

Law, State, & Citizen **Class 2 - Lecture**

Theories of Law and the State: Part 1 of 2

First Reading Response:

- Friday, May 14th, 2021, 11:59PM
- Scope:
 - You can make the scope of your reading responses very narrow if you wish (e.g. you could focus on one aspect of one letter reading – for example, you could focus on the subsection, “Citizen Control and the State” (p.2) of reading 1(a).
 - Or you could be broader and focus on the whole of an individual letter reading: 1(a), 1(b), 1(c) etc. Either approach is satisfactory and one is not better than the other.
 - Must be complete sentences, structured into paragraphs, no notes or bullet-points.
- 2. Structure: POINT - EVIDENCE - EXPLAIN (“PEE”):
 - This is the foundation to all good scholarly writing.
 - Make your point, provide evidence (a brief quote or paraphrase), then explain how the evidence supports your point.
 - The explaining is the key part, its where you draw it all together.
- 3. Quotations: Direct quotations can be very helpful.
 - Explain what you want me to see in the quote (PEE!).
 - Keep any quotes fairly short.
 - Don’t let the quote ‘speak for itself’.

A Few Notes on the Milanovic Textbook:

- How to use the textbook: (ix)
 - Be critical and analytical.
 - Adapt the following four strategies in order to read critically and analytically.
- Four key points:
 1. Look for underlying frameworks.
 - It might be a function of a state structure, or the purpose of a statute, the process in which it was designed, think about how an administrator might try and action a piece of legislation, think about if a judge is writing an opinion - why the judge is justifying that judgement that they reached.
 2. Pay attention to context.
 - Pay attention to the year. Some elements might seem out of sync with what the 21st century’s scope is.
 - Think of the history.
 - In order to understand legal texts you might need to pay attention to none legal matters - for example corporate, international matters all which impinge upon the state.
 - Don’t look at just historical, but social, and political..etc.
 3. Look for themes and patterns.
 - This requires some comparative thinking.
 - To identify a pattern you need to look beyond the text you are reading at that moment.
 - What are the commonalities and discrepancies between readings. How can we explain that they have these shared concerns?
 4. Look for values and preferences.
- All law is human process.
- ‘Law’, ‘state’, and ‘citizen’ are all contested, not innate and settled upon.
 - These 3 key terms that make up this course are all contested. None of them are settled on they are not stable they are influx.

Reading 1(a): Elliot: Social goals and the state.

- Elliot provides you the basics and briefly glosses the readings to come so you know what to expect. You know what the main features/take aways will be.
 - How should we understand, critique and think about the state?
 - He says the state is not natural land mark - its a human creation.
 - From the beginning the state inseparable from society as a whole has always been about reckoning with tensions between individuals and communities.
 - In communes there are always competing interests. More than one individual in a community means there might not be agreement on everything. Interests of a group are separate from interests as individuals.
 - Starting premise:
 - "The state [...] like law [...] is a human creation." (1)
 - In which you have a jumble of different interests.
 - The State and Social Goals:
 - Collective interests: collectivist law and order.
 - Why we chose to form a state is to ensure human survival & physical security. AKA Strength in numbers.
 - Private interest: +ve & -ve
 - The positive right interest - an interest you have against the community or the state.
 - The negative right - is some aspect of your life which should be free from interference from the outside.
 - Citizen control of how they are governed.
 - Participatory democracy - the idea that citizens have some kind of control of their government.
 - Equality: is the state a tool of class/ elite domination?
 - Whether the state is or isn't a tool of class or elite domination is one of the key questions we will be thinking about today.
 - Marx is the key thinker here - for him the state did not promote equality.
 - What we see in Marx is that the makeup of a state can be understood into different classes that have different antagonistic interests.
 - Other
 - Ethnic & cultural interests.
 - Environmental goals.
 - Human 'flourishing'.
 - The ultimate objective of the state would be human flourishing. How can we construct a state that promotes the full development and flourishing of its citizens. How can a state both nurture and support and YET no impede. That concept of flourishing is important when thinking of the productive capacity and limits of the state.

