Human Rights Consortium Scotland

Human Rights and Devolution:

Understanding the role of judicial review in Scotland and the consequences of the independent review of administrative law.

A briefing paper for the Civil Society Brexit Project, authored by Dr Katie Boyle*

INTRODUCTION

The independent review of administrative law (IRAL) may result in changes to the operation of judicial review (JR) across the UK. The implications are not yet known as the Panel tasked with undertaking the review has yet to make recommendations to the UK Government on any proposed reform based on the evidence before it.[1] The review is due to conclude by December 2020. This paper outlines the potential implications of the review on JR in Scotland. It focuses specifically on the potential consequences for human rights and devolution. The briefing explains that the reforms proposed by IRAL may be minor in nature. Nonetheless, there is also a risk that the proposed changes could have significant implications for citizens in Scotland, both in relation to the devolved settlement, as well as in relation to the way human rights are currently protected in devolved and reserved areas. The risk ranges from minor technical changes that may inadvertently introduce uncertainty, complexity and a lack of clarity, to more severe implications that render the UK in breach of its international obligations to ensure JR is available as an accountability mechanism for violations of human rights. The paper does not speculate on what is the more likely outcome but provides the reader with an overview of the area and identifies the risks across this spectrum.

WHAT IS THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW?

The independent review of administrative law (IRAL) forms part of a wider reform agenda promised in the 2019 Conservative Manifesto.[2] The Conservative Government promised to establish a Constitution, Democracy & Rights Commission.[3] This Commission was to be established within the first year of government and tasked with addressing a number of constitutional issues, namely: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; access to justice; the role of security services in relation to terrorism and organised crime; and updating the Human Rights Act and administrative law.[4] The Government has not established a Commission as such but proceeded on an issue-by-issue basis. First, IRAL was launched in July 2020

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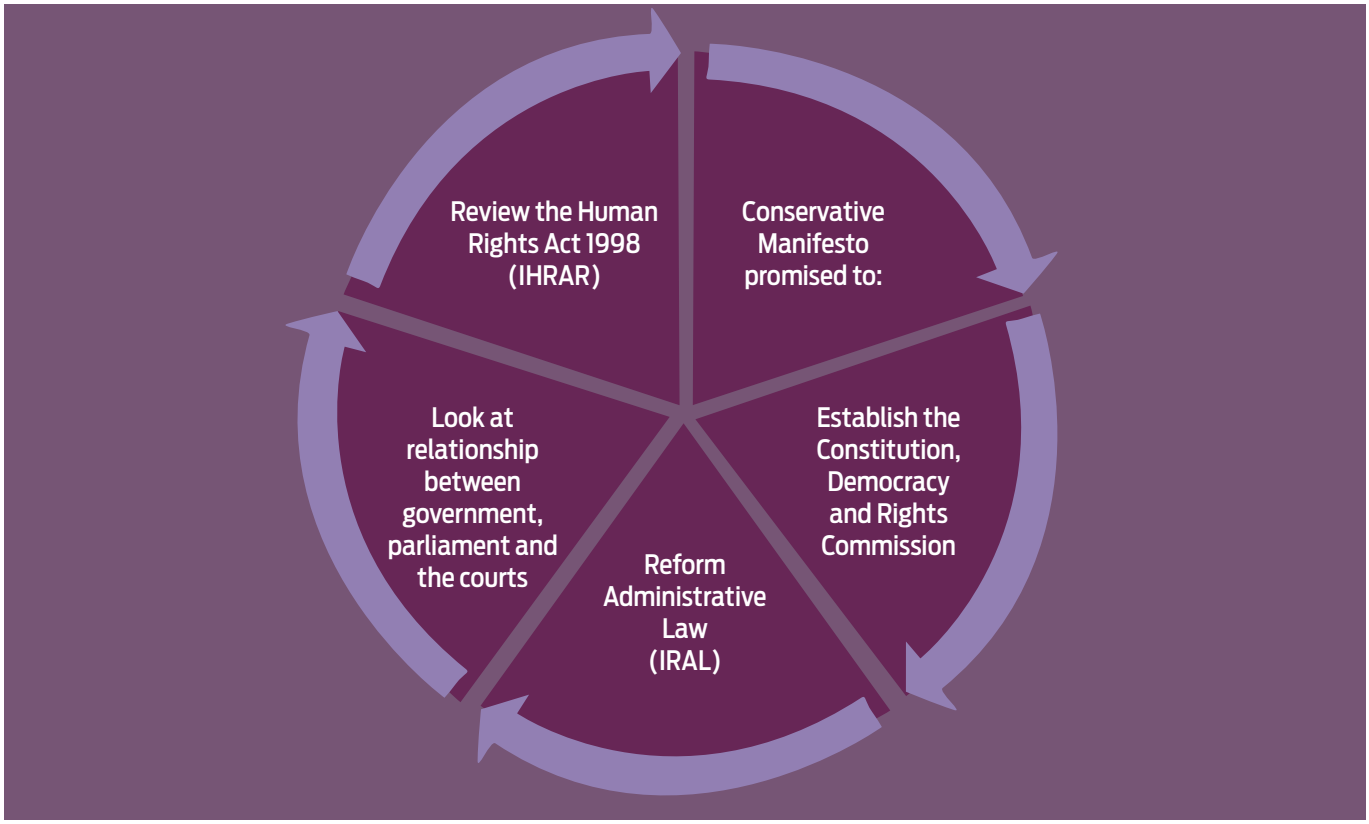
and is due to conclude by the end of the year. On 7 December 2020 the UK Government announced the Independent Review of the Human Rights Act (IHRAR). A third review on the role of the Supreme Court is also imminent. Whilst there has been no clarification on the terms of reference or process as yet, the Government has indicated that the IHRAR will conclude by Summer 2021 and that it will be based on the IRAL model in terms of process and duration.[5] One of the critiques of IRAL is that the process has been insufficient to ensure legitimacy in the outcome of the review[6] suggesting close scrutiny of the IHRAR methodology will be required.



