



Select Committee on the Constitution

Corrected oral evidence: Parliamentary scrutiny of treaties

Wednesday 5 December 2018

9.40 am

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Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Dunlop; Lord Judge; Lord MacGregor of Pulham Market; Lord Norton of Louth; Lord Wallace of Tankerness.

Evidence Session No. 4

Heard in Public

Questions 33 - 41

Witness

I: Sir Franklin Berman QC, Barrister with Essex Court Chambers and former Legal Adviser to the Foreign and Commonwealth Office.

Examination of witness

Sir Franklin Berman.

Q33 **The Chairman:** Good morning, Sir Franklin, and welcome to the Committee. We are very pleased that you have been able to adjust the timings. You will understand why we wanted to bring this session forward because of the Brexit debate today. The two things are at times connected, so you are very welcome.

Can we start with a general question? You say in your evidence that relations between Parliament and government could develop, to the benefit of both sides. Can you tell us what benefits you think there would be, and what could be said to convince government of the fact that there are benefits, given the reluctance of successive Governments to move away from keeping powers close to their chest?

Sir Franklin Berman: I should be delighted to try, and I am delighted that I am here. I must say that Southeastern did its best to prevent me from getting here altogether, but, like the Prime Minister, I never give up.

Let me preface my answer by saying that these questions, specifically of treaties—I am not in my evidence talking about areas of governmental power other than foreign policy and treaties—are not susceptible to very easy or simple answers. One of the complicating factors about treaty making in the modern world is that it no longer affects only the Foreign Ministry. In our system it is not just the Foreign and Commonwealth Office but many governmental departments that are involved, in one way or another, in the process of treaty making or treaty implementation.

Let me go back just once, if I may, to my prior experience inside government and the public service. Within the FCO there was a considerable willingness to get Parliament involved in an appropriate way in the treaty process, using that phrase in its most general sense. I could not, of course, speak for other government departments, some of which were rather surprised at the thought that Parliament had a role to play, except in the matter of a statute to implement a treaty or subordinate legislation under statutory powers. But within the FCO there was, and there quite possibly still is, a willingness to find methods of fruitful collaboration with Parliament.

Where the anxieties might creep in is over the thought that a relationship develops that is combative or hostile, and that was not what I had in mind in my evidence at all; it was the opportunity to build up something that could be genuinely collaborative but in which Parliament would respect the position of the Executive, and the Executive would welcome a constructive contribution by Parliament. If one were able to work towards that sort of scheme, the Committee and Parliament would find a ready response from at least that part of government that carries out the co-ordination of treaty making, namely the FCO.

There would be potential returns. One potential return that stays most firmly in my mind is a more flexible, more manageable and more effective

method for ensuring that when national legislation is required to give effect to a treaty, that can be achieved more easily than has very often turned out to be the case in the past.

That was the broad picture that I had in mind when saying what I said in my written evidence.

The Chairman: Would you see Parliament being involved at a very early stage in the actual mandate for negotiations? Do you think that is feasible?

Sir Franklin Berman: I tried in my evidence to sketch out a number of phases of the treaty process. There were five. One was obviously and exclusively for Parliament, which is legislating to give effect to a treaty, where that is necessary. One was purely formal on the international plane.

The others, whether that be the notion of entering into a treaty negotiation or the question of what outcome of the treaty negotiation the Government aim for, the conduct of the negotiation and the approval of the result, are all foreign policy questions, but they are not identical to one another.

I would make a distinction between the first two stages that I referred to. The decision to try to negotiate a treaty with X, whether it is a bilateral treaty or some multilateral treaty, is not the same as what the Government's objectives will be for the outcome of those negotiations. There can be quite a sizeable difference between the two. The first might quite easily be a public act that is susceptible to public discussion. The question of the Government's objectives is not straightforward and in some cases could be very delicate indeed.

Then one comes to the process of treaty negotiation, where I must say that, with great respect, I do not see much room for parliamentary involvement at all, unless the Minister concerned wishes to report to Parliament or has been asked to report to Parliament. But then the Minister's report would be confined to what could reasonably be said in the public sphere, with the hope of getting parliamentary encouragement pursuant to the Government's policy.

