ALBA KEYNOTE LECTURE

THE INDEPENDENT HUMAN RIGHTS ACT REVIEW ("IHRAR") AND BEYOND

November 2022

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INTRODUCTION

1. Thank you for the invitation. It is a pleasure to be here and to present this ALBA keynote lecture, given your most important focus on areas of law concerned with regulating the exercise of public powers and your much valued contribution to the HRA debate.
2. My topic tonight is "*IHRAR and Beyond*". In broad terms, the topic divides into two.

(I) First, IHRAR and its work;

(II) Secondly, where to from here?

3. The first part is valuable and necessary, to understand what IHRAR was, how it worked and what it recommended. None of that should be obscured by political controversies of one sort or another which have taken place since the IHRAR Report was published.
4. The second part is more difficult. As it is said, predictions are notoriously difficult, especially about the future! Mere speculation is pointless, so I shall emphasise the proposition that there is an evidence-based case for incremental change improving the HRA, whereas the case for going further has not been made.
5. Before, however, turning to my topic, I would like to place it in a broader context, that of our legal framework, of which the *Human Rights Act 1998 ("*the HRA*")* is an important part.

6. Our legal framework shapes the society in which we live but it also forms part of a still wider picture, serving to emphasise the importance of that framework. English[1] law and London as a centre for dispute resolution are world leaders. That is of great importance in terms of both the value of our exports and the exporting of our values – soft power.
7. These leading roles cannot be taken for granted; the world is a competitive place. What are the strengths of English law, making[2] this a good forum in which to shop? I would venture to suggest a framework of the rule of law; the institutional strengths of the Judiciary and the legal profession; the genius of the common law, combining certainty with flexibility[3] and utilising the common law method to adapt to changing circumstances[4]. There are of course other factors: the strength of the City, historical trade practices, language and time zone but these need not take up time tonight.
8. A very recent illuminating address by Lord Hodge[5] focused on the law and the Rule of Law as underpinning economic prosperity[6]. The figures cited by Lord Hodge are noteworthy:

"*A recent analysis by Legal UK highlighted that in 2018-2019, English law governed around £80 billion of gross written insurance premiums in the London market; £250 billion of global M&A deals; US$11.6 trillion of*

[1] I use "English law" as a shorthand for the law of England and Wales.
[2] See, *A good forum to shop in: London and English law post-Brexit* [2018] LMCLQ 222, Sir Peter Gross, 35th Donald O'May Lecture.
[3] See Sir Ross Cranston's remarkable work, *Making Commercial Law Through Practice 1830-1970*, esp. at pp. 31 and 41 *et seq*.
[4] *The Common Law Constitution*, Sir John Laws, 2013 Hamlyn Lectures, Preface at xiii.
[5] Deputy President of the UK Supreme Court; The Guildhall Lecture, delivered on 4 October 2022, *The Rule of Law, the Courts and the British Economy*.
[6] See too, The Lord Burnett of Maldon, Lord Chief Justice, *The Hidden Value of the Rule of Law and English Law,* Blackstone Lecture 2022, Pembroke College, Oxford, 11 February 2022.

global metals trading; and €661.5 trillion of global derivatives transactions. English law is the governing law of choice for maritime contracts, a sector that contributes over £15 billion annually to the UK economy. English law secures 7% of the global legal services fee revenue of US$ 713 billion. The UK is the second largest legal services market in the world and the largest in Europe, where it accounts for a third of all Western European legal services fee revenue. The UK legal services sector generated a trade surplus of £5.9bn in 2019."

9. As Lord Burnett expressed it[7], "*The rule of law and English law have a hidden value going well beyond the value of the legal services or the legal sector, enormous though that is*."

10. The stakes therefore are high when considering the working of an important part of our legal edifice and whether changes to it should be made. Of course, no system, however venerable, is or should be immune from change; that way lies ossification and irrelevance. But - important structural changes, if proposed, merit careful scrutiny and require justification, *a fortiori* when more than incremental.

