FUNDAMENTAL RIGHTS AND THE PROSECUTION OF CRIME

The JUSTICE Human Rights Day Lecture 2016

Given by W. James Wolffe QC, Lord Advocate

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It is a great privilege to have been invited by JUSTICE to give this Human Rights Day Lecture. It is also a great pleasure to be back here in Parliament House, the seat of the College of Justice in Scotland, and in the Advocates Library, which has been my professional home for so much of my professional career. I am grateful to the Dean and to the Faculty of Advocates for hosting this lecture.

According to its website, JUSTICE seeks to promote a vision of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflects this country's international reputation for upholding and promoting the rule of law. I, for my own part, believe strongly that the rule of law is one of the foundations of a just and successful society. The rule of law is made real through the mechanisms through which the law can be invoked and justice administered. And if those mechanisms are not, in fact, fair, accessible and efficient, the rule of law will be diminished.

There is a serious philosophical debate as to whether the protection of fundamental rights is or is not an inherent and necessary feature of the rule of law[1], and there is an even larger debate about the place of rights-based

[1] See e.g. T. Bingham, *The Rule of Law*, 2010, pp 66-68.

thinking in moral and political, if not legal, analysis[2]. For my purposes, today, it suffices to acknowledge those debates, for since the promulgation of the Universal Declaration of Human Rights, 66 years ago tomorrow, the international community has developed a significant body of international human rights law – a body of law which is based, as the Preamble to the Declaration puts it, on the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". The United Kingdom is party to most of the key international treaties, and is, accordingly, bound by those international human rights norms.

Although enactment within our own domestic legal system of fundamental rights was, in its day – and not, in the long sweep of things, all that long ago - highly controversial[3], it is, now an established fact. And, for my own part, I believe that the entrenchment of fundamental rights in our law, through the Human Rights Act 1998 and the Scotland Act 1998, as well as through the EU Charter of Fundamental Rights within its field of application, has been good for the law in Scotland.

We are, rightly, proud of our legal heritage, and we have much of which to be proud in relation to the protection of fundamental rights. By way of example, in 1587 the pre-Union Scottish Parliament established the universal title of the Lord Advocate to prosecute crime in the public interest[4], thereby laying the foundation for the public prosecution service which I head. In the same year, the same Parliament accorded accused persons the statutory right to be represented by counsel[5] - some 150 years before representation by counsel became the norm in criminal trials in England & Wales[6].

[2] See e.g. J. Raz, "Rights-based Moralities" in J Waldron (ed), *Theories of Rights,* 1984.
[3] See e.g. J. McCluskey, *Law, Justice and Democracy,* 1986.
[4] APS 1587 c. 77; for an account of the background and context, see G. Omond, *The Lord Advocates of Scotland,* 1883, vol. 1, pp. 45-60.
[5] APS 1587, c. 91.
[6] See DJA Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* 1800-1865, 1998.

So we can, I believe - and should - look to our own law as the primary basis for the protection of fundamental rights in Scotland[7]. But without an explicit commitment to the protection of fundamental rights, and the opportunity, when necessary, to test our law against those requirements, there is a risk that we lose sight of the imperatives which flow from respect for that inherent dignity of all human beings which is referred to in the Preamble to the Universal Declaration.

Those of us who work within the criminal justice system have, in my own professional lifetime, experienced, at first hand, the significant impact of taking seriously a commitment to fundamental rights. I was appointed an advocate depute not long after *Holland*[8] and *Sinclair*[9] had transformed the law on disclosure, and I was personally involved in some of the subsequent cases[10] as we worked out the consequences of those decisions. And I was an advocate depute when we learned of the European Court case of *Salduz v. Turkey*[11], I argued the case of *McLean*[12], in which the High Court grappled with the consequences of *Salduz* for our own legal system, and appeared with Lord Advocate Angiolini in *Cadder*[13] in the UK Supreme Court.

It is hard to overstate the practical consequences for the prosecution service, and for the criminal justice system generally, of *Holland, Sinclair* and *Cadder*. At the time, these cases were greeted with alarm in some quarters, and they certainly placed significant demands on the Crown, which had to adjust rapidly to meet the new requirements placed upon it - and did so remarkably well. Indeed, it is astonishing to remind ourselves just how recently those extraordinarily significant changes took place, and how profoundly they have affected our practice. But, now that the dust has settled, we can, I think, approach that history with a measure of objectivity, and

[7] See *R (Osborn) v. Parole Board* [2014] AC 1115, paras. 54-63 per Lord Reed (Lord Neuberger, Lady Hale, Lord Kerr and Lord Clarke concurring).
[8] *Holland v. HM Advocate* 2005 1 SC (PC) 3.
[9] *Sinclair v. HM Advocate* 2005 1 SC (PC) 28.
[10] Including *McDonald v. HM Advocate* 2010 SC (PC) 1; *HM Advocate v. Murtagh* 2010 SC (PC) 39 (High Court of Justiciary)
[11] (2009) 49 EHRR 19.
[12] *McLean v. HM Advocate* 2010 SLT 73.
[13] *Cadder v. HM Advocate* 2011 SC (UKSC) 13.

recognise that, by testing our criminal justice system against international standards, we may, in fact, improve its robustness.

Let me turn then to my main theme, and let me start by repeating something that I said in June, in this Hall, immediately after I had been sworn in as Lord Advocate.

"The effective, rigorous and fair prosecution of crime in the public interest underpins our freedom and security and helps to keep people and communities safe from crime, disorder and danger. The work of the public prosecutor, acting independently in the public interest, is essential to an effective criminal justice system - one which deals fairly with people accused of crime, secures justice for the victims of crime and punishes those who are convicted of crime."

Effective, rigorous, fair and independent. Those adjectives reflect moral qualities which, I believe, characterize and should characterize the professional prosecutor. And they are qualities which characterize and should continue to characterize our prosecution service.

According to Baron Hume, as Her Majesty's Advocate, I prosecute crime "for the public interest, and in the name of [Her] Majesty, as guardian and administrator for all [her] people, of the laws which secure their tranquility and welfare"[14] - to vindicate Her Majesty's interest "in the execution of her laws", and "in the due and equal distribution of criminal justice to all [Her] subjects"[15]. Indeed, it is interesting to note that one of the reasons for giving the Lord Advocate universal title to prosecute in 1587 was to ensure that crimes would be prosecuted, regardless of the willingness or unwillingness of the victims of crime to pursue them[16].

As head of the system of prosecution and investigation of deaths in Scotland. I am obliged by statute to exercise my responsibilities independently

[14] *Commentaries,* ii.118.
[15] *ibid.,* ii.131.
[16] See Omond, loc. cit.

of any other person[17]. That is no mere shibboleth; it is a constitutional imperative which I take seriously. I am ably assisted by the Solicitor General for Scotland, and expertly supported by the Crown Agent and his staff, but responsibility for the direction and leadership of the prosecution service is mine and mine alone.

I have approved the institution of a wide-ranging prosecution policy review, which is directed to implementing more effectively and more rigorously the Crown's existing policies. And I have also, since the first day of my appointment, emphasized the trust which I have in the professional lawyers who prosecute on my behalf in the Scottish courts. It is in the public interest that prosecutors exercise their judgment independently, robustly, forensically, and objectively on the whole evidence available.

That does not, of course, imply that prosecutors may disregard the policies which I set. That has never been the case; and nor should it be. The consistent application of policy is a reflection of the rule of law imperative that like cases should be treated alike – and it is accordingly the responsibility of prosecutors to implement my prosecution policies. But I rely on individual prosecutors, exercising their own professional skill and judgment, to apply those policies to the cases with which they deal; to assess the evidence with rigour, and to make robust and realistic decisions, having regard to the particular circumstances before them.

A robust, effective, fair and independent prosecution service, working according to these principles, is one aspect of the legal system's response to the demand, manifested in the Universal Declaration and other international human rights instruments, to respect human dignity. An effective and rigorous prosecution service secures that we have a system which is directed to protecting the fundamental rights of victims of crime and, thereby, respecting their human dignity. And, at the same time, a fair prosecution service insists on respect for the fair trial rights of persons accused of crime – fair trial rights

[17] Scotland Act 1998, section 48(5).

which are a non-negotiable aspect of our collective commitment to fundamental rights and which respect the human dignity of those who are accused of crime.

When Adam Smith held the Chair of Moral Philosophy at the University of Glasgow, he gave a series of lectures on Jurisprudence. In those lectures, which he gave in 1762 and 1763, he said this[18]:

> "Crimes are of two sorts, either first, such as are an infringement of our natural rights, and affect either our person in killing, maiming, beating, or mutilating our body, or restraining our liberty, as by wrongous imprisonment, or by hurting our reputation and good name. Or secondly, they affect our acquired rights, and are an attack upon our property, by robbery, theft, larceny etc."

Smith's classification of crimes is both incomplete and over-extensive, but it is interesting, in the present context, because it characterizes a crime as a breach of the natural or acquired rights of the victim. It is a reminder, if reminder were needed, that it has long been recognised that at the centre of most crimes is a victim, whose rights have been infringed by the perpretrator.

And It is now well-established, in international human rights law, that respect for the rights of the victims of crime may impose positive obligations on the State. This was recognised by the European Court of Human Rights as long ago as 1985 in *X and Y v. Netherlands*[19]. The case concerned an allegation that a certain man had sexual intercourse with a woman of 16 who was mentally handicapped. The woman's father wanted criminal proceedings to be instituted. She was unable to express her wishes concerning the institution of proceedings. The prosecutor decided not to institute proceedings. According to the report, it was doubtful whether a charge of rape could be proved. According to Dutch law there was a separate offence where a minor was caused to commit indecent acts through abuse of a dominant

[18] A. Smith, *Lectures on Jurisprudence* (ed. Meek et al), 1982, p. 105.
[19] (1986) 8 EHRR 235.

position but this offence could only be prosecuted on the complaint of the actual victim, who in this case was unable to make a complaint.

The Strasbourg Court examined the case under reference to Article 8. The Court observed that:

"although the direct object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. … These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".

The Dutch Government argued that the Convention left it to each State to decide on the means to be utilized to that end, and pointed to civil law provisions which were available in Dutch law. The Court accepted that the choice of means for securing compliance with Article 8 is in principle a matter that falls within the Contracting States' margin of appreciation, and accepted that recourse to the criminal law is not the only answer. However, in the case of wrongdoing of the kind inflicted on the victim in this case, the protection of the civil law was insufficient.

"This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area, and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated."

The Dutch Criminal Code did not, in the circumstances, provide the victim with "practical and effective protection" and her Article 8 rights had accordingly been violated.

On that basis, the State has a positive obligation to put in place appropriate substantive law provisions which protect fundamental rights - and those provisions must protect the right to life under Articles 2 and the right not to be subjected to torture or inhumane or degrading treatment under Article 3, and also some rights under Article 8, albeit that in relation to Article 8, the case must cross a threshold of seriousness before international human rights law imposes on domestic law the requirement to provide protection through the criminal law provision rather than by other means.

While appropriate substantive law provisions are necessary to fulfil the State's positive obligations, they are not sufficient. The State must also, in fulfillment of those international obligations, put in place machinery for the enforcement of the relevant criminal law provisions. The well-known *Osman*[20] case concerned the question of whether, in the particular circumstances of the case, there was a positive duty on the part of the police to take operational measures to protect the deceased against a risk to his life. The claim was rejected on the facts, but the Court referred to the State's

> "primary duty to secure the right to life by putting place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions …".

And it could hardly be controversial that, if substantive rights are to be practical and effective, there must be a machinery of enforcement; or that, in the context of the criminal law, the machinery of enforcement includes machinery for the prosecution of crime.

Tomorrow is not only the anniversary of the Universal Declaration of Human Rights; it is also the final day of Sixteen Days of Activism against Gender-Based Violence. If we take seriously "the inherent dignity and of the equal and inalienable rights of all members of the human family", we cannot ignore gender-based violence. Two years ago, I was privileged to chair the JUSTICE Human Rights Day lecture for 2014 in this room. It was given by Professor Christine Chinkin, and she spoke on the Istanbul Convention, the Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted by the Council of Europe in April 2011. Article 5 of the Convention states that:

"Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors".

[20] *Osman v. United Kingdom* (2000) 29 EHRR 245.

The UK has signed that Convention, but has not yet ratified it. But the positive obligations of the State under the European Convention on Human Rights have already been invoked and applied in the context of the prosecution of crime and domestic abuse. Let me mention three cases, by way of illustration.

The first is *MC v. Bulgaria*[21]. The applicant alleged that she had been raped by two men on two successive days when she was 14 years old. The accused claimed that she had consented to intercourse. In due course, after investigation, the prosecutor terminated the proceedings on the basis that the use of force or threats had not been established beyond reasonable doubt and, in particular, that no resistance on the applicant's part had been established. The applicant complained that Bulgarian law and practice did not provide effective protection against rape and sexual abuse.

The Strasbourg Court held that states have a positive obligation, inherent in Articles 3 and 8 of the Convention, to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution. The Court reviewed the legal definition of rape across the Council of Europe, and the evolving understanding of the manner in which rape is experienced by the victim. The Court concluded that:

"any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalization of any non-consensual sexual act, including in the absence of physical resistance by the victim".

The Court went on to consider the approach which had been taken by the Bulgarian prosecuting authorities, and found that approach wanting. The court observed that the "investigation and its conclusions must be centred on the issue of non-consent"; whereas the approach of the Bulgarian authorities had been restrictive - "practically elevating "resistance" to a defining element of the offence".

[21] (2005) 40 EHRR 20.

The second case to which I wish to refer is *Bevacqua v. Bulgaria*[22]. The first applicant claimed that she had been regularly beaten by her husband. She left him and filed for divorce, taking their three-year-old son (the second applicant) with her. She maintained that her husband continued to beat her. She spent four days in a shelter for abused women with her son but was allegedly warned that she could face prosecution for abducting the boy, leading to a court order for shared custody, which, she stated, her husband did not respect. Pressing charges against her husband for assault allegedly provoked further violence. Her requests for interim custody measures were not treated as priority and she finally obtained custody only when her divorce was pronounced more than a year later. The following year she was again beaten by her ex-husband and her requests for a criminal prosecution were rejected on the ground that it was a "private matter" requiring a private prosecution.

The Court held that there had been a violation of Article 8 of the Convention, given the cumulative effects of the domestic courts' failure to adopt interim custody measures without delay in a situation which had affected adversely the applicants and the lack of sufficient measures by the authorities during the same period in response to the abusive behaviour of the first applicant's former husband. In the Court's view, this amounted to a failure to assist the applicants contrary to the State's positive obligations under Article 8. The Court stressed in particular that considering the dispute to be a "private matter" was incompatible with the state's obligation to provide adequate protection for the applicants' Convention rights.

And that proposition, that domestic abuse is not a private matter and must not be dealt with as such, was further reinforced in my third case, *Opuz v. Turkey*[23]. Nahide Opuz, and her mother, endured years of physical abuse and threats from Nahide's husband (HO), who eventually killed her mother. Nahide and her mother had complained to law enforcement on numerous

[22] Case 71127/01.
[23] (2010) 50 EHRR 28.

occasions, but the authorities had done little in response. One feature of the history of the case was that Nahide had, on two occasions, made complaints which she later withdrew, which meant, under the relevant Turkish law, that the proceedings had to be dropped. The level of violence escalated thereafter, culminating in the stabbing of Nahide. HO was charged but received only a monetary penalty. HO subsequently murdered Nahide's mother.

The Court held that there had been a violation of Article 2 (right to life) of the Convention by reason of the murder of the applicant's mother and also a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention by reason of the State's failure to protect the applicant from domestic violence. It found that Turkey had failed to set up and implement a system for punishing domestic violence and protecting victims. The authorities had not used the protective measures available and had discontinued proceedings as a "family matter" ignoring the reasons why the complaints had been withdrawn. There should, considered the European Court, have been a legal framework which allowed criminal proceedings to be brought irrespective of whether the complaints had been withdrawn. And the Court also held – for the first time in a domestic violence case – that there had been a violation of Article 14 (prohibition of discrimination) of the Convention, in conjunction with Articles 2 and 3.

It is well-known that I take a rigorous approach, as a matter of policy, to the prosecution of domestic abuse. My policy in that regard is one component of Scotland's response to the positive obligation which I have been describing. I may, of course, only prosecute domestic abuse where there is a proper basis for concluding that there has been criminality – where there is sufficient evidence that a crime has been committed. But where there is sufficient evidence of criminality, it is not pandering to any partisan agenda to seek to address with rigour a form of criminal behaviour which for far too long was not taken sufficiently seriously by the criminal justice system, and which blights the lives of individuals and families. In the context of recent comments about this particular area of criminality, it is worth observing that the last year 80% of domestic abuse cases which went to trial resulted in a conviction.

Let me, then, make some more general observations about the position of victims of crime in the criminal justice system. My host, the Dean of Faculty, will, I am sure, not mind if I mention that, earlier this year, he wrote me an open letter[24]. Unsurprisingly, the Dean said much in his letter with which I agree. In relation to victims of crime, and their relatives, he said: "For too long those most affected were largely ignored, given little or no information. That has changed and rightly so." I agree with those observations. He also stated that the prosecutor is not the victim's lawyer, but an independent prosecutor in the public interest". I agree with him on that count also. As I said a moment ago, it is my responsibility, as Her Majesty's Advocate, "to vindicate Her Majesty's interest in the execution of her laws, and in the due and equal distribution of criminal justice to all Her subjects". But the Dean did express a concern that, as he put it, though "everybody pays lip service to that principle", it is "being eroded in practice" and I would like to address that expression of concern.

You will find no-one more resolute in defence of the independence of the public prosecutor than I am - and I do not believe that, in that regard, I differ from my predecessors. But I do not, for my part, believe that there is any conflict between resolute professional prosecutorial independence and the provision of appropriate and meaningful support to the victims of crime. Indeed, I would go further. As prosecutors, we can only do our job of tackling crime if victims and witnesses are willing to come forward and give evidence, and we can only secure justice if victims and witnesses are able to speak up within the criminal justice system and to give their evidence effectively. Our responsibilities as prosecutors demand, then, that we engage with victims of crime, that we seek to give victims the confidence to come forward and to speak up, and that we seek to support and enable them through the criminal justice process. If we do not do that, we will fail in our responsibility, as independent public prosecutors, to vindicate the public interest in the due and

[24] http://www.scotsman.com/news/opinion/an-open-letter-to-the-lord-advocate-james-wolffe-qc-1-4227461

equal distribution of criminal justice to all who are the victims of crime in Scotland.

I mentioned earlier the changes effected, by the Crown, in response to *Holland, Sinclair and Cadder* – changes which were directed to ensuring that the rights of the accused were more fully respected. The Crown has also effected, during my professional lifetime, a remarkable change in its approach to victims. I am proud that the Service which I now lead has been at the forefront, in Scotland, of recognizing the needs and rights of victims of crime. Our VIA officers work hard to provide appropriate information to victims, and to assist and support victims through the criminal justice process. Where they can, they will signpost victims to other agencies which can provide other types of support. As prosecutors, we can and will utilize the procedural opportunities presented by the suite of special measures which are now available to mitigate the impact of the process on vulnerable witnesses, including victims.

The law now recognizes the interests and rights of victims of crime in the Victims and Witnesses (Scotland) Act 2014. And earlier this year, the rights of victims within the criminal justice system were, further, explicitly recognised by the Court, in the case of *F v. Scottish Ministers*[25], in which Lord Glennie held that the potential disclosure to any third party of medical records pertaining to the complainer engaged her Article 8 rights, that an order seeking recovery of such records required to be intimated to the complainer and that she had a right to be heard on any such application, and to be legally represented.

There continue to be systemic aspects of the criminal justice system which cause difficulties for victims, and indeed for others who come into contact with the criminal justice system. These include churn in the summary court, floating diets in the High Court, and the impact on some vulnerable witnesses of the adversarial trial process itself. Prosecutors cannot, on their own, address these issues. Nor can we, as prosecutors, on our own, address

[25] 2016 SLT 359.

the desire of victims of crime for a more holistic approach to advice and support. After all, as prosecutors, our essential function is to prosecute crime, and the needs of victims are often not limited to the criminal justice process.

What we can do, as a prosecution service, is to be an agent of change – to work hard with our colleagues across the justice system and in the legal professions to change our criminal justice system for the better – in ways which will serve more effectively not only the victims of crime, but all those who come into contact with the criminal justice system, whether as victims, witnesses or accused persons. We should aspire to a system which routinely respects the "inherent dignity and of the equal and inalienable rights of all members of the human family", whilst being rigorous in our insistence on the obligation to secure a fair trial to every person who faces a criminal charge.

I would like to emphasise this last point. I have dwelled so far, in what I have said tonight, on the State's positive obligations to protect victims of crime. But in every criminal case, there is an accused person whose fundamental rights are at stake. The state may only justifiably inflict punishment on an accused person, if that accused person has been proved guilty to the requisite standard of proof, and through a fair process which respects the fundamental rights of the accused.

The right to a fair trial, expressed in Article 6 of the European Convention, is an unqualified right – although the way that a fair trial is secured may differ very markedly from one legal system to another. The public prosecutor, acting fairly and independently, must, as I observed earlier, respect the fundamental rights of the accused; and indeed a fair and independent prosecution service, taking decisions rigorously, independently and robustly in accordance with the evidence, is, I believe, essential to the freedom under the law which we enjoy as citizens of this country.

But, as the late Lord Rodger of Earlsferry, one of the very greatest lawyers ever to hold the office which I am now privileged to hold, used to say: prosecutors should not forget that it is their job to prosecute. I have been told,

though the tale may be apocryphal, that there was once a case in the Appeal Court, in which the ground of appeal was that the Crown had led evidence which was prejudicial to the accused. Well, I need to advise you that the prosecution case will, necessarily though not unfairly, include evidence which is prejudicial to the accused.

The defence bar, both solicitors and counsel, accordingly, have an essential role in securing the fundamental rights of the accused and the integrity of our criminal justice process. A vigorous and independent legal profession is one of the guarantors of the rule of law and fundamental rights; and Scotland is fortunate in that regard. It has, after all, been the persistence of defence lawyers, that has, since 1998, compelled us to examine different aspects of our criminal justice system against our international commitments and to take fundamental rights seriously.

Let me observe, in conclusion, that we are at an unusual moment of significant reform of the justice system, including the criminal justice system[26]. We would fail the people, whom it is our responsibility to serve, if we were not, collectively, to grasp and embrace the opportunities of that moment. Shortly after I was elected Dean of Faculty, in 2014, I said this[27]: "Change and the prospect of change … invite us to reflect on fundamentals – what we must hold onto, and what, on the other hand, we can – and should – let go". As we contemplate reform, we could not I think, do better than to keep before us, as our guiding principle, that articulated in the Preamble to the Universal Declaration, of the "inherent dignity and of the equal and inalienable rights of all members of the human family".

[26] See, in particular, the Scottish Courts and Tribunal Service, *Evidence and Procedure Review,* 2015, and *Evidence and Procedure Review – Next Steps,* 2016.
[27] *"The Twenty-first Century Bar: What is it for? An Inaugural Lecture",* 7 May 2014.