The Chairman: That is also a problem between transparency and confidentiality. It cuts across all that.

Sir Franklin Berman: Yes.

Q34 **Baroness Drake:** Staying on that same point about the balance between confidentiality and transparency, I note in your evidence that you say that there is nothing inherently wrong with the current arrangement of the different prerogatives of the Executive and Parliament. What scope, if any, given the nature of the debate that is taking place on the scrutiny of treaties, should there be for Parliament to be involved at the opening of the negotiations and during the process of the negotiation in reaching an agreement?

Sir Franklin Berman: There must be some scope, but it seems pretty plain to me that the scope would vary according to the situation. The treaty negotiations cover an enormously wide spectrum. One point that is not always appreciated by the outside world is that there can be a huge difference between a bilateral treaty negotiation between the United Kingdom and another state, to deal with a particular problem in their relations, and a massive multilateral negotiation under the auspices of the UN or one of the UN's specialised agencies.

In the latter case, the opening of the negotiations would of course be a public fact, and I would have thought that there must be considerable scope, as there no doubt has been in practice, for indication by the responsible Minister to Parliament of what is happening and what the purposes of the negotiation are. Much of that will be in the public domain, because there will have been a debate in the General Assembly of the UN or in whatever other international organisation is convening the conference.

Conversely, if you have a bilateral situation and if the purpose of the negotiation is to settle a long-running, very difficult, highly contentious dispute, even the process of edging towards opening a negotiation can be quite a subtle and delicate question of foreign policy. Sometimes—I can think of cases in my own experience—the process of entering into contact with the other side is not necessarily under the label of setting out to negotiate a treaty. It is a process of contact that might ultimately turn into a closer discussion, in the course of which the parties are not even clear at that stage whether the ultimate objective will be a treaty in the formal sense, or some other kind of understanding or less formal arrangement between them.

Baroness Drake: Who should own the judgment of assessing what the level of parliamentary involvement at the opening of those negotiations should be, given, as you say, that situations will vary according to the nature and scope of the negotiation of a treaty?

Sir Franklin Berman: I do not, I am afraid, have a ready answer. But I entertain some hope that a serious examination of the question, as in this Committee, might lead to the development of a system in which customs and practices begin to develop, for example in the development of the relationship between a government department and the departmental select committee that oversees the activities of that department.

Some departments will lead the way while others will be laggard, but I would hope that one could think of developing a system that would encourage a degree of openness where that was appropriate. But there clearly must be scope for committees to expect the Minister to report to a committee on a particular subject, leaving the Minister scope for deciding just how detailed that reporting can be and when it takes place.

Q35 **Lord Judge:** In your written evidence, you make the point that the 2010 Act was, in your words, a "missed opportunity", which, also in your words, did "nothing useful". What did we miss?

Sir Franklin Berman: When I said the Act did nothing useful, it represented a clearly held view of mine. I was not in the FCO at the time. I meant that all the things that the Act lays down would have been granted voluntarily, certainly by my department in its co-ordinating role in treaty making, as indeed we had been behind many of the developments in the laying of Explanatory Memoranda and their content without statutory intervention before then.

Lord Judge: What was missed?

Sir Franklin Berman: What was missed is this kind of discussion. The only discussion I remember is one that Lord Beith may remember too, some years before; there was a discussion in the Procedure Committee that revealed a considerable willingness on the part of my successors in the FCO to take matters further. But the Procedure Committee, as I recollect, was acutely conscious of the prerogatives, if I can use that word, of individual departmental select committees in their policy areas as against a more general process for handling treaties across the board.

I can only come back to the point I adverted to in answer to the Chairman's opening question, namely that I really would have hankered for a process that made it easier for the Government to seek and obtain statutory authority for the implementation of a treaty in cases in which it was necessary, and I was scarred by the experience of some treaties on which it took decades before parliamentary time was made available. In one particularly notorious case, it was only through the success of a Member of this House in the ballot that a private member's bill was moved, which enabled the United Kingdom to ratify an important pair of international treaties.

It was in that area, but I was also thinking—this may be within your specific field of interest, Lord Judge—of a process that would also make it easier for the courts to handle the effect of treaties within our system without being made to feel that, in the generality of the cases, there is an impenetrable barrier between what the Government do on the international plane and the extent to which that has any effect at all within the internal legal system.

