

Human Rights: Accountability and Enforcement

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Briefing No. 2 (of 3): February 2019

Background

The first briefing in this short series, *Incorporation of International Human Rights*, discussed methods of embedding (incorporating) the UK's international human rights obligations in Welsh law. It also demonstrated why this should be the objective in Wales. The briefing outlined three approaches: direct incorporation, indirect incorporation, and sectoral incorporation. In doing so it emphasised that these are rarely (if ever) encountered in a clear-cut way in practice. This is because incorporation is partly dependent on domestic arrangements for holding national authorities to account for human rights.

This second briefing will discuss accountability and enforcement of human rights, and how these might be strengthened in Wales as a consequence of incorporation. It will focus on socio-economic rights as these are the human rights that most often correspond with devolved competences, i.e. in areas such as housing, health care, social care and social provision, and education.

Socio-economic rights are set out in the Covenant on Economic, Social and Cultural Rights (CESCR), but also in human rights treaties that guarantee rights to particular social groups, for example, conventions on the rights of disabled people, children, women and racial minorities. Incorporation of these rights in Welsh law is necessary in order to fill the gap in protection arising from the UK's failure to embed international human rights at domestic level (see briefing no.1).

In order to understand how accountability and enforcement are linked to incorporation of socio-economic rights the next section will describe some key human rights obligations. These obligations apply to the State, but are discussed as relevant to the conduct of government, as government at all levels is the most significant State institution having an influence on how human rights are given effect.

Human Rights Obligations

The UK is a party to seven major human rights treaties.¹ This brings with it a number of obligations which include general requirements to respect, protect and fulfil rights, as well as to make progress toward full realisation of rights, to ensure rights are available without discrimination, and, to provide a minimum level of rights for everyone.

Respect, protect and fulfil

At a general level government at all levels in the UK is required to respect, protect and fulfil human rights. To **respect** rights means refraining from actions that result in violation of human rights. To **protect** rights means taking action to prevent third-parties from interfering with rights. To **fulfil** rights means taking steps to ensure the realisation of rights for everyone, but in particular for those at greatest disadvantage in society.

Progressive realisation

Socio-economic rights may be given effect in different ways and may be subject to different degrees of fulfilment. The duty to fulfil socio-economic rights is subject to progressive realisation, so that rights may be given effect gradually to the fullest possible extent over time. Any assessment of the extent to which government has complied with the obligation to fulfil rights will need to take account of the resources it has available, the demands made on those resources, and the prioritisation given to rights alongside other pressing policy considerations. Ministers have scope to balance a range of interests when deciding on strategies for implementation of socio-economic rights.

¹ For a list of treaties signed and ratified by the UK see: <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties>

Non-discrimination

Although socio-economic rights may be subject to progressive realisation some obligations are of immediate effect. One such obligation is non-discrimination. This demands that access to human rights (to whatever extent these are fulfilled) should not be denied to protected groups. The CESCR, for example, prohibits discrimination based on 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Other human rights treaties have similar prohibitions on discrimination.

Minimum core

While the fulfilment of socio-economic rights may be achieved progressively, all such rights are said to have a 'minimum core' or 'minimum essential level' of achievement. The minimum core is not defined but may be understood as the basic level of a right which should be provided consistent with ensuring the dignity of the person. This minimum essential level of a right must be provided immediately so that no individual is left to live a life of destitution or to suffer degrading treatment.

It is worth noting that the extent to which government policy, including policy in Wales, is adequate to meet the obligations of progressive realisation and the minimum core are matters for public debate, discussion and scrutiny. They are not set in stone and may be subject to different interpretations. What is essential is that mechanisms exist to hold Ministers to account for the choices they make in relation to these obligations.

Accountability

An accountability gap arises for socio-economic rights because these are not incorporated in UK law (see briefing No.1). Incorporation helps ensure that appropriate mechanisms for accountability and enforcement are available, although this does not necessarily imply court-based mechanisms. This section discusses relevant informal (non court-based) accountability mechanisms.

Complaints

Complaints mechanisms are informal procedures which enable an individual aggrieved by some decision or action of government to bring their grievance to the attention of decision-makers. Incorporation would allow individuals to complain about

decisions or actions of government which fall below the human rights standards established by specific human rights treaties. In order for complaints mechanisms to be effective they should be accessible, especially to those from disadvantaged communities, and should include the opportunity to reconsider or review a decision or action.

Strengthening the role of National Human Rights Institutions (NHRIs)

Legislation to incorporate human rights treaties can provide for NHRIs to be given powers to investigate and hold government to account for alleged breaches of relevant rights.² However, even without this incorporation would strengthen the role of NHRIs, including in Wales. Relevant NHRIs in Wales are UK-wide (Equality and Human Rights Commission), or Wales-national (Children's Commissioner for Wales, Older People's Commissioner for Wales). Incorporation would establish an accountability framework against which to assess government decisions or actions, and against which NHRIs in Wales could hold Welsh Ministers to account.

National Assembly for Wales (NAW) scrutiny

In Wales incorporation would mean that meeting the obligations associated with socio-economic rights becomes a condition of legitimacy of Welsh Government policy. This would give the NAW an opportunity to scrutinise proposals for policy or legislation against human rights standards, including by interrogating whether enough is being done to progress toward the fulfilment of rights in accordance with the obligations of progressive realisation and minimum essential provision.

Socio-economic rights establish non-specific targets for progressive attainment (realisation) through public policy. As already noted, how best to make progress to meet these targets is a matter for public debate, public discussion and public accountability. The informal accountability mechanisms outlined above are appropriate to support these processes, as well as to help protect the individual and groups from violation of their rights. In addition to informal mechanisms incorporation underpins formal court-based accountability and judicial enforcement. This is an

² Consideration of what this might involve is beyond the scope of this briefing.

additional layer of protection for socio-economic rights in cases where informal mechanisms fail to provide adequate safeguards.

