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Session 12: The role of the legislature at the interface between domestic and international human rights law

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Materials

1. This outline
2. Murray Hunt, "Reshaping Constitutionalism" in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights* (Oxford: OUP, 2007) at 473-9
3. Carolyn Evans and Simon Evans, "Evaluating the Human Rights Performance of Legislatures" (2006) 6 HRLR 545

¹ The views expressed in this paper are personal to the author and do not purport to represent the views of any other person or institution.

Introduction

This outline considers the role of the national legislature in securing a State's compliance with international human rights norms. It is in three parts. First, it considers briefly why the legislature should have such a role and what the nature of that role is compared to the well established role of the national courts in securing such compliance. Second, it draws on some examples of the work of the human rights committee of the UK Parliament to demonstrate possible ways in which the legislature can attempt to fulfil such a role.

Third, it offers some reflections about aspects of this particular interface between national and international human rights law, and asks some questions about how we can evaluate the contribution made by the legislature towards increasing a State's compliance with its international human rights obligations.

1. What role for the legislature in securing human rights compliance?

For those interested in closing the compliance gap in international human rights law by making human rights norms effective in the national legal system, courts have traditionally been the national institutions on which both academic debate and practical effort have focused. This has been for entirely understandable reasons. Courts are coercive institutions, with the power to make norms legally binding, including against other branches of the State. Overcoming obstacles to the effective judicial reception of international human rights norms into national law has therefore to a large extent been the holy grail for both scholars and practitioners working at the interface between domestic and international human rights law.

In recent years, however, growing dissatisfaction with the democratic legitimacy of judicial enforcement of human rights has led to a renewed interest in the role that can be played by the legislature. There is now a considerable literature exploring the possibilities of legislative as opposed to judicial models of human rights protection, in which the role of scrutinising laws for compatibility with human rights is carried out by

the legislature rather than the courts.² Such models have often been developed purely as domestic alternatives to the traditional judicial role under a national bill of rights, but the underlying concerns about democratic legitimacy apply equally to the judicial role in enforcing international human rights instruments. In addition, there are good reasons to be concerned about the effectiveness of relying mainly on courts to give effect to international human rights instruments, particularly in countries such as the UK with a predominantly dualist tradition, in which courts are reluctant to regard international norms as being legally relevant unless they somehow have the imprimatur of the legislature. The premise of this paper is that *both* the national legislature and national courts have an important role to play in closing the gap between commitment to and compliance with international human rights norms.

The most obvious way in which the legislature could enhance a State's compliance with international human rights norms is by directly incorporating those norms, by legislation, into the national legal system, making them directly enforceable against the State in national courts, and ensuring that effective legal remedies are available for their violation. Indeed, this is what the UK Parliament did in relation to the European Convention on Human Rights in 1998 when it enacted the Human Rights Act. But this would not exhaust the possible contribution which the legislature could make towards securing greater compliance with international human rights norms. Coercion is but one of the ways in which increased compliance can be secured. As Ryan Goodman has argued in an earlier session in this series, other social processes of persuasion and acculturation also have a role to play.

² See, for a recent sample of the growing literature, Carolyn Evans and Simon Evans, "Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights" [2006] PL 785; Janet Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 29 MLR 7; "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?" (2004) 82 Texas Law Review 1963; "Parliamentary Rights Model: The Case of the United Kingdom" (2005) MLR (forthcoming); "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2004) British Journal of Political Science; David Feldman, "The Impact of Human Rights on the UK Legislative Process" (2004) 25 Statute Law Review 91; David Feldman, "Can and should Parliament protect human rights?" (2004) European Public Law 635; Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006) and *Protecting Human Rights: Instruments and Institutions* (Oxford: OUP, 2003).

Some questions for discussion: What is the role of the legislature in ensuring State compliance with international human rights obligations? Should it have such a role at all? If so, what should that role consist of and how should it perform it? What should be the role of specialist parliamentary committees? How is the role of the legislature in securing greater compliance with international human rights norms different from the role performed by courts? Are scrutiny and monitoring by the legislature any more democratic than judicial enforcement? Is it an alternative to judicial enforcement, and if not what is the relationship between the two? What should be the role played by NGOs in such legislative scrutiny? How can Parliament contribute towards a culture of justification, in which the Government is required to articulate publicly and defend its reasons for its view that it is acting compatibly with human rights norms?