Nation states exist in the world system. They are a system of interconnected nation states. Sovereignty is expressed inwardly, in you have sovereignty you have control over what is in your state or territory. You have monopoly and lawful forms of power. Whereas outwardly sovereignty is expressed as other nation states can't interfere with what happens in your borders. However, no state is permanently sealed. States today and for centuries have operated under a system of global capitalism. International law is not a major part of this course but in the background you should remember "no modern state is an island".

Collective & Private Interests in the Canadian Context:

- Collective interests:
 - In 20C Canada, concern for social welfare was heightened by the economic disruption of WWI, a devastating depression in 1930s, and WW2.
 - Eg. The CCF (Co-operative Commonwealth Federation, now the NDP) party proclaimed the Regina Manifesto in 1933 during the depression, which stressed that state resources should be used to improve economic and social conditions for all citizens
 - An example to create policy based out of a desire to identify and enhance our collective interests as a community/state.
- Private interests:

- With enactment of Constitution Act of 1982, the constitutional rights-based approach gained a central role in Canada.
- +Ve: Enforceable against the state.
- -Ve: free from interference.
- The constitution rights based approach that was enacted with the constitution act 1982 becomes more main stream and seems the discourse of the 1980s to today has seen a primacy of private interests, individual rights, individual rights that are enforceable against a state. A desire to enhanced wellbeing as a collectivity.

Reading 1(b): Hobbes:

- The state saves us from ourselves.
- “The laws of nature [...] are contrary to our natural passions”.
 - Two different kind of nature.
 - Our natural passions as human beings and these laws of nature he identifies as justice, equity, modesty, mercy.
 - Profound tension between society and the individual. This tension that Hobbs tracks this is animated social theory through Hobbs but all the theorists below.
 - Society and the individual — tensions (Hobbes through Simmel through Freud to the present).
 - What the individual wants to do and what they need to do in order to remain in good standing in a community/state causes difficulty.
- Must confer all power in one hand [sic] assembly.
 - Reduce plurality into one “will”.
 - To hobbs this is how you get out of this problem. You reduce the plurality of these passions to one “will”. Confer all power into one assembly/man.
- “I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner. This done, the multitude so united in one person, is called a COMMONWEALTH ...”.
- Sovereign/ Sovereign Power:
 - We’ve established a sovereign power now.
 - Attained by “natural force” (father and children) or war.
 - A natural hierarchy like parents to a child OR through war.
 - Voluntary submission.
 - Why would we give up our rights of self governance? Because the state is an instrument of human survival and physical security.

Reading 1(b): Hobbes Continued:

- From view of Thomas Hobbes in 1651, state was an instrument for human survival and physical security.
- This collectivist “law and order” goal remains a key rationale for states to this day.
- In Canada, it can be seen in the “Peace, order and good governance” clause in the Constitution Act of 1867.
 - This collectivist law and order goal seems kind of brutal and medieval. But remains a key rationale of states today. In Canada we can see this collectivist goal in our “Peace, order, and good government” clause.
 - It is a trade off. You trade your rights to survive - be part of state with an army, and access to markets.
- For more on Hobbes, listen to the “Hobbes On Power: Taking Politics” Podcast by David Runciman, linked to from the bright space course page.
 - <https://www.talkingpoliticspodcast.com/history-of-ideas>

Reading 1(c): Locke:

- Locke gives the foundations of certain kinds of liberalism.
 - Man is “by nature free”.
 - Only justification for limiting this freedom: voluntary decision to unite into a community (for comfort, safety, secure enjoyment of private properties, greater security against the outside world).

- Property is key for Locke.
- Preservation of property: “to which in the state of nature there are many things wanting.”
 - Resources are limited, if you own a resource you want to protect it from everybody else.
- Four Conditions of forming a state/government:
 - Equality before the law.
 - Law must be for the good of the people.
 - Very vague.
 - Cannot raise taxes without the peoples consent.
 - It all connects to property. Money is property, therefore no one can seize it from you.
 - Tax and consent are important for Locke because if the state is going to take your property than you must have consent to it. If they could than it would violate your exclusive right to enjoy your property.
 - Legislative cannot transfer the power of making laws elsewhere.
 - They cannot duck the responsibility and hand it off to someone else.
- If the conditions are broken the people are absolved of a requirement of obedience: right of rebellion against the government that fails in its most basic obligations.
 - Almost a right to revolution. A failed government on its basic obligations no longer has moral authority to continue to exist. You have a right to rebel again you government in this situation for Locke.

