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Book Review

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Freedom Under the Private Law
Allan Beever*

In the decades after the Second World War, the proportion of economic activity undertaken or supervised by the state expanded sharply in many liberal democracies. States took the leading role in areas like healthcare and pensions while subjecting the private sphere to an expanding set of regulations. Over the same time period, their legal systems underwent a more elusive shift in judicial style: courts became less attached to precise, context-independent rules, and more comfortable with broad principles and multi-factored tests which left room for judicial discretion. This shift occurred not only in administrative law, where it might have been expected as a response to legislative impetus, but also in private law, even in jurisdictions where private law is mostly judge-made. Allan Beever's new book presents these developments as two halves of an unnoticed revolution. His goal is not only to show us what has happened, but to shake us from the complacent sense that these developments were, on the whole, progressive (161).

The first half of the book tells the story of the modern welfare state, while the second half is about what happened to the law—mainly private law—in response to the welfare state. Beever makes his case not by way of a systematic account, but through a series of vignettes about crucial people and events, almost all in the United Kingdom. This makes the book an engaging read. Every chapter abounds in historical detail—interesting in its own right, aside from its contribution to Beever's broader argument—in a way that is hard to capture in a review. But telling the story through the eyes of its main characters also poses a risk: if the nature of the welfare state eluded its founders and critics in 20th-century Britain, it may also elude this book.

Beever vs. collectivism

Beever argues that the postwar decades saw a dangerous shift towards *collectivism*, which he characterizes as politics directed at collective goals (63). Both the institutions of the welfare state and the increasing regulation of the private sphere aimed at collective goals. Beever's critique builds on those of AV Dicey in his

*Allan Beever, *Freedom Under the Private Law* (Edward Elgar, 2023) pp. 320 [ISBN 9781035314515]. All parenthetical page references are to this book

Introduction to the Study of the Law of the Constitution, Lord Hewart in *The New Despotism*, and Friedrich Hayek in *The Road to Serfdom*: for Beever, as for Dicey, Hewart, and Hayek, collectivism is a threat to the rule of law.[1]

The nature of the threat takes some time to become clear. We might worry, for example, about the arbitrary exercise of administrative power by statutory delegates, tasked with deciding who gets benefits, housing, a license, or a visa. Beever does raise concerns about discretion (33) and contrasts the rule of law with the rule of persons (28). But he insists that the arbitrary exercise of administrative power is not what he has in mind. After all, administrative law is designed to prevent such arbitrariness.[2] This, for Beever, is beside the point:

> The fundamental challenge laid down by Dicey, Hewart and Hayek was not that the growth of administrative power would lead to abuses of power and violations of the rule of law, though certainly that was an issue. It was that the growth of administrative power was itself an abuse of power and a violation of the rule of law. (174)

If the problem is not the arbitrary exercise of administrative power but the very existence of administrative power, then administrative law will be no help.

What, then, is the threat that collectivism poses to the rule of law? The conception of the rule of law that Beever finds "most profound" (25) is that, in Dicey's words, "the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land."[3] For example, Dicey suggested that, under ordinary English law, freedom of speech was protected by default rather than being specifically protected in a bill of rights. The fact that "censorship required a departure from the ordinary law" (27), and therefore seemed exceptional, meant that free speech would tend to prevail. But what is it about ordinary law that protects freedom, and why should we identify such protection with the rule of law?

Perhaps the answer can be found in Beever's later discussion of private rights. He writes that "justice requires respect for rights," such that "it does not follow from the fact that something is in the public interest that that thing should be done" (189). The ordinary law Beever has in mind is common law—for the most part, private law. Private rights, such as property rights, constitute a space in which individuals can freely pursue their ends: if I own a plot of land, I can do what I like with it, provided that I respect the rights of my neighbours. Beever's conception of the rule of law aligns with this conception of justice. The rule of law is respected where individuals are free to pursue their own ends, subject only to side-constraints on how they do so.[4] Administrative power is

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1. See AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (Liberty Fund, 1982); Rt Hon Lord Hewart of Bury, *The New Despotism* (Ernest Benn, 1929); FA Hayek, *The Road to Serfdom*, 2nd ed (Routledge, 2001).
2. See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; Cass R Sunstein & Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020).
3. Dicey, *supra* note 1 at 120.
4. *Cf* Michael Oakeshott, "The Rule of Law" in *On History and Other Essays* (Basil Blackwell, 1983) 119.

abusive when it intrudes upon this space. This is how it can be abusive even when not arbitrary.