As above, the independent review of administrative law was launched in July 2020 and is due to conclude in December 2020.[7] It is constituted of a Panel of experts and chaired by Lord Faulks and includes Professor Alan Page, a leading expert in administrative and constitutional law in Scotland. A Call for Evidence ('CfE') ran between 7 September to 26 October 2020.[8] The IRAL Panel is tasked with making recommendations on reform, for consideration by the Lord Chancellor and Justice Secretary, Robert Buckland, and the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, Michael Gove, by December 2020.[9]

The aim of the IRAL is to address 'the Government's manifesto commitment to guarantee that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays.'[10]

The terms of reference ('ToR') identify a number of questions to be addressed, including whether JR should be codified (set out in legislation), whether the legal principle of justiciability requires to be clarified (what is subject to supervision by the court), whether the exercise of a public power should be justiciable (should the grounds for review or remedies available be curtailed?) and whether procedural reforms are necessary (reforming disclosure, the duty of candour , time-limits, standing, appeals and costs).

The CfE reiterates the questions posed in the terms of reference and includes a questionnaire for government departments.[13] The CfE further stipulates that it seeks evidence on reserved matters, excluding devolved matters from the scope of the review[14] (the complexity of this as a realistic position addressed further below). This is further clarified as meaning that the review will look at JR in relation to

> *'UK-wide policy and England and Wales policy. Any wider implications for the devolved administrations will be carefully thought through and we will continue to engage at all stages of the process, as appropriate. [T]he Panel may also recommend certain minor and technical changes to court procedure in the Devolved Administrations which may be needed as part of implementing changes to UK policies. Any such recommendation would follow careful consideration of any relevant devolved law and devolution matters arising, and also engagement with the Devolved Governments and courts.'*[15]

The IRAL process is not without its critics. The methodology of the review has been challenged on the grounds that it does not allow sufficient time for deliberation, it does not proactively engage with citizens, and the CfE and questionnaire for government departments lacks neutrality and displays a bias towards curtailing JR in favour of 'effective government' to the detriment of the citizen.[16]

This paper does not revisit those critiques here but examines the potential implications of the review on judicial review in Scotland in so far as it relates to human rights and devolution.

SOME KEY DEFINITIONS

Administrative law: administrative law can be understood broadly as all the processes and rules that govern the state in decision-making.
Administrative justice: within the administrative law sphere is the realm of administrative justice – that is, the pathways or routes to remedy related to the state's decision-making. One of these routes is judicial review, and JR also sits alongside other pathways or routes to remedy including tribunals, ombuds, complaint procedures and various hybrid processes including public inquiry-based decision processes.[17]
Judicial Review: judicial review is the process by which a court reviews a decision, act or failure to act by a public body or other official decision maker. It is only available where other effective remedies have been exhausted and where there is a recognised ground of challenge.[18]
Petition: legal term for an application for judicial review in Scotland (called a claim in England and Wales).
Petitioner: the person(s) seeking judicial review of a decision (called a claimant in England and Wales).
Respondent: the decision maker against whom the judicial review is sought (called defendant in England and Wales).
Standing: the legal entitlement to seek judicial review.
Court of Session: sits in Edinburgh and is the supreme civil court in Scotland, the court responsible for hearing judicial review cases.
Inner House: is the court of first instance in the Court of Session meaning it hears cases when they first come to court.
Outer House: is the highest civil court in Scotland and can hear cases appealed from the Inner House, or sometimes from other bodies including the Sheriff court and tribunals. Certain decisions are appealable from the Outer House to the Supreme Court in London.

JUDICIAL REVIEW IN SCOTLAND

Judicial review is a means of assessing the lawfulness of decisions made by public bodies or other official decision makers. Using this power to review administrative (state) decision-making is often referred to as the court exercising its 'supervisory jurisdiction'. Whilst judicial review became part of Scots law in 1985[19], the history of the court performing this 'supervisory jurisdiction' goes back much further.[20] Since devolution, procedure in the Scottish courts, including judicial review, has been considered a devolved matter.[21] The legal remedies available as an outcome of the judicial review process are also a devolved matter.[22] As Mullen points out, Scotland and England and Wales have 'long operated with common grounds for judicial review and a common approach to justiciability operating alongside different systems of remedies'.[23] There has been little interference from Westminster with the judicial review process until now. Changes to the JR process for reserved areas of law were first introduced with a discretionary option for the (Scottish) Court of Session[24] and later an obligation on the court to transfer some immigration cases to the Upper Tribunal (Immigration and Asylum Chamber).[25] Apart from this very limited intervention, the operation of judicial review has remained firmly within the remit of the Scottish Parliament and the Scottish Courts and Tribunal Service (the latter of which produces detailed rules around court process).

Over the past 35 years there has been relatively light-touch devolved statutory amendments to the judicial review process in Scotland. The most significant came in 2014, following the recommendations of Gill Review,[26] when the Scottish Parliament introduced certain restrictions on applications for judicial review. The Courts Reform (Scotland) Act 2014 introduced a new statutory time-limit (cases must be brought within three months of the unlawful act)[27], a new permission stage (allowing the courts to assess whether the case should proceed)[28], and statutory codification of the sufficient interest test for standing.[29] However, as noted by Lord Reed, since its inception, there was a 'notable absence of reform, or proposals for reform by government or by the Scottish Law Commission.'[30]

RECENT EXAMPLES WHERE JR ACTED AS A ROUTE TO REMEDY FOR VIOLATIONS OF HUMAN RIGHTS[31]

Christian Institute and others (Appellants) v. The Lord Advocate (Respondent) (Scotland) (2016)[32] the UK Supreme Court found that the information sharing provisions in relation to the Named Person Service in Part 4 of the Children and Young People (Scotland) Act 2014 were beyond the legislative competence of the Scottish Parliament as they breached Article 8 ECHR, the right to private life. The petitioner claimed the compulsory appointment of a named person without parental consent breached the parents' Article 8 rights and the information-sharing provisions under Part 4 violated the rights both of parents and children. The Scottish Ministers agreed to amend the incompatible provisions before passage of the legislation.

