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Minority Rights in the 1940s and 1950s: Disappearance of Universalization?

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“Were the Minority Treaties a Failure?”: the title of this study published in New York in 1943 is indicative of the widespread reevaluation of the interwar minority protection system by wartime Jewish legal scholars. In this work, the former Lithuanian Jacob Robinson and former Russian Mark Vishniak, both employed by the Institute of Jewish Affairs during the war (World Jewish Congress), did not come to a definitive conclusion. Both of them had in the 1920s and 1930s fervently defended the granting of rights to collectivities (namely, Jews in East-Central Europe) whose members were linked by cultural, religious, or even national characteristics; and both still lauded the noble intentions of the Wilsonian protection system. Yet they also seriously doubted whether minority problems were “capable of solutions by legal means”: poor enforcement mechanisms, lack of accountability and above all, the ongoing genocide of the Jews in Europe significantly dented their devotion to minority rights. Other Jewish scholars, to be sure, remained more favorable to this concept. Oscar Janowsky, the noted City College expert on ethnic and political minorities in Eastern Europe, was one of them: for him, the League of Nations’ efforts to protect endangered groups was still preferable to the vague stipulations of the 1945 UN Charter on the minority question. With the UN Charter, he wrote, “The gains of a century have been lost.” In San Francisco, the Great Powers indeed dismissed the protection of special groups to resurrect the concept of individual rights: if individuals were protected, so the logic went, then collective rights were unnecessary. Taking their cues from Janowsky, recent historians have ferociously challenged this legalistic explanation. Mark Mazower in particular, sought to expose the hypocrisy behind this argument. “Behind the smokescreen of the rights of the individuals”, he claimed, “the corpse of the League’s minority policies could safely be buried.” Thus in 1945, staunch advocates of mass expulsions of ethnic minorities, such as the
Czechoslovak leader Edvard Benes, could at the same time ardently champion “a charter of human rights throughout the world”. Americans, for their part, were wary of the dangerous consequences of “minority rights” for the status of African Americans in the Jim Crow South. As Eleanor Roosevelt declared at the United Nations in 1947, “there was no minority problem” in the United States. And above all, Soviet hegemony in East-Central Europe (the geographical cradle of the Wilsonian rights system) made any international monitoring and enforcement of minority treaties in the area impracticable. In this light, Machiavellian politics, more than idealist fervor for the virtues of individual rights, explains the quasi-disappearance of collective rights – whether self-determination of minority rights – from the “human rights talk” of the 1940s. Group rights were indeed an explosive topic contrary to the interests of Great Powers, leading the United Nations, as the Canadian John Humphrey wrote at the time, “to dodge responsibility for the protection of minorities.”

Disillusionment with the “twenty years crisis” of 1919-1939 and postwar realpolitik do not exclusively explain the abandonment of minority rights after 1945. Framed as endangered citizens warranting special protection during the interwar era, minorities became, during world war two, understood by the West as “geopolitical problem children” challenging the cohesiveness of nation states. Migration and massive population distribution, as advocated in the United States under the authority of Franklin D. Roosevelt in his secretive M-Project, was one way to come to terms with the problem. The other one was assimilation, at a time when melting pot theory still dominated the field of migration studies. As the proceedings of the Commission on Human Rights at the United Nations amply show, the question of minority rights was perceived by large countries of immigration (the United States, Canada, Australia, France) and many others as delaying the fast assimilation of migrants. (This puzzling conflation of
“minorities” and “migrant groups” was perhaps another ploy to dodge the burning issue of group protection altogether.) The distinctiveness of groups, acknowledged de jure by the interwar minority treaties, rapidly turned into a nuisance, if not a threat, to be quickly dismissed in favor of “protection against discrimination”. Indeed, in the UDHR, the “positive liberty” of groups to freely assert their differences within the boundaries of a state is simply never mentioned; instead, the Declaration championed, in a non-binding fashion, the “negative liberty” of “everyone” to be free from discrimination and nefarious state practices. In the Declaration, anti-discrimination can be seen as an escape from a much more far-reaching commitment to the respect of collective rights, cultural, national, religious or else. The failure of the Genocide Convention of 1948 to include “cultural genocide” among the crimes it tried to ban can therefore be interpreted in this regard as another manifestation of the plummeting popularity of minority rights in the postwar era. The recent revisionist historiography on the subject is categorical: the non-binding shift to individual rights was a passing juridical moment, of interest to a handful of international lawyers only, and was rapidly made irrelevant by the Cold War: whether individual or collective, there were no human rights to speak of in the 1940s and 1950s. Peripheral to the superpower struggle, the international human rights project was cast aside until the opening of the détente era. (Sam Moyn). Mark Mazower goes further: for him, the exact opposite of interwar minority rights won the day after 1945: the legitimacy of population transfers (ethnic Germans, Hindus/Muslims, and Palestinians) and the active suppression of all minority rights stood at the core of what he called “the strange triumph of human rights” in the postwar era. Chronology adds some credence to this pessimistic view: as well known, the United Nations waited until 1992 to finally pass a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic
Minorities, too late to prevent large instances of mass murders in Bosnia, East Timor or Rwanda in the 1990s.

