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Legalism and Discretion

While there is probably fairly general agreement that the system of individual welfare rights that has been built up over the years should not be dismantled, there is still dispute at the margin about whether the right balance has been achieved between legalism and discretion, and thus 'between precedence and innovation, precision and flexibility and between equity and adequacy'.¹ By legalism is meant the allocation of welfare benefits or services on the basis of legal rules and precedent. By discretion is meant the allocation of welfare benefits or services on the basis of individual judgments.

Tawney has said that:²

The services establishing social rights can boast no lofty pedigree. They crept piecemeal into apologetic existence, as low grade palliatives designed at once to relieve and to conceal the realities of poverty.

Nevertheless the development of social policy can be characterised as a movement from discretion to legalism. Even up until the Second World War 'welfare' — whether alms, charity, poor relief or unemployment assistance — was allocated for the most part on the basis of discretionary judgments about the deserving nature of each individual case. There was no sense of legal entitlement — the applicant was a supplicant and the poor law guardians, the charities and the officials of the Unemployment Assistance Board would not have conceived that their beneficiaries should have rights.

The turning point in the movement from discretion to rights came with the great spate of social legislation in the late 1940s — the Family Allowance Act 1945, the National Insurance Act 1946, the National Health Service Act 1946, the Education Act 1944 and the National Assistance Act 1948. The broad aspiration of this legislation was to ensure a minimum standard of living for all as of right: everyone would be entitled to free medical treatment, everyone would have equal access to education, contributors would receive social insurance benefits as of right, and there was even an entitlement to national assistance once need had been proved. The consumer of welfare was no longer a supplicant

beholden to the giver but a citizen claiming his legal entitlement. These at least were the aspirations.

T. H. Marshall has distinguished between three components of citizenship in Britain:³ civil, political and social rights. During the eighteenth century we had achieved (at least on paper) civil rights — those necessary for individual freedom such as liberty of person, freedom of speech, thought and faith, the right to own property and make valid contracts, and the right to justice. During the nineteenth century we achieved political rights through adult suffrage. During the twentieth century we have begun to introduce social rights — the right to live the life of a civilised person according to the standards of society. While civil and political rights are for the most part recognised and enforced, social rights such as the right to a decent standard of living, to a reasonable house, to an adequate education, are frequently neither recognised nor enforced.

Neither are these basic social rights declared in any general way in Britain because we have no written constitution or Bill of Rights. However we are signatories of the Universal Declaration of Human Rights which states *inter alia*:⁴

Every human being has a right to a standard of living adequate for the health and well being of his family.

The United Nations' Covenant on Economic, Social and Cultural Rights 1966 declares more specific rights to insurance, family benefits, adequate food, clothing and housing and physical and mental health, and education. But the European Convention on Human Rights (1966) (which has specific articles dealing with social rights) is the only covenant for which citizens have access for the redress of grievances (through the European Court of Human Rights). Britain is a signatory to both of these international agreements.

The movement from discretion to rights in social policy has been associated with the increasing intervention of the state in human affairs. It has been part of the movement away from the *laissez-faire* individualism of the nineteenth century. Citizens' welfare is no longer only (or mainly) left to the private market or charity. The state's role is no longer residual but institutional. It is the state that has responsibility now for maintaining basic social rights. This shift in the relationship between the individual and state has brought about the fundamental change in the principles of English law which are at the root of much of the discussion about legalism and discretion. It is to this, the relationship between justice and administration, that we now turn.

Justice and administration

Writing at the turn of the century Dicey claimed:⁵

It would be a grave mistake if the recognition of the growth of official law in England . . . led any Englishman to suppose there exists in England as yet any true administrative law.

Dicey believed that the only true justice was legal justice characterised by the application of a body of law within an institutional framework by a judicial mind. However, with the extension of government from one field to another there arose a need for a technique of adjudication better fitted to respond to the social requirements of the time. It was impossible for the State to extend the functions of government as long as its activities were limited by the individualistic ideas which prevailed in the courts of law. One result of this has been that administration has made inroads on what was previously the preserve of the legislature and the courts.

