



Parliaments and Human Rights

GPG's *Guide to Parliaments* series explores the key processes and functions of parliaments around the world. The series also highlights elements of GPG's work on the design and delivery of effective parliamentary strengthening projects. This paper discusses the significance of human rights for national parliaments and their work.

1. Introduction

Human rights considerations infuse the work of parliaments at all levels. As democratic representatives of the people, parliaments can themselves claim to be tangible embodiments of fundamental civil and political rights. The principal roles of modern parliaments - legislating, overseeing and scrutinising the actions of governments, and representing and expressing the views and concerns of the public - all directly engage human rights. This can be in relation to high-profile matters, such as when parliaments are asked to legislate to provide additional powers to law enforcement agencies to counter terrorism, or on individual constituency cases which parliamentarians may be asked to raise, such as the right of an elderly married couple to be accommodated in the same old people's home, rather than different ones. Human rights, and the extent that they may be restricted in pursuit of legitimate democratic purposes, can be at the heart of many difficult political decisions parliaments are asked to make.

This paper considers the subject of parliaments and human rights from various perspectives. It examines ways in which parliaments seek to ensure that they

conduct their own business in conformity with human rights standards, and ways in which they hold governments to account for their observance, or breach, of those standards. It presents concrete examples of mechanisms and processes by which parliaments organise themselves to carry out formal roles in relation to human rights, including through dedicated committees.

Human rights are often the subject of political controversy, both abstractly and in concrete cases, and the paper looks briefly at the current debate on human rights in the UK, as well as presenting a case study, on the issue of prisoner voting rights in the UK, which demonstrates that parliaments' relationships with human rights and their associated jurisprudence can be problematic.

2. Parliaments and human rights: the context

There is a great variety of historical and constitutional contexts in which national parliaments carry out their functions. National written constitutions usually contain provisions which concern the human rights of the country's citizens: these will often include socio-economic rights as well as civil and political rights. As just one example, the Bill of Rights which forms Chapter 2 of the Constitution of the **Republic of South Africa** sets out a panoply of rights, including political rights, dignity, freedom of expression, freedom of association, freedom of religion, belief and opinion, and rights of access to housing, health care and education. When such rights are enshrined in national constitutions they will often be enforceable

Contents

1. Introduction	1
2. Parliaments and human rights: the context	1
3. Parliaments' functions relating to human rights	2
4. Parliamentary human rights committees	4
5. Politics and human rights	5
6. Conclusion	7
About the author	7
Further reading and relevant websites	7
Endnotes	7

by Constitutional Courts or Supreme Courts, and national parliaments may ultimately be subject to judicial oversight in carrying out their functions.

In contrast, the **UK** is unusual in being a country without a single codified written constitution, and with a theoretically sovereign parliament. Before the emergence of the international framework for human rights in the twentieth century, the evolution of the legal framework for protection of human rights in Britain had been effected largely through statutory provision and the development of common law. That history can be traced through a number of important legal texts which over time asserted the rights of subjects, and of parliament itself as their representatives, in opposition to the Crown or the Executive: this lineage includes the Magna Carta of 1215, the Petition of Right in 1628, setting out the freedom of the subject from arbitrary arrest and imprisonment, and the Bill of Rights 1689, which established the supremacy of Parliament over the Crown. In modern times the Human Rights Act 1998 (see below) follows in this tradition.

In terms of human rights there are interesting differences between the position of the UK Parliament and the devolved parliaments which were established 20 years ago in **Scotland, Wales and Northern Ireland**. Unlike the UK Parliament, the three devolved parliaments are required by law to legislate in a manner which is compatible with the rights set out in the European Convention on Human Rights.

Differing national histories and contexts mean that there is no single template for the place of parliaments within national constitutional systems for protecting human rights. Obligations on states to uphold and protect human rights, whether arising from domestic constitutions or laws, or from international human rights law or treaties, normally fall primarily upon governments and other executive bodies or public authorities which exercise authority over citizens or provide public services to them. Those authorities will be accountable to courts, both national and supranational, for meeting their human rights obligations in particular cases.

In addition, many countries have established **national human rights institutions** (NHRIs), often on a statutory basis and independent or at arm's length from government, which have formal functions and powers to promote and

protect human rights. Such NHRIs may have close relationships with parliaments and their committees dealing with human rights, as well as with non-governmental organisations operating in the field of human rights.

