

Observatory on Human Rights of Children 2019 Annual Lecture

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It's lovely to be back in Wales. I spent three years down the road in Cardiff doing my first degree. And I always thought Wales was very modest about its culture and its achievements. Sorry about the rugby, but with the rest... But I was delighted that it wasn't going to be a Wales-England final because I'd have split loyalties. So thank you. I'm delighted to celebrate with you in this, the 30th anniversary year of the Convention on the Rights of the Child, a convention which many were told at the time we were drafting it only a few governments would ratify it. The convention, we were told, would be ignored by most of the world.

As we know, every country in the world, bar the United States of America, is legally bound by the convention. So this should give us heart. Just because we're told that to remedy a new challenge for children's rights, such as climate change or eradicating child poverty, rather than just reducing it is impossible, such negative thinking in the sphere of children's rights has often proven wrong. And I want to explore with you how the Convention on the Rights of the Child can be used to reduce the new challenge of global warming and the new challenge for the United Kingdom in taking the elimination of child poverty much more seriously than it has done previously.

And we sometimes think that remedying large new problems is too much for one individual or for small groups, but children's rights is replete with actions by individuals who face dealing with problems, which, at the time, were considered just as new and just as overwhelming. Almost a century ago, we had a British woman, Eglantyne Jebb, who single-handedly drafted the first global child rights instrument, the Declaration on the Rights of the Child, 1924, which was adopted, completely unamended, by the League of Nations, the predecessor to the United Nations. An extraordinary achievement by just one woman. Her vision, and note this was almost a quarter of a century before the Universal Declaration of Human Rights, should give us more strength when looking at new challenges for the next 30 years or more what we can do as individuals, small groups and community.

And it may be very tempting in our "wear only once" Instagram society to think that because the convention is now three decades old, it's no longer fit for purpose and can no longer combat new problems. I want to reject that assumption, not because I helped draft the convention, nor because I think it's perfect, but because we have not yet utilized the full potential of the Convention on the Rights of the Child. And when I helped draft the convention, I was in my 20s, not long out of Cardiff Law School, and to tell the truth, I was very nervous. But I was positively ancient in comparison to one group of children who've realized that the convention has far greater potential.

Greta Thunberg, and my husband speaks Swedish and tells me that's the correct pronunciation, so Greta Thunberg and 15 other children from 12 countries, they're aged between eight and 17, and five weeks ago, they filed a complaint under the Convention on the Rights of the Child. They petitioned the UN Committee on the Rights of the Child, the body which oversees the implementation of the convention. And the children argued that the failure to meet the challenge of global warming violated their rights under the convention. The rights, they argued, which were violated, included the right to life, the right to health, a denial of the right to culture and a violation of the principle of the best interests of the child.

The children are from Argentina, Brazil, France, Germany, India, the Marshall Islands, Nigeria, Palau, South Africa, Sweden, Tunisia, and the United States. The procedure which allows this is a complaints mechanism under the third protocol to the UN Convention on the Rights of the Child. Now, a protocol is an additional optional treaty to the main treaty. And this allows those children who've exhausted all

effective national remedies to petition the UN Committee on the Rights of the Child. So the UN Committee will first have to decide whether if any or all of the children's petition is admissible. And the countries they've brought the petition against are Argentina, Brazil, France, Germany, and Turkey.

Their petition raises so many new challenges, including for international law. The general rule in international law is that protection of rights in a treaty generally is restricted to those within the jurisdiction of a state party. The children who come from Argentina, Brazil, France, and Germany come within the jurisdiction of states which have ratified the third protocol and also, incidentally, ratified substantive international legal obligations relating to climate change. Now, this makes it easy for the Committee on the Rights of the Child to consider the petition.

Their communication, however, makes a broader complaint. Any child, they argue, is within the jurisdiction of a country when its polluting activity impacts upon the rights of children within or outside of that country's territory. So that even though there are also children who come from countries, which are not legally bound by the third protocol, India, Nigeria, Palau, South Africa, and Sweden, the Committee, they argue, should not reject the petition on this ground. The United States of America, where two of the petitioners live, has not even ratified the main convention, let alone the third protocol.

