Our Human Rights: A Joint Effort?

The Howard J. Trienens Lecture

The Law School, Northwestern University, Chicago

Lord Wilson, Justice of The Supreme Court of the United Kingdom

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Yes, I arrived here at the law school in August 1966. I was aged 21 and had just graduated in law at Oxford. I came with Andrew Walker, a fellow graduate. Andrew was to hold a one-year associateship. I was to hold one for six months because I wanted to race back to London, cram for the bar exams and embark on my career. But what were we supposed to teach ? It turned out to be a fairly nebulous course called Legal Writing and Research. We were to teach it to the first years, who, we soon learnt, were the same age as we were.

To be honest, 52 years later, I recall only a little about my time at Northwestern. I mainly recall:

- a warm welcome from the members of the faculty;
- the bitterly cold winter of 1966-67;
- Andrew and I living in what was then rather a second-rate hotel called the Eastgate;
- one or two blind dates that didn't end up where I had hoped that they would;
- appearing with Andrew as non-singing extras in a sensational production of Boris Godounov at the Lyric (we were Russian noblemen); and
- finding it difficult to exert authority in class over extremely articulate students of my own age.

But the students' written work was not nearly as strong as their verbal dexterity. Hence the course. The university gave us a book by reference to which to conduct it. Well, it was more of a bible. Here's a modern edition of it. Mr. Strunk wrote the first edition of this admirable book at Cornell precisely 100 years ago. I have followed his precepts throughout my career. Of course, it's mainly a guide to decent *writing*. But a lot of it applies also to *oral* communication. So, yes, in giving this lecture, I intend to follow the advice to "avoid tame, colorless, hesitating, noncommittal language". Mr Strunk also says: "Do not explain too much". If you feel that my explanation of things is rather thin, it's only because I'm obeying him.

No, seriously, I want to talk to you about human rights: the rights which are recognised as attaching to everyone on our planet who belongs to the human race, irrespective of every other distinguishing characteristic which a person may have. Some speak instead of civil rights or constitutional rights – but I confess that I prefer the label which expressly includes everyone. There is, I suggest, no subject more fundamental for a lawyer to be considering with fellow lawyers this afternoon. By and large we lawyers are not artists but, within the confines of our more prosaic talents, the development of human rights is in my view at the pinnacle of our own brand of artistic endeavour. Inevitably I will make substantial reference to European human rights but, before I look at current rights, I want to sketch their historical development. And please note: these are my personal views, not the views of the UK Supreme Court.

"Thou shalt not kill."¹ Was that the germ, three thousand years ago, of our right to life? "Thou shalt not steal."² Was that the germ of our right to own property? Perhaps, but there's a big difference. These were commandments against individuals, of which the purpose was to protect other individuals. Human rights, by contrast, are rights against the state. In Europe in the Middle Ages the idea grew up that, if you acted loyally towards your king, fought for him when necessary and paid him dues, he had a duty to protect you, in particular to protect your life but also, and increasingly, to protect your other interests.

So we look for an early assertion of rights against the state, or in my country against the king, and we find it, inevitably, in Magna Carta. It was a series of concessions by a weakened King John to angry barons who were primarily concerned to make him commit himself to rights referable to themselves, not universal rights. In particular the barons were fed up with his levy of taxes upon them for the funding of his speculative foreign wars; so in clause 12 he had to promise not to levy taxes except in accordance with "the common counsel of our realm", which soon came to mean Parliament, unless he was kidnapped and needed to raise a ransom immediately. But, for present purposes, and apart from minor provisions still close to our hearts today, such as the ban on what we may all agree to be the truly pernicious sale of short measures of wine³, we must focus on clauses 39 and 40 of Magna Carta: "no free man shall be …

¹ Exodus, Ch 20, v 13

² Exodus, Ch 20, v 15

³ Clause 35

imprisoned ... except by the lawful judgment of his peers or by the law of the land", and then famously "to no one will we deny or delay right or justice". So here we have the birth of the human rights to a fair trial and to be able to live our lives under the orderly protection of law. These two articles are still part of English law; and they were part of American law directly between 1607 and 1776, as indeed they have been indirectly ever since. Before Parliament in London in 1766 Franklin, for example, based his objection to the Stamp Act on Magna Carta. It is just as much a part of your heritage as it is of mine.