Q36 **Lord Beith:** I want to follow up on an interesting phrase that you used. You questioned whether, within Parliament, the organs necessary to make scrutiny work were really ready for the task. You said, "Past experience suggests that abstract interest in a general system of treaty scrutiny has exceeded any practical enthusiasm for carrying it out". There seems to be a scar there, but do you not think that there is a learning process in which Parliament extends its ability to challenge, question and scrutinise the Executive once the opportunities are created?

Sir Franklin Berman: I would hope so. Indeed, I am glad you picked up that phrase. I thought about it at length before writing it. In truth, there had been moves in the past to set up some more generalised process of treaty scrutiny, and they always seemed to have foundered on the lack of

enthusiasm, from whichever part of the House it was, to take up the burden.

That lack of enthusiasm is likely to be more marked in the lower House than in the House of Lords, and that is why I particularly welcome this inquiry. It seems to be a good locus for a serious examination of the problem. But I also hope that one would embark upon a developing process. What you start with is not going to be what you end up with, as people get used to acting with one another.

Q37 Lord Wallace of Tankerness: You said previously that you thought a specific select committee would be the most appropriate vehicle for scrutiny. I just wonder whether that is still your view or whether it would beat the lethargy problem. If so, how would you see it operating? You also mentioned, perhaps best of all, a joint committee of both Houses. Is that a view you still adhere to?

Sir Franklin Berman: I am not sure that I still adhere to the latter view. I find it quite difficult to answer your question, Lord Wallace, without some idea of the magnitude of the task that we are talking about. Any across-the-board examination would have to begin with a proper analysis of what the burden of treaty making is going to be in the future. I made that point in particular, because if we leave the European Union there is going to be a different pattern of United Kingdom treaty making in the future. In many areas that were previously covered not just by the exclusive competence but by the mixed competence of the EU and the member states, we will be acting on our own. There will be a huge burden of treaty making, as we know from our daily press, to make up for the fact that we are no longer within the trading arrangements of the EU and the EU's network of broader international arrangements.

One needs to have an analysis and it is quite a difficult one, too. From what I have been able to see from a quick look at the figures, the current pattern of national treaty making varies quite a bit, from 25 treaties per annum at the bottom to 50, 60 or even 70 in a given year. They would be treaties of very different levels of complexity.

I had in mind that, if one had a generalised system, it would be quite unreasonable to expect the House, or even committees of the House, to pay attention in the same level of detail to each of them. I had in mind a sifting system that would take treaties that are of particular interest and importance, notably those that are more likely to have an effect inside the United Kingdom, and separate them from others that are purely on the foreign policy level or that might be so technical that they are of no general interest to Parliament at all. It would use that as the fork in the road to determine those that would have a more detailed examination, by whatever process is most appropriate, leaving the others aside.

That, I would have hoped, would reduce the problem to a manageable one and make it easier to decide exactly where the detailed examination of individual treaties would take place. If we were talking about a highly technical multilateral convention on maritime safety, it would clearly be

of minimal interest to the Foreign Affairs Committee and obviously of much greater interest to the Transport Committee, for example.

- Q38 **Lord Dunlop:** Sir Franklin, you have drawn attention to the impact of treaties on devolved legislation or legislation generally, which will include devolved legislation. What role should the devolved Governments and legislatures play in the treaty process after Brexit?

Sir Franklin Berman: You are tempting me onto difficult ground. I am not sure that the kinds of things I think about should have any impact, of themselves, on the devolution settlement. My recollection is vague, but as I recollect, in the Scotland Act, for example, foreign affairs remains a reserved area but the implementation of treaty commitments is not a reserved area, so that falls within the competence of the devolved Administrations. That is the essential framework within which matters would continue.

Beyond that, it becomes a matter for the operation of the concordats, which I assume still exist, between the Westminster Administration and those in Holyrood and elsewhere, to develop a habit of sensible discussion, particularly of treaties that will likely ultimately require some form of implementation within the devolved polities.

Lord Dunlop: One feature is areas of shared competence and agreeing common frameworks. Do you have any views, where there is a clash or an impasse, on the right way to resolve those conflicts?

