legislation under scrutiny”. The result in *R v A (no 2)* left judges subject to criticism about the trampling of Parliamentary sovereignty, and the undemocratic approach taken to adhere to the Convention. In fact, adherence to the Convention, has led to further criticism that “re-writing” the legislation under *R v A*, should be left to parliamentarians. Yet, Lord Steyn in *R v A (No 2)* maintained, that the courts are not putting Convention rights ahead of the UK government. Lord Steyn stated, “In accordance with the will of Parliament as reflected in s 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions”.

According to the House of Lords, use of section 3 is expressly approved by Parliament. This view is supported by considering the relationship between the HRA and Parliament. In fact, the courts argue when using section 3, “there are two legislative intentions at play. There is the original intention of Parliament when enacting the legislation under scrutiny, but also the intention of Parliament expressed in s 3(1)”.

Therefore, the arguments and criticisms about the approach taken towards section 3 of the HRA, should be qualified. The power given to courts under section 3 does not necessarily threaten Parliamentary sovereignty. The UK specifically included section 3, to allow the courts to make legislation Convention compatible. The courts are simply following the directions of Parliament, as stated within the HRA. While, criticism still exist that section 3 allows European influence

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51 *R v. A*, *supra* note 48 at para 44.
52 Kavanagh, *supra* note 50 at 269.
within UK law, it is only “so far as possible”. There are limits in place within the wording of section 3 to protect the original intention of Parliament. For example, Lord Steyn confirms that it will be inappropriate to use section 3 where it would lead to a radical rather than piecemeal reform of the legislation, as was the case in *Bellinger v Bellinger*.\(^{53}\) Therefore, section 3 does uphold Parliamentary sovereignty and ensures that the intention of Parliament within a specific legislation is maintained. Yet, the appearance of control is important and it is this category where the House of Lords and the HRA have failed. The process of section 3 is neither open nor transparent.

### 3.2 Section 4

Where section 3 cannot be used, to interpret primary or subordinate legislation to become Convention compatible, the courts are obligated to enact section 4 of the HRA. Section 4 “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, and is not binding on the parties to the proceeding in which it is made”.\(^{54}\) Section 4 seeks to preserve the idea of Parliamentary sovereignty. It is up to Parliament to change or not change the legislation, for Convention compatibility. It should be noted, that section 4 is criticized by the European Court due to its non-binding nature and since a “declaration provided the appropriate minister with a power, not a duty, to amend the offending legislation”.\(^{55}\) Under section 4, there is no guarantee that legislations will be amended and made compatible. Parliamentary supremacy is maintained.

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\(^{53}\) Kavanagh, *supra* note 50 at 267.


\(^{55}\) Ibid.
3.3 The real problem

The root problem regarding section 3 and section 4 is the failure to engage the public. As noted earlier, many members of the public did not even know that the HRA had come into effect. The public does not accurately understand the role of section 3 in relation to Parliamentary sovereignty. There is a deep sense, that section 3 and section 4 enlarges the power and role of the judiciary at the expense of Parliament. The public has expressed concern that the power given to the HRA infringes upon the Parliamentary system and is influenced by European law. The HRA is therefore met with skepticism. Sections 3 and 4 have been equated with giving power away to Strasbourg. Sections 3 and 4 are equated with creating judge made laws that reflect the judgments by the ECtHR. It does not seem to protect British traditions and values. Speaking directly to the idea of the loss of Parliamentary sovereignty, Cameron argues, “Because we have no written constitution, unlike many other EU countries, we have no explicit legal guarantee that the last word on our laws stays in Britain”.\textsuperscript{56} Cameron expressed fear amongst the public that the ECtHR has ultimate authority within the British legal system. Cameron maintains, such a scenario cannot be upheld and Parliamentary sovereignty must remain within the UK to ensure accountability.\textsuperscript{57} Especially, in a post 9/11 world, national security issues have become paramount. For the public, the HRA has failed to address issues of deference to the elected members of Parliament regarding safety and security policies. Therefore, it is evident that there exists real fear amongst the public, whether

\textsuperscript{56} David Cameron, “A Europe Policy that people can believe in” (The Conservative Party, 2009) at 2 (Cameron).
\textsuperscript{57} Cameron, supra note 56 at 3.
real or not, about the loss of Parliamentary sovereignty and increased European influence domestically. The HRA has failed to address the lack of public knowledge.
Chapter 4
What is the Public Interest?

4 The Media and the Post 9/11 World

4.1 How to define the public interest

The incorporation of the HRA was heralded as a practical instrument to human rights development in the UK. However, while Rights Brought Home focused on the benefits of incorporation, early on the media expressed doubt and concern about how the HRA would operate in practice. Focusing on the arguments of the media is important. The press can represent and even influence the public. During the debate about incorporation, the media was specifically concerned about how the HRA would balance the competing interests of freedom of expression and right to private life. The media feared that incorporation would lead to judge made privacy laws, affecting news reporting. Lord Irving dismissed these arguments, believing that incorporation would only strengthen and benefit the media. Lord Irving stated, “any law of privacy will be a better law after incorporation, because the judges will have to balance Article 10 and Article 8, giving Article 10 its due high value”. Yet, the media still had doubts about achieving a balance that would be acceptable to the notions of a free press. Such fears were heightened by the fact that under the HRA, free speech would not be absolute. It was argued that free speech would be “limited in a democratic society to meet some pressing social need, including the state’s positive obligation to ensure respect for personal privacy by public authorities and the media”. The media was concerned about judge

58 House of Lords Debate, 582 (3 November 1997) cc1227 at cc1229 (House of Lords Debate).
59 House of Lords Debate, supra note 58 at cc1238.
made laws, which would curb the ability of news outlets to expose issues of public interest.

