

APPG on the Rule of Law

Meeting Report: The Ministerial Code and International Rule of Law

9 November 2015, 18:00 – 19:30

Committee Room 19, House of Commons

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Format

18:00 – 18:10	The Rt Hon Dominic Grieve QC MP (Chair) Introduction
18:10 – 18:30	Expert speakers Sir Franklin Berman KCMG QC Professor Richard Ekins [unable to attend due to illness] Ms Yasmine Ahmed
18:30 – 19:00	Questions and comment – MPs and Peers
19:00 – 19:30	Questions and comment – open to the floor

Attendance

Host and Chair: The Rt Hon Dominic Grieve QC MP

MPs and Peers: The Lord Judd; The Lord Dubs; The Rt Hon Sir Edward Garnier; The Rt Hon the Lord Anderson of Swansea; The Lord Hodgson of Astley Abbotts CBE; Andy Slaughter MP

Others in attendance included: Christina Dykes; Adam Beazley; Clare Duffy; Murray Hunt; Mr David Anderson QC; Nicole Piche; Ben Stanford; Sir Stanley Burnton; Naina Patel; Shaheed Fatima; Julia Mizen; Rebecca Elvin; Dr Devika Hovell; Dr Tristram Riley-Smith; Sir Jeffrey Jowell; Robert McCorquodale; Xiao Hui Eng; Swee Leng Harris

Meeting Aim

In light of recent debate about the Ministerial Code, the meeting will discuss the rule of law internationally, the importance of the UK's compliance with its international obligations, and how this can be reconciled with the principles of national and parliamentary sovereignty.

The 2010 Ministerial Code stated at paragraph 1.2:

The Ministerial Code should be read alongside the Coalition agreement and the background of the overarching duty on Ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice and to protect the integrity of public life.

The updated 2015 Code states at paragraph 1.2:

The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life.

The Bingham Rule of Law Principles

The eight rule of law principles that were identified by Lord Bingham can be summarised as:

1. The law must be accessible and so far as possible, intelligible, clear & predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;

3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, bone fide civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair; and
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

Presentations

The following paraphrases and summarises the presentations based on notes taken at the meeting, but should not be considered verbatim quotes.

The Rt. Hon Dominic Grieve QC MP explained that unfortunately Professor Richard Ekins could not be part of the panel due to illness. Accordingly, Mr Grieve would set out the key points made by Professor Ekins in Professors Richard Ekins and Guglielmo Verdirame's piece "The Ministerial Code and the Rule of Law" in the U.K. Constitutional Law Blog (6 November 2015) <http://ukconstitutionallaw.org/2015/11/06/richard-ekins-and-guglielmo-verdirame-the-ministerial-code-and-the-rule-of-law/> (hereafter referred to as Professor Ekins' blog) that had been distributed in hard copy to all attending the meeting.

Speaker 1: Sir Franklin Berman KCMG QC, Legal Adviser to the Foreign & Commonwealth Office from 1991-99

Sir Franklin observed that although he is a trustee of the British Institute of International and Comparative Law, his participation in the panel was not in that capacity. Rather, he was there as a former Legal Adviser to the FCO, and as someone who has spent a lifetime trying to understand international law and how it interacts with governmental systems.

Sir Franklin observed that the Ministerial Code had been invested with a significance that it may not deserve as it is not a statute nor legislation. Rather, the Code is a statement from the Prime Minister of his expectations concerning the conduct of his Ministers. The Ministerial Code sits alongside other codes such as the Diplomatic Service Code, which when drafted was envisaged would mirror the Ministerial Code so far as compliance with the law was concerned.

Sir Franklin explained that his objection to the change in the Ministerial Code did not arise from his thinking the Code had a higher status, rather, it was because there had been a change and that change ought to be justified and explained. In some ways, this had been achieved through the Cabinet Office's briefing, and exchanges in the House of Lords, in which Lord Faulks had stated that the amendment does not alter the obligations of Ministers in relation to International Law.

Accordingly, the discussion has moved on to consideration to what is international law, and how do we give effect to it in domestic law. Sir Franklin drew attention to the argument in Professor Ekins' blog that the change to the Code was appropriate because Ministers do not have an obligation to implement international law, governments do. However, this argument fails to take into account that governments are comprised of individuals and act through those individuals. In addition, high ranking individuals can have international law applied directly to them, for example Pinochet was indicted for violations of international treaty norms.