ABC, Petition of ABC Against (First) Principal Reporter; (Third) The Lord Advocate (2018)[33] In this case a brother petitioned for judicial review when his younger brother was subject to a compulsory supervision order and there was no right for the sibling to participate in the proceedings. The case had some success in the Outer House, was dismissed on appeal in the Inner House, and was unsuccessful in the Supreme Court. However, the judgment noted the importance of the child's right to participate in proceedings under Article 8 ECHR and the finding of non-compatibility was only due to

changes to the system made by the Scottish Government during the case duration.

McHattie v South Ayrshire Council (2020)[34]: in this case a JR was raised against the council for failing to meet their public sector equality duty (PSED)[35] before taking the decision to close an Adult Day Care Centre. The Kyle Centre provided a key service to disabled users. The council chose to close the centre based on a budgetary decision without paying due regard to its PSED under the Equality Act 2010. The court ordered the council to keep the centre open. The court also confirmed how the PSED should be exercised. The PSED means the council should have payed due regard to the elimination of discrimination, advancing equality and fostering good relations between those who share protected characteristics and those who do not. The duty has to be fulfilled before a policy is adopted. The duty must be exercised in substance with rigour and an open mind. The decision maker must go beyond a tick box exercise. The PSED continues as a policy evolves meaning there is a continuing need to keep it under review.[36] The JR helped clarify that the law in Scotland reflected the position south of the border and ensured a more robust and substantive understanding of how the PSED should operate in practice.

There have been concerns over the years that JR has been under-utilised in Scotland as a route to remedy for violations of human rights, and for challenging administrative decision making more broadly.[37] Whilst there are examples of the efficacy of JR (see the table above) studies have also shown that, although it is not possible to establish with any certainty the exact reasons for this, there are a number of factors that may have contributed to the pace of JR being slower in Scotland than south of the border. Historically the subject matter was overlooked in law school curriculums;[38] judicial attitudes have arguably been 'slower to change, or more resistant to change, than judicial attitudes south of the border'[39]; and there may be less awareness of JR as a route to remedy amongst citizens as well as a lack of appropriate advice and representation.[40] **The barriers to JR as a route to remedy cannot be ignored in particular in relation to the historically narrow definition of standing[41], the prohibitive costs in bringing a case[42], inadequate legal aid support, inadequate advocacy support[43], the lack of group proceedings to challenge systemic issues[44] and the lack of awareness as to what constitutes an 'effective remedy' in international human rights law.**[45] The efficacy of JR therefore is worthy of further review, however, it should be with a view to addressing these barriers to enable the citizen to access justice.

The historic slow pace of change in Scotland means that public interest and strategic litigation[46] is still very much in its infancy due to the narrow definition of standing that prevailed until 2012 that essentially prohibited parties from bringing proceedings on a public interest basis.[47] As Jack and McCorkindale have pointed out elsewhere,

> *'rules on standing shape the function of judicial review – whether the role of the courts is a narrow one, to protect the holders of individual or private rights against interference by the state, or whether judicial review exists to defend the public's interest more broadly in good administration conducted in accordance with the rule of law.'*[48]

The sufficient interest test widened the scope of type of applicants that could bring a case in 2012.[49] It was hoped that this would help support the development of public interest litigation in Scotland where charities, NGOs and other civil society organisations would be able to establish sufficient interest to raise a petition for judicial review. Whilst the court initially recognised the importance of public interest litigation,[50] standing has still been restricted in cases engaging with human rights concerns. This is because there is an

additional hurdle to establish 'victim' status in ECHR cases.[51]

This historical context is important to note as there is scope and calls for JR to be improved in the devolved context to better enable access to justice for human rights violations. **Any inadvertent tampering with the system may inadvertently slow the tide of progress going forward.**

WHAT ARE THE POTENTIAL IMPLICATIONS OF IRAL FOR SCOTLAND?

– Incidental 'minor and technical' changes

As explained above, the IRAL has committed to avoid impinging on devolved matters, apart from 'minor and technical' changes to court procedure in devolved administrations. This position is very difficult to reconcile with the reality of devolution. **Scotland has a separate legal system to England and Wales that predates devolution and since devolution, judicial review has been considered a devolved matter**. Scotland and Northern Ireland's devolved powers include the administrative law system in each jurisdiction, including courts and court processes, meaning any review or proposed administrative law reform relating to Northern Ireland or Scotland engages with devolved matters by default. Wales, on the other hand, does not have devolved power over the legal system, however, there is a process underway to consider further devolution in this regard.[52] In each jurisdiction there are legal volumes produced by administrative law academics and lawyers and each jurisdiction operates as a separate administrative law system sharing many of the same principles.[53] **It is near impossible to avoid impinging on devolved matters across the different jurisdictions.** There is no clarification given in the ToR or CfE as to what would constitute 'minor and technical changes' and what conflict resolution procedures would be put in place to address conflicts between reserved and devolved policy.[54] In addition, the idea that devolution means the same thing in each jurisdiction ignores the complexity and huge jurisdictional divergences between each devolved settlement. As Mullen together with the Scottish Human Rights Commission clarified,