The courts frequently state the need for a free press. For instance, in Sherwood, the court emphasized the necessity of having a free press to ensure that the public interest is exposed and understood. In Sherwood the court stated, “It is generally recognized that the media have a positive duty to act as a watchdog or as the eyes and ears of the general public and to inform their readers about matters of the public interest”. Yet, the media argues that its ability to be a watchdog has been significantly curtailed by the HRA. The media argue that the House of Lords have not found the right balance between human rights and the public interest. For example, in Campbell the court ruled, “the public had a need to know that Naomi Campbell had been misleading them by her denials of drug addiction and that she was receiving drug therapy for her drug addiction. However, other confidential details she had chosen not to put in the public domain were off limits”. Consequently, the court in Campbell limits the idea of public interest. The media only has a right to expose misleading information, which is already in the public domain. The Campbell case formed the boundaries of a judge made privacy law. The court claims that there must be a balance between public interest and privacy. The balance the court reached, does not favour the press in exposing issues of the public interest.

In the aftermath of Campbell, the media argues that the courts protect the rights of the less deserving in society ahead of the idea of a free press. Even The Guardian, which generally favours the HRA, has included criticism of the judgment of the Campbell case.

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60 Human Rights Law, supra note 25 at 426.
61 Human Rights Law, supra note 25 at 429.
In The Guardian, Edgar Forbes claims, “It is disappointing that a fundamental right has effectively been bought by those less deserving of its protection”. The reaction amongst the tabloid press reiterates the idea of the undeserving benefiting from the HRA. The tabloid media claim, that the House of Lord have handed victory to “crooks, con artists and sleazy politicians”. The media have drawn lines between the deserving and undeserving in society. The media argue that the House of Lords have “seized on Article 8 of the European Convention of Human rights, which underlines the right to privacy” to the detriment of the public interest. The media also argue that the House of Lords have followed and been unduly influenced by the decisions of Europe. The media argues, “In the rest of Europe, corruption is rampant, because sleazy politicians hide behind privacy laws. Do we want that to happen here?”.

From the decision in *Campbell*, the media highlights the connection between “crooks” and those whom are protected and benefit from the HRA.

*Campbell* is important to understanding the judiciary’s relationship with the media. *Campbell* is also important as it emphasizes the need on the part of the media to protect the public interest against the “other”. The following cases focus on the how the HRA is perceived amongst the general public. The cases will focus on media reaction to decisions of the House of Lords. Finally, the cases will focus on the environment, in which decisions of the House of Lords were rendered.

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64 An insult to our intelligence, *supra* note 63.
It is important to emphasize that the HRA is being established in a hostile and fearful setting. Post 9/11 there is a large focus on the needs of the public interest, specifically in terms of national security. According to Jack Straw, the introduction and enforcement of the HRA “came to life in the coldest possible climate”. In the aftermath of 9/11 and the London bombings, Straw argues that the public and the press became increasingly concerned that the HRA did not achieve the right balance between national security and human rights. Straw claims, “Many sections of the public, and the media on their behalf, put the necessary balance between ends and means to one side, and simply demanded to know why they had not been kept safe and what we were doing to keep them safer”. There is widespread belief that the HRA has failed to keep British nationals away from harm. The HRA does not effectively address the public interest. According to the Review of the Implementation of the Human Rights Act, “Commentators have blamed human rights for a range of ills, but in particular giving undeserving people a means of jumping the queue and getting their interest placed ahead of those decent hardworking folk”. There has been a categorization of deserving and undeserving people, through the media commentary of the HRA. For instance, the media argues, “judges and lawyers were the main beneficiaries of the HRA”. Such commentary hampers the development of a human rights culture in the UK. The HRA is viewed negatively and suspiciously. The HRA fails to achieve the correct balance.

66 Straw, supra note 65 at 579.
Controversial cases, by the House of Lords have failed to address the public concerns, expressed through the press. A focus on immigration and asylum cases are important. First such cases reflect the environment in which the HRA has been introduced. Second, such cases show how the balance achieved between competing rights have failed the development of human rights. The HRA has failed to adequately protect the public interest. The HRA has failed to promote and foster a culture of human rights. Moreover, such cases are important since the HRA makes immigration and asylum policy increasingly political.\textsuperscript{69} Immigration and asylum is wrapped in an ongoing debate about British role in Europe and British national identity. Immigration and asylum issues are “bound up with national security in the post-September 11th world” and the London bombings have increased “concern that foreigners were spreading Muslim extremism among certain male populations”.\textsuperscript{70} Within the public arena there is deep concern that the HRA has usurped Parliamentary sovereignty. There are calls for parliamentarians to re-address the issue of the HRA, to ensure that British rights are paramount, that Parliament, elected by the people, has final authority on jurisdictional matters. The HRA needs to redress the public interest element.

