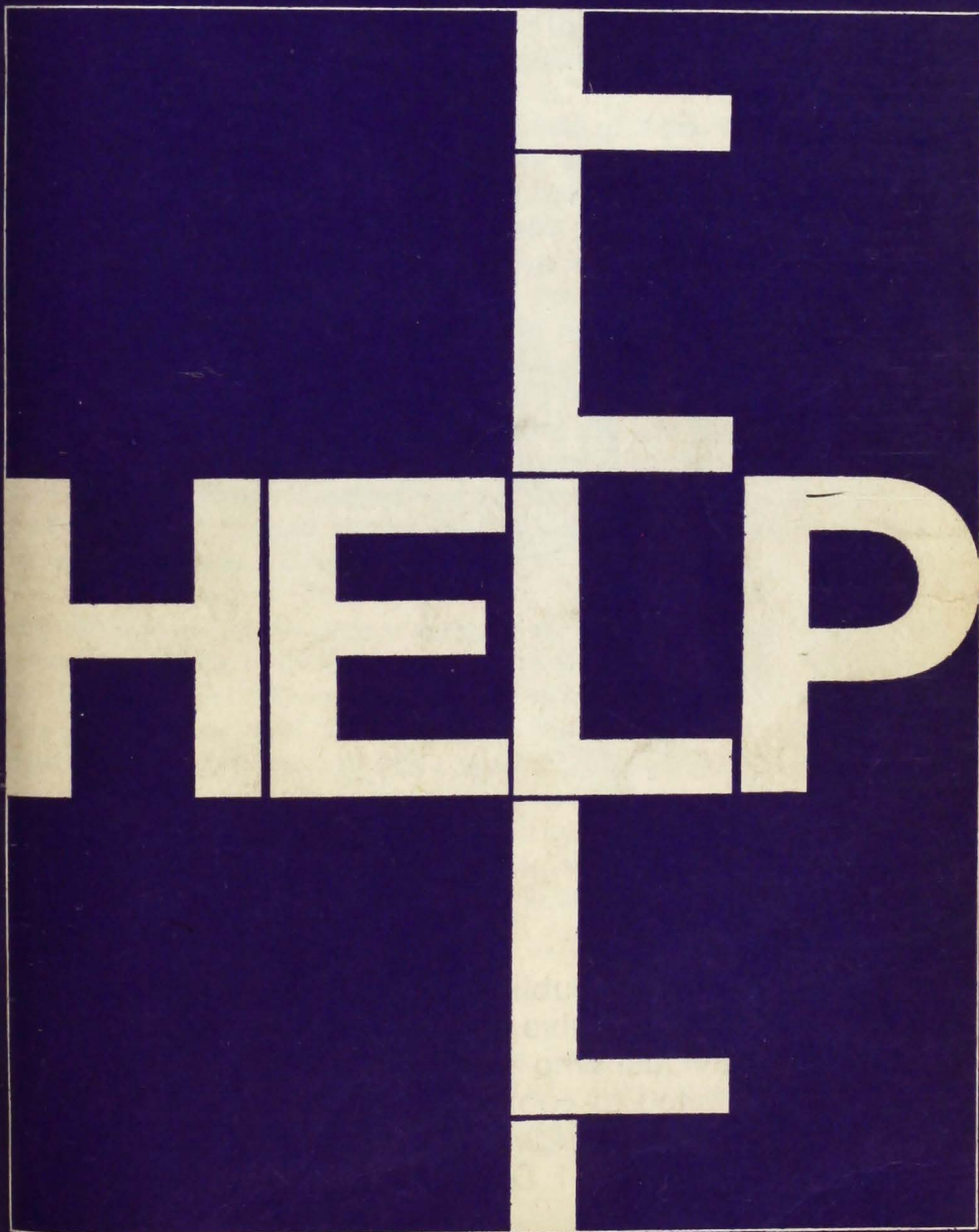


welfare rights

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Tony Lynes
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welfare rights

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1. introduction of rights

The traditional approach to the problems of poverty is to ask, first, what are the needs of the poor and, secondly, how can those needs best be met. Whether the argument is conducted in terms of the relief or the prevention of poverty, it is essentially paternalistic, concerned above all with what, if anything, should be done for the poor. Recently, however the emphasis has shifted. Disadvantaged groups are seen as potentially able to bring about improvements in their own situation, either by direct action or by pressure on government, both central and local.