2. What can a legislative committee do to enhance human rights compliance?

This part of this paper draws on some examples of the work of the human rights committee of the UK Parliament, the Joint Committee on Human Rights, to demonstrate some of the ways in which a legislative committee can try to enhance a State's compliance with international human rights norms.

The Joint Committee on Human Rights ("the JCHR") is a parliamentary select committee appointed by the House of Lords and the House of Commons. It has twelve members, six from the Lords and six from the Commons. The Committee's terms of reference require it to consider (1) matters relating to human rights in the UK (but excluding consideration of individual cases) and (2) "remedial orders", which are orders which the Government has power to make under the Human Rights Act 1998 following a finding of a violation by the European Court of Human Rights or a declaration by a national court that an Act of Parliament is incompatible with the European Convention on Human Rights. Under the first limb of its terms of reference, the JCHR therefore has an extremely broad remit, and it has interpreted that remit very widely.

What sort of human rights institution is a parliamentary human rights committee? It is clearly not a national human rights institution of the kind envisaged in the Paris Principles. Its function is quite different from that of a human rights commission or other similar national human rights institution. However, as a committee of the legislature, it clearly has the function of advising Parliament as a whole and as such can be considered to be part of the institutional machinery for ensuring that the Government is held accountable to Parliament, including for its compliance with international human rights norms. It can also assist Parliament with its own responsibility, as a branch of the State, for complying with those norms, for example in the laws that it passes.

A number of strands of the JCHR's work have the potential to increase the State's compliance with international human rights norms, although the ways in which this might be achieved may vary somewhat from strand to strand.

(i) Legislative scrutiny

As part of its work, the JCHR examines every Government Bill presented to Parliament. The Human Rights Act requires Ministers to certify to Parliament in respect of every Government Bill they introduce that they are satisfied that its provisions are compatible with the Convention rights.³ These are bare statements of compatibility, not accompanied by any reasons, but, in practice, the Joint Committee has succeeded in going behind s. 19 statements of compatibility by asking carefully targeted questions of the Minister as to the reasons why a particular measure is considered to be compatible.

It may help to describe briefly the Committee's working methods for conducting legislative scrutiny. As soon as a Bill is published it is examined by the Committee's Legal Adviser to determine whether any of its provisions raise any significant human rights issues. Whether a Bill raises a significant human rights issue is decided by reference to the following criteria:

³ Human Rights Act 1998 s. 19.

- how important is the right affected?
- how serious is the interference?
- how strong is the justification for the interference?
- how many people are likely to be affected by it?
- how vulnerable are the affected people?
- how far is any of the State's most important positive obligations engaged?

In addition to these primary criteria of human rights significance, other considerations which are treated as being relevant to the assessment of significance to be applied at the sifting stage include the following:

- whether the issue is one on which the European Court of Human Rights or one of the higher courts in the UK has recently given a judgment
- the broad political or public impact of the bill, including the extent to which it has attracted public and media attention (provided always that the bill engages human rights)
- the extent to which reputable NGOs or other interested parties have made representations about the Bill
- the particular interests or expertise of the members of the Committee and the degree to which the Committee can add value to the scrutiny which the bill might receive from other committees
- the completeness of the Explanatory Notes or Human Rights Memoranda (if the Government agrees to provide these) accompanying the Bill (it is more likely to be necessary to ask questions of the Minister, e.g. about the justification for any interference with a right, if the Explanatory Notes or Human Rights Memoranda do not provide this information)
- the extent to which the bill furthers the promotion or protection of human rights, or could have contained provision to that effect but does not
- whether the issue is one on which the Committee has previously reported, particularly if there is a clear pattern of incompatibility, i.e. if reports from us and our predecessors have repeatedly raised the same incompatibility issues and the

Government does not appear to have addressed them (we will seek in the first place to identify the most frequently raised incompatibilities or potential incompatibilities in bills since the Committee's inception).

