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Legislative Competence in Northern Ireland and the Independent Review of Administrative Law

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On 31 July 2020, the Government [established](#) an independent panel to take forward its [Independent Review of Administrative Law](#). The [terms of reference](#) for this panel are very broad, as pointed out by [Elliott and Hemsworth](#).

Given that administrative law is a devolved matter for Northern Ireland, UK wide reform is problematic. The purpose of this paper is not to examine the entirety of the field for reform, but to focus on one narrow point - how can reform be implemented in Northern Ireland. The geographic remit of reform is specifically mentioned in Note A to the terms of reference:

the review should consider public law control of all UK wide and England & Wales powers that are currently subject to it.

The Laws of the United Kingdom

It isn't technically accurate to speak of the law of the United Kingdom. Devolution and the separate legal jurisdictions in the UK mean that, to be precise we should speak of:

- The law of England and Wales
- The law of Scotland
- The law of Northern Ireland

The Westminster Parliament can pass laws for the entirety of the UK, or for any part of it. The Welsh Parliament / Senedd Cymru can pass laws which form part of the law of England and Wales applying in Wales. The Scottish Parliament can pass laws for Scotland and the Northern Ireland Assembly can pass laws for Northern Ireland. The Scottish, Welsh and Northern Irish legislatures don't have a free hand to legislate, but can only enact laws on matters within their legislative competence.

Legislative competence of the Northern Ireland Assembly over administrative law

Legislative competence is set out in [Northern Ireland Act 1998](#). Under this Act, a matter can be either an excepted matter under Schedule 2, a reserved matter under Schedule 3, or a transferred matter. If a matter isn't excepted or reserved, it is transferred. Transferred matters are within the [competence](#) of the Northern Ireland Assembly. The Assembly can also legislate for reserved matters if the Secretary of State consents.

In Wales, it is clear that judicial review is not within the competence of Senedd Cymru. Paragraph 8(1)(f) of [Schedule 7A](#) of the Government of Wales Act 2006, explicitly refers to "judicial review of administrative action" as not being within legislative

competence. There is no provision like this in the Northern Ireland Act 1998. The only provisions in the same area are that judicial pay and the Supreme Court are excepted matters under Schedule 2.

When it was originally enacted, the following was a reserved matter under paragraph 15 of Schedule 3 to the Northern Ireland Act 1998.

All matters ... relating to the Supreme Court of Judicature of Northern Ireland, county courts, courts of summary jurisdiction (including magistrates' courts and juvenile courts) and coroners, including procedure, evidence, appeals, juries, costs, legal aid and the registration, execution and enforcement of judgments and orders....

However, following the devolution of justice to the Northern Ireland Assembly in 2010, paragraph 15 was repealed. This now-repealed paragraph is the closest that the Northern Ireland Act comes to making administrative law an excepted or reserved matter.

In the absence of anything in the Northern Ireland Act 1998 stating that administrative law is excepted or reserved, I argue that it is within the competence of the Northern Ireland Assembly.

Could the Northern Ireland Assembly legislate for judicial review?

Since administrative law is within the competence of the Assembly, it can legislate for judicial review and change the law of Northern Ireland in this regard. It could codify it, expand or restrict its grounds, add or remove barriers to accessing it in the courts, widen or restrict what is justiciable under it and make provision in respect of costs of it.

However, there is a limitation on this, or to put this another way, a way in which the Westminster Parliament could legislate in a way which did not step on devolved powers.

Although the Assembly can legislate for judicial review, it cannot legislate for other topics - as set out above it does not have the same competence over reserved and excepted matters. Taking one example from the list set out in Schedule 2 to the Northern Ireland Act 1998, it cannot legislate for immigration law. So, the Assembly could not pass an Immigration Bill.

Thus far, this is straightforward. But what happens if an Act of the Assembly deals both with judicial review and with immigration? The test is set out in s. 6 of the Northern Ireland Act(2):

A provision is outside that competence if any of the following paragraphs apply - (b) it deals with an excepted matter and is not ancillary to other provisions (whether in the Act or previously enacted) dealing with reserved or transferred matters;

'Deals with' is defined in s.98 , as follows:

For the purposes of this Act, a provision of any enactment, Bill or subordinate legislation deals with the matter, or each of the matters, which it affects otherwise than incidentally.

