

## **HLRA Inaugural Annual Lecture**

**London, 2 October 2025**

### ***Our Framework of Human Freedoms***

#### **Introduction**

1. The international rule-based order, democracy and human rights have certainly contributed to an unprecedented period of stability, peace and human prosperity in the Western hemisphere in the last 75-80 years. However, I address you at an inflection point. Human rights, as a political and moral value system, is losing ground; history appears to be repeating itself. One even fears that a hurricane of horrors might be brewing. It may be a tropical storm at present, but its rapid intensification into Category 4 or 5 is by no means unlikely, on the contrary.
2. This evening I will discuss some of the recent criticism levelled at the system of the European Convention on Human Rights in this country as well as the so-called letter of the nine, a public call by nine Member States of the Council of Europe for, and I quote, ‘a new and open-minded conversation about the interpretation’ of the Convention.
3. As I will explain, a large part of this criticism is without merit when one fairly represents the current state and trajectory of Convention law. However, the sense of societal dislocation with human rights which is emerging cannot be disregarded. Even if one believes in the fundamental value of human rights and

freedoms as the foundation of a life worth living, one must accept that a recalibration is needed about human rights and in the public narrative to reinforce its value for democratic societies.

4. This evening, I will therefore submit that we must reconsider a purely individualistic rights-based model of human rights law and attempt to progressively revert back to its genesis as a framework of human freedoms, its core function constraining arbitrary and oppressive governmental power, while also encompassing individual duties and responsibilities towards the common good.
5. I will discuss this thesis within the context of the European Convention on Human Rights and its development over the past 75 years. Just to be clear, while I will adopt a somewhat self-critical posture in this lecture, having served as President of the European Court of Human Rights, it goes without saying that I urge everyone to fully appreciate, highlight and celebrate the Convention's positive influence on our societies. The importance of tolerance and broadmindedness in societal debate, our right to speak out against Government without fear of retribution and punishment, the strong protections for the most intimate aspects of our private and family lives, rule of law protections against abusive government surveillance and law enforcement and robust due process rights.
6. Now, more than ever, the Convention's guarantees against the inherent dangers of unrestrained and oppressive majoritarianism are needed. There is no

question that the fundamental freedoms embedded in the Convention continue to be worth fighting for and the calls in this country to withdraw from the Convention system are unprincipled and unwise.

7. Having said that, I have nevertheless come to accept that the European human rights project is appearing to lose its resonance in the hearts and minds of large segments of our societies. This state of societal affairs is not sustainable for a system of law that purports to condition the exercise of governmental power to safeguard the irreducible core of human freedoms that all signatory states have professed.
8. I will proceed in three parts.
9. First, I will briefly trace the philosophical roots of the concept of ‘fundamental freedoms’ in the Convention drafted after WWII specifically aimed to prevent totalitarianism. I will argue that the Convention’s core aim was to safeguard human freedom, not a list of narrow individual entitlements.
10. In my second part, I will discuss the current predominance of what I will call the ‘Rights Paradigm’ and how it has developed into a unitarian concept which may appear sometimes divorced from its derivative communal context. It can plausibly be argued that this development, influenced by strong social and cultural transformations, has perhaps contributed to our current ‘era of dark passions’, adopting David Brooks’ formulation in a recent Op-Ed published in the New York Times.<sup>1</sup>

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<sup>1</sup> David Brooks, ‘*The Era of Dark Passions*’, The New York Times, Sept. 18, 2025.

11. I will proceed on the assumption that it is not only plausible but, in fact, more than likely that human rights law's focus on individual claims of rights, and on technical compliance, rather than shared values and individual duties and responsibilities, have unfortunately given the enemies of freedom an effective platform of persuasion. We therefore need a strategy of pushback to, once again, construct and preserve our framework of human freedoms, a strategy which continues to enforce our core principles, but accepts some of the weaknesses of the current trajectory of human rights law. While I will not be opining directly on recent calls for Convention reform in this lecture, I think we need to engage with that debate with an open and constructive mindset.
12. Set against this more theoretical background, my third part analyses Convention law through the lens of the concept of fundamental freedoms. In this regard, I will focus, in particular on the elephant in the room, migration, as this area has been specifically targeted as a source of criticism, most recently in the public letter of nine Member States of the Council of Europe.

