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Is Equality Lite the new UK Human Rights Standard?

Report of meeting, House of Lords, Tuesday 13 November 2012

In his introduction, the Chair of the meeting, **Lord Judd of Portsea** explained that the problem that still confronts all discussion around the topic of Human rights, one of seeing it as an optional extra rather than as a prerequisite for a civilised society. Human Rights were an indispensable element in the historic fight for global security and stability. An essential cornerstone of a healthy, stable society was human rights. Where human rights were present extremism would be marginalised; where they were absent extremism and instability would flourish.

He was concerned by the proposed changes in the Equality legislation by the Coalition Government: was their intention to strengthen human rights or to rationalise it? He believed that Human Rights should be recognised as a universal concept that affected the whole of society and should be made available to all, irrespective of the personal circumstances, or differences. Eleanor Roosevelt, whom he had the excitement of meeting when he was 13, had been the midwife of the Universal Declaration of Human Rights and regarded equality as the fundamental principle on which all human rights were based.

In his address, **Prof Sir Bob Hepple QC** referred to the historic shift from single identity equality, and the inevitable flaws and inconsistencies in anti-discrimination legislation to a new type of regulation under a unified Equality Act, to be enforced by the Equality and Human Rights Commission (EHRC). Prof Hepple feared that the Government's plans would lead to the abolition of the organisation by stealth, death by 1.000 cuts. He was alarmed by the decision to repeal key measures in the Equality Act which had been agreed relatively recently with all party support.

The Enterprise and Regulatory Reform Bill currently before Parliament repeals key Equality provisions such as the procedure for obtaining information from a respondent suspected of unlawful discrimination, together with the proposal to remove the provisions protecting employees from third party harassment. The proposal to introduce fees in employment tribunals was also likely to have an adverse impact on equality. More welcome news was the Government's plans to introduce Equal Pay audits for employers found to have breached the law on sex equality. However, he would like to see the EHRC given enhanced powers to require employers to undertake regular equal pay audits.

The EHRC was facing budget cuts since its creation of 62%, potentially rising to 72% after the zero based budget review, leaving it with possibly fewer than 150 staff by 2014, few GB locations and no front line services. Equality services such as its helpline services were being outsourced. It is not at all clear whether the EHRC will retain control and responsibility for overall service delivery, which Prof Hepple considered to be essential. All of these matters will be of concern to the UN Human Rights' Council's International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).

The Government proposes to repeal Section 3 of the Equality Act 2006 the general duty to promote equality and human rights on the grounds that it is 'vague, unrealistic and serves no legal function'.

Prof Hepple disagrees. Section 3 does perform a legal function especially in the absence of a purposes clause in the later Equality Act of 2010 that would have allowed the courts to apply interpretative principles. The previous Labour Government refused to agree to this fearing that it would lead to the adoption of Optional Protocol 12 of the European Convention on Human Rights. This measure, opposed by successive Governments, would make equality into an independent human right. Removing Section 3 leaves the law rudderless without the unifying principles. It will encourage inconsistencies in the way in which the law is applied between both equality and other fundamental human rights and also the different strands of discrimination. A situation that equality and human rights advocates had long been seeking to get away from.

The Government must ensure that any changes to the EHRC's functions do not affect its independence. Under the Paris Principles, National Human Rights Institutions (NHRIs) are required to have a broad and unrestricted mandate, adequate funding and independent budgetary and financial autonomy. Prof Hepple agrees with the proposals outlined in the EHRC's latest Parliamentary briefing that the Government should use this opportunity to increase the EHRC's accountability to Parliament rather than to restrict its autonomy.

NHRI accessibility is another important criteria under the Paris Principles, including local and regional access.*1. The removal of the duty under Section 3 is likely to weaken the moral and political pressure toward voluntary self-regulation.

The Government also has plans to repeal Section 10 and the related Section 19 of the Equality Act 2006. Prof Hepple suggested that this called into question whether the EHRC could continue to work for good relations between different groups. These duties predate the EHRC and derive from the 'Communities duty' of the Commission for Racial Equality (CRE). In the 1970s it allowed the CRE to intervene in the Salman Rushdie affair, S10 was used in the 1980s to launch the CRE's Let's Kick Racism Out of Football campaign, and has been used by the CRE (and later by EHRC) to combat extremism in elections. It affords the EHRC unique opportunities to work on good relations issues with key sectors of the economy, a role it is uniquely placed to do.

What would loss of independence and the loss of Category A status as a National Human Rights Institution mean in practice? 130 countries have recognised NHRIs, 62 enjoy Category A status. The UK would be forced into a secondary league of NHRIs from countries with less exemplary human rights records. Loss of Category A status would, among other things, place in jeopardy the UK Government's campaign for re-election to membership of the UN Human Rights Council.