So far, there has been a good deal of talk, most of it somewhat theoretical, about community action. The achievements, with a few exceptions, have been more limited. This is not surprising. The poor, as such, are in a weak bargaining position. The circumstances which make them poor also tend to make them powerless. Short of violent protest, just how are the homeless and the slum-dwellers, the disabled and the fatherless, to become a force on their own behalf? Even the low-paid worker is relatively powerless, his industrial situation generally not lending itself to effective organisation—and the record of the trade unions as advocates for their lower paid members has not been particularly inspiring, though the recent pressure for a minimum wage may mark the beginning of a new phase. Without reverting to the old paternalism, it is time to recognise that progress towards social justice can legitimately come through the efforts of middle-class professionals, as well as those of the poor themselves. "Participation" is a fine slogan, but lack of participation is no excuse for inaction.

One of the more hopeful signs of change is the growing tendency to see poverty in terms of the denial of rights. The purpose of this pamphlet is to draw attention to *the potentialities of this emphasis on rights as a strategy of social change, but also to point out some of its limitations. One might perhaps describe it as the new Fabianism, in that it seems to offer a means of achieving gradual progress without upsetting the basic value assumptions of our society. The prospects of transforming society's values and priorities into something nearer to a socialist ideal seem to get if anything more distant. Yet, at the same time, it becomes increasingly clear that considerable change in the right direction is possible within the existing scale of values and priorities.

the achievement of rights

There are all sorts of inequalities in our society which are extremely resistant to normal social and political pressures: wage and salary differentials and social class differences in educational opportunity are obvious and crucial examples. Hardly anybody really believes that the labourer ought to be paid as much as the foreman, or the miner more than the managing director—so those who do believe it are in for a fight that will be long or bloody or both before any substantial change

* occurs in the present pattern of rewards. But there are other kinds of inequality which seem easier to reduce, if not eliminate, because they do not represent a situation which most people believe to be right. On the contrary, once they are aware of the facts, most people can see at once that change is needed, not to overturn accepted values but, on the contrary, to preserve them. The inequalities to which I refer represent the gap between the rights that people have on paper or in popular belief and what they are able to achieve in practice.

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This pamphlet, like all publications of the Fabian Society, is intended to be a contribution to the achievement of rights, which are extremely necessary to all sorts of progress in our society, which are extremely necessary to social and political progress: wage and salary differentials and social class differences in educational opportunity are obvious and crucial examples. Hardly anybody really believes that the labourer ought to be paid as much as the foreman, or the minor more than the managing director—in those who do believe it are in a fight that will be long or bloody or both before any substantial change

2. recognition of rights

The American civil rights movement provided the first dramatic illustration of this strategy. The rights it demanded were not new. It sought the full implementation of rights which already existed, which most white Americans already enjoyed, and which were enshrined in the American constitution. For the first time, black Americans began to take white American society at its face value. The civil rights movement did not achieve all its goals. It under-estimated the economic forces ranged against it. But it did undeniably achieve a great deal. Above all, it established a broad based alliance of liberal opinion in favour of radical and relatively rapid reform. The fact that the reforms have turned out to be neither radical enough nor rapid enough does not detract from their importance as an example of what can be done by insisting on rights being made real. "Give us what you admit we are entitled to" is a demand that is not easily resisted.

