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Transcript

Does the UK Need Its Own Bill of Rights?

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Elizabeth Wilmshurst:

Good evening and thank you for coming here through the cold and the wet. I am very glad to welcome here to talk on the Commission on a Bill of Rights on my right, Martin Howe QC, who is a barrister at 8 New Square and a member of the Commission on a Bill of Rights. He was also working on the Conservative Party's Commission on a Bill of Rights for the UK. He has spoken publicly in support of his position in favour of a British bill of rights, and he joined in the report of the Commission and appended what a new bill of rights could look like. On my left, Professor Philippe Sands QC, who is also a barrister at Matrix [Chambers] and a professor of international law at University College London. He is also a member of the Commission on a Bill of Rights; he didn't join in with all of the conclusions of the report of the commission, and with Baroness Kennedy explained that they were unable to agree with the proposition that there should be a new bill.

I am Elizabeth Wilmshurst; I'm an associate fellow in international law here at Chatham House.

We are going to have – rather than each of our speakers standing up and speaking to you – we are going to have more of a discussion and if at any point during our discussion any of you has a very strong wish to intervene, please put up your hand and I will try to bring you in at an appropriate point.

I want to begin by reading out the terms of reference for the commission. As they put it: 'In August 2008, the All-Party Joint Committee on Human Rights published a report, "A Bill of Rights for the UK?", expressing the conclusion that the UK should adopt a bill of rights and freedoms which should continue to incorporate [European] Convention [on Human Rights] rights into UK law and which should set out a shared vision of a desirable future society. It should be aspirational in nature, as well as protecting those human rights which already exist.'

In 2010, the new coalition government announced as part of its coalition programme that they would establish a commission to look at the matter. And in March 2010 the commission was set up with these terms of reference, and I'm quoting: 'To investigate the creation of a UK bill of rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties. It' – that is, the commission – 'will examine the operation and implementation of these obligations and consider ways to promote a better understanding of the true scope of these obligations and liberties.'

Well, with that small introduction I want to begin by asking you, Martin, if you could just tell us what the commission has actually done. What is in its report, which you are in the majority?

Martin Howe:

The commission, or the majority view of the commission, was in principle in favour of introducing a bill of rights for the United Kingdom, mainly based on the argument about ownership. And if I can explain that, most countries, including most countries who are members of the European Convention on Human Rights, have their own statements of fundamental rights. They vary, but are usually constitutionally embedded – one very well-known example is, for example, is the German Basic Law – and in those countries the protection of fundamental rights is looked at primarily through the prism of their own national statement of rights.

In this country, because of the way things have developed historically – the well-known 19th century legal authority, AV Dicey, was fundamentally opposed to anything in the nature of a statement of rights, arguing – and probably correctly in the context of those times – that such statements of rights were ineffectual for the protection of liberties and citing the way things worked in France in practice as distinct from the way things were in theory, and that the British constitution with its supreme parliament, no limitation on rights but a representative democracy, was in practice a much better guardian of fundamental freedoms than these various statements of rights.

Now, for various reasons I am convinced that although that position may have been right in Victorian times, it is no longer right now that we have moved a century and a half further on. And we do need a statement of rights to measure the acts of the executive and, to an extent, the acts of Parliament or the legislature against. But, for historical reasons, because we've never developed organically our own bill of rights within our own country, dovetailed into our own constitution, legal traditions, historical traditions, we ended up in 1998 taking in wholesale the external statement of rights contained in the European Convention on Human Rights, and also taking in, to a large extent with it, the interpretation of those rights which has been built up over the previous 50 years by the Strasbourg court, the [European] Court of Human Rights at Strasbourg.

And it seems to me, and I think to my fellow colleagues in the majority on the commission, that it is important for us to move to a position which would be similar to that of the majority of other European states, the majority of other

Commonwealth states, of having our own home-grown bill of rights, which would be consistent with the European Convention, would cover the various categories of rights which it contains, albeit in different ways, expressed in different forms, and possibly adding rights here and there – like, for example, the right to jury trial, which appears in the Canadian Charter of Rights and Freedoms. It can't, obviously, appear in a European instrument because many countries do not have jury system at all in criminal trials, but it could be usefully incorporated into a British bill of rights.