\subsection*{4.2 Human rights and national security}

\textit{A v Secretary of State for the Home Department} is a prime example of the ongoing debate between competing rights. \textit{A} involved nine appellants who were detained under the Anti-


\textsuperscript{70} Waites, \textit{supra} note 69 at 30.
terrorism, Crime and Security Act 2001. \(^{71}\) It had to be determined, whether “there was a public emergency threatening the life of the nation and that, therefore, the Government had been entitled under article 15 to derogate from its obligations under the Convention to the extent strictly required by the exigencies of the situation”. \(^{72}\) The court was balancing the rights of suspected terrorists with the safety of the public. Courts do play an important role in determining national security issues. In A, the House of Lords argued, that the role of the courts is to ensure that “legislation and ministerial decisions do not overlook the human rights of the person adversely affected”. \(^{73}\) There is emphasis on issues of fundamental human rights. The House of Lords in A, concluded that “Parliament must be regarded as having attached insufficient weight to the human rights of non nationals” and that the “human right in question, the right to individual liberty is one of the most fundamental human rights”. The House of Lords argued that Parliament did not affectively consider the rights of the suspected terrorists, which must be protected. However, the response to the House of Lords decision in A, is not positive. Commentaries for the Daily Mail include arguments that the Law Lords are “using the HRA to establish supremacy over Parliament”. \(^{74}\)

Moreover, in Secretary of State for the Home Department v JJ, the House of Lords had to decide a case on non-derogating control orders. According to the facts of the case, the controlled persons were subject to certain conditions that were argued to be contrary to Article 5 of the Convention rights. For instance, the controlled persons were “required to

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\(^{71}\) A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department (2004) 56 UKHL 68 at para 1 (A v SSHD).

\(^{72}\) Ibid.

\(^{73}\) A v SSHD, supra note 71 at para 80.

\(^{74}\) Gies, supra note 68 at 179.
wear an electronic tag and to report to a monitoring company on first leaving their flat after curfew period and on returning to it before a curfew period. They were forbidden to use or posses any communications equipment of any kind save for one fixed telephone line in their flat maintained by the monitoring company. They could attend a mosque of their choice if it was in their permitted area”. The controlled persons also had no family or social support, were confined to their flats for 18 hours a day, and most were ineligible to work. Clearly, the controlled persons were living within extremely restricted rules. Lord Bingham believed that such an existence was sufficient to conclude that the controlled persons’ Article rights had been breached. Lord Bingham compared the controlled persons’ existence to that of solitary confinement and where the Home Office essentially regulates their lives. Therefore, when balancing the rights of the individual verse the community, the House of Lords sided with the controlled persons. Such a decision continues to be extremely disliked within the media and parliamentarians. It is argued that the House of Lords did not achieve the right balance. It is suggested that the House of Lords failed to recognize that “due to the legitimate aim of preserving national security there was a need to narrow the ambit of art. 5(1)”. The public believes that national security is being compromised for the human rights of “others”.

Such criticisms surrounding the issue of national security is based on the war on terror and the London bombings. The Government has justified the restrictions on human rights in the interest of “ “collective right for security””. It is a response to terrorism

76 Ibid.
77 SSHD v JJ, supra note 75 at para 24.
78 Fenwick, supra note 32 at 475.
79 McKeever, supra note 31 at 137.
events. As McKeever states, “the fact remains that the events of July 7, 2005 illustrate clearly that there is a real threat”. The Government has pursued limitations on human rights in the interest of protecting lives within its jurisdiction. The Government is attempting to find a compromise between competing rights and interests. The JCHR argues, “human rights law does not merely condemn act of terrorist violence, but also imposes onerous positive obligations on states to take steps to protect the lives and physical integrity of everyone within the jurisdiction against the threat of terrorist attack”. The fact that courts have ruled against Government action causes frustration. It also points to the fact that the correct balance between government obligations and protection of rights has yet to be reached.

The fact the HRA has been used as a defense against control orders and deportation is a source of political grievance amongst the public and members of Parliament. This idea has been highly publicized in the media. The Daily Mail and The Sun frequently report on the inability of the HRA to truly protect the UK and suggests that judges and the HRA favour terrorists and criminals. According to the Daily Mail in 2007, “Six out of ten voters want Britain to withdraw from the European Convention on Human Rights to protect the country from terrorist suspects”. The Daily Mail claims the majority of British subjects no longer believe in the Conventions to protect their rights. In the same article, the Daily Mail states that a survey done by YouGov found that “75 per cent were in favour of introducing power to keep terror suspects in jail “as long as necessary”.

80 Ibid.
81 Ibid.
83 Ibid.
Clearly, this is a response to the injustice many British feel concerning control orders. There is a deep perception amongst the public that terror suspects and criminals are not punished by the current legal system for their actions. There is a perception that the HRA can be used to guard the rights of terrorists and criminals. This idea is reiterated by Sir Andrew Green who claims, the “British people are tired of seeing the interests of those intent on destroying our way of life put before the safety of themselves and their family”.

The HRA has created a division between nationals and the “others”. Furthermore, The Sun in the article, “Give Us Back Our Human Rights” claims that nearly 35,000 readers called into the You The Jury hotline to support and put an “end to the interests of killers, rapists and pedophiles coming ABOVE those of victims”. The news media depicts the HRA as a piece of legislation that has no public support and therefore legitimacy. Therefore, the development of a human rights culture becomes extremely difficult to foster.

