

Muddling Through? The UK, economic and social rights and the Disability Rights Convention

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Introduction

In this presentation, I am going to talk about economic and social rights, equality and disability, in the context of the UK's imminent ratification of the UN Disability Rights Convention. I will touch on what the government has been saying about those things both at international level and within the UK. In the process, I will try to identify some of the challenges and opportunities for implementation of the Disability Rights Convention in the UK.

The Disability Rights Convention

The UN Convention on the Rights of Persons with Disabilities, which came into force in May 2008, is a major milestone in the history of both disability and human rights. First and foremost, it is a spectacular re-affirmation of the equal application of all human rights to disabled people. It is also, among other things, the first international human rights treaty to fully integrate economic, social and cultural rights with civil and political rights since global re-evaluation of their crucial inter-relationship in the 1990s. This recognises that – for everyone - civil and political rights are meaningless without the means to exercise them through access to education, to health and social support, to employment and the built environment and to an adequate standard of living.

But, as with any international treaty, what ultimately matters is what happens if and when the Convention is implemented at national and local levels. As Quinn and Degener put it, ‘the challenge has to do with the application’¹.

The UK has signed the Disability Rights Convention, and intends to ratify it by December this year. In doing so, it will undertake (barring reservations) to ‘ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability’.

Disability Rights in the UK

The human rights of disabled people already have some legal protection in the UK. The Disability Discrimination Act was enacted in 1995 – the first such Act in Europe - and it has developed incrementally to include not only a duty not to discriminate in specific fields but also a positive duty on the public sector to promote disability equality². The Human Rights Act 1998 gives ‘further effect’ to the European Convention on Human Rights, which, though predominantly concerned with civil and political rights, has been used to uphold the rights of disabled people to physical and psychological integrity, dignity and participation in community life³.

So far, however, economic, social and cultural rights have received far less attention in the UK and they have not been incorporated into UK law. Instead, we have a complex assortment of ‘social welfare’ law, some dating back to the 1940s, which risks being incompatible with the purpose and principles of the new Convention. This presentation argues that some fundamental conceptual transformations relating to socio-economic rights, equality and

¹ Quinn, G, Degener, T et al, ‘Human Rights and Disability: the current use and future potential of United Nations human rights instruments in the context of disability’, New York and Geneva, United Nations 2002 HR/PUB/02/1, Chapter 5
www.ohcgr.org/english/issues/disability/study.htm

² Disability Discrimination Act 1995, as amended, Part 5, ss49A – 49F

³ See e.g. *A and Others v East Sussex County Council* [2003] All ER (D) 233 (Feb): ECHR jurisprudence imposes a positive duty on States to ‘take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not ‘so circumscribed and so isolated as to be deprived of the possibility of developing his personality’: see .e.g *Price v UK*, *Botta v Italy* etc.

disability need to happen, and to be translated into law and into practice, before the Convention can be effectively implemented here. Let's start by looking at what the UK has been saying at international level.

International dialogue

The Disability Rights Convention sets up a number of procedures for monitoring its implementation, one of which is a United Nations monitoring committee⁴. Once it has ratified the Convention, the UK will start to report periodically to that committee on measures it has taken to 'give effect' to the Convention. But that process has not yet begun. In the meantime, the UK's ongoing dialogue with another UN monitoring committee, the UN Committee on Economic, Social and Cultural Rights⁵, can give us some interesting clues about the UK's position on socio-economic rights, on equality and on disability.

Economic and social rights

The International Covenant on Economic, Social and Cultural Rights (the Covenant) sets out rights to education, health, work, social security, an adequate standard of living, protection for the family and the right to take part in cultural life. The UK ratified this Covenant in 1976, and reports to its monitoring Committee every five years, building up an ongoing 'constructive dialogue' between the UK government and the Committee. In that dialogue, the Committee has been pressing the UK to incorporate economic and social rights into our domestic law, but the UK has been reluctant to do that. In its latest periodic report to the Committee, in July 2007, the UK confirms that '[t]he [Covenant] has not been and is not expected to be incorporated into domestic law... The Government is not convinced that it can incorporate the rights contained in the ICESCR in a meaningful way within the British legal system.' The UK prefers instead to comply with its obligations under the Covenant by enacting 'specific laws, policies and practices' such as an Education Act, Housing Act etc.⁶

⁴ Article 34

⁵ see UN Treaty Bodies database, <http://tb.ohchr.org/>

⁶ Fifth Periodic Report from the United Kingdom, the Crown Dependencies, the British Overseas Territories, July 2007, E/C.12/GBR/5, paras 74/75
www.justice.gov.uk/publications/fifthperiodicreport270707.htm

From the point of view of the Disability Rights Convention, there are two problems with this position, one conceptual, one practical. The conceptual problem is that these 'laws, policies and practices' largely have their roots in the post-war welfare state; they have not yet made the necessary transition from 'welfare' to 'rights' thinking⁷. This conceptual shift means moving away from seeing disabled people as problems towards seeing them as holders of rights: a 'social model' concept familiar to many disabled people, but one which is not yet reflected in social welfare law, as evidence, for instance, in the Disability Living Allowance claiming process.

