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The First Half Century

INTRODUCTION

The European Convention on Human Rights is an international treaty for the protection of fundamental (mostly) civil and political liberties in European democracies committed to the rule of law. It was created in 1950 by the ten Council of Europe states – an organization founded the previous year – as part of the process of reconstructing western Europe in the aftermath of the Second World War. Like the Council of Europe itself, it has since grown to embrace every state in Europe except Belarus, forty-six in total, with a land mass stretching from Iceland to Vladivostok and a combined population of nearly 800 million.

It is not, of course, the only international human rights treaty in the contemporary world. Several others are global in scope and there are also regional regimes in the Americas, Africa, in the Arab world, and between the former Soviet republics. But it is unique in providing, what is widely regarded as the most effective trans-national judicial process for complaints brought by individuals and organizations against their own governments, and, much less frequently, accusations of violation made by member states against each other. Nor is the Convention the only site for the institutionalization of the human rights ideal in post-war Europe. The profile of human rights has grown in other transnational European organizations, particularly and increasingly, the European Union, while national constitutional and legal processes have also converged around a single model characterized by the Convention ideals of constitutional democracy, human rights, and the rule of law.

The Convention's fiftieth birthday was marked, in 2000, by celebration of the fact that it had matured from uncertain infancy at the height of the Cold War into an institution now deeply entrenched in western Europe, and beginning to take root in the new democracies

of the former Soviet-bloc. Yet, even before its birthday celebrations had begun, it was clear that it faced a crisis raising fundamental questions about its future and purpose. This study argues that the solution lies in a process of 'constitutionalization'. But, before considering what this might entail, the Convention's core achievements and difficulties first need to be identified. Two questions are particularly central: what was it originally for, and how, if at all, has this been changed by events over the past half century?

HUMAN RIGHTS, LIBERALISM AND INTERNATIONALISM

The modern western 'human rights ideal' can be summed up as follows: prima facie everyone has an equal legitimate claim to those tangible and intangible goods and benefits most essential for human well-being. Self-evident though this notion might seem in contemporary Europe, it did not gain serious political and social momentum until the collapse of feudalism in the early modern era accompanied by the rise of natural rights theory, liberalism, constitutionalism and internationalism.[1] The European Convention on Human Rights is one of the many products of this process.

Like many other pre-modern societies, European feudalism was based not upon rights as such, but upon obligations attached to tiers of a fixed social hierarchy considered 'natural' and God-given. But as feudalism succumbed to crisis in the late middle ages, new theories of legitimate social order and authority were required to fill the void. With the advance of secularism and rationalism, the 'naturalness' of divinely ordained, fixed social hierarchy became increasingly discredited, and the 'natural' needs of individual human beings was emphasized instead.[2] The natural rights theorists of the seventeenth and eighteenth centuries

[1] For useful accounts see, e.g. M. Freeman, *Human Rights: An Interdisciplinary Approach* (London: Polity Press, 2002), pp. 14–31; C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000); R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986), pp. 7–36; E. Kamenka, 'The Anatomy of an Idea' in E. Kamenka and A. Soon Tay (eds.), *Human Rights* (London: Edward Arnold, 1978), pp. 1–12.

[2] Although the ideas of 'rights' and of 'natural rights' gained currency in the early modern period, the roots of the debate can be traced to ancient Roman law. See, e.g. T. Honoré, *Ulpian: Pioneer of Human Rights* (Oxford: Oxford University Press, 2nd edn., 2002); Freeman, *Human Rights*, pp. 16–18.

