

Incorporation of International Human Rights

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Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.¹

Human rights have been agreed by the community of nations (the United Nations, UN) as basic entitlements which should be available to everyone. This briefing focuses on why it is important that these international human rights are incorporated into Welsh law, and how this might be achieved.

International Human Rights

The UK has signed and ratified seven international UN human rights treaties.² These include two general UN Covenants which guarantee Civil and Political Rights (civil liberties, access to justice etc), and Economic Social and Cultural Rights (housing, social care, health care, access to work, education etc). The UK is also bound by a number of UN conventions which guarantee rights to social groups experiencing disadvantage and discrimination in society. These include women, children, disabled people and racial minorities. The breadth of coverage of human rights at international level is comprehensive.

¹ Equality and Human Rights Commission: <https://www.equalityhumanrights.com/en/human-rights/what-are-human-rights>

² 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>

In international law the UK State, primarily the UK Government, is under a duty to implement all the rights set out in the treaties the UK has signed and ratified. The UN has established a number of treaty bodies made up of experts on human rights in the area covered by a specific human rights treaty. These treaty bodies publish guidance on how governments can go about meeting their human rights obligations. Amongst the actions governments are encouraged to take is to incorporate human rights treaties into national constitutions or in national law.³ The next two sections discuss incorporation.

The Meaning of Incorporation

Unfortunately, the meaning of incorporation is far from settled. This section adopts the most widely accepted description of incorporation, but it is emphasised that the approaches discussed below are rarely (if ever) encountered in a clear-cut way in practice. This is because incorporation will depend as much on context, e.g. arrangements for accountability and judicial oversight, as on the approach adopted.

Direct incorporation

Direct incorporation involves transforming an international human rights treaty into domestic law by making it part of a national constitution or national legislation.

This approach means human rights become binding on governments and public authorities in law, and individuals are able to rely on their rights before national tribunals or courts. It is assumed that this means human rights are fully enforceable by the courts. However, this assumption is not necessarily demonstrated in practice. The provision of effective redress for violation of rights will still depend on how national legal systems function and the remedies available.

An example of direct incorporation in the UK is the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR) into the UK legal system.

³ For example: Committee on the Rights of the Child, General Comment No.5, 2003, *General Measures of Implementation of the Convention on the Rights of the Child*; and, Committee on Economic, Social and Cultural Rights, General Comment No.9, 1998, *The Domestic Application of the Covenant*. Both are available from the treaty body section of the website of the office of the High Commissioner for Human Rights: <https://www.ohchr.org/EN/HRBodies/CESCR/pages/cescrindex.aspx>

Indirect incorporation

Indirect incorporation means that a human rights treaty is given some legal effect through domestic legislation. The key distinction from direct incorporation is that human rights do not bind governments or public authorities, but have some indirect impact, e.g. by requiring government or public authorities to take particular human rights into account when making policy decisions.

It is assumed that indirect incorporation means human rights will not be enforceable by the courts. Once again this is not the complete story. Provision may be made for some legal accountability via the courts, even where there is indirect incorporation. However, it is unlikely that this will be as effective to provide redress to individuals whose rights are infringed as mechanisms associated with direct incorporation.

An example of indirect incorporation in the UK is the *Rights of Children and Young Persons (Wales) Measure 2011* (the Child Rights Measure). This makes the UN Convention on the Rights of the Child (CRC) part of Welsh law and requires Welsh Ministers to have 'due regard' to children's rights when exercising any of their functions.

Sectoral incorporation

Sectoral incorporation involves giving some effect to human rights in legislation in relevant areas of public policy (i.e. sectors). This usually means that some rights are decoupled from the treaty in which they are found and referred to in sectoral legislation. The right(s) in question may be directly referenced, or an attempt made to give effect to the right(s) through legislative provisions. Depending on how this takes place the courts may be able to enforce the particular provision concerned.

The UK Government claims that UK sectoral legislation is compliant with human rights and is adequate to incorporate human rights into UK law. It points to the enactment of specific legislation (e.g. the HRA 1998, on equality and discrimination, and on child protection) as evidence of compliance with its obligation to implement human rights. These claims are contested (see below 'Why Incorporation Matters: International Human Rights in the UK').

Issues of accountability and enforcement are discussed in the next briefing: *Human Rights: Accountability and Enforcement*.

Why Incorporation Matters

An important impact of incorporation is to shift the location of human rights from the international to the national. Without incorporation human rights may be seen as mere aspirational standards at a distance from the real world of domestic policy. Even worse, without incorporation human rights risk becoming ‘dead letters’ because they are not taken seriously by those responsible for their implementation (the State/government).⁴ Incorporation, whether direct or indirect, makes human rights relevant to the business of government. It embeds human rights in the work of government now and in the future, insulating them from political whim by making them part of the national legal framework.

A second important impact of incorporation is to address the accountability gap. This is the gap between what States agree as their human rights obligations, and their actions, which often leave individuals and social groups without the necessary levels of protection or resources to experience even the most basic aspects of human rights.