Then came the English Bill of Rights 1689. Stuart kings had been claiming that they had legislative powers so here, in a re-issue of Magna Carta, updated and enlarged, we have the new Dutch King and Queen accepting the legislative sovereignty of parliament. They also assented to Parliament's detailed enactment of the people's ancient rights and liberties, including not to be taxed without its consent and not to be subject to cruel and unusual punishment.

Your Declaration of Independence 1776 is one of the most uplifting documents I've ever read. It's so moral, so proper; and, as an Englishman, I am constrained to admit that the explanation for the need for independence is so convincing. Today, when the quality of political discourse seems to have fallen far, we should embrace the beauty of the Declaration's measured prose:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

So here Jefferson and the other framers expressly recognise the existence of rights attaching to every single human being. And ... *Happiness*? Where did a right to pursue *Happiness* come from? It came from the writings of John Locke⁴, whom Jefferson greatly admired. But for happiness to find its way into a founding document ... well, that really *was* revolutionary.

The more important provisions of your Bill of Rights have been of huge worldwide significance for more than 200 years. You should be proud of them. Conscious as I am that, until after the Civil War, federal law had only narrow reach, I highlight:

⁴ "Concerning Human Understanding", 1690

(a) the ostensibly unqualified nature of your right to free speech in the first amendment;

(b) your right to bear arms in the second, explained in its preface (but which, according to the *Heller* case⁵, is of no interpretative significance) by the need for a militia;

(c) your right, modelled on an English statute of 1354⁶, not to be deprived of life, liberty or property without due process of law in the fifth;

(d) your right to a fair criminal trial, now including free representation by counsel, in the sixth;

(e) your right, interesting to a modern UK lawyer, to a trial by jury of civil claims in the seventh; and

(f) your right, copied from our Bill of Rights, not to suffer cruel and unusual punishment in the eighth.

Meanwhile in 1789, borrowing from the American Declaration of Independence, the French revolutionaries had compiled their own Declaration of the Rights of Man. It was only an aspirational document: in its preface they explained that it was to serve as a constant reminder of people's rights and duties. In the fourth article, they declared – wonderfully – that the liberty to which all were entitled consisted in their doing anything which did not injure anyone else. We may note, however, that, in the eleventh article, they qualified freedom of expression by reference to such cases of abuse of that freedom as might be prescribed.

Even more interesting was the then unofficial French revolutionary slogan in favour not just of liberty and equality but also of "fraternity", a concept later suggested to be represented by the last, red, third of France's tricolour flag. So the idea arose that all of us belonged to the same family and had brotherly responsibilities to each other – and corresponding rights. But the development of that idea into mutual economic support had to wait more than 100 years.

England yes ... the US yes ... France yes ... but what about human rights at an international level? For them, we need again to wait until the twentieth century.

⁵ District of Columbia v Heller 128 S Ct 2783 (2008)

⁶ 28 Edw III, c3

In 1948 the United Nations adopted the Universal Declaration of Human Rights, which had been drafted for it by a Commission chaired by the redoubtable Mrs Roosevelt. Although the Universal Declaration was greatly influenced by the Bill of Rights, the US was particularly suspicious of its perceived socialist tendencies⁷. The US representative at the UN noted with relief that it was only a wish list; that it had no machinery for enforcement; and that it was not even a convention which would bind those who ratified it. Beyond its significance as an aspiration which collected worldwide endorsement, I would highlight, in passing, the arrival in it of economic rights, including to an adequate standard of living maintained if necessary by social security, and, most importantly, of the demand that member states should provide an effective remedy for any violation of other, substantive, human rights.

And so in 1950 we move to Europe. The continent has been shattered. Germany has violated human rights in unspeakable ways and must never be allowed to do so again. In the east Stalin is building a menacing communist bloc behind an Iron Curtain. We in Western Europe must unite under a code of human rights. And Germany must be made to sign up to it, along with the rest of us. Thus was the European Convention on Human Rights conceived and delivered.