### 4.3 The HRA and deportation

The issue of deportation of foreign nationals is also insightful. In the UK there have been concerns that the courts and the HRA have failed in protecting British freedoms and values. This includes the interests of the public. The inability of the UK to deport suspected terrorists has frustrated the public, press and Parliament. The inability to deport suspected terrorist relates to *Chahal v United Kingdom*. In *Chahal*, the ECtHR held that the UK could not deport foreign nationals if there was a risk of ill treatment or

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84 Ibid.
torture in the receiving country.\(^{86}\) *Chahal* establishes that the right against torture is considered more fundamental than the right to national security. The ECtHR maintained, “the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct”.\(^{87}\) The ECtHR continues to reinforce the absolute terms of Article 3, without regard to the terrorism activities of the individual.

The decision in *Chahal* has been extremely influential. *Chahal* is a decision that predates 9/11 and the London bombings. Yet, UK courts have been unwilling to reinterpret Article 3 because of its approach to section 2(1) of the HRA. The inability of the HRA and the judiciary to adapt to the changing environment causes public mistrust. The public does not have confidence in the courts to defend British values. There is the belief that the HRA is a charter that protects terrorism. The Guardian, argues that since “the attacks of 11 September 20001 and the beginning of the ‘War on Terrorism’” the *Chahal* principle needs to be challenged due to the “exceptionality of the threat posed by Al Qaeda and associated forces”.\(^{88}\) In light of changing circumstances and criticisms, balancing Article 3 with the public interest needs to be re-examined.

The UK government has responded to the changing political environment due to the London bombings and the war on terror. The UK government has advocated against the absoluteness of Article 3. The UK government has argued for the need to balance the competing interest of Article 3 with national security. At the Constitutional Affairs Select Committee 2006, Lord Falconer, the Lord Chancellor, seemed open to a new test.

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\(^{86}\) Alexander Home and Melanie Gower, Deportation of individuals who may face a risk of torture (House of Commons Library, 2012) at 4-5 (Home and Gower).

\(^{87}\) Home and Gower, *supra* note 86 at 5.

In discussing the need to balance the risk of torture with national security, Lord Falconer argued, “if a person threatens the lives of people in this country, it may well be that that person has to endure a higher risk of it than might otherwise be the case. But if it is clear that the person would suffer degrading or human treatment or torture of course he could not be sent back”. Accordingly, a possible new test will focus on the degree or likelihood of torture.

Recent cases in the UK have sought to challenge the Chahal principle, with limited success. For instance, the government has attempted to avoid the consequences of Chahal through memoranda of understandings (MOU). MOUs are diplomatic “assurances that will safeguard the rights of those individuals being returned”. MOUs are political guarantees of against torture or inhuman and degrading treatments. In AS and DD (Libya) v Secretary of State for the Home Department, the Special Immigration Appeals Commissions (SIAC), commented on the use of MOUs. In AS and DD the SIAC ruled against deportation, despite a MOU being in place. The SIAC questioned the reliability of the MOU. The SIAC “concluded against deporting suspects to Libya, in part due to the mercurial character of its then leader” and believed that “there was a real risk of torture despite the MOU”. The courts have treated MOUs with trepidation. The decision in AS and DD reveals that the courts are still protective of the rights of Article 3. By questioning the assurances of MOUs the courts have made it difficult to protect against terrorist activities. MOUs are meant to effectively address competing Convention rights and obligations. The Guardian cites Rosalind English as claiming the decision of

\[89\] Home and Gower, supra note 86 at 9.
\[90\] Home and Gower, supra note 86 at 15.
\[91\] Home and Gower, supra note 86 at 17.
the SIAC makes it “difficult to see how the authorities can make any effective progress in
the suppression or even restriction of terrorist activities in this country if their hands are
so firmly tied behind their backs”. Such statements go to the idea that the public
interests of nationals are not being protected, despite having a HRA with a guarantee to
protect the life. English argues that by giving Article 3 a broad interpretation and
requiring a country to put their national security at risk “makes a mockery of the
Convention in general and Article 2 in particular, which is after all designed to protect the
right to life of people living within the signatory state’s own jurisdiction”. A more
appropriate balance must be reached. The HRA cannot create a culture of human rights,
where such issues are viewed as insufficient to protect their fundamental rights.

However, harsh criticisms of the current system have led to a rethinking of MOUs. In
Othman (Abu Qatada) v UK, the ECtHR seemed to accept the validity of MOUs, under
certain circumstances. The MOU between the UK and Jordan was specific,
comprehensive, made in good faith and bilateral ties between the two countries were
strong. The problem with the Othman case is that the ECtHR decided against
deporation based on Article 6. The judgment in Othman is important for several reasons.
Othman makes clear that “diplomatic assurances and MOUs are an acceptable way to
allay the risk of torture”. Parliament is able to have its decisions enforced by the courts.
In addition, the ruling in Othman held, it will “only be rare cases that the general situation
in a country will mean that no weight at all can be given to assurances”. The decision