If any significant human rights issues appear to arise on a preliminary consideration, a Preliminary Note is prepared for the Committee identifying the compatibility issues which arise and the questions which may need to be asked of the Minister. This is considered by the Committee at the earliest opportunity (within two weeks of the Bill's publication), and the Committee decides what, if any, questions it wishes to ask the Minister. The Chair then writes to the Minister in the terms agreed.

At this point, the letter to the Minister is posted on the Committee's website, so that both Parliament and the public is apprised of the compatibility issues which the Bill raises in the Committee's view and which the Committee is pursuing with the Minister. Evidence or representations from outside organisations, whether in relation to the identified issues or any other human rights issues raised by the Bill, is positively encouraged on the website. Occasionally, but rarely, the Committee may take oral evidence in relation to a Bill, including sometimes with the minister who is responsible for the Bill.

The Committee then considers the response from the Minister and agrees a report to Parliament analysing that response and setting out in full the Committee's view as to the human rights compatibility issues which arise. The correspondence with the Minister is appended to the report. If there are subsequent amendments to the Bill during its passage through Parliament, the Committee tries to report on those in time to be useful in the parliamentary debates.

The timing of the reports is obviously crucial. The earlier the Committee's views can be made known to Parliament the better it will be performing its function. But the Committee's workload, its modest resources and the often compressed nature of the legislative timetable make it difficult to systematically report at an early stage of a Bill's progress. The Committee's informal aim is to report within 8-10 weeks of a Bill's

publication , which should normally be before the Bill reaches report stage in the first House.

The input of NGOs and other civil society groups is invaluable in the scrutiny process. Scrutiny for human rights compatibility is mostly not “technical scrutiny”. It cannot be conducted by a lawyer alone in a room with the Bill, the ECHR and a set of law reports. Because human rights compatibility is so often about whether an interference with a particular human right can be shown to be justified, scrutiny for human rights compatibility will nearly always involve consideration of factual questions: for example, the extent to which a measure will in fact have an impact on a particular right, and the extent to which the measure will in fact advance some competing goal. On these questions, information from those with experience and expertise in the relevant substantive area is of great assistance. The Committee therefore encourages NGOs and others to make submissions to it in relation to Bills which are being scrutinised, and an increasing number are doing so. However there is an obvious tension with the tight timetable. The speed with which it is usually necessary to report means that there is usually not enough time to issue a formal call for evidence. Submissions which are received, however, are always taken into account, and are usually published as an appendix to the Committee’s report.

The Committee has also consciously decided to scrutinise Bills for compatibility with international human rights norms other than those contained in the European Convention on Human Rights. Its assumption of a scrutiny role in relation to non-ECHR human rights standards, as well as its scrutiny of the UK’s compliance with the observations of the international monitoring bodies (considered below), are important steps in ensuring democratic input into the domestic application of these unincorporated norms.

The Committee recently decided to expand its legislative scrutiny work to include more pre-legislative scrutiny, that is, examining the human rights implications of draft bills, and even earlier policy papers such as White Papers, Green Papers, consultation papers; and more post-legislative scrutiny, which includes the implementation of legislation

through regulations or guidance as well as considering whether the impact of legislation in practice has had a deleterious impact on human rights.

(ii) Scrutiny of compliance with UN human rights treaties

Another area of the Committee's work has been to inquire into the UK's compliance with the principal UN human rights treaties, by taking evidence in relation to the concerns raised in the most recent set of concluding observations. So far it has done this in relation to four treaties: the Convention on the Rights of the Child,⁴ the International Covenant on Economic Social and Cultural Rights,⁵ the Convention for the Elimination of Racial Discrimination⁶ and, most recently, the Convention Against Torture.⁷

The Committee has taken the most recent Concluding Observations of the relevant monitoring body as its starting point, publicly called for evidence about the extent to which the UK has complied with the recommendations contained in those observations, held evidence hearings with relevant witnesses (including NGOs), and then held a public evidence session with the relevant Government ministers to ask directly about the main areas of concern. It has then reported to Parliament, where necessary making recommendations as to action needed by the Government in order to implement the concluding observations or to address other compliance concerns uncovered by the Committee in the course of its inquiry. As a Report of a Select Committee, the Government is expected to respond to these reports of the JCHR. It usually does so, although, disappointingly, a response to the Committee's report on CERD is still awaited, nearly two years after its publication.

