THE FUNCTION OF LAW IN SOCIAL PLANNING

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1. *Introduction*

In this lecture I am going to discuss how legal texts (parliamentary acts, ministerial degrees, orders, circulars, etc.) are used as means in social planning. This is a problem related to those that are well known in analytic philosophy, where the connections between language, thought and action have been in focus; the connections between legal texts, interpretations of them, and the activity governed by them, can be seen as a special case. So philosophy is likely to have something to contribute.

Contrary to private activity, decisions made by and realized by the state must be written out in texts with legal validity, and so state activity is governed by texts in a way and to an extent which is unknown elsewhere.

I think that the use of legal texts in such planning is problematic, and that is why it is worth while examining it from a philosphical point of view.

State planning is a necessity in modern societies. I think it is clear that social problems and necessary social initiatives require an increasing degree of state intervention, as can be seen for instance in the development of the welfare societies in the Nordic countries. This development must continue in the next decades. At the same time there has been constant criticism of the way in which state planning is realized. Public institutions are accused of being bureaucratic and inexpedient and it can be seen from the political discussions in Denmark that too many people there, at least, feel that they have no influence upon or real interest in the goals which they think are characteristic of these institutions. There has been a tendency to demand a reduction in state intervention instead of the opposite.

I think that such a demand is dangerous and I am sure that its bad consequences will show up very soon. But on the other hand this

criticism should not be overlooked. It is often true that state activities are impeded by bureaucracy and inexpediency and by concerns that seem rather irrelevant for the social ends they are aimed at realizing.

The central role of legal texts is not an explanation of this. But my idea is that an analysis of the function of these texts will help to clear up some of the problems.

2. *Two distinctions*

To specify the problem let me introduce two distinctions.

a) First, I think it is useful to distinguish between a "regulative" and an "inspiratory" function of a legal text. The regulative function of a legal text is to prevent undesirable consequences of actions which in other respects are governed by the personal interests and aims of the actors. For example, citizens move about on the national network to an extent and for purposes which they themselves decide, and the state only intervenes with trafic regulations in order to prevent such undesirable side-effects of this activity, as collisions, traffic jams or conflicts between road users.

The inspiratory function is, on the contrary, to initiate actions by supplying citizens with a specific motive to act and by formulating the objectives which shall govern their actions. For example, Danish teachers and children assemble in the nation's schools in order to give and receive instruction. This takes place in accordance with the legislation governing the Danish elementary school system, which not only prescribes who is to participate in the programme of instruction and at what times, but also determines the detailed contents of the programme. Elementary schooling is in other words not an activity in which teachers and pupils participate on their own initiative —as is the case when they travel about on the road network. It is an activity whose aims and governing principles are laid down by the state in a series of texts intended to provide the actors with the necessary understanding of what they are to do and why they are to do it —in other words, to inspire them.

Traditional philosophy of law has been concerned with the regulative functions of legal texts. I think the important task here is the analysis of the inspiratory functions.

b) Another distinction is between the "material" and "immaterial" goals of inspiratory legislation.

Part of the state's activity is material, consisting in building and maintaining material installations —roads, the telephone network, power stations, etc. Such activity is also preceded by legislation which

is followed up by administrative decisions and directives which in the last instance is realized in the form of concrete actions, for example building or other types of material production. But the legal texts controlling such material activity on the part of the state raise fewer problems of interpretation than those controlling what I shall call immaterial activities.

By "immaterial activities" I mean activities which are essentially characterized by the immaterial values which they aim at realizing —values such as art, culture, quality of life, information, vocational qualifications or research results. Admittedly these activities also consist in material actions, but these actions are only means which accidentally, as it were, are suited to the purpose in question and can be changed or replaced by others as occasion arises. It is, among other things, not possible to weigh and measure the result of these activities by their material aspects.

I think an analysis of the function of legal texts in the planning of immaterial activities is of special interest because it will give an opportunity for reflections that can be transferred to material activities, whereas the opposite is more doubtful. As I shall mention in the following, my studies have been concerned with the use of legal texts in a special type of immaterial activity, educational planning.