92 De Londras, supra note 88.
93 Ibid.
94 Home and Gower, supra note 86 at 17.
95 “Case Comment Deportation: deportation of foreign national – safety on return – Othman v United
   Kingdom” 3 E.C.H.R.L.R 339 at 342 (Case Comment).
96 Ibid.
in *Othman* shows that courts are willing to give some deference to Parliament. MOUs have added another dimension to the balancing equation. Article 3 rights have been reinterpreted to allow greater weight to be given to Parliament. This decision has emphasized and reinforced the idea of Parliamentary sovereignty. Yet, the ECtHR also places another hurdle for the UK to deport foreign terrorists. Article 6 rights must also be considered. Such a decision does not sit well with the media, which reiterates sentiments of British politicians. For instance, there have been calls for reforms of the HRA and even the ECtHR. Theresa May, the Home Secretary, argues that the decision of the ECtHR is simply not acceptable and “after his removal has been approved by the highest courts in our land, we still cannot deport such a dangerous foreign national”.97 Public reaction reveals the distaste of the ECtHR and HRA, in the UK. According to the Sun, 6 out of ten Britons want Abu Qatada “kicked out of Britain NOW” and 57% “say ministers should ignore Strasbourg judges”.98 Moreover, the Daily Mail warns, such a decision from ECtHR is out of touch with the realities, since 9/11 and the London bombings. The Daily Mail maintains that the decision of the ECtHR will “impede our capacity to deport those who pose a risk in this country”.99

Such controversial cases, have spurred the belief that the HRA seeks to protect the rights of terrorists and criminals ahead of UK society. According to The Daily Mail, as of April 15 2012, “nearly three quarters of Britons think human rights have become a “charter for

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97 Home and Gower, supra note 86 at 21.
criminals”. Both the Daily Mail and The Sun suggest that the HRA has extremely little support and that politicians should be listening to their constituents. Such strong reactions by the public have led senior members of the Government to express their outrage at the HRA. Accordingly Theresa May, promises that a shake up of human rights laws will mean that foreign criminals and terror suspects will be kicked out of Britain.

Home Secretary Theresa May specifically targets the ability of criminals to use Convention rights, to remain in the UK, despite their criminal history. May states, “We all know the stories about the Human Rights Act: the violent drug dealer who can’t be sent home because his daughter, for whom he pays no maintenance, lives here; the robber who cannot be removed because he has a girlfriend; the illegal immigrant who cannot be deported, and I am not making this up, he had a pet cat”. Therefore, the media often depicts the HRA in a negative light. Such criticism by the media has led politician to publicly condemn judicial decisions based on human rights laws. This has not helped to nurture the development of human rights.

100 Jack Doyle, “Human rights laws are a charter for criminals, says 75% of Britons” Daily Mail (15 April 2012) online: MailOnline <http://www.dailymail.co.uk/news/article-2130224/Human-rights-laws-charter-criminals-say-75-Britons.html> (Doyle).
102 Ibid.
Chapter 5
The Future

5 The next step

5.1 What can be done?
When the Labour Party first introduced the idea of “bringing rights home”, there was
great anticipation about creating a new cultural awareness of human rights, domestically.
Senior members of the government reiterated this hope, as the HRA was brought into
force. For instance, Lord Irvine proclaimed that the HRA would create a “culture of
respect for human rights” whereby “our public institutions are habitually, automatically
responsive to human rights considerations in relation to every procedure they follow, in
relation to every practice they follow, in relation to every decision they take, in relation to
every piece of legislation they sponsor”. ¹⁰³ There existed a vision of acceptance of the
HRA by public authorities and by the general public. Yet, as mentioned previously, there
is deep concern about the incorporation of Convention rights into British national
identity. Controversial decisions by the House of Lords, have garnered negative press
about foreigners and their impact upon national security and British rights. The impact of
cases on immigration and asylum has created an, adversarial environment. The reaction
amongst the public has been detrimental in fostering a human rights culture. Deep
misunderstanding and confusion concerning the HRA exists, primarily due to failures.
For instance, the failure to include the public on the education and promotion of the HRA
was recognized early on. According to the White Paper Rights Brought Home, the idea
of establishing an institution to educate and advise individuals on the details of a human

E.H.R.L.R. 609 at 610 (Gordon).
rights act was discussed. However, the Labour party ultimately rejected the idea of establishing an institution dedicated to the promotion of human right knowledge. According to Labour, establishing a “Human Rights Commission is not central” to rights development. ¹⁰⁴ Labour saw little connection with establishing a Human Rights Commission with ensuring that people had sufficient knowledge about the uses of the HRA. Labour did not believe that a Human Rights Commission was needed to generate public support and legitimacy for the HRA. Labour maintained, the government’s priority was the implementation of its Manifesto, and expressed concern that a Human Rights Commission could lead to “additional public expenditure” and organizational problems between existing human rights bodies. ¹⁰⁵ Establishing a Human Rights Commission was viewed as unnecessary and costly. For Labour, the incorporation of Convention rights into the UK was a technical exercise and politically important to ensure greater British influence abroad. Labour did not believe that a Human Rights Commission was necessary, since citizens were held to be familiar with the idea and concept of human rights, which were already widely accepted within society.

Yet, the failure to establish a Human Rights Commission is highly criticized. In fact, reports exist, stating the need for a Commission to be established in order to ensure public acceptance and a successful incorporation. The Institute for Public Policy Research (IPPR) believes that a Commission is essential if the HRA is to be effective. ¹⁰⁶ Without a Commission, fear exists that the HRA will have trouble gaining public legitimacy. A Commission is seen as essential to developing a culture of human rights.

