

Fundamental Rights Agency (EUC Report)

Thursday 8 June 2006, 4.31 pm

Lord Brown of Eaton-under-Heywood rose to move, That this House takes note of the Report of the European Union Committee on Human Rights Protection in Europe: The Fundamental Rights Agency (29th Report, HL Paper 155).

The noble Lord said: My Lords, it would not be altogether surprising if this proposal for a new EU fundamental rights agency were to be received with some scepticism. At the moment, human rights generally are getting a poor press. Undeservedly so in my opinion, but it is so. Fundamental rights, which, in the absence of a constitutional treaty, lack the force of law, are treated warily by many, and the idea of yet another EU agency—indeed two new agencies as will be immediately apparent from the scope of this debate—is unlikely to be greeted with universal enthusiasm.

I shall return later to the question of whether there should be two new agencies, rather than one—a question that I suspect other speakers will also address—but first let me indicate briefly why, taken as a whole, the EU Committee—and not least Sub-Committee E, of which I have the honour to be chairman—extends a cautious welcome to the proposed new agency. I say "a cautious welcome" because for this new agency to be worth while and successful a number of conditions must be satisfied. Among them are that the agency must be more than merely a postbox for collating and sorting information coming from other agencies; it must have power to seek out information for itself; it must be competent to act in relevant areas, not least, as I shall suggest, in third pillar matters where fundamental rights questions often arise; it must be independent rather than subject to excessive control by the Commission or the Council; and it must avoid the risk of duplicating rather than complementing the work of the Council of Europe, which is the pre-eminent body in the human rights field.

Let me come at once to some of the concerns about this proposal that are highlighted in the committee's report, particularly about the scope of the agency's work. I fear that I have time to comment only on two or three of them. The first is the very important question of whether the agency should have a third pillar remit. The third pillar, let us remind ourselves, is concerned with police and judicial co-operation in criminal matters. The committee feels strongly that the agency should have that remit. Third pillar proposals regularly engage fundamental rights; for example, measures such as the European arrest warrant and the exchange of personal data in criminal investigations. The committee thinks that it would be odd and unsatisfactory not to empower the agency to operate in those areas. We understand that both the European Commission and the Parliament support us in this view. Certainly, in June of last year, when the Commission adopted the proposal for a regulation establishing the new agency, it adopted at the same time a decision empowering it to act in third pillar matters.

We understand that the Commission found our report particularly convincing on this point. The European Parliament too strongly supports a third pillar remit. Indeed, the LIBE Committee, the Parliament's committee on civil liberties, justice and home affairs, in a draft report this year, suggested that the agency should be empowered not merely in third pillar matters but in second pillar matters too; that is to say, with

regard to common foreign and security policy matters. We do not go that far, but we certainly urge a third pillar role for the agency.

However, the Government are opposed to this and appear to question both the legal base for it and the value of empowering the agency to operate in this area. We are rather puzzled by those objections. Certainly, neither of them was raised in the Government's original letter clarifying their approach to the proposal before we embarked on our inquiry. If, as the Government now say, Article 308 of the Community treaty allows for the establishment of the agency, providing the Council as it does with the means to attain the objectives of the Community if the treaty has not itself provided the necessary powers, it is difficult to see how Article 6 of the Union treaty and Title 6 of the Union treaty, which provides for common co-operative action under the third pillar, could fail to constitute a sufficient legal base for the protection of fundamental rights there too. After all, the main treaty provision which requires respect for fundamental rights is Article 6(2) of the Union treaty, which provides:

"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

Article 6(4) provides:

"The Union shall provide itself with the means necessary to attain its objectives and carry through its policies".

Surely, empowering the fundamental rights agency to act in third pillar matters would be an obvious case of the Union providing itself with the means necessary to attain its objective of respecting fundamental rights as required by Article 6(2).