In response to the argument made in support of the change to the Ministerial Code that international law and domestic law are different spheres, Sir Franklin emphasised that the spheres of international law and domestic law interact. International law merges with the domestic sphere when the government undertakes the responsibility to apply their international obligations domestically. Thus, the state is the body through which international law is transmuted into domestic law, and it is appropriate that ministers should act in accordance with international law.

Sir Franklin expressed some sympathy for the use of the word 'comply' in the previous drafting of the Code being regarded as problematic because the use of the word makes it look like a restraint on ministerial action, and hence a constraint on the powers of the Executive. However, it is important to recognise that the state is the hinge through which international law is transmuted into the domestic context. In that context 'comply' took on its full value.

Another of the arguments raised against giving significance to international law is that it is uncertain and lacks a system of courts to enforce it. Sir Franklin rebutted this argument noting that there are areas of domestic law without full compliance, and courts do not enforce the law, other organs do. Furthermore, although there may not be a comprehensive system of courts under international law, there are courts like the International Court of Justice and European Court of Human Rights, as well as the EU courts. Moreover, domestic courts in the UK and elsewhere are called on to interpret and enforce international law.

In conclusion, Britain often uses the argument of complying with international law in its relations with other countries, so cannot, in the domestic context be seen to be evading its obligations of upholding and complying with international law.

Speaker II: Ms. Yasmine Ahmed, Director of Rights Watch (UK)

Rights Watch UK is an NGO that is looking at whether legal action can be taken in relation to the change to the Ministerial Code. Rights Watch monitors UK government action in areas such as counter-terrorism and security.

The change to the Code has greatly concerned Rights Watch, especially in light of recent government action such as the drone attacks in Syria. The status of this use of drones under international law was in question as it is uncertain whether an attack by a non-state actor, as set out in the circumstances, is of sufficient gravity to amount to an armed attack for the purposes of self-defence under international law. If and in so far as any lethal force is authorised in advance, it is unclear whether this satisfies the criterion of the target posing an imminent threat, on which the doctrine of self-defence relies. Furthermore, it is not clear whether the doctrine of self-defence (either individual or collective) under international law, derived from Article 51 of UN Charter or customary international law, permits the use of force against

a non-state armed attack, in particular when the state from where the non-state armed attack was carried out is not involved in the armed attack nor did it consent to force being used on its territory. It is also unclear what legal framework — international humanitarian law or the law enforcement framework as found in international human rights law — is governing the actual force used against individuals and in particular the direct recourse to lethal force (*jus in bello*).

Ms Ahmed observed that although the Ministerial Code is not an Act, it is a document that guides Ministers' actions, and it is important for civil servants to be able to refer to the Code.

To illustrate what the Code has meant and continues to mean, Ms. Ahmed discussed examples drawing from Rights Watch's experience. The speaker pointed to the decision of UK Government Ministers during 1971-72 in Northern Ireland, when the UK Government interned and mistreated the 14 men (known as the 'hooded men') in Northern Ireland using the so-called '5 techniques' (prolonged wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink). In 1978, the European Court of Human Rights ruled that the '5 techniques' did not meet the threshold of torture but fell under the less severe category of inhumane and degrading treatment. Last year it was revealed that the Home Secretary Merlyn Rees had written to the Prime Minister James Callaghan in 1977 explaining that a "political decision" was made to use "methods of torture" in Northern Ireland in 1971/1972. This note had been withheld from the European Court of Human Rights.

This example highlights the importance of having specific reference to international law in the Ministerial Code.

Another example involved an NGO working on child rights that is concerned about the change to the Ministerial Code with regard to possible implications it could have on policy decisions on children because the Convention on the Rights of the Child is key to ensuring that the interests of the child are paramount.

Ms Ahmed referred to Lord Bingham's view of rule of law, the relationship between the Code and international law, and the importance of the Code's including respect for international law. Similarly, Chatham House has referred to the Ministerial Code as important in relation to legality and morality.

Ms Ahmed also made note of the Parliamentary Convention on seeking prior Parliamentary approval to engage in military force abroad with two recently defined exceptions: when there is a critical British national interest at stake or there is the need to act to prevent a humanitarian catastrophe. Ms Ahmed noted that it was important that Ministers were reminded of their obligation to comply with international law even in the circumstances when Parliamentary approval was not a prerequisite.

Further, on the day the Ministerial code was amended, the Attorney General gave a speech in which he observed the importance of international law for government lawyers, and referred in that speech to the Ministerial Code. This raises a question as to whether the Attorney General was consulted regarding the change to the Code.