> *'the consequence of changing the grounds only with respect to the exercise of UK-wide powers is that the Court of Session would have to apply different grounds of review according to whether the decision challenged was an exercise of UK-wide powers or an exercise of devolved powers. This would make the tasks both of the Scottish judges (in adjudicating questions of administrative law) and of Scots lawyers (in advising their clients) more complex and difficult given the need to keep two sets of judicial review principles in mind in dealing with administrative law cases.'*[55]

At a minimum, and if the IRAL recommendations relate solely to reserved matters there are incidental consequences that may be far reaching. It is not possible to predict what these potential reforms might be, but the recommendations could relate to the grounds of review, the type of cases that are deemed justiciable, or even curtail the rules around standing, by way of example. Bearing in mind that the devolved settlements are different in each jurisdiction – so changes to JR in Scottish reserved matters may impinge on devolved matters elsewhere. For example, employment law[56] and equality law[57] are largely reserved in Scotland, whereas both are largely devolved in Northern Ireland.[58]

Where procedural changes are introduced for Scottish reserved matters – such as immigration or (in part) social security, it could lead to a two-tier framework for Scottish courts and Scots law lawyers and judges.[59] The first tier would relate to procedural rules for devolved matters, and the latter to

procedural rules for reserved. It would require lawyers, and the judiciary, to assess whether the powers under which the decision has been exercised are reserved or devolved in order to decide which procedural route is applicable. What if the case is complex and involves the exercise of both devolved and reserved powers? Which procedure would prevail? This will no doubt add to the court's work substantially, bearing in mind that at the moment the grounds of review and questions regarding justiciability have been the same for both devolved and reserved matters until now. **It also potentially stymies the development of JR in devolved areas as Scottish courts have turned to the JR as it applies in England and Wales to inform their understanding of common principles** across jurisdictions. To curtail the operation of JR in reserved areas may therefore inadvertently curtail the development of JR in devolved matters.

Ultimately, the result of these small and incidental changes could lead to **greater uncertainty and a lack of clarity** in Scotland as the court seeks to ascertain the rules which apply when there is a revised formulation of the grounds of review (or other aspect of JR) arising from statutes conferring UK-wide powers on public bodies.[60]

– Codification – statutory footing

The IRAL suggests that there may be need to codify the rules around JR by putting the process on a statutory footing. Again, it is not possible to say with any certainty what this might look like, however, it is important to consider the potential implications. The Faculty of Advocates in Scotland have argued that there is no need to codify as this will undermine the clarity and flexibility of JR. Codification of the existing principles of judicial review, could inevitably lead to jurisprudence on how the codification should be interpreted, meaning an additional layer of complexity in adjudication.[61] The Faculty clarify that some statutory intervention in the past has been welcome in both Scotland and England, but highlighted that those statutory changes did not fundamentally alter the nature of the JR process.[62]

Of course, JR has been both restricted and enhanced by statutes in other respects. The Human Rights Act 1998 and the Scotland Act 1998 introduce a breach of the European Convention on Human Rights (ECHR) as a grounds of review.[63] This has fundamentally changed the landscape of JR, where the process is the main route to remedy for a violation of the ECHR. The implications of any changes to the remedial process for human rights could be significant and far-reaching.

IMPLICATIONS FOR HUMAN RIGHTS AND DEVOLUTION

– Omission of human rights from IRAL

Both judicial review and human rights are devolved matters under the Scotland Act 1998.[64] Neither the CfE nor the ToR of IRAL mention human rights. This is a strange omission.[65] It is near impossible to see how any even minor changes to the operation of JR could avoid impacting on human rights.[66] A review of JR cannot be comprehensively assessed unless the human rights dimension is considered. As Konstandinides, Marsons and Sunkin have assessed:

> *'Human rights are now fundamentally entwined into the life of JR and while surgical procedures may be used to try to separate them out, there is a real risk that the patient will not survive: that no sustainable reforms will be produced and that those reforms will ignore major issues at their core.'*[67]

This omission could be in part due to the historical development of JR, a process that pre-dates the HRA and SA. Prior to statutory intervention that introduced human rights as a ground of review, the role of the court was very much restricted to assessing the procedural lawfulness of decision

making based on the grounds of illegality, irrationality, procedural impropriety. This has resulted in a tension in how the role of the court is perceived. In one sense, judicial review is about looking at the decision making process, on the other hand, it is also about looking at the merits of the decision itself when considering compliance with human rights. The tension is therefore around a procedural v merits distinction.

A key principle of JR is that the court cannot substitute its own views for the views of the decision maker.[68] The court can supervise the legality of the decision, and if it is unlawful, remit it to the decision maker to be revisited and/or provide for another suitable remedy. **In practice, however, review of compliance with the ECHR (and EU law) has meant that the process v merits distinction has become blurred**. This is because assessing compliance with human rights requires an assessment of the substantive merits of the alleged human rights violation in order to assess the lawfulness of the decision making process. The court deploys different tests to perform this review, including both reasonableness[69] and proportionality.[70] Lord Carloway addresses this tension by explaining that assessing compliance with human rights is about establishing an error of law. It just so happens that Parliament has 'lowered the bar' at which that error may be established in ECHR cases.[71]

As a result of this tension administrative law has at times struggled with the substantive grounds of ECHR and EU law cases. It is difficult to reconcile review of the process with review of the merits of a decision. Nonetheless, human rights cases require the court to adopt a substantive review of the merits of a decision in order to assess the lawfulness of that decision. **In this sense, the court performs a role much more akin to a constitutional court performing constitutional review**.[73] Human rights reform in Scotland[74] may enhance the role of the court in this type of review, requiring the court to adopt more intensive forms of reasonableness and proportionality review to assess compliance with ESCER.[75]