argued that since nobody in the 'state of nature' – outside the social and political institutions associated with 'civilization' – has a stronger claim to survival than anybody else, everyone has an equal 'natural right to survive', the 'right to life'. The right to life implies a right to the means of survival – 'property' in a wide sense – plus the right to organize survival as each chooses – liberty and other derivative rights, for example the right freely to associate with others. According to this view, the political state and civil society can be conceived as a contract between rational, self-interested, formally equal individuals to secure their fundamental natural rights, with the social and political order this suggests retaining its legitimacy only in so far as these contractual commitments continue to be fulfilled.[3] Inherent in this idea was also the notion – deemed an essential condition for ending the religious wars which had scoured Europe since the Reformation – that the state should be neutral between competing conceptions of the meaning and purpose of life. Paradoxically for two of the three leading natural rights theorists – Hobbes and Rousseau – the social contract could legitimately produce authoritarianism of, respectively, the state and the community. But for Locke, and what became the liberal tradition, only the constitutional state – limited by constitutional rights and by the rule of law – could effectively protect natural rights.[4]

To gain ascendancy a political ideal not only needs a certain threshold level of coherence and plausibility, but also the support of powerful interest groups who see some benefit for themselves in its effective realization. This was also true of the Lockean idea of natural rights and the constitutional state which was carried to prominence in the early modern period by the economically powerful, though politically emasculated, mercantile (and later industrial) middle classes in Europe and America.[5] The identity and material interests of this social group were intimately connected both with the freedom they enjoyed from feudal obligation – a negative right from which a whole catalogue of other negative rights or freedoms could apparently be 'logically' derived – and with a commercial world in which contracts were central

[3] See Douzinas, *End of Human Rights*, pp. 69–107.
[4] See J. R. Milton and P. Philip Milton (eds.), *John Locke: An Essay Concerning Toleration and other Writings on Law and Politics, 1667–1683* (Oxford/New York: Clarendon Press, 2006); M. Goldie (ed.), *John Locke: Two Treatises of Government* (London: Everyman, 1993).
[5] See Kamenka, 'Anatomy of an Idea', p. 8.

to their own, and they assumed to everyone else's, legitimate prosperity and progress.

In the eighteenth century the liberal social contractarian vision, popularized by campaigners such as Tom Paine,[6] inspired two formal declarations of rights, which later provided models for numerous subsequent documents both national and international including, in the twentieth century, the European Convention on Human Rights. In 1776 the Preamble to the *American Declaration of Independence* famously claimed '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'. In 1791 the US Constitution was amended by a series of constitutional rights, known collectively as the US Bill of Rights, which include the rights to freedom of religion, assembly, speech and the press, and the rights to bear arms, to jury trial, to privacy, to public trial, and to security of property.[7] Meanwhile, in 1789, the Preamble to the *French Declaration of the Rights of Man and the Citizen* had declared that 'the Representatives of the people of France formed into a National Assembly, considering that ignorance, contempt, or neglect of human rights are the sole causes of public misfortune and corruptions of Government, have resolved to set forth, in a solemn declaration, these natural, imprescriptible, and inalienable rights'. Faithful to the social contractarian tradition, Article II states that 'the end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistance of oppression'. Other provisions contain familiar rights to freedom of thought, conscience and religion, fair trial according to the rule of law, freedom from arbitrary arrest and detention, and democratic participation. In spite of their similar content there are, however, various formal differences between the French Declaration and the US Bill of Rights. For example, the French document, unlike the American, was drafted before the constitution and, therefore, gave the latter

[6] See T. Paine, *The Rights of Man* (Harmondsworth: Penguin, 1984); F. Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London: Penguin, 2000), pp. 79–82.

[7] For a discussion of the global legacy of the US Bill of Rights see A. Lester, 'The Overseas Trade in the American Bill of Rights', *Columbia Law Review* **88** (1988), 537–561. However, Ackerman argues that 'we must learn to look upon the American . . . (constitutional) . . . experience as a special case, not as the paradigmatic case', B. Ackerman, 'The Rise of World Constitutionalism', *Virginia Law Review* **83** (1997), 771–797 at 775.

its legitimacy,[8] and the rights enshrined in the US Bill of Rights are generally expressed in absolute terms while those in the French Declaration are more formally circumscribed.[9]