As for the value which the agency would bring to consideration of third pillar matters, we believe that there is a clear role for a body expert in EU law to advise on compliance with fundamental rights at both the legislative and the implementation stages. Although the Government's original response to our report was that the agency would simply duplicate existing human rights monitoring, which is effectively carried out by the Council of Europe and other international bodies, we are glad to note from the Minister's latest letter to the committee that it is now apparently acknowledged that advice on compliance with fundamental rights in third pillar matters might, indeed, be helpful. In this connection perhaps I may say how enormously grateful we are to the Minister for providing a response last week to our discussions on all this in time for today's debate. Alas, the Government it appears are not alone in opposing a third pillar. Apparently they are joined by Slovakia and Germany.

The second important question arising about the scope of the agency's remit is whether it should have a legislative scrutiny role. Article 4(2) of the original draft regulation said, in terms, that the agency's opinions should not extend to questions of the legality of proposals from the Commission or the positions taken by the institutions in the course of legislative procedures. We thought that that was a pity and that the agency could play a valuable scrutiny role. It seemed to us unsatisfactory to have an agency that could intervene only after the adoption of a proposal, even when it was evident that the proposal raised serious human rights issues. Again, it appears

that the Government took a different view and thought that the agency should not play any such role.

Happily, the European Parliament shared our view. The LIBE Committee's most recent report proposed that the regulation should provide for pre-legislative scrutiny and we are glad to note that Article 4(2) of the proposed regulation has now been amended by the presidency to allow for some such limited role. At the request of the European Parliament, the Commission or the Council, the agency will be permitted to formulate opinions on specific topics concerning Commission legislative proposals.

My third and final question concerning the scope of the agency's work is whether to include in the text of the regulation express reference to the European Convention on Human Rights or the Charter of Fundamental Rights. Article 3(2) as originally drafted—on which we originally reported—stated that,

"the agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union and as set out in particular in the Charter of Fundamental Rights of the European Union as proclaimed on 7 December 2000".

I have already cited Article 6(2), which expressly refers to the convention. Our report suggests that the agency should use the charter as the principal point of reference, but it would be impossible to monitor fundamental rights across the Union without reference to the convention, which is, of course, the seminal instrument in the field—so the convention should be expressly mentioned in the text.

The Government agree that the agency should refer to the charter as an important political declaration that reaffirms rights already agreed by member states in previous treaties, including the ECHR but, because the charter is not legally binding, to avoid confusion, as they put it, the Government want to remove mention of the charter from the body of the regulation and place it in the recitals. In other words, far from adding reference to the convention in the text of the regulation, as we advocate, the Government want to remove reference in the text even to the charter.

We note from the new presidency text of the regulation that Article 3(2) has been amended not merely to retain its reference to the charter but also to include reference to the convention. It is true that neither the convention nor the charter have formal legal force binding on European institutions. The convention does not because, although all member states are signatories, the EU itself has yet to accede to the convention although for many years that has been advocated, most recently by the Juncker committee, chaired by the President of Luxembourg. The charter does not have legal force because it has not been incorporated into European law, but the charter puts flesh on the bones of Article 6(2). It identifies what it refers to as the constitutional traditions common to member states.

The question is whether there should now be a new European institute for gender equality as well as a new fundamental rights agency. This is discussed in chapter 4 of our report under the simple title, "One Body or Two?" Initially, the question was considered by Sub-Committee G under the chairmanship of the noble Baroness, Lady Thomas of Walliswood. It concluded that the case for a separate body had not been demonstrated, but suggested that Sub-Committee E should consider the question again in the context of our inquiry into the fundamental rights agency. We, too,

concluded that so far from there being any justification for creating a separate gender institute, there would in fact be positive advantages in having a single body to cover human rights and all equality strands. After all, in the domestic context, the Government have recently supported the establishment of a single new body, the Commission for Equality and Human Rights, to incorporate all the existing bodies—the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission—as well as tackling other forms of discrimination.

The fundamental rights agency is intended to incorporate the nine year-old European Monitoring Centre on Racism and Xenophobia. One might ask whether it is inconsistent to absorb that body's work within a larger human rights agency, yet at the same time establish a separate body to deal with gender equality. Is gender equality really more important than racial discrimination? We found no convincing argument for two bodies rather than one. We do not accept that gender rights would be marginalised by the creation of one body, and we regret the proliferation of EU agencies and the loss of the economies of scale that would result from one body rather than two. It may seem as though the political die has been cast so far as that issue is concerned. It is to be hoped, however, that our report may contribute to other battles that may be won.

