

Curbing Labour's Totalitarian Temptation: European Human Rights Law and British Postwar Politics

The genesis of the European human rights regime has become the object of increasing scholarly attention. The European Convention on Human Rights, which the Council of Europe adopted in November 1950, provided for the eventual establishment of a European Commission of Human Rights and a European Court of Human Rights in Strasbourg capable of acting on petitions from state and nonstate actors. Analyses of the drafting of the European Convention have focused primarily on these measures of implementation. Existing scholarship has not, however, provided an adequate explanation for one of the central puzzles regarding the normative content of European human rights law: why did the European Convention not guarantee economic and social rights?

The absence of the rights to health, social security, and work from this document does not accord with the frequent characterization of the period after the Second World War as a moment of extensive support throughout Western Europe for greater social protection.¹ There existed at least a nominal recognition across the political spectrum of the importance of balancing the principle of individual freedom with that of social justice. The new postwar constitutions on the continent and the postwar policy statements of the major British political parties made commitments to the safeguard of economic and social rights. The conclusion of a European human rights charter that enshrined a predominantly classical liberal understanding of rights did not reflect the new functions that states had assumed in the provision of social services. It also appeared at odds with the pervasive disillusionment with classical liberalism stemming from the crises of the interwar period.

The framers of the European Convention, moreover, claimed to be inspired by the Universal Declaration of Human Rights, which the United Nations General Assembly adopted in December 1948. The Universal Declaration enumerated a wide range of civil, political, economic, social, and cultural rights, as the United Nations signaled that international human rights norms would not be limited to classical liberal principles alone. Studies of the postwar human rights moment, including Mary Ann Glendon's account of the drafting of the Universal Declaration and Samuel Moyn's more recent interpretation, have stressed the high degree of unanimity around the question of economic and social rights, attributing this "welfarist consensus" primarily to the preponderant influence of social-democratic and Christian social thought.²

Why, then, did the European Convention not guarantee a similar array of economic and social rights? A common explanation—one offered by the Council of Europe itself—has been that the framers of the European Convention were hampered by legal considerations.³ In this view, the authors of that document felt they had no choice but to exclude economic and social rights because they did not believe them to be justiciable. Cases of violations of these rights were not suitable for adjudication. Any judgments, moreover, would be difficult or impossible to enforce.

This study argues, by contrast, that the reason for the absence of economic and social rights from the European Convention was political rather than technical. The sources of this omission must be located in the pivotal role that a small group of British Conservatives played in shaping the European Convention's outlines before the intergovernmental negotiations over this document commenced. These Conservatives believed that Clement Attlee's Labour government was leading Britain down the path of totalitarianism, particularly as concerned the most "socialist" components of the Labour program (e.g., economic planning). The British executive was, in their view, increasingly ready to deny "personal rights" in the name of protecting economic and social rights. Conservatives active in the movements for European unity envisioned European human rights law as a forum in which the primacy of the former set of rights could be reasserted over the latter. For this reason, they were temporarily willing to cast aside a long-standing ambivalence toward declarations of rights, concerns over national sovereignty, and the constitutional principle of parliamentary sovereignty. In return, they believed that they were fashioning an international mechanism that might prevent the erosion of liberal democracy at home and abroad by the left, whether communist or noncommunist.

My thesis is compatible with the broad outlines of the argument advanced by scholars such as Ed Bates, Mikael Rask Madsen, Andrew Moravcsik, and Elizabeth Wicks that the progenitors of European human rights law viewed it primarily as a tool to defend liberal democracies against a seizure of power by antidemocratic forces.⁴ These scholars argue, however, that those founding the European human rights regime were exclusively concerned with the dangers of communism and fascism. Hence, Bates contends that the European Movement's draft convention of July 1949 was formulated "after an era in which the continued existence of Europe's humanist culture and democratic way of life had been challenged as never before, and again seemed to be under threat from external sources," without accounting for how prominent Conservative members of the European Movement viewed the most insidious menace to liberal democracy as coming from Labour and socialist parties operating within Western European governments.⁵ According to A. W. Brian Simpson, there was no "fear in Britain—and here the position in Continental Europe was different—that such a weapon might be needed in the future, to prevent decline into totalitarianism."⁶ Simpson describes the "United Kingdom's promotion and ratification" of the European Convention as "a product of British foreign policy, not of the British legal tradition, much less of British domestic policy."⁷ Madsen, whose historical-sociological approach to the study of transnational legal phenomena has greatly enhanced our understanding of the relationship between domestic politics and the European human rights regime, dates the onset of the "boomerang effect" or "home-

coming” of European human rights law from the 1970s onward.⁸ “What essentially had been regarded as an external measure for an external threat and altogether a means to help bring future peace to Europe,” Madsen argues, “was to become one of the key challenges to the national conceptualizations of law and justice as they had developed under the French and British ‘new deal’ economics of the postwar welfare states.”⁹ Though the impact of the European human rights regime on the domestic legal and political field may have been minimal in the first decades of its existence, this does not exclude the possibility that the original framers of European human rights law were motivated by domestic political considerations apart from anticommunism and antifascism. Scholars have not accounted adequately for how a perceived “internal threat” of totalitarianism occasioned by the rise of the center left in the 1940s catalyzed the creation of European human rights law.

The present study responds to Stefan-Ludwig Hoffmann’s appeal to write “a history of human rights as the history of conflict” by complicating the narratives of those who have described the European Convention as a product of consensus.¹⁰ Studies of European human rights law have often described the European Convention as a statement of shared “Western” values designed to strengthen the bonds of solidarity between peoples engaging in the preliminary stages of European integration and collectively confronting the Soviet menace.¹¹ The European Convention’s preamble proclaims “that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms.” It goes on to speak of “a common heritage of political traditions, ideals, freedom and the rule of law.” Yet, as Danny Nicol has suggested, the debates over the European Convention within the Council of Europe revealed highly divergent understandings of these terms.¹² Further analysis is still required to explain why a classical liberal conception of European human rights law eclipsed a welfarist vision.

