

Unedited speaking notes.

The implementation of international human rights obligations and the changing structure of the unitary State: Decentralisation, localisation and ‘tailor-made’ impact assessment

Inspiration for this research - work on implementation of UNCRC in context of decentralised governance in Wales – more later - / First - general observation on implementation of human rights – ratification of human rights treaties attracts rule of international law – Contracting States required to give effect to human rights – protect rights – fulfil rights - / my work begins with observation that how rights experienced by individuals depends on internal arrangements within State for government – introduces challenges to idea of State responsibility for human rights – / paper sets out to identify some ‘human rights risks’ from decentralisation – then considers responses from international human rights mechanisms – argues that response is at best partial – at worst inadequate – / introduce HRIA as mechanism for mitigating human rights risks for human rights in system of multilevel governance

About decentralisation - / different forms – variety of power-sharing arrangements – all involve some relinquishing of power from central government to regional or national authority – often amongst several governance authorities – leading to multilevel governance - authorities responsible for planning and delivery of public services – through policy or legislation - / immediate problem for human rights system – these authorities will impact on human rights – but international system tends to focus exclusively on State action - / challenge for human rights – how to accommodate diversity of governance arrangements affecting how individuals experience human rights

Aspect of research is to consider claimed benefits of decentralisation - tentatively linking to benefits for human rights – needs work – some benefits from decentralisation are - / leads to better services and improved accountability – because of the proximity of service planners to service users - / we can see benefits extending to human rights – for example - likely to be human rights gains where decentralisation leads to improvements in public services in areas such as health - social care - education, or housing

Alongside any human rights gains there are risks – distribution of central government powers over policy levers has potential to undermine State planning for human rights – / in addition whether decentralisation is good or bad for human rights may depend on approach of decentralised authorities toward obligations entered into by the State – especially where regional and central government differ politically – another possibility is that some decentralised regions will make better progress on human rights – gives rise to risk of exacerbating social division - or worsening inequality – / a further risk is lines of accountability become blurred – difficult to know how to hold duty bearers to account – or who is accountable - / linked is possibility that data gathering, monitoring, audit and review become fragmented – then difficult for civil society to hold government to account – especially where civil society not well resourced

Clear human rights risks from decentralisation - / but decentralisation is reality of human rights implementation in many States – my question is - / having regard to the possible risks what has been the response from the international human rights system? - / my view - TMBs have not contributed greatly to understanding problem – or solution – / approach is to focus on risk - Committee on the Rights of the Child perhaps most articulate – expressed concerns about decentralisation - raises possibility of decentralisation leading to discrimination – / the Human Rights Committee also implicitly raised concerns about decentralisation – emphasised that human rights obligations apply to ‘State Party as a whole’ - similar approach taken by Committee on Economic Social and Cultural Rights - stated that only States are parties to ICESCR – therefore ultimately accountable for compliance

Both TMBs have confirmed - internal constitutional arrangements do not absolve Contracting State from human rights obligations – this suggest twofold solution to human rights risk – State must incorporate human rights treaties to make them justiciable before national courts – and States should retain powers to intervene in affairs of decentralised authorities to ensure compliance with human rights – / related to this is requirement of State centralised planning to protect and promote human rights for all

All perfectly reasonable from perspective of international human rights system - focussed on State party – / but are problems with the approach

First - fails to recognise prevalence or implications of decentralisation as favoured system of governance in many States - arguably fails to show sensitivity to claims for greater autonomy advanced by nations or regions within State – upward solutions which involve State intervention through centralised coordination and planning undermine principle and benefits of decentralisation – may be justified where rights violation by lower tiers - but opens up possibility of reversion to centralisation without justification based on political difference - / also assumes State retains power to intervene – not always the case - / finally familiar call for treaty incorporation attracts standard response about justiciability of rights – an important debate - but my view - a distraction in the context of decentralisation

If upward solution not appropriate response to human rights risks then necessary to seek out alternatives – including to respect principles and practices of decentralisation – / partly from experience I have come to regard HRIA as a possible solution – / I refer to pre-implementation predictive impact assessment rather than post-implementation evaluative assessment

Before explaining experience in Wales need to mention general approach to HRIA - / many versions of HRIA available - no universal model – may be strength - allows for flexibility and adaptability to take account of human rights in different contexts - / despite no universal model it is possible to identify key elements of HRIA procedure

Preliminary step in all HRIA- to establish the relevant human rights framework – initial selection between different human rights instruments – / whichever is selected this is used as normative framework against which to assess impact of any policy proposal from a relevant authority - / once appropriate normative framework is established I suggest there are six key stages in HRIA:

- Contextualisation and screening.
- Collating evidence.
- Consultation.
- Analysis of impact on human rights.
- Identifying and assessing alternatives.

- Publication.

Still carrying out research - final paper will include more detail about each – I will briefly introduce only touch on each in this presentation

Contextualisation and screening - / involves setting the economic, social, legal, cultural, environmental context for proposal - / also includes providing reasons for proposal – and objectives - an explanation of mechanism to achieve its objectives - / also identify any social group targeted likely to be affected – and how they will benefit or be affected - / Vital stage in HRIA procedure - basis for initial screening to determine whether impact on human rights – HRIA only proceeds to next step if screening establishes some human rights impact

Next step *Collating evidence* - / evidence required will vary according to proposal and context - adequate evidence should be available to inform assessment about - likely impact of proposal – e.g. quantitative or qualitative data, statistical reports, public surveys, reports on consultation etc.