When in 2016 a majority of my fellow citizens voted to leave the European Union, a number of them, I have no doubt, believed that they were voting for the UK to leave the European Convention and to rid itself of the jurisdiction of the court in Strasbourg which, on the pan-European level, interprets and applies it⁸. In fact, however, the European Convention is the product of the Council of Europe, set up in 1949, not of the European Economic Community, now the European Union, set up in 1957. 28 states are members of the EU. But 47 states, including Turkey and now, following perestroika, even Russia, are members of the Council of Europe.

Two men, one British and one French, were in particular responsible for drafting the European Convention⁹. As its preface shows, they considered themselves to be building upon the recent

⁷ "An International Bill of Rights: Proposals Have Dangerous Implications for United States", Holman, ABAJ 34 (1948), 984

⁸ See for example "The UK and The European Union: The Facts", Vote Leave, April 2016

⁹ Sir David Maxwell-Fyffe, Pierre-Henri Teitgen

UN Declaration. But they also considered your Bill of Rights. Indeed there was one unique feature of that instrument: for, because its provisions were an entrenched part of federal law, valuable regard could be had to the way in which your Supreme Court had actually interpreted and applied its short sentences during the previous 150 years.

Unsurprisingly there is nothing in the European Convention to suggest a right to bear arms. Few of the economic rights outlined in the UN Declaration are reproduced there. The right to freedom of expression under article 10 of it is expressly made subject to so-called necessary restrictions, including for protecting the reputation or rights of others. And, perhaps most controversially, the Convention includes, at article 8, a person's right, again subject to necessary restrictions, "to respect for ... his private and family life ...".

Article 8 has been described as the most unruly of the Convention rights¹⁰. The question, still not fully answered after almost 70 years, is: what does it actually mean and how far does it extend ?

The machinery for enforcement in Strasbourg of the European Convention against member states was slow to get going. The Convention has been described as a sleeping beauty for the first 20 years of its life¹¹. The prevalent view in the UK, arrogant I fear, was that, although we didn't have a comprehensive Bill of Rights, the common law and Acts of Parliament had already combined to give us ample protection in terms of human rights and that our obligation under international law to ensure enjoyment of rights under the Convention in effect added nothing. But in 1966, without realising its significance, the UK took a dramatic step which the Convention had at that time left to member states as optional. The UK accepted that from then onwards any individual could complain to Strasbourg of a violation on its part of his or her Convention rights. At first the complaint could be addressed only to the Commission, which was no more than a quasi-judicial body, but since 1998 the complaint has gone directly to the court there; and, under the Convention and therefore under international law, the UK is obliged to abide by any adverse determination made by that court.

¹⁰ R (Wright) v Secretary of State for Health [2009] UKHL 3, para 30 (Lady Hale)

¹¹ "European Integration through Fundamental Rights", Frowein, 18 (1984) Michigan Journal of Law Reform, 5 at 8

In the 1970s, for this and other reasons, the princess awoke. There was a flood of individual complaints of violations of the Convention on the part of the UK, some of which were upheld. UK authorities were taken aback. They soon came to regard the Strasbourg court as getting above itself and departing too far from the text of the rights. A good example is the complaint which Mr Soering made against the UK in 1989¹². The UK was about to extradite him to the US, where there was a real risk that he would be sentenced to death in Virginia. We in Europe hold that a sentence of death, even when passed on a sane adult, is inhuman punishment and contrary to article 3 of the Convention. But the UK's protestations that the possible death sentence would not be passed in the UK, by a UK court, fell on deaf ears: the court in Strasbourg held that the UK would itself be in breach of article 3 if the foreseeable consequence of its action would be breach of it elsewhere. A later decision extended this principle to where it was foreseeable that our deportation of a terrorist to Jordan would result in breach there of his right to a fair trial and, specifically, of his right not to be tried by evidence obtained by torture¹³. The reasoning of the Strasbourg court in this respect has been logical but the UK can be forgiven for having grumbled that the framers of the Convention would not have contemplated such an extension of its ambit. It is definitely a living instrument.