Ms. Ahmed questioned the intent and effect of the amendment, differing somewhat from Sir Franklin's acceptance of the Cabinet Office's statement that the amendment had no change in the effect of the code. Notably, the Conservative Party's paper Protecting Human Rights in the UK explicitly

referred to amending the Ministerial Code,¹ and Ms Ahmed viewed this as providing the true motivation for the change. Ms Ahmed argued that if the change really meant nothing, then the former wording should be reinstated because the current wording creates uncertainty.

Chair: The Rt Hon Dominic Grieve QC MP

In the absence of Professor Ekins, Mr Grieve broke with the usual role of meeting Chair and summarised for the audience the arguments made by Professor Ekins in his blog.

The piece argues that the old Ministerial Code wrongly implied that ministers have obligations under international law. The old Code risked creating constitutional confusion especially because Lord Bingham stated that it was 'binding', when really Ministers are not bound regarding the UK's international obligations. If such a duty were to exist, it would give rise to possible conflict between domestic legal requirements and international legal requirements.

Furthermore, the piece argues that the 'tone-setting' defence of the old formulation of the Code is misplaced. Rather, the new version of the code corrects the old Code's misleading formulation. There are good democratic reasons to respect parliamentary sovereignty and not give direct domestic effect to international obligations.

The piece also argues that international law is not positive law due to the lack of an enforcement mechanism.

Mr. Grieve then engaged with and gave some responses to the arguments from Ekins' blog.

The Ministerial Code is not law, rather, it is a statement by the Prime Minister on how Ministers should conduct themselves. In this context, the reason for the reference to international law is that it forms part of UK ethics; respect for international law is at the heart of how the government intends to go about itself.

Mr Grieve acknowledged that it is possible for there to be conflicts between international law and domestic law, but it is a misplaced anxiety to think that international law might override domestic law.

If the UK places at the heart of its operations compliance with international law, then given that the government acts through its Ministers it is appropriate that they respect international law.

The duty of Ministers is to try to reconcile international law with the law of the land. It may be that because of parliamentary sovereignty, the two are irreconcilable, but at least attempting to bring domestic law into conformity with international law is better than not attempting to so do, or actively undermining compliance with international law. Where there is compatibility, Ministers should not be thinking about ways to bring in incompatibility. Moreover, if a civil servant was asked to do something incompatible with international law, they may refuse to do it.

¹ *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* states at page 7: "We will amend the Ministerial Code to remove any ambiguity in the current rules about the duty of Ministers to follow the will of Parliament in the UK." Available at https://www.conservatives.com/~/_media/files/downloadable%20Files/human_rights.pdf

Mr Grieve was comforted by Cabinet office explanation, but not convinced that the change to the Code was mere coincidence. Furthermore, looking forward to the proposed British Bill of Rights, the government says it wants to stay within the Council of Europe/European Convention on Human Rights. But taking Ekins' views to their logical conclusion, Parliament might decide to go in a direction inconsistent with international law, and the government might do nothing about it.

Key Points from the Discussion

The following points were raised in discussion at the meeting. The outline below paraphrases and summarises points made, but should not be considered verbatim quotes.

Civil servants and law officers

The change to the Ministerial Code was considered in terms of its effect on interactions between Ministers and civil servants. Ministers do not only act externally, they also act internally within their departments. Ministers cannot order their civil servants to breach international law in light of the Civil Service Code's provision requiring that civil servants comply with the law. Some expressed concern about the position of civil servants, who have the understanding that the law is to be obeyed unless the government changes it.

Similar concerns were raised with regard to the Attorney General, Solicitor General, and Lord Chancellor. The amendment to the Code removed the reference to the administration of justice, as well as international law, which is another concerning change. Notably, the Attorney General and Solicitor General have obligations to uphold administration of justice. Similarly, how can one reconcile the Lord Chancellor's oath with Ministerial Code if there is a conflict between international law and what parliament instructs the Lord Chancellor to do. The response was that surely the Lord Chancellor does what Parliament tells them to do. However, concerns regarding the law officers were less straightforward to resolve, as it was observed that law officers have no power apart from the power to resign.

Parliamentary sovereignty, state institutions, and international law

The argument in support of the change to the Ministerial Code based on the principle of parliamentary sovereignty was criticised as irrelevant because what is being discussed is the Ministerial Code, which is by the Prime Minister for Ministers. There is no coincidence of powers that allows the Code to be amended by Parliament. Parliament is sovereign, but only in certain areas, for example, Parliament could not force the Prime Minister to put the deleted words back into the Code. Furthermore, although there is the principle of parliamentary sovereignty, Parliament may also have constitutional duties.