The second, more practical, problem is the complexity, inconsistency and general ineffectiveness in the disability context of 'social welfare' law.⁸ Unnecessary bureaucracy is a major issue in its delivery⁹, and redress systems such as complaints or Tribunals are inaccessible, stressful and often counterproductive¹⁰. Meanwhile, research by the Legal Services Research Centre has found that disabled people are not only more likely than others to experience a problem that might be resolved through this (ineffective) system, they also experience more such problems, particularly those relating to socio-economic matters such as housing or welfare benefits. Experience of these problems can in turn lead to the kind of 'spiralling problem sequences' that result in social exclusion¹¹ and the denial of human rights.

Equality

Equality, in this context, includes not only non-discrimination but also a positive duty to provide equal access to socio-economic rights. Here again,

⁷ for further discussion see, for instance, Quinn 2002 supra, Chapter 1

⁸ see e.g. 'Improving Life Chances', Chapter 2: the current situation and its causes' 2005; 'Fairness and Freedom: the final report of the Equalities Review', 2007; O'Grady et al, 'Disability, Social Exclusion and the consequential experience of justiciable problems' *Disability & Society*, 19/3, 2004

⁹ Maynard Campbell, S, Maynard Lupton, A, 'Bureaucratic Barriers to Normal Day to Day Activities', *Muscle Power!*, 2000 www.leeds.ac.uk/disability-studies/archiveuk/Campbell/bureaucratic%20barriers.pdf

¹⁰ Hurstfield et al, 'Monitoring the Disability Discrimination Act', Disability Rights Commission, 2004; Adler, M, Gulland, J, 'Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review' Council on Tribunals, 2003

¹¹ O'Grady et al, 'Disability, Social Exclusion and the Consequential Experience of Justiciable Problems' *Disability & Society*, 19/3, 2004, pp259-271

the UK 'prefer[s] to adopt specific, concrete laws on racial equality, gender equality, etc, rather than enshrining the principle of absolute equality in general law.'¹² It is well established, however, that the anti-discrimination legislation we currently have is fragmented, inconsistent, has gaps, and is very difficult to use; and, despite all of that legislation, actual discrimination is still endemic in our society¹³. For these reasons, the UN Committee has recommended bringing in 'umbrella' legislation – an overall framework Act - on equality and non-discrimination which does enshrine the overarching principle of equality.

The UK's 2007 Report does not respond directly to this recommendation¹⁴, but it does tell the Committee about the new Equality and Human Rights Commission. In the process, a footnote explains that '[u]nder UK law, equality and human rights are kept separate', though the new Commission can 'look into' both.¹⁵

This statement, taken with the UK's reluctance to enshrine the principle of equality into law, illustrates a concept of equality which does not go beyond the removal of a limited range of specific, well-defined barriers, and which falls far short of comprehending equality as one of the foundational values permeating all of human rights law. The Disability Rights Convention, by contrast, is a 'hybrid' treaty: it inextricably combines non-discrimination, positive rights and social supports, making it impossible in practice to keep equality and human rights separate in any effective implementation. The equality of human rights surely constitutes the Convention's fundamental rationale.

Disability

The UK's reporting on disability to the UN Committee predominantly relates to discrimination in employment, and to Welfare Reform, with little or nothing on

¹² Summary Record of the 12th Meeting, E/C.12/2002/SR.11, para21

¹³ see, for instance, 'Fairness and Freedom: the final report of the Equalities Review', 2007 www.theequalitiesreview.org.uk/equality_review.pdf

¹⁴ the Disability Law Review was still underway as the Fifth Report was drafted

¹⁵ UK Report to the Human Rights Committee, CCPR/C/GBR/6, 2007, para 66, footnote 52

housing, education, health or other public services. Questions from the Committee about the percentage of disabled people living below the poverty line go unanswered¹⁶. Virtually no disaggregated data relating to disability is provided¹⁷, and the language of rights is absent.