Legal services for the poor are another example of the strategy of rights; rights which, in this case, do not yet exist in law, but which do exist in public opinion. There can be little doubt that the growing awareness of the inadequacy of the legal services at present available to—or, at any rate, used by—most working class people in Britain will lead to reform of some kind within the next few years. The right to equal protection by (or from) the law, regardless of income or rank, is accepted without question. When sceptical lawyers like Michael Zander demonstrate that this right, which we have all taken for granted, exists only on paper, nobody argues about whether something should be done. If anything, reform seems likely to be delayed by an excess of proposals rather than by lack of them.

These are cases where rights are clearly recognised and generally accepted though not fully implemented. But there is another, much more problematic, area of rights to which the underprivileged, or others on their behalf, are increasingly laying claim. A distinction must be drawn between rights that people have although they are poor—rights to equal treatment with the better-off members of the community—and rights which people have because they are poor. Again we can best illustrate the point by turning to American experience. The civil rights movement, concerned with the achievement by a minority of rights which the majority already enjoyed, inspired the creation of another movement—the welfare rights movement—concerned with rights of a different kind. Across the nation, groups of public assistance recipients, mostly negro mothers unmarried or separated from their husbands, began to demand their "rights" from the local welfare department. Public assistance at certain prescribed standards, they argued, was the right of poor people. They were poor; therefore, this right must be accorded to them. This was not mere oratory. One of the most remarkable phenomena of the US war on poverty has been the role that lawyers have played in spelling out the right to assistance in precise legal terms, insisting on the publication of local administrative rules and fighting unjust practices through the legal process right up to the Supreme Court. At the

grassroots level, the lists of items of clothing and household goods drawn up by the welfare departments as a guide to the standard of material equipment needed by a family have been seized upon by groups of welfare recipients and used in a systematic campaign to extort the last penny from the system by way of special grants for everything from beds to potato-mashers.

The reaction to the welfare rights movement, both among administrators and the public at large, has been less than enthusiastic. After all, what business have these people, whose very existence is a burden on society and whose way of life is clearly immoral, to be demanding their rights? If the rest of us, the decent, hard-working, clean-living majority, are charitable enough to dole out money to these people, should they not be satisfied and grateful for what they get? For, whatever the lawyers might say, public assistance had never been intended as a right—not at least in the sense in which the welfare rights movement was interpreting it. Of course people had a right to be saved from starvation by the application of public funds, though even this right could in practice be limited by what a particular local authority could afford. But to take a list of requirements drawn up for the guidance of social workers in assessing need, and to attempt to translate it, item by item, into a code of legal rights—this was a grotesque perversion of what its authors had intended. To publish such a list, intended solely for the use of the givers of welfare, and to distribute it wholesale to the receivers of welfare urging them to claim their rights, was to display a fundamental misunderstanding of what the system was about.

The objections to the welfare rights approach did not come only from reactionary administrators and outraged citizens. Many sympathetic and liberal-minded people were deeply worried by developments which, they rightly foresaw, must produce a backlash. If the objective was a more humane welfare system, they argued, the way to achieve it was by making the system more responsive to individual circumstances, by introducing social work skills, and by improving the relationship between the givers and receivers of welfare. The welfare rights movement was doing precisely the opposite: insisting on the legalistic application of regulations and driving the welfare officials into a defensive posture by the threat of legal action if the most trivial rights of welfare recipients were not granted in full on demand. This approach could and did produce short-term results in the form of valuable extra grants for the minority of recipients organised in the local groups—especially in New York. What it could not do was to mobilize a current of public opinion in favour of unsupported mothers on public assistance. It could not do this because the rights on which the movement was based were not generally recognised as such and depended for their validity on the perverse insistence of welfare lawyers that what had been intended as a system of public charity should be administered according to the letter of the law in total defiance of its spirit.