National parliaments and parliamentarians also engage with human rights frameworks internationally. The **Inter-Parliamentary Union** (IPU), with 179 member national parliaments, undertakes a range of work on human rights, including defending the human rights of parliamentarians themselves, assisting and encouraging parliaments and their committees to sign up to UN conventions and treaties, and providing human rights training to them.

In Europe, one of the institutions of the Council of Europe is the **Parliamentary Assembly**, composed of delegations of national parliamentarians from the Council's 47 member states. Together with the Committee of Ministers, representing member state governments, the Parliamentary Assembly oversees the European Court of Human Rights. The Assembly and its committees carry out inquiries and produce reports on human rights issues in member states, maintaining pressure on governments to honour their commitments under the European Convention on Human Rights.

The **European Union** also has important provisions to establish and monitor human rights in its member states. The EU's Charter of Fundamental Rights came into effect in 2009 with the Treaty of Lisbon. The rights contained in it are enforceable in relation to the EU's institutions and bodies and to national authorities when they are implementing EU law.

3. Parliaments' functions relating to human rights

As mentioned above, human rights concerns permeate practically all parliamentary activity. This section of this paper considers three areas in which they are particularly relevant and in which parliaments may exercise a role, either formally or informally.

i. Ratification and implementation of human rights treaties

National parliaments may often seek to influence their governments when they are negotiating the provisions of international treaties, and they will often have a formal role in ratification of treaties which their

governments have signed. These roles will apply to international human rights treaties as to others. Especially in countries where ratification of a treaty incorporates that treaty's provisions directly into domestic law (so-called "monist" states), express parliamentary consent will normally be required for ratification. Parliamentary controls may be weaker in so-called "dualist" states, where the provisions of international treaties do not come into force until they are incorporated in separate domestic legislation. In the dualist UK, for example, the statutory provisions relating to parliament's role on ratification of treaties¹ give the House of Commons power to delay ratification, but they do not require parliamentary consent to be positively given.

Under dualist systems, when international treaties are ratified which have provisions which need to be implemented through new legislation, this will naturally fall to parliaments to undertake. Where legislation is not required, and treaty commitments are met by executive action (or refraining from action), parliaments may choose to play a role in monitoring the effectiveness of the executive in meeting those commitments.

UK Human Rights Act 1998²

The UK Human Rights Act 1998 (HRA) is an interesting example of incorporation of an international human rights treaty into domestic law under a dualist system.

The UK was influential in the genesis and drafting of the European Convention on Human Rights (ECHR), and was a founder member of the Council of Europe in 1949, signing the Convention in 1950 and ratifying it in 1951. However, until 1998, the only way UK citizens could bring a legal challenge relying on their rights under the ECHR was to go the European Court of Human Rights in Strasbourg, France, and this process could be lengthy and expensive. The Human Rights Act incorporated the Convention rights word for word into UK statute, enabling them to be enforced in UK courts.

The Human Rights Act places duties on public authorities, and other persons carrying out "public functions" (such as private prison providers) to uphold Convention rights. Public authorities include central and local government, devolved governments and parliaments, police, the health service, educational

services, and courts and tribunals. The UK Parliament itself is not designated as a public authority to which the Act applies.

The Human Rights Act performs a delicate balancing act to reconcile strong protection of human rights with the UK's constitutional principle of parliamentary sovereignty. In reaching judgments in which UK legislation may be at issue, courts are required to read that legislation, as far as possible, to make it compatible with the Convention rights. Where courts are not able to do that in relation to delegated legislation, they may quash that legislation. In relation to primary legislation, they are not able to quash it, but they may make a declaration of incompatibility, placing the onus on Parliament to make any necessary legislative change (which can be done by means of a remedial order, a type of delegated legislation provided for by the Human Rights Act).

ii. Legislation

When carrying out their function of legislating, parliaments should ideally have mechanisms in place to ensure that they do not pass or enact provisions which conflict with binding human rights obligations. This may be done in a variety of ways, usually involving analysis of draft legislation (bills) for compatibility with those obligations. It may also involve analysis of amendments tabled for inclusion in bills as they are passing through their legislative stages. Such analysis can be carried out by parliamentary committees or by legal advisers.

In relation to legislation brought forward by governments or ministers, there is usually an internal governmental process to examine that legislation from various perspectives, including that of human rights compatibility, before it is published or presented to Parliament. In Germany, for example, this process is carried out by the ministry responsible for the legislation and by the Federal Ministry of Justice. Once legislation is introduced to the German parliament, the Legal Affairs Committees of both the Bundestag and the Bundesrat assume responsibility for overseeing its conformity with human rights obligations, among other matters.