This is potentially a very important strand of the Committee's work as far as increasing the UK's compliance with unincorporated international human rights norms is concerned.

⁴ JCHR, 10th Report of 2002-03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81.

⁵ JCHR, 21st Report of 2003-04, *The International Covenant on Economic, Social and Cultural Rights*, HL Paper 183, HC 1188.

⁶ JCHR, 14th Report of 2004-05, *The Convention on the Elimination of Racial Discrimination*, HL Paper 88, HC 471.

⁷ JCHR, 19th Report of 2005-06, *The UN Convention Against Torture*, HL Paper 185, HC 701.

The lack of effective follow-up at the domestic level is a well documented weakness in the UN human rights treaty monitoring mechanisms.⁸ The danger with a four or five yearly reporting cycle is that between the presentation and examination of the State's compliance reports the Government does nothing to monitor its own compliance with these human rights treaties. As James Crawford recently described it, "There are no doubt inherent problems with a system for human rights protection based essentially on self-criticism and good faith. The system encourages states to view compliance only in the context of a rather sporadic reporting procedure, with a lack of follow-up mechanisms."⁹

Indeed, this suspicion was confirmed at the very first evidence session with the Government in connection with this line of the Committee's work, when it became clear that the Foreign Office had lead responsibility for such compliance reports, regardless of the subject matter of the treaty. One beneficial effect of the Committee's work in this area is that the Government has agreed that the Human Rights Division in the Department for Constitutional Affairs should have lead responsibility and should co-ordinate the input of the relevant departments.

The Committee has indicated that it intends to continue with this work of scrutinising the domestic implementation of the principal UN human rights treaties and that it regards this as an important part of its work.¹⁰ The precise form which this will take in future, however, is uncertain. It has not committed itself to reporting on each set of Concluding Observations in future, and may wish to take a broader thematic approach which is at the same time both more selective amongst the concerns raised in the Concluding Observations and goes wider than them to include topical issues which have arisen since the last reporting round. Although the Committee clearly hopes that its work in this area will influence the Government's preparation of its next compliance report, it has not

⁸ See e.g. Gallagher, "Making Human Rights Treaty Obligations a Reality: Working with new Actors and Partners" in *The Future of UN Human Rights Treaty Monitoring*, Alston and Crawford (ed.s) (2000, CUP), ch. 9.

⁹ Crawford, "The UN Human Rights Treaty System: A System in Crisis?", in Alston and Crawford, *op. cit.*, ch. 1, p.p. 7-8.

¹⁰ *Future Working Practices*, *op. cit.* at para. 67.

really addressed yet whether it should play a role in relation to that report, for example by commenting on it in draft when the Government consults the NGOs, or scrutinising it itself when it has been submitted, including by holding public evidence sessions.

(iii) Monitoring of implementation of judgments

Another important strand of the Committee's work which is directed at closing the compliance gap is its monitoring of the implementation of judgments of the European Court of Human Rights finding UK law or practice to be in breach of the ECHR and of domestic courts under the Human Rights Act declaring an Act of Parliament to be incompatible with a Convention right.

Implementation of judgments of the ECtHR is supervised within the Council of Europe by the Committee of Ministers, which meets regularly to review the implementation measures taken by states in response to judgments of the Court, both in providing individual redress for the applicant, and in introducing necessary general measures, including changes to law, policy or administrative practice, to ensure that the violation does not re-occur.

The JCHR has taken the view that, to be effective, this international review must be accompanied by close scrutiny at national level of the implementation of Convention rights and judgments of the ECtHR. The importance of implementation measures at national level, both in respect of the Convention rights generally, and in respect of particular judgments of the ECtHR, has been emphasised by the Council of Europe, most particularly in the package of measures for reorganisation of the European Court of Human Rights under Protocol 14 ECHR. A series of Recommendations of the Committee of Ministers, agreed alongside the Protocol, propose enhanced measures of national implementation.