At international level there is some accountability for human rights. States are required to report on a regular basis to the treaty body which monitors compliance with a particular treaty. This process is repeated every 4 to 5 years and results in the treaty body issuing ‘Concluding Observations’ which identify where the reporting State is not meeting human rights standards and giving advice on steps to implement rights.⁵ However, treaty bodies have no mechanism to enforce compliance with human rights. Incorporation is therefore seen as a vital step toward more effective domestic accountability and enforcement.

⁴ Inter Parliamentary Union and UN Office of the High Commissioner for Human Rights, *Human Rights Handbook for Parliamentarians No.26* (Geneva: 2016), p.97, available to download here: <https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf>

⁵ A comprehensive guide to the treaty monitoring mechanisms is available from, Office of the UN High Commissioner for Human Rights, *The UN Human Rights Treaty System*, Fact Sheet No.30/Rev 1 (New York: 2012, available here: <https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>

Why Incorporation Matters: International Human Rights in the UK

Human rights offer an ethical and a practical framework to guide public policy. However, in the UK international human rights are not part of UK law system unless the UK Government decides to incorporate them via statute.⁶ Successive UK Governments have refused to do this.

The significance of the UK Government's choice not to incorporate human rights is twofold: important human rights standards are not effectively embedded (or mainstreamed) into policy decision-making or government action (or the actions of other public authorities); and, there is an accountability gap as there are no effective mechanisms for accountability and enforcement of unincorporated human rights.

While international human rights have not been incorporated, the UK has incorporated the ECHR via the HRA 1998. UK public authorities (with the exception of Parliament), are required to act in compliance with the rights set out in the ECHR.⁷ UK courts have powers to provide redress to individuals whose human rights under the ECHR are violated. However, the ECHR does not extend into the terrain of social or economic rights: it is a document of primarily civil and political rights. While there is the possibility of enlarging the coverage of some rights under the ECHR into the socio-economic sphere, the protections it affords individuals in important aspects of their lives such as health care, housing, education, access to employment and welfare is either non-existent or extremely limited. The ECHR is not an adequate substitute for the comprehensive coverage of socio-economic rights afforded by international human rights treaties.

The significance of this shortfall in human rights coverage at domestic level was highlighted during the visit to the UK by the UN Special Rapporteur on Extreme Poverty and Human Rights (November 2018). The Rapporteur raised numerous concerns about the impact of austerity and welfare reform in the UK, and the consequences for human rights. The Rapporteur's statement following his visit describes instances where the UK is in clear breach of socio-economic rights

⁶ This is referred to as a 'dualist' approach.

⁷ To be precise, an edited version of the ECHR contained in a schedule to the HRA 1998.

guaranteed by international law, e.g. on adequate housing, social security, health care, and provision for vulnerable groups.⁸

The Special Rapporteur's concerns are consistent with the Concluding Observations of the UN Committee on Economic Social and Cultural Rights published when the UK last reported on compliance with the Covenant on Economic Social and Cultural Rights (CESCR) in 2016.⁹

Despite the criticism levelled at the UK by international mechanisms, the UK Government insists that it acts in compliance with international standards. As the UK has not incorporated international human rights treaties there are no effective domestic mechanisms to hold UK Ministers to account for these claims, or to provide redress to those suffering violations of their human rights.

It is not just in the area of socio-economic rights that failure to incorporate leads to gaps in protection and provision. Campaigners for child rights, women's rights, disability rights and minority rights regularly bring forward evidence to highlight how the UK's failure to incorporate special protection treaties means these groups continue to suffer disproportionate discrimination and disadvantage in society.¹⁰

It would be incorrect to suggest that the UK has failed to comply with international human rights standards in all respects when it comes to socio-economic rights, or the human rights of disadvantaged groups. But for many, the lack of a directly applicable human rights framework means their rights receive too little attention in public policy, and too little protection in legislation, with the courts powerless to hold the UK government (or indeed any public authority) to account by reference to standards which it has ostensibly accepted.

⁸ Access the Special Rapporteur's initial report here:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881&LangID=E>

⁹ Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, 2016, available here:

https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GBR&Lang=EN

¹⁰ These are too numerous to list, but see for example the submissions made by the Equality and Human Rights Commission to the Committee on the Rights of Persons with Disabilities when the UK was examined in 2017, available here:

https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=GBR&Lang=EN

Incorporation and Devolution

Although the UK Government is primarily responsible for implementation of human rights in the UK, the devolved administrations are expected to contribute. Indeed, given the breadth of devolved competences, they may be seen as having a very significant role to play in ensuring the realisation of human rights. In contrast to the UK Government, which is increasingly seen as hostile to human rights, the Welsh Government is open to (and indeed supportive of) international human rights as a framework for public policy (as is the Scottish Government).