In the UK, under the terms of the Human Rights Act, when introducing legislation to Parliament, Ministers are required to make a statement that, in their view, the provisions

of the Bill are compatible with Convention rights. On very rare occasions, when they do not feel able to do this, they are required to declare that, although unable to make a statement of compatibility, the government nevertheless wishes the House to proceed with the Bill. Each government bill presented to parliament is also accompanied by explanatory notes, which include a section giving a brief analysis of the bill's human rights compatibility. Mechanisms for ensuring compatibility with international human rights obligations are usually less systematic in relation to bills brought forward by private Members or backbenchers, who do not have the resources available to governments to conduct legal analyses. Scrutiny of legislation for human rights compatibility in the UK parliament is carried out by the Joint Committee on Human Rights (see below).

iii. Monitoring governments' compliance with international human rights obligations

As part of their general function of overseeing and scrutinising the activities of governments, parliamentary committees and individual parliamentarians will frequently find themselves making judgements and expressing views concerning governments' adherence to human rights norms. It is less common for parliaments to have a formal or systematic role in the process by which governments account to international treaty bodies for their honouring of international human rights commitments. In the case of UN treaties, such monitoring is carried out by the UN through the treaty bodies with responsibility for each of the main human rights treaties, and by the UN Human Rights Council in relation to the Universal Periodic Reviews which involve a broader examination of conformity with human rights standards.

In the various reporting cycles of each treaty body, evidence about the performance of governments in observing their commitments will normally be provided by the governments themselves, non-governmental organisations, and national human rights institutions (NHRIs). The latter will often have a central role in providing authoritative information to treaty bodies independently from governments: in the UK it is the Equality and Human Rights Commission which leads in this respect.

It is open to national parliaments and their committees to participate in the reporting process if they wish by submitting views directly to treaty bodies, and occasionally

they do. In addition they can follow up recommendations made by treaty bodies to seek to ensure that they are implemented by governments.

4. Parliamentary human rights committees

According to the IPU's Parline database, there were 70 parliamentary committees or sub-committees in 56 countries dealing in whole or in part with human rights matters in 2018.³

In many parliaments, formal roles in relation to human rights are delegated to committees. In some cases, as in the UK, there is a joint committee of both Houses dedicated to consideration of human rights matters within the country. In other cases human rights may be a subject considered by a committee with a broader remit encompassing other matters. Often human rights issues arising in other countries will fall within the remit of a different committee, such as the committee with responsibility for considering foreign affairs. In other cases one committee will be charged with considering domestic and international human rights matters, such as the German Bundestag's Committee on Human Rights and Humanitarian Aid.

Other variations may arise in the role, powers and remit of human rights committees in different parliaments, including the extent to which committee recommendations and reports are required to be put for decision to the plenary.

There are currently no internationally-agreed guidelines on principles applicable to parliamentary human rights committees. There is a set of draft principles produced by the UN Office of the High Commissioner for Human Rights in 2018, entitled Draft Principles on Parliaments and human rights. These draft principles are modelled on the UN's 1993 Paris Principles, which apply to national human rights institutions (NHRIs), and they prescribe a series of ways for parliamentary committees to engage with national human rights matters and to participate actively in national reporting mechanisms in relation to international human rights treaty commitments. They also prescribe resourcing and working methods for committees.

It is an interesting question whether these principles, if adopted, will in practice

enhance the quality of national parliaments' engagement with human rights issues. A potential concern with them as they stand is that they are over-prescriptive, and do not sufficiently take into account the wide variation between parliaments and their committees in terms of responsibility for human rights matters.

One example of GPG's recent parliamentary strengthening work to enhance protection of human rights through parliamentary committees was a post-legislative scrutiny (PLS) project on human trafficking legislation undertaken in 2016-17 with two committees of the Parliament of Honduras. Over a series of visits, GPG's project team worked with the Family, Children, Youth and Older Persons Committee and the Justice and Human Rights Committee in the Honduran Congress to introduce the concept of PLS and guide an inquiry process, focusing on building capacity around planning, consultation and coordination. In 2020 GPG began a similar project of post-legislative scrutiny of human trafficking legislation in Sudan.