Yet was this abandonment of minority rights in 1945 as brutal, Machiavellian and definitive as the current scholars claim? Did collective rights abruptly disappear or continued to remain, in a different and subdued way, on the human rights horizon of the 1940s and 1950s? The case of Jewish demands for human rights during and immediately after WW2 offers indeed the possibility of a different narrative: even if submerged in the dominant framework of individual rights, a collective vision of rights remained central in the thoughts of Jewish legal scholars and advocates concerned with “the future of the Jews”, as they called it, in the postwar order.

It is in this respect necessary to briefly revisit the thought of prominent Jewish legal scholars, such as Rene Cassin and Hersch Lauterpacht, who championed the elevation of the right of individuals in international law, as the cornerstone of the human rights order to come. Their main concern was to keep state sovereignty in check through international guarantees defending the safety of individual: a distinct Jewish legal and intellectual contribution to individualized notions of rights after 1945 is indeed easily traceable. Offering a similar rights-based platform, Karl Popper’s open society envisioned at the end of ww2 a world in which “human individuals and not states or nations but are the ultimate concern (….) of all politics.” His verdict was quickly delivered: the Wilsonian experiment was “inapplicable on earth.” Cassin, similarly, advocated individualism as a response to the League of Nation’s inability to prevent discrimination, statelessness, and forced displacement. The French lawyer and future drafter of the Universal Declaration sought to transcend these shortcomings through universal rights: The league’s central flaw, he argued on the eve of WW2, was its limited focus “on men
who belong to certain collectivities” as opposed to “man itself.” A clear “path to universality” was needed to protect the victims of political and racial persecution, a rights system in which the individual would become the “common denominator of humanity.”

Yet Cassin’s goal was less to dismantle the system of minority protections, which he certainly did not hold in high esteem, than to ensure the safety of minority groups through a new prism, that of the individual. The same applies to Joseph Proskauer, the jurist and president of the American Jewish Committee who served as a consultant to the drafting of the San Francisco Conference, and equally concerned in the protection of Jews in the postwar world. For this proponent of civic and political rights, the protection of Jews in the postwar world “could be best achieved if it was made part of the far greater and more fundamental protection of the rights of all human beings.” Hersch Lauterpacht went a step further: the author of a famous International Bill of the Rights of Man in 1945, in which collective rights were conspicuously absent, the most distinguished postwar proponent of individual human rights was also a discrete advocate of Jewish collective self-determination, and lent his expertise to the drafting of the Israeli Declaration of Independence. This was not only a case of privately-held Zionist sympathies: the reconciliation of individual rights and collective protection (in the case of Lauterpacht, through the very taboo subject of self-determination!), generally seen today as sharply diverging, was not an impossibility in the mind of Jewish legal scholars of the time. The diagnosis remained the same as in the recent past: Jews, as Jews, were prime target of discrimination and violence. The solution diverged from the interwar era: groups would be better protected through universal norms, not minority treaties contingent to geography and politics.

That Jewish advocates of individual rights were not insensitive to the question of minority rights is clear from Rene Cassin’s article on the subject published in 1947. In it, the
French Republican tried to insert the following clause in the preparatory draft of the UN Declaration of Human Rights:

“In states inhabited by a substantial number of person of a race, language, or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic, or religious minorities shall have the right, as far as compatible with public order and security to establish and maintain schools and cultural or religious institutions and to use their own language in the Press, in public assembly and before the courts and other authorities of the State.”

Cassin’s did not replicate verbatim the extensive language of the post-Versailles treaties, which then granted members of minorities the right to equal treatment and protection by the state, to establish and control educational, religious, and social welfare institutions for their groups and to receive a proportional share of state expenditures for educational, religious, and welfare services. He also made clear that minority groups owed individual allegiance to the government of the state in which they resided. A French Republican, Cassin believed indeed in assimilationism, not ethnic distinctiveness. But his approach to minority rights was driven by a clear division of labor: what individual human rights would not guarantee, minored down minority rights could. Collective rights, as such, did not disappear but instead complemented the potential deficiencies of individual rights. Cassin’s article was ultimately rejected in the drafting process, indicating again that references to collective guarantees were frowned upon internationally. As mentioned earlier, the protection of minorities was transformed into a guarantee of non-discrimination for all (article 7 of UDHR): a convenient way to altogether avoid the issue, but also a sign of “universalization of minority rights” in which the collective level was not drastically suppressed but curbed to a universal doctrine of rights.