It was observed that there is a general trend that parliamentarians do not understand the law; and courts and lawyers do not understand politics.

A number of people observed an apparent illiteracy or lack of understanding regarding international law concepts and related principles. In particular, under international law, the state includes Parliament, the Executive and the Judiciary, which of which can breach international law. Moreover, the state cannot escape from having been in breach by arguing that one or another state institution committed the breach – for example the Executive cannot argue that the UK is not in breach because Parliament committed the breach.

A broader question was asked about parliamentary sovereignty as it is referred to in debates around the UK's possible exit from the EU and human rights in the UK. We seem to be in a period in which the simplicity of the doctrine of Parliamentary sovereignty, and UK involvement in International Affairs, is now associated with resistance as if formerly judges knew their place, and international law was only between states and without application within states. From all this, Parliamentary sovereignty is being distorted into an idea that Parliament rules anything it wants to, which is leading to various areas of tension.

International law

The indeterminacy of international law was discussed as a possible motivation for the change to the Ministerial Code. It was highlighted that the current Attorney-General noted in recent speech that the flexibility of international law is a positive thing. Furthermore, lots of things in law are uncertain, hence why we have a law commission. Indeterminacy is not really an answer for the question of why the Code was changed

It was also observed that if international law is indeterminate, states only have themselves to blame. International law is a language: if it is not used, then it is not enriched. States need to use international law in order to enrich it and fill in the details.

Purpose/effect of the change to the Ministerial Code

The purpose and effect of the amendment to the Ministerial Code was much discussed. It was suggested that Prof Ekins' blog contradicts the government's position that nothing has changed, and that the amendment was just simplification of wording. There was also puzzlement at the argument that the Code has been improved/clarified in the new version, instead it was argued that the words were precise as previously drafted and now they are ambiguous.

One question raised was what the government thinks it could do now, that it could not do before.

The removal of the reference to international law was described as a 'softening up exercise' by one speaker, and another took the view that the government does not want to comply with international law. A further view was that the change was designed to create ambivalence where there is inconsistency between international and domestic law, rather than Ministers/the government trying to bring the UK into compliance with International Law.

In searching for the explanation for the change, one parliamentarian considered a number of points. Might the decision on drone strikes in Syria have sparked the change to the Code? Yet, it must be remembered that nothing has changed in international law just because the Ministerial Code has changed. A more likely candidate for the motivation for the change might be the content of the British Bill of Rights, which may draw questions as to the effect of the Bill on membership of the European Convention on Human Rights.

Others agreed that a key motivation appeared to be issues around the ECHR and the Prisoners Voting decision — the UK wants to stay within ECHR, but not have to comply with it.

UK, International Law and International Relations

It was observed that the UK want to 'square the circle' — to be a member of the ECHR, but not comply with judgments of the European Court of Human

Rights. Yet, this is not possible. Furthermore, Russia brings up UK actions and policy on human rights, for example, Russia cites the UK response to the Prisoner Voting case to justify its noncompliance with human rights, arguing that that LGBTI discrimination in Russia is a matter for Russia's parliament, just as prisoner voting is for the UK Parliament.

Similarly, there was criticism of the focus on domestic law's prevailing over international law in cases of inconsistency. This focus was described as distorting the discussion as it fails to pay due regard to the importance of international law, and is a view that is also being picked up by Russia. Russian representatives are focussing on which body of law prevails, and not showing interest in international principles such as human rights obligations. Again, the actions of the UK are being invoked by Russia in these discussions about domestic law prevailing over international law.

A number of people emphasised the importance of international law's standard setting function. One speaker was troubled by why it seems difficult for people to understand that if you want standards that apply to others, you need to comply with the standards yourself. Furthermore, there was appropriate deference paid to the principle of national sovereignty through the principle of the margin of appreciation developed by the European Court of Human Rights.

One parliamentarian expressed his belief in human rights as the path to international stability. While this debate about the Ministerial Code wrestles with the niceties, we are diminishing the struggle to try to achieve a society that believes in human rights, a society that believes in international law, and the struggle to win others over to the cause. If the UK drags its feet on international law and human rights, then we discourage others from following international law and human rights. The change to the Ministerial Code undermines our commitment to international law and standards, when we should be building a consensus.

