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European Human Rights 1919-1950: From Negative to Positive Example? The Prioritisation of 'First Generation' Rights?

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The United Nations General Assembly's Universal Declaration of Human Rights (1948) and the Council of Europe's Convention on Human Rights (1950) were contrasting responses to the 'paradigm shift' in social and political attitudes induced by the dysfunctional behaviour of the western world's economic and financial systems, and the attendant social trauma, political extremism, war-mongering and racism of the preceding twenty years. At the core of this shift were demands for counter-cyclical state spending to obviate the chronic unemployment of the 1930s; for a 'welfare state' in which there would be universal access to health services, education and social security; and for a 'free society' in which civil and political liberties would be guaranteed. These demands were crystallised between 1939 and 1945 (1) by the manner in which unemployment was mopped up in Germany by Hitler's rearmament programme and subsequently in Britain and the United States by government war-time expenditure; (2) by the widespread feelings of 'entitlement' engendered by a conflict which cost 100 million lives and inflicted unparalleled hardship and physical devastation on civilians; and (3) by the radical social agendas proclaimed by the Atlantic Charter and Chapter IX of the United Nations Charter

(‘International and Social Co-operation’). After elaborating on the historical context which explains the unprecedented emphasis of the 1948 Universal Declaration on social and economic rights, this paper goes on to discuss why the 1950 European Convention on Human Rights, which established the European Court of Human Rights as a bastion of civil and political rights, completely ignored social and economic rights.

Context of UDHR

Professor Johannes Morsink, the author of *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Pennsylvania, University of Pennsylvania Press, 1999), attributes the UN General Assembly’s adoption of the Universal Declaration of Human Rights on 10 December 1948 principally to the human atrocities committed during the war of 1939-1945, above all the Holocaust. Morsink may have been influenced by the Assembly’s unanimous adoption on the preceding day of a Convention obliging its signatories to prevent and punish acts of genocide. Yet the Universal Declaration, as its title implied, embraced a comprehensive spectrum of human rights which were to be registered, fostered and protected. This predictably included the so-called ‘first generation’ of ‘*negative*’ individual, civil and political rights (‘*freedom from*’ physical abuse, arbitrary legal procedures, persecution, discrimination, thought control, political oppression), which had been articulated during the seventeenth and eighteenth century revolutionary struggles of Britain, France and the American colonies, only to be trampled underfoot by the dictatorial regimes of inter-war Europe. Yet unprecedented prominence was also given to the ‘second generation’ of ‘*positive*’ (‘ *rights to*’ social, economic and cultural justice) which had been forged in response to the vagaries of nineteenth and twentieth century capitalist development. This emphasis on ‘second generation’ rights was reinforced by the conviction that the booms and slumps of the western economic and financial system between the wars had been an underlying cause of the authoritarian, aggressive and racist behaviour of countries such as Germany. The latter’s newly founded Weimar Republic had set out in 1919 to become a state-of-the-art liberal democracy, but had been temporarily crippled by the hyperinflation of 1923-1924 and finally succumbed to the Nazi dictatorship largely because of the massive unemployment induced in the early 1930s by the pre-Keynesian deflationary

policies of the right-centre cabinet of Heinrich Brüning. It should be stressed that Hitler knew nothing about economics and came to power not because he had a programme to relieve unemployment but because the traditional conservative elite with whom he formed a coalition government in January 1933 regarded him as a heat shield against the Communists and Social Democrats, who had garnered more seats than the Nazis in the Reichstag elections of November 1932 in response to the depression.

It was his awareness of the deviant trajectory of Germany and other Axis powers which prompted H.V. Evatt, Australia's Minister for External Affairs, to remind the conference which gathered at San Francisco in 1945 to devise the United Nations collective security system, that there were socio-economic preconditions for the preservation of international peace. 'The great threat to human freedom which we have been combating for five years', he declared, 'arose out of, and was made possible by, an environment dominated by unemployment and lacking freedom from want.' As Professor Glendon, the author of *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001) remarks, 'the widespread support for the Australian position led to strengthening the Charter's provision for an Economic and Social Council (ECOSOC), making it the principal organ of the UN, alongside the Security Council'. The Human Rights Commission, one of the first bodies established by ECOSOC in 1946, duly drafted a Universal Declaration, Articles 22-28 of which plotted the path to international social justice via the right to work and protection against unemployment; the right to equal pay for equal work; the right to remuneration consistent with human dignity, well-being, health and development; the right to join trade unions; the right to leisure and periodic paid holidays; the right of mothers and children to social protection; the right to free, compulsory primary education and access on grounds of merit to secondary and tertiary study; and, finally, the right to participate freely in the cultural life of the community and even to IP protection.