In presenting this report, I am all too conscious of the many, many issues raised by the proposal, with which our report deals and on which it is impossible to touch. I hope other members of the committee will make other important points, and that the noble Lord, Lord Norton of Louth, will speak on the agency's independence, particularly in the context of its management structures. I also await with interest the views of the noble Baroness, Lady Thomas, on the related question of the gender institute, and I greatly look forward to the Minister's response on at least some of the points that we have made.

[...]

5.55 pm

The Parliamentary Under-Secretary of State, Department for Constitutional Affairs (Baroness Ashton of Upholland): My Lords, I congratulate the noble and learned Lord, Lord Brown of Eaton-under-Heywood, on introducing the debate. I have looked forward to it because, as the noble and learned Lord knows, I spent a large amount of my time in work in the European Union on this issue. Indeed, I remember with great affection appearing before the noble and learned Lord's committee for what I thought was going to be 45 minutes which, I think, turned into two and a half hours—a very enjoyable two and a half hours. I am grateful to the noble and learned Lord for bringing this matter forward. Although he began by saying that human rights may have a poor press, I hope that your Lordships' House can agree that human rights are fundamental to the way in which we wish to live in our society and of which we should be extraordinarily proud in terms of the Human Rights Act.

The noble Lord, Lord Howard of Rising, quite rightly indicated that the fundamental rights agency and the gender equality institute have been the subject of criticism. The difficulty in working with the European Parliament, the Council of Ministers and, indeed, with your Lordships' House is that criticisms vary. We have either gone too far, not far enough or we should have had two institutes or one. We need to consider carefully whether in both cases we have organisations worthy of funding and whether we give them power in the third pillar. There are as many views as there are Members of your Lordships' House. That is one of the interesting and enjoyable parts of trying to discover what the UK position should be.

The noble Lord, Lord Lester, set me off on my Hans Christian Andersen days which, for me, will always be Danny Kaye. Noble Lords who remember the film will know that there is a great song in it which begins, "The king is in the altogether", which will be with me for the rest of this debate. I love the idea of the noble Lord, Lord Lester, being the little child in that context. I am not sure I quite agree with the analogy but, none the less, it is important. I understand the point he is trying to make with the fairy-tale that he so kindly gave us today.

I want to start by saying a couple of things about how we work in the European Union in the context of this dossier. Noble Lords will know that this is an important dossier in that it is a unanimity dossier within the Council of Ministers. The European Parliament has played a very important role in deliberating on how the fundamental rights agency, which I know best in this context, should work. I pay tribute to Kinga Gál, a rapporteur in the LIBE Committee in the European Parliament, who sought to try to bring together disparate views in the European Parliament as well as to formulate sensible propositions. Noble Lords may know that the commissioner for justice and home affairs issues, Franco Frattini, has been very keen to see the fundamental rights agency as part of the balancing between the work we have to do in order to tackle issues of serious and organised crime and terrorism on the one hand, which lead to our need to share information and to think strategically across the 25 nations about how we deal with those issues, and to ensure that people's fundamental rights are not disturbed by having the agency. So, he would always describe it as part of the balancing act that he is trying to maintain on these issues.

It is worth saying that the UK also has a balancing act to perform, which is to recognise issues where we simply do not have a view that is recognised by other

nation states, either with the gender institute through qualified majority voting or through the fundamental rights agency, even where we might be quite isolated, although, because of the unanimity nature of the dossier, in a stronger position.

In our work in the European Union we always have to consider very carefully which issues we feel it is right to press. So I agree with a huge amount of what was said and accept entirely some of the criticisms raised. I hope that in the comments I make noble Lords will perhaps understand better why we have not pushed particular issues which, from the point of view of either the committee or individuals, may seem to be fundamental and where on other issues we felt strongly that the UK should have a strong position.

