



HOUSE OF LORDS

Select Committee on the Constitution

Corrected oral evidence: Parliamentary scrutiny of treaties

Wednesday 9 January 2019

11.30 am

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Members present: Baroness Taylor of Bolton (The Chairman); Lord Beith; Baroness Corston; Baroness Drake; Lord Hunt of Wirral; Lord Judge; Lord MacGregor of Pulham Market; Lord Norton of Louth; Lord Pannick.

Evidence Session No. 9

Heard in Public

Questions 79 - 87

Witness

I: Rt Hon Sir Malcolm Rifkind, former Foreign Secretary.

Examination of witness

Rt Hon Sir Malcolm Rifkind.

Q79 The Chairman: Welcome. You heard a little of the last discussion, but not the earlier parts. We want to start off by asking you your general view on Parliament's role, whether it is effective, where it should be going, and the CRaG process and whether that has made a real difference. Give us some general thoughts to start with.

Sir Malcolm Rifkind: Thank you very much indeed. I welcome this opportunity to share some thoughts with the Committee. This Committee knows better than most that, traditionally, foreign policy was seen as the prerogative of the Government and not something that Parliament was expected to involve itself in. There were reasons for that and we do not need to go into them at this particular moment, but it has never been as absolute as the theory implied. Not just in modern times but even in the 19th century, Parliament was occasionally involved.

I was rather surprised to discover that when the British Government decided to transfer Heligoland back to the German Empire in 1890, they made it clear that Parliament would have to give its approval. To that, Parliament gave its approval, but that was not a legal obligation. It was a voluntary decision by the Government of the day, I presume recognising the political benefit of requiring that consent.

We have seen how, in more modern times, the reality of many modern treaties is that they either involve changes to domestic law in order to become effective or require public expenditure to be spent. Indirectly, as a consequence of that, Parliament has power. It is not just theoretical power; it is not just a theoretic involvement. It has real power, and therefore Governments, knowing that, not always but on many occasions, have thought it appropriate to consult with Parliament or the relevant individuals who have an interest in these matters, even while the negotiation is progressing.

The Chairman: That is because of the political benefit rather than any rules or framework of accountability.

Sir Malcolm Rifkind: It is a bit of both, if I may say so. If a treaty involves the need to amend domestic law or public expenditure, the Government have no choice. It is no use agreeing a treaty with another country if Parliament at the end of the day may refuse to produce the necessary legislation. The sensible thing for a Government is to consult during that process to know whether they are going to get into difficulties. That has always been true.

What has changed is, first, the volume of international treaties that have domestic implications. Traditionally, treaties were relations between states—war and peace, exchange of territory and matters of that kind; not entirely, but to a very substantial degree. Now the bulk of treaties are on trade or issues that have domestic implications.

On top of that, there is the change of public expectation. There is now a political expectation, a public expectation, not just of Parliament and not just of lobby groups, but a wider stretch of public opinion that is not willing to automatically assume that somehow, because it is foreign policy, Parliament has no role or relevance.

Q80 Lord Judge: What should Parliament's role be in the examination of a treaty or treaty proposal? Can you give us some idea of the structure that you might have in mind?

Sir Malcolm Rifkind: At the present time, Parliament's role is essentially scrutiny of an agreement that has been reached and, therefore, either exercising that role to demand further debate and discussion or, in certain cases, as I have indicated, using its power to block. An issue that is often raised, and I suspect it is going to be asked later in this session, is whether Parliament should be involved in mandating.

Lord Judge: That is what I am driving at: mandating or knowing what is going on. How should Parliament be involved, if it should be involved at all, before the treaty has been signed?

Sir Malcolm Rifkind: I heard part of the latter exchanges you had with Mr Straw, and one of the questions was about whether there should be a presumption of the sharing of the information if there was no public interest that required otherwise. I am slightly more sympathetic to that than I think he was, but there are pretty severe constraints and we should be under no illusions as to how much information it would be sensible to share outside Government while a negotiation was progressing.