In the historical literature on Britain, there has been a vigorous debate over the existence of a welfarist “postwar consensus,” that is, over whether the Conservative Party responded to a leftward shift in popular opinion during the Second World War by fundamentally realigning its policy agenda in accordance with the Labour Party’s broad social objectives.¹³ This study posits that European human rights law originated as a countercurrent to any such consensus. The omission of economic and social rights from the European Convention reflected unresolved ideological tensions between the British left and right, as well as between *laissez-faire* individualist and state-interventionist strains of British conservatism. An examination of the role of Conservatives in the drafting of the European Convention reveals how transnational political space offered a different set of constraints and opportunities than the domestic political arena. The debates over a European human rights charter allowed Conservatives to fashion an alternative political landscape where contested views at home could be enshrined as values that were at once universal and distinctly European. Jay Winter has employed the term “minor utopia” to describe this kind of “radical act of disjunction” that “used universal language to describe a project or goal” that “either

masked or encapsulated a particular ideology, the interests and outlook of discrete social and political formations.”¹⁴

It is true that the campaign for European human rights law cannot meaningfully be described as a grassroots social movement that emerged “from below.” Tom Buchanan is correct to observe that “the movement towards a European Convention . . . was primarily one driven by intellectual and political elites, rather than popular pressures.”¹⁵ Nevertheless, the activities of these elites operating within transnational political spaces merit greater investigation, as it was they who fashioned the ideational framework for the European Convention before the start of intergovernmental negotiations, setting the parameters within which states selected the categories of rights that would be protected under European human rights law. The following case study, while acknowledging that a wide range of state and nonstate actors of different nationalities played important roles in framing European human rights law, focuses on that small number of British political figures in the Conservative opposition who did the most to ensure that the European Convention would not guarantee economic and social rights. It examines three fora in which the minor utopia of European human rights law was collectively imagined: the Congress of Europe in The Hague during May 1948, the first meeting of the European Movement’s International Council in Brussels during February 1949, and the first session of the Council of Europe’s Consultative Assembly in Strasbourg during August and September 1949. These each marked steps toward the realization of a classical liberal understanding of European human rights law.

A Postwar Social-Democratic Human Rights Moment?

Social democracy constituted a viable ideational framework for European human rights law in the 1940s. During the Second World War, movements for European unity linked the creation of a united Europe to respect for an extensive list of civil, political, economic, social, and cultural rights.¹⁶ Even Richard Coudenhove-Kalergi, the Czech count who sought the support of right-wing dictators for his Pan-Europa movement during the interwar period, wrote in 1943, “Some will prefer the Russian example of social equality without liberty—and others the American example of liberty without social equality. But most of the Europeans will hope for some compromise, uniting the western ideal of liberty with the eastern ideal of equality—a European federation, more democratic than Russia and more socialist than America.”¹⁷

In the aftermath of the war, there was substantial cross-party support in Britain for a conception of fundamental rights that comprised economic and social rights as well as civil and political rights. This was evidenced most prominently with the publication in May 1947 of the *Industrial Charter*, a Conservative Party manifesto drafted primarily by reformers within the party led by R. A. Butler. This document tacitly accepted many of the policy objectives of the Attlee government, namely, a mixed economy, full employment, education as a means of achieving equality of opportunity, the welfare state, and a limited degree of economic planning. Among its pages was found a “Worker’s Charter,” which guaranteed “three general rights,” including “security of employment.”¹⁸ Even many Conservatives who privately recoiled at any

suggestion of excessive state intervention during peacetime, including the opposition leader and former prime minister Winston Churchill, endorsed the *Industrial Charter* in public despite their deep-seated reservations over its “pink Socialism.”¹⁹

The Labour government appeared in a strong position to take the lead in bringing together the states of Western Europe to conclude a European human rights charter that would guarantee economic and social rights as well as civil and political rights. Social democracy provided an ideational framework for the Western Union and Third Force schemes of British foreign secretary Ernest Bevin. On January 22, 1948, Bevin called in the House of Commons for the creation of a “spiritual union” of nations based on a shared set of Western European values that included both “our Parliamentary democracy” and “our striving for economic rights.”²⁰ That same month, Bevin submitted a paper to the British cabinet that maintained, “It is for us, as Europeans and as a Social Democratic Government, and not the Americans, to give the lead in [the] spiritual, moral and political sphere to all the democratic elements in Western Europe which are anti-Communist and, at the same time, genuinely progressive and reformist, believing in freedom, planning and social justice—what one might call the ‘Third Force.’”²¹

However, the Labour Party, retreating from its earlier internationalism, had showed a pointed lack of enthusiasm for experimenting with radical new forms of international organization and international law that might infringe on national sovereignty.²² Already in December 1940, Clement Attlee had said, “We believe that we should expand further our political, personal and economic liberties. We cannot lay down the law to the rest of the world . . . we can only say, ‘Here is our way of life and the best way we can advocate those principles is by striving more and more to live our principles of freedom and social justice here, and set an example for the rest of the world.’”²³ Although the postwar Labour government would support the adoption of a binding international human rights convention, it was adamantly opposed to the creation of an international human rights court out of a wariness of external interference in its domestic legal system and imperial affairs.²⁴