The noble and learned Lord, Lord Brown, raised the issue of the third pillar in the fundamental rights agency. I confirm to the noble Lord, Lord Howard of Rising, who quite rightly asked about the legal base on these issues, that there is now consensus among member states to use Article 308 of the treaty establishing the European Community as the legal base for the regulation that establishes the agency. There was a lot of deliberation about the legal base for the agency. When Commissioner Frattini was thinking about involving the European Parliament, he thought about using the legal base in Article 13(2), but discovered that would have affected the work that the agency could do. He therefore decided against it and rather considered how best the Parliament could be involved consultatively. The noble Lord, Lord Howard of Rising, was right to raise the fact that there was quite a lot of discussion about how best we might take that forward.

We had to consider the legal basis for third pillar involvement. We were clear that the third pillar remit does not exist. We understand that the equivalent of Article 308 is absolutely clear that there is no basis for third pillar involvement. We are joined in our opposition to that by Germany, Slovakia, Ireland, Malta and Cyprus. Indeed, the working group met this week to consider those issues yet again.

I want to make clear that just because we do not have the third pillar remit—and feel strongly that they should not be a third pillar remit because there is no legal basis for it—does not mean that we feel that police and judicial co-operation in criminal matters should have no scrutiny. Far from it. As noble Lords will know, that has been part of our dialogue with the Council of Europe. The Council of Europe has what I consider to be quite effective mechanisms to consider such matters. Of course, we always retain our national law.

We are very clear and are joined by other nations in the view that there is no legal basis on which the agency can have a role in the third pillar. That remains a key part of our strategy that we shall pursue in the final discussions on the question of the role of the fundamental rights agency. In that sense, that is not a political decision.

Lord Lester of Herne Hill: My Lords, if the Prime Minister cannot have the third pillar, which is the one that deals with terrorism, crime, privacy and such matters and if the answer is that the Council of Europe or national governments can do that, that hole cannot be filled by the fundamental rights agency. Is that not an appalling gap in the system that the EU says that it needs to balance security, on the one hand and liberty, on the other?

Baroness Ashton of Upholland: No, my Lords, I do not believe that it is. I want to make progress, but I hope to address that question more fully. One big question in trying to work out what is the role of the fundamental human rights agency has been its relationship with nation states and the Council of Europe. Looking at the basis on which it is to be established, it does not have a third pillar remit as far as we and the other member states that I mentioned are concerned. That does not mean that those things are not covered in the work that we are doing. It does not mean that the agency does not have a role to play. It may not be the role that the noble Lord would want it to have; I accept that, but that does not mean that it does not have a role.

That is the other balancing act to which I have been alluding. For some noble Lords, some member states and some Members of the European Parliament, such things are fundamental to how the agency can deliver and its purpose. For others, they are not. On balance, the UK Government's view is that there is a role for a fundamental rights agency. It is not the role that the noble Lord would want, but there is a role. Who knows, if an agency can prove its worth, it may do other things. One big debate in the LIBE Committee when I attended was about ensuring that the agency we set up is not only fit for purpose—something about which my noble friend Lord Brennan feels very strongly—but has the capacity to do what we want it to do. We have a lot of sympathy about what has been said about the management structure. We need to give it a sensible series of things to do so that it can achieve, be successful and develop. One thing that I have learnt about working in the European Union is that you have to start from one place and build to where you want to get to. You have to do it in stages; you cannot always get there all in one go, although I understand the frustration of the noble Lord that we cannot do that.

The second point about which the noble and learned Lord, Lord Brown, in particular, was concerned was the charter and the relationship between that and what is proposed. He asked whether we have reference to the charter in the body of the regulation or in the recital. Noble Lords will know that the charter was to have been part 2 of the constitutional treaty, which would have given it some kind of legal force, subject to lots of official explanations that were going to be mentioned specifically in the treaty. As we do not have a treaty, of course, it is only a political declaration at this point. We do not believe that it is right to anticipate what might happen in any future treaty negotiations by implying that the charter has any status as a legal document, so we have made it very clear that we believe that it should be moved into the recitals to the regulation, and that that will be the appropriate place for it.