I am slightly influenced by my experience as chairman of the Intelligence and Security Committee, and the way in which public attitudes have changed with regard to the sharing of intelligence issues. As is well known, until relatively recently, we did not even admit they existed, even though the Russians were well aware, as were many other people.

To some degree, the position now in relation to intelligence information, the role of MI6 and MI5 and so forth is that they discuss their affairs unless there is an obvious reason not to, whereas in the past it was exactly the other way round: you did not say a word, even about where your buildings were or who your people were, unless you could not avoid it. If that can be true of intelligence, it is difficult to argue that it should not also be true of foreign policy to some degree, which is inevitably less sensitive than intelligence matters.

Lord Judge: In the context of intelligence, there is a committee, which you chaired. Should there be a committee addressing these issues?

Sir Malcolm Rifkind: I would have thought there was a pretty persuasive argument, because there is no point in Parliament having powers if it does not have the structure, the time or the interest of individual Members to carry out a useful role. Legislators in either House are pretty hard working, and you cannot, on top of everything else,

expect that degree of commitment. The advantage of some committee with a specific function is that those who agree to serve on it would presumably have an interest in devoting a significant part of their time to that.

It is also necessary to take into account what is likely to be the post-Brexit situation, particularly in regard to trade policy. Trade is a sensitive issue. It is an issue on which we have not had to have national scrutiny in the sense that we are discussing today for 43 years. If that is going to become necessary, as is expected, what is needed to deal with that situation is very different.

Q81 Lord Beith: You made the point that treaties used to be about boundaries, not going to war with each other and things of that kind. To a much larger extent now, they operate in areas of domestic policy, with an impact on citizens.

I suggest to you that it goes further than that. The whole politics of some issues—labour standards or environmental standards—has shifted to the treaty-making process, because if you want to achieve something in those spheres, not only is it preferable to do it on an international basis, but you could end up committing your Government to things that they might not have agreed to do unless obliged to do so as part of an international treaty negotiation. Has that not left Parliament behind, failing to exercise influence when really significant decisions are being taken?

Sir Malcolm Rifkind: Most treaties normally talked about the Foreign Office, but as more treaties deal with other issues—trade and regulatory matters—other government departments and other Ministers are more involved. It already happens to a significant degree, but perhaps the degree of consultation should be greater, particularly with the devolved Administrations, where these are not reserved matters, or with other interested outside parties. That should become standard. But there is a crucial difference between consultation and requiring approval, and that is where the most sensitive issues arise.

Lord Beith: No one can expect to require approval other than of a general mandate.

Sir Malcolm Rifkind: I am including a general mandate, for reasons I can explain if the Committee wishes me to.

Lord Beith: The implication of that is that, in your view, it would be unwise for Parliament to have the ability to amend the Government's general mandate for discussions they were embarking on to, let us say, make a trade treaty with the United States.

Sir Malcolm Rifkind: At this very moment in time, we are all conscious of the difficulties that arise if you try to amend a treaty that the Government have agreed with other Governments.

Lord Beith: Amending a mandate is what I am talking about at the

moment, where no treaty yet exists. Let us take trade with the United States. We have to devise a treaty if we have left the EU, and people will have views about the health service, chlorinated chickens or whatever. Should Parliament have some influence on that mandate process?

Sir Malcolm Rifkind: Again, Lord Beith, you are using the term "mandate". Perhaps I should comment on why I am particularly concerned about that. When the Government are involved in a negotiation, they would traditionally work out their own objectives, what they believe to be in the public interest, and seek to advance them.

You mentioned trade treaties. In the case of the European Union, the Commission gets a mandate, not from the European Parliament but, essentially, from European Heads of Government. It needs that relationship. It needs a mandate because the European Commission is an unelected body. It is not an autonomous body and, therefore, it needs a mandate from those who have the responsibility. The Heads of Government, in giving the EU Commission a mandate, do not go back to their own national Parliaments to decide what that mandate should be. That is a responsibility of government, as it would be at the national level.