This, again, raises two issues for me. Firstly, whilst recognising the value, in all kinds of ways, of work in our society, I am concerned that disability equality, for the UK government, may be seen primarily as a matter of productivity rather than of broader humanity. Secondly, the absence of the language and concept of rights from the UK's reporting on disability suggests that the writers have not yet internalised disability as a human rights issue. This too raises obvious concerns for implementation of the Disability Rights Convention.

Summary

From an international perspective, then, in 2007 we have found reluctance on the part of the UK to incorporate socio-economic rights into domestic law; reluctance also to enact the overarching principle of equality, or to recognise its integral place as a fundamental component of human rights; and a failure to fully grasp disability as a human rights issue.

These conceptual 'malfunctions' are also apparent within UK domestic law and policy, but here we can also find some recent developments that have the potential – maybe - to begin to transform them.

Internal developments

Legislation

On social welfare legislation, for instance, the National Assistance Act 1948 still provides the legal foundation for social care, including residential care and

¹⁶ 2002 List of Issues, para 25

¹⁷ total of 3 paragraphs, all relating to employment: Fifth Report, Appendix A – Report under ILO Convention 111, Annex B. This coverage compares to 6 pages each on women in employment and employment by ethnicity, and just one paragraph on older people's employment rate.

‘welfare arrangements for blind, deaf, dumb and crippled persons’.¹⁸

Compare that with the Independent Living Bill 2008, whose principles include that ‘disabled persons are the best judge of their own requirements’, that they should determine their own living arrangements and be enabled (where necessary) to make their own decisions.¹⁹

Policy

Moving to policy, the government’s 2005 report on Improving the Life Chances of Disabled People²⁰ talks at length of equality, inclusion, dignity and respect, which also happen to be the fundamental principles of the Disability Rights Convention (though the connection with human rights is not made in the Life Chances Report²¹). The work of the Office for Disability Issues (ODI) in carrying that policy forward has so far produced an independent living strategy and promoted individual budgets. This work has recently been acknowledged as contributing towards the Government’s work to ratify the United Nations Convention on Disability Rights²².

The recent Welfare Reform Green Paper²³ goes further, recognising the links between work, financial support and public services in the realisation of equality and rights. The proposed reforms are said to ‘reflect [the government’s] drive towards world-class public services across the board – delivering personalised services tailored to individual needs’.²⁴ Consultation on those ‘personalised’ services is also underway.

A British Bill of Rights?

None of this policy is explicitly couched in terms of human rights. But the Joint Parliamentary Committee on Human Rights (JCHR) has been busy too. It has just published a report on the content of a potential future British Bill of

¹⁸ National Assistance Act 1948 ss 21 & 29

¹⁹ Disabled Persons (Independent Living) Bill 2008, s 1(4),(5) & (9)

²⁰ www.cabinetoffice.gov.uk/strategy/work_areas/disability

²¹ Apart from a somewhat dismissive footnote describing the Human Rights Act on p 48

²² www.officefordisability.gov.uk/working/independentlivingstrategy.asp

²³ ‘No One Written off: reforming welfare to reward responsibility’ 2008

²⁴ *ibid* Prime Minister’s Foreword, p 5

Rights.²⁵ It reports a shift in the government's position since 2007: it is now willing to consider ways of maybe incorporating some socio-economic rights into UK law. The JCHR suggests starting with rights to health, education, housing and an adequate standard of living. The JCHR also reports a government shift on a free-standing right to equality. On that subject, a Single Equality Bill consolidating all of the existing discrimination legislation looks likely in the next Parliament. Though we are told that it will not include any broad statement of the principle of equality, consultation is promised on including such a statement in a Bill of Rights.²⁶

Rationing of resources

So far so good, but, inevitably, there is another side to this picture. The resources required to translate such ideas into reality are not only not forthcoming, they are more and more severely rationed, leaving many people to manage without support, and those in dire need receiving a bare minimum for survival. The Commission on Social Care Inspection has found that many people's experiences were 'dismal': '[m]any cases were uncovered where the absence of any help, or the provision of inadequate help, resulted in very poor individual experiences...' It asks whether 'the present situation is both sustainable and – in pursuit of an outcomes focused personalisation agenda – [whether it is] defensible'.²⁷ The High Court has recently held that such acute rationing breaches a local authority's duty to promote disability equality under the Disability Discrimination Act.²⁸ As Jane Campbell remarks, '[i]f disabled people cannot access services unless they have the highest level of need, then all the empowering, transforming delivery in the world will not change the inequality they experience'.