Prof Hepple welcomed the appointment of Baroness Onora O'Neill as the new Chair of the EHRC. This afforded an opportunity for the Government to step back and review its position. The EHRC's previous accounting difficulties aside, it must be free to set its own priorities and budget. He noted that the framework agreement signed in April, 2012 between the EHRC and the Home Office restricts the EHRC's capacity to run its own affairs as it specifically requires the EHRC Board to 'take account of the Home Secretary's guidance in its decision making'. The Government is misreading and confusing an expectation on the EHRC of political neutrality, a key requirement of the Paris Principles, with one of party political neutrality.

Why Equality Lite? Prof Hepple concludes that the motives for these measures derive from the small business lobby that has been persistently arguing that employment regulations prevent them from hiring workers. However, these claims are based on hearsay rather than evidence. It is also contradictory as some regulation (as opposed to red tape) can be beneficial to business as the EHRC and the Legacy Commissions have so often demonstrated through their promotional work. It is difficult to see how the international competitive advantage of the UK can be maintained if it becomes known for denying access to justice for its employees. The decision to introduce fees on tribunal applications, and abandoning the victims of Third Party Harassment would certainly fall within this category.

Taken together, these measures appear to be part of an ongoing agenda to repatriate EU powers and weaken the Treaty of Amsterdam; the targets in this case being EU Equality Directives, and the rulings of the European Court of Justice. It is difficult to see how we could remain members of the Council of Europe or signatories to relevant UN Equalities and Human Rights Conventions if we continue along this path.

**1 The EHRC previously funded local equality and human rights organisations (awarding £10m over 3 years between 2009-12) to undertake good relations projects and provide discrimination case work advice. The*

Government has no plans to replace this programme although it has stated that it will use the money instead for additional funding to existing Government sponsored programmes with an equalities and human rights theme. However grants to local organisations will not continue.

The EHRC has already announced plans to close its regional and country offices (whilst maintaining a small presence in Cardiff and Glasgow), as well as potentially withdrawing from London and Manchester and re-establishing itself on a single site outside of the capital.

Amanda Ariss explained that she was speaking as CEO of the Equality and Diversity Forum, a network of non-governmental human rights organisations. Her remarks were largely based on the views of EDF members but also reflected her personal analysis. The Government's approach to equality and human rights was an important topic, and she would start by commenting on the position of EHRC but then look more broadly.

She largely agreed with Bob Hepple's analysis; EDF had expressed its concern about the changes to the EHRC's remit and the logic behind it. Clearly there have been problems (as well as good work) but the reforms Ministers were proposing did not match the problems. Also the Public Bodies Act allowed the Government to amend or remove EHRC powers further with minimal parliamentary scrutiny.

She felt that stakeholders should not despair about the EHRC – it still had important powers and considerable resources compared to many civil society organisations and she wished the new Chair well. But there were definitely questions about its independence. The Framework agreement agreed between the Government and the EHRC restricted its de facto and de jure independence. Any lack of parliamentary counter-weight to ministerial power is of concern.

If Ministers want the EHRC to flourish – and they say that they do – they should treat this as a fresh start. Government could show this by amending their proposals in the Enterprise and Regulatory Reform Bill or, if they opt not to do this, by how they speak about EHRC in debates on the Bill. Civil society organisations want to focus on how EHRC rises to future challenges, not listen to the Government and the EHRC trading blame about what happened in the past.

On the broader issues of equality and human rights policy, she highlighted the absence of a coherent government approach covering human rights as a whole and equality in particular. They are treated as if they were clearly different policy spheres. This is perhaps driven by the history of differing policy treatments, and where coalition parties are in their own thinking on equality and on human rights, the personal views of key government figures, perceptions of the UK's relationship to Europe and the electoral logic of an increasingly multi-racial and multi-faith society.

There is no government approach to human rights as such because of differences both between and within the coalition parties. Each was marshalling its arguments and policy positions for next general election. We therefore effectively have a policy standstill bar. ECtHR reform and the Bill of Rights Commission was clearly a holding device. A few things have been achieved e.g. reforms of the DNA database, dropping of ID cards, but there has been a big missed opportunity as there was still much to do to protect human rights, especially full implementation of S6 of the Human Rights Act and building accurate public understanding of Human Rights.

Similarly, the Government's approach to equality varies: Gove, May and Clegg, for example take rather different approaches. There was an attempt to ground government's philosophy in the 2010 Equality Strategy but it is not always conceptually coherent. Core concepts are given as equality of opportunity and equal treatment but many of the examples it gives of the problems to be addressed are differences in outcomes (despite documents explicitly rejecting equality of outcomes as a goal). Despite noticeable changes in some areas e.g. concerns about the diversity of their parliamentary parties, she questioned whether either coalition party saw equalities as core territory for policy? Liberal Democrats focus more on socio-economic inequality; Conservatives focus more on changing social roles and values.

