

## Introduction

Herbert Vere Evatt was a chief architect of the world's most important institution. His genius is present in the UN Charter, and in that post-war human rights triptych – the Genocide and Geneva Conventions and the Universal Declaration of Human Rights. He was the progenitor of the European Court of Human Rights and the International Criminal Court, both of which he proposed at the Paris Peace Conference. His international renown led to his election as the third President of the General Assembly of the United Nations. Why did this intellectual giant concern himself with the sad story of six Dorsetshire labourers, convicted in 1834 of administering an unlawful oath and sentenced to transportation to Australia?

Evatt wrote this work in 1937 while he was a judge of the High Court of Australia. He had earned Sydney University's highest accolades: his doctoral thesis, on the subject of the Royal Prerogative, prophetically pointed the way by which "dominions" like Australia and even colonies could attain full sovereignty.<sup>1</sup> He speedily acquired a practice at the Bar representing trade unions and his conspicuous brilliance enabled a Labor government to appoint him to the High Court in 1930, at the astonishingly young age of thirty-six. By then, the case of the Dorsetshire labourers was already celebrated: Sidney and Beatrice Webb had canonised them in their *History of trade unionism* published in 1894, and the Trades Union Congress (TUC) had recently published *The Martyrs of Tolpuddle*. Left-wing lawyers like Walter Citrine and Stafford Cripps QC roundly declared that they had

been wrongly convicted. This particular legend, of working men who were victims of a miscarriage of justice, was inspiring for the union movement in the 1930s and today it has acquired a mythic quality: in 2009 Tony Benn claimed that the campaign to free them “was the turning point from feudalism to capitalism and socialism” while folk hero and folk singer Billy Bragg “credits the martyrs with the birth of the trade union movement”.<sup>2</sup> But “Doc” Evatt (as he was affectionately known by the Australian Labor Party, few of whose politicians had doctorates) realised that the case of the Dorsetshire labourers stood for something very different, and something very frightening. He wrote:

The Dorsetshire case illustrates the fact that oppression and cruelty do not always fail. Indeed, they sometimes succeed beyond the hopes of the oppressors. Unless trade unionists throughout the world are always ready to sacrifice their personal interests, their safety, or even their lives for the amelioration of the lot of the poor, their elaborate organisation may perish overnight either in a holocaust of terror and force or in the slower process of legal repression.

Evatt’s analysis makes the case more significant. This early example of a workingman’s combination was utterly crushed, by use rather than by misuse of the law. The government achieved exactly what it wanted – the suppression of a nascent trade union movement – through the fear and terror engendered by the savage sentences, emphasised by the desperate campaign begging mercy for the men. It was not the beginning of the trade union movement, but its end. The Grand National Consolidated Union collapsed and there was no causal link to Chartism or to the later resurgence of unionism in the 1870s. Although the judge and jury were biased and the sentences were brutal, the men were nonetheless guilty as charged: Evatt found no violence in the Dorsetshire case “save the extreme and horrible violence of the law itself”.

This revelation of injustice *within* the law came as a shock to Evatt: it moved him to write this book (an unusual exercise for a sitting High Court judge) and it inspired him to think about the necessity for incorporating into the law a set of basic guarantees of human rights which would make “injustice within the law” much less likely. Evatt was appalled that statutes designed for one purpose could be used by one class for violence against another, “through the slower process of legal repression”. His immediate solution was to endorse the jury system, so long as it is truly representative (“a jury consisting of the labourers’ real peers, not of their bitter opponents, would certainly have acquitted them”). However, such “sympathy verdicts” are unreliable, as has been shown by convictions in notorious “Irish miscarriage” cases (the Birmingham 6; the Guildford 4) by jurors riven with prejudice towards minorities or emotionally intimidated by the prosecution or the tabloid media. Evatt gave the solution to “injustice within the law” more thought. Two years later, when H.G. Wells published his Penguin special, *A New World order*, arguing for a universal declaration of human rights, Evatt saw how such a charter, introduced into domestic law, could provide the necessary inbuilt protection against the kind of cruelty that had been so evident in the case of the Tolpuddle Martyrs.