²⁵ Joint Committee on Human Rights, Twenty-Ninth Report: 'A Bill of Rights for the UK?' HL 165-I/HC 150-I www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm

²⁶ Discrimination Law Review: a Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A consultation paper, para 14.1

<http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation>

²⁷ Commission for Social Care Inspection, 'Lost to the System? The Impact of Fair Access to Care', 2008 http://www.csci.org.uk/pdf/20080128_Lost_in_the_system.pdf

²⁸ *R(on the application of Chavda and others) v Harrow London Borough Council*, [2007] EWHC 3064 (Admin)

Resistance to legislative change

At the same time, any renewal of legislation is resisted, and the existing bureaucracy and inaccessible redress systems continue. Although the ODI acknowledges 'that there is a gap between national policy and people's real experiences', it believes that 'change can be achieved without new legislation'.²⁹ The Independent Living Bill has been supported through the House of Lords, but has so far failed to make its way in the House of Commons³⁰.

Ratification with reservations

Last but not least, the UK government is considering ratifying the Disability Rights Convention with reservations. Potential reservations relate, among other things, to 'specialist provision for disabled children', mental capacity and mental health law, choice of place of residence, and some aspects of cultural services.³¹ In my view, the mere fact that the government is considering such reservations undermines the credibility of its own policy objectives. Choice of place of residence is fundamental to independent living under Article 19 of the Convention; the right to access mainstream education is key to the development of human potential and self-worth under Article 24; and mental capacity and mental health provisions are central to autonomy and equality under the law. All are inextricably linked to the Convention's underlying principles of equality, inclusion, dignity and respect, which are also – coincidentally - the principles underlying the government's policies for Improving Life Chances of Disabled People.

So where does all this leave us?

Opportunities and challenges and: muddling through?

We have seen that, in the past twelve months since the UK last reported to the UN Economic, Social and Cultural Rights Committee, the government's

²⁹ Office for Disability, Independent Living Strategy, 2008, Executive Summary p 10
www.officefordisability.gov.uk/working/independentlivingstrategy.asp

³⁰ at the time of writing. Sponsored by Lord Jack Ashley and Roger Berry MP.

³¹ Statement of Minister for Disabled people, Anne McGuire, 6 May 2008

positions on socio-economic rights, equality and disability have begun to shift – from outright denial of the possibility of incorporating economic and social rights into our legal system to hypothetically accepting that possibility; from refusal to enact the principle of equality to agreement to consult on it; and from a failure to connect human rights and disability to the beginnings of a change in the language and design of disability-related policy.

We have also found that those shifts in thinking are not yet reflected in the real lives of disabled people, and, in fact, that aspects of current law and practice are holding back that process of transformation. Jane Campbell identifies current levels of social care rationing as ‘the major problem which blocks the transformation of social care from a welfare safety net, to an empowering human rights, public support service.’³² Researchers at the Legal Services Research Centre conclude that the issues highlighted by their research into the justiciable problems disabled people face ‘cannot be addressed by policies focussing only on the civil justice system; a systematic change in direction at the wider, societal, level is instead required.’ And attempts by some to take matters into their own hands, through, for instance, the Independent Living Bill are held at bay.

The small shifts in government thinking that have been identified here can easily disappear. The resistance evidenced by the potential reservations to the Convention and by the failure to back policy with legislation and with resources, will not make it easy for those incipient new discourses to reach the point where they become accepted ‘common sense’. In the process, if they are to actually begin to change people’s lives for the better, they will need to be translated into a fundamentally different kind of law and a fundamentally different kind of practice.

It has to be said - though I hate to end on a not altogether optimistic note - that a Disability Rights Convention has become necessary only because all of the other international human rights treaties failed to protect and provide –

³² Campbell, J, ‘Social Care as an Equality and Human Rights Issue’, National Centre for Independent Living, ‘Independently Newsletter’, February 2008 p 9

effectively and in practice - for the human rights of disabled people.³³ There is certainly no guarantee that this Convention will succeed where others have failed. Even in our relatively wealthy and enlightened democracy, we still have a long way to go before we can reassure the UN monitoring committee that, contrary to its suggestion,³⁴ we are not just 'muddling through'.

Thank you for listening.

³³ see, for instance, UN High Commissioner for Human Rights Louise Arbor's Statement to the UN Ad Hoc Committee drafting the Disability Rights Convention, 27 January 2006

³⁴ UN Committee on Economic, Social and Cultural Rights, Summary Record of the 36th Meeting, 24 November 1997, E/C.12/1997/SR.36, para 31