Due process: a boundary for intervention

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Due process should be seen not as a hindrance to effective intervention, but as a flexible concept that can serve as a model for responsible practice consistent with the notion of protecting client integrity. This discussion of the boundaries between governmental authority and individual rights can help planners, administrators, and practitioners in dealing with social programs and legislation.

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ALTHOUGH WEBSTER'S DEFINES "due process" as a course of legal proceedings carried out regularly and in accordance with established rules and procedures, the legal term can be conceptually defined as the parameters of intervention between the state and the individual. Such parameters include the notions of when the state may place restraints on an individual and how those restraints may be applied. This article will discuss the conceptual basis of due process under the U.S. Constitution and how this concept can limit or extend the role of government in its interaction with individuals.[1]

Due process is relevant to social work for several reasons. In most public social work activity, social workers control and manipulate the lives of individuals. Whether social workers are involved in public welfare, psychiatric services, or medical care, they are required to administer programs granting or denying social benefits. Practitioners in mental health or corrections work often control the personal liberty of clients. As administrators or planners, social workers determine how official intervention is going to take place or how policy is to be changed. Due process should be considered in all actions.

Due process is the technical label applied to the powers under which courts act in restraining the official conduct of other courts or administrative agencies and under which legislatures may restrict the action of an executive or administrative agency. Due process is applied either by identifying an action as outside the scope of permissible government activity or by prescribing the steps that must be taken during the course of government intervention. The former is generally termed substantive due process, the latter as procedural due process.

The literature of social welfare and social work dwells on the procedural element.[2] The focus is often on how much must be done, generally in terms of paperwork, to protect or permit an agency's activity or on how far an agency can go in controlling its clients' behavior—particularly in mental health and corrections. The legal and social work professions tend to be mechanistic in their approach to due process, treating it as a fixed rather than as a dynamic concept.

HISTORICAL ORIGINS

Corwin traced the origins of due process from the time of the ancient Romans to the end of the first half of the twentieth century.[3] He noted that the idea of placing limits on the action of the sovereign is traceable in English common law to the Magna Carta, which limited the action that the king could take in governing the nobility. Out of this document grew the two major traditions regarding the relationship between government and individuals.

The first tradition is positive law, or those rules that are expressly stated as limits on governmental action. The other tradition is natural law, or those rules that exist a priori and that may not be legislated away. The early English laws, such as the Magna Carta, were expressions of natural law; that is, they were not law-making documents but were announcements of existing principles. (Natural law received support from the belief —widespread prior to the seventeenth century—that humans were carrying out a divine injunction for the organization of society.)

The positivist stance was bolstered during the Tudor reign when the state took legislative control of ecclesiastical affairs and confirmed that Parliament could regulate all forms of conduct. It was asserted that *"Law made by human beings can be of the highest obligation."*[4] In contrast, during the Stuart period, legal scholars such as Sir Edward Coke asserted that the powers of Parliament and the king were limited by the "law of nature," permitting a court to rule an act beyond the authority of Parliament.

These two positions were expressed in general statements about the nature of government by John Locke and Thomas Hobbes. Hobbes saw people as hostile to one another and believed coercion to be a necessity of social control. Locke saw people as essentially peaceful and contended that

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the state had only to provide a framework through which this essential nature could be expressed.

The Hobbesian approach involved the social contract, in which each individual gave to the state the power to make all laws in regard to conduct. That is, individual liberty was surrendered to the state for the purpose of establishing orderly and peaceful conditions. The state was permitted to make laws in all areas except those specifically reserved by the people in their social contract. Thus, citizens created the state for their own benefit through the will of the majority, and the majority always ruled.

Under Locke's formulation, the state was given limited authority, and when the governing group exceeded its power it could be overthrown. Minorities had to be protected, and power was always limited by natural law. Always protected were life, liberty, and property.

The Lockean idea is found both in the U.S. Declaration of Independence and the Federalist Papers. The notion of the people's right to determine their form of government and the assertion that minorities have a right to protection from overreaching majorities are concepts that were often expressed in early American political debate.[5] However, the Constitution as originally proposed to the states did not incorporate the Lockean notion. Fears of overreaching acts by the central government later led to the adoption of the Bill of Rights, including the due process clause of the Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property without due process of law."

