

Rights that can Wrong

In the closing weeks of 1948, the memory of total war fresh in their minds, the nations of the world gathered to sign up to the Universal Declaration of Human Rights. It was an ambitious vision. It incorporated the liberal freedoms with which we are familiar, such as freedom of assembly and expression, rights to a fair trial, private and family life. But it also incorporated what have been termed positive rights (to housing, employment, subsistence, leisure and medicine, for example) and collective rights to an international order in which a just society is realised.

Earlier that same year, as part of our own post-war legacy, and to deal with Want, one of Beveridge's Five Giants, this country passed the National Assistance Act, bringing to an end the Victorian Poor Law.

Here, I draw those two threads together to examine the application of human rights by the social work profession, using section 21 of the National Assistance Act by way of illustration. My argument is that we have allowed others to control the human rights agenda which is our own natural territory, and we must assert our professional autonomy and reclaim human rights with and for our service users.

Human Rights

Human rights are fundamental to social work.

Did you get a warm glow at this statement, immediately recognising a statement that comes from the key purpose of social work expressed in our occupational standards? Or do you have a sneaking sympathy for the political and public antipathy to human rights?

Politicians and the tabloids are falling over each other in their efforts to denounce the Human Rights Act, with suggestions ranging from "let's go local and write some human rights for just the UK" to "let's pass laws to tell the judges that human rights mean just what we say they do".

The very idea of non-universal human rights may seem nonsensical at first blush. But it has been reality almost from the outset. For example – and this is the example that matters – the Council of Europe in 1950 approved the European Convention on Human Rights. Europe did not incorporate the Universal Declaration. Generally, the liberal freedoms were in, but many of the collective and positive rights were out.

It is this **subset** of human rights, which I shall call the "European rights", rather than the Universal Declaration, that was incorporated into British law by the Human Rights Act, and to which we as social workers have

a legal obligation to give effect. And it is this **subset** that has prompted not only tabloid hostility but also serious calls for a more generous understanding of human rights.

In April, the Social Care Institute for Excellence co-hosted a human rights conference. With a significant service user presence, questions were repeatedly being asked why we are leaving it to the courts to determine what our human rights are.

Days later, the radio 4 programme “Unreliable Evidence” debated the proposition that judges were unwilling to step beyond ‘the Strasbourg jurisprudence’. Strasbourg is the home of the European Court of Human Rights. In effect, the suggestion was that judges are too deferential to the European Court’s restrictive understanding of human rights.

Then in June, a report by Age Concern found public bodies saw human rights as legal obligations to be complied with rather than positive duties to promote equality and dignity for older people.

As social workers, our **legal obligation** may be to adhere to the European subset of human rights, but our **professional obligation** is to the “universal rights” of the Universal Declaration. BASW is quite unequivocal in its Code of Ethics – “Social workers have a duty to... respect basic human rights as expressed in The United Nations Universal Declaration of Human Rights...” (3.1.2(a)). Even if you are not a BASW member, the key purpose statement in our National Occupational Standards that human rights are fundamental to social work derives directly from the International Federation of Social Workers’ definition of social work, and when IFSW refers to human rights there is no reason to assume a European understanding.

The National Assistance Act

Earlier this year, I spoke for BASW in London on section 21 of the National Assistance Act, and its application to people subject to immigration control. Section 21 provides an ideal illustration of the dilemmas raised by this article so far – the tensions between positive and negative rights, universal and European rights, and those calling for an advance of, or a retreat from, the Human Rights Act. It contains a power to accommodate and support people in need of care and attention. That power is vested in statutory social services.

While there was a universal safety net of welfare benefits, section 21 was generally confined to providing “Part III” accommodation such as residential care for elderly people. As successive governments of both persuasions have removed the universal safety net, in particular from people subject to immigration control, the courts have ruled that the

provision can be used to provide conventional housing and subsistence to those who are destitute.

And now the threads come together. As social workers, our powers and obligations will differ according to whether someone is in an "excluded class". A legal provision ominously entitled "Withholding and Withdrawal of Support" means exactly what it says on the tin – social workers are **required not to** support people in an excluded class, unless our Human Rights Act requires it. We have a two-tier service. For those who are not in an excluded class, we are entitled, professionally obliged even, to interpret human rights generously. In the context of section 21 assistance to those who are destitute, this is likely to mean we provide our clients with accommodation and the means of subsistence. For those who are in an excluded class, we are legally obliged to interpret human rights narrowly, and maybe contrary to our professional values, potentially turning away the destitute. What do we do?