I have to say that that view is not shared with our colleagues in the European Union, but we certainly feel very strongly about it across government. Indeed, this week, we considered the issue again at the appropriate committee in government. It was described as a showcase in my letter to the noble Lord, Lord Grenfell, at the beginning of our discussions on the fundamental rights agency, and that is what we believe the charter should be. We have been putting out those very clear and strong signals and messages about the third pillar and the appropriate place at which to refer to the charter throughout our discussions with colleagues across the European Union.

It is also very clear, as I have said, that we need to be certain about the relationship between the fundamental rights agency and the Council of Europe. The noble and learned Lord, Lord Brown, referred to that. The noble Lord, Lord Howard of Rising, talked about being clear about the role of other organisations, and I agree that one of

the most difficult and passionate debates has been how we ensure that the Council of Europe and the fundamental rights agency work effectively together but do not duplicate or overlap. There seems to be consensus now among member states on the need to ensure that a person appointed by the Council of Europe is on the management board and the executive board of the agency, and we hope that they will be able to work together to ensure that we do not have duplication, which, as I am sure the noble Lord, Lord Brennan, would agree would be a waste of resources and time.

The noble Lord, Lord Norton of Louth, in particular asked about the management board and its independence. We have moved away from representatives on the board to independent persons, as the noble Lord knows.

Negotiations are obviously still in progress, but it looks as if most member states are in favour of ensuring that the European Parliament will be consulted on the agency's multi-annual framework, and will have a greater role than originally anticipated in the appointment of the director.

I have been so strong in saying that the fundamental rights agency should put its multi-annual framework report and, more to the point, its work programme before the Council of Ministers rather than the Commission because I do not want the agency to be sidelined or ignored, which would waste resources. The best way of avoiding that is if the agency presents what it is going to do to the Council of Ministers, which would have to take note of it and be aware of what it was doing. It would probably have a greater chance of being understood, recognised for the work that it could do and resourced effectively if the Council took a view about it. Although that is a different view from those of other member states, I have been arguing that position for some considerable time. If we are going to make this work, let us make it work properly and ensure that the Council of Ministers actually takes it seriously. There will be different views of how to achieve that, but that is my personal view about what we ought to be doing.

I shall now talk about the management structures and, in so doing, speak about the gender institute as well, because there are differences in the way in which the two management boards are being set up. The fundamental rights agency has independent persons on the management board, and the gender institute has representatives of member states. The fundamental rights agency has two Commission members on the board, and the gender institute has three Commission members. There is also a wonderful thing called a scientific committee, which is for the fundamental rights agency and which I think formed the basis of a French proposal some time ago.

We have tried to ensure that the management board and the structure of the fundamental rights agency and the gender institute do two things. One is to enable people to feel properly involved. I accept what the noble Baroness, Lady Thomas of Walliswood, said about the need to think carefully about 25 states rising to 27, and about how on earth everyone will be represented in reality. My preference is always for smaller management boards, but there is always the need, particularly when setting up anything new—this is pertinent not only to the European Union; it applies everywhere—for people to feel involved and, by their involvement, bound into the work of the organisation.

We are a bit trapped in that whole dilemma. We want everyone to take this seriously. The recognition of taking it seriously is people being part of the management structure. I again hope that the management structure will change over time as people get used to it. I do not know of any formal plans—if I find them, I will certainly write to the noble Baroness, Lady Thomas—on how much further the UK Government can go in pushing to see how we can best work towards moving from 25 or 27 member states being represented on everything to a more sensible approach, if I can describe it as that.

Again I pay tribute to Kinga Gál, who I know has spent a huge amount of time on this. At least there is some progress in thinking about how we involve people from member states, make sure that this organisation has the support that it needs from outside and is able to operate. The last thing that we want, by creating a management structure that is unwieldy, is to prevent people with great calibre from applying to become part of the agency, which would be a huge problem.

We have said that we support setting up the European institute for gender equality. We hope that its purpose will be to raise the profile of gender equality across Europe and to get a much more coherent approach to obtaining information and gathering research. One of the roles for both agencies will be to make sure that we understand better what is happening across the European Union. We do not really have the ability to bring information together and do a compare-and-contrast exercise, which would be enormously helpful. It is very important that the gender equality institute is effective and efficient, and does not duplicate what is done in other parts of the European Union.

