

**DRAFT WORKING PAPER:**  
**Devolution and Human Rights**

JUSTICE is currently working on a project looking at the legal, constitutional and political implications of any attempt to repeal or amend the Human Rights Act, or enact a Bill of Rights.

This is a draft working paper prepared by JUSTICE on devolution and human rights. It briefly outlines the devolution framework, particularly in relation to the protection of human rights, and then addresses some of the issues and problems that would be involved in any changes to the Human Rights Act, and the enactment of a Bill of Rights for the UK or Britain.

This document is at an early stage. It has been prepared using general preliminary research, the sources of which are found in Appendix 1. This draft working paper is intended to be a consultation document. Your views on this document are expressly solicited. JUSTICE's aim is to prepare a final report early next year on the devolution implications of any amendment/repeal to the HRA and/or any Bill of Rights. It would be very useful if we could be provided with your views and opinions on the points made in this paper. A series of specific questions have also been proposed in Appendix 2. Your thoughts on any or all of these questions would also be very welcome. Further, feel free to indicate any relevant issues that you feel have not been dealt with in this paper. Any inaccuracies in this paper should also be pointed out.

We are considering holding roundtable discussions to address some of these issues. Some of these may be held in the devolved jurisdictions. We will endeavour to keep you informed of any such meetings.

It would be very helpful if you could provide your comments to me by 15<sup>th</sup> December 2009. In the meantime, I am happy to discuss any of these issues further in person or over the telephone. Please do not hesitate to get in touch with me.

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**A. Overview of Devolution**

**(i) Some background** (This does not purport to be comprehensive and respondents please comment by way of clarification or correction as necessary)

1. Scotland was historically a separate jurisdiction with its own Courts, Parliament and monarch until, in 1707, the Act of Union ended the Scottish Parliament and brought together England with Scotland under the government and Parliament in Westminster. But Scotland retained its own legal system, and so continued to be a separate legal jurisdiction from England. The Labour Party came into power in 1997 with devolution as an important priority, and Parliament passed the Scotland Act 1998 which gave a degree of autonomy and power to a newly formed Scottish Parliament in Edinburgh.
2. Wales had been subsumed by England since the 13<sup>th</sup> century and since then, Wales and England have formed a single jurisdiction. The Wales Act 1998 gave a degree of responsibility to the devolved Welsh bodies, which was increased by the Wales Act 2006.
3. The history of, and motivation for, devolution in Northern Ireland is different to that in Scotland and Wales. The Government of Ireland Act 1920 intended to provide for two jurisdictions on the island of Ireland. The 1920 Act then applied to Northern Ireland (until 1998) but in what became the Republic of Ireland the 1920 Act was not accepted and it took its separate constitutional path from the United Kingdom. In Northern Ireland the 1920 Act provided for a devolved parliament and government at Stormont and for a separate legal jurisdiction (subject to the House of Lords having ultimate appellate jurisdiction). Nevertheless within Northern Ireland a persistent divide endured between those who wished Northern Ireland to remain part of the United Kingdom (Unionists or Loyalists), and those who wished it to be separate from the United Kingdom and reunited with the remainder of the island of Ireland (Nationalists or Republicans). The devolutionary settlement of 1920 continued until the conflict became so severe that Westminster re-assumed all legislative and executive powers in 1972. The Belfast (Good Friday) Agreement of 1998 (and subsequent developments over a ten year period), signalled a settlement for Northern

Ireland between most categories of Unionists/Loyalists and Nationalists/Republicans. Consequently, a 'power sharing' Executive has been established together with a devolved Assembly at Stormont.