I. IHRAR AND ITS WORK

Outline:

11. I turn to IHRAR which was, in a nutshell, an independent, objective, evidence-based, review into the operation of the HRA – not the substance of the *European Convention on Human Rights* ("the Convention"). IHRAR's overall conclusion[8] was that the HRA had generally worked well, benefited many, and fulfilled three of its original objectives: (1) "bringing rights home"; (2) reducing the

[7] In his Blackstone Lecture, *supra*, at para. 15.

[8] See the *IHRAR Report*, CP586 and the *Executive Summary* ("ES"), CP587, both published in December 2021.

number of cases in which the UK lost before the ECtHR (the Strasbourg Court); (3) facilitating a UK contribution to the development of Strasbourg jurisprudence and the high regard in which UK Courts are (rightly) held by the Strasbourg Court. All that said, IHRAR concluded that there was clear room for a coherent package of practical reforms, readily capable of implementation, with benefits both domestically and in the UK relationship with Strasbourg. While it is of course a matter for Parliament, IHRAR urged HMG to implement its recommendations in full. That remains my position – and I await and look forward to a proper dialogue and engagement with Government as to the way ahead.

12. In my remarks to you today, my anchor is the IHRAR Report. I am not free-wheeling and, as has consistently been my position, my focus remains firmly on the work of IHRAR and its Recommendations.

Genesis and ToR

13. In December 2020, the then Lord Chancellor and Secretary of State for Justice, The Rt Hon Sir Robert Buckland KC, established IHRAR[9] to review the operation of the HRA, by then in force for 20 years. Specifically, IHRAR was asked to consider two key themes: (1) First, *Theme I*, the relationship between UK courts and the *European Court of Human Rights* ("the Strasbourg Court"); (2) secondly, *Theme II*, the impact of the HRA on the relationship between the

[9] The *Written Ministerial Statement* ("WMS") issued by the Lord Chancellor is at Annexe II to the IHRAR Report and IHRAR's ToR are at Annexe III.

Judiciary, the Executive (Government) and the Legislature, i.e., the *"constitutional balance".* [10]

14. The WMS called on IHRAR to consider these questions independently and thoroughly. It also stated that IHRAR's Report "*will be published as will the Government's response*". As I have said elsewhere, there never has been a "response" to the IHRAR Report.

15. As with any Review, the Terms of Reference ("ToR") are crucial. It is necessary to underline both what *was* and *was not* within IHRAR's scope:

(1) IHRAR was informed by the Government's commitment to the UK remaining a party to the *European Convention on Human Rights* ("the Convention"); this commitment served as a fixed premise for IHRAR and told in favour of a broad consistency of approach between UK courts and the Strasbourg Court.

(2) An examination of substantive Convention rights fell outside IHRAR's scope. Its focus was on the operation of the HRA, the domestic statute. To be clear, on anything outside IHRAR's scope, any views I could express would be personal only; I therefore concentrate on matters within IHRAR's remit – but return to the ramifications of this issue later.

(3) IHRAR was UK-wide and therefore concerned with England and Wales, Scotland and Northern Ireland. Throughout, the Panel was very much alive to devolution issues.

[10] Sir John Laws, *The Constitutional Balance* (Hart, 2021).

Methodology:

16. As to methodology, IHRAR adopted throughout a transparent, objective, evidence-based approach, without preconceptions[11]. It was emphatically not party political.
17. Pausing here, it is of the first importance that IHRAR's recommendations were informed by the breadth, depth and broad spectrum of this engagement, involving so many people across the UK and beyond, a factor worthy of consideration before departing from them. These were anything but the mere personal pet causes of individual Panel members.

The working of the HRA:

General:

18. Overall and as already recorded, IHRAR's conclusion was that the HRA had worked well.
19. The Panel's work further revealed that there is clear room for a coherent package of practical reforms, readily capable of implementation, with benefits both domestically and in the UK relationship with Strasbourg. Domestically, IHRAR's proposed reforms seek to promote a settled acceptance of the HRA through a greater sense of public ownership of the rights in question. Majority support is needed, through recognition that rights are for all – consider for example, care homes in the pandemic. In formulating that package of reforms, IHRAR resisted the temptation to propose cosmetic changes, such as amending the reference to "Convention

[11] See the ES, at paras. 7-8

rights" in s.1 of the HRA to read "United Kingdom" (or "British") rights.[12]

Major Recommendations:

20. Amongst IHRAR's Recommendations, I would single out three:
    - Amending s.2 HRA to give greater prominence to the common law, putting it centre-stage.
    - Targeted proposals addressing concerns as to s.3 HRA, designed to generate light rather than heat.
    - Recognition of an Extra-Territorial Jurisdiction problem resulting from the course taken by the Strasbourg jurisprudence but emphasising (in the national interest) the need for a multilateral, rather than unilateral, solution.
21. IHRAR made other Recommendations as well, going to Remedial Orders, Derogations and Suspended Quashing Orders. Additionally, and much urged on IHRAR, was the proposal that serious consideration be given by Government to developing an effective programme of civic and constitutional education, particularly focused on questions about human rights, the balance to be struck between such rights, and individual responsibilities.
22. Reflecting its concerns about the operation of the HRA, IHRAR proposed specific, targeted reforms – certainly not repeal of the Act.
23. Let me say a little more about the Recommendations I have singled out, together with the importance of the relationship between UK Courts and the Strasbourg Court.

[12] See, the IHRAR Report, ch. 2, at [13] and following.

Section 2:

24. I begin by disposing of a straw man. It has never been suggested, least of all by the Strasbourg Court, that ECtHR decisions bind UK Courts. They do not. "*Take into* account" in section 2 HRA patently does not mean "*bound* by". IHRAR gave some thought to a declaratory amendment to s.2 to say just that but decided against it.

25. As ECtHR decisions do not form part of the hierarchy of UK Court decisions, the rationale of s.2 was to give guidance to UK Courts as to how they were to be considered.

26. There are undoubted tensions in this context:

(1) First, a Strasbourg straitjacket on the development of UK jurisprudence was never intended.

(2) Secondly, "mind the gap". A significant gap between rights protection before UK Courts and that available at the ECtHR would run counter to the UK commitment to remaining a party to the Convention and undermine the objective of "bringing rights home".

(3) Thirdly, there will, sometimes, be good reason for a difference of view between UK Courts and the ECtHR and is implicit in the important objective that UK Courts will make a distinctive British (UK) contribution to the development of Strasbourg case law. On occasions too, as the HRA makes clear[13], our Courts will put the UK in breach of its international obligations, leaving the matter to be resolved at the political level.

(4) Fourthly, as the UK Supreme Court has emphasised, our Courts are not to develop "free-standing" Convention rights,

[13] See further, s.4 below.

unsupported by Strasbourg case law [14] The injunction against developing free-standing Convention rights does not apply to common law developments, in accordance with the traditional common law method, guided throughout by the principle of *judicial restraint*[15] and subject, as such developments always are, to Parliamentary Sovereignty.

27. With these considerations in mind, IHRAR recommended[16] amending s.2 HRA to clarify the priority of rights protection by making UK legislation, common law and other case law the first port of call before, if then proceeding to interpret a Convention right, ECtHR case law is taken into account. This recommendation is straightforward and simple to implement.[17] It gives the common law[18] greater prominence – putting it *centre-stage* – reflecting its centuries long protection of human rights. It codifies the approach taken by the Supreme Court in its decisions in *Osborn*[19] and *Kennedy*[20].

28. IHRAR's recommendation involves a natural approach – confidence in our own UK law as the starting point - an approach familiar to other Convention States, such as Ireland and Germany. Domestically, it serves to reinforce the foundation for the HRA's settled acceptance. Likewise, it gives full and principled effect to the Convention principle of *subsidiarity* – i.e., that Convention States,

[14] What might be termed the developed *Ullah* doctrine: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26;[2004] 2 AC 323; *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [[2021] 3 WLR 494
[15] Recently and authoritatively underlined by Lord Reed in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857.
[16] The ES, at [20]
[17] An indicative draft amendment is at [199] of Ch. 2 of the Report.
[18] And UK statute law and Scots case law.
[19] *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115.
[20] *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.

not the ECtHR, have primary responsibility for human rights protection.

29. A word on certain of the other options, which the Panel did not recommend.

30. First, the Panel received no detailed submissions on repeal and replacement of the HRA by a British Bill of Rights[21], which would in any event have been outside its ToR; to the contrary, there was overwhelming support for retaining the HRA.