### **The ECHR as a Framework of Human Freedoms Not Individual Entitlements**

13. Now to my first part.
14. It is often forgotten that the full title of the European Convention on Human Rights is the 'Convention for the Protection of Human Rights and Fundamental Freedoms'. When viewed against the background of the historical genesis of the Convention, drafted to address the horrors of WWII, its core purpose was

to enact a framework of fundamental freedoms, not individualistic-rights-based entitlements. And let's not forget that it was the UK common law which provided a source of inspiration here.

15. Indeed, the Convention's Preamble refers to the 'profound belief in those fundamental freedoms [as] the foundation of justice and peace in the world and [that they are] best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend'. In other words, it is the framework of fundamental freedoms which forms the basis for the protection of human rights. The drafters were thus quite clearly focused on limiting state power and preventing arbitrary interferences, emphasising societal conditions for liberty, not individual grievances commonplace in any democratic society where a balance must invariably be struck between individual wants and wishes and the public interest.
16. Importantly, the whole edifice of the Convention is structured around justiciable rights not being viewed in isolation, their scope and content always being relative to individual duties and responsibilities. In other words, the Convention's framework of human freedoms does not and never has recognised individualistic entitlements wholly divorced from the justified and reasonable imperatives of the common good.
17. Tracing the ideological and philosophical roots of the Convention is thus key to correctly articulating its proper legal scope, in particular in addressing the

challenges the system faces at present. To be clear, I do not accept, as is sometimes claimed by those on the political right, that the Convention only adopts a vision of liberalism as a theory of limited government. This theory, according to Joseph Raz, ‘presents a view of political liberty as a doctrine of what governments may not do, how they may not treat their subjects, which areas of individual conduct they should keep their hands off’.<sup>2</sup> The doctrine of limited government regards government as a threat to liberty and human freedoms. Its protection is in keeping governments confined within proper moral bounds. However, as Raz correctly argues, there is also a ‘conception which regards [governments] as a possible source of liberty. They can create conditions that enable their subjects to enjoy greater liberty than they otherwise would. This second conception regards liberty as sometimes threatened by individuals and corporations, not only by governments’. While governments should ‘keep off certain areas of life, or avoid interfering with them in certain ways’ they should act in other areas ‘and in other ways to promote freedom’.<sup>3</sup> As Amartya Sen argues, freedom is not just about removing barriers, but also about having the capacity and power to fulfill ones potential.<sup>4</sup>

18. I would argue that the Convention’s reference in its title and in the Preamble to the concept of ‘fundamental freedoms’ includes this two-dimensional Razian concept of human freedoms or liberties, with both negative and positive

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<sup>2</sup> Joseph Raz, *The Morality of Freedom*, Clarendon Press, Oxford (1986), 18.

<sup>3</sup> *Ibid*, 18-19.

<sup>4</sup> Amartya Sen, *The Idea of Justice*, Harvard University Press (2009), Part III, 225ff.

components. This also emerges quite clearly from the case-law of the European Court of Human Rights. This is important, because if we accept that government has both a negative and a positive role in furthering fundamental human freedoms, including by preventing or limiting harms in society caused by individuals themselves, this must have important effects on the concept of human ‘rights’, as I will explain in due course.

19. To sum up, the Convention’s core aims are to prevent the arbitrary and oppressive use of governmental power - the negative component of freedom - as well as positively promoting human freedoms with positive actions that prevent harms inflicted by individuals or corporations upon other members of society. All the rights and freedoms in the Convention are to be interpreted and applied with this in mind. The focus is therefore not on narrowly conceived individual entitlements, but rather on constructing a collective framework of human freedoms where the scope and force of rights takes due account of conflicting individual duties and obligations.
20. To explain this further, allow me then to turn to my second part where I discuss the current predominance of what I term the ‘Rights Paradigm’ and how it has, in some ways, developed into a unitarian concept which may appear unduly divorced from its derivative communal context.