3. *Special characteristics of state activity*

Now what are in general the characteristics of state activity, besides the one already mentioned —the use of legal texts?

I shall single out four demands as crucial: a) the demand of legality, b) the demand of justification in relation to the common good, c) the demand of equality, and d) the demand of rationality.

a) The demand of legality.

It is a demand of state activity that every action has to have authority in law. If it can be shown that an action is without such authority, it can be annulled.

The characteristic form of legal authority consists in the actor having a warrant to take actions of the type in question. A teacher is authorized to conduct examinations and issue examination certificates. A headmaster is authorized to employ teachers but not to dismiss them arbitrarily. A staff-student committee at a Danish University has the power to lay down the curriculum for a degree but not to specify the use of particular textbooks.

Legality is ordered as a hierarchical system at the top of which is the legislative assembly of the country —in Denmark the *Folketing*—

and in which the lower instances are the government, the central administration, municipal councils and other horizontally and vertically organized administrative units. Each instance has its own powers, which may be ambiguously delimited, but which it will be possible to determine by judgement in a court of law in cases where there is disagrement.

b) The demand of justification in relation to the common good.

It is, furthermore, a characteristic demand upon state activity that it can be justified in relation to the common good, that is to say in relation to the set of values which obtains in the society as a whole and which is recognized as applicable. Because Danish society is more or less homogeneous such a common set of basic values exists, which makes it possible to discuss the activities of the state, although complete unanimity does not of course prevail. With various reservations it can be said that the party spectrum is representative of the prevailing variety of opinion as to how the common good can best be served in Denmark. In a political discussion the opposition will of course argue that certain decisions do not serve the common good, but though this undoubtedly can be a wellfounded argument (and the decisions thereby be proved to be harmful), the point is simply that this is an issue. It calls in question the legitimacy of the decision and in this way can effect its realization, even to the extent that it can be difficult to recognize the decision in the actions in which it results. It can also mean that the decision will be reversed politically at a later stage. In other words, in public activity consideration of the common good is important in a way that it cannot be for instance in private firms.

c) The demand of equality.

Third, it is a characteristic demand upon state activity that the citizens be equally treated. Like cases must be treated in a like manner, and every differentiation in the treatment of the citizens must be capable of justification by reference to the fact that the circumstances in the cases dealt with were different.

d) The demand of rationality.

Fourth, it is a demand that a public body should be held responsible for its actions in a discussion where both the aims and the means are subjected to rational examination, on the one hand in relation to the demands of legality, of justification in relation to the common good, and of equality, and on the other hand in relation to the facts or reality forming the point of departure. A part of this demand is also called "demands for impartiality" and "demands that power be not abused".

A decision taken by a public authority must be able to be defended as appropriate in relation to its aim, and the body which takes the decision must be able to demonstrate, on the one hand, that the specific aim is necessary to the realization of the general aim which it is its duty to fulfil and, on the other hand, that the means employed were suitable and not equally or to an even greater extent means of realising quite different objectives –for example the furtherance of sectarian interests or of objectives which the authority in question had set iteself. In special cases the decisions can be tested in the courts with the possibility of their being annulled as a result. In other cases they can be brought before what in Denmark is called the *Ombudsmand,* with the possibility that they may be criticized in a reprimand addressed to the authority in question and in a report to parliament.

4. *Some remarks on actions and their interpretation*

As said before legal texts have special importance in social planning. It is of interest to follow the creation of such texts to see how the political ideas behind a certain planning in the end are codified as legal texts. Let me just sum up one point: the process of formulation involves so many people in different phases with different opinions and interests that the resulting texts have many layers of meaning and will always be open to many interpretations. This is the case to a special degree when the activities planned are immaterial.

In other words: the ideas are there, in some way or other, in the texts, but they are often expressed in very indirect ways and it is necessary to recreate them by a complicated process of interpretation when the texts are put into effect.

What then has philosophy to say about the interpretation and the use of such texts?

Let me mention three very general points. I think it has been shown: a) That there is a necessary logical connection between an action and its idea, b) that actions can always be interpreted in several ways, and c) that an actor who is to realize immaterial aims by his actions must himself believe in them.

a) *There is a necessary logical connection between an action and its idea.* By the idea of an action is meant the actor's own conception of the action.