In order to contribute to the scrutiny of implementation measures within the domestic political process, the JCHR adopted the practice of monitoring judgments of the ECtHR

finding the UK to be in violation of the Convention rights.¹¹ Where the judgments raised issues of general implementation, as well as individual redress, the Committee wrote to the relevant Minister to request information about the implementation steps proposed. The Committee has continued this monitoring work and now aims to report regularly to Parliament about the adequacy of the steps taken by the Government to implement a judgment of the Strasbourg Court and, where appropriate, recommending the general measures it considers necessary to prevent a repetition of the violation and commenting also on the adequacy of the remedial avenues available at the national level for the individuals concerned.¹²

The Committee has recently decided to expand this monitoring of the implementation of Strasbourg judgments to include more systematic monitoring of the Government's response to declarations of incompatibility by national courts under the Human Rights Act.¹³ The first such report will be published soon.

The Committee's objectives in this strand of its work are, first, to seek to ensure that Parliament is both fully informed and has an active role in deciding what general measures are required in order to avoid a repetition of a human rights violation; second, to improve upon the wholly unsatisfactory and untransparent process which takes place in the Committee of Ministers of the Council of Europe following a judgment of the European Court of Human Rights; and, third, to seek to ensure that the domestic system of remedies is adequate to enable individuals who have suffered a violation of their human rights can obtain individual redress at the national level for the violation.

(iv) Pre-ratification scrutiny of human rights treaties

The JCHR has also sought to increase Parliament's involvement in the adoption of human rights treaties, by initiating parliamentary scrutiny of new treaties with substantial

¹¹ 19th Report of Session 2004-05, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112, HC 552, para.128.

¹² See 13th Report of 2005-06, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133, HC 954.

¹³ 23rd Report of 2005-06, *The Committee's Future Working Practices*, HL Paper 239, HC 1575 paras 62-63.

human rights implications, after their signature and laying before Parliament but before their ratification.¹⁴ In the UK it is the Executive that signs and ratifies treaties. The JCHR has taken the view that it is desirable for Parliament to be more involved before the ratification by the Executive of treaties which incur human rights obligations on behalf of the UK. The purpose of the constitutional practice in the UK known as the “Ponsonby Rule”, whereby a treaty is laid before Parliament for a limited time before ratification, is to enable Parliament to be informed about a treaty that the Executive intends to ratify, and to give it an opportunity to debate it if it is controversial. In practice, however, there is no mechanism for reliably scrutinising treaties to establish whether they raise issues which merit debate or reconsideration before they are ratified.

The Committee has taken the view that the general problem of lack of effective parliamentary scrutiny of treaties before ratification is particularly pressing in relation to human rights treaties, because it is now well established that UK courts will have regard to such treaties in a wide range of circumstances, whether or not they are incorporated, and the Executive and administration also routinely have regard to such treaties in both policy-making and decision-making. The JCHR has therefore decided to report to Parliament in relation to all human rights treaties, or amendments to such treaties, in respect of which there is a need to ensure that Parliament is fully informed about the background, content and implications of such treaties. This will enable parliamentarians to decide whether it is appropriate to call for a debate on the treaty concerned before it is ratified, and hopefully ensure that any such debate is properly informed. The JCHR hopes that this will increase parliamentary understanding and involvement in the ratification process and so help to enhance the democratic legitimacy of human rights obligations incurred on behalf of the UK by the Executive pursuant to the prerogative power.

In its recent report of this kind on the Council of Europe Convention on the Prevention of Terrorism,¹⁵ for example, the Committee advised Parliament that the UK could not and

¹⁴ See e.g. 1st Report of 2004-05, *Protocol No. 14 to the European Convention on Human Rights*, HL Paper 8, HC 106; 19th Report of 2004-05, *The Work of the Committee in the 2001-05 Parliament*, HL Paper 112/HC 552, para. 197.