There are two children from America who've joined this complaint, Carl Smith and Alexandria Villaseñor. They also argue that they, as with all the children, are within the jurisdiction of each of the state's parties because, they say, the children are all victims of the foreseeable consequences of the carbon pollution knowingly emitted, permitted, or promoted by each of the states from within their respective territory, and such pollution does not limit itself to the land boundaries of any state.

So can the Convention on the Rights of the Child be used to effectively combat climate change? When we were drafting the convention, climate change was not even being discussed generally. So it's tempting to assume that the convention is redundant when it comes to climate change. However, although the convention does not expressly include the words climate change, global warming, or even biodiversity, the convention is still applicable, as we did include the dangers and risks of environmental pollution. And the first thing we have to do is to consider the nature of international human rights treaties, of which the convention is one. International treaties are different from national laws. They're designed to last a long time and to be sufficiently flexible that they can meet the demands of events which did not occur at the time of the drafting.

This design also helps when incorporating their provisions, international laws and national programs. And this follows a general principle of international law laid down by the International Court of Justice that when interpreting treaty terms, they're interpreted in their current context and not frozen in time. And this approach has been taken by the European Court of Human Rights that sees human rights treaties as living instruments, something which Lord Jonathan Sumption disagreed with but didn't realize that, actually, it's a binding international law.

So that losing the benefits of a healthy ecosystem affects the child's rights to food and clean drinking water protected by the convention. The loss of herbal medicines violates children's rights to health, particularly Indigenous children. So we need to spend some time and think again how we read the convention. How can we read it imaginatively and positively to benefit children and meet more recent challenges? This doesn't mean stretching the rights in the convention beyond their linguistic meaning, but applying the rights as international law requires in their current context.

So this is a new challenge. And by extending it to non-states parties, to the third protocol, it's a new and bold approach. But when we consider new challenges, we should also not forget history, including child rights advocates. Although the pleadings do not state it, the petition to the UN Committee could be cited and defended by a case from the Philippines Supreme Court, brought by children themselves, the case of *Minors Oposa*. A group of children wanted to bring a case in the Philippines to the country's

Supreme Court to try to prevent deforestation. The mass felling of trees was causing widespread destruction, not only of the children's environment but it was also creating poverty.

Some adults objected to the children's action, but the court said the children even had a duty to bring the case on the ground of intergenerational equity. The Philippine court spoke to the "right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature." The court linked this to the right to health and then conceptualized the right as belonging to a "different category of rights altogether, for it concerns nothing less than self-preservation and self perpetuation, the advancement of which may even be said to predate all governments and all constitutions."

This was an extraordinary visionary statement which would not have been possible without the litigation brought by the children. The court went further. It even argued that such rights need not even be expressly included in the Philippine Constitution, as they are assumed to exist from the inception of humankind, and, therefore, the court would still be under an obligation to consider them. So if the UN Committee were to follow this approach, which could be described as a natural law approach, then the fact that children from non-states parties have joined the action would not be an insurmountable obstacle, as children can bring such actions themselves, speaking for themselves and for future generations of children yet unborn.

And in Wales, the danger of environmental pollution has been tragic. 53 years and one week ago at 9:15 in the morning, a colliery spoil tip slid down to Aberfan Junior School, and those who were alive at the time remember well, it's etched in everybody's memory, killing 116 children and 28 adults. Had the law obliged the National Coal Board to take children's rights and the environment more seriously, this avoidable tragedy may have been averted. Now, currently, at the moment, there's a hearing in London against the expansion of Heathrow Airport, and its appeal against the High Court ruling. And lawyers will argue for the first time that the rights of children were not taken into account by the government when it approved the third runway.

And you'll notice when I mentioned the list of children, I did not mention a child from the United Kingdom joining the group of children petitioning. Regrettably, the United Kingdom has so far refused to join over 40 countries and ratify the third protocol. And the third protocol allows children to bring complaints against governments, not only in relation to climate change but in relation to all the rights guaranteed to children in the Convention on the Rights of the Child. And the United Kingdom refusal is very strange because the United Kingdom has ratified the two other protocols to the convention on children in armed conflict and the sale and exploitation of children.

