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Human Rights and Social Justice

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I was born in January 1945. World War II was coming to end. I don't remember the war at all but I do remember bomb sites, the recently closed RAF bomber station in Scorton where we lived, Catterick Camp teeming with servicemen living in Nissan huts, ordinary people who had lost their homes also living in Nissan huts, rationing and general post war austerity and drabness.

Post war reconstruction

Nevertheless, optimistic plans for post-war reconstruction were well under way during the war. They came to fruition in the post war Labour government. There were two quite separate strands to this – national and international.

(1) National

The national strand was the development of the post war welfare state – starting from the Beveridge Report of 1942, with its aim of slaying the five 'giants' standing in the way of post war reconstruction - squalor, ignorance, want, idleness and disease. Legislation in the 1940s recognised rights to universal free education up to the age of 14, including grammar school education for the more academically able; national insurance against unemployment, old age and inability to work owing to sickness or injury; national assistance for people who still did not have enough to live on; and free health care; plus expanded provision of social housing and environmental services (as we would now call public health services). The underlying principle was social justice – that the whole community should look after those who could not look after themselves – from the cradle to the grave.

(2) International

The international strand was the development of machinery to protect world-wide peace and security through the formation of the United Nations and international human rights law. The

seeds were sown in President Roosevelt's famous 'Four Freedoms' set out in his State of the Union speech in 1941 (before the USA entered the War):

'The first is freedom of speech and expression – everywhere in the world.

The second is freedom of every person to worship God in his way – everywhere in the world.

The third is freedom from want – which, translated into world terms, means economic understandings which will secure to every nation a healthy peace time life for its inhabitants – everywhere in the world.

The fourth is freedom from fear – which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour – anywhere in the world.'

In short – 'Freedom means the supremacy of human rights everywhere'.

But there was not much focus on human rights in the negotiations to establish the United Nations. Understandably, there was much more concern with international peace and security; there was also a fear that the international protection of human rights would involve interference in the internal affairs of Member States. But it could not be ignored. So respect for human rights became one of the principles in article 1 of the United Nations Charter. The UN established a Commission, chaired by Eleanor Roosevelt, which drafted the Universal Declaration of Human Rights. When this was adopted by the UN in 1948, she predicted that it might become 'an international Magna Carta for all men everywhere'. But it was a non-binding aspirational instrument attracting little attention at time. It did cover both civil and political rights and socio-economic rights. The plan was that it would eventually be developed into binding international conventions, as did indeed happen, but the rights were divided into two separate strands: the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights, both adopted in 1966.

Meanwhile, in the 1940s Britain promoted the Council of Europe as part of a policy of strengthening western European nations against threats from the East, specifically Russia. Included in that was the promotion of a binding European Convention on Human Rights and Fundamental Freedoms, albeit limited to civil and political rights. The UK was the first to sign in 1950.

There are two very odd things about this:

- (1) Why would the UK commit itself to a binding international instrument allowing other countries to supervise our observation of human rights and fundamental freedoms when we were not prepared to have a Constitution with a Bill of Rights of our own to protect those rights in our domestic law? As AWB Simpson comments (in *Human Rights and the End of Empire*, Oxford University Press, 2001):

‘That Britain, or indeed any other European power, should sign up to even moderately effective mechanisms for the protection of human rights is intrinsically surprising.’ (p 11)

- (2) Why, if it was prepared to do so, did the instrument have hardly anything to say about socio-economic rights – even though they were included in the Universal Declaration and the Labour government was vigorously implementing them at home?

The answer, brilliantly expounded by AWB Simpson, is that the conduct of international relations, the negotiation of international treaties, was the responsibility of the Foreign Office, which did not have any responsibility for running the country at home:

‘Plainly human rights, if actually protected, come with a price: restriction on the powers of those with authority. That was not a price which Foreign Office officials had to pay. They ran no prisons, police forces or courts, organised no executions and no floggings, ordered no deportations or exiles, put down no insurrections.’ (p 337)

No, they saw human rights as an instrument, not of domestic, but of foreign policy. What Simpson refers to as ‘the export theory of human rights’:

‘. . . human rights were for foreigners, who did not enjoy them, not for the British, who enjoyed them anyway. They were for export. The export theory of human rights was and indeed still is shared by all the major powers . . .’ (p 346)

Allied to this, of course, was the invincible belief of the ‘establishment’ (to which the Foreign Office officials by definition belonged) that Britain was the home of freedom. In Britain, everything which is not prohibited is permitted. This can be seen as positive feature – some joke that in Germany everything is forbidden which is not permitted (and in Austria everything is permitted which is forbidden). But it can be seen as negative – freedom consists only in what is left over after ‘this and that’ has been made illegal. Written laws dating back to Magna Carta, the

Petition of Right 1628, the Bill of Rights 1689 and the Act of Settlement 1701 showed that Parliament, too, was the guardian of our rights. Both Parliament and the courts were there to safeguard our liberties from over-weening officialdom and the abuse of executive power.