Since the early 1930s, moreover, the British left had emerged as the most ardent champion of parliamentary sovereignty, believing that only a government unfettered by traditionally conservative institutions such as the judiciary would be able to enact a sweeping program of social reforms. Although the British constitution was not codified, it safeguarded certain fundamental common-law freedoms on the basis of judicial precedent. These were understood to include civil liberties such as habeas corpus and freedom of association, as well as property rights. Yet the principle of parliamentary sovereignty meant that statutory law could in theory abrogate them at any time.²⁵ During the interwar period, British courts had been active in defending the common-law freedoms of property owners against slum clearance, compulsory purchase policies, and new housing legislation. By contrast, the ability of the courts to constrain the powers of the national government would decline precipitously during the war and in the immediate postwar period.²⁶

Another reason why Labour support for a European human rights court was not forthcoming was that most in Britain associated such schemes with the United Europe Movement, an “all-party” organization chaired by Churchill that many regarded as

an instrument of Conservative propaganda.²⁷ Labour politicians were concerned that British Conservatives might use common European institutions to promote the defense of free-market principles, fearing that the British right would ally with the continental right to undermine the Attlee government's economic policies.²⁸ Emmanuel Shinwell, secretary of war and chair of the Labour Party, derided those "utopian schemes for United Europe which start at the wrong end of the stick and disregard the political and economic transformation which has occurred since the first world war."²⁹

Conservative Countercurrents at the Congress of Europe

The May 1948 Congress of Europe in The Hague omitted any references to economic and social rights from its proposals on the subject of European human rights law, in large part because British Conservatives wielded a disproportionate influence over the proceedings of this gathering of advocates of greater European unity. The communist left was excluded from the congress, and many prominent continental Christian democrats were unable to attend due to Italian presidential elections and a concurrent meeting of the Popular Republican Movement in Toulouse. The British Labour Party's National Executive Committee discouraged party members from travelling to the congress and succeeded in dissuading most prominent continental socialists from participating as well. It had justifiable grounds for suspicion. The umbrella organization coordinating the event, the Joint International Committee of the Movements for European Unity, was under the chairmanship of Duncan Sandys, a Conservative and Churchill's son-in-law. The Joint International Committee had issued a Political Report drafted under the personal supervision of Sandys that advocated the creation of a "European Court," to which members of an "Emergency Council of Europe" could appeal in the case of violations of a "common declaration guaranteeing the fundamental personal and civic rights essential for the maintenance of democracy."³⁰ No mention was made of the social protections endorsed by the Conservative Party in the *Industrial Charter*.

Both the congress's Cultural Committee and its Political Committee took up the question of the drafting of a European human rights charter and the creation of a European human rights court. The Cultural Committee abstained from endorsing a report by the personalist intellectual Alexandre Marc that advocated establishing supranational guarantees for civil, political, economic, social, and cultural rights.³¹ Instead, it voted to give the Conservative MP David Maxwell Fyfe the responsibility for authoring the human rights provisions of the congress's Cultural Resolution, which specified only "freedom of thought and expression" as one of the "fundamental rights of man."³² An early draft of the congress's Political Resolution urged European states to adopt "a Charter of the Rights of Man, since in our eyes respect for these rights is the very goal of society, without omitting the rights of workers without which the state would be resting on social injustice."³³ Yet the final Political Resolution, while recommending the drafting of a "Charter of Human Rights," made no mention of "the rights of workers."³⁴ This should not be surprising in light of the relatively weak representation of trade unionists, who composed 4.5 percent of all congress

participants and only 1.5 percent of the British delegation, in contrast to that of economic elites.³⁵

Conservatives deliberately set out to fashion a hierarchical understanding of rights. Churchill announced in his opening address to the congress as its honorary chair, “In the center of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law . . . President Roosevelt spoke of the Four Freedoms, but the one that matters most today is Freedom from Fear.”³⁶ Two days before, Attlee had declared in the House of Commons that “freedom from fear was as necessary as from want.”³⁷ Churchill, by elevating freedom from fear over freedom from want, implicitly denied that economic and social rights were as fundamental as civil and political rights. This hierarchy of rights had already been implicit in Churchill’s addresses at Fulton in March 1946, when he argued that the British and U.S. constitutions provided a set of minimum standards of democracy for the rest of the world, and at The Hague in May 1946, when he outlined several “tests” that would evaluate a nation’s “political health and soundness” based on respect for the “rights of the individual, subject to his duties to the State.” In these speeches, he had stressed the necessity of safeguarding a long list of civil and political rights while specifying no economic or social rights. Churchill’s statement at Fulton that “courts of justice, independent of the executive, unbiased by any party, should administer laws which have received the broad assent of large majorities or are consecrated by time and custom” had constituted a tacit invocation of the conservative role that courts had traditionally played in the face of initiatives from the left.³⁸ While composing an address delivered in May 1947 at the inaugural mass meeting of the United Europe Movement in London, Churchill had eliminated a reference in an early draft to “those fundamental *human and* personal rights” from a passage on the criteria for entry in a common European organization. Instead, he had favored using the phrase “those fundamental personal rights and liberties on which our democratic European civilisation has been created.”³⁹ Churchill was undoubtedly aware that “human and personal rights” could denote economic and social rights in addition to civil and political rights.