**(ii) Framework of devolution**

4. The Scotland Act 1998 conferred legislative powers on the newly created Scottish Parliament. Scotland would continue to send representatives to sit in Parliament in Westminster, as well as electing Members of the Scottish Parliament, sitting in Edinburgh. Provision for the creation of a Scottish Executive, headed by the First Minister, was also made. The key to the devolution settlement in Scotland was that the Scottish Parliament was given the power to legislate on all matters that were not specifically reserved to Parliament in Westminster. As such, the Scotland Act sets out the list of all matters reserved to Parliament in Westminster ('reserved powers'). It is unlawful for the Scottish Parliament to legislate with respect to any of these areas. The Scottish Parliament is, however, permitted to legislate with respect to all areas not specifically reserved ('devolved powers'). Despite the Westminster Parliament retaining the legal authority to legislate on all matters, whether reserved or devolved, a convention has arisen that it will not legislate for Scotland on devolved matters without the consent of the Scottish Parliament, which is given through a so-called 'Sewel Motion'.
5. The Wales Act 1998 gave limited responsibilities to the newly formed Welsh Assembly. In essence, however, these were mainly executive functions (those formerly exercised by the Secretary of State for Wales). The Wales Act 2006, in response to criticism of the former Act, created a Welsh government separate from the Welsh Assembly. Unlike the Scotland Act, which gives the devolved bodies the power to deal with all matters not specifically reserved, the Wales Act specifies exactly what powers have been devolved. The Welsh Assembly still has no legislative powers.
6. The Northern Ireland Act 1998 (NIA) which was in essence intended to be the implementation the Belfast or Good Friday Agreement, provided for a complicated settlement based on the specific historical and social circumstances of Northern Ireland (brief indication of these factors being given above). The Act provided for the creation of the Northern Ireland Assembly and an Executive led by a First Minister

and Deputy First Minister. The members of the Executive are elected on a basis of party strength as demonstrated in the elections to the Northern Ireland Assembly.

7. The Northern Ireland Act created three categories of powers.

- (a) First, powers that are 'excepted'. These are those which remain entirely within the competence of the UK Parliament. (These are equivalent to the 'reserved' powers in the Scottish context).
- (b) Second are 'reserved' powers. These are those that remained within the sole competence of the UK Parliament following the passing of the Act, but there is provision that they or any of them may be subsequently devolved.
- (c) Finally, the third category of 'transferred' powers. These are powers that the Northern Ireland Act conferred on the Stormont Assembly and Executive. (Equivalent to the devolved powers under the Scotland Act). The Act itself (like the Scotland Act) does not specifically recite the transferred powers but simply defines them as those that are neither excepted nor reserved. As the first two categories are specifically enumerated, any matter that is not listed within the first two categories falls within the competence of the devolved institutions. Westminster, however, retains the power to legislate in all areas.

**(iii) Two relevant problems within the devolution framework**

8. The first problem relates to the division between devolved and reserved powers (or excepted, reserved and transferred powers in Northern Ireland). Himsworth explains that there are some areas:

where the division between what is devolved and what is reserved is unclear in the first instance. The difficulties here are borne out by overlaps between the (devolved) responsibility for housing in general and the (reserved) responsibility for housing of asylum seekers; the (devolved) responsibilities for policies in relation to children and education and the (reserved) responsibility for the expulsion of illegal immigrants; the (devolved) responsibility for charities and the (reserved) responsibility for their taxation; and the (devolved) responsibility for planning and the (reserved) competences for nuclear power.<sup>1</sup>

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<sup>1</sup> Himsworth (2007), 70(1) MLR 31, 46.

9. Hazell makes the point that '[i]t was naive at the dawn of devolution to suppose that powers could be neatly separated into watertight compartments'.<sup>2</sup>

10. The second problem relates to the convention that normally requires the consent of the Scottish Parliament and Northern Ireland Assembly if Westminster is to legislate on devolved matters relating to Scotland or Northern Ireland. As Bradley and Ewing explain:

On devolved matters, there is a firm convention that Westminster should not legislate without the prior consent of the Scottish Parliament, given by a so-called 'Sewel motion'. This extensive use of Westminster's continuing supremacy is controversial and might not be sustainable if in future a close political relationship is not maintained between the governments in Edinburgh and London.<sup>3</sup>