The doctrine of natural rights, and its implications for the structure of state and society have, however, been hotly disputed since first formally articulated in Europe in the seventeeth and eighteenth centuries. Conservative critics, such as Edmund Burke, argued against replacing the 'organic' bonds of personal fealty and mutual personal obligation, cultivated by tradition over the centuries, with the much more impersonal, universal, formal, rationalistic, legalistic – and also allegedly more volatile and antagonistic – ones derived from the doctrine of natural rights.[10] Jeremy Bentham also launched a scathing critique, arguing that there are no such things as natural rights, and that the promotion of the greatest happiness of the greatest number (the principle of utility), is the only rational and universal moral principle.[11] Arguing that the only genuine rights are legal rights, Bentham maintained that these should only exist if they are consistent with the principle of utility. The protection such rights offer minorities is, therefore, precarious and unstable since they can be dispensed with in an instant if the overall pain caused by the persecution of a troublesome minority would be less than the aggregate satisfaction it would give the majority. Addressing this much-criticized defect, John Stewart Mill modified utilitarianism in the mid-nineteenth century by acknowledging that the application of the principle of utility should

[8] L. Hunt, *The French Revolution and Human Rights: A Brief Documentary History* (Boston/New York: Bedford Books, 1996), p. 15.

[9] Compare, for example, the First Amendment to the US Constitution – 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances' – with Art. 10 of the French Declaration of the Rights of Man and the Citizen – 'No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law'. See the discussion of differences between the European Convention on Human Rights and the US Bill of Rights in N. Bobbio, *The Age of Rights*, trans. by A. Cameron (Cambridge: Polity Press, 1996), Chs. 6–8; Klug, *Values for A Godless Age*, pp. 127–132.

[10] E. Burke, *Reflections on the Revolution in France* in T. O. McLoughlin and J. T. Boulton, *The Writings and Speeches of Edmund Burke* (Oxford: Clarendon Press, 1997); Douzinas, *End of Human Rights*, pp. 147–157.

[11] J. Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of the Rights Issued During the French Revolution* in P. Schofield, C. Pease-Watkin and C. Blamires (eds.), *Jeremy Bentham – Rights, Representation, and Reform: Nonsense upon Stilts and other Writings on the French Revolution* (Oxford: Clarendon Press, 2002).

be grounded in an equal right to liberty,[12] a compromise which enthroned utilitarianism as the dominant political morality in England for a hundred years.[13] Darwinism also discredited the notion that society is the result of an historic association of once asocial individuals since, if the human race is descended from other primate species, it is, like them, social by nature.[14] In the late nineteenth and early twentieth centuries, under the influence of Marx, Weber, Durkheim, and others, interest in political and moral philosophy waned as social science grew. Within this paradigm the individual came to be seen as at least as much a product of society as the other way around, and the notion that moral or political entitlements can be derived from putative observations about universal characteristics of the 'human condition' or 'human nature', was either rejected or ignored.[15]

The liberal natural rights tradition also suffered from a double political weakness. Although some of its exponents, such as Kant, produced imaginative schemes for international peace and order, in the eighteenth century the social contract vision was generally limited to the constitutional protection of rights *within* the sovereign state. Therefore, if a state decided to violate the rights of its own subjects there was little other states, or their citizens, could do, or generally felt they were entitled to do, about it. Secondly, in the nineteenth century, nationalists ascribed to 'peoples' – defined by the allegedly 'natural' characteristics of kinship, language, and homeland – the 'natural rights' to statehood and self-determination in the 'state of nature' among nations, which earlier natural rights theorists had claimed for individuals. In western Europe in the nineteenth century this increasingly pitted state against state in a restless quest to incorporate scattered fragments of 'the nation' within the frontiers of the country to which they were deemed by kinship to belong, thus undermining the foundations of the large multi-ethnic Austro-Hungarian,

[12] J. S. Mill, *On Liberty* (London: Routledge, 1991); J. S. Mill, *Utilitarianism* (Oxford: Oxford University Press, 1991).