Sir Franklin Berman: I do not, but I have a recollection of earlier days when I was in the FCO and we were negotiating a very considerable number of maritime delimitation agreements for the division of the continental shelf with our neighbours. Many of those cases directly involved the interests of Scotland. I can certainly remember that within government itself there was a developed process for continued consultation.

I can remember discussions, if I may say so, Lord Judge, in which we consulted the Scottish law officers and the English and Welsh law officers, and we did so jointly. I can equally remember cases—the Lockerbie case is the obvious one—in the International Court of Justice where the Scottish law officers were deeply involved throughout. Within government, those processes are easily manageable. I am not quite sure how that relates outward to the parliamentary scene, where my experience is too limited.

- Q39 **Baroness Corston:** Given that we have been led to understand that the negotiations on international agreements are becoming increasingly transparent, which obviously gives others an opportunity to take part, is this a good idea? What is the scope for greater transparency and what is your view?

Sir Franklin Berman: I am not sure that the proposition is entirely accurate. It is accurate for certain kinds of treaties, particularly for big multinational negotiations taking place on a global scale under the

auspices of an international organisation. An obvious example is the Paris agreement on climate change. I have had my own personal experience in the negotiation of the Statute of the International Criminal Court, for example. There was considerable pressure for a process under which the non-governmental organisations in particular could have some kind of access to the whole treaty making arrangement. It is not always an easy thing to achieve. Those who ran the Paris conference were sometimes overwhelmed by the sheer magnitude of the problem. I can remember something of a similar kind in Rome for the International Criminal Court.

But those are particular kinds of major international conventions. When you get down to other negotiations, and very much when it is a question of bilateral negotiation, the scope may shrink to nothing for outside involvement. You can imagine, can you not, that given some of the discussions that one has seen recently, particularly if the negotiation was a really tricky issue between two states without friendly relations, with quite hostile, competitive relations, where matters of important national sovereignty were at stake.

Once again, as in the whole treaty making area, there is a broad spectrum and you can place a given case at any point on that spectrum. I was always interested—I go back to my experience in Rome—in the opportunity to talk to the non-governmental organisations but on the basis that my negotiating mandate was for me and not for them, and that I took my instructions from the Government. For a difficult negotiation such as that, one was always very chary, as a negotiator, of finding that your scope for reaching a deal at the end should not be unduly inhibited by the special interests of those who simply did not want to swallow part of the deal. The negotiator has to look across the board at everything.

Baroness Corston: Would they have an opportunity to be inhibiting?

Sir Franklin Berman: I do not know. I remember that they were getting at the Government at the time and they were also getting at me in Rome, so perhaps or perhaps not. It is delicate. You find as a negotiator, if you are talking in these big international negotiations, that your interlocutors expect you to be able to keep confidences when you are talking in confidence. If they had the feeling that you were rushing outside the room and talking to outside groups, your chance of achieving a negotiation would diminish rapidly.

Q40 Lord MacGregor of Pulham Market: If there are these inhibitions that you have described, how do the Government allow interest groups and other stakeholders to become more interested in the process of treaty making, and at which point in the process would this be most appropriate?

Sir Franklin Berman: This is a matter of the Government sucking that into the policy-making process, which goes into forming its position for the treaty negotiation itself, and then establishing consultative arrangements as the negotiation goes along. I go back yet again, at the risk of boring you, to the experience in Rome. It may even have been me

who had the idea of having somebody from the British Red Cross as part of my negotiating team, part of my delegation. It had never been done before, but it was a superb opportunity to pull into the negotiating team a degree of knowledge and expertise that we would not necessarily have been able to muster ourselves. But, of course, it had to be on the basis that this person kept it confidential and did not talk to his organisation without leave about things we had been doing inside the negotiation.

I see this as operating at that sort of level. I would hope—perhaps it already happens in areas such as climate change and the environment—that this kind of internal discussion goes not just into the formulation of the Government's policy at the beginning but into taking the key decisions as it moves along. I would hope so.

The Chairman: A confidentiality agreement would be essential in doing that and bringing people in, would it not?