In the same way, I would suggest the traditional approach, which is that the Government in this country enter into whatever treaty negotiations they think appropriate. I certainly believe they should inform Parliament, and we can discuss, perhaps, the extent to which that could be greater than it has been traditionally. But I do not, for reasons I am very happy to explain, believe that the concept of a mandate from Parliament or from any element within Parliament would be in the public interest.

The Chairman: Do you want to elaborate?

Sir Malcolm Rifkind: I would be happy to do so. It is for reasons of both principle and practicality. As to the reasons of principle, a Government who are known to require, in advance, the approval of Parliament speak with less authority during these negotiations. It reduces the authority of the Government in the negotiations. I can give a specific example. When I was in government, the Danish Government was always in this situation. Even when Ministers had reached agreement on some proposal, the Danish Government had to say, "Yes, we can agree to this, but we can only agree to it subject to going back to our Parliament, and Parliament approving". That seriously impacted upon the authority and credibility of whatever the Danish Government were saying.

It also implies that if you have been given a mandate and you wish to depart from the mandate, in the middle of the negotiation you have to go back and forward to your Parliament to say, "Can we please change the mandate that you have given us?" It is often at the very least inconvenient, to put it mildly, and sometimes entirely impractical, if you hold up the whole European Union process for that purpose.

There are additional practical problems. When we say that Parliament should give a mandate, what do we mean by "Parliament"? Do we mean it will need the agreement of the House of Commons and the House of Lords to provide that mandate? Is that mandate going to be provided by the full House of Commons or House of Lords voting on every treaty that the Government are contemplating negotiating, or is it going to be a committee of the House of Commons or the House of Lords, which is the much more likely scenario?

If it is only a committee of the House of Commons or the House of Lords, is it really necessarily right and in principle that an elected Government should be told their mandate not by a whole Chamber but by a committee of that Chamber, which will not have the experience of the government department, unless we are very fortunate in who makes up that committee at that particular moment in time? In any event, that committee, if it is a normal committee of either House, will meet occasionally in its part-time job of supervising these matters. It is not remotely practical or sensible to try to proceed in that way.

Forgive me for the length of this response. There is one other very major consideration that I would draw attention to. It is highly relevant at this moment in time. The nature of any negotiation involves both sides knowing that, at some stage, they will have to offer compromises. You do not announce these compromises in advance; you keep them in reserve for when and if they are required.

We are very familiar at this very moment with one of the hard examples of the problems that can arise in relation to the Brexit negotiations. We have had no knowledge at all of the compromises that the European Union may be willing to make in the final stages of this negotiation, because it has been under no pressure to disclose any of these possible compromises, for reasons we can all understand. It is not such a huge issue for other national Governments.

In our case, our Parliament, our press and our public have said to the British Government, and they would have said it to any Government, "Yes, this may be what you are seeking to achieve but what are your red lines? What are the compromises you will be prepared to make? What are the ones you will not be prepared to make?" The Government have found it politically impossible. They could have said, "We refuse to tell you. This is a negotiation. It is against the public interest". In reality, the Government have constantly had to reveal, disclose and acknowledge concessions that they have made, are making, are willing to make, or will never make, they say, until they sometimes make them.

All of that has created an asymmetrical negotiation, and people must come to their own judgment as to whether the public interest has benefited from this or, indeed, whether it was avoidable. I am not necessarily criticising what has happened. Such is the importance of the EU issue or the Brexit issue that it would have been unrealistic to believe that the Government could have conducted this as a private negotiation without telling anyone.

But it would be infinitely worse if, at each stage, the Government had had to come to Parliament and say, "Can we please have a mandate to make these compromises or these concessions, or to keep them in reserve? Will you please not tell anyone, but one of the compromises we might be prepared to make is X or Y". It would not work, it would not be kept confidential and the public interest would suffer severely. Although I am using quite strong terms, I do not think I am exaggerating the problem, but no doubt those who feel I am will tell me so.

The Chairman: Thank you. That was interesting.