Almost the first thing which Tony Blair achieved when the Labour government came to power in 1997 was to get Parliament to pass the Human Rights Act. I have developed a close acquaintanceship with that Act and I regard it as brilliant. It made the European Convention part of UK domestic law. As a mere international treaty, it had not, for us in the UK, previously been enforceable as law. So the Act enables everyone in the UK to enforce their Convention rights in UK courts; only if they are then still dissatisfied can they approach the court in Strasbourg. The Act made it unlawful for a public authority, including a court, to act incompatibly with a Convention right. But – and here's the crucial difference from your constitutional arrangements – the UK Parliament is not a public authority for this purpose. Sovereign power is vested in Parliament. We judges cannot strike down as invalid an Act of Parliament for any reason, not even if it violates the European Convention. All we can do is to

¹² (1989) 11 EHRR 439

¹³ Othman v UK (2012) 55 EHRR 1

make a formal declaration that a statute is incompatible with the Convention – and to invite Parliament to repeal or amend it accordingly¹⁴. It almost always does so.

A controversial area is the relationship between our courts and the Strasbourg court. The Act says only that, in determining an issue in relation to a Convention right, our courts must take into account any relevant judgments of the Strasbourg court¹⁵. But the pressure on us to follow a Strasbourg judgment is considerable. It is undesirable that Convention rights should bear different interpretations in different member states; and if, for example, we in our Supreme Court were to rule that the UK would not violate the human rights of a failed asylum-seeker by removing him from the UK, and if he were then to go to Strasbourg and obtain a contrary ruling, his removal would, notwithstanding our ruling, be in breach of international law. That would be awkward.

I personally respect the Strasbourg court and have no difficulty in following almost all of its decisions. Occasionally, however, they stick in the throat. In two cases in 2011 the Strasbourg court was in a particularly extravagant mood, although since then it has rowed back to a limited extent. The subject was the extent to which Iraqi civilians had Convention rights which the UK was bound to observe during its occupation of Iraq, along with the US, in 2004. In the first case UK forces there had detained an Iraqi suspected of terrorism. Unwisely the drafters of the European Convention had limited the power to deprive someone of liberty to six specific situations, none of which applied to this case. The drafters would have done better to cast the power within more general limits, like the reference to "due process of law" in your 5th and 14th Amendments. Disagreeing with the UK courts, which had held that the mandate of the United Nations to the multi-national force, including the UK, to maintain stability in Iraq overrode its obligations under the Convention¹⁶, the Strasbourg court held that the UK had violated the right of that detainee to liberty¹⁷. The second case was even more extreme¹⁸. In the course of a military operation in Iraq UK forces had shot dead three Iraqi civilians. The UK's obligations under the Convention apply only to those "within [its] jurisdiction". One would expect that,

¹⁴ Human Rights Act 1998, s4

¹⁵ Human Rights Act 1998, s2

¹⁶ R (Al-Jedda) v Secretary of State for Defence [2007] UKHL 58

¹⁷ Al-Jedda v UK (2011) 53 EHRR 23

¹⁸ Al-Skeini v UK (2011) 53 EHRR 589

even if the detained man in the first case was within its jurisdiction, surely those civilians fell outside it. But the Strasbourg court held otherwise and that the UK had violated its Convention duty to the grieving relatives to conduct an independent investigation into the deaths.

But the groundswell of objection in the UK to human rights in general, and to the jurisdiction of the Strasbourg court in particular, whipped up by a powerful populist press, revolves largely around the right under article 8 to respect for one's personal and family life. Foreign criminals facing deportation; failed asylum-seekers facing removal; alleged criminals facing extradition: all these have relied on the presence in the UK of their wives, girlfriends and children as the basis for a claim that their enforced departure would violate their right to respect for their family life under article 8. Sometimes their claims have prevailed; and at dinner-parties I have often been assailed about the absurdity of this, usually on the curious basis that it was all my fault. Recently, however, a combination of a judgment of our court¹⁹ and an Act of Parliament²⁰ has tipped the balance against the success of most claims of that sort.