However, it was judicially ruled that the first ten amendments applied only to the federal government.[6] The states, unless specifically regulated by a constitutional provision, such as the commerce clause, were exempt from regulation by the Constitution. For example, California could give different statuses to Catholic and non-Catholic marriages.[7] After the Civil War, the Fourteenth Amendment was passed, extending due process to the states in the phrase: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

SCOPE OF DUE PROCESS

For social workers, the two primary issues relating to the due process concept are: (1) When is there a due process requirement? and (2) How should that requirement be applied? The traditional idea of due process revolves around the overreaching of government in relationship to a constitutionally protected or fundamental right.

The two methods of determining whether or not the interest is fundamental are derived from the previously described approaches of positive law and natural law. Under the positive approach, one looks to the Constitution to see if a specific limit is placed on governmental responsibility regarding the action that has been proposed or taken. Once a fundamental right is found in the text of the Constitution, a strict due process test is applied to review of the government's action. (If no fundamental right is present, the government must show that it had a rational basis for its action.)

For example, if Congress wished to pass a law establishing a state religion, the court would look to the text of the Constitution to see if the proposed act were specifically circumscribed. If such a prohibition were found, the court would then declare the act unconstitutional as a violation of the fundamental law. Similarly, during World War II, the court should have reviewed the establishment of concentration camps for Japanese-Americans to see whether that act impinged on the fundamental right to liberty. If it had so found, it should then have reviewed the government's action to see if it was within the procedures allowed in the restriction of liberty.

The natural-law approach incorporates the positive-law approach and goes beyond it to assert that fundamental rights or interests can exist even when there is no express case or textual language to base them on. The proponents of natural law contend that certain types of individual behavior may be protected on the grounds that the law must include an area of personal integrity.[8] This approach has most recently been used in the development of the rights of privacy and bodily integrity.[9] Thus, fundamental rights are seen to be of such basic importance that a democratic free society cannot survive if they are violated.

Regardless of the approach that is taken, once a court finds that a fundamental right is involved, a review is made of the government's action to see if it violates either the substantive or procedural rights of an individual. The key issue for substantive due process analysis is whether the legislation in question serves a proper public purpose, that is, whether it is within the police power of the state and whether it serves the public welfare.[10] The concepts of public purpose and public welfare fluctuate and are policy elements of judicial action.

The traditional substantive due process often involved the attempts of government to regulate the conduct of business relationships and employer-employee relationships. In several cases, the doctrine was used to prevent states from regulating the activities of private schools.[11] The test used by the courts for substantive due process requires the determination of whether the law achieves a legitimate objective. If the law is found to achieve such an objective, the courts are then required to determine subjectively if the law is in the public welfare or if it unduly infringes on a fundamental right.[12]

LEGAL CASES

The doctrine was fully explicated in *Lochner* v. *New York,* in which a law regulating the working hours of bakery employees was set aside.[13] The court ruled that the law served no public welfare purpose and that even if it had served such a purpose (protecting the health of workers), it went too far in trying to achieve that objective by regulating working hours and in effect regulating the employer-

employee relationship. Thus, public welfare was defined within an extremely narrow parameter.

This use of substantive due process tended to support laissez-faire capitalism and was used to limit early social welfare legislation as well as to discourage the attempts of labor to organize and to influence legislation. However, this interpretation was disapproved in the case of *Nebbia* v. *New York*, in which it was decided that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose." [14] That is, the court decided it would not look behind the state's express legislative purpose, which in this case involved fixing a minimum sales price for milk. This and subsequent judicial decisions involving Depression-era legislation seemed to spell the demise of substantive due process.[15] The only areas strictly reviewed were those involving speech, press, and other expressly protected rights. Most commentators felt the rational relationship test had become so weak and easy to meet that the notion of so-called natural law–substantive due process (probably mislabeled because all of the laissez-faire interpretations were based upon property or contract expressions in the Constitution) —would never again be invoked.