11. On Sewel motions, Hazell makes the point that:

[i]n most cases it reflects the frequent entangling of reserved with devolved powers: a reflection of the impossibility of maintaining watertight compartments [the first problem that has already been highlighted]. In others it reflects a decision by Scotland to opt into a uniform regime...Not surprisingly, the initiative for most of these uniform policies come from the centre, but it is always open for the Scots to opt out.<sup>4</sup>

## **B. The protection of human rights in the devolution settlements**

### **(i) The Human Rights Act**

12. The Human Rights Act 1998 (HRA) applies throughout the UK, including the devolved jurisdictions. The devolved authorities and institutions, including the devolved parliament in Scotland and the Assemblies in Wales and Northern Ireland, are public authorities within the meaning of s6 HRA such that it is unlawful for them to act in any way contrary to the Convention rights.

13. According to Hazell:

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<sup>2</sup> Hazell (2007), 60(3) Parliamentary Affairs 3, 6.

<sup>3</sup> Bradley and Ewing, Constitutional and Administrative Law, p46.

<sup>4</sup> Hazell (2007), 60(3) Parliamentary Affairs 3, 6.

[d]espite the vehement opposition of the tabloids, it was hard to sustain a case that the HRA had been a disaster. Although there was an initial surge of cases in Scotland, the initial dire predications of floods of cases and judges running wild has not been borne out.<sup>5</sup>

14. The operation of the HRA in Northern Ireland might be similarly so described.

15. The devolution statutes provide that the HRA cannot be modified by the devolved institutions.

**(ii) The Devolution Acts**

16. The HRA, and human rights more generally, are tied into the devolution statutes. These provide that the devolved institutions have no competence to act in any manner that is contrary to the Convention rights (as defined by s1 HRA). This competence, or lack of it, is controlled in a number of ways. When Bills are going through the Scottish Parliament, the Scottish Executive and Parliament's Presiding Officer must separately determine that the Bill is within the competence of the Scottish Parliament (ie, not incompatible with the Convention rights). The bill can be challenged by a reference to the Supreme Court. Post-enactment, an Act can be challenged as a 'devolution issue' before any court.

17. In Northern Ireland, there are 8 ways under the NIA to monitor the compatibility of Assembly legislation. According to Gray, '[w]ith regard, in particular, to the implementation and enforcement of Convention rights...the NIA 1998 provides a more superior mechanism to that outlined in the corresponding provisions of the HRA 1998 governing parliamentary procedure, as can be seen from a comparison of the relevant provisions in the two Acts.' Whilst the HRA has s19, requiring a ministerial statement of compatibility whilst the bill is going through Parliament, 'the NIA 1998 provides for legislative scrutiny at a number of different stages of the legislative process and by a number of different bodies'.<sup>6</sup>

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<sup>5</sup> Hazell (2007), 60(3) Parliamentary Affairs 3, 16.

<sup>6</sup> Gray (2000), 5 Judicial Review 114, 116.

**(iii) Relationship between HRA and Devolution Statutes**

18. The consequence of the incompetence of the devolved institutions to do anything incompatible with the Convention rights is that the Convention rights are protected both under the devolution statutes and under the HRA albeit in different ways.<sup>7</sup> This allows for the possibility that claims of violations of Convention rights, in most cases, may be brought either under the HRA, claiming that the relevant act of the public body was unlawful, or as a 'devolution issue', claiming that the relevant act was outside the competence of the relevant public body, because it was contrary to a Convention right.
19. Under the devolution statutes, the term 'Convention right' is given the same meaning as that in s1(1) HRA. The Devolution Acts incorporate the victim test of the HRA, but there is also reference to Article 34 of the European Convention on Human Rights (ECHR). The damages approach of the HRA is also incorporated into the devolution statutes.

