

Welfare rights in theory and practice

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Overview

- Marshall: “The relief of the poor, the care of those who are unable to care for themselves, is among the unqualified objects of public duty.”
- Welfare rights may mean:
 - Social rights – as rights of citizenship or human rights; substantive or procedural rights
 - Social entitlements provided by the state
 - Advice and representative services

Welfare rights in theory

Human rights or social citizenship?

- Social rights of citizenship (Marshall)
 - Sequential emergence of civil, political and social elements of citizenship
 - Rights may be codified in constitution, or depend on statute/common law
- Human rights
 - UDHR stresses centrality of social rights to protection of human dignity
 - But social rights often play second fiddle to civil and political rights
- Competing or complementary sources of rights?
 - Tambakaki: Irreconcilable
 - Arendt: Human rights have no weight unless embraced by the state
 - Lister: Human rights gained currency as faith in citizenship waned

Welfare rights in practice

From the *trente glorieuses* to retrenchment

- Post-WW2 period sees rise of welfare states across developed world
- From 1970s, cautious retrenchment with cumulative effect on generosity and conditionality
- Post 2008 age of austerity brings sharper, deeper cuts
- Medium-term impact of coronavirus unclear

- High-level social rights and the individual's 'right to welfare'
 - UK: no entrenched constitutional rights to act as brake on retrenchment; limited success in use of ECHR and common law
 - Germany: constitutional rights (protection of human dignity and social state principle) form basis for a social floor

The reality of welfare rights

- Rights in theory – a vicious cycle of rights exclusion in practice or a virtuous circle of rights expansion?
- inadequacy compounded by administrative and procedural barriers
- Problems with accessing adequacy within social security elide with problems with accessing support
- Civil right of ‘equality before the law’ that demands access to justice
- Garth and Cappelletti: ‘the full panoply of institutions and devices, personnel and procedures used to process, and even prevent, disputes in modern societies.’
- The ability to participate in the panoply of justice processes
- Interdependence of social/civil/political rights/citizenship

Learning from Covid

- Sense of community and shared purpose has been developed
- Only the state has the ability to manage a crisis of this nature
- Social security has played a critical role in enabling people to survive – a critical part of the welfare state

- Where can we go from here?

Looking ahead

The research agenda

- “Empirical research on social security and social welfare law [is] rather thin on the ground” (Adler, 2010). Priorities then:
 - Build capacity for empirical legal research in the field
 - Raise profile of social security/social welfare in law programmes, and of the law in social policy/social work programmes
 - Effect of new modes of delivery on first instance decision making?
 - Impact of appellate decision making on first instance decision making?
 - Relationship between representation and approaches to dispute resolution?
 - Legal implications of claimant activation policies?

Talking point: to what extent have these priorities been achieved, and what are today’s priorities?