Parliament and Human Rights in the UK: Two Years On

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Debate with David Feldman and Jean Corston, legal advisor and chair of the Joint Committee on Human Rights respectively.

I'm ‘dangerous’. If we look back twelve years instead of two that is what I and some of my colleagues at Liberty were once called for proposing that we could have a bill of rights in which parliament would have as significant a role in upholding rights as the courts.

And the primary vehicle we proposed for this parliamentary role was the establishment of what we called a Human Rights Scrutiny Committee.

To begin at the beginning…or at least the 1980s…one of the consequences of years of having one party in power which, though elected on a minority of the popular vote, was able to tear up cherished liberties and freedoms at the stroke of a handbag was to bring home to people the weakness of parliament in our unwritten constitution.

The main opposition to Mrs Thatcher's government invariably landed on the courts – not renowned for keeping the executive in check up to this point – but they too were deeply constrained by legal and constitutional conventions that were virtually unique to this country.

Some lawyers and civil libertarians began to look enviously at the rest of Europe and the US with their bills of rights that allowed judges to strike down unconstitutional legislation. Some American states had even got rid of their poll taxes through this route whereas we had to hold riotous demonstrations and watch the Conservative party mount a coup against the then Prime Minister to achieve much the same end.

It is true that the people did not march on Whitehall demanding a bill of rights, but the establishment of Charter 88 in 1988 caught the mini zeitgeist of the time. The burgeoning pressure group pointed out that parliament, like the proverbial emperor, had no clothes. In other words, when we said parliament we usually meant government acting through parliament. Thousands of Charter 88 signatories called for reform of parliament and a bill of rights to provide a bulwark against unaccountable executive power.

Reined against this view was a fairly unholy alliance of politicians, academics, lawyers and activists from across the political spectrum who feared that a bill of rights would

actually increase our democratic deficit. Very reasonably, in my view, they were concerned that a bill of rights or incorporation of the European Convention of Human Rights (ECHR) into domestic law (which effectively amounts to the same thing) would merely transfer legislative power from a nominally accountable, indirectly elected executive to a fully unaccountable unelected judiciary.

Their reason for holding this view? Well human rights law is, of course, not like any other law. By its very nature it is a set of broadly expressed values and standards which is intended to influence all other law and policy. Whoever is given the power to interpret how this 'higher law' should be applied will, in practice, be law makers as much as law interpreters. Bills of rights inevitably muddy powers rather than separate them.

Here is where we at Liberty stepped in with our Human Rights Scrutiny Committee idea. Broadly speaking, we accepted the *analysis* of the latter group – the rejectionists – but the policy proposal of the former group – the incoporationists. Hence you can kind of see why we might have been regarded as dangerous all round.

In a document we rather pretentiously called *A People's Charter* published in 1991 we proposed a bill of rights based on an incorporated ECHR (with knobs on) with the executive, legislature and judiciary each given a role in its enforcement. Government would be given responsibility for signposting whether a new statute breached the bill of rights or not, the courts would be given the right to review legislation and executive acts for human rights compliance for the first time and parliament's role would be bolstered by this new Human Rights Scrutiny Committee.

We suggested that this Committee should probably be a joint committee of both houses to reduce interference in it from the executive through the party whips – something comparable to the Joint Committee on Statutory Instruments. We gave it a central role in enforcing the bill of rights through an extraordinarily labyrinth set of proposals which I shudder to look at now.

Unsurprisingly no-one took the over-complex and ultimately unworkable proposals in *A People's Charter* too seriously. This gave us the chance to work on the model some more which we called *"The democratic entrenchment of a bill of rights"*.

If you sneak a look at Labour's 1992 manifesto you will see reference to a 'democratically enforced bill of rights'. Only weeks before the election we had managed to persuade the then Labour leader Neil Kinnock's office (but not the deputy leader Roy Hattersley) that – contrary to the then legal orthodoxy – it would be possible to introduce a bill of rights to curb unaccountable power *without* fatally compromising our democratic system and without handing what would amount to legislative power to the judiciary.

By now New Zealand had just introduced its bill of rights which – in contrast to the American, Canadian and German models – does not allow courts to strike down primary legislation and which gives a significant role to parliamentary committees. Our idea that bills of rights do not inevitably have to involve judges having the last word and could include a significant role for parliament was beginning to look less daft.

Of course Labour lost that election but I don't think this can entirely be laid at the door of our dangerous proposal. When John Smith took over as leader and made his famous speech in favour of constitutional reform to Charter 88, I was dispatched to meet the new shadow home secretary, Tony Blair.

We worked on a model for incorporating the ECHR into UK law which would *crucially* still leave parliament with the last word on what the law of the land should be.