- Q82 **Lord MacGregor of Pulham Market:** Could I follow this up in the context of the EU? We have received evidence that while the UK has been a member of the EU, it has benefited from the scrutiny of proposed new international agreements carried out by the European Parliament. Does the loss of those scrutiny processes post Brexit require Parliament to create new security mechanisms of its own to replace them? The Foreign Office, in its evidence to us, said that the Government stand ready to "engage in discussions and consider arrangements to strengthen parliamentary scrutiny of treaties within the framework of CRAG", and then rather cunningly added, "should there be the requisite appetite and capacity in each House". You have referred a bit to this.

Can I ask you whether you think it is desirable to have some replacement for the loss of that scrutiny in the European context? In particular, we all know how very busy Members of Parliament and even of the House of Lords are all the time. Do you think Parliament has the appetite and the capacity to deal with that suggestion?

Sir Malcolm Rifkind: I certainly believe it is desirable, if we leave the European Union, to have an appropriate response in terms of parliamentary scrutiny to handle the huge volume of treaty material that has been dealt with through European Union organs, which will become a national responsibility. The single most obvious example is trade, where we have had no responsibility at the national level at all for 40 years, and now we will have exclusive responsibility, and so forth. Yes, it is desirable.

Will Parliament be able to respond to that effectively? As with all such questions, it is a question of how much priority Parliament chooses to give it. There is no shortage of expertise, in either this House or the House of Commons. There are people who either have been Ministers or have an interest in these issues, who can make a very important contribution. It is a question of individual and collective parliamentary choice as to whether this is a priority. My personal hope is that they will see it as a priority and respond accordingly.

- Q83 **Baroness Corston:** You seem to be suggesting that if Parliament played a more active role in the mandating and negotiating phases of the treaty process, from the Government's point of view, as you said, it would be inconvenient and impractical. Is there any stage in the treaty process at which you think that Parliament's input would strengthen the Government's hand?

Sir Malcolm Rifkind: First, I did not say it would be inconvenient. I said it would be very seriously damaging, not just to the Government but to the public interest, because that is the only relevant consideration. I am not arguing against involving Parliament. My concerns have been specific to the question of whether Parliament's approval, in advance, should be required to determine what the Government's negotiating objectives are.

That is a quite separate question from whether it would be wise or unwise of the Government to be much more open with Parliament, insofar as they felt able to do so, with regard to their negotiations and what they seek to achieve. Traditionally, Governments have kept this very much to their chest and have not shared very much information. There is scope for that being substantially greater.

But there is a huge difference between consulting, inviting Parliament to offer views and sharing information with Parliament, and requiring, in advance, its approval. The role of Parliament, in my judgment, is very often to give or withhold its approval once the Government have completed a negotiation. Because the Government know that that approval will be required, in many cases that influences the very way in which the Government are prepared to make compromises and concessions or seek objectives that might be very controversial in Parliament.

Baroness Corston: Is there, in your view, any stage in the treaty process when Parliament's input, and indeed that of civil society, if we are looking at our position now, post Brexit, with trade treaties, would strengthen the Government's hand?

Sir Malcolm Rifkind: It would only work if Parliament was unusually unanimous, and the Government normally have a majority in Parliament. If the Government were able to say, "On this particular issue, the Opposition are as enthusiastic as we are about this objective", that undoubtedly would help. It would only help if it mattered.

From the point of view of other Governments, when we are negotiating with the French or the Germans we are not necessarily that interested as to how big a majority they would get in their Parliament. We want to know whether they would get a majority. As long as they get one, the size of it is their domestic problem, not ours.

Q84 **Baroness Drake:** In response to Lord Beith's questions, you very clearly gave us your view on the executive prerogative in setting the mandate and the complications in the negotiation phase.

Returning to the question of the extent to which a parliamentary committee on treaties would be a useful forum for scrutinising the Government's treaty actions, if you believe it would be useful, what powers and functions could it have in the mandating and negotiating phase?

Sir Malcolm Rifkind: First, I think it would be useful. Whether it should be a Joint Committee or a committee of each House is not for me to offer

a view on. I do not really have a view on that. In terms of what their role should be, of all the various treaties there are, some are very technical and not necessarily of other than limited public interest, although they are really necessary. Others are of profound public interest.