That cruelty comes through to us today, even in Evatt’s precise and lawyerly account of the proceedings against these good, simple, hard-working men. He explains the direness of their straits, as they laboured for rich landowners for a few shillings a week in a stratified society which allocated rank and station at birth, and which allowed, even after the 1832 Reform Act, only about 5 per cent of the population to vote at elections. The hopes engendered by the recent repeal of the Combination Acts, which had at least made trade unionism legal in theory, imbued intelligent men like George Loveless, a Methodist lay-preacher, with the idea of setting up a “friendly society” which might seek through collective bargaining an increase in their meagre wages.

They feared victimisation – hence the rather pathetic ritual of kneeling with a copy of the Bible and swearing to keep the union secrets before the picture of a skeleton whilst hearing the sepulchral injunction to “remember thy end”. The rules of their society were hardly revolutionary: “that no person should be admitted to their meetings when drunk; that no obscene songs or toasts should be allowed; that they should not countenance any violence or violation of the laws of the realm”.

But 1834 was the year when the Grand National Consolidated Union was established in London, extending even to women workers such as the bonnet makers, and the Tolpuddle society belonged to it. William IV, a King who despised his lesser subjects, demanded “some checks to the progress of this evil” (i.e. trade unionism). And Home Secretary Lord Melbourne, a Whig (i.e. a liberal) who ruled in the interests of the upper class, boasted in private correspondence with the King of “the mortal blow which it [the sentence of transportation] strikes at the root of their whole proceedings” (i.e. of national trade unionism).

When a vicious Dorchester landowner and magistrate, George Frampton, wrote to Melbourne to complain about this little Tolpuddle society, the government decided to make it a scapegoat whose fate would destroy the union movement. The six men were arrested under the Illegal Oaths Act. The statute was passed in 1797 as a result of mutinies in the navy and intended to combat seditious conspiracies in the armed forces, but its words were wide enough to catch oaths taken by members of friendly societies (and Masonic and Orange Lodges, whose members were, of course, never threatened with prosecution). A lickspittle judge, Baron Williams, was despatched to Dorchester to ensure their conviction – a certainty before a jury of landowners in any event – and to pass an unconscionably brutal maximum sentence of seven years transportation in order to discourage other would-be friendly societies.

Evatt tells the story as undramatically and as fairly as possible. He is angry, as a lawyer, that such an important case has been omitted from the “State Trials” – law reports that purport to record all politically significant criminal proceedings in Britain. (The reason is that the state trial series was “a Whig compilation”, and it is likely that the transcript of a trial that would show the vileness of a Whig government was deliberately omitted.<sup>3</sup>) So Evatt sets about constructing as accurate a record as sources allow, set against the social reality of a time when, as Harold Laski put it: “the forcible suppression of discontent was an integral part of Whig policy” – a policy which the Tories completely supported, although even conservative newspapers were revolted at the savagery of the sentence.

Evatt precisely outlines the course of the prosecution, with the magistrate/landowners improperly encouraged by Melbourne and the Attorney-General (and by clergymen of the Church of England, always supportive of the upper classes in this period). Melbourne himself selected the charge and arranged for their speedy trial: his brother-in-law became the foreman of the Grand Jury which indicted the men! They could – and should – have been prosecuted summarily (i.e. before magistrates, not a judge and jury) for their pathetic oath-taking, but this would carry a maximum sentence of three months and the government wanted them put away for much longer. So its law officers opted for the more serious charge, a felony carrying transportation for up to seven years. Evatt describes the imposition of the maximum sentence as “cruelly unjust and disproportionate” and demonstrates that it was a political decision, since a few months later members of a much more active trade union branch who swore a similar oath were merely discharged on a good behaviour bond. The Tolpuddle sentences were designed to destroy the trade union movement – so these men were “martyrs” to that cause in the true sense of that word.

George Loveless and his five comrades were transported 12,000 miles to “Botany Bay” (in fact to Port Jackson, the harbour of Sydney),