3. supplementary benefits

Much the same situation is beginning to develop in Britain. Supplementary benefits, unlike the old national assistance, are a right. The Act says so. But there is a wide gap between the wording of the Act and the spirit in which it is administered. And that gap has very little to do with the viciousness of officials, most of whom are neither more nor less vicious than the rest of us. The fact is that *nobody*—except a few cranks in the Child Poverty Action Group—really thinks of supplementary benefits as a legal right in the same sense as, for example, wages or even national insurance benefits are a legal right. Certainly the average British lawyer doesn't. As a result, social workers and others who, in dealing with the Supplementary Benefits Commission, insist on the legal rights of their clients, often get the feeling that they are talking about a quite different scheme from the one the officials are administering. The officials in turn tend to feel that the game is being played according to rules which they do not accept.

demand for publication of the A code

There has, for instance, been a growing demand for the publication of the A Code. This, as is by now widely known, is the book of instructions issued by the Commission to its officers at the local level, telling them in considerable detail how they are to use the very wide powers which the Ministry of Social Security Act confers on them. The A Code is not a legal document in the same sense as the Act and the Regulations, which can be enforced in a court of law, or at least before an appeal tribunal. The legal position is, or so it is generally assumed, that an officer of the Supplementary Benefits Commission can deal with any individual case in any way that is consistent with the very wide discretionary powers bestowed on the Commission by the Act and Regulations. If, in doing so, he disobeys the instructions contained in the A Code, he may be guilty of a breach of discipline, but not of an illegal act. The victim has no legal redress other than an appeal to the local tribunal, which has the same discretionary powers as the Commission itself and, at least in theory, does not even have access to the A Code. But even if the A Code cannot be legally enforced, it is still true that what a particular individual gets when he applies to the Supplementary Benefits Commission depends just as much on the unpublished rules as on the very general provisions of the Act. Hence the demand for publication—and although that demand has so far rested on arguments about fairness and natural justice rather than on legal rights, some lawyers believe that the courts may eventually compel the Supplementary Benefits Commission to disclose its secret rules.

The official reaction to the suggestion that the A Code should be published has rested on a quite different interpretation of the nature of this document. It is, we are told, a purely internal guide to the officials of the department on the administrative details of their job, and publication of such a document would be a most abnormal

procedure. To demand access to it as a matter of right is therefore quite inappropriate. But that is not all. We are also told that publication would not be in the interests of the Commission's clients. The great virtue claimed for the supplementary benefit scheme is its flexibility and the ability of the officers to take account of the particular circumstances of each individual case. The humanity and efficiency of the system rest on the very wide discretionary powers vested in the staff of the Commission. Publication of the A Code, we are warned, would make the system more rigid and less responsive to individual needs.

This is a curious argument. Either the A Code limits the officer's freedom to treat each case on its merits, or it does not. If it does not, then its publication will not do so either. But if the A Code does limit the officer's discretionary powers, then publishing it will not impose any further limitation, except by ensuring that the instructions are complied with. If flexibility is really a virtue, and if the A Code reduces it, then the proper course is to amend the A Code, not to keep it under lock and key so that it can be ignored or deliberately flouted. This is not flexibility. It is anarchy.

- * The real reason for keeping the A Code secret, I suspect, is that supplementary benefits are for the poor and only for the poor. They are a form of communal charity, and the essence of charity is that it is concerned not with people's rights but with their welfare. To publish detailed rules about the administration of the scheme would conflict with this view of its essential nature. The reluctance to concede that supplementary benefits are a right, not only in law but in administration, may also explain the long delay in publishing a booklet for social workers explaining how the Commission exercises its powers, promised by Judith Hart as long ago as October 1968 but still awaited.

