

JOINT PLANNING LAW CONFERENCE

LOCAL GOVERNMENT'S REACTION TO CHALLENGE

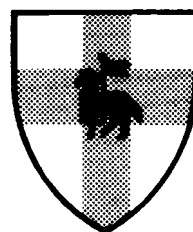
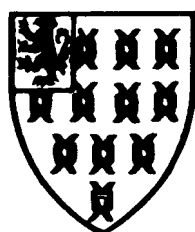
by

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20th - 22nd September 1985

New College, Oxford

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Introduction

It is always difficult to generalise about local government. There are 456 local authorities in England and Wales, of differing sizes and functions (and I exclude parish councils). Although they cover areas of varied historical, social and economic character there are nevertheless strong pressures for conformity of practice. For example local authorities operate within a common statutory framework and administer functions vested in them by Parliament according to statutes of universal application like the Town and Country Planning Acts. The national political parties dominate the selection of candidates standing for election to local authorities, and the principles and disciplines of those parties are to be found operating now in nearly all councils. The officers employed by local authorities, while they are not members of a national municipal civil service, are governed by national conditions of service, with pay scales determined in national negotiations, and the skilled ranks are trained in professions with national standards and in many cases national governing bodies.

It is not surprising therefore that there is a substantial degree of common experience in the way local authorities manage their services, and familiar patterns exist in relation to decision making. This is borne out by studies carried out by research institutes such as INLOGOV at Birmingham University.

I should add that an audience, such as this, will not need reminding that the principles of administrative law have been frequently declared and developed in litigation involving local authorities. However, although statutory, political, administrative, and legal pressures push local authorities into common and familiar patterns of operating practice, those powerful influences on a series of what remain corporate bodies should not mislead the observer. It is still necessary to examine rather closely the decision-making process in any given case. Although a local authority is a corporate body operating within legal structures of a common form, the decisions of a local authority are often reached by methods not immediately self-evident from the formal structure; furthermore, their nature and their susceptibility to challenge varies considerably.

Decision-making - the formal structure

Perhaps I can refresh your memories on the basic structure of local authority in relation to decision-making.

*A local authority is defined as meaning its council (LGA 72 S.270).

*The powers vested in a local authority are in nearly all cases vested in the council e.g. TCPA 1971 as amended by the LGA 1972 says that the council of a County is the County Planning Authority for the County.

*A council must have an annual meeting and such other meetings as they determine and take its decisions by a majority of those present and voting (paras 1,2 and 39 of schedule 12 LGA 1972).

*A council may delegate nearly all its functions to a committee or sub-committee (LGA S.101). If it does so the rules as to taking decisions on a majority vote apply (LGA para 44 of schedule 12).

*A council may delegate nearly all its functions to an officer of the authority (S.101 LGA).

*The council shall keep minutes of its meetings (para 41 schedule 12LGA).

There are some short points to make about this deceptively simple set of arrangements.

Firstly, and it is a point to which I shall return, the structure neither expresses nor makes any allowance for the way in which elected members organise themselves into party political grouping. There is, in short, no express conventional part of the local government constitution; there is indeed no Erkine May.

Secondly, and this is really a development of my first point, all councillors are equal. There is no legal concept of the "administration" or the "Government of the day". The chairman of a committee has no greater powers than any other member of the Council. Officers serve the whole Council, and up to a point, have a certain independent professional position which contrasts, at least theoretically, with the position of civil servants.

Thirdly, there are some interesting points which arise when you have to identify the point at which a decision of a local authority is reached. If the decision relied on was taken by an officer was there evidence of a delegation by the council to him, or, as in *Poppetts (Caterers) v. Maidenhead Corporation* (1971 1 WLR 69) was there any other evidence of the council's intention? Or, will the doctrine of Estoppel bind the authority? Can an authority purport to delegate a decision to a chairman of a committee, as a single member, as many purport to do, or is such a decision in practice saved by the doctrine of ratification? Certainly in the case of the Education service, *Reg v Liverpool City Council ex parte Professional Association of Teachers* (1982 LGR 648) makes it clear that the Education committee cannot delegate to the chairman of that committee power to act on behalf of the committee in preparing a report of the committee as required by the Education Act 1944 to the full council. The

matter is also of interest in Town Planning where, for example, a committee purport to delegate to the chairman of a Planning Committee the power to authorise the service of an enforcement notice. There is some doubt about this practice in DOE and some at least of my colleagues would argue that the scheme of the Act permits such a delegation.