¹⁵ JCHR, 1st Report of 2006-07, *The Council of Europe Convention on the Prevention of Terrorism*, HL Paper 26, HC 247.

should not ratify the Convention because UK law is not compatible with it. The reason for this was that, in the Committee's view, the offence of encouragement to terrorism as defined in s.1 of the Terrorism Act 2006 is likely to have a disproportionate impact on freedom of expression, contrary to the express requirement in Article 12 of the Council of Europe Convention on the Prevention of Terrorism.¹⁶

(v) Thematic inquiries

The JCHR has conducted a number of inquiries on thematic lines, considering the human rights issues which arise in a particular policy area, or for a particular group of people, and making recommendations for policy changes which would make policy in that area or towards that group more human rights compatible. The Committee's objectives in this strand of its work have been to identify the human rights compliance issues which arise in a particular policy area, or for a particular group of people; to take evidence about the extent to which in practice human rights norms are being complied with; to provide a rigorously human rights based analysis of the shortcomings not only of the legal framework but of current policy and practice; and to make recommendations of changes in law, policy and practice which would be more human rights compatible.

The Committee's first thematic inquiry was its inquiry into deaths in custody, in respect of which the UK has a particularly poor record compared to other comparable democracies.¹⁷ This inquiry was a deliberate departure for the Committee, attempting to move beyond what might have been perceived to be a narrowly legalistic, defensive approach to human rights, towards "a much more proactive approach which seeks positively to promote and to ensure the human rights of people in custody. By doing this we can take the Human Rights Act out of a purely legalistic context and make it relevant to the daily practice of people who work for and run our custodial institutions." The Report made a number of recommendations, several of which were accepted by the Government, although it remains far too early to be able to evaluate whether the report was successful in achieving its ambitious aims.

¹⁶ Ibid at para. 50.

¹⁷ JCHR, 3rd Report of 2003-04, *Deaths in Custody*, HL Paper 15, HC 137.

More recent examples of thematic inquiries and reports include one into human trafficking,¹⁸ in which one of the Committee's recommendations was that the Government should sign and ratify the Council of Europe Convention on Trafficking on which the Government was dragging its feet. Shortly after the publication of the report, the Government signed the Convention and is now in the process of ratifying. Most recently, the Committee has concluded its inquiry into the Treatment of Asylum Seekers, in which it finds, amongst other things, that the UK Government has been operating a deliberate policy of destitution in order to deter asylum seekers from coming to the UK.¹⁹ It is currently hearing evidence in an inquiry into the treatment of older people in health care settings.

The Committee has also been conducting an ongoing inquiry into Counter Terrorism Policy and Human Rights and has published a series of reports on this topic. In its most recent report on this theme, concerning prosecution and pre-charge detention,²⁰ it sought to put forward positive proposals for overcoming some of the main obstacles to prosecuting people in connection with terrorism, in order to facilitate a return to the paradigm of criminal due process which is more likely to be human rights compatible than the parallel universes of administrative detention and control orders which have been resorted to in place of prosecution.

The Committee intends to continue such thematic inquiries, including possibly in future some more focused inquiries into urgent matters of highly topical interest, whilst taking account of the inquiries being conducted by the new Commission for Equality and Human Rights when it becomes operational later this year.

(vi) Monitoring implementation of the HRA

¹⁸ JCHR, 26th Report of 2005-06, *Human Trafficking*, HL Paper 245, HC 1127.

¹⁹ JCHR, 10th Report of 2006-07, *The Treatment of Asylum Seekers*, HL Paper 60, HC 80.

²⁰ JCHR, 24th Report of 2005-06, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, HL Paper 240, HC 1576.