In fact as Robson⁶ points out there has been a long tradition in the English constitution of a mingling of administrative and judicial functions from the time of the King's Council and the Star Chamber, in the Court of Requests and Courts of Chancery and later in the work of Justices of the Peace who, according to the Webbs, mixed judicial decisions, administrative orders, and legislative resolutions.⁷

Though many of the orders were plainly discretionary and determined only by the justice's view of social expediency, they were all assumed to be based on evidence of fact and done in strict accordance with the law.

The gradual separation of judicial and administrative functions never reached completion. Coroners and Returning Officers still have both judicial and administrative functions and judges still have extensive administrative duties. Most of the administrative functions of JPs were transferred to local government but they still retain some administrative functions in prisons, the probation service and the police authority.

However with the vast extension of the work of government there developed a new body of administrative law that gave discretionary judicial powers to the administration outside the traditional structure of legal institutions.⁸

The revival of administrative law in England is very largely due to the creation of new types of offences against the community, the growth of a new conception of social rights, an enhanced solicitude

for the common good and a lessening of a belief in divinity of extreme individualistic rights which was evinced in the early nineteenth century.

Dicey would have viewed this growth of discretionary powers by government officials, even if they were subject to control by administrative tribunals, with disdain. He would have held that administrative justice would sap the foundations of precedence and judicial case law and be subject to political influence. However Robson defended the development of administrative law.⁹

Again and again in the history of civilisation what appeared at first as an arbitrary discretion wielded by an irresponsible official gradually crystallized into a body of known, ascertainable and consistently applied law.

He thought that as long as administrative discretion retains the character of justice and the spirit of justice there is no reason why the administration should not be as capable as the judiciary in administering justice. Justice demands that the decisions made by authority are comparatively regular and stable, are more or less consistent, and that self-interest and emotion are as far as possible eliminated. Judges are trained to administer law with consistency; impartiality and judicial discretion must be exercised, as Halsbury said, in accordance with¹⁰

the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular.

Modern Diceyists attack administrative discretion on two fronts. These are that:

(1) Administrative discretion undermines substantive rights. The bureaucracy intervenes to thwart the aspirations of legislators so that rights enacted in law do not get implemented; and

(2) Administrative discretion does not meet the requirements of consistency and impartiality and in practice is either amateurish, inquisitorial and moralizing; or in an attempt to match judicial discretion, a mass of rules are created which result in wooden uniformity. The procedures of administrative discretion do not meet the criteria of justice.

Those who continue to defend the exercise of discretion by the administration are inclined to make the distinction between proportional (equitable) justice and creative (individualised) justice. Any system of welfare requires the capacity to respond to the special needs and

circumstances of each individual. It needs this element of flexible individualised justice as Titmuss says:¹¹

In order to allow a universal rights scheme, based on principles of equity, to be as precise and inflexible as possible. These characteristics of precision, inflexibility and universality depend for their sustenance and strength on the existence of some element of flexible individualised justice. But they do not need stigma. The essential problem is to find the right balance.

and Olive Stevenson says:¹²

It is somewhat ironic that in a shift from eligibility to entitlement and in the reaction against the degrading procedures by which eligibility was sometimes established, there may be a new kind of injustice in which the individual finds there is no rule to fit his own case.

Discretion as a threat to substantive rights

The actual nature of social or welfare rights is difficult to discern. It is doubtful if some of them exist in law (there is for example no law providing the right of the homeless to a house). Even where there is a right in law, the mode of delivery may turn a right into a discretion (and *vice versa*). A category of the population may have a right to a benefit or service but the test of category may involve a discretionary judgment and the actual service provided may be limited by discretion. Most welfare rights are fenced in by qualifying conditions and those qualifying conditions inevitably involve discretionary judgments. In some cases that discretion is more or less governed by rules and not left to human caprice. Thus a decision on national insurance about whether an unemployment benefit claimant is eligible for benefit is made on the basis of his contributory record, whether he is available for work and for what reasons he is unemployed. All this is governed by the legislation itself and by precedents determined by the National Insurance Commissioners and the High Court. If he is not satisfied with the decision made on his claim he can appeal to a local tribunal and upward through the Insurance Commissioners to the High Court. On the other hand what does the right to health care on the basis of medical need mean? It is certainly not enforceable through the courts and it is subject to administrative discretion: a clinical judgment is made about diagnosis and treatment

and the care which is received is not only dependent on the judgment of doctors but the availability of facilities.