The fourth point which I think emerges from this consideration of the formal arrangements is that the nature of decisions needs careful consideration. It is customary for the powers of local authorities to be regarded as discretionary or mandatory. This distinction carries in itself important legal consequences in respect of the remedies available in the courts. But from the point of view of lawyers, of course, and even more from the point of view of the public, the distinction by itself is wholly incomplete. This is because there are also large numbers of decisions affecting the public under decision codes of their own with particular remedies by way of appeal. And appeals lie to a variety of courts or indeed Secretaries of State. And there are decisions which, while of great significance, fall outside any remedial action, decisions of a political nature where the central character of an elective local authority is left unchallengeable except at the ballot-box.

The Nature of Local Authority Decisions

When I came to consider this paper I tried to classify the kinds of decisions which local authorities make in practice. For example, authorities make resource decisions: that is the level of resource to be applied in exercising their discretion or mandatory functions; they make means decisions: how to carry out a task in the physical sense; they make action decisions: whether or not to do something; they make permission decisions, whether or not to grant or withhold consent to someone else.

They make decisions about position: that is to say, decisions about attitude, about local advocacy. I concluded that while as such a classification is perhaps a useful working description of the kind of activity in which a local authority member may be involved, it is of no use in relation to remedies because remedies themselves are not classified in this way. What you have to consider in relation to remedies is the whole process, and the point in it where you collide.

Let me illustrate this by using an enforcement decision from the Town and Country Planning Act as an example.

The level of staffing in a local authority Planning department, and the efficiency with which it is managed involves a set of decisions, explicit or implicit, deriving from the local authority's political view of resource levels and priorities. But the Audit Commission will have a responsibility to bring to the attention of the local authority the relative effectiveness of its planning services. And of course the citizen himself has a right of objection at audit.

The level of planning enforcement activity derives from that set of earlier decisions. Thereafter, how diligently the council takes note of breaches and exercises its powers might be thought to be principally a ballot-box issue since the Act enables the local planning authority to issue an enforcement notice only if they consider it expedient to do so. (S.87 TCPA 1971) But it could be argued, at least by a citizen affected by a particular breach of planning control, that having had the breach drawn to its attention, his local authority ought to determine whether or not to exercise its discretion (perhaps a matter for judicial review or the ombudsman). If the Council is thereafter incompetent in its administration and in the exercise of its procedures at committee, so causing the complainant an injustice, a complaint to the local ombudsman may lie. So far as the person enforced against is concerned he has his line of challenge to the actions of the authority through the appeal mechanisms of the legislation related to enforcement notices.

All that, put in those simplistic terms, is, you may say, straightforward: but I would argue it has complications for elected members and officers, because in any standard meeting of a committee they may drift imperceptibly from one statutory regime to another in the decisions they are asked to consider making, and they move from one kind of decision to another, and from one set of legal rules governing their approach to yet another. Try saying for example, to a tired committee at 10.30pm in the evening having considered previously a long agenda "a local authority is entitled to have a fixed policy on how it will exercise a discretion conferred on it so long as it allows people to come forward and say the policy does not apply to them for various reasons: but if you apply your fixed policy in such a way as to show you have left yourself no discretion outside the fixed policy you will have improperly fettered your discretion" (R. v Rochdale MBC ex p. Cromer Ring Mill Ltd 1982 3 All ER761). Furthermore, I imagine, it is difficult for the individual outside the local authority to know how to get into the system: at what point is the decision being made which affects him? How can he change it? Does he have a remedy?

Decisions and Democracy

What's that to us, you may say? We are clever men: these problems are readily identifiable to us as advisers. Local authorities employ clever officers who will tell their councillors how to go about things and if they don't know they will get Counsel's Opinion or lots of them. That is of course true so far as it goes. But I think the complexity does matter for other reasons. Local authorities have historically acquired extensive powers: Governments require them to perform well, and in an accountable way. The public want to challenge decisions which affect them. Elected members want to achieve political aims in local authorities. The formal frameworks seems not to be able to contain all these aspirations in a way which preserves the importance of a local democratic process in our society.

You may be among those who do not regard as self-evident the case for the present system of elective local government. Indeed it is not clear that it is the most efficient and accountable system of delivering services to the public. This is not the time perhaps to rehearse all the arguments usually advanced in favour of local democracy. However one line of argument has always been that services administered locally offer not only better responsiveness to local need, but greater accountability to the local electorate partly through the accessibility of decision-makers.

And recent reforms have been in the direction of improving that accountability by giving new rights of information about the activities of local authorities, and new duties of publication by local authorities. For example, the statutory rights of access to meetings of a Council, its committees and sub-committees have been re-stated and extended with new rights to information in connection with items discussed at those meetings (Local Government Access to Information Act). These provisions add to the existing rights to see limited classes of documents already in the Local Government Act 1972, the wider common law rights of Councillors, and the registers kept for public inspection in specific statutory services, such as Town Planning.

The requirement to publish information includes information in relation to rate demands and staffing levels and to publication of annual reports including comparative statistical information. There are more recent new duties to consult business ratepayers, and to publish information on the handling of planning applications.