Enforcement

It should be emphasised that enforcement does not necessarily imply court-based procedures. Enforcement can take place through informal mechanisms or political processes (above). However, the term enforcement is widely understood as court-based enforcement, and this is the sense in which the term is used in this section.

It is sometimes argued that socio-economic rights are not suitable for adjudication by the courts.³ This argument has been roundly rejected by UN treaty bodies, and as a matter practice it has been shown that the courts, and judges, are capable of adjudicating on socio-economic rights.⁴ More significant than the question of whether socio-economic rights are capable of adjudication by the courts, is the question of *whether* socio-economic policy *should* be subject to judicial scrutiny.

When it comes to protection of individual and group rights the courts represent a bastion of accountability, and a powerful force to ensure socio-economic policy is human rights compliant. On the other hand, courts may be seen as interfering with the democratic authority of government if they are permitted too much power to interfere with the decisions of elected representatives, e.g. Welsh Ministers. How the balance between these two important considerations is achieved is something which needs to be taken into account as an aspect of incorporation.

It is often assumed that direct incorporation means human rights are enforceable by the courts, and that indirect incorporation means they are not. Although direct incorporation embeds human rights within a legal regime the assumption about enforceability is not necessarily fully demonstrated in practice. The extent to which rights are enforceable will depend on arrangements for judicial oversight of public policy. This is illustrated by the two examples below.

³ The argument is sometimes seen as socio-economic rights are not 'justiciable', i.e. they are not amenable to adjudication by judges within the formal justice system.

⁴ Space does not allow for a full discussion.

Enforcement and direct incorporation

(Readers should refer to the briefing no.1 for a full description of direct incorporation.)

The Human Rights Act 1998 (HRA 1998) is often given as an example of direct incorporation of a human rights treaty in UK law, i.e. the European Convention on Human Rights (ECHR). The HRA 1998 requires public authorities to act in compliance with the ECHR, and the courts are able to provide redress where an individual's rights are violated.⁵ The HRA 1998 makes the ECHR enforceable in the UK. However, the HRA 1998 itself provides exceptions to enforceability. Parliament is excluded from the requirement to act compatibility with the ECHR, and public authorities compelled to act contrary to the ECHR by statute are absolved of responsibility. Instead of being able to enforce rights where statute is in breach of the ECHR the courts can issue a 'declaration of incompatibility'.⁶ This is intended to prompt law reform to remedy the breach.

The exception to full enforceability of the ECHR under the HRA 1998 is in order to strike a balance between the democratic authority of Parliament to make law, and the function of the courts to hold politicians to account and uphold the *rule of law*. It demonstrates that full enforceability does not necessarily follow as an aspect of direct incorporation but will be shaped by legislation giving effect to human rights.

The HRA 1998 approach is not the only mechanism for achieving the balance between democratic authority and public accountability. This is also achieved, in a different way, by legislation to incorporate the Convention on the Rights of the Child in Wales (CRC), i.e. by indirect incorporation.

Enforcement and indirect incorporation

(Readers should refer to briefing no.1 for a full description of indirect incorporation.)

The *Rights of Children and Young Persons (Wales) Measure 2011* makes the CRC part of Welsh law. The rights set out in the CRC are not however directly binding on

⁵ Sections 6 and 7, HRA 1998.

⁶ Section 4, HRA 1998.

Welsh Ministers. Welsh Ministers are instead required to have ‘due regard’ to the CRC when exercising their functions. For this reason the CRC is said to have indirect effect and the Measure is often cited as an example of indirect incorporation.

Welsh Ministers are not legally accountable for compliance with the CRC directly. However, any failure to have due regard to the CRC in the exercise of policy decision-making (including when deciding to introduce new legislation) is grounds for judicial review. Any adverse finding at judicial review could result in Welsh Government policy being set aside with Ministers being required to revisit policy decisions. In addition, there is the possibility that policy which is particularly harmful to children’s rights (disproportionate or unreasonable), could be declared unlawful as not in compliance with the due regard duty.

Direct incorporation provides a straightforward route to judicial oversight and enforcement. Judicial remedies are more accessible and likely to be more effective where there is direct incorporation. However, as the examples above show, enforcement as a consequence of direct incorporation can be circumscribed, and indirect incorporation can provide for some judicial oversight (albeit not as strong as under direct incorporation).

Conclusion: Further Incorporation in Wales

The first briefing discussed incorporation of human rights. It demonstrated why this is needed in Wales. It also showed how the approach to incorporation is not fixed but can take different forms. This briefing has demonstrated that the consequences of incorporation for accountability and enforcement are not predetermined, but again depend on choices made about how incorporation is given effect. These choices are essentially political choices based on a view taken of the benefits and priorities for incorporation, as well as the appropriate role for the courts – particularly in relation to socio-economic rights.

The opportunity presents itself in Wales (and indeed there is a pressing need) to further incorporate international human rights, especially socio-economic rights. This would result in divergent, different and higher legal standards of human rights protection in Wales, and discrete mechanisms to safeguard rights, as well as possibly

a new role for the courts. These are inevitable consequence of devolution and differences in approaches to human rights. While it is unfortunate that the UK Government is not willing to consider incorporation of human rights, this should not stand in the way of progress in Wales.⁷

Human rights Briefings

This briefing paper is part two of a series of three briefing papers outlining some fundamentals of incorporation of human rights and is authored by Dr Simon Hoffman, Associate Professor at Swansea University.

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We are independent of government or any political party, and are funded by subscriptions, donations, grants from charitable trusts and foundations and commissions.



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⁷ Or in Scotland, where recent developments suggest that Scotland is about to make significant progress on incorporation of human rights: