Welfare State or Constitutional State?

By
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Someone once remarked that the world is divided into two kinds of people; those who think that the world is divided into two kinds of people and those who do not! (The implications of this remark for the theory of logic will be ignored for the purposes of this review.) I tend to the view that there *are* two kinds of people, and that when it comes to political opinions the most fundamental and irredeemable division is not between "left" and "right"[1] (for some people have been converted from one of these polarities to the other) but between what moral philosophers sometimes call "rationalists" and "intuitionists". These words of course have about six *other* meanings each, but in *this* context they relate to kinds of moral philosophies: rationalists believe that there is One Great Good, from which all moral or political conclusions can be derived, and intuitionists believe that the forms of good are many, and that particular moral or political conclusions often involve a trade-off between two goods. The trade-off has to be made intuitionistically, after weighing up all the relevant circumstances. Rationalists regard intuitionists as a bit wishy-washy and lacking in intellectual rigour, while we intuitionists (for I admit to being one) regard rationalists as dogmatic, inflexible and tending to be a bit unbalanced — not always quite *rational*, in fact. We think that the philosophers have got the names mixed up, for we think of ourselves as *reasonable* people, more truly rational than those who are obsessed with a single-valued "rationality". The "rationalists" might be better named "deductivists" or "dogmatists".

The dominant "rationalisms" (dogmatisms) of the past century or so have been of the "left". Marxists have sought to emphasise our true nature as "species beings", utilitarians have promoted the greatest good of the greatest number, and American pragmatists have promoted "efficiency" in the pursuit of the objectives of social engineering. If bourgeois notions such as the rule of law, natural justice or claims of individual "rights" got in the way of an administrator creating a better society, they should be disregarded. This view was a central tenet of Marxism, beginning with Marx Himself[2], and was widely shared in the earlier half of this century by utilitarians, Fabians, social democrats and pragmatists[3] as they developed what has come to be known as the "welfare state". In the last couple of decades, however, theorists of the "left"[4] and the policy-makers of the Australian Labor Party have developed much more respect for the rule of law and rights — though the belief that such things are irksome impediments to efficient, instrumentalist administration evidently lives on in the minds of many bureaucrats.

Since, say, 1950 theorists of the "right" have been gaining increased attention for their own dogmatisms. Notions such as Liberty (meaning freedom from government restrictions,

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1. I enclose "left" and "right" in quotation marks throughout this review, to indicate that they are broad labels, each of which can include a variety of views. They are, however, useful labels, so I use them.
2. E.g., *On the Jewish Question,* in *Early Writings*, Penguin, 1975.
3. See, as to social democrats, the earlier writings of Sir Ivor Jennings, e.g. "The Report on Ministers' Powers" *Public Administration* Vols X and XI (1932 and 1933), and as to pragmatists John Dewey "Force and Coercion" *Ethics* XXVI (1916).
4. E.g., Tom Campbell *The Left and Rights* Routledge & Kegan Paul 1983.

not from the superior power of wealthier individuals or the constraints of poverty)[5], or Economic Efficiency[6] have been advanced as the One Great Good, to the exclusion of considerations such as welfare, or community, or the other forms of liberty. The other considerations are sometimes explained away as the result of linguistic confusion[7], or just dismissed as not worthy of consideration against the One Great Good. Many reasonable "intuitionistic" proponents of the welfare state would admit to having learned something from the writers of the "right"; Hayek must have some credit (though probably not as much as his followers would claim) for the revival of interest in the rule of law, and even the Labor Party has conceded that air fares and some aspect of the banking business are better controlled by a competitive market than by bureaucratic regulation. However, to admit this much is a long way from a total conversion to the new anti-welfare-state dogmas.

Ratnapala's book is another contribution to the dogmatism of the "right" (though there are a couple of minor qualifications to the dogmatism). The main theme of the book, as the title implies, is that the growth of the welfare state has subverted some of our most cherished constitutional principles — in particular, that it necessarily involves the delegation of discretionary power to the executive, in violation of the doctrine of separation of powers. A secondary theme is that the "New Administrative Law", though the motives behind it may be laudable, has failed "to have a significant impact on the arbitrariness of regulatory decision-making" (p 82). In addition, there is much recitation of other criticisms of the welfare state; in particular, of the "social choice theorists"[8], who explain that it is possible for welfare measures to be adopted despite genuine majority support because of bargaining and coalition-making by interest groups, each pushing their own barrow.

Ratnapala does show some appreciation of the motives behind the introduction of the welfare state. He quotes Jennings's condemnation of the Whigs' approval of profits "even when profits involved child labour, wholesale factory accidents, the pollution of rivers, of the air and of the water supply, jerry-built houses, low wages, and other incidents of nineteenth-century industrialism"[9], and concedes that "these sentiments explain Jennings's motivation" (p 45). From an opponent of the welfare state and the rule of law who has made that concession, I can imagine four responses. He could claim that, given enough time, forces would develop in a free market which would eliminate the evils of early industrialism. Then there would be grounds for rational debate over the truth of this assertion of fact. He could enter into rational (but non-"rationalistic") debate with the welfare-staters as to the extent to which welfare-motivated controls are compatible with the rule of law (as Hayek did in *The Constitution of Liberty*[10]). Thirdly, he could pursue his dogma "rationalistically" but expressly and say clearly, "Yes, I can acknowledge the moral claims of those who have been exploited, injured and poisoned, but I am sorry — they are less compelling than the claim of everyone to liberty and to government only by the most general of rules, and they simply have to give way." Or he could adopt the third approach by implication only, by pursuing the dogmatic line and simply brushing off the opposing argument without any attempt to come to grips with it constructively.