shackled to the debauched and violent villains for whom transportation meant a reprieve from the death sentence. For two years they toiled as convicts, while a protest movement – fuelled by a reaction to the savagery of the sentences rather than sympathy for trade unionism – gathered apace in London. A quarter of a million people signed a pardon petition and tens of thousands turned out at street rallies demanding that the men be brought back home. Melbourne remained hostile, as did Pitt, his brief Tory replacement as Prime Minister, but the fact that the sentences had been effective in smashing the trade union movement allowed the next Melbourne government to be more generous. The six were pardoned, and they returned to a hero's welcome in London in 1837. But nothing had changed for the better: as Evatt emphasises, society remained as class ridden as ever, the Grand National Consolidated Union had collapsed, and the privileged few showed no interest in sharing political power or economic wealth with “those they contemptuously termed the lower orders.”<sup>4</sup> Further proof of Evatt's thesis is provided by the men themselves, who were set up with land in Dorchester purchased from the proceeds of a tribute fund. They were ostracised by neighbours, and George Loveless saw no future for the working class in England. Five of the six set sail for Canada, where today they are buried in modest graves in an Ontario cemetery. Neither the British Labour Party nor the trade union movement which now hails them as martyrs has ever thought to bring them back for burial in Westminster Abbey, resting place of British heroes, although the TUC does hold an annual festival in their honour in Tolpuddle.

Evatt was writing in 1937, as war clouds gathered over Europe and as Japan's militant nationalism had begun to threaten Australia. Laws in Germany and Italy had already turned trade unions into instruments of the fascist state, and Evatt was prescient in his perception that workers' rights would “perish overnight ... in a holocaust of terror and force” unless they were defended by the sacrifice of lives. He recog-

nised that obedience to such laws – the Tolpuddle Martyrs had accepted their fate with resignation – was no example for this time, and that movements protesting only for merciful sentences were not a satisfactory response. The true lesson of 1834, that tyranny will triumph unless workers are prepared to stand and fight, was a lesson that he drew for 1937. Evatt's thinking in this book soon inspired him to resign from the court and win a seat for Labor in the federal parliament. When Labor took office in 1941, he became both Attorney-General and Minister for External (i.e. foreign) Affairs – posts he held for the next eight years.

Evatt made his – and Australia's – first international mark in 1945 at the San Francisco Conference which founded the United Nations. My friend Michael Foot, then a young journalist, still remembers his sense of awe at this gravel-voiced Australian who emerged to dominate it. Evatt became the *de facto* leader of the small- and medium-sized nations who sought to build an institution that would assist their development as well as their security. He led the fight against the Soviets in an attempt to limit the “great power” veto, and the fight against the United States to secure a pledge of full employment in the Charter, a document which benefited in many ways from his drafting suggestions. At the end of the conference Ed Stettinius, the American Secretary of State, publicly declared that “no-one had contributed more to the conference than Mr Evatt” and the Peruvian delegation even moved a resolution by small powers to “pay homage to their great champion, Mr Evatt”. In the words of the *New York Times*, the conference had seen the exercise of two kinds of political power, the first packed with heavy national muscle and coercion and the other purveyed by force of ideas, argument and intellectual effort – and the paper hailed Herbert Vere Evatt as the epitome of the latter.<sup>5</sup>

Evatt's far-sighted vision for the enforcement of human rights was on display the following year at the Paris Peace conference, when he was the first to propose the establishment of a European Court of

Human Rights, which would have the power to admit individual complaints and make binding determinations for that war-ravaged continent. He argued that even democratic governments could not be trusted to protect the rights of individual citizens, as they could be ridden over roughshod by prejudiced majorities. Only a court could give legal remedies that would deter other states from abusing their powers. The European Court of Human Rights was established in 1951 in Strasbourg and is the most influential human rights court in the world today.

As a result of Evatt's pre-eminence in San Francisco and Paris, Australia was elected to the UN's first commission on human rights and presented that body with a statute for an international human rights court. To arguments from nervous delegations that such a court would impinge upon national sovereignty, Australia's delegation, instructed by cablegram from the Doc in Canberra, feistily replied that sovereignty was "an outmoded conception, a fetishist survival whose worship should be anathema in the face of economic and human inter-relationship of our one atomic world". Non-aligned countries were mightily impressed and the UK and US were forced to concede the strength of the argument, although of course the Soviets opposed it from the outset and the Cold War made it unsustainable. It was later reversed by Robert Menzies, whose government opposed international co-operation in respect of human rights for fear that it would come to target the White Australia policy and the treatment of Aborigines. But it is a remarkable fact – upon which Australians rarely remark – that Evatt and his delegates were first to beat the drum for policies that Amnesty International and other human rights organisations were to take up again in the 1990s, and which today are beginning to come to pass.