Labour was elected to power and the rest is history as they say. But it is widely recognised that the model that was finally included in the Human Rights Act (HRA) – and which I was fortunate to be given the opportunity to continue to work on with Jack Straw's office after Labour came to power – can trace its pedigree to Liberty's original proposal for 'democratic entrenchment of a bill of rights'.

Central to this approach was always going to be the statement of legislative compatibility with human rights by ministers (now s19 of the HRA) and the role of a Joint Human Rights Scrutiny Committee.

Of course new parliamentary committees are formally the creatures of parliament not government. And although the then Leader of the House, Margaret Beckett, announced that it would be set up shortly after the 1998 HRA was passed, it took further lobbying by a number of us on the Government's Human Rights Task Force – set up to oversee implementation of the HRA – and by others behind the scenes before the Joint Committee on Human Rights (JCHR) was eventually established in January 2001.

Without the Committee there was a real danger that parliament's role – which was so central to the unique model for incorporation developed in the HRA – would in practice be usurped by the government's dominance of parliament. The Committee was to be the vehicle to ensure that Parliament had its own, independent and – just as crucially *informed* – voice which could filter down to those backbenchers who had the will – but not the means – to scrutinise legislation for human rights compliance.

However I was always confident that the Committee would ultimately be set up. Having worked so closely on this with Jack Straw and other ministers over the years I was sure that the vision behind the HRA was shared. The White Paper *Bringing Rights Home* accompanying the Human Rights Bill was explicit.

"Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy."

I will leave it to Jean and David to describe – if they will – how the Committee was able to infer their (unusual for a select committee) scrutiny role from the broad terms of reference the Committee was given when it was established in January 2001 "to consider…matters relating to human rights in the UK".

But the formidable reputation the Committee already has – both inside and outside of Parliament – could undoubtedly not have been achieved without this scrutiny role. It could also not have been achieved without the undoubted skills of its Chair and legal advisor but that should be obvious to you all, if it isn't already, by the end of the evening and requires no more comment from me.

David Feldman asks in an article I recommend to anyone interested in this subject[1] – "How can one assess the effectiveness of a process of scrutiny". Well, in preparing for this evening I counted seven indices of success:

i) Indefatigability – 24 full reports and several special ones

Subjects ranging from animal health and homelessness to police reform. The Committee published its initial, influential report on the Anti-Terrorism, Crime and Security Bill (ACSA) only two days after David Blunkett introduced the Bill on 12 November 2001.

ii) Influence on legislation

Limited success. Some reports have led to small but significant changes in the final shape of legislation

- ACSA: Astute questioning by Vera Baird led to amendments to the bill requiring the Home Secretary to at least have 'reasonable grounds' for his suspicions before locking up international terrorists indefinitely
- Employment Bill: government tabled amendments which addressed the JCHR's concerns.

iii) Influenced parliamentary debates

More success here not only through JCHR comments but through methodology used of ferreting out – at least some – of the reasoning from ministers behind their s19 statements on compatibility of legislation with the HRA and passing this on to backbenchers with the Committee's reports. For example:

[1] David Feldman 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *Public Law* 323.

- *Police Reform Bill 2002* where the JCHR reports were relied upon extensively in debates
- Several amendments were tabled on the basis of the Joint Committee's Report on the *Criminal Justice and Police Bill 2001* and the *Nationality Immigration and Asylum Bill 2002*

The Committee also scored important successes in:

- persuading the government to expand the information it issues with its s.19 statements and effectively extend this procedure to private members bills

- developing good practice and guidelines for responding to a declaration of legislative incompatibility by the domestic courts or the European Court of Human Rights – it persuaded the government to amend the offending provisions of the Mental Health Act 1983 following a declaration of incompatibility by using a fast track procedure especially introduced by the HRA for the first time.

- influencing the work of both other scrutiny committees and civil servants in the drafting stages of a bill. There is nothing like knowing you are going to be held accountable for your proposals by a well advised scrutiny committee almost as soon as they are hot off the press to concentrate the minds of bill drafters.

- Doing what most select committees mainly do which is conducting an enquiry through methods more commonly associated with Select Committees the JCHR is even as we speak galvanizing the debate on whether to establish a Human Rights Commission and if so whether it should be integrated within the proposed new Equalities Commission to form an Equalities and Human Rights Commission.

But despite the remarkable impact of this new Committee – new in time but also new in type – I would like, if I may, to throw down a gauntlet to its representatives here tonight before concluding.

Reading both the Committee reports and articles on the methodology employed by the Committee I wonder if you are being more reticent in your approach than you need to be.

I am not thinking so much of your conclusions here but the way you reach them and what you think is your appropriate role within the scheme of the HRA.