The crusade for socio-economic justice was given additional impetus by the realisation of the Anglo-American financial elite that the seemingly chronic unemployment which afflicted Britain and the United States in the 1930s had been mopped up almost overnight by government expenditure on the war effort. (In the

1930s, unemployment had never dropped below 10% in Britain and, after peaking at 23% in 1932, had hovered at between 12% and 18% in the United States until 1940). Such changes acted to reaffirm the growing influence of Keynesian 'demand-side' economic theory and its increased prominence amongst many influential thinkers, notably Sir William Beveridge, the Master of University College, Oxford. No longer was there an insurmountable domestic financial obstacle to the achievement of a 'welfare state' based on full, or close-to-full, employment, and buttressed by increased government outlays on social security, health, housing and education. The notion that 'Full Employment in a Free Society', as Beveridge was to label it, was attainable quickly struck a chord with the 'bleeding masses'. Indeed, given the unheard of physical exposure to the conflict as a result of 'tactical' terror bombing, Britain in particular, felt such experiences 'entitled' it to 'a decent minimum standard of living for all' as compensation for the suffering endured. It was highly significant that 635,000 copies of the Beveridge Report on Social Insurance and Allied Services were sold after it was reluctantly released to the public by the martially focussed Churchill government on 29 November 1942. The BBC's initiative of broadcasting details of the Report in twenty-two languages ensured that the ideas of Beveridge would also permeate the programs of the European resistance movements which gained increasing momentum in the wake of the German defeat at Stalingrad in January 1943.

The legitimacy of government intervention in the cause of social justice was boosted even in the free market United States. Roosevelt's New Deal legislation was to mitigate the impact of the depression via the 1935 National Labour Relations (Wagner) Act (guaranteeing the right of workers to form trade unions and strike) and the accompanying Social Security Act, which provided for unemployment insurance and benefits for retired, disabled and bereaved spouses. By the time of the Atlantic Charter, which he proclaimed with Churchill in August 1941, Roosevelt had committed himself not only to helping to destroy Nazi tyranny but also to achieving what amounted to an international New Deal by means of 'collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security' by means which included 'access, on equal terms to the trade and raw materials of the world which are needed for their economic prosperity'. Roosevelt was rash enough, inadvisedly as it

transpired, to underpin this radical international agenda at the domestic level with his 1944 State of the Union Address proposal for a 'Second (Socio-Economic) Bill of Rights', which promised good education, useful and remunerative employment, adequate wages, medical care, social security and housing for all Americans.

The Context of the European Convention of 1950

Why, in view of the widespread acceptance of the notion of increased state intervention to ensure greater social justice and thereby to protect the peace of the world, did the European Convention of 1950 omit any reference to socio-economic rights? It is too simple to attribute this silence to the narrow focus of the predominantly English lawyers who drafted this instrument upon 'first generation' rights which were 'justiciable' before the European Court of Human Rights which the Convention established. A more sophisticated explanation is suggested by the title of A.W.B. Simpson's labyrinthine 1,161 page monograph *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: OUP, 2001) In brief, it can be inferred from the evidence unearthed by Simpson that the British Foreign Office had only been prepared to sign the Universal Declaration because it was not a Convention, which would have been binding on the signatories. The main reason for British reservations is to be found in Article 2 of the Universal Declaration, which makes it clear that the 'universality' of the document resided not simply in its comprehensiveness but also in its applicability to 'all sorts and conditions' of human beings. Article 2 reads

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

In would seem that it was the threat posed by the Universal Declaration to the British Empire, the preservation of which was one of the pillars of British policy, which prompted the Foreign Office to relocate its activity in the international human rights

arena from the UN to the Council of Europe. The Council was a smaller and more manageable regional organisation that initially represented ten advanced western European, Scandinavian and Benelux countries which had been established early in 1949. In view of Britain's reluctance to become involved in any genuine, as opposed to gestural, moves towards European integration at this juncture, it seems likely that the Foreign Office valued the Council of Europe, which was largely a British creation, primarily as a platform from which to promulgate a restricted 'first generation' version of Human Rights. Such a conclusion is encouraged by the Preamble of the European Convention, which, after genuflecting to the Universal Declaration, stressed the appropriateness of the governments of European countries 'which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law …(taking) the first steps for the collective enforcement of *certain of the rights* (my italics) stated in the Universal Declaration'.

