I Introduction

Peter Townsend came to human rights as a term late in his career but its spirit had been with him from the start. As early as 1958, in his contribution to the well-known *Conviction* volume, Peter was writing like a human rights activist:

If that overdone phrase ‘a classless society’ means anything it is a society where differences in reward are much narrower than in Britain today and where people of different backgrounds and accomplishment can mix easily and without guilt; but also a society where a respect for people is valued most of all, for that brings a real equality (Townsend, 1958: 93, 120).

With his wife Jean Corston as chair of the newly established Joint Committee on Human Rights, there was no shortage of energetic human rights support in the Townsend household in the first decade of the 21st century. Here was an ideal way for Peter to carry on his battles against poverty at a time when the traditional socialist ethic seemed so much in eclipse and when (as a result of such decline) progressive language of any sort was very hard to find. His support for me as the incoming Director of LSE’s Centre for the Study of Human Rights was immense: helping me navigate the perils of a new university environment on my arrival in 2002; securing Mary Robinson to give the lecture to launch my directorship (and packing out the Peacock theatre as a result); chairing the centre’s advisory board for the first five years of my tenure as director; throwing himself into all our activities (I particularly remember him holding forth as Mahatma Gandhi in front of 450 enthralled students to win a Centre debate over who was the greatest human rights person of the 20th century – beating
Eleanor Roosevelt, Nelson Mandela and many other distinguished activist icons in the process); and teaching a hugely popular course on children’s rights which drew admiring attendees from across LSE’s entire spectrum of postgraduate students. One meeting among many stands out: early in my tenure and at the height of New Labour’s popularity, I brought a colleague from my barristers’ chambers (and LSE governor) Cherie Booth together with Peter to talk about poverty and how to reduce it: for two engrossing hours in my office Peter sought to persuade her that government could do more, and Cherie tried as best she could to explain why what her husband Tony Blair had already done – slight though it seemed to Peter – was revolutionary by the standards of the international political culture in which as Britain’s prime minister he was then moving.

In this chapter I want to explore a position that Peter Townsend unequivocally adopted, but I acknowledge immediately that it is a hard one to maintain and also that few non-lawyers (much less lawyers) have argued for it.: can we be strongly in favour of human rights but at the same time be firmly against the lawyers’ exclusive appropriation of the term? It is a difficult stance because human rights has been so indelibly associated with the legal profession from the moment of its re-emergence in 1948 (with the Universal Declaration of Human Rights) and particularly since 1989 when the collapse of the Berlin Wall brought down not just Soviet communism for ever but (let’s face it) old style democratic socialism as well, for a generation (or two) at least. The core of human rights was to Peter to be found not in the courtroom but on the streets, in the souls of the activists and campaigners who were seeking by their human-rights-inspired actions to change society for the better. But how can we resist the lawyers plundering of human rights, their transformation of it from a source of emancipatory power into an arid mechanism for the resolution of disputes? Not only are they powerful but they are also well-resourced, have a straightforward story to tell (forget the tedium of politics and persuasion; we can deliver individual rights by court order!), and are usually (this type of lawyer anyway) well-meaning. The law is now so deeply-entrenched in the field of civil and political rights that the once eccentric American system of judicial oversight of legislation is
these days regarded as practically the democratic norm rather than the tool of reaction it so obviously was to people of Peter Townsend’s generation (Griffith, 1997). With their control of political rights secure, the lawyers are now moving onwards and upwards towards their next goal, the legalisation of social rights. The momentum towards transforming social rights from a political idea into a series of individual rights that fall to be enforced by the courts is very strong. A feature of the collapse in radical political confidence in recent times has been this dash to the law as a panacea for ills thought to be both deep and (nowadays) unreachable by political action. This counsel of despair must be resisted: lawyers are never the answer to any serious question about social policy that any progressively-minded person might ever care to ask.

