

TRACK NINE: RESISTING LAW'S EMPIRE

In this track I explore a position that few non-lawyers (much less lawyers!) ever argue for: that it is possible to be strongly *in favour* of human rights while at the same time being firmly *against* the lawyers' appropriation of the term.

I have a book coming out with Virginia Mantouvalou with Hart Publishing, either this week or next, [Debating Social Rights](#) in which Virginia and I argue the pros and cons of the judicial enforcement of social rights. I am getting my critical comments in here early so if you want balance I'll need to ask you to get the book and read Virginia's bit – that is unless what I am about to say stimulates her to contribute to this web site (which I hope will be the case!).

A SUMMARY OF MY POSITION

- The idea of human rights is a valuable one that deserves nurturing and protection. It should not be written off by the Left or by any progressively-inclined thinker: I have already covered this ground in earlier essays, on [track three](#) and [track four](#) so won't talk about it so much here.
- The value of human rights lies principally in the political arena – again I have already dealt with this here, in [track one](#) so will also leave it aside for now.
- (this is what I DO want to talk about here) The least effective way of securing rights generally, and social rights particularly, is via an over-concentration on the legal process, letting lawyers do all the work for you via litigation and legal agitation.

Heresy for lawyers perhaps but do I have a point?

TAME, NOT DESTROY

For sure there is a role for law in the enforcement of social rights. Politics produces laws which the courts must then interpret and explain.

I am not against that.

What I am against is enacting vague and woolly laws which you call human rights laws and which you then hand over responsibility for to the judges. Since I am concerned mainly with social rights here (and in the book) I should explain what I mean by this term. Rights like:

- The right to health
- The right to work
- The right to social assistance
- The right to a home

Let me be clear: I am in favour of all these rights – it is just that I do not think the way to get them is to turn them into ‘constitutional rights’ and hand their enforcement over to the judges and the lawyers.

Here are some excellent objections to such a course, not from me but from the UK’s august [Joint Committee on Human Rights](#):

- The rights themselves would be ‘too vaguely expressed’, and would ‘only raise expectations and encourage time-consuming and expensive litigation against public bodies’
- The move ‘hands too much power to the courts and so is undemocratic’
- Such an adjudicative power would involve ‘the courts in making decisions about resources and priority setting that they are ill-equipped to take’

SEVERAL FURTHER OBJECTIONS!

And I would add:

- The strong emphasis on the individual that is inherent in the whole idea of litigation runs counter to the kind of collective work we all need to do to achieve social rights. It is not individual wins we are after but community victories.
- The way cases get resolved, which is hugely adversarial, does not fit with the kind of work that a society needs to do to achieve social rights for all. Courts are no good at processing empirical data and guessing about future trends – yet these are exactly the kinds of things that should underpin all social policy (including on the provision of social rights).
- Even if courts were the right places to protect social rights, who would follow-up their decisions to see that they had 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?
- Even if it is successful now and again, fighting for individual justice in specific cases uses up too much of an NGOs organisational time, its money and its campaigner zeal. The fight is better fought in the legislature, in civil society, and if necessary on the streets.

AN OLD CLICHE HELPS MAKES ANOTHER POINT FOR ME

[What is sauce for the goose is sauce for the gander.](#)

What is to stop the rich and powerful, the beneficiaries of our unequal society using their social rights (to a private education? To private health care? To [property](#)?) to resist change which may hurt them a bit but which is for the better of society overall? After all, 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. What kind of changes would most societies in the world have to make if they really truly wanted good social rights for all? The answer is obvious - the changes would have to be radical

indeed. Taxes would need to be raised, restrictions on individual freedom introduced, bureaucracies empowered.

A topical example comes 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 as Alan Milburn's report [Unleashing Aspiration](#) made so depressingly clear. 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 entitlement 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.

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
- 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.

But judges and lawyers just don't think like this. They are trained in individual facts not imagined futures.

SUPPORTING POLITICS

What progress there has been in Britain in the delivery of social rights generally has been achieved by political action, by legislation forced upon our rulers by determined and brilliantly dogged egalitarians. This includes:

- the successful establishment of the national health service
- the delivery of free education for all
- 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, particularly the current coalition: see my sidetracks on [higher education](#) and [legal aid](#).

Of course 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.

The central argument of this track is that such tempting short-cuts are in truth cul-de-sacs.

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.

AND A FINAL THOUGHT

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.