[13] See J. Rawls, *A Theory of Justice* (London/Oxford/New York: Oxford University Press, 1972) p. vii; R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), p. vii.

[14] Although Rousseau saw the social contract as an historical event, or series of events, for Hobbes and Locke it was less an historical claim about the origins of the state and civil society and more a heuristic device in a normative theory of political obligation. See R. Harrison, *Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy* (Cambridge/New York: Cambridge University Press, 2003).

[15] Douzinas, *End of Human Rights*, pp. 109–114.

Russian and Ottoman empires which dominated the eastern and central regions of the continent.

However, as the nineteenth century progressed, international cooperation between states also became more routine, as problems demanding technical solutions increased, for example, with respect to travel and communications.[16] The growing humanitarian concern for needless human suffering also led to several significant developments. The drive against slavery, powerfully bolstered by the need for global labour mobility, resulted in an Anti-Slavery Act at the international Brussels Conference of 1890, which established enforcement procedures, including the right to search ships. In 1863 the Red Cross was founded, and in 1864 the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was promulgated. In the nineteenth century, a 'right to humanitarian intervention' – military interference in other states to prevent gross violations of human rights – was also claimed as a norm of customary international law by western powers seeking to protect Christian minorities in the Balkans and the Middle East from atrocities committed by the Ottoman Empire. However, this was to prove a double-edged sword as the same doctrine would later be used by Hitler as a pretext for the annexation of neighbouring countries in which German minorities were said to be suffering persecution.

Competitive nationalism in Europe climaxed in the First World War. Since no redrawing of Europe's national frontiers, whether by conquest or negotiation, would ensure that every state was homogenous in terms of language, ethnicity, religion and culture, one of the great challenges in its aftermath was to find ways of ensuring that minorities defined by these characteristics were not mistreated in whatever state they happened to find themselves. The victorious, and newly created, states signed special minority-protection treaties, chapters on minority rights were included in treaties with defeated powers, and some states made declarations before the Council of the League of Nations as a condition of membership.[17] The national minorities section of the League's secretariat supervised these arrangements by receiving petitions from any source which alleged violation of treaty commitments, and determined if they should be scheduled for a decision by the

[16] C. Archer, *International Organizations* (London/New York: Routledge, 2nd edn., 1992).
[17] See J. Jackson Preece, *National Minorities and the European Nation-States System* (Oxford: Clarendon Press, 1998), Ch. 5.

League Council. Although rarely used, a judicial procedure enabled advisory opinions to be sought from the Permanent Court of International Justice, which could also make a binding decision in a case referred to it by a Council member. However, Jackson Preece claims that the humanitarian conditions of minorities mattered less than the effect their mistreatment might have on relations within, and between, particular nation-states.[18] Indeed, human rights more generally had a low profile in the League's activities, making only a limited appearance in the League Covenant which enjoined members to work towards more humane working conditions, prohibited traffic in women and children, and encouraged the prevention and control of disease and the just treatment of native and colonial peoples. The post-war settlement, including the attempt to protect national minorities, was, however, to prove a dismal failure. A mere two decades later economic crises, rising tension between communism, fascism and liberalism, and the international competition produced by the still-robust nation-state system, doomed the League of Nations and set Europe on course for a war which would again engulf the world.

THE MERE SHADOW OF A UNION

When the Second World War ended in 1945 one question reverberated around the globe: how could such a catastrophe be prevented from recurring? It was clear that the constitutional, political, and legal systems of some European countries had not effectively curbed the ambitions of political movements offering authoritarian answers to economic problems and military solutions to territorial disputes. The way forward for many western democrats, therefore, seemed to lie in the firmer national entrenchment of constitutional democracy, human rights and the rule of law, and their better protection in much more effective international institutions. There was little enthusiasm for a return to the system devised by the League of Nations for the protection of minorities in Europe in the inter-war years. It had, after all, been a double failure. It had failed to protect minorities, which had become mere pawns in the territorial squabbles between 'kin-states' claiming to champion their interests, and the host-states in which they found themselves.[19]

[18] *Ibid.*, p. 94. [19] *Ibid.*, p. 91.