In the spirit of Peter Townsend, and following in his footsteps, I will argue three propositions in this short essay. The first assertion is that the idea of human rights in general (and social rights in particular) is valuable, that such entitlements deserve not just our protection but also to be respected and promoted. Peter was right that the Left needs to embrace human rights even if (as I argue below) it involves taking a cleaver to some sacred Marxist preconceptions. My second point is that the value of this notion of social rights lies principally in the political arena, this being the world in which the good that these words do can be best concretised or (to use a more bucolic image) most fruitfully deployed. Nowhere is this more true than in relation to poverty-reduction, the focus of Peter Townsend’s work over so many generations. Third, and following directly from this second assertion, and occupying most of what follows, I argue that the least effective way of securing social rights is via an over-concentration on the legal process, with the constitutionalisation of such rights being an especial disaster wherever it occurs.

II Why Care?

Social rights are primarily about everyone having the right to a chance to thrive in life, to have sufficient resources, education and leisure time to live a fulfilled life. A prior question presents itself,
frequently skirted around, skated over or ignored altogether: why does it matter that so many are currently lost to the world on account of their impoverishment, either because they die unnaturally young or lead lives of unyielding grimness? Why should we not think of this as simply the (bad) luck of the species birth-lottery? In times past it was easy to grasp why we both cared for others and ought to care for them: it was God’s direction. This was whether or not we rooted our faith in Christianity, in Islam or in one or other of the great religions of the world. At least since Marx however, secular society has had the greatest of difficulty with absolutes of any sort, a scepticism that has extended to a reluctance to explore any of the supposed ethical foundations that might lie at its core. The inclination to feel for others, to care about their situation and to act to improve their lot has somehow survived the decline of religion in such cultures, but is this just the death rattle of organised religion, likely to wither away completely as the memory of what faith-based moral duties necessitated is gradually forgotten? If it is human rights will die with it.

It is important to the future health of rights-based activism that something deeper than this is going on, reflecting at a fundamental level a part of what is entailed in our being human, of which religion is not the source but merely just a possible (albeit for a time hegemonic) reflection. Human rights need foundations deeper than the latest social practice. After decades in the doldrums, when all was thought to be constructed and the human mind a mere creature of the social forces into which the body containing it was born, the power of this kind of intuitive thinking has been making something of a comeback (Ridley, 1996). Its attraction lies in its link to human nature, that we think certain things because of what we are, not how we have been composed. Foreign though it is to so much social sciences teaching over so many years, this can be made into an attractive ally of the caring characteristic which when it is then linked to entitlement produces the underlying explanation of human rights: that many of us want to care for others, feel compelled to do so in a way that seems to flow not from any conscious decision but simply from how we are, and (taking this insight further) that we claim on behalf of those who are the subjects of our sympathy (including the billions
whom we do not know) a right to its receipt, together with the actions that flow from recognition of it.

If we think of ourselves not as members of a special species but as each of us composed of a bundle of genes on the look-out for survival, then it by no means follows that in this field we have to commit ourselves to the rather loaded idea of the ‘selfish gene’ – there are many routes to survival and not all of them are marked ‘me alone’. The way we are is not all self-oriented: as Adam Smith put it in 1759, ‘How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it’ (Smith, 1761). What Darwin allows us to do is locate an insight of this sort within science and then to see it as part of an animal (rather than uniquely human) approach to living. Far from being something spilt into us at birth from which we then learn how to behave, ‘the building blocks of morality’ are as the great primatologist Frans de Waal put it in his Tanner lectures, ‘evolutionarily ancient’ (de Waal, 2006: 7). The intuition to help others that is the product of this evolutionary dynamic, and its offshoot into a more general empathy and outreach to the other that de Waal describes in his lectures, is clearly close to the desire to achieve the kind of flourishing towards the other at which contemporary human rights practice is aimed. Of course not all of us care all the time or even (some of us) at all: there are very nasty competing instincts out there as well (tribal solidarity; hostility to the stranger; fear of the different) and these always threaten and often manage to swamp the better side of our nature, both individually and collectively.