However, in the mid-1960s, the substantive due process doctrine reappeared in the areas of personal integrity, the rights of privacy, and bodily integrity. Using the natural law approach, the justices carved out new areas for protection from government involvement.[16] In the case of *Griswold* v. *Connecticut*, a doctor and a planned-parenthood clinic challenged the state's prohibition against the use and distribution of contraceptives. After finding that the case involved the issue of the right to privacy, the court ruled that the marital relationship was a private relationship. Such a relationship was found to be constitutionally protected, and any law that inquired into that relationship was held to be void because it went beyond the permissible legislative scope. In other words, a law regarding marital privacy was considered to be without public welfare purpose.[17]

A second major case, *Roe* v. *Wade*, involved the question of whether a state could enforce a law prohibiting abortions.[18] The court in essence said that the decision whether or not to have children was within the concept of privacy (specifically, bodily integrity), and that a state could not make laws—except as they relate to other health issues—regulating abortion during the first and second trimesters of pregnancy (prior to quickening and viability). It was held that the antiabortion law violated the mother's rights and that the nonviable fetus was not legally a person. The area of personal protection was extended by the voiding of the law, which failed to meet public welfare requirements. (It was shown that the abortion prohibition endangered maternal health.) Substantive due process was thus resurrected in the area of personal integrity and privacy.

Procedural due process embodies the concept that when an individual is subject to the actions of a court or an official agency, he should be treated fairly. It is most readily seen when one looks at the requirements for conferring jurisdiction on a civil court, or in the relationship between an arresting authority and an individual. Most often, procedural due process involves first a determination as to whether a fundamental right is involved—usually a right of liberty or property—and then a determination as to whether the use of official sanction is properly carried out. For example, in *Goldberg* v. *Kelly*, the court first determined that the continued collection of welfare cash payments is a property right (of sorts) which requires a hearing prior to deprivation of the benefit.[19] (The right to terminate benefits was not disputed, only the method of such action.)

Similarly, in *Sniadach* v. *Family Finance Corp.*, the court said that prejudgment garnishment of a creditor's money deprived her of a property right (the use of the money) without a fair and impartial determination as to whether a debt existed and that therefore due process had been violated.[20] In a somewhat different situation, the court held, in *Goss* v. *Lopez*, that a student's right (or liberty) to receive an education required that a school give him notice and a minimal hearing before a suspension could take place.[21]

The essence of procedural due process is to insure that an individual not be deprived of life, liberty, or property without a fair appraisal of what he is likely to lose, and why, and without an opportunity to defend his interest. Thus, procedural due process calls for laws and regulations reasonably calculated to inform a person of the legal status or right that is to be affected and to provide a fair opportunity to be heard. The deprivation of a fundamental right or interest is to occur only after a hearing held prior to intervention or, in an emergency, as soon as possible after intervention. In the case of a limited entitlement or conditional right, a hearing may be held after deprivation or interference with the right, but without undue delay.[22]

IMPLICATIONS

The social work practitioner is often called upon either to consult in the drafting of new laws regarding the treatment of individuals by society or to administer laws affecting clients. These interactions are most graphically seen in social work's role in the areas of public welfare, physical and mental health, child welfare, and service to the aged.

As an adviser in the drafting or redrafting of legislation, the social worker needs to be aware of the limits placed on government intervention and the reasons for these limitations. By understanding the boundary between the state and the individual, the adviser may make recommendations that will either test the right of the state to intervene, or—if it seems preferable—avoid such a test. A social worker who understands the trends of the law can anticipate judicial or legislative shifts and design a program or plan that provides procedural safe-

guards, rather than perceiving programs as imposed by outside forces that understand neither the worker-client relationship nor the administrative difficulties in agency structure.

A worker cognizant of the limits of due process can build a system of procedures that anticipates demands for accountability and fair treatment. In the mental health area, a social worker might want to build in a layer of intrahospital review before permitting a patient to petition a court to intervene. For example, a patient seeking release from an institution might first be required to submit a request for release to a committee that would consist of independent health and legal professionals who would be required to evaluate the patient's need to be hospitalized under the local legal standard.