¹⁰⁴ House of Commons Research Paper 98/24, supra note 6 at 52.
¹⁰⁵ Ibid.
¹⁰⁶ Ibid.
domestically. A Commission is viewed as a necessary educational tool. A Commission can establish dialogue and understanding between the government, judiciary and the people. The people can feel involved in the process of governance. There is a need to bridge the disconnect between policymaking, judicial decisions and public understanding.

Being involved in the process of governance is important to creating a culture of rights. Allowing people to be involved in discussing issues involving human rights, can facilitate a greater understanding and appreciation for the HRA. In an interesting article by Alice Donald, the process of introducing major legislation is discussed. Donald’s chief criticism about the HRA, is not what rights are included or not included. Donald states, the major problem with the HRA is that “Labour ministers did little to champion or explain the HRA and did much to undermine it”.

Without a visible public campaign to support and champion the benefits of the HRA, there exists little opportunity for the public to truly understand the reasons for incorporation. Without a public campaign, the importance of the HRA to the public is never fully explored or acknowledged. Having a public campaign to engage the citizenry is important. The UK’s approach was neither open nor inclusive. The people never felt part of the process and therefore, never agreed to the consequences of incorporation. The current expressions of hostility and anger are not surprising. The HRA never had the full democratic support of the people.

In comparison, Canada has succeeded in creating a culture of human rights. Ronald Penner argues that for “its credibility as a democratic instrument and for its effectiveness the Charter was then forged in what may be described as a “democratic crucible””.

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During the initial discussion of the Charter of Rights and Freedoms there was “televised hearings of a joint parliamentary committee” where more than “1000 individuals and 300 groups petitioned for changes and additions” which were presented to Parliament.\(^{108}\) This helped to establish a culture of human rights. There was popular engagement and therefore ownership and legitimacy of the Charter. For instance a few years after the repatriation of the Charter, a “large scale survey” “found that no less than 90 per cent of English Canadian and 70 percent of French Canadian respondents reported hearing about the Charter and that most of them who had thought positively about it”\(^{109}\). Creating public involvement helps to establish a culture of rights and a culture of understanding human rights. Public involvement creates democratic legitimacy and where the decisions of the courts were accepted. The UN also recognizes the importance of public participation. The UN recognizes the “right to participate in choosing or changing a constitution” and the process of adoption must “be determined by a broadly-based process of popular participation”\(^{110}\). Unfortunately in the UK, the HRA never attained the status of democratic legitimacy. The public has never viewed the HRA as domestic law or a document that reflects public sentiments or values. According to Donald, without championing the HRA, no “constitutional moment” was created.\(^{111}\) The HRA has failed to attain the status of constitutional importance and respect.

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\(^{109}\) Penner, supra note 108 at 116.

\(^{110}\) Donald, supra note 107 at 462.

\(^{111}\) Donald, supra note 107 at 461.
5.2 Human rights and the British label

The HRA has failed in creating a culture of rights. The HRA rather than being considered a British document it is often confused and described as European law. There is a lack of ownership of the HRA. The lack of ownership has sparked ideas of reform, including the development of a British Bill of Rights. According to Straw, “If you read certain newspapers you might be forgiven for thinking that human rights were an alien imposition foisted up us by ‘the other’”.

There is a disconnect between the general public and the HRA. A Bill of Rights has been proposed, to give a sense of ownership to the rights agenda. It will redress this sense of disengagement. In order to develop a culture of human rights, there must be a sense of Britishness, within the document. An important aim is therefore to “repackage the ECHR and put a British label on it, in order to gain public acceptance of a catalogue of rights”.

Rights must reflect British values and traditions.

The relationship between rights and British values and traditions is important. Rights should reflect the principles and ideals of the society. Currently, the HRA fails to link rights with the British public. The British public does not feel that the HRA represents or protects their values. For instance, the Equality and Human Rights Commission survey finds that 42% of people polled believed that the “only people to benefit from human rights in the UK are criminal and terrorists”.

Yet, the survey also finds that “more than

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112 Lucinda Maer and Alexander Home, Background to proposals for a British Bill of Rights and Duties (House of Commons Library, 2009) at 19.
113 Ibid.
114 Ibid.
eight out of 10 people said they supported human rights legislation. Some 81% agreed that human rights were important to creating a fairer society”. 116 Human rights legislation is important to the British public. However, human rights legislation must have public legitimacy, in order to be supported. The proposed Bill of Rights must be a “home grown document” that includes public perceptions of “rights and liberties and ultimately, promote a sense of popular ownership of the concept, principles and content of human rights” currently lacking within the HRA. 117 Popular ownership is a concept that needs to be addressed, for a human rights culture to truly develop within the UK.

To address the failure of popular ownership, interesting proposals include the idea of creating a statement of values. The idea of creating a statement of values is supported by the Green Paper: The Governance of Britain and the Joint Committee on Human Rights. The Governance of Britain believes that creating a statement of values will create greater trust of the democratic process and create a greater sense of national unity. Such an objective reflects the environment and context in which the HRA took force. A statement of values reflects the concerns about terrorism after September 2001 and the London bombings. A statement of values is a response to criticisms that the HRA only protects certain people. The HRA did not promote a sense of national unity. According to The Governance of Britain, a statement of values “will set out the ideals and principles that bind us together as a nation”. 118 A statement of values will foster national unity. Moreover, The Governance of Britain believes that a statement of values will be “fundamental to restoring trust in politics and for ensuring that the values of this and

116 Ibid.
118 The Governance of Britain CM7170 at para 198 (The Governance of Britain).
future generations are reflected in the constitution and fabric of British politics and society”. ¹¹⁹ A statement of values is important to defining British values and ensuring values are reflected and protect the public.