The impact of the escalation of the Cold War on the resurgence of classical liberal conceptions of human rights in Western Europe should not be underestimated. The communist seizure of power in Czechoslovakia in February 1948, in particular, sparked a vigorous public debate over the meaning of the term “democracy,” in which sharp contrasts were drawn between “people’s democracy” centered on the promotion of social justice and “Western democracy” anchored in the defense of individual freedom. As the congress’s Political Resolution affirmed, “In no circumstances shall a State be entitled to be called a democracy unless it does, in fact as well as in law, guarantee to its citizens liberty of thought, assembly and expression, as well as the right to form a political opposition.”⁴⁰ The “Prague coup” sent shockwaves throughout the West and acted as a powerful catalyst for the creation of a European human rights regime.⁴¹

Nevertheless, the Cold War frame alone does not explain the absence of social rights from the congress’s recommendations on European human rights law. This omission should be understood in light of how British Conservatives such as Churchill

and Maxwell Fyfe viewed the totalitarian threat to liberal democracy as coming not only from communism but also from the noncommunist left. During the 1945 general election campaign, for example, Churchill had notoriously accused the Labour Party of desiring to suppress the right of political opposition and establish a “political police” akin to “some form of Gestapo,” declaring, “There can be no doubt that Socialism is inseparably interwoven with totalitarianism and the abject worship of the state.”⁴² Even after their disastrous electoral defeat, Churchill continued to insist that the mission of the Conservative Party was to “set the people free.” Above all, this meant denouncing Labour’s continuation of wartime emergency measures, the nationalization of certain industries, and strict economic controls as infringements on individual freedoms.⁴³

Maxwell Fyfe, the author of human rights provisions of the congress’s Cultural Resolution and perhaps the single most influential figure in the genesis of European human rights law, was a fiercely partisan Conservative politician who was convinced that Britain was becoming a totalitarian state under Labour rule. Although Maxwell Fyfe had been among the authors of the *Industrial Charter*, he was by no means a steadfast supporter of the welfarist postwar consensus. During the war, Maxwell Fyfe had served in a leadership role on the Conservative Party’s Post-War Problems Central Committee, whose initial reaction to the Beveridge Report had been to issue a statement maintaining that “provision by the state of complete social security can only be achieved at the expense of personal freedom and by sacrificing the right of an individual to choose what life he wishes to lead and what occupation he wishes to follow.”⁴⁴ Despite the efforts of the moderates serving on the committee, Maxwell Fyfe opposed postwar plans that envisioned a significant positive role for the state and, in the words of Brendan Evans and Andrew Taylor, “was far more combative, anti-Socialist, and more interested in party propaganda than Butler.”⁴⁵ As a member of the Tory Reform Group, formed in March 1943, Maxwell Fyfe had argued for a “new-look Conservatism geared to a reassertion of competitive capitalism,” according to Helen Mercer.⁴⁶ Described by the pro-Labour *Daily Herald* as “a private-enterprise Tory,” Maxwell Fyfe had been one of the most outspoken opponents of the postwar Labour government’s nationalization measures, once describing the nationalization of steel as “a step on the road towards totalitarian government in England” and accusing its proponents of “seeking to fuse the Communists and Socialists into a united left movement.”⁴⁷ Maxwell Fyfe, who had served as deputy chief British prosecutor at the Nuremberg trials, frequently compared the Attlee government’s policies—whether on the establishment of “closed shop” unions, controls on the press, or the curtailment of parliamentary debate—to those of the Nazi regime.⁴⁸

Maxwell Fyfe’s enthusiasm for the creation of a European human rights court accorded with his view that an independent judiciary was the ultimate check against the Labour government’s ability to abuse its growing powers. A consistent theme in Maxwell Fyfe’s speeches and writings was his concern that the executive, whose size and reach had expanded over the course of the war, had usurped the legislative function of Parliament and destroyed the independence of the judiciary. After the Conservative Party conference in Blackpool in October 1946, Maxwell Fyfe wrote an opinion piece in the *Sunday Chronicle* in which he asked “whether the advance of

European freedom had even in its home got bogged down in the morass of regimentation.”⁴⁹ In an internal memorandum, dated only “1948,” Maxwell Fyfe signaled out in particular the pernicious consequences of the passage of the Emergency Powers Act and the Defence Regulations of 1939. These had resulted in “far reaching and dictatorial provisions” in the realms of “Industrial and Economic Control” and “Labour Direction,” measures that the Labour government had prolonged into peacetime. He described Britain’s domestic situation in dire terms, writing, “The legal power of the executive is now in theory as great as that enjoyed by the regimes of Hitler and Mussolini . . . Conservative failure at the election will certainly result in the eclipse of democracy in this country.” He recommended that the Conservative Party engage in “educating the electorate to the fact that the legal structure of a totalitarian dictatorship is already in print in the form of the emergency legislation” and that, if the Conservatives should win the next general election, they should engage in an “overhaul of the relations between the law-making body and the judicial tribunals administering it to ensure freedom of decision for the latter unfettered by administrative direction.”⁵⁰

For Maxwell Fyfe, international human rights norms were not only for export. He had already been one of the first MPs to draw on the work of the UN Human Rights Commission during parliamentary debates on domestic matters. In December 1947, he had made mention of the provisions on the prohibition of compulsory labor in a draft UN bill of human rights while speaking out against the “Registration for Employment Order” in the House of Commons.⁵¹ After the adoption of the Universal Declaration by the UN General Assembly in December 1948, he would refer to that document to condemn the British government’s domestic policies.⁵² Despite the nonbinding character of the Universal Declaration, Conservatives and Liberals would cite it throughout 1949 to bolster their case against domestic legislation affecting civil liberties, trade unions, property rights, and the free choice of employment.⁵³