Third step in procedure – *Consultation* - / as aspect of HRIA consultation reflects principle of participation which is aspect of human rights generally – engaging rights-holders in how their rights given effect – / but also will provide invaluable evidence on likely impact of proposal

Once evidence gathering and consultation complete HRIA proceeds to *Analysis of impact on human rights* - / requires reflection on impact of any proposal on human rights - analysis should be meaningful and engage processes of informed analysis and evaluation - this step is difficult to reckon in process terms - some insights from UK jurisprudence in field of equalities - / public bodies in UK required to have due regard to equalities enactments – including promoting improved race relations - / position analogous with taking account of and promoting human rights - / guidance from UK courts on due regard to equalities objectives confirm need for substance and with rigour

These requirements suggest approach properly informed by relevant evidence – and proper awareness and understanding of objectives under consideration - / in case of human rights

this means awareness and understanding of human rights objectives – in my view this will often require assessor to engage with explanatory commentaries from TMBs

Once the human rights impacts have been assessed HRIA next step - *Identifying and assessing alternatives* – it should be apparent if a proposal likely have a positive, negative or neutral impact on human rights – alternatives should be provided to mitigate or remove any negative impact – / but should also be provided where different approach might improve human rights

Finally - *Publication* is key element of HRIA – publication in public domain – this is contribution toward accountability - / published HRIA will assist stakeholders to challenge decisions which negatively impact human rights – will include State as a stakeholder – State can use HRIA carried out by lower tier authorities to inform decisions on intervention

See these steps in HRIA as key and integral to all HRIA - / now want to provide some insights from experience working with form of HRIA in system of decentralised governance – / work on children’s rights in Wales - / impact assessment is CRIA

Briefly explain decentralisation in Wales - devolution – Wales – 4 regions and 3 devolved administrations - Northern Ireland, Scotland and Wales – decentralisation of law and policy - National Assembly is Welsh legislature - Welsh Government executive – Assembly makes laws in broad areas of public policy - Welsh Government empowered to exercise executive functions in areas corresponding to competences – include health, education, social care, planning, transport, and environment – ultimately UK Parliament could legislate for devolved territories in all areas – but UK government constitutionally and politically deterred from interfering with actions of devolved institutions

Devolution in UK has come under scrutiny for impact on human rights – including concerns expressed by CESCR and CommCRC - / on children’s rights - UK has ratified UNCRC but not incorporated into UK law - UK government claims procedures in place to ensure compliance with UNCRC - claims approach to children consistent across UK - / reality is significant variation in approach to children’s rights across UK - Wales has made greater progress on incorporating UNCRC in domestic law – legislation in 2011 imposing duty on Welsh Ministers

to have ‘due regard’ to UNCRC in exercise of all functions – / Ministers introduced CRIA to support compliance with duty – CRIA template incorporates all key elements of HRIA – UNCRC is normative framework against which policy of Welsh Government is assessed

CRIA in use since 2012 – 2015 Welsh Government commissioned evaluation - concluded that CRIA procedure made contribution to embedding children’s rights in work of Welsh Government – however found CRIA process often failed to meet expectations of HRIA

Evaluation identified four weaknesses

- failure to consult meaningfully with children
- CRIA not meaningful – not rigorous
- assumption of alignment of policy objectives with children’s rights – meaning CRIA not meaningful
- similar to last - deference to established policy objectives with very limited consideration of alternatives

Evaluation found several possible explanations for weakness –broadly categorised as:

- inadequate resources to support CRIA processes
- limited awareness of mechanisms for consultation with children
- limited capacity to engage with UNCRC – not enough time to become ‘experts’ - mitigated through support provided by specialist referral team
- timing – CRIA carried out late in policy development – meaning policy becomes fixed and difficult to introduce alternatives

Evaluation concluded CRIA procedure fit for purpose – being to embed children’s rights in policy process – some good examples of CRIA outcomes influencing changes to policy – / but report also made recommendations for changes – including recommendations on timing, consultation with children and developing capacity and expertise within the Welsh Government on children’s rights

So what conclusions do I draw at this early stage of developing this research:

First - purpose of HRIA not to ensure fidelity to human rights across different levels of State governance – but as a policy tool for public administration it requires human rights to be taken into account in a particular way

Second – if principle elements of HRIA applied consistently there will be consistency in way in which human rights are taken into account in policy development

Third - HRIA is not prescriptive – allows for discretion over responses to policy issues that may arise in different regions within a State – consistent with the principles of decentralisation

Fourth – not prescriptive but HRIA not neutral on human rights – introduces alternative policy choices – to prevent violation of human rights – but also to better promote human rights

Fifth - HRIA will lead to variation in way rights are experienced in different regions in decentralised systems – but HRIA will ensure all parts of the State work toward achieving objectives which support State compliance with human rights

In my view -/ HRIA is suitable mechanism for addressing human rights risks from decentralisation – but cautious – first because of the outcome of the evaluation – which suggests that failure by one region to provide adequate resources for HRIA could result in re-introduction of human rights risks - / a second problem is that HRIA will only apply to policies or legislation under consideration – it does not necessarily apply where rights are at risk because of gaps in policy – this is something which could be dealt with by HRIA of government programmes and manifestos

Finally – there is the problem of how do you ensure consistent HRIA across all decentralised authorities – the answer here is found in recent Concluding Observations from CommCRC on UK progress toward implementing UNCRC - / CommCRC recommended legislation to mandate CRIA of all new policy and legislation at all levels - it seems to me that this would be the State taking responsibility for ensuring compliance with children’s rights – whilst respecting legitimacy of decentralised authorities -/ in principle approach could be extended to require HRIA of all new policy and legislation at all levels