Where human actions are concerned, it is an important philosphical point that the idea of an action is a logically necessary element in the definition of what that action actually is. It need not be adequate but one cannot leave the idea of an action out of consideration if one

is any way to be able to speak about actions in a well-defined fashion. It can also be said that the actor's own description of an action takes precedence over other descriptions.

The point of this in relation to a discussion of how legal texts can control human actions is that control cannot be exercised without the idea being alive, so to speak, as a part of the actor's consciousness of what they are doing. This is at any rate the case with actions having immaterial aims. When those actions which realize legislation must necessarily be defined among other things through the actor's own understanding of the, it is not sufficient that there exists a legal text, complicated as it is, or an "outsider's description" of the kind which an administrator can give.

b) *Actions can always be interpreted in several ways.* In everyday situations we describe our own and others' actions without seriously considering possible alternatives. A person running towards a waiting bus is trying to catch it; a teacher who makes his class recite French verbs in chorus is trying to teach his pupils the conjugations. This is what we usually say without considering other possibilities.

But suspicions are always possible. A person who for the sake of experiment or because of exaggerated suspicion always looks for alternative versions will experience no difficulty in discovering them, nor will it be hard for him to find versions which can be consistently defended against criticism.

In principle, this maxim about alternative possibilities of interpretation holds true for all descriptions but actions with immaterial aims are on certain points irreducibly attached to the interpretation of the actors and observes, and this leaves more than the usual amount of space for imagination or free creativity, which excludes definitive decisions.

When we are discussing how legal texts can steer human actions, the point in this is that there will always be room for interpretation when the legal text is confronted with the actual behaviour and plans of the actors. On the one hand the legal text in itself will allow many possible interpretations, on the other hand the actions and considerations which it is applied to will be capable of interpretation as mentioned above.

To put the point metaphorically: the wish to control such actions by means of a legal text could perhaps be compared to the drawing of a portrait from an oral description which was not even made with the specific purpose of helping the artist.

c) *An actor who is to realize immaterial aims by his actions must himself believe in them.*

Certain actions can be carried out without the actors themselves being convinced of the value of the result, either because they do not think the object will be achieved, or because they do not consider it to be desirable. However, when it is a question of actions having immaterial aims, the personal convictions of the actors are significant. Inasmuch as the values which the actions aim at realizing are immaterial, they are connected with the interpretation of the actions just as much as with their visible results. Here we encounter the room for manoeuvre that was previously mentioned. It is no longer enough for the actor to follow instructions without thinking or adopting a standpoint; in many contexts he/she must make certain decisions, thereby "pronouncing" them to be correct.

The fact that there is a choice can mean that the actor is put on the defensive and thereby forced into an involvement which demands personal conviction.

Considering in this way the complexity of legal texts and these philosophical points concerning human actions I think it is clear that it must be difficult, almost impossible, to control activities of an immaterial kind by legal texts. It is possible to influence the actions of public employees, but it is not possible to ensure that the influence exerted is the one that brings the goal nearer. It may just as well do the opposite. Everything will depend on the pre-established understanding and consensus concerning the goals.

This has been clearly demonstrated for instance in Danish educational planning.

Briefly, it has been demonstrated there that when the political idea behind the legislation disintegrated in ideological clashes, the plans could not be implemented. Politically controlled planning of this kind is possible in a system like the Danish one only it those who have adopted the law and those who are to carry it out are able to maintain the idea until it has been implemented or at least is well on the way to being so. If the political majority is disbanded and if changes occur in "public consciousness" in some other way, the administration will lack the means of carrying the plans through and the result will be different from what has been intended.

It should be noted that this probably only holds true for planning with immaterial objectives. If political decisions about plans with material objectives have been made for example about road construction it would seem that a process has been started which is very difficult to halt (cf. a very well known Danish bridge –construction project– the "Farø" project). When the realization of the plans is

connected to visible results it is to a lesser degree dependent on the survival of certain ideas.