I have already contrasted the ostensibly unqualified right to freedom of speech guaranteed in your First Amendment with the expressly qualified right to it under article 10 of the European Convention. How far your right extends and whether it is desirable for it not to have been expressly qualified are, I realise, profoundly difficult issues, upon which you should be lecturing me. But, in your apparently polarised society today, the value of free expression, particularly in the press, probably outweighs the greater facility for others to abuse the right, such as those whom it entitled to hold up a placard "Thank God for dead soldiers" outside a military funeral in Maryland²¹. For the UK it is, again, a right under article 8 of the European Convention which, in particular, may curtail the exercise of freedom of speech under article 10. So, when the London Daily Mirror published a photograph of the model, Naomi Campbell, leaving a meeting of Narcotics Anonymous, the UK court²², with which the Strasbourg court later agreed²³, held that her right to respect for her personal life overrode the newspaper's right to freedom of speech. In the European Union we have also recently developed a controversial right for us to

¹⁹ Ali v Secretary of State for the Home Department [2016] UKSC 60

²⁰ Immigration Act 2014, s19

²¹ Snyder v Phelps 131 S.Ct 1207 (2011)

²² Campbell v MGN Ltd [2004] UKHL 22

²³ MGN Ltd v UK 39401/04, 18 January 2011

demand that certain historical data about us should be "forgotten", in the sense that internet search engine operators, such as Google, can be required to erase its links to such data²⁴.

I predict that, in both our countries, the tension between the preciousness of free speech and its destructive potential will become even more acute. Facts can now apparently be alternative²⁵. We are told that truth isn't truth²⁶. False messages are given to voters who have no reason to doubt their truthfulness and no ability to verify them. Untrue statements are insinuated into our newspapers and social media with a view to the manipulation of our thought for hidden ulterior purposes. Stemming this tide will be a huge challenge, in which concerted legal action at the international level can play a part, along with communicators, educators, religious leaders and other role-models.

My close acquaintanceship with human rights began only when I was appointed to the Supreme Court in 2011. Since then I have come to recognise the enormous value of rights under the European Convention; and, so long as I am not obliged to follow their decisions too slavishly, I welcome the wider perspective brought to bear upon them by the judges of all the member states in the Strasbourg court. I applaud the heightened standards by which public authorities in the UK have over the last 20 years been required to treat all its citizens, but in particular the traditionally disadvantaged, such as women, immigrants, ethnic minorities, gay people, defendants to criminal charges, prisoners and mental patients.

Yet I harbour real concerns. Human rights sound wonderful but they can amount to no more than hot air. They are nothing if they cannot effectively be enforced. Article 13 of the European Convention requires member states to provide an effective remedy for violations of it; and, by making its rights part of our domestic law, the UK considered that it had provided it. But please never dismiss as unimportant a provision about free legal advice and representation: I now realise that it's as important as any provision of substantive law. In pursuit of its economic policy the UK government has recently felt the need to dismantle much of our precious system of legal aid, introduced in 1949 along with the other two pillars of our Welfare State, namely

²⁴ Google Spain SL, Google Inc v AEPD and Gonzalez, CJEU, Case C-131/12

²⁵ Kellyanne Conway, Meet The Press, January 2017

²⁶ Rudy Giuliani, Meet The Press, 19 August 2018

social security and the National Health Service²⁷. It is, in particular, the disadvantaged who need to be acquainted with their human rights and helped to enforce them; but they are unlikely to be able to do so without free legal advice and representation. And, even where it is required to continue to provide free legal aid, for example to defendants to criminal charges and to parents threatened with the removal of their children, the UK is dismantling it indirectly by setting rates of remuneration for the lawyers at levels so uncommercial that, reluctantly, most of them feel unable to do that work. Access to justice is under threat in the UK. Our lower courts are now full of litigants who have to represent themselves, often of course very ineptly. In our own court very able advocates still regularly appear. But, particularly when they are asserting human rights against a public authority, they nobly appear *pro bono*, or for a small fee under the attenuated legal aid scheme; and it constantly offends me that it should be necessary for them to do so.