The first function of such a committee should be to have a look at all the treaties but to make its own judgment as to which deserve much greater attention and scrutiny. That is one of the reasons why they are going to be there. That already happens. In a sense, Select Committees and other committees already have to choose their priorities. They do not have the time to devote equal attention to everything that in theory they have a responsibility for. In that sense, it should not be a difficult structure, because it is not going to be that different, I would have thought, from the structure that already exists for other issues.

Baroness Drake: In your view, would the functions that such a committee could discharge vary according to the type of treaty that is being considered—a trade treaty or a security treaty?

Sir Malcolm Rifkind: That is a good question, because if we assume that a substantial chunk of future treaties will be on trade and a substantial chunk will not, ideally you want to have the right people scrutinising the particular treaties you have in mind. There may be a case for some committee or sub-committee purely concerned with trade issues, for example, on which the people who serve had real experience of trade policy and trade negotiations, if you could acquire such people. It is a very specialist skill, which I do not pretend to claim I understand. Such people are available, if they are willing to serve.

Normally, when you think of a Select Committee or a specialist committee, it deals with a finite area of policy: defence, education, taxation or public expenditure. When you are dealing with treaties, you are not dealing with a subject, you are dealing with a series of legal instruments that can cover any or all of these. Therefore, it may be unrealistic to believe that the same people on a particular committee would be equally competent or useful in providing the level or quality of scrutiny that you want to see.

Baroness Drake: You could have a committee that acted as a sifting committee and made suggestions as to which Select Committee or other committee could look at those things.

Sir Malcolm Rifkind: That is right. Many years ago, before I became a Minister, I was a member of the European Scrutiny Committee. In a sense, it was doing that. Everything came before it and it was a first consideration of what might require further deliberation and what did not. It was very boring work, as I recollect.

Baroness Drake: Could you ever entertain a situation where, even on an in-confidence basis, a parliamentary committee could receive quite detailed reports on the delicacy of a set of negotiations?

Sir Malcolm Rifkind: Yes, I could conceive of it, but I am, as you can tell, rather cautious about it. It would depend on why you were doing that. For example, if the Government were negotiating a treaty that, because it involved domestic law or public expenditure, or for some other reason, was going to require Parliament's approval eventually, it might make sense. If I was the Minister doing that negotiation, I might wish to go not necessarily to the whole committee but to the chairman of the committee and, in private, say, "We are going to be making certain compromises or concessions, and this is why we believe this to be in the public interest, but I must ask you to keep that confidential".

Again, I am sorry to go back to my Intelligence Committee experience, but that is what occasionally happened. I remember, on intelligence issues, that the Foreign Secretary or the Home Secretary, and perhaps even the Prime Minister, might occasionally not feel able to share some information with the whole committee because of its sensitivity, but I, as chair, was occasionally asked to have such a discussion. Although my committee did not know the detail, if I came back and said, "The Government are not being unreasonable here. I cannot explain to you entirely why, but they are being reasonable", or "unreasonable", they would accept my judgment on that. It did not happen very often and it should not happen very often, because normally the chair should not be a substitute for the committee. If we are dealing with highly sensitive issues, that might be different.

Q85 **Lord Norton of Louth:** You have already made clear that, when it comes to negotiations, you leave it to negotiators. They should be able to negotiate in private, if necessary, and not have their hands tied. Would there be conditions in which stakeholders, indeed Parliament, might have a role to play or be useful in having some input? Really, the question comes back to this point about transparency: how much transparency should there be in the process?

Sir Malcolm Rifkind: Perhaps it depends on the kind of treaty negotiation we are talking about. If it is a treaty negotiation on a subject that is already in the public domain, if the Government are sensible they will not just wait for but invite stakeholders, NGOs and other interested parties to offer their views, and perhaps should do that considerably more than happens at present. I am not an expert on what happens at the moment, but that is desirable.