31. Secondly, the question of repeal of s.2 was dealt with and rejected emphatically at paragraphs 145-150 of Ch. 2 of the IHRAR Report. It would remove the formal link between the HRA and the Convention; while the UK remains a party to the Convention, that option had nothing to commend it.

32. Thirdly, although meriting careful thought, the Panel did not recommend amending s.2 to introduce a requirement to consider case law from other jurisdictions.[22]

33. Fourthly, while recognising the attractions of the option, a majority of the Panel were not persuaded to recommend statutory guidelines on the non-exhaustive circumstances to be taken into account when UK Courts were considering whether to depart from ECtHR case law.[23]

Sections 3 and 4:

34. The rationale for s.3 is to avoid an undue gap between rights protection available from the UK Courts and from the ECtHR, which

[21] Report, ch.2, at [19].
[22] Report, ch. 2, at [173] – [176].
[23] I.e., clarifying and codifying the exceptions to *Ullah*, which have developed in the case law: Report, ch. 2, at [177] – [184]

would undermine the objective of bringing rights home. The HRA architecture struck a careful balance between ss. 3 and 4, with declarations of incompatibility (s.4) providing a last resort, where interpretation in accordance with s.3 was not possible. [24]

35. Clearly, s.3 HRA contains an unusual rule of interpretation, going beyond ordinary rules of interpretation and conferring a power and imposing a duty on UK Courts to read and give effect to primary and secondary legislation, so far as it is *possible* to do so, in a way which is compatible with the Convention rights. The s. 3 rule is not conditional on any ambiguity in the legislation interpreted. Though a Court giving effect to this rule is giving effect to the will of Parliament in enacting s.3 – a point too often overlooked – concern as to this rule is readily understandable, creating, as it does, the danger of Courts straying into territory more properly that of Parliament.

36. Importantly, however, neither s.3 nor s.4 adversely affect Parliamentary Sovereignty[25]. S.3, properly understood, confers an *interpretative power* – within the well-settled province of the Courts – not an amending power (the province of the legislature).

37. With regard to s.4, the Court has a discretion to grant a declaration of incompatibility, in keeping with the Court's general discretion to grant declaratory relief. *If* the Court makes a declaration of incompatibility, Parliament is not *obliged* to act on it. That is not to say that a declaration of incompatibility is other than an important

[24] S.19 should not be overlooked; the starting point for post-HRA legislation is that there will have been a s.19 compatibility statement, unless, knowingly, Government has invited Parliament to proceed in circumstances where such a statement cannot be made.

[25] ES, at [51].

signal of the Court's view. It is to be expected that it will be carefully considered by Parliament, but Parliament has the last word.

38. Making every allowance for the concerns as to s.3, consideration of the evidence powerfully suggested defusing such concerns through a focus on the facts as to the actual practice of the Courts in deciding cases. The reality is that the high-water mark of alarm as to the use of s.3 hinges on a case now over 20 years old.[26] The next most-criticised decision dates back to 2004.[27] Relatively settled, restraining, guidance as to the use of s.3 has stood for well over a decade.[28] None of this suggests a pattern, still less an enduring pattern, of misuse of s.3. It follows that statutory amendment to narrow the section itself (*a fortiori,* to repeal it) itself risks uncertainty.

39. Two additional features of s.3 should be noted. First, in litigation involving Government, ordinarily at least Government invites the Court to use s.3 rather than to default to s.4. Secondly, perhaps strikingly, Government has not sought to reverse decisions founded on s.3 of which it disapproves.

40. Overall, in the view of the majority of the Panel, once the law had settled down post-HRA, the Courts have been guided by judicial restraint and institutional respect, with the upshot that notwithstanding the unusual rule of interpretation contained in s.3, there is no substantive case for its repeal or amendment *or* for

[26] *R v A (Complainant's Sexual History)* [2001] UKHL 25; [2002] 1 AC 45.
[27] *Ghaidin v Godin-Mendoza*[2004] UKHL 30; [2004] 2 AC 557; the pragmatic advantages of these two decisions, whatever the difficulties of principle to which they give rise, should not be overlooked.
[28] In addition to *Ghaidan*, see *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264.

altering the balance between ss. 3 and 4, leaving s.4 as a rare, last resort.