It had also failed to prevent war. Nor had the Second World War solved the minority question in Europe either. Indeed the displacement of millions had made it more complicated. The protection of individual rights seemed, therefore, to offer a simpler solution, and one which still offered the tantalizing prospect of success.

In 1941, when President Roosevelt enunciated the Four Freedoms, human rights became an official war aim, even before the US had officially entered the conflict.[20] Nevertheless, it was only as a result of successful lobbying by NGOs attending the San Francisco conference, which established the United Nations in the summer of 1945, that the UN Charter contained so many references to human rights. For example the Preamble reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. Article 1 states that one of the purposes of the UN is to 'cooperate . . . in promoting respect for human rights and fundamental freedoms for all', Article 55 proclaims that the UN shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without discrimination as to race, sex, language or religion,' and Article 56 provides that 'all members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. Other provisions, for example, Articles 13, 62, 68, and 76, enable UN organs to study, promote, and make recommendations about human rights.

But, in spite of these propitious developments, there was still a great deal of uncertainty about what the term 'human rights' meant. On the face of it, both 'human' and 'natural' rights share the same underlying assumption – that certain basic entitlements are universal, integral to being human, and are not merely the expression of the values of a particular culture at a particular stage in human history. But the upsurge of interest in human rights in the aftermath of the Second World War had less to do with the re-affirmation of natural rights theory than with the task of finding a normative language – and the national and international institutions and processes it suggests – which could effectively promote peaceful coexistence in an increasingly

[20] A. W. B. Simpson, *Human Rights and the End of Empire – Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001), pp. 172–173.

interdependent world.[21] The focus of the definitional debate, therefore, shifted from the attempt to derive a universal set of values from putative universals of the human condition, to finding a workable consensus between the core elements of the world's major value systems. The outcome was the proclamation of the *Universal Declaration of Human Rights* by the UN in 1948, the significance of which has divided commentators. Some regard it as a watershed in the history of human rights because, for the first time, representatives of western and non-western civilizations from around the world collaborated to produce a list of basic civil, political, social and economic rights going far beyond those the Enlightenment thinkers had regarded as 'natural'. For example, Mary Ann Glendon, a strong critic of the rights culture of the US, believes it to be 'on the whole, remarkably well-designed', not least because of the links it proclaims between freedom and solidarity.[22] On the other hand, the Declaration's aspirational character, and its lack of any enforcement machinery, have led others to regard it as virtually worthless. For example, according to Simpson, Hersch Lauterpacht, perhaps the leading scholar of human rights of the period, viewed the UN's adoption of it with 'something approaching contempt'.[23] Although the Universal Declaration has since inspired other rights documents at the national and international levels, the unwillingness of states to surrender sovereignty makes it, and subsequent UN human rights treaties, difficult to enforce.

However, in the latter half of the twentieth century, the new political momentum behind the international human rights ideal gave fresh impetus to the debate within the western intellectual tradition about the ontological and institutional status of human rights. But as time progressed it became increasingly clear that the centre of gravity of this debate had also shifted. While little interest has been expressed in resurrecting the old theories of natural rights, other attempts have been made to provide the human rights ideal with cogent theoretical foundations.[24] Although none of these has escaped criticism,

[21] *Ibid.*, p. 219.
[22] M. A. Glendon, 'Knowing the Universal Declaration of Human Rights', *Notre Dame Law Review* **73** (1998), 1153–1190 at 1176.
[23] A. W. B. Simpson, 'Hersch Lauterpacht and the Genesis of the Age of Human Rights', *Law Quarterly Review* **120** (2004), 49–80, at 74, 56, 62, 68, 72, 79.
[24] For example, J. Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge: Cambridge University Press, 1996); A. Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago/London: University of Chicago Press, 1982).