Case study: the UK Parliament's Joint Committee on Human Rights

The Joint Committee on Human Rights (JCHR) was first established in January 2001, soon after the coming into force of the Human Rights Act 1998, in October 2000. Before that the UK Parliament had no human rights committee per se. It consists of twelve members, 6 from the House of Commons and 6 from the House of Lords, with wide remit to examine matters relating to human rights within the United Kingdom. This excludes consideration of individual cases.

The Committee's work includes scrutinising Government Bills presented to Parliament for their compatibility with human rights, including;

- the rights under the European Convention on Human Rights (ECHR) protected in UK law by the Human Rights Act 1998
- common law fundamental rights and liberties, and
- the human rights contained in other international obligations of the UK.

This scrutiny of bills also includes consideration of whether they present an opportunity to enhance human rights in the UK.

The Committee also scrutinises the Government's response to court judgments concerning human rights, and the UK's compliance with its human rights obligations contained in a range of international treaties, although it does not do this comprehensively and systematically. Its most recent report on the UK's compliance with a UN human rights treaty was in 2015, concerning the Convention on the Rights of the Child.

The Committee also conducts "thematic" inquiries, where it chooses its own subjects of inquiry and seeks evidence from a wide range of groups and individuals with relevant experience and interest before reporting its conclusions and recommendations to both Houses of Parliament.

The Committee is also required to report to Parliament on any remedial order to amend primary legislation found by courts to be incompatible with the European Convention on Human Rights. Such remedial orders are a form of delegated legislation, made by a Minister under the Human Rights Act 1998.

5. Politics and human rights

Most human rights are not absolute, and the exercise of such rights may be restricted or qualified by law, when that is done in a proportionate fashion in pursuit of legitimate democratic objectives. Rights may also be in conflict with each other, and achieving the correct balance between them can involve difficult legal and political judgments. Human rights policy and legislation is frequently a subject of political debate and controversy in the UK. Since 2015 the policy of the Conservative Government has been to replace the UK's Human Rights Act (HRA) with alternative legislation, by introducing a new UK Bill of Rights. However, in 2017 the Government indicated that it would not seek to repeal or replace the HRA while the process of Brexit was under way, but would reconsider the human rights legal framework when the process of the UK leaving the EU concluded. In its manifesto for the December 2019 election, which it won, the Conservative Party stated "We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government." All the other main political parties in the UK support retention of

the current human rights framework.

A classic example of the tensions between human rights law and jurisprudence, on the one hand, and the political issues which parliaments also deal with, on the other hand, is the long story of the European Court of Human Rights and prisoner voting rights in the UK.

Prisoner voting rights⁴

In recent times the UK has found itself most persistently non-compliant with judgments of the European Court of Human Rights (ECtHR) in relation to the issue of prisoner voting rights. This protracted controversy arose because under UK law prisoners serving a custodial sentence after conviction could not vote in any elections. The ban did not apply to prisoners on remand. In 2001 the ban was challenged by three convicted prisoners. The domestic courts rejected the challenge and one of the prisoners, John Hirst, then took his case to the ECtHR.

On 6 October 2005, in the case of *Hirst v United Kingdom (No 2)*, the ECtHR ruled that the UK's ban on all serving prisoners from voting contravened Article 3 of Protocol No 1 of the European Convention on Human Rights (ECHR), which provides that signatory states should "hold free elections ... under conditions which will ensure the free expression of the opinion of the people". The central element to the ECtHR ruling was that the UK's blanket ban on prisoner voting was indiscriminate and disproportionate.

The *Hirst (No 2)* judgment set off a political debate, largely focused on the constitutional issues raised by the judgment, in particular: the UK's relationship with the ECtHR; reform of the Human Rights Act 1998; and the importance of parliamentary sovereignty. The judgment is regarded by some as an example of the ECtHR overstepping its proper role and encroaching upon Parliament's legislative authority.

In response, the 2005 Labour Government considered the ban on prisoner voting was appropriate but was conscious of the need to meet its obligations under international law to rectify the contravention of Article 3. It issued two consultations, one in 2006 and one in 2009. It did not bring forward final proposals before the 2010 General Election.

In its *Hirst (No.2)* judgment, the ECtHR adduced the fact that there had been no substantive debate in the UK Parliament on the continued justification for the ban on prisoner voting. In February 2011 a motion was brought forward for debate in the House of Commons by backbenchers expressing support for the ban. This motion was passed after a vote.