One example of how the stated intentions of legislators can be mediated by the executive is the Chronically Sick and Disabled Persons Act. Alfred Morris MP obtained all-party support for a comprehensive Private Member's Bill giving local authorities mandatory duties to trace the handicapped in their area and ensure they are informed of the help available under the Act. Local authorities were also required to make services available to those disabled in need in their area. However, when it came to enforcing this legislation, things began to go wrong. First, its implementation was delayed because Sir Keith Joseph felt that social services departments were too busy. When he did issue the order, it recommended not full identification of the disabled, but sample surveys. In the absence of a clear lead from the government, the County Councils' Association and Association of Municipal Corporations issued a circular to local authorities which Alfred Morris described as 'a disturbing and shocking manoeuvre' — 'a hard-faced and cynical blueprint for diluting and evading the purpose of the law'. The associations recommended that before local authorities gave a disabled person a telephone, he must be unable to leave home *and* at risk when left alone *and* have no family or friend within reach of the house *and* be physically and mentally capable of using the telephone *and* unable to afford the cost himself *and* it would be unreasonable to ask relatives *and* he must know someone he can telephone!

The Chronically Sick and Disabled Persons Act was implemented unevenly between different authorities; though the Act gives authorities a mandatory duty to provide services where need exists it leaves it to them to decide what constitutes need. If an authority admits a need and refuses to provide assistance, then a case may lie for the Secretary of State to seek an order of mandamus to enforce the local authority. In practice a local authority is unlikely to be silly enough to accept that a need exists and risk court action, and no case has been taken.¹³ The legislation may have been unrealistic and ill conceived but nevertheless the discretion left to the administration had the effect of overturning the intention of reformers.

During the late 1950s and early 1960s in almost every area of social policy it became clear that the hopes that had been invested in the reforms of the previous decade were not being achieved. The evidence of widespread and continuing poverty, poor housing, educational deprivation, difficulties of access to health and welfare, even the failure of the legal system to reach out to all, brought disillusion. These problems

arose partly as a result of the shortage of resources and partly as a failure of legislation to cover certain groups adequately. However part of the fault lay at the delivery stage — at the interface between the client, claimant or patient and the service. The authorities were less than energetic in selling their service and benefits, and many are unaware of their rights. (A recent example of this is the finding by Rosemary Newnham that half of the council tenants evicted by Edinburgh Corporation for rent arrears were eligible and not claiming rent rebates.¹⁴) Others were deterred by the organisational form of the service.¹⁵ For example the condition of supplementary benefit offices and those forbidding hatches common in council offices which have to be leaned through at waist level to obtain attention, seem designed as a symbolic deterrent. These are trivial examples, but what they reflect is the ambivalence with which many social policies are implemented, financed and administered. As Titmuss said:¹⁶

Many need-eligibility programmes are basically designed to keep people out; not let them in. Moreover, they are often so administered as to induce among customers a sense of shame, guilt or failure in using a public service.

One suggested reason for the fact that entitlements for the poor are not being effectively enforced is that the poor have been and still are seen as in some way blameworthy.¹⁷ The attempts by the 'welfare rights movement' to affirm or reaffirm the existence of these rights is a reflection of their belief that poverty is primarily the consequence of impersonal forces. We shall return to this conflict in values at the end of the chapter.

Discretion as a threat to procedural rights

Every measure which produces the possibility of beneficent state action necessarily produces at the same time the possibility of the abuse of power.¹⁸

The discretionary power that has been invested in administration has raised a host of issues concerning the rights of welfare recipients. Much of the criticisms of discretion in relation to procedural rights have been directed at the supplementary benefit scheme, but in local government and particularly in social work, discretionary judgments are made

with less regard to principles of justice and with less adequate procedures for the redress of grievance.¹⁹

The law of social welfare grew up on the theory that welfare is a 'gratuity' furnished by the state and thus may be subject to whatever conditions the state sees fit to impose.

