

## Devolution Issues



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## Issues

- Current position
- Future position
- Case study
- Procedure

## Current position

## Current position

1. Legislation “*incompatible with any of the Convention rights*” outside competence of devolved legislatures and so not “law”:
  - Scotland Act 1998, s.29(2)(d)
  - Government of Wales Act 2006, s.108A(2)(e)
  - Northern Ireland Act 1998, s.6(2)(c)
- Offending law struck down – e.g. US Supreme Court

## Current position

2. Acts of public bodies which are incompatible with “*Convention rights*” can be challenged as long as a victim:
- Scotland Act 1998, s.100(1)
  - Government of Wales Act 2006, s.81(2)
  - Northern Ireland Act 1998, s.71(1)
- ““*the Convention rights*” has the same meaning as in the *Human Rights Act 1998*” – s.126(1) of SA 1998; s.81(6) and 158(1) GWA 2006; ss.71(5) and 98(1) NIA 1998 .

## Future position

## Future position

- Clause 37 of Bill of Rights Bill – “*Schedule 5 contains consequential and minor amendments*”
- Schedule 5
  - Amends references in SA 1998, GWA 2006 and NIA 1998 to “*the Human Rights Act 1998*” to “*the Bill of Rights 2022*”.

## Future position

1. Legislation “*incompatible with any of the Convention rights*” outside competence of devolved legislatures and so not “law”:
  - Scotland Act 1998, s.29(2)(d)
  - Government of Wales Act 2006, s.108A(2)(e)
  - Northern Ireland Act 1998, s.6(2)(c)
- BUT “*Convention rights*” now defined as: ““*the Convention rights’ has the same meaning as in the Bill of Rights 2022*”

## Future position

2. Acts of public bodies which are incompatible with “*Convention rights*” can be challenged as long as victim:
- Scotland Act 1998, s.100(1)
  - Government of Wales Act 2006, s.81(2)
  - Northern Ireland Act 1998, s.71(1)
- Again “*Convention rights*” now defined as: “*the Convention rights’ has the same meaning as in the Bill of Rights 2022*”

## Outcome

- Subtle change with big effect
- Means devolved authorities will have to comply with Convention-lite

## Future position

- NB - Clause 16 – For JRs in S, W and NI challenging an act of a public authority, C has to be a “*victim of the act*”.

## Belfast Agreement?

- Strand 1 – “Safeguards” to ensure all sections of community can participate and work together in operation of institutions and all sections of community protected, including – *“the European Convention on Human Rights...which neither the Assembly nor public bodies can infringe”*
- Rights, Safeguards and Equality of Opportunity – “United Kingdom Legislation” – *“The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”*
- *Re Allister* [2022] NICA 15, [244] (huge challenge to NI Protocol)

## Case Study

## Case study

- Abortion Services (Safe Access Zones) Bill
  - Private Members' Bill – Clare Bailey
  - Completed final stage on 24 March 2022
  - Criminalises certain protests outside abortion clinics:
    - “5.(2) It is an offence for D to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of—
      - (a) influencing a protected person, whether directly or indirectly,
      - ...
- Referred by AG to Supreme Court
  - Blanket prohibition on pure protest without “*reasonable excuse*” defence breaches Articles 10 and 11 ECHR
  - Therefore, outside competence of NI Assembly

## Case study

- How would this be affected by Bill of Rights 2022?
  - Safe Access Zones Bill outside competence if incompatible with Bill of Rights 2022
  - Clause 7(2) – *“The court must— (a) regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance as between the matters mentioned in subsection (1)(b)(i) to (iii), and (b) give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament.”*
  - Sch 1 Interpretation Act 1978 – *“Act means an Act of Parliament”*.

## Case study

- Clause 4(1) – “*a court must give great weight to the importance of protecting the right [Article 10 ECHR]*” but exception in clause 4(3)(a) would apply – “*whether a provision of primary or subordinate legislation that creates a criminal offence is incompatible with a Convention right*”
- Clause 10 – “Declaration of Incompatibility”
  - 10(2) applies where “*a provision of subordinate legislation is incompatible with a Convention right, and (ii) does not quash the provision, or declare it invalid, by reason of the incompatibility.*”

10 (2) says: “*The court may make a declaration that the provision is incompatible with the Convention right.*”

## Case study

- Clause 23(2) – In considering whether to grant any relief which might affect the exercise by a religious organisation of Article 9 ECHR rights, “*The court must have particular regard to the importance of the right.*”

## Procedure

# Procedure

- Westminster has power to legislate for S, W, NI.
- But Sewell Convention
  - Contained in Memorandum of Understanding
  - the UK parliament “*will not normally legislate with regard to devolved matters without the consent*” of the devolved legislatures.
- Will refusal stop UK Govt?
- Other pushback?

# Thank you for listening

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