The Joint Committee on Human Rights further endorses the idea of a statement of values. The Joint Committee on Human Rights argues that a statement of values will be important to the judiciary and the public. Accordingly, a statement of values will describe the “purpose of adopting a UK Bill of Rights and, second, the values which are considered fundamental in UK society”. ¹²⁰ Such an approach addresses two issues that are facing the HRA. By describing the purpose of a bill of rights, it can help courts determine judicial approaches to rights interpretation. A statement of values will also reflect the values of British society. The Joint Committee argues, “the HRA contains no such preamble and in retrospect, might have benefited from one, as a source of guidance for courts and other decision-makers as to the purpose of that Act and its underlying values”. ¹²¹ By including a statement of values, courts will be compelled to take into account the purpose of the legislation and ensure that the purpose is reflected during judicial interpretations. An agreement about British values will be important to creating greater unity amongst the general public.

Moreover the HRA has been described as a piece of legislation that only benefits criminals. According to a government poll, “57 per cent agreed that too many people, mostly asylum seekers and other “foreigners”, take advantage of the Act, while 40 per

¹¹⁹ The Governance of Britain, supra note 118 at para 199.
¹²⁰ Maer and Home, supra note 112 at 24.
¹²¹ Ibid.
cent agreed it has cause more problems that it has solved”. The HRA has not achieved the right balance between protecting interests of nationals and foreigners. Decisions of the House of Lords have not helped shake off this impression. For instance, there is concern that during deportation hearings, “only the human rights of the suspected terrorist can be taken into account”. There is the belief that the HRA only benefits a small segment of society. There is the belief that the HRA has made the UK vulnerable. The HRA has not responded adequately to the post 9/11 world. The HRA has not been responsive to national security issues. Deportation cases have also raised concerns about Parliamentary sovereignty. There is concern that the courts have become legislators. There is concern that the separation of powers doctrine has failed. David Cameron has reiterated this idea, claiming that issues “such as deportation mean that ‘the very concept of rights is in danger of slipping from something noble to something discredited – and that should be of deep concern to us all’”. Since individual cannot be deported, there is deep concern that HRA does not protect nationals.

Since the HRA has failed to adequately protect nationals in a post 9/11 world, reforms have been proposed to address the problem of rights enforcement. Common descriptors of the rights in HRA include, “society is “less deferential” and “more consumerist”, it is “atomized” and people see each other as “customers rather than citizens”, “rights have

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become commoditised”.

In effect, human rights have become a polarizing issue. Such an understanding means that human rights under HRA focuses on the individual. There is a lack of respect for the community or society as a whole. Again, the issue of balancing rights of the individual and the community must be reassessed. The Governance of Britain argues for the inclusion of “rights and duties” within a reformed Bill of Rights. In addition, a “Bill of Rights and Duties could provide explicit recognition that human rights comes with responsibilities and must be exercised in a way that respects the human rights of others”. Judges and the public will be able to engage with rights more often. It is recognition that human rights need to be balanced. It also seeks to address the controversial deportation cases. A bill of rights and duties centers on the idea that a “democratic society’s rights have to be balanced by obligations”. It is the belief that human rights legislations should not be taken advantage. It is about finding the right balance between rights and obligations. Moreover, including responsibilities will help foster a culture of human rights, which the HRA has not been able to accomplish. The Equality and Human Rights Commission (EHRC) believes that having responsibilities within a Bill of Rights will foster a “greater sense of greater social awareness, community cohesion and a culture of respect for others”. This is a duty to recognize and respect the human rights of other people. Moreover, it discourages the selfish and “aggressive assertion of rights, in a way which may damage others’ enjoyment of their own rights”. The use of human rights should focus on the collective

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125 Harvey, supra note 117 at 36.
126 Maer and Home, supra note 112 at 28.
127 Ibid.
interests. A Bill of Rights and Responsibilities discourages the selfish use of rights. It places certain rights of the nation ahead of the individual.

Moreover, advocating a British Rights and Responsibilities, addresses the educational deficiencies that have plagued the public’s understanding of the HRA. It is important to emphasize that linking rights and responsibilities does not mean, “rights are contingent on responsibilities, that would be an absurdity and an affront to democratic society”.\textsuperscript{130} Instead, a British Rights and Responsibilities will highlight the behaviour expected of citizens. By emphasizing rights and responsibilities, it addresses the importance of knowledge. Francesca Klug argues that the idea of rights and responsibilities is “an issue of education and of leadership – principled and consistent leadership”.\textsuperscript{131} Klug argues that the idea of rights and responsibilities can educate the public on human rights issue but strong political leadership is also important to the development of a human rights culture. Klug argues that such ideas are not new and the U.S., has used the idea of strong leadership to develop an effective human rights culture. Klug argues that President Obama is an example of leadership using the American Bill of Rights, to “conjure “a new era of responsibility – a recognition, on the part of every American, that we have duties to ourselves, our nation and the world”.\textsuperscript{132}

Leadership is also important in overcoming the lack of a constitutional moment, which often accompanies human rights documents. It is suggested that the “HRA was never consulted upon and that has been its downfall”.\textsuperscript{133} However, a consultation process about