Sir Franklin Berman: Yes. I am thinking not of a formalised written agreement but of an understanding. Politics is full of that kind of thing, is it not?

The Chairman: You could say that.

Q41 **Lord Beith:** Has Miller changed anything, even in perception, of the balance between government and Parliament in respect of treaties?

Sir Franklin Berman: I reread Miller before coming here this morning. The answer is no. I do not believe that the Supreme Court Justices thought of themselves as changing the essentials. In fact, if you reread both the majority judgment and the two dissents, they seem to be very clear-cut and firm, and extremely eloquent reassertions of the essentials. In fact, it would have been extraordinarily risky for the Supreme Court to see itself, in this context, to be changing the fundamentals of treaty making and the relations with statute and Parliament. The essentials are there.

The other thing I read constantly out of Miller is a reminder of how extraordinary and unusual the situation of the European Union treaties is, as one can see from what is happening in Parliament from yesterday until next week. Not only that, but the original European Communities Act and its successors are unique in legislation. I am not aware of any other statute that incorporates a treaty that way. Actually, it does more than that: it incorporates the United Kingdom into a moving treaty system. There is nothing remotely comparable to that situation. Miller does not change the fundamentals, but it illustrates very vividly the point I was trying to make earlier about the huge variety of individual cases and how they situate themselves across a very broad spectrum indeed. One has to be able to look at individual cases or clusters of cases for what they are.

Lord Beith: Is the "meaningful vote", which is being redefined as we go along, a precedent of any kind, or is it, for the reason that you have just given, peculiar to the EU issue?

Sir Franklin Berman: That is quite tricky. If it was simply a question, pre-Miller, of the denunciation and withdrawal from an international treaty, one would look at it rather differently from the current situation, which is not that, because the current situation is that of national approval of a treaty to withdraw from the earlier treaty.

That is not the usual pattern in international relations. In a sense, it has something to say, because we are talking precisely about the subject of this Committee's investigation, treaty approval. But I can only go back to the fact that the case is so special that, while it may suggest some pointers for the future, I do not see it as being a direct precedent for the future.

Lord Beith: If we set aside the European issue, is the thing that has changed the proportion of treaties that are, in effect, commitments to extensive domestic law changes? Under these treaties, as opposed to saying that you will not go to war against each other or that you will play a part in an international system of posts and telegraphs, you are pursuing particular policies on climate change or particular standards in some area or other. All these have big domestic law implications. Would you be looking at treaties differently now that that is the case?

Sir Franklin Berman: It may be so. It is certainly true that treaty making has entered into all kinds of regulatory areas that were not previously covered, or at least not covered in the same detail. But it has been somewhat distorted by the fact that, under the legal system of the European Union, treaties concluded by the Union become part of Union law. As part of Union law, they apply directly in the law of member states and, indeed, take precedence over national law.

If we were outside the Union, we would go back to a more traditional kind of treaty making, and it would be a subject for examination as to whether this changes the overall pattern of the kinds of treaties we make as a state. You are probably right that in practice there are much larger numbers of treaties that end up affecting our domestic legal system, but they may do so only in the smallest of ways. It can, in some cases, be marginal only.

The Chairman: On that last point, on the meaningful vote, you are suggesting that this is a vote for parliamentary approval of a treaty to withdraw. Given the difficulties that Parliament is in this week, is part of the reason for those difficulties the fact that Parliament was not involved in the mandate for the discussions about that withdrawal and setting the parameters?

Sir Franklin Berman: I take with due reserve the idea of the existence of a mandate. I am not sure that what I have read about the course of the discussions suggests that there was a clear-cut mandate.

It is different, is it not? This is one of the illustrations of the difference between treaty making by the European Union and by member states. In the case of the EU, because it is a supranational organisation without its

autonomous powers, it requires a mandate. The Commission must have a clear-cut, defined instruction from the member states as to what it can do. I do not think that national Governments operate in quite the same way, and this is such a tricky area in any case. I would really hate to draw wider conclusions from the quite extraordinary, extra-ordinary and unprecedented situation we are in.

The Chairman: Thank you very much indeed. Your practical experience has been very useful to us and has given us some food for thought. Thank you very much indeed. Again, thank you for being so early.