A further distinct strand of the Committee's work has been its monitoring of the implementation of the Human Rights Act 1998. For example, the Committee inquired into the narrow meaning given by judges to the term "public authority" in the Human Rights Act, concluding that this amounted to a judicial frustration of the clear will of Parliament in 1998 and as a result left a serious gap in the legal protection available for many vulnerable people receiving privatised or contracted out services.²¹

In the absence of any progress towards resolving the problem since that first report, the Committee very recently reported again on this issue, this time recommending that the time has come for a clear legislative response to reverse the judicial interpretation and restore the original intention that the protection of the Human Rights Act should be available to those receiving services from a private entity pursuant to a contract or other arrangement with a body which is under a duty to perform the function.²²

The Committee also reported recently on the Government's own reviews of the operation of the HRA, which were prompted by a series of events widely blamed in the media, to some extent with ministerial complicity, on the Human Rights Act.²³ The Committee stated its belief that a culture of respect for human rights was a goal worth striving for, but noted that there remained doubt about how far such a culture had developed and that public misunderstandings will continue so long as very senior Ministers make unfounded assertions about the Act and use it as a scapegoat for administrative failings in their departments.

(vii) Human Rights Institutions

The Committee has taken a very close interest in both the initial design and ongoing monitoring of national human rights institutions. It conducted an inquiry into the need

²¹JCHR, 7th Report of Session 2003-04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39/HC Paper 382.

²² JCHR, 9th Report of 2006-07, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 77 410

²³ JCHR, 32nd Report of 2005-06, *The Human Rights Act: The DCA and Home Office Reviews*, HL Paper 278, HC 716

for a Human Rights Commission, recommending that the case for a commission had been made out. It conducted a similar inquiry into the need for a Children's Commissioner for England. It scrutinised the relevant legislation establishing the Commission for Equality and Human Rights and the Children's Commissioners for compatibility with the Paris Principles. It has also monitored the activities of those human rights institutions which have been set up, taking evidence from the Northern Ireland Human Rights Commission and making recommendations about its powers, and taking evidence from the Children's Commissioners. It recently strongly criticised the Government's proposal to merge the current independent prisons inspectorate (HM Inspector of Prisons) into a much larger single criminal justice inspectorate which, in the Committee's view, would have made it impossible for the UK to comply with the Optional Protocol to the Torture Convention.

(viii) Monitoring Government human rights policy generally

In addition to the strands of work summarised above, the Committee has monitored the Government's human rights policy generally in a number of other ways. It has held regular evidence sessions with the minister responsible for human rights to explore Government thinking on human rights policy. It has reported on the Government's Review of International Human Rights Instruments, in which the Government comprehensively reviewed its human rights obligations (including reservations and non-signatures or non-ratifications) under international treaties. And it is currently awaiting the outcome of the Government's review of the CEDAW individual petition experiment.

3. Reflections

(i) Sources

In a predominantly dualist system, which the UK remains, Parliament and its committees are not constrained by dualism in the same way as courts are constrained. According to dualist orthodoxy, courts should only treat as “law” those international human rights obligations which have been “incorporated” into national law by Parliament, such as the European Convention on Human Rights which has been given the status of national law by the Human Rights Act 1998. All other human rights treaties, on this traditional view, are only legally relevant to questions to be determined by courts to the extent that they assist in the resolution of an “ambiguity” in national law.

Parliament and its committees, by contrast, are at liberty to refer to all international human rights obligations which are binding on the State. Indeed, given that it is the executive in a dualist system which ratifies the treaties, it is important that the executive itself is subjected to some meaningful parliamentary scrutiny against the obligations which it has incurred on behalf of the state.

(ii) Methods

What methods does the JCHR use to attempt to influence the Government to improve its compliance with human rights norms? It identifies, with the benefit of legal advice, the relevant human rights norms engaged by a particular Government action or inaction. It seeks to identify as precisely as possible the human rights compatibility questions raised by the action or inaction in question. It takes evidence about the impact of a particular policy action or inaction on the ground, including visiting relevant places or other countries where necessary. It exposes the Government’s reasons to public scrutiny. It analyses and comments publicly on the quality of those reasons. Where appropriate it praises the Government for making progress towards complying with international human rights obligations or, occasionally, for going further than it is required to do by

those obligations. It is also appropriately critical of the Government where it considers it to be acting incompatibly with human rights norms, or missing an opportunity to improve compliance with those norms. Sometimes this means it is highly critical. It seeks to engage NGOs in this process of parliamentary scrutiny of governmental justifications.