In addition to Jewish individualist legal thinkers who indirectly aimed at the welfare of endangered collectivities, other Jewish advocates simply continued, during the war, to strongly demand the continuation of minority rights after the demise of Nazism. Unsurprisingly, Eastern
European Jewish scholars and activists, witnessing the ongoing eradication of the Yiddishland, led the campaign for the persistence of cultural and autonomous “national” Jewish rights after the war. The extent of the Holocaust was not fully known, and the idea of surviving Jewish communities in soon-to-be-liberated East-Central Europe not yet entirely ruled out. The former Russian socialist-revolutionary Mark Vishniak was the first Jewish legal scholar to urgently reaffirm the need of even stronger collective guarantees for Jews in East-Central Europe. Written in Yiddish in 1939, his plea for enforced and internationally guaranteed minority rights was prescient. Vishniak was later echoed by Polish and Lithuanian Jewish scholars and community leaders in exile who similarly clamored for Jewish minority rights in the liberated areas east of Germany. In a much different way, this concern for group rights was at the core of Raphael Lemkin’s one-man crusade for a convention on genocide. Although “cultural genocide” was safely expunged and the ratification process dragged over decades, the very adoption of the Genocide Convention in late 1948 rhetorically counterbalanced the individualist language of the Universal Declaration: human rights for Lemkin, were only thinkable in the context of group preservation. For the international jurist Jacob Robinson, (and even for Hannah Arendt writing during the war), group rights, and in his case “Jewish rights”, were also an essential component of the world order to come. Speaking of post-Holocaust Jews, Robinson was unambiguous: “What is to be their status, who will represent them or take care of the must be decided on the basis of Jewish rights and status as a whole.” Like other Jewish advocates of the time, Robinson supported a maximum rights platform for postwar Jews whom the Holocaust had entirely disentangled from national politics and jurisdictions: civil and political rights in the West, minority and collective rights in Eastern Europe, and timidly advocated for the time being, self-determination in Palestine. The collective level, again, remained predominant in wartime Jewish
human rights talk, with impressive results: in many respects, the UN Partition Plan, affording Jews self-determination, can also be seen, with the tragedy of Jewish DPs in the background, as an extension (and remarkable resurgence, elsewhere) of interwar Jewish minority rights.

The postwar history of UN-based minority rights, however, is straightforward. There is no need to yet again restate the obvious: Western Powers were not interested in minority rights (collective rights reeked Marxism and allegedly threatened individual freedom), and the first decolonized nations, for their own reasons, similarly looked askance at such guarantees: they preferred to ignore the cultural, ethnic and racial diversity of groups living within their new borders – (groups rapidly turned into “enemies” in the case of Kenya and Uganda.). Article 27 of the International Covenant on Civil and Political Rights (1966), which mandates the rights of ethnic, religious and linguistic minorities to enjoy their own culture and profess their own religion was supposed to mark a turning point, but its numerous critics relentlessly point out that it ignores the existence of “national” minorities; and that it only addresses minorities from an individual perspective (“persons belonging to such minorities shall not be denied the right…”).

But isn’t it precisely what the so-called and very imperfect “human rights revolution” of the 1940s and 1950s precisely achieved, thanks in no small measure to Jewish legal activism: the possibility to “universalize minority rights” and expunge them from the constraints of geopolitics? To make minorities both visible and invisible in a nation state, thereby allowing its members the freedom to navigate the waters of ethnic or religious identity? To divorce our thinking on minorities from the need to name, identify and rank minorities more deserving than others? There may be in this regard a parallel between the place of the “Holocaust” and “minorities” in the judicial history of human rights after 1945. Despite recent claims that postwar human rights were not a response to the Jewish genocide, since there was no “Holocaust
consciousness” to speak of, the UDHR and other instruments repeatedly referred to Nazi anti-
Jewish violence while also “universalizing” the Holocaust, to the satisfaction at the time of
Jewish organizations who saw in universal international law the first instance of international
Holocaust memorialization. The same could be said of minority rights, despite the
“Machiavelian” onslaught on their very existence: advocates of human rights, Jews primarily
among them, universalized their scope (at the risk indeed of eradicating them altogether), and
thus imperfectly paved the way for the yet unrealized equal protection of the individual and the
group in current international law.