Professional autonomy

Do we decide for ourselves, in conjunction with our service users and bearing in mind our professional values, what respect for human rights might mean for service users? Or do we bow to a 'legal model' of human rights, just as we have been accused of bowing to a 'medical model' of community care? It seems we are diffident about making decisions about human rights.

Most of the time, our obligation as social workers is to give effect to human rights. As Local Authority Circular (2000) 17 expresses it, "Social Services Departments should actively develop existing good practice in a manner suited to the new human rights culture..." There is no inconsistency between this obligation and our professional obligations to respect human rights more generally. The only question is whether we remain loyal to the wider universal rights agenda, or whether we come to view human rights as a burden rather than a positive tool.

Section 21 does, however, raise a legal and professional dilemma for social workers, because of the "Withholding and Withdrawal of Support" provision. Where this provision applies, the usual social work practice is subverted. Instead of the social worker pursuing the wider universal rights agenda (that is, of course, consistent with but much broader than the narrower legal obligation), the social worker **must not** give effect to anything other than the narrow European human rights agenda.

In the particular context of section 21 assistance, many statutory social workers are actually instructed to take legal advice, but it is worth

pausing to deconstruct the context in which that advice will be provided. For local authority solicitors, the authority itself is their client, not the service user. Such solicitors, quite rightly, are expected to protect the interests of the authority, including its financial interests. And therefore:

- We might want to know whether it would be lawful to help our service user; we might be receiving advice on whether it would be lawful to refuse our service user;
- We might want to, and might be entitled to, give effect to a broader universal understanding of human rights; we are likely to be receiving advice based on the narrower European rights. For example, since the latter, unlike the former, is short on positive rights, the lawyer will not be asking whether it would breach a right to housing and subsistence, but whether it would be *inhuman or degrading treatment* were we to do nothing;
- We might want to accept our service user's account of why they fear removal from the United Kingdom; we are likely to receive advice that accepts at face value the conclusion of any decision maker or tribunal on this question;
- We might want to know what we **ought** to do; we might be receiving advice on what the authority might do tactically. For example, the lawyer might recommend settling cases in favour of a service user which is being pushed rigorously without advising that a trawl should be made to see if other service users ought to benefit. Or he or she might advise that a certain case is unlikely to be challenged by a service user through the courts because the costs of doing so are disproportionate to the small value of what is at stake.

For all these reasons, the questions the lawyer would address and the questions you would want to decide are different.

So are we entitled to make our own decisions? I believe we are not only entitled to make our own decisions, but also effectively obliged to do so. If our professional status as social workers means anything, it means we form our own judgements within our sphere of expertise, and are professionally accountable for those judgements. If "human rights are fundamental to social work" then they are within our sphere of expertise. If we don't feel expert, we should be developing our expertise. We should be looking within social work for support in doing so. And it is in the nature of social work that that will result in service user involvement in developing and interpreting our human rights culture. If

we have to go outside of social work we should bear clearly in mind the limitations on the advice and support we receive.

When we make our own decisions, based on our broad understanding of “universal rights”, when we consult with service users as to their understanding, when we stand by and defend the judgements we make, we are acting professionally, just as we are whenever we advocate for the services we truly believe our service users need, rather than what we believe they will get. When we see human rights only in narrow terms, the liberal rights but not the social rights, the narrow but not the wider agenda, a burden rather than a positive duty, we are not being true to our professional values. Sometimes, but rarely, we are being true to the letter of the law.

In two further articles, I continue to use section 21 of the National Assistance Act to examine two further professional dilemmas for social workers: what to do if your employer instructs you to act in a way that is unlawful; and what to do if you are required to act in a way that is lawful but ultimately unjust.

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The definition and key purpose of social work

"A profession which promotes social change, problem solving in human relationships and the empowerment and liberation of people to enhance well-being... Principles of human rights and social justice are fundamental to social work"

Extract from Universal Declaration of Human Rights

“Article 23

Everyone has the right to work...

Article 24

Everyone has the right to rest and leisure...

Article 25

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...

Article 26

Everyone has the right to education... Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship...

Article 27

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits...

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.