Recipients are therefore subject to forms and procedures and control not imposed on other citizens. They are subject to the tendency of moralists to prescribe what is best. The administration may seek to impose moral standards on welfare recipients: Louisiana cut off aid in cases where mothers gave birth to an illegitimate child, and discrimination between categories of single parents in the provision of exceptional need payments may be influenced by the moral valuation of officers.²⁰ Investigation of eligibility necessarily and inevitably results in some invasion of privacy, but procedures for investigation for cohabitation and the policy of a housing department that keeps press cuttings of criminal charges on its tenants may be invasions of privacy. Two common invasions of rights derive from the Elizabethan poor law: the attempt to impose duties for financial responsibility beyond those normally expected²¹ and the practice of insisting on residence qualifications for benefits — still a common requirement on housing waiting lists. Welfare authorities may also seek to control other aspects of a recipient's life beyond what is acceptable to non-recipients — they can decide what work the recipient can be compelled to do, they can impose standards of behaviour on their tenants and even in some States in America require loyalty oaths in order to receive benefits. Perhaps the most common characteristic of the welfare process is that of secrecy. In justice the law must be known or at least ascertainable, but much decision making in social policy is based on secret criteria or no criteria at all. The Cullingworth Committee²² was critical of local authorities' reluctance to divulge the basis of their schemes for allocating council houses and every day the staff of social service departments make 'professional' decisions about whether to provide aid to the handicapped or help under section 1 of the Children and Young Persons Act,²³ or a home help to an old person, without ascertainable criteria and without redress. Redress is perhaps the key to these procedural issues. As de Smith has said:²⁴

Public authorities are set up to govern and administer and if their every act or decisions were to be reviewable on unrestricted grounds by an independent judicial body, the business of administration would be brought to a standstill.

Nevertheless rights lawyers argue: that because administrative discretion in welfare involves important decisions over the people's lives they should be subject to basic safeguards; that there are fewer opportunities for a fair hearing in welfare decisions; and that of all areas of administrative discretion, the opportunities for the redress of grievance are least developed.²⁵ Where in the exception there is access to tribunals such as in supplementary benefits, these tribunals do not meet the criteria of openness, fairness and impartiality that natural justice demands.²⁶ (See also the chapter on 'The Redress of Grievance'.)

Welfare rights movement

It is against this background that a new assertion of legalism in welfare has developed in Britain. Many diverse influences have gone into this 'welfare rights movement'. It has been developed in Britain by social workers influenced by the writings of Wootton²⁷ and Sinfield²⁸ and disturbed by the material problems of their clients, by lawyers concerned that a large section of the public does not get access to the legal advice and assistance that they need, and principally by the Child Poverty Action Group. The antecedents of the movement are in the USA where through action in the courts, lawyers and social workers managed to get laid down what low income families should get, item by item. It is an attempt to define poverty in terms of a denial of rights and to alter the status of the client from a supplicant appealing for handouts to a claimant demanding his entitlements. It is based on the principle that society has through legislation accepted a commitment to provide certain benefits and services, and if people are not getting those rights then the agencies of the law are failing in their responsibility. Thus the welfare rights movement is concerned with the manipulation of the law in clients' favour and the pushing of the law to its furthest limits to extend the generosity of the service. As Tony Lynes has said, it is a classically Fabian strategy.²⁹

The hotchpotch of pressure groups, claimants and community groups and advice services that make up the welfare rights movement have been active in three main areas.³⁰ First, they have been concerned to *enforce* welfare rights through the provision of information and advice. They have sought to improve the availability of benefits directly through advice and information and indirectly by revealing to local and national agencies their failure to publicise the benefits and services. Second, welfare rights workers have begun to advocate on behalf of

claimants. The American welfare rights movement thought that:³¹

campaigns to double and triple the relief rolls would produce significant pressure for national reforms in the relief system, perhaps along the lines of a national guaranteed common income.