**C. Status of human rights – devolved, reserved or neither?**

**(i) The position under the devolution statutes**

20. As set out, the HRA itself is a 'protected provision', such that the devolved institutions cannot legislate to modify the HRA or the scope or meaning of the Convention rights.
21. However, it is not totally clear whether 'human rights' are a devolved or reserved matter under the devolution statutes. Himsworth argues that because human rights have not specifically been reserved to Westminster, under the framework of the Scotland Act (SA) (and likewise the Northern Ireland Act) they are arguably a devolved matter.<sup>8</sup> Elsewhere, he explains that "human rights" are not, as such, reserved to the Westminster Parliament.<sup>9</sup> If indeed it could be shown that human rights were a devolved matter, a difficult but not impossible argument to make, then any legislation by Westminster relating to human rights that would affect the devolved jurisdictions may need the consent of the devolved parliaments.

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<sup>7</sup> Beatson, Gross, Hickman and Singh, Human Rights: Judicial Protection in the UK

<sup>8</sup> Himsworth (2009) 77 Amicus Curiae 229.

<sup>9</sup> Himsworth (2007), 70(1) MLR 31, 55.

22. It could however be argued that it is unhelpful to assign 'human rights' as to any of the categories. Rather the obligations under HRA and the devolution statutes could be seen as overarching provisions that apply to all categories of legislation wherever made.

23. In any event it is arguable that any legislation in the field of human rights (including any amendment to HRA or passing of new legislation) touching upon areas of devolved competence (such as housing, education and local government) would require the consent of the devolved Parliament in Scotland and the devolved Assemblies in Wales and Northern Ireland.

24. According to Himsworth:

[a] Bill in the UK Parliament designed to repeal or amend or replace the Human Rights Act would, I assume, require a legislative consent (Sewel) motion in the Scottish Parliament because of the Bill's encroachment on devolved matters – both in respect of its touching on human rights at all and, if this were the case, its extension into other aspects of devolved legislative competence such as criminal justice or education or housing policy.<sup>10</sup>

25. In any case, a repeal of the HRA would require considerable amendment to the devolution statutes, due to the incorporation of elements of the HRA and the ECHR into the devolution statutes. For example, the definition of Convention rights in the devolution statutes is simply attached to the definition of Convention rights in the HRA, as is the victim test for standing.

26. In conclusion:

- (a) The devolution statutes are complicated, and the human rights frameworks under them are tied up in a number of ways with the HRA and the indeed the ECHR.

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<sup>10</sup> Himsworth (2009) 77 *Amicus Curiae* 229.

- (b) Any amendments to the HRA and any enactment of a Bill of Rights may, from a constitutional perspective - or simply to take account of the political ramifications - need the consent of the devolved institutions.
- (c) Any amendments to the HRA and any enactment of a Bill of Rights would almost certainly, from a legal perspective, require amendments to be made to the devolution statutes.

**(ii) The example of the Devolved Human Rights Commissions**

27. Some interesting implications can potentially be drawn from the creation and work of the relevant Human Rights Commissions. The Scottish Commission of Human Rights was established by the Scottish Commission for Human Rights Act 2006 (an Act of the Scottish Parliament). As has already been indicated, the Scottish Parliament can only legislate in devolved areas. Since it has legislated for a Scottish Human Rights Commission (SHRC), it could therefore be argued that human rights is a devolved matter.

28. Section 7 of the Equality Act 2006 provides that the Equality and Human Rights Commission (EHRC) (the UK's Human Rights Commission) may not take human rights action in relation to a matter, or consider the question whether a person's human rights have been contravened, if the Scottish Parliament has legislative competence to enable a person to take action of that kind in relation to that matter, or to consider that question. That general prohibition does not, however, prevent the EHRC from taking action with the consent of a person established by an act of the Scottish Parliament whose principal duties relate to human rights, for example, the SHRC. What this seems to indicate is that the EHRC needs the consent of the SHRC to deal with issues in Scotland on which the Scottish Parliament, and therefore the SHRC, has competence. This would seem to include human rights issues in Scotland.

29. The Northern Ireland Human Rights Commission was established under the Northern Ireland Act 1998 (the first of the Commissions to be established. Its main function – relevant to this paper is its role in regard to a possible 'Bill of Rights for Northern Ireland'.