Evatt's argument was that the fifty-eight nations then making up the UN had a duty not only to agree on minimal universal values but to incorporate them into a convention that would bind all nations and



have enforcement machinery based on an international court. The Australians were proposing a convention to be implemented by a domestic statute in every country, which would require that country to accept the decisions of an international human rights court. They lost this argument through the hypocrisy of countries unprepared for any independent body to hold them to their pledges, but it is ironic to think that Australia, a nation that would subsequently shrink from adopting Human Rights, first earned its international spurs by its stance – widely respected at the time – in favour of a binding charter and an international human rights court.

On Evatt's instructions, the Australian delegation played an important part in many debates over particular articles of the Universal Declaration. It called the bluff of the Soviet Union and its highly strung puppet states when they wanted to change the right to "independent and impartial" courts merely to "open" courts. (Stalin's rigged trials were always open, but were never independent or impartial.) It stood up for minorities: despite the reservation of the great powers (especially the US with its "Jim Crow" segregation laws, and the Soviets with their subjugated peoples). The Australian delegation explained that human rights were all about protecting minorities from oppression, including the oppression of the majority in a democracy.

Australia had a fifty-year history of flourishing trade unions and Evatt was appalled to find these two words unmentioned in the first draft of the Universal Declaration, so he insisted on inserting them in Article 23.4: "Everyone has the right to form and to join trade unions for the protection of his interests". Evatt's greatest achievement was to ensure the Universal Declaration included social and economic rights – for example, to minimum standards of health and housing. Mrs Roosevelt, who chaired the drafting committee, remarked that rights needed to be universal and not just "for a progressive state like Australia", but she accepted that economic and social rights should at least feature in the declaration. Hence Article 22:

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

And so it was that the man who had been so concerned by the fate of the Tolpuddle Martyrs that he wrote this book about their case later came to ensure that the rights for which they had been sacrificed were written into the Universal Declaration, including:

**Article 23:** The right to work; to equal pay for equal work; to just remuneration; and the right to join trade unions

**Article 24:** The right to reasonable working hours and periodic holidays with pay

**Article 25:** The right to an adequate standard of living, including food, clothing, housing and medical care and benefits in the event of unemployment, sickness, disability, widowhood or old age.

Evatt's Presidency of the UN General Assembly was a tribute to his international standing. On 10 December 1948 he received the Universal Declaration from Eleanor Roosevelt, who described it as "the Magna Carta for mankind". The previous day he had unveiled the Genocide Convention, the brainchild of Raphael Lemkin, a Polish lawyer. Evatt had taken Lemkin under his wing as soon as he recognised (and he was one of the first to do so) the importance of forging an international criminal law that would require state intervention against any regime that embarked upon the mass murder of its own people for racial or religious reasons. This too was an historic moment, Evatt declared:

Today we are establishing international collective safeguards for the very existence of such human groups ... whoever will act in

the name of the United Nations will do it on behalf of universal conscience as embodied in this great organisation. Intervention of the United Nations and other organs which will have to supervise application of the Convention will be made according to international law and not according to unilateral political considerations. In this field relating to the sacred right of existence of human groups we are proclaiming today the supremacy of international law once and forever.<sup>6</sup>

A few months later came the Geneva Conventions – requiring humane treatment of prisoners of war and laying down rules to protect civilians in war time. These three instruments now form the human rights triptych and Evatt – representing a nation of only seven million people – had played a crucial part in their design and in their acceptance as the basis for a new international human rights law. Sean McBride, the Irish Foreign Minister of the time, once told me that he regarded Evatt as the statesman who most contributed to this crucible period for modern history.

But prophets are not honoured in their own country. In today's Australia, Doc Evatt is perceived as a political failure: his leadership of the Labor Party between 1950 and 1958 was marked by bitter infighting and by repeated electoral defeats at the hands of the conservatives led by Robert Menzies. Evatt is, however, favourably recalled for his lonely, utterly courageous and ultimately successful battle, at the height of McCarthyism, against the Menzies' attempt to abolish the Communist Party. In 1951 the Doc put on his legal harness of wig and gown and had the Communist Party Dissolution Bill declared unconstitutional by the High Court. Then, when Menzies put the question to a national referendum, Evatt led the campaign which had the proposal narrowly defeated. But his mind began to crack and to falter as he reached his 60s. I will always remember the look of sadness in my Labor-supporting grandfather's eyes when, as a precocious ten-year-old, I taunted him about how much better Mr Menzies sounded on

radio broadcasts than Doctor Evatt. “If only you had heard the Doc at the height of his powers”. If only ... but I hear it now, unmistakably on those old newsreels of the first UN meetings and read his name in books of UN history or international law. Ironically, there is seldom any reference to his political rival, Menzies. Only an occasional footnote about his failed Suez mission. Evatt, whom he so often taunted and outclassed on the national political stage, was the man who contributed so much more to the building of a better world.