This conception of liberty was derived from, principally, Sir William Blackstone, who wrote his *Commentaries on the Laws of England* in 1765. He discerned three fundamental rights in English law:

- (1) Rights of personal security – a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. (The reference to health may hint at socio-economic rights.)
- (2) Rights to personal liberty – the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.
- (3) Rights to property – freedom from taxation unless imposed by Parliament.

He did not include freedom of expression but he did consider that freedom of the press was essential to the nature of a free state.

So it is that conception of freedom which the European Convention protects: the right to life; the prohibition of torture and inhuman or degrading treatment or punishment; the prohibition of slavery and forced labour; the right to liberty and security of person; the right to a fair trial; freedom from punishment without law; the right to respect for private and family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; and the right to marry. The First Protocol (adopted in 1952) also covers: the protection of property; the right to education; and the right to free elections.

Crucially, article 14 of the Convention provides that:

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

The European Convention did not, and still does not, protect most of the rights set out in the International Covenant on Economic, Social and Cultural Rights: the right to work; to just and

favourable conditions of work; to social security, including social insurance; to special protection for mothers before and after child-birth and for children and young persons; to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions; to the highest attainable standard of physical and mental health; and the right to take part in cultural life, and to enjoy the benefits of scientific progress.

(The European Convention does protect freedom of association, which includes the right to form and join trade unions; it contains limited protection for the right to education; and the protection of property would encompass the right to benefit from one's own intellectual property – that is, in the International Covenant on Economic, Social and Cultural Rights, the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is author.)

The example of South Africa

In contrast, the Constitution of the Republic of South Africa does protect socio-economic rights. But this is not without its difficulties. These are well illustrated by the landmark case of *Government of Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46.

Mrs Grootboom and about 900 others had been living in appalling conditions in an informal settlement, with no water, sewage, refuse disposal or electricity. They moved to set up another informal settlement on private land. From this they were forcibly evicted, their homes bulldozed and burnt and their possessions destroyed. They applied to the High Court for order compelling the municipality to provide them with temporary accommodation. Their claims were based on section 26 of the Constitution, which provides that everyone has the right of access to adequate housing, and on section 28, which provides that children have the right to shelter. They won on section 28 in the High Court and the Government appealed to the Constitutional Court.

It had been controversial to include socio-economic rights in the Constitution at all. It was argued that these are non-justiciable – that is, not suitable for determination by judges - because they involve the allocation of scarce public resources. But it had been held in an earlier case (*Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744) that they were 'to some extent at least' justiciable: civil and political rights also had budgetary implications, so these could not be an insuperable obstacle (for example, the right of access to a court in both civil and criminal cases costs public money, but it is a fundamental feature of the rule of law).

However, the Court's decision illustrates the limits of what can be done. Section 26(1) provides that everyone has the right to have access to adequate housing. But section 26(2) carefully defines the positive obligations of the state – (a) to take reasonable legislative and other measures (b) within its available resources (c) to achieve progressive realisation of that right. The Constitutional Court carefully examined each of these and decided that the programmes adopted in the particular locality (Cape Metro) fell short of what was required by section 26(2), because no provision was made for the temporary relief of people in desperate need.

Section 28(2) provides that every child has the right (a) to family care or parental care or to appropriate alternative care when removed from the family environment; (b) to basic nutrition, shelter, basic health care services and social services. The High Court had held that this meant that children, and their parents, must be provided with shelter by the state. The Constitutional Court disagreed. The obligations in (b) were imposed upon the people looking after the children in (a). These children were living with their parents. Section 28(2) could not be a way of pass-porting whole families to 'shelter' from the state thus by-passing the careful qualifications in section 26 (and also in section 27, which deals with health care, food, water and social security).

The Court therefore made a declaratory order that the state housing programme in the Cape Metro area fell short of the requirements of section 26(2)(b) in that it failed to make reasonable provision within its available resources for people in the area with no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations.

The case is a landmark - in deciding that such rights are justiciable; in carefully examining the reasonableness of the implementation of a robust government housing policy; in focussing on the rights of those most in need who could not afford housing and insisting that they be given priority; but also in failing to make mandatory order to enforce those rights; Mrs Grootboom died in 2008, still penniless and homeless.

