What will replace the Human Rights Act?

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David Cameron has promised to scrap the Human Rights Act. What will replace it? ***David Mead*** *writes that it seems highly unlikely that the Tories will tamper with the substance of the ECHR within any domestic Bill. The focus might well be on a re-adjustment of the relationship between British judges and those in Strasbourg, with the difficulty lying in how to do so. And who is a Bill of Rights for? It won't be for the UK, considering that the ECHR is written in to the Good Friday Agreement, and any planned changes will not affect Scotland as the HRA is part of the devolution package.*

At least it'll save on typesetting. The Tories can simply cut and paste their 2010 pledge to scrap the Human Rights Act (HRA) and replace it with a UK Bill of Rights into next year's manifesto after David Cameron's speech at conference yesterday. The only caveat is that UK in 2010 becomes British in 2014 – of which a little more later. What does this tell us – what can we learn?

First, the Tories must confront the fact that as long as the UK remains a member of the Council of Europe, and thus of the European Convention on Human Rights (ECHR). At state-level we are committed to abide by judgments of the Strasbourg Court, however unpalatable. That is an international law commitment, contained in Article 46 of the ECHR, and not something that can be altered by a domestic statute. Thus, problem cases such as prisoner voting or Abu Qatada will not go away – if we lose in Strasbourg we are bound to implement. Though it is true that courts in the UK are not "bound" by Strasbourg (i.e. it is not a superior court), the legal reality is the law must change.

Decoupling UK law from Strasbourg – by removing s.2 of the HRA and its requirement to "take account" of ECHR case law – while achieving the objective of creating a domestic legal order untainted by foreign influence (save that already here and/or that which might unconsciously seep in) is simply going to increase the number of cases we lose there – having washed our dirty linen in public – and at greater cost. Not an especially edifying sight. It would also remove the mediating influence of British judges both here, when Strasbourg jurisprudence is at issue in an instant case, and then at Strasbourg when cases reach there as part of what's called inter-institutional dialogue. It was one of the marked successes of Dominic Grieve's time as Attorney-General to lay the ground for this approach, and the more sensitive and sympathetic approach by the Strasbourg Court in recent years has been well-documented. This striving to accommodate seems to have been lost on those advising Cameron. We might think here of *Firth v UK* in August this year, meaning that prisoners will obtain not simply no compensation but no costs for bringing cases to Strasbourg any longer. Perhaps eyes have been on the media misreporting, on which I have blogged elsewhere.

What then will replace it? Details weren't given by Cameron, though Chris Grayling has intimated there will be some sketching out this week. It seems highly unlikely that the Tories will tamper with the substance of the ECHR within any domestic Bill. Not simply because the ECHR will loom large nonetheless but as Lord Bingham famously said in 2009 "which ones would we wish to discard?"

Instead the focus might well be on a subtler re-adjustment of the relationship between British judges and those in Strasbourg. Tightening up the wording of s.2 is probably the preferred route. The problem there is how to do so: currently judges need only "take into account" Strasbourg decisions but, historically at least, that was taken as an adjuration to reflect it – the so-called mirror principle – despite more directive wording being rejected during the passage of the Bill. While we have seen less shackling, the issue remains: how can legislation be worded to capture and direct that loosening? "Must have regard to but be able to reject" would achieve the objective of sufficient domestication but at cost of clarity – on what grounds? Judges simply don't like it? Out of keeping with constitutional principles or the trajectory of the common law? However worded, it still doesn't get around the Article 46 issue.

Three last points seem worth making. First, the increasing reach of EU law, directly part of UK law via the 1972 Act,

into the realms of human rights – think of the Charter – means that even repealing the HRA would not rescue our human rights from European influence and direction. Secondly, repeal or dilution of substantive rights would probably have limited effect because of recently lain judicial foundations for Ground Zero. Several recent UK Supreme Court decisions – most notably *Osborn* and *Kennedy* – have stressed the common law heritage and basis of rights. Last, and this brings us back to our start; incorporation of – and we must assume continued adherence to – the ECHR into the Good Friday Agreement (part 6). This explains the shift from UK to British Bill of Rights, but surely there's no plan for a twin-track system so why have a different one? Indeed, the Scotland Office has confirmed that any planned changes will not affect Scotland as the HRA is part of the devolution package established in 1998. So for Britain read England, and possibly Wales!

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