The rhetoric Maxwell Fyfe employed to argue in favor of the establishment of a European human rights regime at the Congress of Europe closely mirrored that which he used to denounce the purportedly “totalitarian” practices of the British government at home. At the congress, Maxwell Fyfe explained to the Cultural Committee how he had performed his “duty” at the Nuremberg trials before stating, “I need not assure this audience that the danger to human rights is almost never of a sudden onset. It comes gradually with people failing to realize how these rights disappeared and with a gradually forming film on the eyes of the mind and a hardening of its arteries.”⁵⁴ This echoed statements that Maxwell Fyfe had made at a meeting at Stockport Town Hall in October 1947, in which he had prefaced his attack on the “squalid pseudo-paradise of Socialism” that was leading to the onset of totalitarianism in Britain with the words, “It has been my duty to assist at the inquest on Nazism and for that purpose to examine as closely as any living man the onset of totalitarianism in a great country. One of the things you must notice, as I noticed, is that the onset comes with a growing contempt for free discussion and a certain hardening of the walls of the individual mind.”⁵⁵ At a Conservative rally in Kensington Town Hall several days following the close of the Congress of Europe, Maxwell Fyfe would declare,

I have studied the coming of totalitarianism in a great country. It does not come in a day or a night—but slowly. Then the pace quickens and the slope, from being gentle, becomes steep. In this country today a young man or woman cannot choose the occupation to which they will devote their lives; we have the smallest newspapers of any civilised country; snoopers can enter our homes. If the older people here could turn back the clock and put this to their parents who followed Disraeli or Gladstone, they would never believe that such things could happen in England at peace. All over Europe, Socialism is proving no defence against Communism's attack on the triple European heritage of Christianity, mental freedom and even-handed justice.⁵⁶

The beginning of this passage was analogous to Maxwell Fyfe's speech in front of the Congress of Europe's Cultural Committee, while the coda highlighted the linkage between the violation of rights in Britain and the communist subversion of a shared "European heritage." These parallels—when set against the backdrop of his references to international human rights norms in parliamentary debates over the Labour government's economic planning measures and the concerns over Labour's authoritarian impulses expressed in private memoranda—begin to suggest that Maxwell Fyfe conceived of European human rights law as an extension of his domestic political campaign against the alleged totalitarian tendencies of the Attlee government.

An Ephemeral Socialist Triumph in Brussels

After the conclusion of the Congress of Europe, the Joint International Committee reconstituted itself as the European Movement and assumed responsibility for developing recommendations to governments concerning future steps toward European unification. It did so through a series of conferences, the first of which took place in Brussels February 25–28, 1949. This conference was dedicated to drafting a proposal for a binding European human rights convention and court in accordance with the resolutions of the Congress of Europe. This objective was only realized on July 12, 1949, when the European Movement officially submitted a draft human rights convention to the Council of Europe's Committee of Ministers for consideration by the Council of Europe's Consultative Assembly. The draft convention was developed entirely independently of state actors. Without this document, it is unlikely that the Council of Europe would have taken the subject of international human rights law into consideration.

The principal source of contention during the drafting of the European Movement's draft convention was over whether the document would guarantee the entirety of the rights enumerated in the Universal Declaration or whether it would safeguard a more limited set. In the initial exchanges that preceded the Brussels conference, the Belgian socialist Jean Drapier had adopted the former position.⁵⁷ Maxwell Fyfe responded to Drapier that the draft convention should not be modeled on the Universal Declaration since the UN document was "not really drafted as a document capable of judicial interpretation and enforcement."⁵⁸ A meeting between the British and French jurists in the European Movement's Juridical Section resulted in a joint text outlining a scheme for the establishment of a supranational commission and court

of human rights. In addition to guaranteeing the right to choose freely one's government and the right to form a political opposition, the joint text protected a series of what it described as "personal rights," including "freedom from arbitrary deprivation of property."⁵⁹ An attached memorandum stated that the number of rights had been limited in order "to avoid all controversy" and that "this document specifies in a concise form all the rights that are accepted as truly fundamental."⁶⁰ Although the preamble to the Juridical Section's joint text and the attached memorandum paid homage to the Universal Declaration, the proposed European human rights charter was less a restatement of the UN document and more an expression of a classical liberal understanding of fundamental rights. Not only were economic and social rights omitted but the "freedom from discrimination" provision did not prohibit discrimination on the basis of gender, as the Universal Declaration stipulated.

At the European Movement's Brussels conference, the presence of many prominent continental socialists and progressive Christian Democrats ensured that British Conservatives would not have the same latitude to impose their vision of European human rights law that they had enjoyed at the Congress of Europe. Already shortly before the opening of the Brussels conference, the European Movement's international executive committee had substituted all the rights enumerated in the Universal Declaration for Maxwell Fyfe's shorter list.⁶¹ Subsequently, in the conference's Juridical Committee, a heated exchange took place between those who supported and opposed limiting the rights safeguarded in a draft convention. The American-born legal scholar A. L. Goodhart of Oxford University pointed to the example of the U.S. Bill of Rights as a model by which, if "a very limited number of important rights" were "enforce[d] properly then the others will follow." He was backed not only by British Conservatives but also by the French liberal René Courtin and British Labour MP Ronald Mackay.⁶²

British Labour support for a human rights charter with a narrower range of rights protections was in accordance with the British government's decision to omit economic and social rights from the draft International Bill of Rights it had submitted to the UN Human Rights Commission in 1947. Unlike the European Movement's Juridical Committee, the majority of officials in the British government did not deny that economic and social rights constituted "fundamental" rights.⁶³ Rather, in their internal memoranda, they had argued against the inclusion of economic and social rights in a UN human rights charter most often on the grounds that such questions fell within the purview of other international agencies, such as the International Labour Organization, or that debates over economic and social rights would precipitate incessant squabbling between representatives of the United States and the Soviet Union. British officials were also rightly concerned that Conservatives in "socialist countries" would reframe the right to work as the right to freely choose one's occupation, which could undermine planning measures, and interpret the right to form and join trade unions as the freedom to challenge "closed shop" practices.⁶⁴ The British government preferred to view human rights questions at the United Nations primarily through the prism of international affairs, seeking to craft a document that could be used as a propaganda tool against the Soviets where they were most vulnerable, that is, in the domain of civil and political rights, without allowing the

communist states to take advantage of their perceived strength in the domain of economic and social rights.⁶⁵