It has, furthermore, been seen that part of the breakdown in planning takes place by means of exploiting the interpretative possibilities which exist. The disintegration can start at various levels; the problems perhaps begin when subordinate actors or decision-makers interpret the legal texts in a manner which surprises higher authority and when the latter thus become aware of an ambiguity which up to now has not had any practical significance. The discovery can make them unsure because doubt is raised as to whether they really know what it is they are implementing and because according to the principle of legality they must carry out a specific political decision and not something quite different. Uncertainty can then cause those at the top of the hierarchy to react with what one could call a "misplaced concretisation" of the legal texts. The more concretely a regulation is formulated the more difficult it seems to be to interpret it freely. It is therefore quite understandable that an authority which dislikes the possibility of there being various interpretations of their texts will attempt to solve the problem by concretization.

This tendency can be strengthened by conflicts at lower levels of authority. There, there will often be rival factions with differing conceptions of the ideas which are to be realised —that is to say what are the essential immaterial values the legislation is aimed towards. If one faction forces its conception through and realizes it *inter alia* by using special interpretation of the legal texts in question, the other faction will be tempted to ask the higher authorities to concretize the regulations in a manner which will rule out their rivals' interpretations. In other words the conflict may very easily take the form of a conflict about the formulations in legal texts in that the rival factions try to achieve a misplaced concretization of the regulations at a higher level of authority and in this way to defeat their opponents with arguments of legality.

I would think that the usual experience is that the results of this are bad. A central administration can certainly intervene effectively by means of so-called "tighter" control in the form of more detailed and concrete texts. Although this control will leave traces it is not always the case that improvements are achieved. Good results may be achieved which are due to luck or other circumstances like the enthusiasm of the actors. But the very tightening must imply that there will be a greater likelihood that the activities will take place according to ill-advised regulations and that energies which could have been used constructively will be wasted in having what one does legalized,

adjusting practice to make legalization possible or on frustrating attempts to change or circumvent the regulations. It is without doubt a common experience for public employees in the lower echelons of the hierarchy of control, that that fraction of their working time which they use to carry out the tasks they should, becomes smaller as the central control tightens. And an experience which is just as common is that ideas and initiatives which emerge from practice and which could be defended in relation to aims have been put aside under such circumstances.

5. *What is the problem? —Summing up*

Political control and initiative are necessary in social planning. In societies like the Danish one it is of decisive importance to find means which ensure that the guiding political ideas in a piece of legislation also are those which in fact will form the essential content of the activities which are set in motion. This is not ensured by control by means of the kinds of legal texts which we now know *inter alia* from educational planning. On the contrary it seems to be obvious that the means of control which have been used here have failed and that the authorities' reaction to this has been ill-advised —that is to tighten and concretize the texts without thereby achieving the likelihood of better results.

It is not surprising that this is the case. Reflections about actions and the descriptions of actions which are elementary in the light of modern philosophical theories of action show that this is precisely what one could have expected, at least when the legal texts are supposed to inspire actions with immaterial aims. That form of control provides no insurance for achieving aims which correspond to the ideas behind the legislation and to the principles which are generally valid for public activity.

What possibilities of planning then exist? One alternative to elaborating texts with more and more specified descriptions of the actions which are to be implemented has been to give a free hand to the leaders who thus achieve the authority to make decisions as they see fit just like bosses in a private firm do. Such practice undermines the principles of public activity which I have spoken about.

There is another method —one which is consistent with democratic ideas of planning— and that is to train those people who are to realize the plans (public employees and the elected members of commisions etc.) to respect intensified demands upon rationality in dealing with individual cases and in making decisions.

As I have said demands upon rationality are specially characteristic of public administration, but at present they are more demands that are used in conflict situations than they are the norm when dealing with separate cases. Often, decisions are taken which it seems possible to get through without having to justify them, merely on the basis of what seems reasonable and what can be agreed upon. There is of course only a meagre guarantee of rationality in this procedure.

Every person in public office should be trained to justify his or her actions, juridically, politically, and on an informed basis. If this were the case it would be sufficient to allow the legal texts to contain abstract guiding lines, and it would be possible to respect the necessity for decentralized decisions without giving up the idea realising social aims. I think that it is this problem which must be solved if democratic social planning is to be at all possible.