

Closing Lecture:
Emerging Human Rights Law

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I. Introduction

I will spend about the first half of the lecture addressing the topic set out in the outline. In the second half, I will propose some conclusions from the entire programme, ten things that I hope you learned here, and ten challenges that I hope you will take home with you.

II. Emerging human rights law

It is strange but true. The whole summer programme here at Oxford can be summed up in a single sentence: The regime of international human rights law is a legal system. If you have learned only that while you have been here, you have learned something vitally important. Human rights are legal rights, and the obligations to honor them are legal obligations. That is the principle from which everything else derives.

I am going to speak briefly about three recent developments in international human rights law, and I will propose that they have something important in common. They are:

- (a) the effort to develop a jurisprudence of liability for corporations involved in human rights abuses;
- (b) the increasing profile of environmental, developmental, and sustainability concerns in human rights law; and
- (c) the development of a vision that the way governments operate, and not merely what they do, may have human rights implications.

The increasing pressure on corporations to comply with human rights obligations comes, I think, from two sources. One is the prospect of legal liability for violations. The other is the increasing sophistication and sensitivity of the constituencies of those corporations: their shareholders, executives, and most importantly, their customers.

In *Doe v. UNOCAL*, a U.S. Court of Appeals found that the allegations that UNOCAL aided and abetted its joint venture partner – the junta ruling Burma – in human rights abuses were sufficient to allow the case to go to trial, because UNOCAL knew or should have known that the violations were taking place. In *Talisman Energy*, another appellate court came to a different conclusion, requiring that the corporation intended (not just was aware of) the bad conduct.

This issue may soon be addressed by the Supreme Court, in what will be a very significant outcome for the human rights community. Either way, however, pressure on corporations to clean up their act will increase, with the only question being how fast.

There is no time to give the subject of human rights and the environment the attention it deserves. Suffice it to say, though, that not only do such instruments as the African Charter and the Rio Declaration speak of a **right** to a clean and healthful environment, but regional human rights enforcement bodies such as the European and Inter-American Courts have flirted with recognizing it, including awarding sanctions and injunctions against those infringing this right. It is an area vital to the health and safety of many millions of people, and yet where the law and lawyers are only now awakening to their responsibilities.

Finally, I allude briefly to a right I find one that will most reward the creativity of lawyers in our field. We all accept that access to the judicial system is a basic human right, and at some level so too is the accountability of government. But being able to stand in front of a judge is worth little in a system in which the judge decides cases not based on the law or the facts, but according to who offers the better bribe, or who has the greater influence.

The OECD – hardly thought of as a reservoir of human rights activism – has taken the lead in promoting the idea that there is a human right to non-corrupt government institutions. It is closely related to, but not quite the same as, rights clearly articulated in, for example, the ICCPR. So, while it is not now *lex lata*, is it *lex ferenda*? Can we reach consensus on this in our lifetimes, beginning the process of enforcing compliance?

In each of these instances, and in so many more – from the emerging law concerning people with disabilities, after the U.N. Convention probably closest of all to its “graduation” into *lex lata*, to the increasing concern over the rights of sexual minorities, rights issues surrounding development and economic status, the sustainability of ecosystems and indigenous cultures – there is a critical role for human rights lawyers to play in articulating, crystallising, obtaining consensus for, and protecting newly-recognised rights. In doing so, we must be mindful of the pitfalls of which Philip Alston warned in his epochal article. It may not be necessary to go so far as to propose “appellation controlee” status for human rights norms. And it is surely true that, if the currency of human rights law is debased, it will not be there for those who need it.

But the need to exercise caution and restraint does not equate to a justification for accepting the status quo. Which leads me seamlessly to:

Ten Things You Learned in Oxford and Should Never Forget:

1. As the saying goes, when all you have is a hammer, everything looks like a nail. But everything is not a nail! We are all lawyers, law teachers, “persons learned in the law.” It does not follow that every human rights issue we must confront is a legal issue. Remember that there are other approaches, and make it your business either to master them or to seek out the advice of those who have. The law is not well-suited, for example, to making structural changes. It is not good at overcoming poverty . . . and from that some people infer that the law has a vested interest in perpetuating poverty. That is a subject for another day and another forum. But in any event, the law is simply too fine an instrument to use to bring about social upheaval: it is

good at gardening, not farming. Sometimes, achieving meaningful protection for human rights means changing attitudes – including our own – not, or not just, changing laws. To paraphrase Anatole France: “The law, in its majestic equality, forbids rich and poor alike to beg in the streets, to steal bread, and to sleep under bridges.”

2. Be very careful not to assume that the rhetoric of human rights assumes or promotes their reality. That an international agreement says that states are committed to something does not mean that they are necessarily committed to it, and it certainly does not mean that they are actually ready to honor it.

I am not addressing here the difference between *lex lata* and *lex ferenda*. I am speaking about *lex*, on the one hand, and what Ralph Steinhardt calls “*lex nada*” on the other.

So, you have read many international instruments here at Oxford that are wonderful and inspiring, but they are aspirational. They address our hopes for a better world. There is nothing wrong with having such hopes; in fact, for many, that is what motivates them to do good works. It could even be that they are essential.

But my point here, perhaps an obvious one, is: do not think that because fine goals are embraced by diplomats in Geneva or government ministers in your nation’s capital, that means that those goals are even halfway toward implementation by soldiers in the jungle, policemen on the streets, or civil servants in their offices.

