

UK ELECTION AND THE HUMAN RIGHTS ACT

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The unusual result of the recent British general election appears to have saved the country's Human Rights Act from immediate extinction. The Conservative Party was expected to secure an overall majority in the lower house and had been clear about its intention to repeal the Act if elected into government. Passed in 1998 at the very start of Labour's long tenure in office, the measure requires legislation to be compatible with the European Convention on Human Rights and equips the courts to engage in very imaginative interpretation to achieve this end. But it does not allow the judges to strike down laws on the model of the US constitution or any of the many analogous European systems – instead the courts may issue 'declarations of incompatibility' in respect of such laws: these are unenforceable, requiring only that the other branches of government consider whether to bring the challenged law into line with human rights. So it goes much further than the Rudd administration had suggested for Australia in its human rights statement earlier this year – but at the same time not nearly as far as fully-fledged constitutional rights systems like those of the US and Ireland.

The intention behind the British approach was to achieve a compromise between the tradition of UK parliamentary sovereignty and the current vogue for the infiltration of enforceable human rights standards into democratic culture. It has worked fairly well on the whole, with the judges being pretty robust in their interpreting of statutory provisions so as to ensure they fit with the Convention rights,

while usually contriving to do this without leaving themselves open to the accusation of having overridden entirely Parliament's wishes. So rape trials have been rendered fairer for the accused (and arguably unfairer for the alleged victims), same sex couples have been given rights of succession to tenancies on the same basis as heterosexuals, and asylum-seekers have been required to be fed rather than left to starve on the streets. But other controversial matters where the statutes in question have been clearer (the indefinite detention of suspected terrorists; the rights of transsexuals; certain controversial sentencing matters) have been made the subject only of declarations of incompatibility.

Under the Labour government, these declarations have usually provoked a response – the trend has been to accept the judges' condemnation despite there being no legal obligation to do so. Even the very controversial 'Belmarsh' detention case (involving a ruling by Britain's senior judges that the holding without trial of suspected international terrorists was a breach of article 5's right to liberty and was not warranted by the government's derogation from that right) was reflected in later legislation replacing the impugned system with a new framework rooted in control rather than imprisonment. For its part, the European Court of Human Rights in Strasbourg (which has of course retained its oversight role here in the UK as elsewhere in Council of Europe countries) is content that these declarations amount to an 'effective remedy' for breach of the Convention (a right under article 13 of the Convention) so long as there emerges a consistent practice of implementation – and there matters have rested for now.

So if it has worked quietly and well, why has the law been controversial? Relatively undefended by the Labour government (which while abiding by it gave the

impression it regretted the initiative almost from the moment of its enactment) and fiercely unpopular with the right-wing media (it had the word 'Europe' in it), the Conservative Party in opposition chose to see it as a symbol of 'political correctness' gone mad, another example of unnecessary pandering to unpopular minorities, such as prisoners, asylum seekers, and – most of all – terrorists. It didn't help that the media reported various crackpot attempts to use the Act as evidence of what the Act had brought about: as every child could tell you launching a case (which anyone can do) is different from winning (which depends on a sensible argument and a successful piece of advocacy), but neither antagonistic journalists nor Conservative critics often allowed such an inconvenient truth to get in the way of their fury.

A particular source of anger which was however rooted in fact was the extra-jurisdictional reach of the Act, with the courts applying the Strasbourg authorities in a way that led to a number of high profile cases of non-citizens who were regarded with distaste by the state being nevertheless allowed to remain in the country because there was nowhere to which they could be expelled without a serious risk of their being killed or tortured. The Conservatives have wanted to be able to throw people out where national security required it without having to worry about what happened to them afterwards. But curiously, despite this strong line, David Cameron was clear before the election that even with the Human Rights Act gone he was not against the continued oversight of the European Court of Human Rights. Now the Liberal Democratic Party has saved him from the embarrassment of having created a momentum for more rather than less European entanglement in British affairs.

Nick Clegg's Liberal Democrats are keen defenders of both Europe and human rights and far from wanting the law repealed they would like it expanded into

more areas of policy. The Party hankers after a written constitution which they are almost certain not to get – but their enthusiasm for the Human Rights Act is likely to be tolerated by Mr Cameron and his team as one of the prices that has to be paid for partnership. It is the same with the more ‘British’ commitment to civil liberties which Clegg’s party are so keen on and which historically the Conservatives care about only when in opposition. The strains will become evident when the media blames the Human Rights Act for this or that court decision which is said to be ‘soft’ on crime or on ‘terrorists’ on account of the Human Rights Act – expect frequent wry comments from the Conservatives about how weak their partners are, how naively liberal and (if there happen to be more bombs) how dangerous to national security.

A further source of tension is likely to come from media efforts to tone down the respect for privacy which the Act has promoted and which has traditionally not been part of UK law. The lively tabloid press in particular despise this as a commercially damaging control on their endless intrusion into the lives off celebrities and footballers, and the Conservatives will want to do their best to please the editors and owners of papers that delivered to them such hysterical support at election time, and which promises to do so again. But the Liberals cannot junk the Act (and therefore the law of privacy) as to do so would be to cut off a central aspect of their identity.

So against the odds, the Act survives the change of administration and in a British system so famously dependant on tradition and convention this means that it is much closer to being unassailable than it was when it was under the care of one party alone. A question-mark remains about what will happen to declarations of incompatibility under the new regime: like Labour before them, the Liberal

Democrats will want to implement them while the Conservatives will probably prefer to pretend they have never happened. This will confuse the European Court and lead almost certainly to findings of breaches of article 13. That is however for the future, and if Strasbourg's backlog continues to mount, for the very distant future. If the Act does indeed become a constitutional fixture then Britain will have cause to celebrate an approach to human rights which provides a unique synthesis between law and democratic politics, requiring the judges to act to guarantee rights but not at a price of disproportionate intrusion into the political arena. No Australian government of any political colour has anything to fear from such a light-touch measure, and the Australian people – indeed all those within Australia – would have much to gain.

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