This trajectory is very much towards what is called legal constitutionalism, where the court is part of a framework that requires adherence to constitutional rights. Meanwhile, at the UK level the conservative manifesto commitment suggests a curtailment of the role of the court, a reduction in the level of rights protection, and enhancing the role of the executive. **This is quite a worrying trend from a human rights perspective as it reduces the role of both the Parliament and the court in holding the executive to account.** The Conservative manifesto points to the need to ensure 'effective government'[76], however, from a constitutional perspective the court must continue to perform a constitutional role in ensuring the rule of law, including holding the executive to account if it breaches human rights law.[77]

The IRAL may therefore have omitted human rights based on a desire to return the court to its former role of administrative oversight on procedural grounds. **Recommendations that seek to 'oust' the role of the court in reviewing compliance with human rights pose a particular threat to access to justice from a human rights perspective.**

– Ouster clauses

An example of this trajectory is the recent attempt to render Regulations made under the Internal Market Bill exempt from review on human rights grounds.[78] There is the potential that the IRAL review will recommend further 'ouster' clauses. Ouster clauses are statutory provisions that seek to exclude certain actions of the state from JR. They are controversial and extremely problematic for human rights – as they essentially remove the right to a judicial remedy for a violation thus undermining the rule of law.[79]

Any attempt to remove a right to remedy in domestic law does not change the obligations of the state in international law. And in the case of ECHR cases, and whilst the UK continues to be a party to the Council of Europe treaty, the right to an effective remedy (Art 13) will continue to apply thus leaving the door open to a remedy for a breach in the European Court of Human Rights. Notwithstanding the availability of remedies in Strasbourg, there is a possibility IRAL may recommend further subject areas to be rendered outwith the jurisdiction of the Court of Session (particularly in relation to reserved, and possibly in relation to devolved matters). Such an approach could be tested in the court itself, exacerbating the legal v political tensions mentioned above.[80]

– Retrogressive measures and international human rights law

The omission of the human rights dimension is of particular concern if the outcome of the review results in recommendations to curtail the exercise of JR. This will inadvertently result in a backsliding, or retrogressive measure, in terms of human rights compliance for the state because JR acts as an important accountability mechanism for the protection of civil, political, economic, social, cultural and environmental rights. Retrogressive measures are prohibited in international human rights law except in limited and controlled circumstances. Any deliberate retrogressive measures by the state require the most careful consideration and the least restrictive approach.[81] Any violation of a right as a result of a deliberate retrogressive measure can only be justified in the most exceptional of circumstances and States must be able to explain that the action is reasonable, proportionate, non-discriminatory, temporary, that it does not breach the minimum core obligation and that all other potential alternatives were considered.[82]

It may be helpful to note that there are strong arguments in favour of stronger forms of alternative remedy to address human rights concerns. These include, by way of example, a more prominent role for the ombudsman, tribunals and administrative complaints mechanisms. There is a balance to be struck that such a move enables access to an effective and prompt remedy, rather than adding an administrative tier and delay in access to an effective remedy. One important point to note from an international human rights law perspective is that whilst alternative (non-judicial) administrative remedies are welcome, it is important that an ultimate right of judicial review of administrative procedures is required to satisfy IHRL right to an effective remedy, in particular when human rights and equality issues are engaged.[83] Indeed, some form of judicial remedies are indispensable if human rights cannot be made effective without the court as a forum for accountability.[84] **Whilst judicial review could be improved to make rights and remedies more effective, it would be antithetical to the development of human rights practice across the UK to remove or hinder access to JR as a route to remedy for violations of rights**.[85]

– Future looking

We are at a crossroads in Scotland in terms of the way human rights are protected. The trajectory is a progressive one, with a commitment to enhance human rights protection and extend the existing human rights framework. The National Task Force for Human Rights Leadership (NTF) is in the process of considering how to take forward the recommendations of the First Minister's Advisory Group on Human Rights Leadership (FMAG) to incorporate economic, social, cultural and environmental rights (ESCER) and further specific rights belonging to children, women, disabled people, on race and rights for older persons and for LGBTI communities. Comparative international experience tells us that access to justice for the incorporation of international human rights law requires a degree of disruption to the legal system.[86]

Enabling access to justice for ESCER therefore 'requires the development of standards and criteria and a new litigation culture and practice, without which any application of abstract legal concepts is impossible.'[87] For example, the NTF is considering how to ensure access to effective remedies, with the court continuing to perform a role of last resort through the operation of judicial review.[88] The recommendations of FMAG also include the development of structural remedies to address systemic problems – something that could have far reaching consequences for groups of people facing similar issues in relation to housing, health, education, (devolved) social security and so on.[89] The UNCRC (Incorporation) (Scotland) Bill facilitates a wider test on standing than the ECHR victim status rule, meaning the potential to raise public interest and strategic litigation where appropriate. **Any tampering with the existing operation of JR in Scotland could inadvertently restrict the role of the court in assessing rights compliance under a renewed statutory framework, particularly if there is inadvertent implications for devolved areas of law**. For example, changes to standing, the grounds of review, the intensity of review, what issues are considered justiciable or a codification of rules that results in curtailing access to justice for devolved areas will undoubtedly undermine the future scope of protection in the area. Whilst the IRAL terms of reference indicate the recommendations would not relate to devolved areas, there is an indication that changes may be made for UK-wide policy. If this is interpreted as meaning UK-wide policy that engages in devolved areas, then the consequences for devolved areas could be severe.

Notwithstanding, if the IRAL recommendations relate solely to reserved areas and inadvertently or deliberately curtail access to justice for violations of human rights in reserved areas then citizens[90] in Scotland will be directly impacted by this. When considering cases where the alleged breach is exercised under reserved powers, the courts in Scotland would require to apply the more restrictive framework introduced as a result of IRAL. For example, if standing is curtailed on matters of UK-wide policy then the Scottish courts would be bound by this in relation to reserved matters that come before them.