Arranging to have a hearing held within the institution might allow for better response to client needs and at the same time avoid the cost of judicial scrutiny. Similarly, individual workers might keep accurate and complete records to insure that their actions toward the client cannot falsely be made to appear unduly harsh or overreaching. As a client advocate, the worker with a practical knowledge of due process requirements can protect clients from unfair treatment and can insure that their position is not unfairly prejudiced.

Clinical practitioners who see themselves in the role of the treater or healer may perceive the limits set by due process as unfair. For example, one who thinks that the best form of treatment for a client would be placement in a closed setting will be threatened by the idea that due process permits noncriminal clients to be involuntarily confined only when they manifest symptoms that indicate they are dangerous to themselves or others. The idea of being able to lock up a client arbitrarily because one thinks it is best, or because one fears some negative outcome, is incompatible with the notion of client self-determination. The existence of a system that protects clients from overzealous family members or fearful therapists should be seen as an aid to the provision of better service with accountability rather than as a threat to professional expertise and decision-making.

Workers who see their agencies acting in a manner that does not comport with the ideal of due process may work within the agency or through professional or community groups to change either the agency's procedures or the legal standard. Due process is not a hindrance to effective practice, but a model for responsible action.

Notes and References

1. For general discussions of the subject, *see* Edward S. Corwin, *Liberty Against Government* (Baton Rouge, La.: Louisiana State University Press, 1948); and Corwin, *"The Higher" Law Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press, 1969). *See also* Paul A. Brest, *Processes of Constitutional Decision Making* (Boston: Little, Brown & Co., 1975); and Gerald Gunther, *Cases and Materials on Constitutional Law* (9th ed.; Mineola, N.Y.: Foundation Press, 1976).

2. *See,* for example, Donald T. Dickson, "Law in Social Work: Impact of Due Process," *Social Work,* 21 (July 1976), pp. 274–278.

3. *See* Corwin, *Liberty Against Government,* Chap. 2; and Corwin, *"The Higher" Law Background of American Constitutional Law,* Parts 6 and 7.

4. Corwin, *Liberty Against Government,* p. 32.

5. *See* Richard Hofstadter, *The American Political Tradition* (New York: Random House, 1948), particularly chaps. 1 and 2.

6. Barron v. Major, 32 U.S. (7 Pet.) 243 (1833); and Calder v. Bull, 3 U.S. (3 Dal.) 386 (1798).

7. Harman v. Harman, 1 Cal. 215 (1850).

8. *See* Albert Bendich, "Privacy, Property and the Constitution," *California Law Review,* 54 (May 1966), p. 407; and Gary Goodpasture, "The Integration of Equal Protection and Due Process Standard and the Indigent's Right of Free Access to the Court," *Iowa Law Review,* 56 (December 1970), p. 223.

9. Griswold v. Connecticut, 381 U.S. 479 (1965); and Roe v. Wade, 410 U.S. 113 (1973).

10. *See,* for example, Michael J. Perry, "Abortion, The Public Morals and the Police Power: The Ethical Function of Substantive Due Process," *UCLA Law Review,* 23 (April 1976), p. 689.

11. Meyers v. Nebraska, 262 U.S. 390 (1923); and Pierce v. Society of Sisters, 268 U.S. 510 (1924).

12. Perry, op. cit., p. 703.

13. 148 US. 45 (1905).

14. 291 U.S. 502 (1934).

15. *See* Gunther, op. cit., p. 586.

16. Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'National Law–Due Process' Foundation," *UCLA Law Review,* 16 (June 1969), p. 716.

17. For a similar case involving the distribution of contraceptives to unmarried women, *see* Eisenstadt v. Baird, 405 U.S. 438 (1972).

18. 410 U.S. 113 (1973).

19. 397 U.S. 254 (1970).

20. 395 U.S. 337 (1969).

21. 419 U.S. 565 (1975). For cases involving parole and probation revocation, *see* Gagnon v. Scapelli, 411 U.S. 778 (1973); and Morrissey v. Brewer, 408 U.S. 471 (1972).

22. Arnett v. Kennedy, 416 U.S. 436 (1974).