An Assembly Act codifying the grounds of judicial review 'deals with' administrative law, even though it has the incidental effect of codifying grounds of judicial review as they apply in immigration cases.

The Assembly could pass an Act restricting justiciability over decisions which are thought to be 'political' and thus within the proper scope of governmental but not judicial scrutiny. Or it could impose restrictions on the remedies in these types of cases. This would 'deal with' administrative law, even though it had the incidental effect that it could apply in cases outside legislative competence. To use the language of the older cases on legislative competence (Gallagher v Lynn [1937] AC 863), the 'pith and substance' of the legislation would be administrative law, not immigration law.

In the words of Lady Hale:

If the legislation is within the express powers, the fact that it incidentally affects matters outside the authorised field does not invalidate it. On the other hand, it must not under the guise of dealing with one matter, in fact encroach upon the forbidden field. In deciding the matter the court could look, not just to the actual object of the legislator, but also to the terms of the legislation.

But arguably the Assembly could not pass an Act restricting judicial review in cases of immigration law etc, as this would 'deal with' an excepted matter, rather than merely having an incidental impact upon an excepted matter.

Options for implementing administrative law reform across the UK

As I see it, there are at least 6 options for how administrative law can be reformed across the UK. It seems clear from the IRAL call for evidence, that option 3 is the preferred model.

Option 1 - UK-wide Westminster imposed legislation

At its most brutal, sovereignty of parliament means that Westminster can pass any law it wants, including law trampling over matters which are for the Northern Ireland Assembly to decide. In purely legal terms, this option is available and legitimate. The Westminster Parliament could enact a Judicial Review Act reforming administrative law which has effect in all parts of the UK. In political terms, this would drive a coach and horses through the concept of devolution and could be extremely unpopular.

Option 2 - UK-wide Westminster legislation on non-devolved matters

Westminster could enact a UK-wide law reforming judicial review which is expressly limited to non-devolved matters. So it could codify the grounds, restrict or widen justiciability, change costs etc, but only in respect of matters that are not within the competence of the devolved legislatures. It is not clear how the details of this would work UK-wide given that competence is different for the Northern Ireland Assembly and for the Scottish Parliament. For example, if the Assembly could not legislate for A,B and C, and the Scottish Parliament could not legislate for B, C and D, then Westminster could clearly legislate UK-wide for B and C, but what about A and D?

The consequence of a UK wide law on non-devolved matters would be that, in every judicial review case in the UK, the preliminary question would be, what is the subject matter of the decision being reviewed. If it is a non-devolved matter, then the new (revised) law would apply, if a devolved matter, the current law would apply. This could create anomalous and rather artificial divisions - if a court were reviewing an immigration decision then the criteria for review and the procedure would be different from those in judicial reviews of planning decisions.

However, there is a prior jurisdictional point to this. The IRAL is framed in terms of "administrative law". If the scope of any eventual legislative reform was also "administrative law", even if this was expressly limited to administrative law relating to non-devolved matters, then this still may lie within the competence of the devolved jurisdictions. The subject matter of immigration law is rights and duties of individuals and the state as regards to immigration. The subject matter of administrative law is the lawfulness and rationality of government decisions. To reform administrative law as it applies to decisions taken in the field of immigration is still to reform administrative law, and this is thus something within the competence of the Northern Ireland Assembly, not something for Westminster to legislate upon.

Option 3 - UK-wide Westminster legislation on non-devolved matters plus England and Wales legislation on all matters

Under this model, Westminster could pass an entirely fresh code for judicial review as it applies to the totality of administrative law in England and Wales, which also extends into Northern Ireland (and Scotland) so far as it relates to non-devolved matters.

This would mean that everything in England and Wales is reviewable under the new law, but in Northern Ireland and Scotland, devolved matters are reviewable under the current law but non-devolved matters under the new law. This is subject to the jurisdictional caveat noted in option 2.

