

Building Local Democracy in Times of Austerity: Can the Law Help?

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Different ways of thinking about the law

- Restrictive e.g. Trade Union Bill
- Protective e.g. unfair dismissal, anti-discrimination
- Progressive e.g. Public Services (Social Value) Act, Socio-Economic Duty, Public Sector Equality Duty
- Democratic? (Habermas)
 - Responsive (Nonet and Selznick)
 - Reflexive (Teubner)

Responsive Legislation

- Responsive (evolutionary) legislation (Nonet and Selznick, 1978, 2001)
 - Restrictive ⇌ Autonomous ⇌ Responsive
- evolution from least democratic to most democratic forms of law - but can and do co-exist
- Responsive legislation = redistribution of power by allowing greater participation of those affected by the law
- Risky particularly when governments cannot meet the expectations of citizens (e.g. during economic crisis)

Reflexive Legislation

- Reflexive legislation (Teubner, 1983)
 - Interplay between law and changing social structures
 - Not based on individual ‘subjective’ rights, but on changing human action through ‘self-regulating social systems’
 - Inward looking and introspective – law retains its own internal logic
 - Focus on legal processes that change behaviour
 - “The role of reflexive law is to structure and re-structure semi-autonomous social systems...by shaping both their procedures of internal discourse and their methods of coordination with other social systems”. (p.255)

From Responsive to Reflexive Legislation on Equality in the UK

- NI Fair Employment and Treatment Order, 1998; Northern Ireland Act, 1998)
- Race Equality Duty, 2001; Disability Equality Duty, 2006; Gender Equality Duty, 2007
- Equality Act 2010 s149
- Wales has retained some elements of responsive legislation in 'Engagement Provisions' in its devolved specific duties

Why were the Equality Duties Different?

- Institutional responsibilities rather than individual rights
- Positive and proactive
- Inclusive and consultative
- Provided a collective legal route to challenge the state
- Equality of outcome rather than equality of opportunity?
- Transparency
- Obligatory

The Power of the Duty

The Fawcett Challenge



The Ruling – an admission

“It is submitted that the Budget was arguably unlawful because the defendants did not consider their section 76A duty or produce a Gender Equality Impact Assessment. There is no dispute that no such assessment has been produced. It is not disputed but that the provisions of section 76A are in principle broad enough to apply to government action such as the preparation and presentation of the Budget, including public expenditure limits.”

Ouseley, J. (s. 6)

The Ruling - mitigation

- A 'line' analysis was undertaken
- The budget was complex
- The government has “expressed regret for its omission” (s. 12)
- Fawcett Society had delayed its application causing “problems of a significant order for the certainty which the public and corporate world (individual and foreign) is entitled to have in the budgetary affairs of the United Kingdom” (s 18).

What Happened Next?

- The Equality Act 2010 s149
 - a single public sector equality duty (PSED) covering Race, Gender, Disability, Sexual Orientation, Transgender, Age, Religion, Pregnancy and Maternity
 - Powers to draft specific duties devolved to regional governments
- The Red Tape Challenge
 - Review of the future of the PSED (see Stephenson, 2014 for an excellent review)

Conclusions

- Responsive (rather than reflexive) legislation is the next paradigm shift in relation to democratizing the law
- But as Nonet and Selznick (1978) noted the redistribution of power it represents is risky for state elites, particularly when under pressure
- Only governments committed to taking the next steps towards equality and confident that they can meet the expectations of social movements will take it forward