So, that, if you like, is the main argument, I mean, there are others, but that is the main one.

Elizabeth Wilmshurst:

Thank you very much for that.

Philippe, what is wrong with that? Home-grown rights…

Philippe Sands:

You know, in theory it is wonderful, but we live in a world that is more complex. When I was appointed to the Commission on a Bill of Rights, I had a completely open mind about the question. I didn't have a strong view one way or the other; I wanted to listen to my colleagues in the commission, I wanted to participate in consultations, I wanted to hear from people around the country. If anything, my predisposition was to be rather in favour of a UK bill of rights and I think that probably, in an ideal world, would still be my default or starting position. But – and the 'but' is a series of big ones – the world is not pure in which we live right now.

We were given terms of reference, just to come back to that point, which committed us to proceed on the assumption that any UK bill of rights would build on an incorporated European Convention on Human Rights. It became very clear early on that that was problematic because a number of members of the commission had rather negative views towards the European Convention on Human Rights and *even* more negative views towards the European Court on Human Rights. And, when pushed, it became clear that actually at least three of them would like to leave the European Convention on Human Rights as soon as is humanly possible. Against that background, it became very clear to me – and to Helena because we signed off on a joint separate view – that a bill of rights for some and not for all was a vehicle for withdrawing from the European Convention on Human Rights.

And once that became clear, it was going to be difficult for me to conceive of joining in such a view, largely because I don't accept that the European Convention *is* an imposition of an external view. I go back to the history: I've just finished writing the introduction to the re-issue of Hersch Lauterpacht's book of 1945, *A Bill of International Rights* [*sic*], which is really rather remarkable. And when you follow the process after he wrote that book and what happened between 1945–50 and see the role of people like David Maxwell Fyfe and others – on the Conservative side, ironically; it was the Labour side that opposed the European Convention on Human Rights – you begin to see how far things have strayed. So, that was the first issue: the terms of reference, I thought, were not respected in the final majority report.

Secondly, the other issue that emerged – Martin hasn't mentioned it, but I suspect we don't have very different views about it, although we have different views about how to manage it – the great elephant in the room hit me in a way that I had completely not expected: devolution. We think – I thought – of the United Kingdom as a single, unitary state; it is not any more a unitary state, it is a federal structure.

We went around the country and in Wales we were told very politely by Tory colleagues of the Welsh assembly: 'Well, you know, I'm a member of the Conservative Party, I suppose I have got to say I am in favour of a bill of rights, but actually the truth of it is that I'm rather happy with the European Convention on Human Rights because we are rather progressive, we like what is in there, and actually,' they said rather quietly, 'we are quite happy with the European Court of Human Rights. In fact it is better to have these decisions being made in Strasbourg interpreting our laws than a court in London, a supreme court on which there is not a single Welsh member.'

They were polite. In Northern Ireland… [laughter] You know, you talk about… the word 'British' disappeared and it became a 'UK bill of rights'. I need say no more about Northern Ireland. And then we went to Scotland, in the context of the announced referendum – actually it was coming, it had not yet been announced, that came later – and they basically stuck two fingers up at us. They just said, as one of our nice Scottish members put it, 'Get your tanks off our lawn. We are not interested. We will have our own bill of rights.'

So, you immediately get that reaction and you've got three of the four countries of the United Kingdom saying, 'No, we're not interested in a UK bill of rights really, we will have our own thing and we are perfectly happy with the status quo.' Which leaves the largest of the four countries, which of course has no one to speak for it because there is no English assembly, no English

parliament; what you have instead is Westminster. So, the devolution issue became absolutely central. It became very clear once the referendum was agreed that there could not be anything else happening.

Elizabeth Wilmshurst:

Okay, thank you.

Martin, would you like to say anything about devolution?

Martin Howe:

It is an important issue and, indeed, although you did not read out that aspect of our terms of reference, we were specifically tasked to consult the devolved administrations in the terms of reference.