41. Accordingly, IHRAR's package of recommended options in connection with s.3 focuses on shedding light (rather than heat) on the facts as to the actual practice of the Courts[29]:

(1) First, clarifying by way of amendment to s.3, the order of priority in which UK Courts apply the normal principles of interpretation and then the particular interpretative principle set out in s.3. This amendment is simple to implement and is analogous to the amendment proposed in respect of s.2. It is designed to assist clarity of analysis and contrast pre-conceptions with evidence and fact.

(2) Secondly, increased transparency in the use of s.3 by the creation of a judgments database. By way of contrast, much more is known as to the use of s.4 than is presently known as to the use of s.3.

(3) Thirdly, an enhanced role for Parliament in particular through the Joint Committee on Human Rights ("the JCHR") in scrutinising the s.3 cases. Again, there is currently a contrast between the work done by the JCHR on s.4 and that done on s.3.

42. To reiterate, IHRAR's package of recommended options should either allay concerns as to s.3 or point the way to targeted statutory intervention. By contrast, any amendment diluting (*a fortiori*, repealing) s.3 at this stage risks a period of uncertainty and creating an undue gap between UK Courts and Strasbourg.

[29] The ES, at [44] and following.

Dialogue with the Strasbourg Court:

43. For the majority of the Panel, the question concerning Judicial Dialogue, formal and informal, between UK Courts and the ECtHR yielded a straightforward answer: such Dialogue should continue to develop organically. The relationship between UK Courts and the Strasbourg Court is and is intended to be interactive and dynamic; dialogue is key to achieving this objective.[30]

44. As set out in the Report, the ECtHR has welcomed the "mature equilibrium" reached with UK Courts. This neither means nor requires that UK Courts and the Strasbourg Court always agree. It does entail mutual respect bringing mutual benefit.

45. Overall, IHRAR was struck by the high regard in which the UK Courts and Judiciary are held by the ECtHR and the beneficial influence this has, both domestically and for the ECtHR[31]. That dialogue between the UK Courts and the Strasbourg Court has borne fruit is beyond argument – perhaps the best-known examples concerning the approach to hearsay evidence and whole life sentences.[32]

46. IHRAR placed great store on strengthening and preserving that dialogue[33]. It is important that the respect enjoyed by the UK Courts and Judiciary in Strasbourg and the ECtHR's gratifying receptiveness to UK judicial thinking[34], should be widely and better appreciated

[30] IHRAR was most grateful to the ECtHR for the time given and the constructive discussions which took place when conducting its work. See too President Spano's observations, subsequent to publication of IHRAR's Report, in Joshua Rozenberg's blog, 26 January 2022, *Human Rights Act ain't broke*.

[31] See, *S, V and A v Denmark* – 35553/12 (Grand Chamber) [2018] ECHR 856 (to which the UK was not a party); see, Report, ch. 4, at [36]

[32] See, *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373 (hearsay evidence); [32] *R v McLoughlin* (also known as *Attorney General's Reference* (No.69 of 2013)) [2014] EWCA Crim 188; [2014] 1 WLR 3964; *Hutchinson v The United Kingdom* – 57592/08 – *Chamber Judgment* [2017] ECHR 65; 43 BHRC 667. (whole life sentences)

[33] Report, ch.4, at [89].

[34] See too, *Ndidi v The United Kingdom* 4215/14 [2017] ECHR 781.

domestically; this relationship is a UK asset, under-valued domestically[35]. It should go without saying that a relationship of this nature is too valuable to be discarded simply because of dissatisfaction with an unfortunate individual rule 39 interim decision.[36]

Extra-Territorial Jurisdiction (ETJ):

47. The ETJ of the HRA is linked to that of the Convention.[37] ETJ was one of the most significant topics considered by IHRAR because of its potential impact on important UK interests –additionally, because the extra-territorial and temporal scope of the HRA are sensitive areas for the relationship between the Judiciary and Government[38]. In a nutshell, there is a problem to which the Strasbourg case law has given rise. In IHRAR's view, the Convention was never intended to have a worldwide remit; further, the Convention sits uneasily with International Humanitarian Law ("IHL") in times of active combat operations, where IHL is the *lex specialis*. That problem needs addressing. There is a clear case for change. The far more difficult question is how best to achieve such change.