There have been some achievements or positive moves: equal marriage was perhaps the least expected and the most courageous (although not secured yet) but others include flexible working, parental leave, work around women entrepreneurs, the ban on age discrimination in service provision, LGB and transgender action plans.

However, there were also some substantial concerns: The burdens narrative, treating action to tackle inequalities as a burden on public bodies or businesses rather than a business benefit and a

social good; Reluctance to accept the structural role of discrimination as a cause of relative disadvantage, most noticeably in relation to race inequalities but also across the board; The impact of welfare reform and recession especially on disabled people (harmful elements of welfare reform take forward a trend started by the previous government); Hostility to stigmatised minorities especially migrants, Gypsies & Travellers (again, a trend started by the previous government) changes to Equality Act 2010 and the Public sector equality duty review – also premature and ill-advised

The result was that the Government is missing opportunities in terms of their own goals and aspirations. A good case for tackling inequalities can be made from within both Conservative and Liberal Democrat political philosophies, so there was no ideological bar to them embracing this agenda. But as Paul Goodman from Conservative Home said at another meeting in this place last week, there are interesting electoral lessons for UK parties to reflect on from the US presidential election.

Commentary

Sanchita Hosali, Senior Policy & Legal Affairs Adviser for the British Institute of Human Rights (BIHR), echoing the previous speakers, said that Section 3 (which sets out EHRC's core mandate and vision) was at the core of what EHRC was supposed to stand for. Removing this duty, taken with other measures and the rhetoric surrounding the EHRC, risks reducing the EHRC to simply an equality regulator. She warned that removing the section 3 duty could be the start of a journey in which future repeal of EHRC functions becomes easier to justify. Referring to the proposal to repeal of Section 19, she noted that the equality mandate impacts on human rights too. The BIHR was deeply concerned about the threats to the EHRC's independence and areas of concern included processes around Commissioner appointments and representation, and resourcing for the EHRC. The Framework agreement was a very worrying development as this impacted directly on the EHRC's powers to implement its human rights mandate free from Government interference and which appears to run counter to the Paris Principles.

Sanchita spoke about how, on the international stage the UK often trades on the currency of the EHRC being an A graded National Human Rights Institution, which seems to be at odds with the domestic approach to human rights law and infrastructure. Sanchita highlighted a range of opportunities to address concerns about possible threats to the EHRC's status as an NHRI. The UNICC has been watching the reforms to the EHRC very closely and has written to the UK Government on several occasions to seek assurances. It is likely that the UNICC will retain this watching brief and will seek reassurances as it considers whether any further action is needed. She noted also the range of UN treaty monitoring mechanism which the UK will be subjected to in the coming 18 months, including CEDAW and the ICCPR, all of which are opportunities to raise concerns about domestic laws and structures. In addition, the UK has recently announced its intention to seek re-election to the UN Human Rights Council in 2014, which again provides another avenue for lobbying and campaigning to secure strong domestic human rights institutions.

Sanchita concluded by noting the very worrying direction of travel for human rights in the UK, where we are witnessing attacks on our domestic law – the Human Rights Act – and reforms to the infrastructures needed to support the realisation of rights, such as our NHRI. Now is the time to act, and the international systems offers opportunities which should not be missed.

John Wadham, Legal Counsel at the Equality and Human Rights Commission expressed his thanks for the widespread stakeholder support for the EHRC. The Government narrative on Equality and Human rights was hopeless, obscuring some of its positive initiatives; He referred to Neil Crowther's recent blog: What has the EHRC ever done for us? which highlighted many of the EHRC's achievements in addition to dealing with issues such as the impact of Budget cuts, (70m-18m), loss of powers and Government interference. The organisation was living with the reality of working within a likely budget settlement of £18m. Less money would mean that the EHRC would be able to do less things and by implication less able to take action in defence of equality and human rights. In these circumstances, the EHRC had decided to advocate for an increase in its accountability to Parliament. Politicians are prone to meddle and civil servants instincts are to follow the Government

policy of the day. Parliamentary safeguards for the EHRC's independence were never put in place by the previous Labour Government which chose instead to replicate the Legacy Commission model and structures, making the EHRC vulnerable to political interference and threats to its independence, funding and powers.

The EHRC was concerned about the changes to its remit being proposed in the Enterprise and Regulatory Reform Bill and elsewhere, but he believed that the retention of the unamended Sections 8 and 9 of the Equality Act still permitted the EHRC to adequately fulfil its mandate for the promotion of Equality and Human Rights. He urged stakeholders to continue to lobby for the EHRC so that it could be freed up to concentrate on the big picture.