An achievement of culture has been to erect obstacles to the success of these contrarian impulses. Since we first began to think about more than merely the next meal, our species has been good at erecting barriers to what it has been quick to see as ‘bad’ behaviour. Law, custom, and religion have all played a part in this. In our contemporary culture, human rights is one of the best of these, an effective ‘commitment gadget’ (Boyer, 2001: 211) available to those whose life project
or immediate ethical task is the generalisation of the propensity to help the other into something beyond kin, beyond immediate community, beyond nation even, into the world at large. It is the habit of mind that flows from the far-seeing activist’s capacity to grasp that in our shrunken world we are all affected by actions in a way that requires us all to be seen: the island people whose homes are destroyed by an inundation precipitated by first world greed and recklessness are the contemporary equivalent of the newly arrived neighbour whom some grunting but imaginatively-wired pre-linguistic human types thought it better to befriend and help rather than to kill. The term human rights works so well to capture this feeling because it is multi-purpose: seeming to make sense at the level of philosophy (‘here is why you ought to help the stranger’), in the realm of politics (‘they have a human right to this or a human right to that — therefore arrangements must be made for them to get it’), and in the sphere of law (‘the right is set out in the Charter or the covenant or in the constitution that our forefathers created to keep us in check’).

III How should we care?

The primary way of embedding human rights properly (and social rights particularly) in any given culture, of making this commitment check work, should be via the political process. The tension between acceptance of the necessity of political work and a hankering after the quick-fix of a judicial Deus ex machina is a feature of human rights generally but has become especially evident in the field of social rights, where outcomes have proved stubbornly difficult to achieve in the political domain. The preoccupation with judicial solutions is not just a matter of the activists’ impatience with politics; it is a consequence as well of both the culture in which human rights work is immersed. As I earlier briefly noted, immediately from its re-emergence at the end of the Second World War, the field of human rights has been one which has been very much the preserve of lawyers. This has been entirely understandable, given that the main way in which the subject has expressed itself has been via international, regional and domestic documents which have of necessity required the sort
of expert textual elucidation (frequently in the context of litigation) at which lawyers naturally excel. The UN human rights industry (using that term in a consciously non-disparaging sense) has been peopled by lawyers: they have been prominent in the oversight committees, served as special rapporteurs and been natural choices as independent experts. Of course this has been a great credit to the legal profession, proudly sending its secular missionaries into the world to do important ethical work. But these excellent people have taken with them into the field a partiality for the judicial process which is so deeply embedded within them that they think it to be a reflection of the natural order of things and not a (mere) consequence of how they themselves have been educated, and their subsequent lived experience. And for most lawyers, standards are not truly real unless their existence can be confirmed in legal proceedings before an independent and impartial tribunal. So the momentum in our subject has been away from the kind of political engagement that might deliver on the promise of the Universal Declaration and the subsequent covenants (on civil and political and economic, social and cultural rights respectively) and towards the idea that basic human rights are best protected by allowing individuals to hold their governments to account in judicial and/or quasi-judicial fora.

Peter Townsend knew very well the value of giving human rights a wider remit than this, as his framing of the issue of poverty in rights terms demonstrated so clearly (Townsend and Gordon, 2002; Gordon, Nandy, Pantazis, Pemberton and Townsend, 2003). The way the term has been used to underpin action against poverty is a very good example of the energy outside the law that is to be found in this very contemporary way of doing human rights. The UK’s Joint Committee on Human Rights has remarked that ‘[p]overty and inequality are the central concerns of economic, social and cultural rights’ (Joint Committee on Human Rights, 2004: para 102), observing that ‘a rights-based approach’ is clearly of assistance to ‘government in addressing poverty, and Parliament and civil society in scrutinising its success in doing so’ (ibid: 106). To the leading charity Oxfam, another advantage is that a ‘rights-based approach requires’ not only ‘a system of policy-making that is
accountable in law and open to scrutiny’ but a way of securing this that involves ‘the active participation of those living within the jurisdiction, especially those living on the margins, whether citizens or otherwise’ (ibid: 119ev para 3). The experience of Oxfam is ‘that the realisation of economic, social and cultural rights can most effectively be achieved with the active participation of those affected’(ibid: 122ev para 18). The range of civil society groups and local communities that reach for the language of human rights to articulate this need for action and to express the solidarity that flows from collective engagement in tackling poverty is impressive and (though obviously each individually is very local) truly international in its reach. Good examples can be pointed to in Wales (the Gellideg Foundation Project) (ibid: 125ev para 42-45), in Brazil (the shadow reporting on international social rights obligations in place since the early part of the last decade (Donald and Mottershaw, 2009: 25)) and the Poor People’s Economic Human Rights Campaign in the US (ibid: 15-16). There are many others (ibid) – what unites them is not the language of international human rights law (sometimes they do not even locate their work in this terminology at all) but rather their use of human rights as an idea, a way of asserting dignity, respect for themselves and an insistence that they too (despite their disadvantage and often their misfortune) deserve to be treated properly.