Now, it is interesting and it raises all sorts of interesting constitutional issues because the United Kingdom has now become – Philippe used the word 'federal'… I mean, depending on what labels you apply, certainly a 'quasi-federal' country, but a very odd one. I mean, in most federal constitutions you have a group of states or provinces that have broadly similar powers and then a federal layer on top. Here, in the United Kingdom, we have England with no legislature of its own, and very few, if you like, internal institutions, the Westminster parliament, of course, doing duty as the complete legislature for England. Then you have Northern Ireland and Scotland with a large degree of devolved power and you have Wales with a very considerable, although not as great, degree of devolved power. So, you have this sort of asymmetric, quasi-federal constitution.

Now, it is important that any introduction of a bill of rights for the United Kingdom should not interfere with or trample on the prerogatives of the devolved legislatures. On the other hand, at the end of the day, the Westminster parliament is responsible both for the external relations of the United Kingdom as a whole, and for the internal laws, which apply – and for the central government functions which apply – throughout the United Kingdom, many of which are heavily affected by or influenced by whatever system of fundamental rights we have, and of course for the entirety of the internal laws of England.

So, while it is important that if a bill of rights is taken forward, it doesn't interfere with the prerogatives of the devolved legislatures – or indeed, speaking politically, give Mr [Alex] Salmond to reason for arguing that the

wicked Westminster tanks are on his lawn – it doesn't follow that, necessarily, objections to a particular bill of rights by one or more of the devolved legislatures should act as a sort of veto preventing a majority view at Westminster, if that is what happens, of reaching a decision for the United Kingdom as a whole.

Elizabeth Wilmshurst:

Is there anyone who wants to speak?

Philippe Sands:

Just one thing: I hadn't fully understood – and I don't think many of us on the commission had – the interplay between the Human Rights Act and the devolved legislation: the Scotland Act, the Wales Act. What was done was that the Human Rights Act was woven into the fabric of the legislation creating the devolved assemblies, which meant that if you tweaked the Human Rights Act, you would increase or decrease the powers of the devolved assemblies. And if you got rid of the Human Rights Act completely, well, the powers of the Scottish parliament and the Welsh assembly are dependent upon the rights and obligations set forth in the Human Rights Act, then you change the balance of powers. So, that caused for us a real complexity as to how you go about dealing with that relationship.

Elizabeth Wilmshurst:

Anyone who wants to comment on that? No.

Okay, so, back to your first point Philippe, which was really that there were at least three on the commission who would like to leave the European Convention and that influenced your decision not to go along with the majority. Do you have any comments on that Martin?

Martin Howe:

Well, I mean, I that felt the commission's terms of reference and its remit were to operate within our membership of the convention. I certainly do not regard the adoption of a UK bill of rights as being, as it were – or the purpose of it as being, or as motivated by – a desire to exit from the European Convention. I mean, it is perfectly true to say that if we had our own bill of rights, of course, politically if we have our own, self-contained national bill of rights, it then

makes it easier to argue we have sufficient protection of fundamental rights in this country and therefore to that extent we need less of the international system and protection by the European Convention.

As to the question: undoubtedly the question of our continued relationship with the European Convention will now move on to or will now become a subject of discussion, although it was not dealt with by the commission, but in the wider political sphere. Personally, I mean, I have got no objections to the convention at all as a text, as a statement of rights. If you read through it, 98 per cent of the political spectrum of this country will say, you know, this is fine, this is all perfectly sensible.

The problem comes, and here I think I take a different view from Philippe, over the development of the jurisprudence of the Strasbourg court, which over the 50, now 60 – well, really 60 years since the convention was originally drafted – has adopted an approach to the interpretation of these rights which is described by its supporters as a 'dynamic interpretation' or 'interpreting it as a living instrument'. I tend to take the view that this kind of approach is really an abuse of power by international judges. It is the member states who created the convention, who set out the scope of the rights in the text of the convention. It is not, in my view, the proper function of an international court to go around dreaming up and drafting on new rights as time goes by, and I think this causes great problems both practically and in terms of democracy.

Because you can say, well, by their own constitutional procedures, every country that has signed up to the convention of course has agreed to those rights, as stated in the convention being part of its law. But what they have not agreed to by any democratic process is to have an international court effectively amending the law rather than merely interpreting it, and I think that is what it comes to; it is legislation rather than interpretation.