So I want to discuss this refusal to ratify the complaints mechanism in the context of a principle which is rarely applied to children, the rule of law. I want to explore this with you because the United Kingdom governments of all political persuasions traditionally have been more open to rule of law arguments than simply lobbying it to ratify a treaty because it's the moral right thing to do. Arbitrariness offends against the rule of law. So if groups of children receive less than other children, there needs to be a rationality underpinning the denial.

We're accustomed to applying the rule of law nationally, but I think we now need to consider whether the contemporary rule of law in a globalized world also extends its principles internationally. The consequences of applying the rule of law to international policies is that if there's arbitrariness in international remedies, the United Kingdom would be in breach of rule of law. Currently, all girls in the United Kingdom can petition the United Nations Committee on the elimination of all forms of discrimination against women. All children with mental and physical disabilities in the United Kingdom can petition the UN Committee on persons living with disabilities. This means that able-bodied boys are stranded without access to any international remedy.

And this is important, because although children can bring an action under the European Convention on Human Rights, and many have won cases, the UN Convention on the Rights of the Child includes a range of social rights that is not included in the European Convention on Human Rights. So that in the United Kingdom, girls and children living with disabilities have been granted by the government a safety net to challenge government legislation, which may be in violation of their rights. And this safety net is before a United Nations body. By not ratifying the third protocol, able-bodied boys in the United Kingdom are denied this additional avenue of appeal. There's no rational reason for this exclusion. This strikes me as arbitrary and unjustifiable, and therefore offends against the rule of law.

So far, when arguing for the UK to ratify complaints mechanisms or to bring in legislation in relation to children's rights, a rule of law argument has not been adopted. I would advocate that we start considering it. And ratifying the complaints mechanism is valuable. However, one of the key elements when considering the best interests of the child is the child's sense of time. A speedier remedy for children would be if Westminster incorporated, in some form, all the substantive rights in the convention so that rights would be justiciable, so that, if need be, a child, as a matter of last resort, could commence an action in court, arguing that a particular right had been violated.

Sweden has announced that it'll be doing this, and incorporation will take effect from January the 1st next year. The United Kingdom is a permanent member of the Security Council. And at the very least, this privilege carries with it a moral responsibility to fully implement all the treaties within the ambit of the Charter of the United Nations, and this includes all human rights treaties. The UN Committee on the Rights of the Child perceptively observed in 2002 that we, in the United Kingdom, had incorporated the European Convention on Human Rights, and the committee saw no greater challenges in incorporating the Convention on the Rights of the Child.

When the United Kingdom ratifies a treaty, it does so for all the territory. Currently, as we've just heard, Wales has partial incorporation through the application, for example, of the due regard principle. Scotland is considering incorporation, having just prohibited all forms of physical punishment within the family. And England, in the words of the Eurovision Song Contest, has nil points, as it's not even on the current government's political agenda. Where a child lives within the United Kingdom does not alter the non-discrimination provision in the Convention on the Rights of the Child. And the duty of the government is not to discriminate in the applications of these rights throughout the jurisdiction.

The fact that Wales offers greater consideration of the convention than other parts of the United Kingdom means because of this arbitrariness, the United Kingdom as a whole is in violation in relations to its territory. And were Wales or Scotland to go further, which we hope they do, it will create additional pressure on the Westminster Parliament to follow suit. And this has been a continuing concern of the committee that there's no pan-United Kingdom mechanism which ensures that all the legislation within the United Kingdom is compatible with the UK and the convention. It repeated this in 2008, and then eight years later, it recommended that the United Kingdom expedite, bringing in line with the convention, its domestic legislation in order to ensure that the principles and the provisions of the convention are directly applicable and justiciable under domestic law. And last week we had the publication of the Thomas Commission on Justice for Wales, which argued that justice should be a devolved power and devolved to Wales. And this, in the future, if it were brought in, would include any incorporated treaty provisions.

At the very least we have the model of the Human Rights Act, which applies to adults and children, and which could be used as a model to make the convention's rights justiciable. Each of the rights in the convention could be incorporated, either by citing the exact words or by rephrasing them in a way that reflects the intention of the convention. However, as valuable as the Human Rights Act is, the Human Rights Act does not sufficiently challenge government and local authorities to make child oriented

policies a core part of law. Also, both the Human Rights Act and the various contemporary child statutes have had very little impact on something which ought not to be a new challenge at all, the growing inequality between poorer and wealthier children living in the United Kingdom. What is also a new challenge is how the Convention on the Rights of the Child can be used strategically to eradicate child poverty, not merely to reduce it. We should be ambitious enough in such a wealthy country to end rather than reduce child poverty.