The British welfare rights aspirations have been less ambitious. Their activities have varied from writing letters asking for written explanations of how benefits are assessed, or for exceptional needs payments, to representing claimants at tribunals. Tribunals, through their advocacy have been persuaded to take a different view from the Supplementary Benefits Commission on such things as monthly visits of prisoners' wives, school sports kits, and fees for heavy goods vehicle driving lessons. Third, the welfare rights movement has sought to extend poor people's rights by using the law. This strategy developed in the USA where a written constitution which guarantees safeguards to their citizens and a Supreme Court is able to interpret that constitution and to bind by its decisions both Congress and the State legislatures.³²

The lawyers expected that as a result of their successful cases the world would change in favour of the poor. Unfortunately the high hopes have not been fulfilled. Crucial decisions by the Supreme Court have been open to varying interpretations and there has been a backlash. In welfare rights, particularly, state legislatures, in order to abide by the letter of the decisions, have reduced benefit entitlement to save the public purse.

In Britain with no written constitution and no supreme court, it has been necessary to take social legislation in a piecemeal fashion. In some precedent-making cases, rights lawyers have revived forgotten laws to extend rights. In *Nottingham Corporation v Newton* (1974 2 AER 760) the court affirmed the right of tenants to use section 99 of the Public Health Act 1936 to summon local authorities before the magistrates' courts in order to obtain orders for repairs to be carried out on their houses. Another type of precedent-making case has been the attempt by lawyers to challenge official interpretations of the law. The Child Poverty Action Group has sought leave to take a series of test cases to the High Court challenging the decisions of supplementary benefit appeal tribunals and in effect the SBC's interpretation of social security legislation. In *R v Greater Birmingham Appeal Tribunal* (ex p. Simper) (1973 2 WLR 709) the court held that the commission's use of discretion in relation to allowances for heating was wrong and as a result extra heating allowances were paid to thousands of new claimants.

Another case successfully challenged the commission's interpretation of the Family Income Supplement Act.³³ A series of cases have also been taken to the National Insurance Commissioner which have extended the Attendance Allowance Board's interpretation of the eligibility criteria.³⁴

The use of test cases to maintain or extend rights is only in its infancy and its achievements have been limited. As well as the successes there have been harmful results. In *McPhail v Persons Unknown* (1973 3 WLR 71) a case which originated as an attempt to extend the rights of squatters, their rights were in fact greatly restricted. Legislation used in the courts to advance rights can be repealed or amended by policy makers — this occurred in the *Simper* case. The legal procedures for getting prerogative orders of certiorari, prohibition or mandamus from the High Court are complex and expensive³⁵ and it is not at all clear that judges are really prepared to become involved in vetting administrative discretion: in one recent case³⁶ the judges indicated their unwillingness to interfere with a tribunal's decision *even if it was erroneous in law*.

The defence of discretion

Much of the debate about legalism and discretion in the last decade has centred on the supplementary benefits scheme. One in thirteen of the population of the UK are dependent in whole or part for their income on supplementary benefits and far from becoming a residual service for those who failed to qualify for insurance benefits as Beveridge intended, the supplementary benefit scheme has become the prop for the whole social security edifice. As with most assistance schemes supplementary benefit has an area of flexibility at the margin and this flexibility is embodied in the discretionary powers of the officials to meet needs not covered by the scale rates of benefit. Claimants desperate to supplement the scale rates have turned to these discretionary additions for extra help. At first little was known about what could be obtained in the way of these additions and in what circumstances because the SBC administrative rule used by officers (the A code) was governed by the Official Secrets Act. As a result of pressure from the welfare rights movement more and more information has been published in hand books and guides and over a third of claimants now obtain Exceptional Needs Payments and Exceptional Circumstances Additions each year. The expansion of discretionary payments has been a source of continual dispute and presented the Commission with an enormous extra administrative burden. David Donnison, the Chairman of the Supplementary Benefits

Commission, has argued³⁷ that the Commission cannot go on providing these additions on an individual basis. The current government review of supplementary benefits is likely to standardise policy and procedures. This may reduce the area of discretion and increase the area of right but it may also reduce the capacity in the system to relate benefit to need. Titmuss, when vice chairman of the SBC, in a biting attack on the 'pathology of legalism' stoutly defended this area of flexible individualised justice.³⁸

Just where the line should be drawn between legalised basic rights and discretionary additions is a problem which a fully legalised system based on case law and precedent cannot even begin to consider. It is however a constant challenge to any system like the supplementary benefits scheme which continues to recognise the need for individualised justice.