Speakers' Biographies

(1) Sir Franklin Berman KCMG QC Legal Adviser to the Foreign & Commonwealth Office 1991-99

Sir Franklin (Frank) Berman joined HM Diplomatic Service in 1965 and was the Legal Adviser to the Foreign & Commonwealth Office from 1991-99. For the past 15 years he has been in practice in Essex Court Chambers specializing in international arbitration and advisory work in international law. He is Visiting Professor of International Law at Oxford and the University of Cape Town. Sir Frank is a Member of the Permanent Court of Arbitration, and has served as Judge ad hoc on the International Court of Justice in the Case concerning Certain Property (Liechtenstein v. Germany) and was appointed by the Lord Chief Justice as the Legal Member of the Court of Arbitration in the Kishenganga dispute between Pakistan and India under the Indus Waters Treaty.

(2) Professor Richard Ekins St John's College, Oxford; Director of the Judicial Power Project at Policy Exchange

Professor Richard Ekins is a Tutorial Fellow in Law at St John's College and an Associate Professor in the University of Oxford. He holds a fractional appointment at the TC Beirne School of Law at the University of Queensland and is leading Policy Exchange's new Judicial Power Project. He received his

BA, LLB (Hons) and BA (Hons) degrees from The University of Auckland, before going on to read for the BCL, MPhil and DPhil at Oxford. He has worked as a Judge's Clerk at the High Court of New Zealand at Auckland, and a Lecturer at Balliol College, and was a Senior Lecturer in Law at the University of Auckland before moving (back) to Oxford in 2012. His research interests are in constitutional law and theory and in political and legal philosophy, with a particular focus on the exercise of legislative authority. He has published widely in leading scholarly journals and his books include *The Nature of Legislative Intent* (OUP, 2012) and the edited volumes *Modern Challenges to the Rule of Law* (LexisNexis, 2011) and *Lord Sumption and the Limits of the Law* (Hart, 2016, forthcoming; with Nick Barber and Paul Yowell).

**(3) Ms Yasmine Ahmed
Director, Rights Watch (UK)**

Yasmine has been Director of Rights Watch (UK) since April 2014. She brings a wealth of experience from working in civil society, government, the UN and academia. Yasmine has worked as a public international lawyer for the UK and Australian Governments and the UN. She worked as an Assistant Legal Adviser at the UK Foreign and Commonwealth Office, a Legal Officer at the Office of International Law, Australian Attorney-General's Department and a law clerk at the International Criminal Tribunal for the former Yugoslavia and the Serious Crimes Unit in Timor-Leste. She is a Chevening Scholar, has an LLM in Public International Law from the School of Oriental and African Studies (SOAS) and has taught public international law at SOAS and the University of Adelaide, South Australia.

Further Resources

We are aware of the existence of the following materials on the topic of the meeting, which we set out below by way of further information only.

1. Professors Richard Ekins and Guglielmo Verdirame, "The Ministerial Code and the Rule of Law" U.K. Const. L. Blog (6 November 2015) <http://ukconstitutionallaw.org/2015/11/06/richard-ekins-and-guglielmo-verdirame-the-ministerial-code-and-the-rule-of-law/>
2. Professor John Finnis, "Ministers, International Law, and the Rule of Law" Policy Exchange (2 November 2015) <http://www.policyexchange.org.uk/media-centre/blogs/category/item/ministers-international-law-and-the-rule-of-law>
3. Andy Slaughter, "Why has the government taken international law out of the Ministerial Code?" New Statesman (30 October 2015) <http://www.newstatesman.com/politics/staggers/2015/10/why-has-government-taken-international-law-out-ministerial-code>
4. Josh Halliday, "Dominic Grieve: PM shouldn't have changed ministerial code" The Guardian (28 October 2015) <http://www.theguardian.com/law/2015/oct/28/dominic-grieve-pm-shouldnt-have-changed-ministerial-code>
5. Professor Mark Elliott, "The Ministerial Code and International Law" (26 October 2015) <http://publiclawforeveryone.com/2015/10/26/the-ministerial-code-and-international-law/>

6. David Allen Green “Why the reference to ‘international law’ in the UK’s Ministerial Code matters” Financial Times Blog (26 October 2015) <http://blogs.ft.com/david-allen-green/2015/10/26/why-the-reference-to-international-law-in-the-uks-ministerial-code-matters/>
7. Sir Franklin Berman KCMG QC and Sir Paul Christopher Jenkins KCB QC (Hon), Letters in The Guardian (25 October 2015) http://www.theguardian.com/law/2015/oct/25/international-law-and-the-ministerial-code?CMP=share_btn_tw
8. House of Commons Library, *Briefing Paper Number 03750: The Ministerial Code and the Independent Adviser on Ministers' Interests* (21 October 2015), available for download at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03750#fullreport>