\textsuperscript{130} Francesca Klug, “‘Solidity or Wind?’ What’s on the menu in the bill of rights debate?” (2009) 80(3) P.Q at 423 (Klug)
\textsuperscript{131} Ibid.
\textsuperscript{132} Ibid.
\textsuperscript{133} Klug, supra note 130, at 424.
human rights must be meaningful, if it is to impact and inform a debate on human rights. An important feature of consultation will be strong leadership.\textsuperscript{134} This is feature that has been missing. For instance, the Labour party often criticized the HRA, a document that formed a major part of their political platform. In fact, the “Labour Government has never given the HRA the sustained support it requires and has sometimes disparaged it”\textsuperscript{135}. A consultation process that leads to a new Bill of Rights must have government support if it is to become part of British society.

Finally, one of the main problems with the HRA is the judicial interpretation given to section 2(1). Section 2(1) has raised issues of Parliamentary sovereignty and the inability of British judges to play a role in human rights development. Section 2(1) has also alienated the public. The public lacks sufficient understanding of the HRA and the decisions involving section 2(1) have created an impression, that the HRA does not take into account the rights of nationals. Discussions have occurred, about reinterpreting section 2(1). It is about rebalancing and reengaging rights interpretation. David Cameron has propounded the idea that if Britain is able to obtain a new Bill of Rights, it will include a larger margin of appreciation.\textsuperscript{136} A larger margin of appreciation will create greater deference to Parliament. The Conservative party believe that the “current use of the margin of appreciation doctrine could be taken much further, creating greater subsidiary, meaning that sensitive political issues should be determined by national Parliaments, not the courts”.\textsuperscript{137} Creating a greater subsidiary will mean more deference will be given to Parliament and political concerns. However, such an approach also

\textsuperscript{134} Ibid.
\textsuperscript{135} Klug, \textit{supra} note 130 at 425.
\textsuperscript{136} Fenwick, \textit{supra} note 32 at 485.
\textsuperscript{137} Fenwick, \textit{supra} note 32 at 485.
raises concerns about protecting judicial independence. There is a need to ensure that the judiciary is free to make decision without political manipulation.

However, creating an increased margin of appreciation is not the only option. For instance, there has also been consideration of Parliamentary override. There have been suggestions of creating a “democratic override in the ECHR along the lines of s 33 of the Canadian Charter.” This will allow the judiciary to make decisions, without fear of political manipulation. Parliament will be given the last word, by overriding decisions that are not compatible with policy objectives.

5.3 Recent developments: UK Bill of Rights Commission

Recently, UK Bill of Rights Commission has created a consultation paper, discussing possible issues and concerns that need to be addressed. However, the current operation of the UK Bill of Rights Commission has come under scrutiny. Responses to the consultation paper have yet to be posted on the Commission’s website. This discourages an open dialogue about rights development in the UK. It has been argued that since the development of a Bill of Rights is “one of fundamental importance to the UK public and as such should operate in as open and transparent a way as possible”. It again, appears that UK Bill of Rights is operating behind closed doors, with minor inclusion of the public. There is also suggestions by members of the media, that the “commission should launch a proper public consultation in good time before it has to

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138 Ibid.
139 Fenwick, supra note 32 at 486.
141 Adam Wagner, supra note 140.
It is about inclusive public participation and knowledge. There is concern that by having a closed approach to rights consultation, once again the public will be excluded from the discussion. It can lead to disenchantedment with human rights.

5.4 Conclusion

The HRA was first presented as a practical solution to rights enforcement. Moreover, the HRA was meant to allow British judges the ability to influence rights development. Yet, with the events of September 2001 and the London bombings, there has been a renewed concern about national security and the protection of nationals against terrorism. The HRA has not been able to adapt to the changing environment. The HRA has failed to allow British judges to depart from rulings in Europe. Interrelated to the principle of comity, is the inability of UK judges to deport foreign nationals based on ECtHR rulings on Article 3. The various cases concerning deportation have created an atmosphere where the British public believes that their rights have become secondary to the rights of extremists. There is a deep disconnect between the HRA and the general public. There is a strong belief that the UK has become a safe haven and the HRA a doctrine that protects criminals. Blair argues, “We’re angry about these extremists. We’re angry about what they’re doing to our country. We’re angry about people abusing our good nature and our tolerance.”

There is public dissatisfaction with the conception of human rights. There is dissatisfaction about how rights are balanced and the inability of Parliament to protect citizens. There is fear that Parliamentary sovereignty has been cast aside in favour of judiciary. In order for a human rights culture to truly develop in the UK the relationship

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142 Wagner, supra note 140.
143 Ibid.
between the executive, public and judiciary needs to be readdressed. A human rights culture can only develop when there is trust in the system, to appropriately balance competing human rights interests. From the research and findings that I have collected, it appears that September 2001 and the London bombings significantly affected rights concepts within the UK. Both dates changed Parliament’s attitude towards human rights conceptions. The HRA is seen as an obstacle to the effective protection of the human rights of nationals. Even David Blunkett, the former Home Secretary argues that the judiciary must “stop applying the HRA in ways which ‘thwarted the government’s plan’”.144 Therefore, the war on terror has affected the ability to foster a true human rights culture in the UK.

144 Amos, supra note 54 at 883.
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