You may feel that challenge to a local authority decision ought not not to fail for want of information. But information is of no value by itself: it needs interpretation; you need to know where to find it, the questions to ask. And above all, since you have obtained it you want to be able to deploy it to effect. Although one might consider that the

improvements to assessibility to information do however, in principle, improve accountability, in practice I suggest there are serious limitations. The first is that the rights to improved information are now so many that it is a fairly major task to begin to assess where the entitlement begins, and to what it applies. The second is that by and large the local press seems unable to grasp the opportunities to use and explore the information available. In short there is not always a useful commentary on local issues. Thirdly local accountability has been submerged by central government initiatives which have seemed to stress national other than local accountability. In particular the pressure on local authorities to conform to national economic imperatives has reduced at any rate the sense of local accountability. Fourthly, and for an officer I speak controversially, political parties themselves carry much of the blame for obscuring the strength of local democracy.

Local Democracy and Party Politics

I would like to develop the fourth point, because it relates back to the formal constitutional position of local authorities, and raises the interesting question of how far the electoral process is and should be the proper vehicle for challenge.

The parties are now pervasive in local government; increasingly they use it as an opinion poll on their national standing and the media connive in this perception when they publish local election results. The parties also use local government to try out new ideas, even philosophies, for example, on the one side, privatisation, on the other, enterprise boards, and yet on another, community politics. More negatively the parties try to harness local authorities of like mind in common opposition to or support of government policies of the day.

None of that may be unhealthy for the continuing life and vitality of political parties and their supporters, but it is increasingly imposing strains on the local government constitution. The manifestations of party politics in local authority structure include the superimposition of a system of political decision making outside the Council and its committees, generally inaccessible to the Public and free from the rules governing elected Councillors, notably for example the requirement to declare pecuniary interests. The caucus, meeting in secret as a group of the majority party often with members of the party present who are not themselves elected Councillors, has assumed the debating role of the Council meeting itself. Only in hung Councils where no party can govern on its own does the Council meeting return to its position of a significant decision-making forum. Manifesto politics, the mandating of individual members by ward meetings, and reselection processes are all to be found in many highly politicised authorities.

The implications on the formal machinery of a Council are considerable. Where a strong majority rules, the Council and its Committees may cease to be useful decision-making bodies; decisions of the majority party made elsewhere are submitted, of course, to the same formal process and to some scrutiny by the other minority Council members. But debate may proceed on predictable party lines, the real issues of decision having been considered in private in caucus. By and large however official advice is not given direct to members in caucus; nor, is advice always available when parties draft their manifestos and those increasingly are regarded as of binding effect on Local Authorities. This presents serious problems for officers who are subsequently called upon to implement such policies. Councillors with strong political convictions find that a gap appears between their aspirations and the advice given subsequently by officers; officers are accused of being obstructive, or insufficiently sympathetic to the aims of the majority party. The consequences for the working of a local authority of this breakdown in confidence between members and officers then leads to demands to make political appointments of officials, and for full-time Councillors, able to act like American or French Mayors. Majority parties try to impose their views on those papers from officials containing advice coming in front of the Council or its Committees even in extreme cases they may try to prevent advice appearing at all. Members of minorities parties may be denied access to information and in extreme cases to Committee meetings.

I put these matters starkly and of course many political authorities do not push things so far. The formal constitution of local authorities does not as I have said acknowledge the existence of political parties;

the conventions which might govern the relationship between the parties themselves and between parties and officers do not exist in local government in a general form, and the expectations of the political parties is in some cases at odds with the formal legal structure in which they find themselves operating.

There is now widespread interest and concern in local government about these matters and the Widdicombe Committee of Inquiry is expected to comment on some of them.

Local Democracy and Effective Challenge

Where does this lead the opportunity for challenge? in one sense the existence of party makes very clear the choice in front of local electors at election time. It may demonstrate the issues which the electors must consider before casting their vote. The choice the elector makes in the ballot box may be a real and effective one, even though low turn-outs and the impact of the national standing of parties at local election time may still obscure local accountability; and it has to be said the inequities of the electoral system itself which are peculiarly evident in local authority elections may thwart the actual choices the electors make on the day.

But after elections have taken place, electors as consumers of local authority services want and deserve the opportunity sometimes to get decisions changed; they want to improve the performance of their local authorities; they want to call their elected representatives to account. This is of particular importance because local authorities are established to provide services. And it is in this area that the parties in local government have a case to answer, because the way they sometimes

operate, almost without regulation in secrecy and unbridled, offers an accountability in practice only to themselves and their supporters.

In Response to Challenge

Is it possible to say how local authorities have responded in practice to the manner in which they are challenged? In particular could we demonstrate that better decisions result? I think it is difficult to generalise. But there are some points which I will risk making.