IF MEASURES RESTRICTING JUDICIAL REVIEW IN SCOTLAND WERE ADOPTED IN WESTMINSTER, WHAT IS THE SCOPE FOR LEGAL CHALLENGE?

JR is itself a devolved area, however, under section 28(7) of the Scotland Act 1998 the UK Parliament reserves the right to make laws for Scotland, regardless of whether the legislation engages with reserved or devolved areas.

By convention, and subsequently through legislation (section 2 of SA 2016 amending section 28 SA 1998), it is recognised that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. The 'Sewel Convention' has become the subject of controversy in more recent years following a number of occasions when the UK Parliament passed legislation despite devolved legislatures withholding consent.[91] This position was exacerbated in the context of Brexit, where the UK Parliament passed the EU Withdrawal Act 2018 without consent from the Scottish Parliament[92] and passed the European Union Withdrawal Agreement Act 2020 without consent from all three devolved legislatures. In 2017, the Supreme Court held that 'policing the scope and manner of [the Sewel Convention's] operation does not lie within the constitutional remit of the judiciary.'[93] This means that, despite being embedded in legislation, there is no recourse to a remedy in court should the UK Parliament proceed without consent in legislating in either reserved or devolved areas in Scotland, including judicial review.

Ultimately, there is very little recourse in law to challenge reform that alters either reserved or devolved areas by way of UK statute. If, as a result of the IRAL recommendations, secondary legislation was introduced that undermined the enjoyment of human rights it is possible to challenge that on the basis that it is unlawful. For example, if JR is amended by way of Regulations that are 'manifestly without reasonable foundation' or are in contravention with the ECHR, then the court may consider the legality and declare such Regulations unlawful.[94] If, however, reform is undertaken through primary legislation then it will be more difficult to challenge, albeit such changes may face political challenge from the perspective of the devolved Government, the Scottish Parliament and broader civil society.

CONCLUSION

This briefing addresses the potential implications of the IRAL for human rights and devolution in Scotland. JR remains a key cornerstone of accountability in reviewing the exercise of power by the state. Whilst the pace of change has perhaps been slower in Scotland to date, the jurisdiction is on the precipice of significant reform that seeks to enhance the protection of international human rights law domestically by introducing new rights and new routes to remedy for violations of those rights. It is not possible to say to what extent the IRAL recommendations will impact in devolved areas, or what kind of changes may be introduced in reserved matters. The briefing sets out some of the risks in relation to potential reform. The IRAL recommendations risk introducing a two-tier system for Scottish courts to administer justice depending on whether the power is exercised under reserved or devolved powers. Codification of the JR process could lead to greater inflexibility, uncertainty and add an extra layer of jurisprudence in the interpretation of the principles of judicial review. The omission of human rights from the terms of reference is of significant concern. Even minor procedural changes, could have significant implications for access to justice for human rights violations. By restricting rules of standing, introducing ouster clauses, introducing stricter time-limits, increasing costs and so on, there is a risk that JR as an accountability mechanism for human rights will be reduced. This means citizens in Scotland (and across the UK) will lose routes to remedy for human rights violations in reserved (and potentially devolved) areas of law. Reducing access to justice for violations of human rights risks rendering the state in breach of its international human rights obligations to enable access to an effective remedy. Further, backsliding, or retrogressing on human rights commitments is a breach of international human rights law. If the IRAL recommends reform in relation to UK wide policy that engages in devolved areas, such as housing, education or health, then the consequences could be more severe again – potentially curtailing the access to justice mechanisms that are in the process of being created as part of Scotland's future looking more extensive human rights framework.

Ultimately, the above concerns may never come to pass and the recommendations of IRAL may reflect the commitment to limit reform to 'minor and technical' changes more akin to those statutory interventions of the past that clarified rules of procedure. Nonetheless, the IRAL should be viewed in the context of the wider constitutional reform agenda including the forthcoming reviews on the Human Rights Act 1998 and the role of the Supreme Court. There is a risk that many incremental and minor changes when viewed as an aggregate could tip the existing constitutional balance of power thus changing the role between the citizen and the state to the detriment of the citizen.

December 2020

Footnotes:

1 The IRAL panel is due to make its recommendations by December 2020
2 Conservative Manifesto 2019, available at https://www.conservatives.com/our-plan
3 Ibid, p.48
4 Ibid, p.48
5 Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice, Joint Committee on Human Rights, Oral evidence: Ministerial scrutiny: human rights, HC 978, Wednesday 18 November 2020
6 Several commentators highlight the concern over insufficient duration to examine evidence as well as bias/ lack of neutrality in the questions asked. Responses to IRAL are hosted on the UKAJI website here: https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/ For an indepth review of the methodology see Katie Boyle and Diana Camps, Response to IRAL Call for Evidence, 16 October 2020 available at link above.
7 at https://www.gov.uk/government/groups/independent-review-of-administrative-law
8 Call for Evidence (CfE) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf
9 ibid
10 https://www.gov.uk/government/groups/independent-review-of-administrative-law
11 The duty of candour requires the decision maker to disclose evidence that would support the petitioner, even if that evidence is detrimental to the decision maker's case.
12 Terms of Reference, para.1-4, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf
13 CfE n8
14 above
15 CfE n8, p.4. The IRAL seeks to mitigate any unintended consequences for devolution in Scotland by including a Scottish academic on the Panel to advise on such matters, Professor Alan Page.
16 See for example the submissions of Boyle and Camps, UKAJI, Oxford Human Rights Hub and the Facutly of Advocates to IRAL. Available at https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/
17 Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice', in E. Palmer et al (eds) *Access to Justice, Beyond the Policies and Politics of Austerity* (Bloomsbury 2016) p.70
18 Sarah Harvie-Clark, Judicial Review, SPICe Briefing, 8 July 2016, available at https://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-62_Judicial_Review.pdf
19 RCS 1965 r.260B, inserted by the Act of Sederunt (Rules of Court Amendment No.2) (Judicial Review) 1985 (SI 1985/500) (now RCS r.8)
20 *Moss Empires Ltd v Assessor for Glasgow, 1917 S.C.* (HL) 1, per Lord Shaw at 11. See also Lord Hope's historical analysis in *West v Secretary of State for Scotland, 1992 S.C. 385* at 396–402.
21 The Scotland Act 1998 reserves the 'continued existence of the Court of Session as a civil court of first instance and appeal' to Westminster but the legal system and court processes are devolved (Schedule 5 para.1(e)). As explained by Mullen, 'Procedure in the Scottish Courts is in general a devolved matter and, until now, judicial review procedure has been regarded as entirely a matter for the devolved institutions and the Scottish courts.' Tom Mullen, Submission to the Independent Review of Administrative Law, Scottish Human Rights Commission, 19 October 2020, para.17 available at https://www.scottishhumanrights.com/media/2110/independent-review-of-administrative-law_191020.pdf
22 Mullen ibid, para.13
23 Mullen ibid, para.13
24 Section 53 of the Borders, Citizenship and Immigration Act 2009 permitted (but did not require) transfer of a judicial review to the Upper Tribunal in relation to certain types of immigration and asylum case. Section 53 was repealed on 1 November 2013 by section 22 of the Crime and Courts Act 2013 which amended section 20 of the Tribunals, Courts and Enforcement Act 2007.
25 Tribunals, Courts and Enforcement Act 2007 Section 20. Importantly, this intervention did not prohibit cases based on human rights grounds coming before the Court of Session.
26 Scottish Civil Courts Review 2009
27 Section 27A Court of Session Act 1988. Section 27A(b) allows for a longer period if the court is satisfied in all the circumstances it would be equitable to do so.
28 Section 27B Court of Session Act 1988
29 Section 27B(2)(a)
30 Robert Reed, 'The Development of Judicial Review in Scotland', (2015) 4 Juridical Review 325-336
31 Court statistics reveal that the vast majority of JR cases relate primarily to immigration matters, and in previous years immigration matters and prison matters. For a discussion on this see Alan Page, 'The judicial review caseload: an Anglo-Scottish comparison' (2015) 4 Juridical Review 337-352, p.343
32 [2016] UKSC 51
33 [2018] ScotCS CSIH 72
34 [2020] CSOH 4
35 Section 149 of the Equality Act 2010
36 The court referred to *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 to clarify how the law should be interpreted and applied.
37 See for example the work of Paterson Hazel Genn and Alan Paterson, Paths to Justice Scotland: *What People in Scotland Do and Think About Going to Law* (Oxford: Hart Publishing, 2001) 82-84 and Alan Page, Juridical Review, 2015, n31
38 McCorkindale et al identify a Dearth of academic research and teaching materials, McCorkindale et al, 'Judicial Review at 30', (2015) 4 Juridical Review 317-323, p.318
39 Page n31, p.351
40 Administrative Justice in Scotland – the Way Forward (June 2009) paras 8.74-75, available at: http://www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-WayForward-Full-Report.pdf
41 Douglas Jack and Chris McCorkindale Standing in Scots Public Law Litigation, (Edinburgh: Human Rights Consortium Scotland, 2020)
42 Prohibitive costs continue to threaten the right to access justice as outlined *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51 and FB *(Afghanistan) & Anor, R (On the Application Of) v The Secretary of State for the Home Department* [2020] EWCA Civ 1338 (21 October 2020). Further, even when cost orders are available, such as in environmental cases, the courts have rendered it far from easy to obtain a cost order, Response from the Faculty of Advocates to the Independent Review of Administrative Law (Edinburgh: Faculty of Advocates, 2020) - see *Gibson v Scottish Ministers* [2016] CSIH 31, 2016 SLT 675). As McCorkindale and Jack explain 'important barriers to judicial review remain – most significantly, cost' Jack and McCorkindale n41, p.1
43 For example, see the work of the Health and Social Care Alliance on the right to advocacy, https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2013/09/independent-advocacy-public-consultation-guide-commissioners/documents/0042-health-social-care-alliance-scotland-alliance/0042-health-social-care-alliance-scotland-alliance/govscot%3Adocument/00433440.pdf. The Human Rights Consortium has argued for a right to independent advocacy to be recognised on the face of the UNCRC (Incorporation) (Scotland) Bill, https://hrcscotland.org/2020/10/28/consortium-submits-response-to-un-crc-bill-consultation/
44 Katie Boyle, Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication (New York: Routledge 2020)
45 ibid