In assessing this argument against administrative power, we might ask whether it matters how the collective ends are pursued. One of the most troubling of Beever's vignettes is that of the Control of Engagement Order, issued by the British government in 1947. This Order allowed the Minister of Labour to "direct people to take certain offers of employment and to prohibit others from leaving their positions" (83). The unemployed "would be required to present at employment exchanges" and offered work; "if they refused to work, they would be subject to summary proceedings" (84-85). This is authoritarian stuff, and Beever easily demolishes the government's attempts to say otherwise. The question is what broader significance the event has. Beever writes that "the Labour government's policies made direction necessary" (90): "If the state was to direct the use of inanimate things, then it also had to direct the users of those things" (92). In other words, collectivism, which involves state intervention in the economy, leads to forced labour, as occurred with the Control of Engagement Order.

If Beever is right about this, then it shows that collectivism is inconsistent with freedom. I have some doubts. It certainly seems that many states manage to intervene in the economy without using anything like the Control of Engagement Order. In particular, they intervene by buying property and hiring employees, as well as by imposing taxes and offering grants, rather than ordering people to work. If so, then the Control of Engagement Order tells us little about collectivism: the problem with the Order was not that it pursued collective ends, but that it did so by means of forced labour. At most, collectivism was a necessary condition for the Order—not a sufficient one.

We might also think it matters which collective ends we are pursuing. Beever argues that the founders of the welfare state intended to deliver a specific type of collectivism, namely socialism, which sought public ownership of the means of production as a way of achieving freedom for all. This ambition was never attained. Instead, they settled for a different kind of collectivism, "welfarism" (63), which involves using the welfare state as a way of redistributing wealth (61). Socialism recognized that "[t]he structure of the society was the problem and it needed to be changed" (101). Welfarism, by contrast, "ameliorated the condition of the poor but left the basic power structure intact" (102). Beever thinks that "the welfare state is sold to the public on the basis that it will achieve a socialist conception of justice" (103). As a result, it fails even by its own aims, promising "a kind of justice that it is structurally unable to deliver" (104).

While it may have been true at the inception of the welfare state that people saw it as a way of delivering socialism, it is surely not true today, and has not been for some time. If the welfare state were just a failed attempt at introducing socialism, then it would be puzzling how it survived the rejection of socialism by major political parties in the late 20th century and continued to grow under conservative governments. Beever notes that "[i]nstead of taxing and transferring, the welfare state far more frequently taxes and uses that revenue to set up state institutions that often only indirectly play a redistributive role" (152). If the

welfare state has ends other than redistribution, we need to know what those ends are before we can decide whether the welfare state threatens freedom. If the ends in question are liberal ones—consistent with, or even required by, freedom—then the threat may not be realized.

This is one place where it would have been helpful to engage with serious thinking about the normative structure of the welfare state, much of which suggests that its ends are liberal ones. John Rawls, for example, is cited three times for his insistence on the separateness of persons.[5] But Rawls' theory of justice—a theory which Rawls takes to be consistent with the separateness of persons—requires that citizens be able to exercise their rights and freedoms.[6] The welfare state may be understood, on such a theory, as an attempt to meet the basic needs required for participation in public life.[7] In more recent work, Joseph Heath has argued that institutions such as healthcare, pensions, and environmental and financial regulation are better understood as responses to collective action problems—for example, natural monopolies, externalities, and missing markets.[8] On this view, the welfare state aims at efficiency, addressing pathologies generated by a system of private rights.

Tailoring private law

The second half of the book is about how private law changed under the "collectivist state" (146). As Beever explains, determinate rules were replaced with open-ended principles, and private rights delimited by reference to policy concerns, further undermining the rule of law.

The story begins with Lord Denning's 1949 lectures, *Freedom Under the Law*.[9] These lectures aimed to show not only that "the law could accommodate collectivism," but also that "judges have a crucial role to play in the collectivist project" (168). More specifically, "government *needed* the assistance of the judges in order to produce the welfare state, because without them government would produce instead the totalitarian state" (170, emphasis in original). Judges would assist government by overseeing the exercise of administrative power and preventing its abuse. As we have already seen, Beever thinks this was "an evasion" (174). For example, administrative law might ensure that the power to requisition property is not exercised arbitrarily, but "it cannot answer the charge that the requisitioning and confiscation of property based on an official's judgment was itself an abuse of power" (175).