So why has the United Kingdom as a whole not incorporated the Convention on the Rights of the Child? And why this resistance to using international law to help end child poverty? I want to look at this from a fresh and new perspective. And I think the task now becomes more urgent, because whatever your views about Brexit, one consequence will be the eventual non-application in the future of the provisions protecting children's rights and dignity in the European Union's Charter of Fundamental Rights. And what would be the advantage of incorporation? In an area where we're demanding greater transparency, as symbolized by the Freedom of Information Act, for example, incorporating the Convention on the Rights of the Child would also increase transparency. Any incorporation would have to make clear to children what their rights are in age related methods appropriate to the children, and to make clear to public authorities their duties. Incorporation would also have to clarify what is to happen if these requirements are breached. In this way, incorporation leading to transparency leads to child rights awareness across the whole of the United Kingdom.

Now, one of the principle arguments against incorporating the convention is that it enshrines not only children's civil and political rights, which will be easy to incorporate, as most are already protected under the Human Rights Act and the European Convention on Human Rights, the principal argument against incorporation is that the convention also enshrines children's socioeconomic rights, such as a child's right to the highest obtainable standard of health and to social security and to a standard of living adequate to the child's development. An adequate standard of living includes food, clothing, water, sanitation, and housing. And there's a nervousness around children's socioeconomic rights. A part of this fear relates to cost, and the fear rarely considers the investment for the future and the future savings and national growth that such investment leads to.

But there's also some resistance to protecting rights for children because they're wrongly regarded as a radical departure from Welsh and other British traditional approaches. So I want to argue something unusual. I want to argue that to meet new challenges surrounding children's rights, we also have to look backward, so that if there is evidence which has been overlooked, which has led to long held legal assumptions, which are in fact wrongly held and damaging to children's development, these myths can be overturned.

And to do this, we have to ask questions. And one significant question we have to ask is, is it true that children's socioeconomic rights are new? And secondly, is it accurate to assume that children's socioeconomic rights derive solely from the global and the foreign and do not have Welsh and English roots? So I want to show how Wales and England protected children's socioeconomic rights historically, actually, in the 13th century. And I want to show that we've actually forgotten our histories. And after I've explored this with you, I want to discuss with you the added value of incorporating children's socioeconomic rights. And in this Brexit era, which includes a refocusing on Welsh and English traditions, although we also ought to continue to prize and highly value universality and its important fundamental values, we also have to listen to people who are concerned by an exclusive reliance on universality and who feel excluded by it so that everybody can feel comfortable and included in moving forward to eradicate child poverty without compromising any of the child's rights.

And one of the messages which is coming over loud and clear is there's a pride and a desire for a continuity of Welsh and English traditions. Now, such traditions are often seen as conservative with a

little C, and often seen as excluding. I want to argue that when it comes to child poverty, we should excavate our own pasts. And if we did, we would find radical and inclusive traditions because Wales and England have two of the oldest laws which protected socioeconomic rights in the world, including children's socioeconomic rights. And as I said, both the Welsh and the English laws date from the 13th century.

Now, when we read these laws, we have to imagine we're not sitting in a modern, comfortable, lit lecture hall but in medieval times, and we have to imagine the application of these rights, which may seem quaint to our ears, to children living in the medieval period. In Wales, and please forgive my Welsh pronunciation, the Laws of Hywel Dda, whose approximate date is usually given as 1285, has provisions which lay the foundations for socioeconomic entitlement in the same way as the first Magna Carta did for civil and political rights, so that those who served the king were entitled to woolen clothing. I told you it was quaint. And this is an aspect of the right to an adequate standard of living, enshrined in Article 27 of the Convention on the Rights of the Child.

And the Laws of Hywel Dda also provide in detail the right to food and drink, also protected in the Convention on the Rights of the Child in Articles 24, 2C. As with the first Magna Carta, the focus is on the rights of the few, but the rights were applicable to those under 18 because childhood in the medieval period was far shorter. And we can see that if you've ever seen medieval paintings and the depiction of children looking really quite wizened, almost as adults, at least in the West in medieval paintings. And children worked at very young ages then, serving the nobility. And certain groups of children are expressly included and mentioned in Hywel Dda, such as page boys, to whom these socioeconomic rights also apply.