46 See for example the important strategic litigation brought by Clan Childlaw, ABC v Principal Reporter & Anor (Scotland) [2020] UKSC 26 (18 June 2020)
47 AXA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland) [2011] UKSC 46
48 Jack and McCorkindale n41 p.1
49 Based on the English test applied to Scotland in AXA n47
50 Walton v Scottish Ministers 2013 SC (UKSC) 67 per Lord Hope at §§151-156
51 Christian Institute v Lord Advocate [2015] CSOH 7, 2015 SLT 72
52 Commission on Justice in Wales, https://beta.gov.wales/commission-justice-wales
53 On Scotland see Alan Page, *Constitutional Law of Scotland* (W. Green 2015), Chris Himsworth and Christine O'Neill, *Scotland's Constitution: Law and Practice*, (Bloomsbury 2015) and on jurisdictional differences in judicial review see Alan Page, 'The judicial review caseload: an Anglo-Scottish comparison', Juridicial Review (2015) and Chris McCorkindale et al, 'Judicial Review at ThirtyJuridicial Review (2015). On Northern Ireland see Gordon Anthony, *Judicial Review in Northern Ireland (2nd ed)* (Hart Publishing 2014). On England and Wales see Michael Fordham, *Judicial Review Handbook* (7th ed.) (Hart Publishing 2020).
54 Katie Boyle and Diana Camps, Response to IRAL Call for Evidence 16 October 2020, para.5.6, available at https://ukaji.org/2020/11/04/collection-of-responses-to-the-independent-review-of-administrative-law-iral/
55 Mullen, n21, p.6
56 Schedule 5 para.H1 Scotland Act 1998
57 Schedule 5 para.L2 Scotland Act 1998
58 These are not listed as excepted or reserved matters in Schedules 2 and 3 respectively, Northern Ireland Act 1998
59 ibid
60 Mullen n21 para.10
61 Oxford Human Rights Hub, n16
62 Such as sections 27A – D of the Court of Session Act 1988 or s 31(2A) – (2C) of the Senior Courts Act 1981. Faculty of Advocates, Submission to IRAL 2020, para.3.1. See also Part 54 of the Civil Procedure Rules.
63 Section 7 HRA; section 29 and section 40 SA
64 Judicial review forms part of the legal system, a devolved area excluded from Schedule 4 or 5. Implementing and observing international human rights obligations is a devolved area, expressly excluded from the reservation on foreign affairs, Schedule 5 para.7(2)(a). However, the Human Rights Act 1998 and the Scotland Act 1998 are protected enactments and therefore reserved matters.
65 Theodore Konstadinides, Lee Marsons and Maurice Sunkin, 'Reviewing JR: The constitutional importance of the Independent Review of Administrative Law 2020', UKAJI Blog 24 September 2020, https://ukaji.org/2020/09/24/reviewing-judicial-review-the-constitutional-importance-of-the-independent-review-of-administrative-law-2020/
66 Mullen, n21
67 Konstadinides et al n65
68 *Associated Provincial Picture Houses v Wednesbury Corporation*, [1948] 1 KB 223, [1947] 2 All ER 680; *R v Secretary of State for Home Department ex p. Brind*, [1991] 1 AC 696, [1991] 2 WLR 588, [1991] 1 All ER 720.
69 Wednesbury reasonableness is a restrictive test that falls short of international human rights law (it is based on irrationality). The slightly wider concept of reasonableness in ECHR cases goes further in reasonableness review ('manifestly without reasonable foundation'). The international test adopted by the UN Committee on ESC Rights is wider again and based on the intensity of review applied in South African ESC jurisprudence. For a discussion on the wider tests of reasonableness and proportionality see Boyle n44
70 Denis Edwards, 'Thirty years of judicial review in Scotland: the influence of European Union law', (2015) 4 Juridical Review 399-416
71 Lord Carloway, Constitutional Principle and the Rule of Law, Lord Rodger Memorial Lecture, 29 October 2020, p.8 available at https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/lord-rodger-memorial-lecture---29-october-2020-deb.pdf?sfvrsn=1897b7f7_2
72 Edwards, n70
73 McCorkindale et n37 al p.13
74 Including the First Minister Advisory Group on Human Rights Leadership recommendations, the National Task Force on Human Rights Leadership proposed implementation of reform as well as the UNCRC (Incorporation) (Scotland) Bill
75 As required by international human rights law. For a discussion on reasonableness and proportionality as conceived in international human rights law see Boyle n44
76 Conservative manifesto n2, p.48
77 'the only function of the court's supervisory jurisdiction [is] to redress individual grievances [but must recognise and perhaps even give priority to] its constitutional function of maintaining the Rule of Law' as per Lord Reed, *Walton v Scottish Ministers* [2012] *UKSC 44; 2013 S.C. (U.K.S.C.) 67; 2012 S.L.T. 1211* at [90].
78 Suffice to say the legality of the ouster clauses contained in the Bill are yet to be determined. For a recent discussion on the human rights dimension see Ronan Cormacain, https://ukhumanrightsblog.com/2020/10/15/the-uk-internal-market-bill-mother-of-all-ouster-clauses-ronan-cormacain/?shared=email&msg=fail
79 For a discussion on the case law and the central importance of JR see Paul Craig, 'Ouster clauses, separation of powers and the intention of Parliament: from Anisminic to Privacy International', Public Law (2018) 570-584 and Paul F. Scott, 'Ouster clauses and national security: JR of the Investigatory Powers Tribunal' Public Law (2017) 355-362
80 *R (Jackson) v Attorney General* [2006] 1 AC 262 at para 102 '[i]n exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the ... Supreme Court may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'
81 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, para.9
82 UN Committee on Economic, Social and Cultural Rights, 'Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis', 16 May 2012
83 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24 at para.9
84 ibid
85 Boyle and Camps n54 para.2.6
86 Christian Courtis, 'Argentina, Some Promising Signs' in M. Langford (Ed) *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, p.181
87 Martin Evans, Rethinking Legal Aid an Independent Strategic Review (2018)
88 See First Minister's Advisory Group on Human Rights Leadership, Recommendations for a new human rights framework to improve people's lives, Report to the First Minister (December 2018) available at http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf
89 Ibid
90 By citizen I adopt the widest possible meaning including those in Scotland who have precarious immigration status.
91 In Wales, the Welsh Senedd voted against giving consent to the Police Reform and Social Responsibility Bill in 2011. In Scotland, the Scottish Parliament withheld consent on aspects of the Welfare Reform Bill 2011. In Northern Ireland, the NI Assembly withheld consent on the Enterprise Bill 2015.
92 The Welsh Senedd also withheld consent initially but later conceded.
93 *Miller & Anor*, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3) [2017] UKSC 5 (24 January 2017) para.151
94 See for example the decision of the court in Cox, Re Application for Judicial Review [2020] NIQB 53 (22 October 2020)

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