30. S 69 (7) of NIA requires the Secretary of State for Northern Ireland to request the NIHRC to provide advice in relation to a possible Bill of Rights for Northern Ireland. The terms of reference for this are set out in the Agreement – that NIHRC should:

“ . . . . consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the ECHR, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on International instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with the ECHR – to constitute a Bill of Rights for Northern Ireland”.<sup>11</sup>

31. The NIHRC has produced its Report dated 10 December 2008 recommending an extensive Bill of Rights for Northern Ireland. The Northern Ireland Office has indicated that it intends to carry out a widespread consultation in Northern Ireland – but to date this has not commenced.

#### **D. Northern Ireland**

32. As stated above the primary objective of the NIA was to give the force of law to the essentials of the Belfast (Good Friday) Agreement of 10 April 1998. The Good Friday Agreement represented the foundation of a new constitutional settlement for Northern Ireland based on a commitment to constitutional government, human rights and the rule of law. The Agreement seeks to achieve effective protection of human rights in a number of interconnected ways.

33. The fact that none of the devolved institutions established by the NIA have the power to act incompatibly with the Convention rights was required by the Agreement. It was not directly the result of the UK Government’s decision to incorporate the Convention into domestic law, although the reforms were definitely interwoven.<sup>12</sup> But given the commitment of the UK government as contained in the International Treaty with the Republic of Ireland (to which the Agreement is annexed) it is essential that the ECHR continues to apply in Northern Ireland. Any attempt to alter the HRA (and/or pass a Bill of Rights covering Northern Ireland) in a way which diminished the human rights

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<sup>11</sup> Para 4 of the Rights Safeguards and Equal Opportunity section in Stand 3 of the Agreement

<sup>12</sup> Beatson, Gross, Hickman and Singh, Human Rights: Judicial Protection in the UK.

protection in Northern Ireland may put the UK in breach of the its international treaty obligations owed to the Republic of Ireland.

34. There is a reality that any tinkering with the HRA in regard to Northern Ireland and the human rights provisions in the Northern Ireland Act 1998 (at least of any category which interferes with the provisions of the 1998 Agreement) may not be achievable without both the consent of the Republic of Ireland and the Northern Ireland Assembly. Any such tinkering also risks reigniting the problems of the past in Northern Ireland.

#### **E. The politics of a Bill of Rights in the devolved jurisdictions**

35. It has already been explained that the consent of the devolved institutions may be necessary for legal and constitutional reasons. However, almost more importantly, consensus and consent would be needed – not just among the devolved institutions, but among the people of the devolved jurisdictions – if there were to be any 'British' or 'UK' Bill of Rights.

36. There is the obvious problem of language. The Parliamentary Joint Committee on Human Rights (JCHR) has taken the position that , a 'British' Bill of Rights would, by definition, exclude Northern Ireland:

37. There is also a geographical aspect to the term "British" which is relevant, in that Northern Ireland is part of the United Kingdom but not part of Great Britain. A "British Bill of Rights" therefore could not, by definition, apply to Northern Ireland.<sup>13</sup>

38. However, Unionists and Loyalists in Northern Ireland do regard themselves as, and wish to be acknowledged as, 'British'. So they may not be willing to accept exclusion from a 'British' Bill of Rights. Any such proposal would create, or perhaps more accurately antagonise, unionist and loyalist feeling.

39. But equally labelling any Bill of Rights as 'British' also may create, or perhaps more accurately antagonise, nationalist feeling in Scotland, and nationalist and republican feeling in Northern Ireland.