This is exactly how Peter Townsend used the term, and how best it can be deployed to achieve socially valuable outcomes. A common commitment to human rights can enable the building of alliances that would be impossible without the sharing of a common vision that this term makes possible. What other language could, in the name of the moral imperative of poverty reduction, bring together figures from within civil society, government, trade unions, the poor themselves, and even the Pope (whose position on social rights is entirely progressive, even mainstream) (Benedict XVI, 2009: para 27)? Human rights are authentic when they reflect the values and principles that are rooted in the instinct to help, the perceived obligation to care for the stranger that has been part of our species-behaviour since the dawn of human time. The term is an open-textured one, its content changes over time as new ways of expressing basic values come to
the fore, assuming a human rights shape in order both to capture the essence of what the right is about and at the same time to push for its further realisation in the culture in which the argument for it is being made. All of this is particularly true of social rights because it is the social that is now at the frontier of rights-talk. In contrast to the now well-established and strongly embedded frameworks of civil and political rights, it is the porousness of the boundaries of social rights that are their main strength. The basic rights in the International Covenant on Economic, Social and Cultural Rights are there for all to see, but both what they entail in concrete terms and also the extent to which they are supported, complemented and supplemented remain open to discussion, debate and further action, at whatever level it might happen to be, the international, the regional, the state or even the purely local. The rights can also be added too as new challenges get successfully framed in the language of rights, on disability for example, or the rights of indigenous peoples. Viewed in this way, the framing, detailing and embedding of social rights are quintessential political activities.

Of course politics cannot be guaranteed to deliver the outcomes one desires. There are many examples of how imperfect is the political support afforded social rights: oversight bodies are overworked; vital resources are not forthcoming; new rights take an unconscionably long time to assert themselves, both as facts on paper and then (even more difficult) as realities on the ground. The tension in the mind of human rights protagonists between the certainty of the goal and the radical uncertainty of the political process designed to bring it about has produced a failure of nerve so far as the development of a mature politics of human rights has been concerned. It has been difficult for those who truly care about social rights to avoid being tempted into the belief that rendering their field subject to judicial enforcement will be the ideal way of avoiding the pitfalls of the political while securing all the benefits that ordinarily flow from success in such a process. This explains the momentum towards the judicial enforcement of social rights which has been such a feature of the post 1989 climate, at all levels of governance and to which we have earlier referred.
But what is so wrong with that, it might be reasonably asked. Why not have both the politics and the law, operating in tandem?