This again could create anomalous and artificial divisions. Northern Ireland Ministers would be reviewed under one set of criteria, English and Welsh Ministers under a different set of criteria. There would be two different streams of judicial review law, the uncodified old law with its procedures and safeguards, and a new codified law with potentially different procedures and safeguards. Depending upon which jurisdiction they are in, Ministers would be held to different standards.

And what about a case like *McNern* [2020] NIQB 57 recently heard in Belfast High Court where the respondents were both the Executive Office (i.e. the First and deputy First Minister of Northern Ireland) and the Secretary of State for Northern Ireland. Under option 3, the grounds for holding a Minister to account are different depending if they are a Secretary of State or a Northern Ireland Minister. Would there need to be parallel procedures, parallel costs, parallel grounds for review and parallel safeguards for the different parties within the same case? Picking up on some of the questions set out in the IRAL call for evidence, would NI Ministers be under a stronger duty of candour than GB Ministers?

Option 4 - UK-wide Westminster legislation with the consent of Northern Ireland

The Sewel Convention (as it is colloquially known) means that Westminster will not normally legislate on a matter within the competence of a devolved jurisdiction unless that devolved jurisdiction first consents to Westminster enacting that law. Standing Orders of the Northern Ireland Assembly have established a procedure for this - the legislative consent motion. Interestingly, the Sewel Convention has legislative weight in s. 28(8) of the Scotland Act 1998 and s. 107(6) of the Government of Wales Act 2006, but not in the Northern Ireland Act 1998.

According to research by the House of Commons Library, out of 320 legislative consent motions sought, only 9 have been rejected, and Westminster has never legislated in defiance of a rejected legislative consent motion. However, this research predates the constitutional upheaval brought about by Brexit and the consistent disregard of the Sewel Convention by the Westminster Parliament with regards to any Brexit-related legislation. It is impossible to predict whether Westminster will respect or ignore the devolved legislatures when it comes to legislating for administrative law reform. Suffice to say there is little point in having a constitutional convention if it is simply ignored.

Option 5 - English and Welsh legislation by Westminster and Assembly legislation for Northern Ireland

Westminster can pass legislation for England and Wales without overstepping any convention. And then Northern Ireland would be free to pass its own legislation on administrative law reform. It is conceivable, but unlikely, that Northern Ireland legislators would come to exactly the same conclusions as the UK Government come to on the exact details of the need for reform. There is no guarantee that Northern Irish reforms would be the same as English / Welsh reforms.

There is an additional limitation on the content of any reform of administrative law passed by the Northern Ireland Assembly. It is an implied part of the grant of legislative power from Parliament to the Assembly, that that power be exercised in accordance with the Rule of Law. In examining the extent of legislative power of the Scottish Parliament (and by implication the Northern Ireland Assembly) in Axa Insurance v Lord Advocate [2011] UKSC 46, Lord Reed said at paragraph 153

That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.

See further support in judgement of Lord Mance at Para 97.

Regardless of what the Westminster Parliament may envisage doing with reform of administrative law, the Northern Ireland Assembly simply does not have the option of legislating against the Rule of Law. Before the introduction of the UK Internal Market Bill, this would have been a rather fanciful point. But as that Bill directly attacks the Rule of Law, it is necessary to flag up that regardless of the eventual content of administrative law reform by Westminster, anything directly breaching the Rule of Law is ultra vires an Assembly Bill.

Option 6 - English and Welsh legislation by Westminster

Westminster could legislate for England and Wales only, without equivalent legislation being passed in Northern Ireland. However, this could have unintended consequences. If an English or Welsh decision is challenged in court, it would be challenged under whatever new rules are devised by Westminster. However, if the decision relates to the UK as a whole, challenging it becomes slightly farcical - if the case is brought in England and Wales, then one set of rules apply, but if brought in Northern Ireland, other rules apply. A government decision could be perfectly lawful in London, but unlawful in Belfast.

Conclusion

None of the options for implementing judicial review reform are particularly appealing or practical. This is a necessary consequence of devolution, where each jurisdiction can make its own laws. If a Government wishes to 'judge-proof' itself for UK wide decisions, it can only effectively do so with the agreement of the devolved legislatures. The independent panel will need some creative thinking to get around these problems.

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