### **The Rights Paradigm and the Common Interest**

21. To begin with, there can be no question that Convention law has justifiably, and in conformity with its historical genesis as a framework of human

freedoms, prioritised individual rights over majoritarian oppression. When discussing the way in which the Convention has positively shaped UK law, it is for example legally unquestionable that sexual orientation lies at the core of the right to private life, as confirmed in the landmark judgment in *Dudgeon v the United Kingdom*,<sup>5</sup> or that public policy choices surrounding targeted or mass surveillance are justifiably constrained by the Convention, as the Court made clear in *Malone v the UK*<sup>6</sup> and in *Big Brother Watch and others*<sup>7</sup>.

22. Nor can it be reasonably called into question that free speech principles, by virtue of how Article 10 is formulated, and in light of Article 17 of the Convention, do not operate like the First Amendment to the US Constitution. Criticism from across the Pond assumes the inverse, that is in error. For obvious historical reasons, the Convention rejects absolutism in the European free speech context and allows for its limitations. However, it is not only incumbent on European Governments to refrain from interfering with legitimate speech but to also to ‘create’ a free speech ‘enabling’ environment.<sup>8</sup>
23. To recall, the Convention contains both absolute prohibitions, in particular in Article 3, and qualified rights, such as in Articles 8-11 and Article 1 of Protocol

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<sup>5</sup> *Dudgeon v the United Kingdom*, No. 7525/76, 22 October 1981, ECHR 5; 4 Eur. H.R. Rep 149.

<sup>6</sup> *Malone v the United Kingdom*, No. 8691/79, 2 August 1984, ECHR 10; 7 Eur. H.R. Rep. 14.

<sup>7</sup> *Big Brother Watch and Others v the United Kingdom* [GC], Nos. 58170/13, 62322/14 and 24960/15, 25 May 2021.

<sup>8</sup> *Dink v Turkey*, No. 2668/07, 14 September 2010, para. 137 : ‘ ... la Cour réitère ses considérations concernant les obligations positives de l’Etat en matière de liberté d’expression .... Elle estime aussi que les obligations positives en la matière impliquent, entre autres, que les Etats sont tenus de créer, tout en établissant un système efficace de protection des auteurs ou journalistes, un environnement favorable à la participation aux débats publics de toutes les personnes concernées, leur permettant d’exprimer sans crainte leurs opinions et idées, même si celles-ci vont à l’encontre de celles défendues par les autorités officielles ou par une partie importante de l’opinion publique, voire même sont irritantes ou choquantes pour ces dernières.’

No. 1. Some others, while not formulated explicitly as qualified, have nevertheless been interpreted as containing implicit limitations like Article 6, on the right to a fair trial, and Article 3 of Protocol No. 1, on the right to free elections.

24. It cannot be denied that the scope of application of these provisions has gradually expanded in the Court's case-law. There are certainly sound arguments that have militated in favour of this trajectory when one views the very broad and open-ended language adopted by the founders, as I have explained elsewhere.<sup>9</sup> The potential scope of individual protection has therefore increasingly limited available public policy choices in an ever widening array of areas of human life, in particular in the field of migration which has created protracted societal tensions. I fear that whatever the legal merits of this development in the case-law, it has contributed to a sense of societal dislocation with human rights and its overall narrative which we are seeing in this country and across Europe. The emerging public narrative that everything has become a human rights issue, that human rights has become an impostor, not an enabler, is something that should be taken seriously, whether we like it or not.

25. Allow me to explain this point further.

26. When it comes to the qualified rights in Articles 8-11 and Article 1 of Protocol No. 1, or where a right allows for implicit limitations like in Article 3 of

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<sup>9</sup> Robert Spano, 'The Democratic Virtues of Human Rights Law – A Response to Lord Sumption's Reith Lectures', *Inaugural Bonavero Institute Annual Human Rights Lecture*, E.H.R.L.R. 2020, pp. 132-139.

Protocol No. 1, the Court has in general adopted an interpretive approach whereby it will be relatively easy for an applicant to successfully engage the right alleged to have been restricted. I call this the ‘Rights Paradigm’. In other words, the Court has construed the first paragraphs of these provisions very broadly with the consequence that an increasing array of issues are left to be dealt with under the second paragraphs with the application of a proportionality test examining the necessity of an interference with the rights claimed in a democratic society.

27. However, the Convention is a shield for freedom, not just a catalogue of individual claims. Understanding the Convention in this way, and accepting that persons are not just rights-holders, but also the bearers of duties and responsibilities, emphasises that the Convention is first and foremost meant to preserve a core space of liberty. In this sense, it may appear to overly prioritise an individualistic approach to human rights law by invariably requiring national authorities to engage in the fact-specific balancing of competing interests because rights are almost always engaged in the first place.
28. The ‘rights paradigm’ becomes particularly acute in cases where convicted criminals assert their Convention rights, as we have seen in the migration debate and on prisoners’ voting in this country. The reason is that in such cases there is invariably a strong public interest in protecting the rights and freedoms of others. An overly expansive view of the individual rights asserted in such cases, without adequately taking into account that same individual’s duties and

responsibilities, risks engendering outcomes that are simply not credible or indeed, even understandable, to the average person. This state of affairs was certainly not envisaged if one draws on the historical genesis of the Convention as a framework of freedoms.

29. Referring to history, the comparison between the principle of non-refoulement, as laid down in Article 33(1) of the 1951 Refugee Convention, with the *Soering*-line of case-law under Article 3 of the Convention, is revealing. Recall that in accordance with Article 33(2) of the Refugee Convention the principle of non-refoulement does not apply to refugees for 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.
30. Importantly, the Refugee Convention was adopted at the same time as the Convention, in the immediate aftermath of WWII. It was based on an acceptance that in the context of deportation or expulsion of foreign criminal offenders a balance had to be struck between individual rights and the public interest. This approach was however rejected by the Strasbourg Court in the cases of *Chahal v the United Kingdom*<sup>10</sup> and *Saadi v Italy*,<sup>11</sup> referring in particular to the absolute nature of the language in Article 3.
31. Now to be clear, line-drawing here can be a difficult exercise, I can attest to that fact from my experience as a Judge on the Court. And, as I have argued

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<sup>10</sup> *Chahal v the United Kingdom*, No. 22414/93, 15 November 1996, Reports 1996-V, para. 80.

<sup>11</sup> *Saadi v Italy* [GC], No. 37201/06, 28 February 2008, Reports 2008-II, para. 138.

elsewhere, in the last decade or so the Court has begun to appreciate that more restraint and deference to Member States in some areas properly articulates the true purpose of the Convention under the principle of subsidiarity.<sup>12</sup> This has, in particular, happened in the migration context under Article 8 of the Convention, as I will discuss in a moment.

32. To sum up, there is an argument in favour of the Court recalibrating some strands of the case-law by progressively limiting somewhat the scope of application of qualified rights when issues are not considered to lie at the core of the right claimed. In this way, the Convention becomes less focused on individualistic claims and entitlements requiring a granular, fact-specific balancing of interests based on proportionality, which may also lead to inconsistent results before the national courts. Rather, the Convention should be more forcefully leveraged as a framework of fundamental freedoms targeted at the arbitrary use of governmental power and majoritarian oppression of the weak and the vulnerable.
33. I will now turn to my third and final part where I will analyse Convention law through the lens of the concept of fundamental freedoms. In this regard, I will focus, in particular on the migration context, as this area has been specifically targeted as a source of criticism.

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<sup>12</sup> Robert Spano, 'Universality or Diversity of Human Rights ? Strasbourg in the Age of Subsidiarity', *Human Rights Law Review*, Vol. 14, No. 3 (2014), pp. 487-502 and 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law', *Human Rights Law Review*, Vol. 18, No. 3 (2018), pp. 473-494.

## Migration and the Convention

34. 'At least three former home secretaries whisper in private that they now believe departure from the ECHR is the only way to solve the Gordian knot of foreign criminals'. This is a quote from an article by journalist Sebastian Payne published in the Times on 15 May this year.<sup>13</sup>
35. So, what is this 'Gordian knot' of foreign criminals?
36. It appears to consist of the claim that the UK's membership of the Convention is preventing the expulsion of settled migrants convicted of serious criminal offences. The right to private and family life under Article 8, as interpreted by the Court, is, and I quote, the 'fiendish' culprit, stifling a legitimate policy choice of not accepting that foreign criminals remain on UK soil'.<sup>14</sup>
37. In the same vein, on 22 May 2025, nine leaders of Member States of the Council of Europe (and of the European Union) published an open letter inviting a debate on the Convention.
38. The letter seems to focus on the case-law of the Court in the field of migration, in particular in cases related to the expulsion of migrants having committed 'serious violent crime or drug-related crime'. The leaders suggest that, and I quote, '[restoring] the right balance', is needed.
39. I have already publicly stated that, first, the drafting and clarity of this letter leaves much to be desired. It either suggests that the letter was primarily meant

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<sup>13</sup> Sebastian Payne, 'Leaving the ECHR can become Badenoch's big cause', *The Times*, 15 May 2025.

<sup>14</sup> *Ibid.*

for a national audience in a political debate or that the leaders were not sufficiently advised by their legal experts on the multiple dimensions of the Court's existing case-law in this field and the current state of Convention law.

40. Second, it is a fundamental aspect of the separation of powers that the proper vehicle for prompting change in jurisprudential developments is either by the use of legislative power, here a change of the Convention through the amendment process, or by way of a strategic and case-by-case litigation effort with Governments pleading their case before the Court in live proceedings. Having served on the Court for nine years, I am quite certain that this particular letter will in fact prove counterproductive. To be clear, my view would have been different if some of these statements would in the future make their way into an intergovernmental declaration adopted at the level of the Council of Europe, a sort of Brighton 2.0. Such declarations can indeed have interpretive weight as the post-Brighton subsidiarity case-law demonstrates.
41. Third, if the letter is correctly understood as lamenting the Court's jurisprudence in the field of the deportation or expulsion of migrants convicted of serious criminal offences, it is based on a misunderstanding of the current state of Convention law.
42. A recent report published by the Bonavero Institute of Human Rights at the University of Oxford,<sup>15</sup> thus correctly explains that despite political and media

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<sup>15</sup> Victoria Adelmant, Alice Donald and Başak Çalı, *The European Convention on Human Rights and Immigration Control in the UK : Informing the Public Debate*. Bonavero Report 3/25, 4 September 2025, Bonavero Institute of Human Rights.

focus on cases involving foreign national offenders, successful human rights-based appeals against deportation are rare. The latest available Home Office data shows that in the 15 months to June 2021, the number of successful appeals amounted to only 0.73% of the total number of sentenced foreign national offenders. Over a five-year period to June 2021, the number of successful human rights-based deportation appeals represented about 3.5% of the total number of deportations – and around 2.5% when looking at appeals based solely on private and family life grounds. The Report also notes that these figures may be overestimates, as they do not account for cases subsequently overturned by the Upper Tribunal.

43. As to the effect of the Convention in this regard, the report also correctly explains that judgments by the Strasbourg Court against the UK are very rare. In fact, since 1980, so in the last 45 years ladies and gentlemen, the Court has only found against the UK in 13 removal cases, and just four of those concerned family life. Even more strikingly, in relation to immigration rules more broadly, the Court has only three times ruled that the UK's immigration rules violate the ECHR in the past 45 years. It is therefore not surprising that the authors conclude that suggestions that the Strasbourg Court 'hinders' the UK's efforts to control immigration do not stand up to scrutiny.<sup>16</sup>
44. The bottom-line is this: Migration, in particular due to economic hardships, is a global phenomenon which almost every country in Europe and the Western

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<sup>16</sup> Ibid.

hemisphere like the United Kingdom has to grapple with. There is simply no factual or substantive nexus between the European Convention on Human Rights and the cadence of boats illegally arriving on the shores of this country. Article 8 of the Convention does not preclude the United Kingdom from expelling foreign criminals and any limitations imposed under this provision can only apply in really exceptional circumstances as the actual facts recounted in the Bonavero Report attest to.

45. But more importantly, while the actual facts here will not persuade those that are not willing to be persuaded, it nevertheless remains crucial for all stakeholders, and those present in this room and online, to inform the public narrative in plain language that the Convention does not mandate the negation of national sovereignty, border controls, language, local customs and traditions.
46. In other words, it does not preclude a democratic society striving for social cohesion and a semblance of identity. Its framework of fundamental human freedoms simply outlaws arbitrary, vindictive and oppressive measures by Government and requires actions to promote a culture of human rights. It would be a tragedy indeed if this quintessential liberal tradition, based on the rule of law, would only command a minority of views in this country.

Thank you !

**Robert Spano**