**IV How Can We Tame The Lawyers?**

The word is tame, not destroy. Clearly there is a role for the law in delivering social rights, just as there is in every field in all democratic polities. But it should never go so far as embedding in the constitution legally enforceable social rights of a general nature with the capacity to override statute law. The Joint Committee on Human Rights has elaborated on what it has called the three ‘most common objections’ to such an approach. First it observed that the rights themselves would be ‘too vaguely expressed’, and would ‘only raise expectations and encourage time-consuming and expensive litigation against public bodies’ (Joint Committee of Human Rights, 2008: paras 183-84). Second, the move ‘hands too much power to the courts and so is undemocratic’ (ibid: paras 185-87). Third, such an adjudicative power would involve ‘the courts in making decisions about resources and priority setting that they are ill-equipped to take’ (ibid: paras 188-191). Several additional points of objection can be added to these. There is, fourthly, the strong emphasis on the individual that is inherent in the whole idea of justiciability, with its inevitable focus on particular claimants at the expense of the wider public interest. This might be laudable in the arena of traditional litigation where two parties jostle to secure a reading of a specific law (or prior agreement) in their favour, but it fits less well when such proceedings are being regarded by one of the parties as a device through which to smuggle into court the interests of thousands of invisible claimants, however meritorious the moral arguments being made via their representative litigant might be. Judges are suspicious of ‘test cases,’ not necessarily because they are opposed to the outcome that the litigant before them is pursuing on behalf of others so much as on account of the self-evident lack of fit between the narrow realm of such litigation and the broader issues that are being asked covertly to deal with in such proceedings.
This mismatch is compounded, fifthly, by the inappropriateness of the adversarial model to the resolution of broadly-framed issues of social rights going beyond the litigant before the court. Courts are not suitable places to receive, much less assess, the kind of empirical data and guesses about future trends that should underpin all social policy (including on the provision of social rights). This is more than a reservation based on lack of equipment for the job (the Joint Committee’s third objection, above) so much as it is an observation on the incompetence of the judicial forum however seemingly well-provided for the decision it might appear to be: the point is that it is not the right site to decide these things and the more you fiddle with its procedures to make it the right place (special briefs on socio-economic data and the like; advice from NGOs; expert evidence on the wider social impact of a proposed ruling, and so on), the more any such tribunal looks increasingly like an executive officer, but without the usual democratic necessities of electoral legitimacy and public accountability. And without a proper enforcement arm as well, a sixth objection to assigning the development of social rights to the judicial branch emerges. Who is to follow-up the court’s decision to see that it has been effectively implemented? What happens when unexpected glitches in effecting a court’s orders are encountered? Supposing the court’s guesses about the cost of its intervention prove to be wrong, how are the new financial implications to be properly taken into account? As with the fourth and fifth objections detailed above, the answer to this has often been thought to be to switch the emphasis to ways in which the court process can be made better, more accommodating to the tasks it is now being asked to do, but once again this is to distort the court’s mission and drive it away from its core function.

A seventh objection is broader in nature. Even if the court process was sympathetic and able effectively to deliver social rights from time to time, it is still an avenue down which activists for social rights should not willingly go, however tempting it might seem when contrasted with the long and slow political slog that often seems the only democratic alternative. We are back with the seductive appeal of law as a speedy deliverer of solutions to problems that appear otherwise to be
intractable. But changing the focus to law in this way does not come without cost. Even the most enthusiastically backed of human rights campaigns has only a finite amount of energy, and switching emphasis to the courts uses up organisational time, money and campaigner zeal, strengths that might have been better servants to the shared ideal if they had remained where they were, fighting the good fight in the legislature, in civil society, and if necessary on the streets. Of course the two are not binary opposites in the way that it might be thought is being suggested here – but what is undeniable is that a twin-track approach (law and political activism) is one that is very difficult even for well-resourced groups to keep evenly balanced on the campaigning road. With its court-room drama, its arguments and its inevitable individualisation of the issues to hand, above all with its prospect of a clean victory in a campaign that seems otherwise so bogged down in realpolitik, the lawyers have a tendency to shove all other travellers off to the side of the road.

And eighthly, there is a possibility which is very familiar to old socialists but which has faded out of the limelight somewhat since the collapse of Marxist confidence in the aftermath of the cold war: beware of empowering judges lest you give them an aggressive tool with which to hinder (rather than to facilitate) progress. Here social rights come up full-square against the uncomfortable fact that to be fully realised, their proponents may well have to take on established interests whose power and determination to hold on to privilege is certain to make them dangerous enemies. The achievement of the kind of equal society in which social rights do truly allow all to flourish will not be cost-free, in financial or in political terms. The changes that most societies in the world would need to effect the radical transformation required to move to a situation in which all those within their borders truly enjoyed their social rights would be great indeed. Taxes would need to be raised, restrictions on individual freedom introduced, bureaucracies empowered. The legal obstacle that would be likely to arise would have two aspects. First there would be the way in which civil and political rights-holders would be able to deploy these rights in order to hinder progress and thereby to preserve their privilege. Under the cover of political speech, expensive campaigns against the
‘erosion of individual freedom’ would be mounted and these would be certain to enjoy some traction with a general public which would be at this point by definition schooled in the importance of human rights. Similarly popular would be invocations of the right to property and of the urgent need for ‘fair procedures’ in the face of executive action that would be vulnerable to being credibly attacked as too speedy and disrespectful of existing interests. Advocates of legalised social rights could hardly disparage the use in the courts of civil and political rights, even if the main intention was the block progress. The results would be quickly plain for all to see: slums would be cleared more slowly; unnecessarily large compensation would be paid to property owners, thereby reducing the pot available to the poor; taxes would produce less revenue than if the right to property (eg extending to inheritance for example) did not exist.