failure of appeals machinery

Similar arguments are used in relation to the supplementary benefit appeals machinery. The Ministry of Social Security Act gives the dissatisfied claimant a right of appeal to a local tribunal, and the Child Poverty Action Group has been concerned to encourage fuller use of this right. The number of appeals heard by the tribunals in the course of a year (some 14,000 in 1967) certainly represents only a tiny fraction of the cases in which the claimant either has been or thinks he has been unjustly treated. But getting people to appeal is only half the battle. Far more appeals are lodged than are actually heard by the tribunals (roughly another 5,000 appeals lodged in 1967 never reached a hearing). Some are withdrawn by the appellant; nobody knows how many or why. In other cases, however, the appellant's benefit is increased or he is given a lump sum grant, and it is assumed that an appeal hearing is no longer necessary, even if the increase is less than what the appellant asked for. He is thus deprived of his legal right to have the tribunal adjudicate on

the dispute between himself and the Commission—deprived of it, moreover, by the unilateral action of the Commission. In theory he can appeal against the new decision, but in the vast majority of cases, the appellant gratefully accepts whatever he is offered. The practice of withdrawing appeals in this way, without the appellant's consent, is monstrously unjust and can only happen because the appeal system is seen not as a safeguard of legal rights but as a way of placating dissatisfied applicants.

If the appeal gets as far as a tribunal hearing, the problem arises of ensuring that the appellant is properly represented. The typical appellant appears before the tribunal with a burning sense of injustice but with no idea of what rights, if any, he has. The need for proper legal advice and representation in any proceedings before the courts is fully accepted in principle, if not fully implemented. Yet it is regarded as a positive virtue of the tribunals that lawyers have been kept out of them. Legal aid is still not available for representation by a lawyer at an appeal hearing, and the informality of the proceedings is stressed whenever it is suggested that such representation might be helpful.

The Child Poverty Action Group and a handful of social workers and others have provided skilled representation in a very small number of cases (though enough to show that proper representation enormously increases the chances of success); but most appellants appear alone and unaided, and predictably lose their appeals.

The unspoken assumption seems to be that the tribunals are concerned not with legal rights but with ensuring that the action taken by the Commission is consistent with the welfare of the appellant. There may well be cases in which the welfare criterion leads the tribunal to stretch the law in the appellant's favour. But there are also cases where the paternalist approach of the tribunal leads them to err in the other direction. The wage stop is an example of this. It is intended to ensure that a man will not be better off out of work. Applying the welfare criterion, a tribunal would probably take the view that to reduce a man's benefit in these circumstances is in his best interests, as well as those of the community. Yet wage stop victims who appeal and are properly represented are usually at least partly successful, with the result that they then have a positive incentive to stay out of work.

Is it therefore wrong that they should be represented? I do not think so. Most of those affected by the wage stop are men suffering from disabilities which greatly reduce the probability of their finding work, especially with unemployment at its present level. But even if this were not the case, it is surely right and proper that any citizen should make full use of the appeal machinery provided by the law and should take advantage of whatever professional or voluntary help is available. If

the result of his doing so is regarded as socially undesirable, the proper remedy is to change the law (or the circumstances which lead to its producing undesirable results). In the case of the wage stop, this would mean taking action on low wages and family allowances, so that nobody would be worse off in full-time work than on the normal rate of supplementary benefit. If we are going to argue that people should not have their legal rights because the social consequences may be inconvenient, we would do better to start by looking at the whole field of tax avoidance, in which professional advisers are engaged solely in helping to evade their responsibilities to society.

the rule of law

That the supplementary benefit tribunals are not concerned with legal rights as such is borne out by the fact that they lack one of the fundamental characteristics of the English legal system—its reliance on precedent. This defect became apparent in the recent case of a prisoner's wife who, with the help of the Child Poverty Action Group, won an appeal against the refusal of the Commission to pay her fares for monthly visits to her husband. The policy of the Commission is to pay for visits every two months, despite the fact that relatives are encouraged by the prisons to visit monthly. One might reasonably have assumed that, as a result of this case, the policy would be changed. It has not. The tribunal's findings, we were told, did not constitute a precedent. If any other prisoner's wife wanted to visit her husband in the "off" month, she would have to go through the palaver of lodging an appeal, and the tribunal might this time decide to uphold the policy of the Commission. Even the woman who won the original appeal could not assume that her fare would be paid in subsequent months. If the Commission chose to stick to its guns, she would have to go back to the appeal tribunal every other month, with no certainty that the tribunal would continue to find in her favour.