In 2012, the Conservative/Liberal Democrat Coalition Government published a draft Bill which gave three options for the right to vote in UK Westminster Parliamentary and European Parliament elections: (i) the status quo – an outright ban; (ii) a ban for prisoners sentenced to 4 years or more; and (iii) a ban for prisoners sentenced to more than 6 months. In 2013, a Parliamentary Joint Committee scrutinising the Bill recommended that all prisoners serving sentences of 12 months or less should be entitled to vote in all UK parliamentary, local and European elections. The Government did not formally respond and these proposals were not taken forward. The stalemate over prisoner voting rights at this time also led to a rare statement being made by the then Deputy Prime Minister, on introduction of a bill to reform the House of Lords, that he could not state that the bill was compatible with Convention rights but nevertheless wished the House to proceed with the bill. This was because the blanket ban on prisoner voting would have applied to election of members of the House of Lords under the bill's provisions.

The Conservative Government's Queen's Speech in May 2015 did not refer to any plans to change the current legislative position, and David Cameron subsequently implied that the blanket ban on prisoner's voting rights would not be changed while he remained Prime Minister. Following further calls from the Council of Europe's Committee of Ministers to resolve the impasse, the then Justice Secretary published proposals in November 2017. These proposals were more limited in scope than those included in previous proposals, and were administrative in nature, not legislative. The main change proposed was to allow prisoners on temporary release and on home detention curfew to vote. In December 2017 the Council of Europe welcomed the proposals, agreeing to them as an acceptable compromise that would

address the criticisms raised by Hirst (No 2). In 2018 the Government introduced these changes, and the Council of Europe confirmed that the case was closed at its meeting of September 2018. However, some human rights lawyers and others maintain that the Government's changes, which are estimated to provide the vote to about 100 prisoners, are too minimal, and that further legal challenges can be expected.

6. Conclusion

Whether explicitly or implicitly, human rights standards are integral to the work of parliaments. When carrying out their functions, parliaments and parliamentarians should be aware of relevant human rights standards, and guided by them as appropriate. In particular, in relation to the central parliamentary function of legislating, it is essential that parliaments have at their disposal authoritative information and advice on the compatibility of draft legislation with relevant human rights norms, whether those be set out in national constitutions or laws, or in international treaties to which their nations are party. It is also highly desirable that parliaments take an active part in negotiation, ratification and implementation of international human rights treaties, and in holding governments and other public authorities to account for their performance in honouring their human rights commitments.

In undertaking these functions, parliaments will find it useful to delegate tasks to well-resourced specialised committees, able to call on high-level legal and policy

advice, either exclusively concerned with examination of human rights matters, or with human rights as a major part of their remit.

Vital though human rights work is for parliaments, it should be borne in mind that national parliaments operate in very different historical and political contexts, and that they are not equivalent to national human rights institutions. It is no surprise that there are many differences between parliaments in terms of the powers and functions they possess concerning human rights; nor that there are many different models for parliamentary human rights committees.

Further reading and relevant websites

[Draft Principles on Parliaments and human rights](#), Office of the UN High Commissioner for Human Rights

[Inter-Parliamentary Union website section on human rights](#) (in English or French)

[Parliamentary Assembly of the Council of Europe website](#) (in English or French)

[Global Partners Governance Guide to Parliaments papers](#) (especially No.10: Holding Government to Account: Parliamentary Committees and Oversight Inquiries).

[UK Parliament Joint Committee on Human Rights webpages](#)

House of Commons Library Research Briefing Prisoners' [Voting Rights, developments since May 2015](#), published 30 September 2019.

About the author

Nick Walker worked for the House of Commons for 30 years, retiring in 2017. He was Commons Clerk of the Joint Committee on Human Rights between 2004 and 2007, and Clerk of the Commons Justice Committee from 2012 to 2017.



Endnotes

¹ Contained in Part 2 of the Constitutional Reform and Governance Act 2010

² UK Human Rights Act 1998: <http://www.legislation.gov.uk/ukpga/1998/42/contents>

³ Information taken from search on 30 January 2020 of the old Parline database, which has not been updated since September 2018, for specialised parliamentary bodies dealing with human rights, discounting all party parliamentary groups included in search results.

⁴ This information is mostly taken from House of Commons Library Research Briefing Prisoners' Voting Rights, developments since May 2015, published 30 September 2019.

Publication design by
Joe Power

gpgovernance.net
hello@gpgovernance.net

© Global Partners
Governance, 2020