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5. Notably F.A. Hayek *The Constitution of Liberty* Routledge & Kegan Paul 1960. Despite the material cited in n. 10, *infra*, I count him as a dogmatist, particularly on the strength of his later writings.
6. E.g., R. Posner *The Economic Analysis of Law* 3rd ed Little, Brown & Co. 1972.
7. As in Hayek, *supra* n. 5, Ch 1.
8. E.g., J. Buchanan & G. Tullock, *The Calculus of Consent,* University of Michigan Press, 1962, or M. Olson, *The Logic of Collective Action,* Harvard University Press, 1965.
9. Sir I Jennings, *The Law and the Constitution,* 5th ed, University of London Press, 1959, p 309.
10. *Supra* n. 5, at pp 224-233.

Ratnapala essentially takes the latter approach. Having conceded an understanding of Jennings's motivation, he asserts that Jennings's sentiments "hardly mitigate the intellectual errors he commits in repudiating the rule of law as a constitutional doctrine". Moral sentiments, it seems, have no weight when an intellectual error has been made. The theme of much of the book is summed up on page 10 with the assertion "The distributional aims of the welfare state cannot be achieved by the enactment of general laws" — which are the only kind of permissible law. But there is no attempt to *prove* this — just assertion after assertion that the welfare state necessarily involves the granting of wide discretionary powers to the executive. Even that which is eminently provable — that many wide discretions *have* been granted — is not actually instantiated, except by reference to the Bland Committee's Report[11], now 17 years old.

At least in respect of the book's two main themes, Ratnapala does get involved in specifics. He attempts to prove that English constitutional theory did not allow for grants of wide discretionary powers, as the basis of a critique of the High Court's decision in *Dignan's case*[12]. Here he certainly succeeds in demonstrating at least that such a doctrine had often been asserted (though some of those quoted, like Montesquieu and Madison, were spectators of rather than participants in the English scene), and that Parliamentary *practice* had been not to grant unfettered discretions. He provides a very careful analysis (pp 40-42) of Dicey's views on this issue, but then ignores the trilogy of Privy Council cases[13] in which the grant of regulation-making power was approved. It may be that these cases can be distinguished on the ground that they involved "normal" delegated power whereas *Dignan* involved what the United Kingdom Committee on Minister's Powers[14] called the "exceptional" type, but it is a bit unfair to attack the High Court for misunderstanding English constitutional principles when thrice-stated Privy Council dicta seemed to support the decision.

The other area in which there is some specificity is in his critique of the new administrative law. He discusses the very real problem that giving the Administrative Appeals Tribunal the power to make overriding policy decisions does not properly address the problem of non-accountability — though even here much of the argument is supported by reference to the work of another writer, Peiris.

However, the overall tone throughout remains one of dogmatic assertion, and determined disregard of the fact, conceded just the once, that there might have been some real concerns motivating the laws which are the basis of the welfare state. Since the author sees arbitrariness and discretion as indispensable to the welfare state (p 95), and evidently sees these as worse evils than the ones which worried Jennings and others, he is lead to the approval of "policies that are openly and firmly committed to the dismantling of the welfare state" (p 99). On the second last page (p 101) the author does concede the possibility of taking questions of distributive justice away from "crudely majoritarian judgment" and inserting guaranteed but limited transfer arrangements in the Constitution[15] — but this is clearly intended as an extremely limited concession.

This book will no doubt be hailed as a great contribution to constitutional theory by the "right-thinking" people who already believe what it asserts, but its very dogmatism may well deter even the undogmatic "intuitionist" adherents of the welfare state from reading it. This

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11. Committee on Administrative Discretions, *Interim Report* (AGPS, 1973).
12. *Victorian Stevedoring and General Contracting Co Pty Ltd v. Dignan* (1931) 46 CLR 73.
13. *R* v. *Burah* (1878) 3 App Cas 889; *Hodge* v. *R* (1883) 9 App Cas 117; *Powell* v. *Appollo Candle Co.* (1885) 10 App Cas 282.
14. See its *Report,* Cmnd 4060 (1932).
15. This suggestion is derived from Brennan and Buchanan, *The Reason of Rules,* Cambridge U P, 1985.

is a pity, for the Jeremiahs of the "right" have raised some concerns which ought to be taken seriously. There *is* a need to consider whether justice and welfare can be pursued without granting unfettered discretions to the executive. One seemingly paradoxical solution (which I expect that Ratnapala will hate!) could involve giving executive bodies *more* power to make general policies — but making them subject to an Administrative Procedure Act on the American model, with requirements for publishing drafts and consulting with persons likely to be affected by a policy before finally determining the policy. There *are* limits to the effectiveness of the New Administrative Law; perhaps a greater problem than any of those discussed by Ratnapala is the fact that some departments simply ignore judgments given against them. Perhaps that will only be remedied when a Secretary or member of the Senior Executive Service is committed for contempt! These issues remain to be explored by those who want to balance welfare and rights, and who are not committed to the extinction of either.

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