Some negotiations are not about matters in the public domain. Mr Straw mentioned his experience with Gibraltar. I had a similar experience when I was Foreign Secretary, when the Argentine Foreign Minister, whom I knew reasonably well, contacted me and said his Government had some very new proposals they wanted us to consider. This was after the Falklands War, in the 1990s. We had a series of meetings, ending up with a weekend at Chevening with the Minister and his colleagues, and me and my colleagues. I had the approval of my Prime Minister. I even had the approval of Lady Thatcher in order to protect my back. Present were not just me but—we had insisted and the Argentinians had agreed to it—

representatives of the Falkland Islands council, who up to then they would not have accepted had any legitimacy in the matter.

Sadly, as in Mr Straw's example, it did not lead to a breakthrough, but it made significant progress in improving the bilateral relationship between our two Governments. None of that leaked or was in the public domain, and it would have been very foolish for it to be in the public domain, because any chance we might have had of seeing some even more substantial progress would have been jeopardised.

Lord Norton of Louth: The key point you are making, distinguishing between those two types, is that ultimately it must be a question for Government as to how transparent it is.

Sir Malcolm Rifkind: This may sound very old fashioned, but sometimes you have to trust the Government. They are an elected Government, after all. They are a Government who are ultimately accountable both to Parliament and to the public, so you have to trust the Prime Minister and Ministers, if not all the time at least most of the time. As long as they have to explain to Parliament what they did, why they did it and why they thought it was right, Parliament can either censure them or agree with them. That, it seems to me, is the proper way the system should operate.

Q86 **Lord Pannick:** Is there, would you agree, a role for a presumption of openness, because it would focus the mind of the Government on whether there really is a need in the particular context to maintain confidentiality?

Sir Malcolm Rifkind: Broadly speaking, I agree with you. I do not have any problem with the concept of a presumption of openness, as long as it is the Government who ultimately determine how far they can go and they do not have to negotiate that.

Lord Pannick: I accept that. Can I ask about one other matter? You have recognised that there could be a greater role for Parliament in relation to treaties and you have explained the limits of that. Would you apply the same principles or similar principles to the devolved legislatures?

Sir Malcolm Rifkind: I think you have to, because the whole principle of devolved government is that although Parliament has not given up its ultimate sovereignty and it can overrule, that is the last thing you wish to do and it will always create a political crisis if you do it. For any treaties that require domestic legislation in the devolved areas, it is not a question of being willing; you have no choice but to discuss with the devolved Administrations what you are doing and why you hope they will be able to give their consent. If they were to indicate in advance their consent would not be forthcoming, the Government would be in quite a serious situation because, if they then ploughed ahead with the treaty in question, they could do that legally but they would have to anticipate a serious political crisis, unless the devolved Administration ultimately changed their mind.

This is the essence of political choices. There is nothing improper about what I have just been saying. That is the essence of politics. Devolved Administrations are as willing as UK Governments to play politics and to make threats or promises that may be less certain than they would imply at first. There is a chemistry involved there, but the short answer to your question is that, yes, they have to be involved and their consent has to be obtained if it involves their legislation.

Q87 Lord Norton of Louth: You heard me put this question to Jack Straw. Once treaties are ratified, they may not have the effect that they were expected to have. Do you see a role for Parliament engaging in post-implementation scrutiny?

Sir Malcolm Rifkind: If it has the time and the willpower to do so, yes, not just post implementation, but there has also been some question about withdrawing from a treaty. There, even more than a new treaty, Parliament should be involved. You are dealing with a situation that is already a public matter. It is already a matter of public policy. If the Government of the day wished to withdraw from a treaty, I can see no reason why, in the public interest, they should not be fully transparent with Parliament as to why they seek to do that. Indeed, Parliament will insist on it, in any event. If it is going to insist on it, it is much better to volunteer.

The Chairman: Sir Malcolm, thank you very much.

Sir Malcolm Rifkind: Not at all.

The Chairman: That has been very interesting. I have to say it was very useful for our purposes, so thank you very much indeed.

Sir Malcolm Rifkind: Thank you very much.