To introduce some semblance of legal process into this situation, one would need to establish a higher tribunal or commissioner (as in National Insurance, where an appeal lies from the local tribunal to the National Insurance Commissioner). This higher appeal body would establish precedents which would be binding on the local tribunals. To do this, however, would conflict with one of the basic assumptions underlying the present system: that the function of the tribunal is not to act as a court of law, applying consistent rules to broadly similar situations (like that of thousands of prisoners' wives seeking to visit their husbands monthly), but to look at each case "on its merits," balancing broad humanitarian considerations against a responsibility to the taxpayer.

Once again, as in the case of the A code, the argument is between flexibility and the rule of the law. There are points to be made on both sides. The case by

case approach does mean that, if the tribunal is in a warm-hearted mood, it can bend the rules in favour of an appellant. Moreover, the officer representing the Commission at the tribunal hearing may himself be inclined to present the case in a sympathetic light if he feels that the appellant is deserving and unable to argue effectively on his own behalf.

Would all this change if it became the normal practice for appellants to be professionally represented at the appeal hearing? And if so, would the gains outweigh the losses? The question is not easy to answer. There can be no doubt at all that, as things are, the appellant who is well represented stands a much better chance of winning. The success rate for all supplementary benefit appeals is one in five. The success rate for appellants represented by me is eleven out of twelve (no statistics are available for cases where other people have acted as representatives). But if this became general, the Commission would soon take steps to stop the rot. No government department could tolerate its decisions being overruled on appeal in even 50 per cent of cases, let alone 91.5 per cent. Officers would be specially trained as defence counsel, the hearings would be formalised and there is a risk that the human needs of the appellant would disappear into a cloud of legal jargon. And in the end, the tribunal's decision would often still depend not on questions of law or even of fact, but on its judgment as to the proper application of its discretionary powers to a particular set of circumstances. But at least the appeals system would operate in a reasonably consistent and predictable manner and it would then be possible to use it as a means of establishing clearly defined rights. If a more legalistic approach discouraged the exercise of discretion in favour of the deserving, it would also discourage appeal decisions based on punitive attitudes to those who are apt to be regarded as undeserving: the unemployed, unmarried mothers and so on.

need for open administration

The policy I am advocating, therefore, so far as supplementary benefits are concerned, is one of open administration, publication of rules and administrative practices wherever possible, clear delimitation of the area of decision left to the discretion of the individual officer, fuller use of the appeal tribunals, with skilled representation of appellants, and a two-tier appeals system which would build up a body of case-law. But, in doing these things, we should be aware that we are not merely making the system fairer or more efficient, but changing its nature. It is important to realise this, not only because we must be sure that it is what we really want, but also so that we are prepared for the opposition which such changes in the balance of power in our society are bound to provoke.

4. local authority welfare rights

Turning to the local authority field, and particularly to the various welfare benefits for which local authorities are responsible, one can make much the same points. At a recent conference an education welfare officer said, in reply to suggestions that too little was done to tell people about their right to school uniform grants, "These grants are not a right; they are a privilege." School uniform grants, education maintenance allowances, rate and rent rebates, free school dinners and welfare foods—these are all examples of that peculiar kind of right which people have by virtue of their poverty. We shall, therefore, expect to find very little emphasis placed on legal entitlement to these benefits or on the use of the legal system to protect such entitlement. And we shall be right in so expecting.