It is antiquated, that language to our modern ears, but Hywel Dda is valuable to show that the socioeconomic rights of children, protected in the global treaty of the Convention on the Rights of the Child, has an ancient Welsh heritage. In England, and earlier in 1217, we forget the Magna Carta actually had a younger sister, Carta de Foresta. Carta de Foresta set out not only rights to food, water, and early forms of access to health remedies for a far broader range of people than Magna Carta, but also access to wood, both for energy and wood to build housing, so that even the right to shelter and housing have a long British heritage.

The reasons I'm exploring this with you is it is important to root children's socioeconomic rights in British legal and political history because it strengthens the claim for incorporation. Children's socioeconomic rights are not foreign. Even if they were, that's not a problem, but they're not foreign. They are Welsh and they are English. Children's socioeconomic rights do not originate in the global, but in England and Wales. And eradicating child poverty, not simply reducing it, has to be seen as an urgent and new challenge. So it's important to know it was not only medieval law that created this British heritage of children's socioeconomic rights. The demand for children's socioeconomic rights also continued in the 18th century, and including in the work of what was in the 18th century actually a bestseller. I'm not talking Fifty Shades of Grey here, but a costed call for the state to guarantee specific socioeconomic rights. And this became a bestseller, which shows you even then there was an appetite for these rights amongst the general population.

The bestseller was written by Thomas Paine. In the Rights of Man, published in 1791, Paine called for a sum to be paid to women in need upon the birth of a child and for child benefit to be paid for each and every child. Contrary to current legislation, the child benefit was to be paid without any cap being placed on the number of children. Paine regarded child benefit as justice, not charity. He argued it was not only beneficial to the present generation of children, but such benefits were a tool of poverty prevention for future generations.

He was not the only person in the United Kingdom arguing for children's socioeconomic rights. Another 18th century philosopher, Mary Wollstonecraft, argued in *A Vindication of the Rights of Women* that schools ought to be provided with sufficient open space to enable children to exercise at regular intervals, something which is overlooked in relation to child obesity when schools are selling off playing fields. So we can trace an unbroken line from medieval Wales and England through to the socioeconomic rights in the Convention on the Rights of the Child. This line shows that the convention's socioeconomic rights are simply a modern form of traditional Welsh and English rights for children, and this enhances the case for incorporation.

Enacting children's socioeconomic rights would mean the rights would be clearly expressed so the children would know their rights. Governments would know their duties. It would mean there would have to be a consideration that during the school holidays, when breakfast clubs were no longer functioning, they'd have to consider whether this would impact on children going hungry and violate their right to food. It would mean though in framing social policies, a government would have to consider whether a delay in receiving Universal Credit would indirectly violate a range of children's rights. And the courts would have to decide these issues within binding domestic legal provisions.

There have been cases where government policies have been held to violate children's rights to food, health, adequate standard of living, and housing. So that in the Chiquimula case, the court in Guatemala held the government accountable, not for what it did, but rather for what it did not do to a sufficiently high standard. Guatemalan programs and policies led to children being undernourished. The court found a violation of the right to food and health coupled with the best interests of the child. The court ordered specific shorter and longer term policies which guaranteed food, health and adequate housing, not just for children, but for the entire family. And the Chiquimula case and others originated in countries which are poorer than the United Kingdom. And if they can afford to value and protect the children in this way, so can we.

And the convention creates space for children to participate in national and local budgeting. In 2003, in Fortaleza in Brazil, children passed 33 amendments to the municipal budget. Three of these were approved by the local municipality for the 2004 budget. Peru has also now begun to support children to analyze and propose changes to budgets. And budgets are an essential tool in eliminating child poverty. When we drafted the convention 30 years ago, we thought it would provide a vehicle for children to use to stand up for their rights. The convention, we hoped, would enable children to be supported by government, the courts, and all of us in standing up for their rights. And very importantly, the convention would create a vehicle for children to show all of us the way. Children are now showing us the way. And it's up to us, in consultation with children, to provide them with the necessary tools. [foreign language 00:33:37]. Thank you very much.