Firstly, it could be strongly argued that the elaboration of procedural rules designed to introduce fairness and reasonableness in decision-making, and the publication of and access to information tend towards good behaviour and a reduced risk of the arbitrary or excessive use of power. There is no doubt, however, that once one is aware of the rules of the game substantial steps can be taken to ensure that the will to decide an issue in a particular way can be rationalised, and then protected in procedural terms. Thus I detect a great increase in the activity of administrators and lawyers in local authorities to ensure that the political will can be delivered: that it is judge-proof.

Secondly, as other papers to this conference demonstrate, the principles of administrative law are developing rapidly and in a complex way. So too are the avenues of challenge. While these developments are of very great interest, and of significance perhaps for the freedom of the individual, they are also conducive to challenge itself. There seems to be a greater propensity not to accept decisions, to take the risks of litigation, not, I suggest out of an altruistic desire to see the principles of administrative law yet further refined, but rather to take advantage of its present condition to get decisions overturned. The propensity to challenge is also symptomatic of the acknowledged breakdown

of consensus in many areas of public administration: between the public and the bureaucracies; between elected members and professionals; between the political parties, and between local and central government.

Thirdly, local authorities as corporate bodies now themselves take increasing advantage of the opportunity to challenge decision of the Government in the Courts. Sometimes the tactic is to delay implementation; more normally to get a decision overturned.

Challenge to Local Authority decisions - propositions for change

Local Government as an institution is in a critical period. The nature of wider change which might be proposed within its constitutions to accommodate the party political process and its financial and policy relationship with Central Government are outside the scope of this paper. But what I have said may suggest that challenge to decision making in government is a complex and even bewildering matter especially for an individual who may only have simple service requirements to remedy. It may also lead to uncertainty for decision-making bodies and expensive and time-consuming litigation. It may, in the end, be contrary to the public-interest; rights may be achieved only at an unacceptable cost in use of resources and inefficiency. Could we make these things clearer and more straightforward?

I think there are two broad thrusts: one is to look again at what might be called consumer remedies. The second is to look at the political process in Local Government.

Propositions

First, the case-law surrounding the administrative process, the 'discretion' cases could be codified, and the rights of individuals and

their occasions of challenge could be re-stated. The aim would be to clarify, to simplify and to make more certain when rights to challenge exist, by whom they can be exercised, and how, and to what abuses of procedure they may be directed. The underlying principles of making certain classes of decision would also be set down as a clear code which would be available to local authorities.

Second, remedies against a local authority could be re-cast subsuming the rights currently pursued through objection at audit and to the ombudsman and by way of judicial review. The aim here would be to subject a decision of the authority to one process of challenge only in which all the matters which might now be pursued in the current aformentioned could be considered.

Third, the new remedies should be justiciable through a tribunal or tribunals specially constituted and able to handle such challenges expeditiously.

Fourth, the machinery of enforcing remedies against a local authority decision should be clarified and codified. The nature of the orders possible, the circumstances in which a right to compensation, damages and or costs should be established.

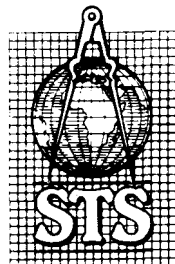
Fifth, the provision for publishing information, for formal access to information, and the maintaining of registers should be examined to see whether they could be replaced by a simpler codified set of rights. The aim would be to bring together and consolidate the various statutory rights which now exist, and in doing so examine whether a more general right to access could now be defined.

Sixth, parts of the political process as now experienced should be regulated perhaps by statute (for example the declaration of interests in party meetings, the registration of party supporters for primary elections, the establishment of machinery to define and declare operating conventions) and partly by codes of practice.

Before I conclude I would add a few glosses to those propositions. I am well aware that clarifying remedies and simplifying routes of appeal will not change the vexed but critical relationship between that exercise of discretion which must be adjudicated in the ballot-box, and that which is properly the subject of scrutiny by a judicial process. If reforms of the political process itself occur however which offer greater effective participation to the citizen, then perhaps idealistically one would hope that the new relationship might become more comfortable. As to a new tribunal I take comfort from proposals recently aired in related fields for similar solutions; the Law Society has variously proposed a Family Court and a Housing Court. But a great extension to legal-aid will in any event be essential to make the benefits of effective challenge real to the Citizen.

Finally, regulating the party-political process itself is historically alien to the British tradition; but I think it is important for the health of local government that the political parties address that issue quickly because if they wish to represent the public in what are primarily service delivery organisations and to express priorities through their political philosophies then they have an equal responsibility to demonstrate that their own procedures from the operation of their ward meetings, selection of candidates to the manner they operate within the Council machinery are open fair and accountable.

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