The next step was for judges to "take the public interest into account when determining the rights of citizens" (196). In *The Mayor of Bradford v Pickles*,

5. See John Rawls, *A Theory of Justice*, revised ed (Belknap Press, 1999) at 24.
6. See John Rawls, *Political Liberalism* (Columbia University Press, 1993) at 7.
7. Rawls argued that the welfare state is insufficient for justice, but it might still be necessary, such that a welfare-state society is more just than a libertarian one. See John Rawls, *Justice as Fairness: A Restatement*, ed by Erin Kelly (Belknap Press, 2001) at 138.
8. See Joseph Heath, *The Machinery of Government* (Oxford University Press, 2020).
9. See Rt Hon Lord Alfred Denning, *Freedom Under the Law* (Stevens & Sons, 1949).

the House of Lords had held that Edward Pickles was entitled to drain water from his land in a way that negatively affected the water supply to the City of Bradford.[10] Lord Denning was one of many who later argued that Pickles' actions should have been unlawful. Denning and others were implicitly suggesting that Pickles' property rights should have been tailored so as not to conflict with the public interest, which they equated with the interests of the City of Bradford. Such tailoring is precisely what judges like Denning went on to do. In *Miller v Jackson*, the Court of Appeal declined to grant two homeowners an injunction against a neighbouring cricket club to prevent cricket balls being hit onto their property.[11] Lord Denning held that the task for the court was "a matter of balancing the conflicting interests of the two neighbours," and that "the public interest should prevail over the private interest."[12]

Beever traces a "public interest model" (229) which connects nuisance cases like *Miller*, the use of policy factors in determining whether a duty of care exists in negligence under *Anns v London Borough of Merton*,[13] and the flexible approach to granting damages in lieu of an injunction adopted in *Lawrence v Fen Tigers Ltd*.[14] In all of these contexts, defining private rights so that they are compatible with the public interest makes it harder to see when one person's rights are being sacrificed for the interests of others. As Beever puts it, "rights become a sham" (197). The public interest model invites judges to become not only facilitators but "*independent* agents of collectivism" (225, emphasis in original), pursuing the public interest alongside the other branches of the state, but with less expertise and less legitimacy. In the end, he fears, judges will no longer defend freedom and the rule of law, but will "stand at the apex of the collectivist oligarchy" (296).

So much of Beever's book proceeds at this heightened rhetorical pitch—the public interest model results in judgments which are "authoritarian" (230, 249, 254); judges "increasingly regard themselves as Philosopher Kings" (294)—that it can be tempting to ignore what he is saying. That would be a mistake. There really are judges and lawyers who believe that courts are the vanguard of progress. This belief does place undue emphasis on litigation as a way of doing politics, as well as limiting our imaginative horizons to goals that might plausibly be understood as constitutional rights. There is a trend towards policy-driven decision-making in private law, and it does make it harder to see the trade-offs involved in particular ways of resolving disputes. In Canada, for example, 'tailoring' is an apt description of how some courts have approached conflicts between Indigenous rights and the private rights of third parties, such as conflicting claims to the same land or resources.[15]

10. [1895] AC 587 (HL).
11. [1977] QB 966 (CA) [*Miller*].
12. *Ibid* at 981-82.
13. [1978] AC 728 (HL).
14. [2014] UKSC 13.
15. See e.g. *Chippewas of Sarnia Band v Attorney General of Canada* (2000), 51 OR (3d) 641 (CA).

Corporate power and laissez-faire

I am less convinced by Beever's solution, which—while he only gestures at it—seems to involve respect for private rights, a reduction in the size of the state, and perhaps an increase in redistributive transfers to the worst-off (291). What is missing is reflection on how to address the pathologies generated by a system of private rights.

This lack is surprising because Beever recognizes the problem. In what was to me the most interesting chapter of the book, "Marx and the Modern World" (105ff), Beever explains that socialism "was not an attempt to replace a free market with socialised property and centralised planning. The free market was already dead" (117). The emergence and dominance of the joint-stock corporation had made laissez-faire competition the exception rather than the rule: most economic activity came to be subject to intentional planning, either within firms or by firms cooperating with each other (114). This was emphasized by Karl Marx, who wrote that the joint-stock corporation is "the abolition of capital as private property within the boundaries of capitalist production itself."[16] The aim of socialism, then, was "to take property that was already to a high degree socialised ... and properly socialise it, coupled with taking economic planning out of the hands of one small group of people and giving it to another that represented the interests of the whole community" (117, footnote omitted).

In short, a system of private rights concentrated resources and power in large firms. Suppose Beever is right that neither socialism nor the welfare state was the right way to address this problem. The problem remains, and Beever's libertarianism would simply recreate the conditions that led to it. It is a problem generated by private rights as a system; arguments for respecting private rights individually don't address it.[17] The task Beever's book leaves us is to find structures that might solve this problem while preserving the freedom he consistently defends.

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16. Karl Marx, *Capital: A Critique of Political Economy. Volume III: The Process of Capitalist Production as a Whole*, translated by Ernest Untermann, ed by Frederick Engels (Charles H Kerr, 1909) ch XXVII at 516.

17. "[T]he entire system of rights has resulted in some persons' being subordinated to others." Ernest J Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford University Press, 2022) at 104.