problem of secrecy

As with supplementary benefits, there is the problem of secrecy. Usually this is not so much a deliberate policy as a failure to recognise that people ought to know what they are entitled to. If a potential recipient asks at the appropriate office, he will probably be given full details of the conditions for claiming a particular benefit—though he should be prepared for several journeys between different council offices before he finally tracks the information down. But if he doesn't take the initiative in asking about his rights, few local authorities will regard it as their responsibility to ensure that he is told about them. And even if he does ask, he will not necessarily be told. There have even been cases of local authority welfare officers themselves being refused information about the income limits for school uniform grants, presumably on the grounds that if they were given this information they might encourage people to apply. The first need, therefore, is for people to be told about their rights—and the advice and information centres recommended by Seebohm, in the unlikely event of their ever coming into existence on more than a token scale, could be an important step in this direction.

can rights be enforced?

But we also need to consider what kind of rights people have to these benefits. There are varying degrees of enforceability. A person who is eligible for a rate rebate, the conditions for which are laid down in an Act of Parliament, can compel the local authority to grant him a rebate. But what about a family which, on paper, qualifies for free school meals? They may be told that the local authority, despite its statutory responsibility, is unable to meet the demand for school meals in its area. The Minister, again on paper, can threaten the withdrawal of grants from a defaulting authority; but, as was found recently when Nottingham withdrew school meals from 2,000 children on a single day, the existence of these powers is no guarantee of their use. And there are other benefits, such as rent rebates, which are not laid down by statute, but left to the discretion of each local authority. What

legal remedy is available to a tenant who is refused a rent rebate although apparently entitled to one? Nobody really knows because this is one of the many areas in the field of welfare rights into which the lawyers have yet to penetrate.

quality of service provided

I have discussed the rights of the poor to various kinds of benefits, but the same problems arise in relation to the provision of services—housing, welfare accommodation, education, etc. Here, however, there is an additional complication, in that we are not concerned only with the giving or withholding of a service, but also with the quality of the service. For example, a local authority may accept the responsibility for housing a family, but the accommodation offered may be anything from a roomy, modern house to an overcrowded, substandard slum. In terms of the family's rights (if it has any in this context), the quality of the housing offered may be more important than the mere fact that it has a roof. And all kinds of subtle, or not-so-subtle, discrimination may operate in the allocation of council housing. Do all families have a right to equal choice and equal opportunity in the allocation of different types of accommodation? Morally, I believe they should. Legally, such a right is probably unenforceable—though here again, it remains to be seen what will happen when the lawyers finally move into this area. But, to return to our starting point, in even talking about such rights we are moving far beyond the area which is generally accepted, by the public and by administrators, as being the concern of the law.

The relationship between the local housing department and its tenants, between the education department and families in need of help to buy school uniforms, between the welfare department and the homeless, are not relationships between equal parties, with rights and responsibilities which can be enforced on either side; they are not relationships freely entered into out of mutual respect. The role of applicant is basically an inferior role and will be felt as such unless a deliberate attempt is made to endow it with the protection of the law. In the whole range of local authority services there is nothing comparable to the supplementary benefit appeal tribunals. There is not even a local ombudsman. If the first need is for information about people's rights, therefore, the second is for proper, easily accessible machinery to enforce them.

the need for the definition of rights

The rights of the poor need to be taken more seriously by academic and practising lawyers, by students of social administration and by politicians. The activities of a few gifted amateurs and shoestring pressure groups are no longer enough. There are opportunities here for a concerted attack on some of the most fundamental

aspects of social inequality in Britain today. It will encounter resistance, but it starts from a position of strength.

I have not discussed the role of "the poor" in all this; not because I think it unimportant, but because there is so much that can be done without waiting for the emergence in Britain of a welfare rights movement on the American model. Once the under-privileged can see that they actually have rights which can be realised through the legal system, they will find the means of organising to obtain those rights.

fabian society the author

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Enquiries about membership should be sent to the General Secretary, Fabian Society, 11 Dartmouth Street, London, SW1; telephone 01-930 3077.

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