To many delegates at the European Movement's Brussels conference, however, the claim that a charter limited to the safeguard of "personal rights" would "avoid all controversy" constituted an implicit rejection of the welfarist postwar consensus. This dramatically came to the fore when the Belgian socialist senator Henri Rolin accused Maxwell Fyfe and Goodhart of espousing "reactionary" views.⁶⁶ The final text of the conference's resolutions appeared to give a victory to the conceptions of the socialists and their allies. It stated, "The rights to be assured by the Court shall be those individual, family and social rights of an economic, political, religious or other nature in the United Nations Declaration of Human Rights which it is necessary and practical to protect by juridical process."⁶⁷ The Juridical Commission also recommended that "a permanent legal section" of the European Movement "prepare in co-operation with the I.L.O. [International Labour Organization] and with the economic section of the European Movement appropriate legislation dealing with social and economic rights."⁶⁸ "We have every reason to be satisfied with the decisions and the texts voted in Brussels," the French socialist André Philip announced in *Le Populaire*, adding, "The European Movement, started by influential personalities and intellectual elites, has now taken shape within economic and social reality."⁶⁹

Yet the Juridical Committee had agreed to two important concessions to the classical liberal viewpoint. The first was to append the phrase "which it is necessary and practical to protect by juridical process" to the description of the kind of rights to be protected by a supranational court. The second was to attach Maxwell Fyfe's list of "personal rights" to their report as "inspiration" for the future work of the European Movement's Juridical Section, which would "draw up a list of those human rights which shall be guaranteed by the European Court, having regard to the list appended hereto." This was an act of great consequence, as the European Movement's final draft convention of July 1949 would not incorporate the entirety of the Universal Declaration. Rather, it would guarantee Maxwell Fyfe's list with the only significant modifications being the deletion of the right of the "retention of nationality" and the inclusion of language concerning "the natural rights deriving from marriage and paternity and those pertaining to the family."⁷⁰ The Belgian socialist Fernand Dehousse and the French Christian Democrat Pierre-Henri Teitgen, though having played a critical role in securing the support of the center left for the Brussels conference's human rights resolution, left virtually all the actual drafting of the final draft convention to Maxwell Fyfe.⁷¹

The European Movement's draft convention thereby guaranteed a far narrower range of rights than that found in the Universal Declaration. The exclusion of the broad array of economic and social rights found in the UN document ignored not only socialist demands but also the positions of those on the center and right who rejected a classical liberal worldview in favor of a more interventionist view of the state. The jurist Hersch Lauterpacht, a member of the European Movement's Juridical Section whom Maxwell Fyfe had consulted before the Brussels conference, pointed out that the draft convention invested supranational institutions with "the authority to review legislative acts of sovereign parliaments," raising the possibility of British

legal challenges to the Control of Engagements Order restricting an individual's free choice of employment and to "interference with the rights of property, such as capital levies."⁷² Maxwell Fyfe, having already revealed his willingness to invoke international human rights norms in opposition to economic planning, was compelled to deny in front of both the House of Commons and the Council of Europe's Consultative Assembly that Conservatives intended to use a European human rights convention to challenge the Attlee government's policies on labor direction, nationalization, and taxation.⁷³

The Contentious Politics of the Council of Europe's Human Rights Project

The inaugural sessions of the Council of Europe were held in Strasbourg between August 8 and September 8, 1949. During this time, it was the Conservative elements of the European Movement, rather than states, that acted as the catalyst for the adoption of the Consultative Assembly's resolution on human rights, which in turn would prompt otherwise reluctant governments to begin negotiations over a binding European human rights convention. It was the prerogative of the Committee of Ministers to fix the assembly's agenda. On August 9, it debated whether to include the "definition, safeguarding and development of human rights." The result of the vote on this motion shocked the European Movement and the journalists covering the proceedings: the Committee of Ministers split with seven "no" votes, four "ayes" and one abstention.⁷⁴ As a result, the assembly was initially barred from deliberating on the subject of human rights during its first session.

Members of the European Movement quickly mobilized to exert pressure on the Committee of Ministers to reverse their decision. "Public opinion," as expressed and shaped by elites in the media and political opposition, proved to have a significant impact on the actions of the Committee of Ministers. Between three and four hundred journalists from around the world were present in Strasbourg that summer.⁷⁵ It is easy in retrospect to overlook the importance that some contemporaries attached to this gathering of foreign dignitaries and parliamentarians. At the time, many believed that the Council of Europe might be the kernel of a future European federation or union, an organization with limited powers that nonetheless could pave the way for more revolutionary steps toward an ever greater pooling of national sovereignty. The proceedings of the Committee of Ministers and Consultative Assembly regularly made for front-page news. This was particularly true in the case of Britain, whose government had been in favor of placing human rights on the Consultative Assembly's agenda. British newspapers gave prominence to developments regarding the creation of a European court of human rights, very often placing these news items at the top of their stories about each day's proceedings. Before the inaugural sessions of the Council of Europe, they had devoted considerable coverage to the European Movement's human rights initiatives. This, in turn, had spurred the Foreign Office to consider endorsing a regional convention on human rights rather than focus all its efforts on securing an acceptable UN document. On February 18, 1949, for example, the *Catholic Herald* had published an article titled "Wide Backing for European Court," in reference to popular support for the proposal to be discussed at the European Movement's upcoming conference in Brussels.⁷⁶ On that same day, Martin

Le Quesne of the Foreign Office had described the European Movement's Juridical Section as a "powerful one" and had written a memorandum that recommended that the British government examine the merits of a binding European human rights convention, noting, "I should myself guess that the United Europe Movement would gather a good deal of support for its proposal."⁷⁷