As Lord Lester, a highly influential member of the Committee recently acknowledged "the Joint Committee scrutinises legislation for compatibility in a way similar to the approach adopted by the courts in assessing claims of human rights violations".[2]

And David has written that "scrutiny" usually has "nothing to do with approving or disapproving of the purpose of [a] measure" and that "the separation of powers establishes that only a court can make a final decision on" whether a provision is compatible with the rights in the HRA or not.[3]

This is not the time or the place to go into the full implications of these statements and the approach to scrutiny which flows from them. But I would like to leave David and Jean – and through them all of you – with a few questions which appear to me to flow from this approach which they may or may not have the opportunity to respond to tonight.

First, if the Committee approaches its task in much the same way as the courts what is its value added purpose? Is it just to save parliament – or more honestly government – from the embarrassment of being hauled over the coals by the courts for passing laws which breach its own HRA?

Looking at the JCHR reports it is difficult not to conclude that sometimes the Committee is unnecessarily constraining itself. In its report on the *Adoption and Children Bill* the Committee seemed to be tying itself up in knots in order to say that it supported the government's measures to end the prohibition on gay and unmarried couples adopting children because they enhanced the human rights of adults and children alike. The Committee seemed to feel the need to rely on the minority opinion on a failed case at Strasbourg to say what it should have been able to say in its own voice.

Second, if *only* the courts can determine compatibility then how do we get out of the catch 22 scenario where our judges frequently defer to parliament on the grounds that this is what is intended under the HRA but the Committee says only the courts can ultimately determine whether measures are compatible with the HRA or not.[4]

The vista develops of a question in permanent motion which never attracts a final answer. This is compounded by the fact that on a large range of mainly social and economic issues – but also often questions of national security – the European Court of Human Rights *also* defers to the 'national authorities' (it doesn't specify between courts or parliaments) under its doctrine of a 'Margin of Appreciation' to individual states.

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[2] A. Lester "Parliamentary Scrutiny of Legislation under the Human Rights Act 1998" [2002] 4 *EHRLR* 432.
[3] Above, n.1.
[4] For example, in *McIntosh*, on the *Proceeds of Crime (Scotland) Act; Benjafield* on confiscation orders; *Lambert* on presumption of innocence under *Misuse of Drugs Act* and *R v Taylor* on prosecution for cannabis possession under the *Misuse of Drugs Act.*

It is obvious, of course, that judges *are* the arbiter of incompatibility in the case before them based on the facts before them. But with the domestic and European Courts both doffing their caps more deferentially than Paul Burrell, if Parliament, advised by the JCHR, does not see *itself* as charged with the responsibility of clearly and decisively determining compatibility of *legislation* with the HRA then the danger is that it is the government who becomes the final arbiter of its own laws and we are back to square one.

Third, if scrutiny for human rights compliance is in all circumstances about technical compliance rather than approving or disapproving *policy* then who, and on what basis, is to determine whether a policy is necessary and proportionate in a democratic society. I am reminded here of an example from New Zealand where the Attorney General (who has the s19 responsibility under their bill of rights) declared back in 1993 that the mandatory reporting of child abuse by certain professional workers could be a breach of the free speech provisions of the New Zealand Bill of Rights.

The scrutinising committee, on the other hand, took the view that such a compulsion was necessary and proportionate to protect the fundamental right to life of children. Who is to decide which stance is right? In the end there is no getting away from the fact that reviews of necessity and proportionality, although conducted within a clearly articulated human rights framework, nevertheless ultimately involve decisions about which policy is to be preferred.

At the risk of unmasking you, I believe that in practice the JCHR *has* shown itself prepared to interrogate the appropriateness of policies in human rights terms. It has taken evidence from non-governmental organisations and experts on the necessity and proportionality of measures the government seeks to justify. But – perhaps I am being naïve here about the political considerations involved – I wish it would be more outspoken and forthright about its role as more than a technical scrutineer of government measures against objective standards.

And I wish for this transparency not only because it goes to the heart of the model in the HRA in which parliament has a major role in determining human rights policy – but because I believe it is central to our understanding of human rights.

As the White Paper which preceded the New Zealand Bill of Rights famously concluded, "In a great many cases where controversial issues arise for determination there is no 'right' [human rights] answer".[5]

What better body is there than Parliament (as distinct from the executive) to seek to provide the "right" or rather the "appropriate" human rights answer when there is no

[5] Para 6.17.

established or consensual human rights law on an issue? And what better body than the JCHR to try to ensure that Parliament fulfils this role in an informed way, as unfettered by government pressures as possible?

To quote the Lord Chancellor who said only last week in a speech at Durham University, the HRA represents a "new and dynamic co-operative endeavour…between the Executive, the Judiciary and Parliament; one in which each works in its respective constitutional sphere."

Far from aping the courts in their methods, this gives the green light to the Committee to develop its *own* voice in advising Parliament to do what it does best: develop policy and legislate but to do so in conformity with human rights values and standards. You are already doing that. Now its time to come out about it.

Thank you.