The second way in which entrenching social rights within the legal system supports this eighth objection to justiciable rights lies in the nature of social rights themselves, and in particular in the effects that flow from the focus on the individual that is (as we have argued) inevitably entailed in such a move. We are not concerned here with the abstract effects of this individualisation, something which has already been covered above (the fourth in this litany of anxieties). Rather it is with what the powerful can do by way of assertion of their own social rights as an indirect means of resisting the social rights of others. Two well-known examples of this come to mind. Many states wrestle with the problem of privately-funded education as a barrier to the achievement of a truly equal society, one in which social rights are available to all. This is because of the disproportionate hold the ‘alumni’ of such elite environments have on the society in which they are to be found. The United Kingdom is an outstanding example of this (Milburn, 2009), and yet because of the existence of the (social) right to education that happens to appear in a protocol to the otherwise civil and political European Convention on Human Rights, anyone seeking genuine reform finds an unnecessary roadblock strewn in their way in the form of a parental entitlemente to an education of their choice. Of course a reformer could and indeed should make strong arguments the other way,
but the point is that in doing so he or she is having to pit a known individual’s freedom against the merely hypothetical social rights that unknown numbers of currently deprived children would (it has to be argued) enjoy in the future if the freedom of an actual, knowable set of children is limited now. The masses of pupils who are potential beneficiaries of the change are, despite their likely numbers, less visible as individuals than the named boys and girls who are being made to suffer now.

As was the case with the civil and political rights obstacles just discussed, reformers coming from outside the rights tradition would have no difficulty with this – of course the known few must suffer for the future unknown many, and the fact that there is a withdrawal of the privileges of the minority now so as to assist in their future flourishing is of the essence of policy-making: this is exactly what planners ought to be doing. Even the most far-sighted and broadminded of those who embrace the language of human rights have difficulty with this; they are uneasy at such utilitarian calculations. And human rights proponents of a more traditional, individualist bent are all the more concerned. Where they happen to be judges, schooled in the application of justice not by reference to broad societal goals but in accord with what precisely configured individual cases before them appear to require by reference of legally enforceable human rights law, then the objections become all the greater. This is why the courts (to mention albeit more briefly our second example) have historically had such difficulty in so many jurisdictions with the concept of affirmative action, not so much with the partisanship shown to those in groups whom the state desires to support so much as with the consequent disfavouring of certain individuals, not for any reason related to themselves but solely on account of their membership of an abstract category of person who is being ruled out a priori: he is a man when a woman is required, a white applicant where some other ethnic identity is being insisted upon, a person without disabilities when the job is required to go to one with such disadvantages, and so on. On whose side in such difficult matters of judgment lies the language of human rights? In the political environment it is possible to look to the future and defend the
imposition of short-term injustice. But if the judges are given a front row seat in the management of these difficult issues, the outcome is likely to be very different.

V Conclusion

What progress there has been in Britain in the alleviation of poverty and the delivery of social rights generally has been achieved by political action, by legislation forced upon our rulers by determined and brilliantly dogged egalitarians like Peter Townsend. This includes the successful establishment of the national health service, the delivery of free education for all, and the guarantor of legal aid for those too poor to pay for such support themselves. But just to identify the gains is to remind oneself of the losses, of how each of these successes has been undermined by the recent antagonism of successive governments. Politics is inevitably a slow business, often poisoned by the influence of money and with seemingly endless setbacks along the way, various pitfalls that seem always to need to be negotiated and concessions made – all of this tries the patience of rights activists and drives many of them into the courtroom in search of a speedy dash to absolute victory. But the central argument of this essay has been that such tempting short-cuts are in truth cul-de-sacs, and that there is no alternative to careful navigation of the traditional route, one that when it is successfully negotiated and the finish line reached has carried all its passengers with it to a destination that is both new and real, and where everybody now agrees it is right to be. Peter Townsend understood this very well: freed from the constraints of law, human rights work has the potential to be the single most important contributor to social justice and to equality in the decades to come. But first it must consolidate its intellectual foundations, celebrate the potential of politics and be perpetually wary of their noisy friends in horsehair.