Julie James AM, when Leader of the House of the National Assembly for Wales (NAW) wrote in an introduction to the Welsh Government's *Enabling Gypsies Roma and Travellers* policy published in June 2018:

Equality and Human Rights are central to the work of the Welsh Government and our vision for Wales.¹¹

This sentiment is echoed in numerous policy documents and statements issued by Welsh Ministers. Jeremy Miles AM, Counsel General for Wales said this about human rights as recently as November 2018:

We have consistently gone beyond seeing rights as a 'parchment guarantee' ... We have sought, collectively, to seep them into the walls of the institution itself, shaping the executive and legislative processes.¹²

In fact, Wales already has legislation to incorporate human rights. The Child Rights Measure (mentioned above) incorporates the CRC into Welsh law. The potential loss of rights guaranteed by the Charter of Fundamental Rights of the European Union following Brexit seems to have inspired calls for further incorporation of human rights in Wales.

¹¹ Available here (words cited are at p.3): <https://gov.wales/docs/dsjlg/publications/equality/180625-enabling-gypsies-roma-travellers-plan-en.pdf>

¹² Eileen Illtyd Memorial Lecture on Human Rights, Swansea University, 15 November 2018. Transcript available here: <https://www.swansea.ac.uk/law/news/>

The NAW Equality, Local Government and Communities Committee and the External Affairs and Additional Legislation Committee have jointly called for legislation to incorporate more human rights adopting the approach taken in the Child Rights Measure. There have also been calls from Assembly Members to incorporate the UN Convention on the Rights of Persons with Disabilities (CRPD),¹³ and the UN Principles on Older People.¹⁴

The Wales Human Rights Stakeholder Group, a coalition of NGOs (including the Bevan Foundation) and academics, with observers from Wales-based National Human Rights Institutions, is working to secure further incorporation of human rights in Wales.

Of particular significance is incorporation of socio-economic rights (health and social care, education, housing, employment etc), whether set out in the CESC or special protection treaties such as the CRPD. These are the human rights that relate most closely to the competences and powers of the NAW and the Welsh Government, with potential to provide a guiding framework for the conduct of policy and legislation in devolved areas. With the exception of the CRC, which includes many socio-economic rights aimed at children, the statutory framework in Wales does not incorporate socio-economic rights. This means they are less likely to feature as an aspect of government decision-making in Wales, and accountability for these rights is very weak.

The need to incorporate human rights as part of the devolved legal framework is highlighted by the human rights deficits experienced in Wales. The Equality and Human Rights Commission Wales draws attention to human rights challenges in its report, *Is Wales A Fairer* (November 2018).¹⁵ These include: persistent and deep-rooted poverty; increasing levels of homeless; inequality of health outcomes and educational attainment affecting worse-off households; and, destitution amongst asylum seekers and refugees. The Bevan Foundation in its briefing, *2019 Outlook for*

¹³ Helen Mary Jones AM.

¹⁴ Darren Millar AM.

¹⁵ Equality and Human Rights Commission: <https://www.equalityhumanrights.com/en/publication-download/wales-fairer-2018>

Wales, predicts that the position of the least well off in Wales is likely to get worse, especially for young people and those living in poverty.¹⁶

Based on this and other evidence it is vital that government policy in Wales addresses human rights directly in order to protect the interests of disadvantaged individuals and households in Wales. International examples help demonstrate how incorporation can support better realisation of human rights through government policy, especially where the courts are given an enforcement role.¹⁷ In Wales this is confirmed by research on the impact of incorporation of the CRC. A study carried out for the Equality and Human Rights Commission Wales notes that incorporation of the CRC by the Child Rights Measure was followed by the introduction of structures and processes to ensure that children's rights are taken into account in Ministerial decision making. This in turn has resulted in better attention to, and a stronger culture of children's rights within Welsh Government, contributing to more CRC compliant policy output. Incorporation has also strengthened accountability by adding opportunities to hold Welsh Ministers to account for compliance with children's rights.

Conclusion: Further Incorporation of Human Rights in Wales

The power to introduce legislation to incorporate international human rights in Wales rests with the Welsh Government. This is what took place with the Child Rights Measure. A recent amendment to the Government of Wales Act 2006 (by the Wales Act 2017) has confirmed that 'observing and implementing' the UK's international obligations is a devolved responsibility. The Counsel General for Wales recently spoke about the possibility of legislation to incorporate human rights that goes further than the Child Rights Measure, including by providing for directly enforceable rights.¹⁸

In these difficult times for human rights in the UK it is vital that the Welsh Government acts with urgency to fill the protection gap left by the UK Government's policies and approach to human rights. Incorporation of international human rights treaties would be significant step in meeting this objective. It would place responsibilities on the Welsh Government to give appropriate priority to human rights in decision-making.

¹⁶ Bevan Foundation: <https://41ydvd1cuyvlonsm03mpf21pub-wpengine.netdna-ssl.com/wp-content/uploads/2018/12/2019-outlook-final-2.pdf>

¹⁷ A number of case study examples are given in: Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission: 2018).

¹⁸ See above note 12.

Depending on the approach taken to incorporation, it would add to the opportunities to hold Ministers to account by reference to human rights standards.

Human rights Briefings

This briefing paper is part one 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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The Bevan Foundation is Wales' most innovative and influential think tank. We develop lasting solutions to Wales' most challenging problems.

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