3. Recognize that legal change is almost always incremental. Sharp, sudden, and radical changes in the law rarely take root, and if they are rejected by the body politic, not only are they reversed, but there is often a backlash and the legal system itself suffers. In a democratic society, it is hard to force people to embrace an interpretation of the law or the constitution that is alien to them just because judges announce it: it is critical that there be a level of popular support not only for the outcome, but for the process.
4. Do not be afraid to be innovative, and never reject anyone else’s ideas simply because they are new and untested. While radical change is highly exceptional, the effective and creative use of existing law, and persuasive arguments to change existing law, are not, and in fact are the stuff of legal progress. Learn from each other. As the Vice Chancellor said last Saturday, “What you know is not what matters. What you do with what you know is what matters.” And that, in turn, depends on what you are prepared to learn from others.

That, incidentally, is why such experiences as this Programme are so valuable.

5. Do not be bedazzled by your own virtue. As we all learned in law school – or are learning there now – the law does not reward a party for being right: it rewards a party for being able to prove that it is right. And proof can be a complicated, tiring, and lengthy exercise. The Devil is where he always is: in the details. Do not forget the basic skills of lawyering, which continue to apply no matter how pure your motivation or how compelling your case.
6. From the fact that you cannot do everything – that you cannot right all wrongs, or correct all inequities – do not fall prey to inferring that you cannot do anything. That danger is all too prevalent. It is why my own view is that I wish UNHCR’s website did not have

language like “end poverty” or “end discrimination.” That is not going to happen, and if it does, UNHCR will have had little to do with it. To me, this distorts the message, and implicitly suggests that defending the human rights of people is as implausible, as theoretical, as changing the human condition itself. I wish that instead the website said, “Obey the law.”

As the Nobel laureate Amartya Sen wrote, “what moves us is not the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate.” Choose your targets wisely, but by all means choose your targets.

7. Do not let the best be the enemy of the good. I find myself increasingly depressed when I hear about human rights NGOs squabbling over turf, and accusing each other of being insufficiently pure because they may work with organizations or people not perceived as thoroughly committed to the cause. In the real world, people make compromises, and if we refuse to do that, we risk being thought of as not serious. We will not reach achievable goals because our own personal or institutional egos will get in the way. Besides, we waste our valuable energy and our scarce resources.
8. Because human rights are universal, so too are the obligations to honor them. Every person, by virtue of his or her humanity and nothing else, is entitled to enjoy those rights. This is true of the people we like, and also of those we do not. It is true of those who are privileged in society, and of those who are not. If we are to defend the human rights of our clients, or those involved in our causes, we must do so in a way that respects the rights of others with whom we may not agree.
Thus, defendants accused of the most horrible human rights abuses – those found with the smoking gun still in their hands – are entitled to counsel, to fair trials, and to having their cases heard in a tribunal of proper and lawful jurisdiction. There is no exception, because once we justify allowing Radovan Karadzic to be tried unfairly, you make it much harder for me to defend my client Tony Barksdale, a prisoner on death row in the State of Alabama, who is guilty of an unspeakable act, but who also had a trial unfair from beginning to end.
9. Be humble, be respectful, and be careful. Remember that this is not a game: people’s very lives are bound up in the work of human rights lawyers. After you leave to go to a far more comfortable and less dangerous place, they will remain.
You may come to meet some of the strongest, most courageous, and most selfless people you will ever know: people who have undergone and are undergoing daily infliction of pain and indignity that we cannot imagine. Admire them; learn from them; help them. Sometimes, your presence alone may put your clients at great risk. We have all had that experience, as human rights lawyers: learning the next day that the person we met and interviewed was questioned by the police, or taken into custody, or sometimes worse. Your presence may be a tremendous force for good. The presence of international observers has ensured that people who might have been summarily executed are given a chance to defend themselves in reasonably fair trials. It has been the difference between fair elections and fraudulent ones. But the point is that, as a human rights activist in the

field you have control of a valuable and powerful asset. You must be very careful in how you use it.

10. And finally, the most important lesson of them all.

I'm going to be the first person to cite from this platform the wisdom of the greatest of all writers in the English language. Shakespeare speaks here through Jack Cade, in Henry VI, Part Two, and he says: "The first thing we do, let's kill all the lawyers."

Here is the context of this remark. Then I will suggest the lesson that should be drawn from it.

Cade and his friend Dick Butcher are musing about how nice it would be to overthrow the government: and not only the government, but all of the existing social order. Here is Jack Cade's platform:

CADE

There shall be in England seven halfpenny loaves sold for a penny: the three-hooped pot shall have ten hoops, and I will make it a felony to drink small beer: all the realm shall be in common; and in Cheapside shall my palfrey go to grass: and when I am king, as king I will be,-- there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers and worship me their lord.

It is in response to this that Cade's accomplice Butcher replies,

BUTCHER

The first thing we do, let's kill all the lawyers.

And Cade goes on:

CADE

Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? that parchment, being scribbled o'er, should undo a man? Some say the bee stings: but I say, 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since.

What does this mean? Why do Cade and Butcher want to kill all the lawyers?

Because it is the lawyers who will oppose their scheme. It is the lawyers who will stand and defend those who would be the conspirators' victims. It is the lawyers who will ensure that promises duly made be kept, that order for the common good be respected, and that neither Cade nor any other man in England will be worshipped as the people's lord.

That is how they know that the success of anarchy, of dictatorship, requires the elimination of the lawyers. In every society in which human rights are openly violated in today's world, the lawyers had first to be silenced: to be coopted, to be marginalized, to be systematically neutralized.

If you are to be a human rights advocate, you must resolve that, to the best of your ability, you will not let this happen to you. You will be noisy, you will be determined, and you will be tireless. And you will be successful.

So here is Lesson #10: Your challenge is to prove that Jack Cade was right. Your challenge, in other words, is to be the kind of lawyer – the kind of human rights lawyer – that Jack Cade and Dick Butcher – and Mahmoud Ahmadinejad and the Burmese junta – know that they have to kill.

Good luck. And thanks for making this programme the wonderful experience it has been for me, and I hope it has been for you.