48. A unilateral solution – amending the HRA to restrict or remove its ETJ, tempting though it might be – would result in an own goal, potentially carrying very serious consequences for serious UK interests. The UK would remain a party to the Convention, so that our Armed Forces, Agencies and Police would be exposed to claims

[35] ES, at [35]
[36] See too Lord Mance in his 2022 Thomas More lecture ("the Mance lecture"), summarised by Joshua Rozenberg in his 31 October blog.
[37] *Al Skeini* [2007] UKHL 26; [2008] 1 AC 153
[38] See, ES, at [76], citing Lord Reed's Submission to IHRAR, at [12].

in Strasbourg, without the prior consideration of UK Courts and the assistance of (for example) closed material procedures. Moreover, in practical terms, UK Armed Forces, for instance, would still be operating on protocols geared to Convention compliance.

49. Accordingly, the solution needs to be multilateral, at a Convention level. IHRAR's recommendations centre on inter-Governmental dialogue at Convention level.[39] Technically, there would be much to be said for an amending Protocol to the Convention[40] and it may be noted that there have been strong dissenting voices in Strasbourg as to the course taken by its jurisprudence in this area.[41]

II. ***WHERE TO FROM HERE?***

50. The IHRAR Report was published in Parliament. In accordance with the WMS, a Response from Government ought to have followed but no such Response has been produced. Neither the Ministry of Justice ("MoJ") Consultation Paper, *Human Rights Act Reform: A Modern Bill of Rights: A Consultation to Reform the Human Rights Act 1998* (December 2021; CP588) ("the MoJ Consultation Paper")[42], nor the Bill entitled the *Bill of Rights Bill,* introduced in the House of Commons on 22 June 2022 ("the BRB") nor its accompanying *Explanatory Notes* ("the Explanatory Notes") have responded to, still less produced any reasoned engagement with the IHRAR Report. As

[39] Report, ch. 8, at [124] – [127].
[40] Cf. the Brighton Declaration
[41] *Hanan* 4871/16; [2021] ECHR 131
[42] In a previous lecture, *IHRAR: UCL Lecture*, 30 March 2022, at para. 55, I categorised the MoJ Consultation Paper to assess its relationship with the IHRAR Report. I did not take up time with a critique of that Paper but noted (at para. 56) the cogent criticism made of it by distinguished commentators, going to its selectivity, cherry-picking, contradictions and risking uncertainty, together with an increased number of cases going to Strasbourg.

a matter of the public interest, this is unfortunate, for reasons which I develop.

51. In my evidence to the JCHR on 7 September, the Committee posed probing Questions on the BRB with which I sought to deal. Although it was the date on which the BRB was "shelved", the Questions were put, and the Answers given on the basis of the BRB as then drafted. I did not know then and do not know now whether the BRB will be resurrected. In a nutshell, I do have real concerns as to the BRB; putting all other troubling matters to one side, mine focus on, first, the proposed repeal of the HRA when no evidence-based case has been made for repeal; secondly, the inherent contradiction in the UK remaining party to the Convention but diminishing its influence by setting up points of friction between UK Courts and the Strasbourg Court.

52. My answers to the JCHR Questions distinguished between, first, provisions which, with respect, involved "grandstanding" but were of no real substance; secondly, provisions which I welcomed; and, thirdly, provisions which, as a matter of substance gave rise to particular concerns.

53. As to "grandstanding", I suggested the example of cl. 1(2)(a) as to the role of the Supreme Court determining the meaning and effect of Convention Rights for the purposes of domestic law; that has always been the case.[43]

[43] See *Kay v Lambeth BC* [2006] UKHL 10; [2006] 2 AC 465, at [40] – [45] on the continued role of the domestic doctrine of precedent: IHRAR Report, Ch. 2, at paras. 56-57. Cl. 9 of the BRB, dealing with jury trial, may be seen in a similar light but is so far outside IHRAR's remit as not to call for comment. Further still, see the extended critique of the BRB in the Mance Lecture.