Christopher Stanley, from the British Irish Rights Watch spoke of the UK's Equality and human rights legislation being eroded on a piecemeal basis. The watering down of the provisions of the Public Sector Equality Duty, already introduced by statutory instrument, and the proposed PSED review was of great concern. The promotion and defence of human rights and the upholding of its universal principles was the responsibility and obligation of us all. The EHRC was its focal point and champion. Newspapers such as the Daily Mail which portrayed human rights as the refuge of the scoundrel. Referring to the case of *Abu Qatada*, he felt that no matter how reviled an individual was, it was simply not right for a civilised country to deport somebody to a country that uses torture.

Lord Judd reminded the meeting about Article 2 of the Human Rights Act 'the right to life' that requires the Government take steps to safeguard the lives of everyone within the UK's jurisdiction and this included torture.

Christopher Stanley expressed sympathy with the EHRC for the cuts it was facing and the fact that the civil servants appeared to have been trawling through the EHRC's accounts with a fine toothcomb. He alluded to the severe impact of the cuts on the Northern Ireland Human Rights Commission (NIHRC) and loss of funding to Northern Ireland human rights groups. In GB the closure of Refugee and Migrant Justice had led to the redundancy of 400 immigration and asylum caseworkers leaving 6000 clients without legal representation. It was vitally important to maintain a strong regional voice on equality and human rights and to recognise the lead the regions could provide.

Lord Judd noted the fragility of the Northern Ireland peace process and considered that the failure to embed a human rights culture in Northern Ireland could well further undermine the peace process. He thought that the recent renewed violence in Northern Ireland was largely the result of the continued political disenfranchisement.

Lord Dholakia, Deputy Leader of the Liberal Democrats in the House of Lords joined the meeting at this point. He was well briefed on the situation at the EHRC and had discussed these concerns directly with Equalities Minister Jo Swinson. Negotiations over the EHRC's resources and powers were at a delicate stage but pressure was being brought to bear behind the scenes. He would continue his discussions with Ministers including those on the Conservative side. The absence of a replacement local grants programme was one of the issues he would be raising. He reported that Lord Lester QC would lead for the Liberal Democrats in the House of Lords second reading debate on the Enterprise and Regulatory Reform Bill. He thought it may still be possible to secure some changes at the Committee stage, although amendments even if carried in the Lords would most likely be reversed by the House of Commons. However, this was no reason for not making an effort to improve the bill. He recalled the significant stakeholder lobbying that had been involved before securing full agreement on the provisions of the amended Race Relations Act. A similar campaign was needed now, this time aided by increased UN scrutiny. He would lobby for improvements in the EHRC settlement but acknowledged that it would be an uphill struggle.

Questions and comments

David Miller led a local human rights group in Lincolnshire which had received start-up funding from the EHRC. One of the projects he had been working on was a survey of local political attitudes. An

interesting finding was that a number of minority groups would consider voting Conservative, if they sent out the right messages but were currently put off by a perception of hostility.

Paul Mrazek, Vice-Chair of UNA Westminster expressed concern at the loss of the EHRC's local grants programme and the fact that it was not being replaced. The Government Equalities Office claimed that as an alternative, it was supporting Government led equality programmes. He noted that four such projects had been identified so far. It appeared to be a repackaging of programmes that already existed and it was certainly not a grants programme. He considered that the absence of thriving local human rights bodies on the ground would make it much more difficult for the EHRC to monitor and enforce the public sector equality duty.

William Say, UNA Westminster Committee member asked John Wadham whether it was true that the Government Equalities Office had to clear EHRC press releases. He also queried the purpose of employing 100 or so civil servants to 'police' the EHRC.

John Wadham explained that the GEO and the EHRC had agreed to provide each other with advance notice of their press notices as part of a 'no surprises' agreement although there was no compulsion involved. The problem for the Government Equalities Office was that it competed with the EHRC in promoting equality but as the EHRC's sponsoring Department it should have a much more limited role. This, and the fact that it was based in the Home Office, had led to instances where there had been a perceived conflict of interest. The GEO had done some good work particularly around gender equality and sexual orientation but it did not have a Whitehall wide remit. The EHRC did and it was also independent and this set it apart.

Lord Judd thanked the two main speakers and four commentators for their contribution to the meeting. He was glad to see that there was so much common ground and agreement on the way forward.

David Wardrop, Chair of UNA Westminster closed the meeting by suggesting that it may become necessary to reargue the case for the UN Universal Declaration of Human Rights. As in the time of Eleanor Roosevelt, it was essentially a battle for hearts and minds, a debate that equality and human rights campaigners could not afford to lose.