The different views are interesting. My noble friend Lord Harrison took a different view from that taken by other noble Lords who talked about the need to merge the two bodies. My noble friend was keen to see them separate. We on the government Benches disagree with colleagues in your Lordships' House on that. I take and understand what my noble friend said. I agree with him that other countries have very different experiences. But the noble Lord, Lord Lester, and other noble Lords are right. In our country, we have moved towards bringing together those issues into the Commission for Equality and Human Rights. As I think was said to me in the committee, it looks rather odd that the Government are in a different place on this.

In part, we are back to the pragmatism of the UK position. As noble Lords will know, I do not deal with this dossier in the European Union. But the rest of our European Union colleagues are very keen to see a separate gender institute. I suspect that that is in part exactly because of the point raised by my noble friend about their different experiences. The issue is subject to qualified majority voting, so the UK does not have the ability to alter this very much. While I cannot speak for my colleagues who have dealt with this, if I were the Minister responsible, my view would be that you have to decide on which issues you have a chance of being successful and on which issues you push. I was very clear with the committee that I also think that, when these two organisations are developed, there may well be a value in first making sure that they can operate and do their work and then looking to the future eventually to see whether we could bring them together.

As I said earlier, the basis on which the gender institute is established is Article 13(2). That is on a different basis from Article 308, the fundamental rights agency, which

has different things to do. If we should think about bringing them together, we would have to reopen all the earlier negotiations on the legal base, which is not something on which we would be successful. Equally, that could delay either of them coming into being, which I am not sure would be appropriate.

We have argued for close collaboration and co-operation between the two bodies. The director of the institute for gender equality will attend the fundamental rights agency management board as an observer. We expect the officials to work closely. In answer to the question asked by the noble Baroness, Lady Thomas, about the future, it may be appropriate that these organisations become one. On whether they will be co-located, the noble Lord, Lord Lester, is right. Many countries wish to demonstrate—the noble Lord put it in a rather negative way, but it is a positive not a negative—that they are part of the European Union by wanting to host institutions of the European Union. I have no idea where the gender issue will end up. We certainly think that they ought to be collaborative, but who knows?

I have tried to cover as many points as possible and I apologise for any that I have missed. As always, I shall write to noble Lords about anything that I think should have been added. I hope that noble Lords know that I am always happy to return to the committee, to whose members I pay tribute for their work, or to your Lordships' House to consider this further as we develop our work.

In conclusion, as the noble Lord opposite pointed out, anti-discrimination issues are very important and there are many areas in which we are in agreement. We are merely arguing about the means to the end. Noble Lords know that we have tried to approach this in a pragmatic and practical way so as to end up with something that is worth having and worth putting resources into so that it can achieve what we seek for the future.

Lord Brown of Eaton-under-Heywood: My Lords, as the noble Lord, Lord Norton, observed, the central task of the EU Committee and its sub-committees is to scrutinise and where appropriate criticise proposed European legislation. Our reports aim to focus the discussion and on occasion perhaps influence the outcome of these proposals. Often our views and criticisms coincide with those of the Government, but sometimes they do not. Today's debate perhaps inevitably has focused largely on issues where there are differences between us, but that surely is no bad thing. I hope it will clarify everyone's thinking on the important questions still remaining and that that will benefit the evolution of both these proposals, which have yet to come to fruition.

I have to say that it is tempting to respond in detail to some of the points raised in your Lordships' speeches, but I know it is a temptation to be resisted or we shall be here all night. I thank all noble Lords for their contribution to this debate, and by no means least the noble Baroness who has spoken on behalf of the Government, who with characteristic helpfulness sought to address so many of the questions raised. I, too, recall with pleasure the extended evidence session that we had with her.

Finally, for me this has been a most interesting occasion. As the House knows, Law Lords are an endangered species shortly to become extinct. I count myself fortunate to have been permitted to present one of the reports to the House this evening.

On Question, Motion agreed to.

The full Hansard transcript of this debate can be found via:

http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60608-21.htm#60608-21_head0