The other area of dispute on supplementary benefits concerns the conflict inherent in the scheme between providing a humane service to those cast aside by the economic and social system and the need to maintain the values which maintain that system. In practice the supplementary benefit scheme maintains social values through a set of controls. Two of these controls are concerned with the work ethic and the family ethic. Procedures for unemployment review, rules about benefit for strikers, and the level of benefit itself all operate as incentives to return to work. The activity of the rights movement was successful in getting two other procedures concerned with the work ethic — the four week rule and the wage stop — abolished. The supplementary benefits system also bolsters the family with powers to pursue erring husbands and putative fathers (liable relatives) and more controversially through the cohabitation rule. The Commission have been at pains to argue that the rule is intended to ensure that no unmarried couple living together as man and wife are better off than married couples.³⁹ Although they have refined and reviewed the procedures governing the rule more than once, in practice the rule still results in many single mothers having their benefit withdrawn without a hearing and as a result of a judgment about the nature of their relationship with a man.⁴⁰

The discretionary basis of these controls has satisfied no one. Claimants and their representatives identify them as the principle source of injustice in the system and yet there is still a bitter chorus of vilification against scroungers and the workshy, and demands for stiffer controls. Officials administering their discretion find it the most difficult and odious part of their work. So far attempts to get the courts to intervene,

to provide for instance a legal definition of cohabitation, have so far been unsuccessful. The supplementary benefits tribunals do not provide a satisfactory mechanism for the protection of rights and the scrutiny of official discretion. The Ombudsman cannot give a ruling on the justice of a discretionary decision, only on maladministration. The success of the Commission's own attempts to clarify the basis for their decisions and get some consistency in decision making has been reduced by high staff turnover, overwork and, because of the size of the operation, the inevitable difficulty of getting uniform decisions by hundreds of officers with different values, attitudes and beliefs. These factors naturally make them fearful of the possibility of having to administer rigid criteria for each particular circumstance if the courts or a higher tribunal began to impose binding decisions and in a recent lecture Donnison has intimated that the Commission should⁴¹

abandon the aspirations to match the benefits we pay to the infinite variety of human needs we encounter — the aspiration for creative justice.

Conclusion

Views about the nature of society and social policy inevitably influence attitudes to the question of legalism and discretion.⁴² Those who accept the consensus model of society where there are no fundamental structural conflicts of values and interests and where the powers of the state are not viewed as a menace to the individual, would believe that discretionary powers will be used to help those in need and disputes will be rare and resolved amicably within an accepted framework. In contrast, those who see society as a state of dichotomic conflict between those who have power, authority and wealth and those who do not, will view rights as meaningless. Benefits are a means of social control or a sop to help keep down unrest and any control over discretion exists to propagate a consensual view of society. Opponents of the system seek to change it by revolution and others despite what they see as its hypocrisy try to work the system for the benefit of the needy. Finally there is the open model:⁴³

that of a society which recognises a continuing multiple conflict of interests and values taking place within an over-arching structure of a more or less fluid or dynamic nature. In this society there are not just two sides but many conflicts.

Rights are essential in this society because they are the means of managing these conflicts.

The fullest discussion of the issue of legalism and discretion is in a book by an American lawyer, Kenneth Culp Davis.⁴⁴ He has argued that although discretion is inevitable and necessary for individualised justice, it is often much greater than it should be and it needs to be restricted.⁴⁵

Discretion is a tool indispensable for the individualization of justice. . . . Discretion is our principal source of creativeness in government and in law. Discretion is a tool only when properly used; perhaps nine-tenths of injustice in our legal system flows from discretion, and perhaps only one tenth from rules.

Let us not overemphasize either the need for discretion or its danger; let us emphasize both the need for discretion and its dangers.

In his book he goes on to outline a framework that could confine, structure and check discretionary power. More meaningful standards should be set out in statute, better and more elaborate and more open administrative rule making is required to confine and structure discretion, there is a need for improvements in the fairness and accessibility of tribunals, and finally for the elimination of barriers to judicial review.

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