You will have to tell me whether the ability to enforce human rights by those who most need them is stronger or weaker in the US than in the UK. Is it lawful in your country for your government to implement its recently declared policy to subject asylum-seekers to forcible return, "immediately, with no Judges or Court cases"²⁸? It's not lawful in mine. And I confess that I did wonder why more than 2000 children were allowed to be separated from their asylum-seeking parents at the border before the judge in San Diego issued his interim injunction three months ago²⁹. He based it on the apparent strength of the parents' right of due process. Fine. We would actually have based it on the right not only of the parents but also of the children to respect for their family life under article 8. With my background in family law, I earnestly hope that our courts would have stopped the abuse more quickly.

But what most strikes the affectionate onlooker about American human rights is their insularity. The horrors of the twentieth century demanded an international response, in which, ever since it declined to join the League of Nations and later expressed its distaste for Mrs Roosevelt's Declaration, your country has been a most reluctant participant. The UN Convention on the Rights of the Child 1989 has been ratified by every member of the UN save two: Somalia and the US. President Obama has called that embarrassing. The International Convention on Civil and Political Rights 1966, sponsored by the UN, was not ratified by the US until 1992. It then

²⁷ Legal Aid and Advice Act 1949

²⁸ President Trump, 24 June 2018

²⁹ L v US Immigration and Customs Enforcement 310 F Supp 3d 1133 (2018)

hedged its commitment to it with a raft of reservations; and, in its most recent report, the committee which oversees compliance with the Convention has identified no less than 22 areas of concern about non-compliance by the US with the residue of obligations which it has undertaken³⁰. Only three months ago the US withdrew from the UN Human Rights Council, following the High Commissioner's denunciation of the family separation policy on the previous day and as a result of earlier statements by the Council which had irritated the US. By thus bailing out of the Council, has not your country, of all countries, set a useful precedent for repressive leaders around the world ?

Equally significant have been the powerful voices raised against reference to international human rights in the interpretation of American rights under the Constitution. In the judgments of the US Supreme Court there are only rare sideways glances at, for example, the judgments of the Strasbourg court. The debate about the propriety of reference to foreign jurisprudence is vividly illustrated in cases about the death penalty. Was it, for example, a cruel and unusual punishment for defendants aged 16 and 17 ? No, said the Supreme Court in 1989³¹. Yes, it said in 2005³². In the earlier case Justice Scalia, then in the majority, said that it was *American* conceptions of decency that were dispositive and that the sentencing practices of other countries were irrelevant³³. In the later case, then in a minority but which included the chief justice, the same judge reiterated their irrelevance. Indeed he added that the reliance placed by the majority on the laws of the UK was "perhaps the most indefensible part of its opinion" and he cited the UK's subscription to the Strasbourg court, which he condemned as "dominated by continental jurists"³⁴. Might this now once more become a majority approach in your Supreme Court ?

So American rejection of foreign treaties, indeed of foreign influence, is nothing new. In one way it shows an enviable degree of national self-confidence. Perhaps it reflects the fact that America is largely populated by families which, to their relief, have escaped here from misery in other countries, particularly in Europe, and which want to rid themselves of their influence in every way. In relation to human rights, the rejection of dialogue with the international

³⁰ CCPR/C/USA/CO/4, 23 April 2014

³¹ Stanford v Kentucky 492 US 361 (1989)

³² Roper v Simmons 543 US 551 (2005)

³³ Stanford, p2975, footnote 1

³⁴ Roper, p1227/8

community is justified on the basis that the American people haven't authorised it even indirectly. Is this invocation of democratic principle a substantial argument? Or is it a fig-leaf?

I have sought to show, no doubt in too narrow a compass, how each iteration of human rights in the western world down the centuries has built upon previous iterations expressed elsewhere in it. In that regard I have stressed the world's debt to the US Constitution. To address my title, human rights have been, and in my view should continue to be, a joint effort across the western world and indeed beyond. In that effort lawyers play a major role. Sadly I have come almost to the end of my career. You, by contrast, will shortly embark on yours, with all the likely success which attends graduation from a top law school. Yes, most of you will have an engrossing legal career and no doubt makes lots of money. But also, and with respect more importantly, please also strive tirelessly, in whatever way you can, to secure the protection and development of... human rights.