No news source ignored the words of the man whose talent for drawing the attention of foreign correspondents was unequalled by any other delegate or official in Strasbourg, the figure whose outsized personality dominated the Council of Europe's proceedings: Winston Churchill. The Committee of Ministers was to find out soon enough that its formal prerogatives were no match for the charismatic authority of this political celebrity. Churchill's first act was to lead a revolt against the Committee of Ministers on the question of the assembly's agenda. On August 12, Churchill sponsored a proposal to include on the agenda the subject of "measures for the fulfillment of the declared aim of the Council of Europe in accordance with Article 1 of the Statute in regard to the maintenance and further realisation of human rights and fundamental freedoms." It was signed by 40 of the 101 members of the assembly, with Churchill's name at the top of this list.⁷⁸ There were two other motions in support of placing human rights on the agenda that comprised an additional twelve delegates not associated with Churchill's proposal, which meant that a majority of the assembly had signed at least one petition in favor of holding a debate on the question of human rights.⁷⁹ Of the forty signatories on Churchill's proposal, twenty-three were on the International Council of the European Movement.⁸⁰ Almost two-thirds of the delegates to the Consultative Assembly were members of the European Movement, though not all of them sat on the International Council.⁸¹ The same day, Churchill spoke to between 10,000 and 20,000 people at a European Movement rally.⁸² The combined pressure of the Consultative Assembly and the European Movement proved to be a formidable force. On August 13, in a remarkable turnabout, the Committee of Ministers considered Churchill's proposal and consented to adding it to the agenda. It also suggested, after Bevin's insistence, that "due consideration should be also given to the question of the 'definition of human rights.'"⁸³

Without the intervention of Churchill and his allies in the European Movement, the Consultative Assembly would not have had the opportunity to discuss questions relating to human rights during its first session, and the entire project for the construction of European human rights law would have been in jeopardy. Bevin had proven prescient in his fear that the Consultative Assembly would become "a stick with which 'public opinion'—in other words, to a large extent, the various Oppositions—might belabour the various Governments of the day."⁸⁴ The Committee of Ministers had ultimately proved to be no match for the political influence of the European Movement and the charismatic power of Churchill. The initiative for the drafting of a European human rights charter had come from Conservative political elites operating through transnational European unity movements rather than government ministries.

During the Consultative Assembly's debates over a proposed European human rights convention, Conservatives outmaneuvered the left on the question of whether economic and social rights would be guaranteed in such a document. The European

Movement's draft convention became the basis of the human rights work of the Committee on Legal and Administrative Questions, which was chaired by Maxwell Fyfe. In the Consultative Assembly, Maxwell Fyfe called for the safeguard of "basic personal Rights" or "negative Rights and freedoms" alone. He explicitly rejected the Universal Declaration paradigm by stating outright that "so-called economic or social Rights" contained therein would not be included in a European human rights charter. Describing "positive rights" as "too controversial," Maxwell Fyfe implicitly threatened to withhold support if they were included. His claim that the presence of these rights in a European human rights charter would "jeopardise" its "acceptance" signaled that Conservatives would not recognize the legitimacy of European human rights law enshrining welfarist principles.⁸⁵

British Labour delegates accused the Legal Committee of having drafted a European human rights charter that would act as a vehicle to undermine their economic and social agenda. Arwyn Ungod-Thomas, a Welsh Labour MP, described the convention proposed in the Legal Committee's report as "anti-democratic and reactionary," using the example of how the Supreme Court of the United States had acted to overturn New Deal legislation on what he considered the flimsiest of pretexts.⁸⁶ The most vociferous opposition to the property rights article came from Will Nally, Labour MP for Bilston. A European human rights charter, according to Nally, should "pay more respect to the liberties of the little people who do not own property" rather than "defend a property structure in which a tiny handful of people own the means by which millions of others live."⁸⁷ According to the *Daily Herald*, Nally saw through the well-spoken arguments of the proponents of a human rights court and "blew the smokescreens away."⁸⁸

Nevertheless, delegates on the left were unsuccessful in their efforts to amend the Legal Committee's report so that the proposed European human rights charter would safeguard the economic and social rights enumerated in the Universal Declaration.⁸⁹ At the end of the last human rights debate on September 8, 1949, the Consultative Assembly adopted an amended version of the Legal Committee's report—one that still did not include economic and social rights in the proposed European human rights charter—by 64 votes in favor, 1 vote against and 21 abstentions.⁹⁰ British Conservatives who were present at the debate voted for the resolution. Nally was the only delegate to vote "no." The rest of the Labour delegation that was present abstained with one exception.⁹¹ The Labour MPs who abstained or voted against the Legal Committee's report were expressing their distaste at its association with the predominantly classical liberal worldview that had been at the heart of the European Movement's campaign for a European human rights court. They understood that "private-enterprise Tories" such as Maxwell Fyfe were deploying the new language of international human rights law as part of a rearguard action against the sweeping reforms already realized or envisioned by the Labour government at home. If the left was mistrustful of the right's intentions, then the converse was also true. Conservatives subsequently reported that Labour MPs had not voted for the Legal Committee's report because they "considered its adoption an impediment to their doctrinaire plans for an authoritarian state."⁹²

After the passage of the Consultative Assembly's human rights resolution of September 8, 1949, the Committee of Ministers authorized groups of legal experts and

senior diplomatic officials to reformulate the Consultative Assembly's recommendations in terms that would be acceptable to member states. These negotiations took place between February and June 1950, laying the groundwork for a debate over the human rights question in a meeting of the Committee of Ministers in August 1950. The Committee of Experts responsible for elaborating a draft convention for submission to the Committee of Ministers before the second session of the Consultative Assembly issued a report on March 16, 1950, stating, "Having due regard for the care with which the Assembly had coordinated the work of the Council of Europe and that of the United Nations, the Committee scrupulously adhered to the text of the Universal Declaration."⁹³ Yet here too the Committee of Experts' draft safeguarded a restricted set of rights that was ultimately derivative of Maxwell Fyfe's list of "personal rights" submitted to the European Movement's Brussels conference in February 1949.