54. As to welcome provisions, I noted areas where the BRB was in agreement with the IHRAR Report – broadly speaking, remedial orders (cl. 26), derogation orders (cl. 27) and suspended quashing orders, addressed in the Explanatory Notes and only not dealt with in the BRB because they are appropriately provided for in the *Judicial Review and Courts Act 2022*[44]. Furthermore, I welcomed cl. 25 of the BRB, imposing a duty on the Secretary of State to notify Parliament of failure to comply with the Convention, following (*inter alia)* a decision of the Strasbourg Court.

55. As to provisions giving rise to particular concerns, I highlighted those which went contrary to IHRAR's Recommendations or risked doing so:

(1) First, the proposed repeal of ss. 2 and 3 of the HRA, increasing the likelihood of the development of a substantive gap between the rights capable of enforcement in UK courts and the rights enforceable in the Strasbourg court. As to the repeal of s.2, IHRAR had[45] considered and strongly rejected it. With regard to s.3, while not downplaying the legitimate concerns as to that section, IHRAR had not recommended repealing or diluting that section for the reasons set out in the Report. The Government went against our recommendations but did not supply a reasoned basis for doing so, either with regard to section 2 or section 3.

[44] C.35

[45] As underlined above.

(2) Secondly, the uncertainty resulting from the repeal of those sections, not in any way cured by cl. 40 of the BRB, an open-ended Henry VIII power.

(3) Thirdly, cl. 14 restricting the rights available in UK courts in respect of "*overseas military operations*", risking the UK scoring an own goal in respect of very serious UK interests by flirting with or straying into unilateralism, with the danger not obviously averted by the commencement provision contained in cl. 39.

56. My concerns did not end there though I did no more than briefly note other matters which had not featured in the IHRAR Report; thus:

(1) First, the importance attached to originalism, namely the mandatory requirement that courts must have particular regard to the text of Convention rights (cl. 3.2(a) of the BRB).

(2) Cll. 5 and 7 of the BRB, both appearing to involve micro-management of the domestic judicial process, with cl. 7 at best amounting to unnecessary and strained surplusage, in the light of the prevailing philosophy of judicial restraint in the UK Supreme Court.

(3) The (with respect) idiosyncratic "*no reasonable doubt provision*" contained in cl. 3(3)(a), inevitably generating uncertainty plus a strikingly intense focus on what the Strasbourg court might do. In any event, cl. 3(3)(a) might be seen as particularly unfortunate, given the now-established UK Supreme Court jurisprudence setting its face firmly against the development of free-standing Convention Rights.

57. Another area on which I was asked was the impact of the BRB on the common law. I was clear in my answer. The BRB does nothing for the common law. When dealing with s.2 of the HRA, IHRAR recommended giving the common law greater prominence and putting it centre-stage. There were good reasons for doing so, both domestically, to enhance support for the HRA, and internationally, where it represented a principled application of the Strasbourg doctrine of subsidiarity. In stark contrast, the BRB, in cl. 3, makes it mandatory to have regard to the text of the Convention and mandatory to form a view (beyond reasonable doubt) of what the Strasbourg Court might do before expanding the protection of a Convention right. The common law is an also-ran in the BRB: cl. 3(2)(b) provides no more than that the court "*may*" – not *must* – have regard to relevant common law developments. That is, in any event, a meaningless provision as a Court is obviously entitled to do so in any event.

58. Enough of the detail. There *is* an evidence-based way ahead through implementation of IHRAR's Recommendations for a coherent package of practical reforms, straightforward to implement and achieving incremental change.

59. There is, additionally, room for discussion as to what might be termed "IHRAR plus", reforms building on IHRAR's approach but going further without doing damage to the overall HRA and Convention fabric. An obvious example is the formulation of statutory guidelines[46] as to the non-exhaustive circumstances to be

[46] Considered but, on balance, not adopted by IHRAR (see above), essentially because of the risks of such codifying guidelines "fighting the last war" and resulting in satellite litigation.

taken into account when UK Courts are considering whether to depart from Strasbourg case law[47].

60. I have not in any of this overlooked Government's prerogative to reject IHRAR's Recommendations or to range more broadly than IHRAR's ToR remit. As to ranging more broadly, cl. 9 (jury trial), cll. 8 and 20 (deportation and Art. 8 of the Convention) spring to mind. Those are matters on which IHRAR had and could have had no view.