Apart from the onset of the Cold War (which led to the informal exclusion of Communist powers from the deliberations of the Council of Europe), the overwhelming reason for the sidelining of social, economic and cultural rights in the late 1940s was the snow-balling anti-New Deal backlash in the United States after Roosevelt's death and the end of hostilities. This development was a predictable response to the unprecedented rise in federal expenditure from roughly 10 per cent of GNP in 1939 to 45 percent of a much larger GNP in 1945. The fiscal hackles of the Republican opposition were raised particularly by the Lend-Lease programme which financed a virtual gift of strategic supplies worth $26 billion to Britain and $11 billion to the Soviet Union during the war. These immense expenditures, coupled with rumours that American supplies had been misused, and the objection of New Deal critics to government handouts of any description, meant that, although the Lend-Lease Act was extended in 1944 and 1945, the debates grew louder and the majorities smaller. Further straws in the wind were the summary rejection by Congress of an attempt by Truman to implement Roosevelt's Economic Bill of Rights in September 1945; the emasculation of his Full Employment Bill, retitled Employment Bill, and redrafted largely by the U.S. Chamber of Congress; the abolition of the controls which had proliferated during the war under the aegis of the much-hated Office of Price Administration (OPA); and finally the landslide victory of the Republicans in the 'beefsteak' congressional election of November 1946. After the first meeting of

the triumphant House and Senate Republicans who descended on Washington in mid November 1946 leading journalists such as the Alsop brothers remarked that Senator Taft, an inflexible advocate of retrenchment and tax cuts, was beginning to look like a progressive compared with his colleagues. Since it was said of Taft that 'whenever he heard the words 'international cooperation ', 'he reached for an amendment', the future of American financial multilateralism, upon which the achievement of the socio-economic rights foreshadowed in the Atlantic Charter and Universal Declaration was jeopardised.

It was ironical that in the midst of this upsurge of fiscal conservatism in Washington a Preparatory Committee appointed by ECOSOC in response to Anglo-American Proposals for an International Conference on Trade and Employment met in London to discuss the drafting of a Charter which would provide the international financial underpinning for the achievement of adequate social and economic rights throughout the world. The so-called Havana Charter for an International Trade Organisation (ITO) was eventually signed by over fifty nations who deliberated in Cuba between November 1947 and March 1948. The conviction of the signatories was that full employment could be achieved and maintained only if international trade were regulated to pre-empt 'beggar thy neighbour' policies and, more positively, to promote balanced development by means of 'fair trade'. These objectives could best be pursued in general by fostering industrial and other development with international capital flows; providing equal access to markets and productive facilities; reducing tariffs and other discriminatory measures; and eliminating restrictive business practices. In many ways the aims and objectives of the ITO resembled those of the World Trade Organisation which was established half a century later. But the organisational structures of the two were different, the former being a 'Charter' organisation which mandated collective action as opposed to the power-based bargaining of a 'contract organisation' like the WTO. In brief, the ITO which was ntended to be the 'fair trade' coping stone of the Bretton Woods system represented by institutions such as the World Bank and the IMF, was never established because Truman's awareness of deep-seated congressional opposition to domestic and international financial regulation dissuaded him from seeking its ratification in November 1950. It is significant that the only part of the ITO which saw the light of day was its provisions for lowering tariffs and eliminating restrictions which took

shape as GATT, because they were modelled on the Reciprocal Trade Agreements Act of the United States and could therefore be adopted by executive action without recourse to Congress. Europe and the world still await, hopefully not in vain, the collective financial regulation which is so clearly needed to obviate inordinate financial and economic instability and preserve peace.