(iii) Voice

Does a parliamentary human rights committee have more authority if it speaks with its own voice or if it predicts what courts will do, as if a legal opinion? The JCHR has no particular claim to authority for its views other than the cogency of its reasoning, which should speak for itself. Should it just take its own view on compatibility? If so, how constrained should it be by domestic interpretations of the international standards/international interpretations of the international standards? Is there any scope for a “margin of appreciation” notion in the JCHR’s approach? Does the legislature, as a national institution, have an advantage over international institutions in terms of being in a position to judge governmental practices for compliance with human rights? What standard of review should the JCHR apply? Should parliamentary human rights committees require only a minimally rational justification for decisions affecting rights?

(iv) Coercion, persuasion or acculturation?

Which of Goodman’s social processes best describes what a parliamentary human rights committee such as the JCHR does? The JCHR is not really engaged in “enforcement” of compliance with human rights law in any meaningful sense. It does not have any coercive powers as such, even within the legislature. It has all the powers of a parliamentary select committee, to call for papers and persons, but it has no power of veto over legislation, nor even any “scrutiny lock” such as that enjoyed by the EU Committees at Westminster, which must clear measures from scrutiny before they can become law.

The JCHR therefore mainly engages in the softer techniques of securing compliance through persuasion: constructive engagement with the Government, a public and transparent dialogue conducted in open correspondence which is published in reports to Parliament. It is most squarely within the model of persuasion, rather than coercion or acculturation. But who is the JCHR trying to persuade? It has multiple audiences. The Committee in its direct dialogue with the Government seeks to persuade the Government of the correct interpretation of relevant international norms. In its reports, the Committee also seeks to persuade Parliament to enable it in turn to seek to persuade ministers to do what it says is required in order to comply with international human rights norms.

At this stage, there could be said to be an element of coercion because the Government requires Parliament's approval in order to be able to pass legislation. So, for example, in the recent attempt by the Government to extend pre-charge detention to 90 days, the House of Commons effectively coerced the Government by voting the measure down. The role of human rights law in that debate, however, was negligible. The JCHR was not able to report until after the vote in the Commons, and therefore a fully informed debate in terms of the relevant human rights norms did not take place until the Lords.

(v) Constraints

What are the constraints and limits on the JCHR? One of the most important limits is the appetite of ordinary parliamentarians for scrutinising the Government for compliance with human rights norms. Parliamentary scrutiny of governments for compliance with human rights norms can only ever be as good as the parliamentarians doing the scrutiny. For the most part this is disappointing. In the House of Commons the JCHR is still seen as being of only very marginal significance in the business of that House. It is not regarded by members as a prestigious committee of which to be a member or a Chair. In the Lords, where scrutiny of legislation is more central to the House's function, the JCHR is probably more highly regarded. JCHR reports are more frequently cited in debates in the Lords than in the Commons. On the whole, though, the number of references to reports of the Committee in parliamentary debate is disappointingly small. Although the

human rights literacy of parliamentarians is gradually increasing, many still tend to regard human rights compatibility as a technical legal question which is the preserve of expert lawyers, not parliamentarians.

Another constraint is that the committee is an all-party committee and, like all parliamentary committees, it tries, where it can, to operate by consensus. This may sometimes mean that a majority view is moderated, that the committee decides not to report on something on which it cannot agree, or even that it prefers not to enter at all upon an issue which it knows in advance will be just too divisive for it to be able to agree a position.

(vi) Evaluation

How do you evaluate the performance of a legislature, or a human rights committee, in human rights terms?²⁴ What should be the criteria for evaluating its performance? How can the human rights literacy of parliamentarians be measured? Does the JCHR have any influence over Government? The Government is sometimes quite happy to disagree with the JCHR overtly and will occasionally say “our legal advice is different”, leaving it to the courts to adjudicate in subsequent challenges to compatibility. What is the relevance of subsequent judicial determinations of compatibility to evaluation of the performance of the legislature, or the parliamentary committee?

²⁴ Carolyn Evans and Simon Evans, “Evaluating the Human Rights Performance of Legislatures” (2006) 6 HRLR 545.