61. As to rejecting IHRAR's Recommendations, the BRB encounters real difficulties. This is not because IHRAR for a moment claims a monopoly of wisdom in this area; it does not. It is instead because IHRAR's conclusions were evidence-based – and other than doctrinaire, unsupported assertions, no basis, still less any reasoned basis, has been advanced for rejecting them. Moreover, there has been no engagement with the thesis that the evidence supported incremental change, involving specific and targeted reforms to the HRA, not its repeal. Targeted reform yes; repeal no.

62. Matters do not end there. Government is plainly concerned by issues such as the impact of protestors on motorways, Art. 8, the deportation of foreign criminals and stopping small boats crossing the Channel. Legislative choices are of course for Government and Parliament and not for the Judiciary or a Panel such as IHRAR. The practical consequences of proposed legislative amendments are, however, fairly within the remit of the Judiciary and have traditionally been so. Addressing such issues of concern for

[47] Thus, to an extent, limiting the difficult balances to be struck by the Judiciary in this area, albeit that most of these concern the Convention, not the HRA, and even there should not be over-stated; see the intriguing discussion on balancing incommensurable values in *Justice for Foxes,* (2022) 138 LQR 583, Philip Sales and Frederick Wilmot-Smith.

Government directly neither requires repeal of the HRA nor will repeal of the HRA suffice to eliminate the problem, if as is Government policy, the UK remains a party to the Convention. [48] Moreover, if still a party to the Convention it is, at the very least, curious to risk increasing friction with the Strasbourg Court, reducing the UK's influence in that court, increasing the number of cases brought there and the number in which the UK loses. It is even more curious to proceed in such a fashion without *any* exercise comparable to that undertaken by IHRAR. In short, there is every reason for respectful concern that the BRB misses its mark on the matters where it parts company with IHRAR's Recommendations. Insofar as legislation is the or an answer to current political issues, it might be thought that targeted legislation better serves the public interest; babies and bath water come to mind.

63. Time will tell and beyond this I would be indulging in speculation.

CONCLUDING REMARKS

64. In his address already referred to, Lord Hodge highlighted the importance of certainty to the attractiveness of English law and dispute resolution in London. Strikingly, in their evidence to IHRAR, the City Law Firms of the Law Society[49] emphasised the contribution to certainty made by the HRA and its links to the Convention in the same vein.

[48] See the Melanie Phillips column in *The Times*, 8 November 2022, *Tinker Bell tactics won't solve migrant issue.*

[49] IHRAR Report, ch. 2, para. 110

65. It would be unwise to undermine either or both the value of UK legal exports and the UK's leadership role in law and dispute resolution by changes to the HRA, unless soundly based.

66. Pulling the threads together:

(1) Typically, a Bill of Rights reflects fundamental, enduring values and is an uplifting document, requiring and commanding wide-ranging consensus. The BRB is not a Bill of Rights. Labelling it as such only serves to encourage cynicism.

(2) The BRB contains an inherent contradiction in the UK remaining party to the Convention but diminishing its influence by setting up points of friction between the UK Courts and the Strasbourg Court, so weakening the UK's position.

(3) There are undoubtedly current political issues of concern which require addressing in the political and diplomatic plane; domestically, there are (at the very least) legitimate concerns about protestors blocking motorways; internationally, there is an understandable interest in stopping people smugglers sending small boats across the Channel. There is no basis for supposing that the BRB will assist in the resolution of those issues. Given HMG's commitment to remaining a party to the Convention, the BRB is not and is incapable of being *sufficient* to achieve the apparent aims of its promoter.

(4) Nor is the BRB *necessary* to attack such problems. The resolute application of existing laws especially in a climate of judicial restraint, coupled with sustained political and diplomatic effort, are overwhelmingly more likely to produce results. Babies and bath water again – here to the detriment of the UK.

(5) There is an evidence-based case for a coherent package of incremental change to the HRA, signifying self-confidence in our British/UK law while consistent with the principle of subsidiarity. The case for going further let alone for repealing the HRA, carrying the risk of undermining certainty in our legal framework, has not been made.

67. Thank you.