It was as a law student that I was first impressed with the Doc, when I came across a judgment he delivered shortly after he wrote about the Tolpuddle Martyrs. *Chester v Waverley Municipal Council* concerned a mother who had suffered permanent mental damage on seeing the drowned body of her young son recovered from a road-work trench, seven-feet deep, which the council had negligently failed to guard or to fence after it filled with rainwater and attracted local children.<sup>7</sup> The other judges cavalierly dismissed her claim for damages for nervous shock, despite the gross negligence of the council, because in their Anglo-centric male minds she should have shown a stiff upper lip: “death is not an infrequent event ... it is not the common experience of mankind that the spectacle even of the sudden and distressing death of a child produces any consequences of more than a temporary nature”. (Decoded, this meant that the plaintiff was a working-class immigrant from Poland, who had to learn to be less emotional.) Evatt, in a passionate yet scholarly dissent, pointed out “the notorious fact that children of working people are frequently compelled to play on the streets” and that the council should have foreseen the trauma for parents of a missing child as they waited “in an agony of hope and fear with hope gradually decreasing”. To assist his unfeeling and unimaginative brethren, he quoted from William Blake (*The lost child*) and from Tom Collins (*Such is life*) and proceeded to refashion the law of negligence to permit recovery in such circumstances. It was a masterly piece of jurisprudence, infused with humanity, which came in time to

be recognised as correct in law as well as in morality. It was an example of Evatt's profound belief that humanitarian principles could be deployed by judges to develop a common law that would meet the needs and challenges of a changing world.

The world has benefited from his passion for human rights, in ways that his own country has overlooked. When Eleanor Roosevelt presented him with the Universal Declaration, he replied "millions of men, women and children, all over the world, will turn for help, guidance and inspiration to this document". They have – but not in Australia, where its promises have never been translated into law. This is despite the fact that the Universal Declaration was hailed by the General Assembly as "a common standard of achievement for all peoples and all nations", to be promoted by education and in particular by "progressive measures, national and international, for their universal and effective recognition and observance".

Australia, unlike all other progressive nations, has taken no national measures to secure the effective recognition of these universal rights by passing them into law – in other words, by legislating a bill of rights. The Rudd government brought a charter closer by holding a national consultation on the subject. The Brennan report, released in October 2009, demonstrates convincingly that the rights of the poor and vulnerable would be measurably improved by adopting a charter. That is the simple reason why the Doc, at his height of his powers, wanted Australia to adopt a Bill of Rights, and it remains the overwhelming reason why those who truly wish to benefit the working class should insist on its adoption as a means of preventing the kind of "injustice within the law" exemplified by the case of the Dorsetshire labourers.

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## Original foreword

The Martyrs of Tolpuddle speak across the years of the price by which alone justice can be set up on the earth. They accomplished little or nothing in their day, but they take an honourable place in the long story of man's struggle against the fear and greed of those who entrench themselves behind the privileges that property and class bestow upon the favoured minority.

Mr Justice Evatt has done a service not only to legal but to social history by telling the story again with clarity and careful documentation. It is not a pleasant story. The legal, political, and clerical professions combined to do a cruel injustice. The voices raised in protest were quite ineffectual at the time, which shows that public opinion was as yet insensitive to the fate of England's worst paid labourers.

It is no doubt true that the great artist can never adequately express himself. The material medium which he must employ is in a lower order of being and, therefore, forever incapable of expressing what he sees and hears. So also religion seeks to express itself in the historic churches. But churches are always inadequate and quickly become institutions interested in a theology that stabilises social conventions, institutions which are only occasionally disturbed by the spirit of religion. So also courts of law are the instruments by which the dominant opinion finds momentary legal expression. Justice struggles to get in a word and is more or less successful according to the depth and the kind of human passions which are stirred at the particular moment.

Neither churches nor courts rise much above the prevailing opinion of the time, and that is why the spirit of truth and justice must whisper in the ear of individuals who will listen and respond and suffer, if need be, till the consciences of the majority begin to awaken. These social and moral pioneers are the one ground of hope that man may yet become civilised.

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