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<sup>13</sup> JCHR (2008)

40. Scotland may in any event react badly to a 'British' Bill of Rights. Kenny MacAskill in his evidence to the JCHR made it very clear that the ECHR was a minimum, and that:

"we have the Human Rights Act and ECHR incorporated into our founding principles and these are dealt with by our courts and we are subject to challenge not simply on what we seek to legislate upon but also what we have legislated upon. We are happy with that and as a Government party we seek to expand upon that if and when the constitutional settlement changes." He went to say: "Are we British? No, we are not. We consider ourselves Scottish and we consider those south of the border to be English. That is perfectly legitimate."<sup>14</sup>

41. Pursuance of a 'British' Bill of Rights may just further fuel calls for independence, and prove to herald the end of the Union.

42. Equally, - if insensitively handled - a Bill of Rights from Westminster could present problems in Northern Ireland. As already indicated if a Bill of Rights were for the whole of the UK, it could present difficulties for the Republican and Nationalist sections of the community. If it were just for Great Britain, excluding Northern Ireland, it could present difficulties for the Unionist and Loyalist sections of the community. As such, any Bill of Rights is likely to present difficulties for one section of the community in Northern Ireland. Even now, over 10 years after the Belfast or Good Friday Agreement, there is a precarious balance. There is an appreciable risk that the Bill of Rights debate may stoke the embers of sectarian conflict in Northern Ireland. As it stands, the HRA applies to Northern Ireland, and the difficulties just mentioned have not arisen.

#### **F. Preliminary Conclusions**

43. A Bill of Rights covering the devolved jurisdictions would be legally, constitutionally and politically very difficult and complicated

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<sup>14</sup> Oral Evidence to the JCHR (2008)

44. It would also require careful consideration so that the UK would not derogate from its international treaty obligations to the Republic of Ireland in regard to the Belfast or Good Friday Agreement.
  
45. It may be possible to have an English Bill of Rights, but that would raise its own problems and complications. In particular there would be a raft of problems between the competing jurisdictions within the UK.
  
46. The HRA works, and at present the devolution framework has also been successful. Amendments to the HRA or legislating for a Bill of Rights would be dangerous and risky – to the protection of rights, to the constitution of the UK, and to the Union itself.

11 November 2009

**Appendix I – Sources used to write Draft Working Paper**

1. Himsworth (2009) 77 *Amicus Curiae* 229
2. Hazell (2007) *Parliamentary Affairs*, 60(1), 3
3. Himsworth (2007) *Modern Law Review*, 70(1), 31
4. Elliot (2004) *International Journal of Constitutional Law*, 2(3), 545
5. O'Neill (2004) *Edinburgh Law Review*, 8(2), 177
6. Gray (2000) *Judicial Review*, 5, 114
7. Beatson, Gross, Hickman and Singh, *Human Rights: Judicial Protections and Human Rights* (2008)
8. Bradley and Ewing, *Constitutional and Administrative Law* (2007)
9. Lester and Pannick, *Human Rights Law and Practice* (2009)
10. Tomkins, *Public Law* (2003)

## **Appendix II – Consultation Questions**

1. Do you have any comments in respect of the accuracy of anything contained in the draft working paper?
2. Do you believe that any specific issues that ought to have been covered have been missed out?
3. Are there any additional sources that you would recommend – see the list of sources in Appendix I?
4. Do you think that 'human rights' are devolved or reserved matters, or indeed neither, under the Scotland and Northern Ireland Acts? Why do you think this?
5. What would the consequences of repealing or amending the HRA be on the devolved jurisdictions? Would the consent of the devolved Parliaments be needed to repeal or amend the HRA?
6. What would the consequences of enacting a Bill of Rights be on the devolved jurisdictions? Would the consent of the devolved Parliaments be needed to enact any such Bill of Rights?
7. Should Northern Ireland be included in any UK/British Bill of Rights? What are the benefits and problems with such an approach?
8. Do you have any other general or specific comments or thoughts on devolution and human rights in the context of repealing/amending HRA or enacting a Bill of Rights?
9. Do you consider that the enactment of a Bill of Rights (or separate Bills of Rights for some or all of the jurisdictions of the UK) would be:
  - (a) practicable?
  - (b) beneficial?
  - (c) likely to derogate from the common core of human rights protection across the UK as a whole?