One of the greatest obstacles to securing support within the Attlee government for a European human rights convention was its association with classical liberal economic principles. In a cabinet meeting of August 1, 1950, Stafford Cripps, Chancellor of the Exchequer, became outraged when Kenneth Younger of the Foreign Office informed him of the results of the negotiations between experts and senior officials representing the member states of the Council of Europe. Cripps declared that "a Government committed to the policy of a planned economy could not ratify the [Council of Europe's] Covenant on Human Rights. He drew attention to various Articles in the Convention, *e.g.*, on powers of entry into private premises, which were inconsistent with the powers of economic control which were essential to the operation of a planned economy . . . The draft Convention would be acceptable only to those who believed in a free economy and a minimum amount of State intervention in economic affairs."⁹⁴ Herbert Morrison added, "Tories would enjoy supporting something embarrassing to 'planning' Governments."⁹⁵ Cripps agreed, stating, "This Convention would enable British Conservatives to object at this court to a planning regulation."⁹⁶ Lord Chancellor William Jowitt subsequently wrote to Hugh Dalton, "It is quite obvious to me that the draftsman, whoever he may have been, starts with the standpoint of a *laissez faire* economy and has never realised that we are now living in the age of planned economy."⁹⁷

After subsequent modification to the draft text, the European Convention was signed on November 4, 1950. When the Consultative Assembly met again in Rome on November 18, 1950, British Labour MP Gilbert Mitchison voiced his unease, lamenting that the human rights resolution that the Consultative Assembly had adopted at its second session in August 1950 had recommended safeguarding property rights but omitted the economic and social rights found in the Universal Declaration. Mitchison asked, "Is it to be said of my country at least, and of the party to which I am proud to belong, that we attach higher importance to the right of property than to the right to employment or maintenance? The right to employment has been our ancient war-cry in our electoral battles. It is something which at long last we have brought to practical fulfillment in our own country."⁹⁸ Conservative MPs argued forcefully for the European Convention's ratification in the House of Commons immediately following its signature.⁹⁹ Britain became the first of the signatories to ratify the European

Convention, doing so on March 8, 1951. Though perhaps acting in response to pressure from the political opposition, the Attlee government also wished to offer a sop to those states displeased at Britain's hesitance to endorse more ambitious plans for economic, political, and military integration.¹⁰⁰ Britain did not incorporate the European Convention into British domestic law, nor did it recognize the right of individual petition and the jurisdiction of a European Court of Human Rights.

The new Conservative government elected in October 1951 also failed to take these steps. Just as Churchill would disappoint many of his allies in the European unity movements by refusing to intervene in favor of greater British participation in European integration schemes, he did not override objections within the British government that a supranational human rights institution would undermine British colonial rule and interfere arbitrarily in the British legal system. Though having publicly advocated the establishment of a European human rights court, Churchill had never explicitly committed himself to supporting the creation of a juridical body that could adjudicate on disputes between individuals and states. With the progenitors of the European Convention in power, the document was now simply a symbolic affirmation of the principles that "private-enterprise Tories" held dear. Like their Labour predecessors, Conservatives came to believe that they did not need any such additional defense of human rights at home.

In 1961, the Council of Europe adopted the European Social Charter, which safeguarded a broad range of economic and social rights. This document, however, did not provide for measures of implementation that were as effective as those of the European Convention. While the European Convention provided for the creation of the European Court of Human Rights, the European Social Charter established no equivalent juridical body to implement its provisions. To this day, civil and political rights continue to be protected to a significantly greater extent than economic and social rights under European human rights law.¹⁰¹

Conclusion

This study has sought to reframe our understanding of the origins of European human rights law by examining it through the lens of the political conflicts underway within Britain during the period immediately following the Second World War. The Conservatives in this narrative viewed a European human rights charter as a means of enshrining their contested views as the foundation stones of a united Europe. It is only through an analysis of the way in which British domestic politics became refracted through transnational space that one can understand how, from the first proposals submitted at the Congress of Europe to the signing of the European Convention, a classical liberal conception of European human rights law became dominant.

The emergence of classical liberalism as the formative ideational framework for European human rights law was by no means inevitable. It was dependent as much on the superior strategic positioning and tactical maneuvering of nonstate actors in transnational political space as on the inherent structural weaknesses of social-democratic human rights discourse in Western Europe after the Second World War. Conservatives sought to counter the perceived slide toward totalitarianism in Britain

by deploying the resources of new international non-governmental organizations such as the movements for European unity and new international institutions such as the Council of Europe's Consultative Assembly.

The dynamic approach that the European Court of Human Rights has adopted in interpreting the European Convention should not obscure the origins of this document as a product of Conservative politics. In recent years, the European Court has, for example, extended the European Convention's provisions concerning the right to life and the right to a fair trial to areas related to the right to health and to social security. Yet one must not lose sight of how the conclusion of the European Convention in November 1950 signaled a defeat for those who had hoped that the document would enshrine a welfarist postwar consensus in international law. Such an outcome was neither preordained nor definitive. A greater appreciation of the historically contingent nature of this event might allow us to talk about European human rights norms in the subjunctive, opening our eyes to all the possible forms they might have taken and may still take in the future.

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