Socio-economic rights and the European Convention

The point about human rights is that they are there to constrain government. They demand effective remedies. The development of the right of individuals to petition the European Court of Human Rights in Strasbourg (accepted by the UK in 1966) and the translation of the Convention rights into rights in UK law by the Human Rights Act 1998 have given the Convention teeth which may not have been foreseen by its original Foreign Office promoters. So what scope is

there for the protection of socio-economic rights under the Convention? Such scope as there is comes from two sources.

(1) *The concept of positive obligations*

In general, the Convention rights are negative – the right to have the state NOT do something: not to take away your life, not to torture you, not to interfere in your family life, and so on. But the Strasbourg Court has developed the concept that sometimes the effective protection of a right places positive obligations on the state. This started with a positive obligation to provide laws which would enable the integration of a child of unmarried parents into her parental family (*Marckx v Belgium* (1979-80) 2 EHRR 330); it continued with an obligation to provide effective protection against sexual abuse for vulnerable victims (*X and Y v Netherlands* (1985) 8 EHRR 235); this has now developed into an obligation to provide effective protection against domestic violence (*Opuz v Turkey* (2010) 50 EHRR 695). The court has also recognised a positive obligation to facilitate the gypsy or travelling way of life, pointing out that travellers are in a particularly vulnerable situation (*Connors v United Kingdom* (2005) 40 EHRR 189). But it has stopped short of developing a positive obligation to supply the homeless with a home, as opposed to protecting the home a person already has. Whether the state should provide funds for those who have nowhere to live is a matter for political rather than judicial decision (*Chapman v United Kingdom* (2001) 33 EHRR 399).

These were all cases under article 8, the right to respect for private and family life, home and correspondence. There have also been recognised positive obligations to protect the right to life under article 2, beginning with the ‘death on the rock’ case (*McCann v United Kingdom* (1996) 21 EHRR 97); and to protect people from torture or ill-treatment contrary to article 3, so that, for example, the state is under an obligation to protect children from serious abuse of which it knows or ought to know (*Z v United Kingdom* (2002) 34 EHRR 3). But is there scope to develop article 3 into a positive obligation to provide the barest means of subsistence? The threshold for what is ‘inhuman or degrading treatment’ under article 3 is said to be very high. But effectively forcing someone into the degradation of extreme street homelessness might reach it.

An example in the UK courts is *R (Limbuella) v Secretary of State for Home Department* [2005] UKHL 66, [2006] 1 AC 396, which illustrates how the boundary between positive and negative obligations is not clear-cut. Legislation prohibited the Secretary of State from providing asylum support to the destitute if they had not claimed asylum as soon as was reasonably practicable; but there was an exception where this was necessary in order to prevent a breach of the Convention rights. As Lord

Bingham explained, a general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3, 'but I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative source of support, unable to support himself, is, by the deliberate action of the state denied shelter, food, or the most basic necessities of life' (para 7). The inhuman treatment resulted from the state's decision to deny both asylum support and the right to support oneself through paid employment. The result was a positive duty to provide basic support if it was necessary to prevent their suffering inhuman or degrading treatment. As I put it,

'The state has taken the Poor Law policy of "less eligibility" to an extreme which the Poor Law itself did not contemplate, in denying not only all forms of state relief but all forms of self-sufficiency, save family and philanthropic aid, to a particular class of people lawfully here (late claiming asylum seekers). We can all understand the reasons for doing so. But it is of the essence of the state's obligation not to subject any person to suffering which contravenes article 3 that the ends cannot justify the means.' (para 77)

Some may see this case as constructing minimal socio-economic rights out of article 3, and possibly going further than the Strasbourg Court would have gone, but it does not go very far. Article 3 sets a very high threshold.

(2) Non-discrimination and equality

A more promising candidate is equal treatment, a principle which has gained much more prominence in modern human rights discourse than it had in the past (it did not feature in the American Bill of Rights until the 14th amendment of 1868 and for nearly a century after that the jurisprudence was not supportive of genuinely equal treatment; this was one reason for the USA's difficulties with enforceable human rights). Article 1 of the Universal Declaration of 1948 movingly declared that 'all human beings are born free and equal in dignity and rights'. Human rights should be enjoyed by all, regardless of race and sex and other status. Distinctions between them need to be justified. This has proved more fruitful in seeking to achieve some measure of social justice. For example:

(a) Non-discrimination in the right to respect for home and family.

The right to respect for the home, protected by article 8, does not give a right to be provided with home or social housing (although it does give the right not to be deprived of the home one has

without due process of law). But if the law does protect the home, it must do so on without unjustifiable discrimination on status grounds.

