

No devolving human rights

It is not true that parliament would have to ask permission of regional administrations in order to pass legislation in this area



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The debate about a UK bill of rights and responsibilities – started by David Cameron in June 2006 – has become silly, a low point being reached with Justice's recent report on devolution and human rights.

"A strong argument can be made," wrote a legal officer, "that 'human rights' have been devolved to the Scottish parliament and the Northern Irish [sic] assembly, or at least that the 'observation and implementation' of the ECHR [European convention on human rights], has been devolved. If this is the case, although from a legal perspective the Westminster parliament could still legislate in this area, constitutionally, the consent of the devolved bodies would be needed".

This is constitutionally incorrect. It raises the question why Justice stormed down this path. And it is a serious own goal for a respected organisation.

Westminster devolved powers to Cardiff, Edinburgh and Belfast with the Government of Wales Act 1998, the Scotland Act 1998 and the Northern Ireland Act 1998. Wales got administrative devolution. Scotland had executive and legislative functions transferred, as did Northern Ireland, but with excepted and reserved functions remaining in London.

Three points may be made about Justice's legal analysis. First, the report is correct about parliamentary sovereignty, and that is really the beginning and end of the matter; freedom was taken away by Westminster when the Northern Ireland parliament was wound up in 1972 and the successor Northern Ireland assembly was suspended a number of times more recently.

Second, the Human Rights Act (HRA) 1998 became part of the constitutions of Wales, Scotland and Northern Ireland, but in ways Justice did not comprehend: (1) the three countries were given legislative competence; (2) but the HRA 1998, like the European Communities Act 1972 (governing EU law in the UK), was entrenched (and made untouchable); (3) devolved executives were prohibited from acting incompatibly with human rights; and (4) the most difficult point: the courts were given jurisdiction over so-called devolution issues.

Three, Justice went badly wrong on the exception of international relations (a matter for Whitehall), and the duties – not powers – of the regional administrations. They have no responsibility for the ECHR, or any other international instruments. On the contrary, as part of the UK state, they share in not undermining our international obligations.

The report misunderstands the legal language, "observing and implementing obligations", in the Scottish and Northern Ireland legislation (as is clear from the Wales statute).

Justice's errors require explanation, and that means a lawyerly descent into politics. A conservative government is more likely to preserve the status quo than tear up the HRA 1998; Dominic Grieve, the shadow lord chancellor, is clear about the UK remaining in the Council of Europe (and, mention it not, the EU). However, Justice and its soulmate Liberty are mobilising against the Cameron project (having been initially interested). And, in the process, they are prepared to rally self-regarding human rights activists who want to fatten up the HRA 1998 with their priority political issues.

The report, distressingly and dangerously, plays two separatist cards, the better to pre-empt Cameron's constitutional activism.

First, Scotland. Alex Salmond's nationalists are in office, but not in power. They object to Westminster law, not to replacing the HRA 1998 with a UK bill of rights and responsibilities. His 2009 white paper, *Your Scotland: Your Voice*, shows a concern with national status (separate immigration laws for Scotland), but has little to say about equality and human rights law. The Justice author, however, has rounded up a few clichés – Magna Carta as an English document (not true), juries the exception rather than the rule (a dream of labour technocrats) – to make a non-legal point: the Scottish national party is a player in UK politics.

Second, Northern Ireland, and here the report stumbles badly. Justice, hitherto a metropolitan beacon, embraces desperation. The 1998 Belfast Agreement did not, as claimed, provide for a local bill of rights. The human rights commission there, however, is promoting an all-singing, all-dancing instrument: it wants to replace representative democracy with rule by judges (and quangos); and it is using foreign funds to campaign against its sponsoring department.