For example, in *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367, it was held incompatible with the Convention to deny to people living on travellers' caravan sites the same level of protection as dwellers on other caravan sites had under the Mobile Homes Act 1983 (but as the discrimination was contained in Act of Parliament, and could not be interpreted away, the court could not do anything more than make a declaration of incompatibility, which was unnecessary because Parliament had already put the law right by the time the case got to the House of Lords: not much comfort to the travellers who were faced with eviction without cause being shown, but the case was sent back to explore whether the local authority's decision to evict them had been lawfully taken).

(b) Non-discrimination in access to education

The only right in the Convention that looks something like a socio-economic right is in article 2 of the First Protocol: 'No person shall be denied the right to education'. But it has been restrictively interpreted to mean a right of equal access to such education as the state provides, plus the express freedom it also contains of parents to educate children in accordance with their own beliefs. So it does not amount to much of a real right. But access has to be provided without unjustified discrimination.

An example is *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3828, where the Supreme Court held that it was unjustifiable to require an applicant for a student loan to have indefinite leave to remain the UK. The applicant had come here with her parents at the age of six and had lived here with her mother ever since, going through the school system (in York) with considerable success and probably in blissful ignorance of the fact that, as her mother had overstayed her leave many years ago, she had no right to be here. She was now in the process of putting that right and wanted to go to University along with her contemporaries but found that she would not qualify for a loan until she had been granted indefinite leave to remain which would take years. The Strasbourg court had said that 'unlike some other public services, education is a right that enjoys direct protection under the Convention. It is also a very particular type of public service which not only directly benefits those using it but also serves broader social functions'. The majority of the Supreme Court held that the harm done to the individual students, in delaying their education, and the harm done to the community as a whole, by delaying their

entry into productive working life, could not be outweighed by the administrative convenience of having a bright line rule.

(c) Non-discrimination in enjoyment of property rights.

The Strasbourg court has recognised that welfare benefits are property rights, the enjoyment of which is protected under article 1 of the First Protocol. This started with contributory benefits – theoretically paid for by National Insurance contributions and so just like any other insurance claim, although statutory rather than contractual. It was then extended to non-contributory benefits (*Stec v United Kingdom* (2006) 43 EHRR 1017). Once again, the Convention does not require the state to provide them. But if it does provide them, it must do so without unjustified discrimination.

However, when considering the justification for general measures of socio-economic policy, the Strasbourg court has generally allowed member states a wide ‘margin of appreciation’, that is, wiggle room or room for manoeuvre. It will not usually find a measure unjustified unless it is ‘manifestly without reasonable foundation’.

So in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, the question was whether the benefit cap was justifiable. The cap limits total household income from welfare benefits to a fixed sum, irrespective of the subsistence needs of the family. The parties agreed that it was indirectly discriminatory against women. The people most adversely affected were single parents with three or more children living in relatively expensive rented accommodation. They were adversely affected because they were least likely to be able to escape the effect of cap by getting a job or moving house. Overwhelmingly these lone parents were women.

So could it be justified? In deciding this, could the court take into account the state’s duty to make the best interests of the children involved a primary consideration, as required by article 3(1) of the United Nations Convention on the Rights of the Child? This is another UN human rights Convention to which the UK is a party but, unlike the European Convention, it has not been fully incorporated into UK law. The majority of the Supreme Court were clear that the government could not have made the best interests of the children involved a primary consideration when deliberately deciding to deny them the basic level of subsistence which they were otherwise thought to need. The Strasbourg court has certainly incorporated article 3(1) of the Children’s Rights Convention into its interpretation of the article 8 rights, but what about the justification for

discrimination required by article 14? Two of the judges thought that it had incorporated article 3 into its consideration of the justification for discrimination; but three thought that it had not. So the challenge failed, but by the narrowest of margins.

We have a similar case awaiting judgment where the argument is that the removal of the spare room subsidy, otherwise known the 'bedroom tax', unjustifiably discriminates against disabled people who need an extra room either because of their own disability or because of the disability of a child (or other family member) living with them and also against victims of appalling domestic violence who need to stay where they are because their home has been specially fortified to protect them from attack.

Conclusion

We can debate endlessly what we mean by social justice. Many would say that it includes at least a measure of redressing the balance between rich and poor: As Justice Yacoob said in the *Grootboom case*, 'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter' (para 23). Many more might say that it includes equal treatment, non-discrimination in the provision of employment, accommodation, goods and services, including in particular public services, on grounds of status, particularly race, sex and disability. We cannot say that that the European Convention on Human Rights and the Human Rights Act have been particularly successful in promoting either form of social justice. But they have more scope for promoting the latter than the former.