Reading 1(d): Mill:

- Most people like Mill.
 - “Right of pursuing our own good in our own way.”
 - The prevention of harm to others is the only justification to interference with this principle.
 - This freedom that the only thing that can interfere with it is when you cause harm to others. As long as you do not harm others, do what you like. This is very tricky though. It seems clear but consider situations below.
 - E.g. Consider assisted suicide laws, road traffic laws, drug taking.
 - It is assumed individuals know what is good for them but what happens when your capacity to decide is limited by material means such as poverty and addiction.
 - “Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.”
 - We all benefit if we get along and allow people to do what they want rather than compel people to live in a way that seems good to the rest. Very anti-authoritarian.
 - Flaws?
 - Materiality, uneven distributions of power and wealth.
 - What about materiality? And power?
 - What would be required to realise Mill’s theory of liberty?
 - Not as straight forward or realisable as it may seem on the first read.

Reading 1(e): Marx:

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- “Legal relations as well as forms of State could neither be understood by themselves, not explained by the so-called general progress of the human mind but that they are rooted in **the material conditions of life** ... and that the anatomy of civil society is to be sought in political economy ...”
 - Marx is rejecting the notion that legal relations can be understood as abstract rules, they are embodied in the material conditions of life. They are embedded, produce and in responsive to the social relations of established by the particular means of production in that society.
 - Social relations and legal relations are produced by political economy.
- “It is not the consciousness of men that determines their being, but on the contrary, their social being determines their consciousness.”
 - We are social creatures for Marx, so this has implications for questions of freedom, interfere with the lives of citizens, extent to which citizen should have control of the state. There is no outside space for consciousness for Marx on society.

- Through the state the ruling class asserts their common interests.
 - For Marx you can divide society into groups in his case classes. The bourgeois class - the ruling class and the working class.
- Law is not based on the will of the people.
 - The ruling class is using the state and law to ensure their common interests are furthered.
- The basis of law is force.
 - Military power, police force, various instruments of the state.
 - Law an expression of the context of actually existing state power.
 - The reason law looks different in different context is because it is an expression of actually existing state power at particular moments.

Reading 1(e): Marx Continued:

- Karl Marx argued the state did not promote equality, and instead was the “form in which individuals of a ruling class assert their common interests.”
- Traditional approach to Marx’s writings sees state in capitalist society as instrument through which bourgeoisie maintain their economic domination of working class.
- More recent views of Marx’s writing argue he saw state not merely as instrument of ruling class, but acting independently to unite competing factions of capital...
- ...while also forging compromises with subordinate classes (e.g. statutory minimum wage increases).
- In doing so, state encourages consent of the dominated.
- State thus has relative autonomy from both ruling class, and class struggle within civil society.
- The state is part of this extraordinary process of movement that is now acting independently. Not only is the state no longer under the control of the ruling class it is also something through which the ruling class can compromise with subordinate classes through statute/law. An example is statutory wage increases AND limitation to the working day.

Reading 1(g): Hunt on Gramsci:

- Gramsci works in the Marxist tradition.
- Antonio Gramsci used historical materialism and ideas and discourse to understand law and the state.
 - He points the attention economy with attention to ideas and discourse (fancy way of saying public discourse - the prevailing public conversation)
- He argued ruling class domination is enforced not only through economic relations and state, but also through institutions such as the media, schools, and the family.
- Gramsci and other Marxists often argue that many features of modern democratic states, such as representation, justice and basic rights, help produce hegemony,

Gramsci gives you a more sophisticated model than orthodox marxism provided us with in terms of relationship of the state and law.

Marxist theory - the base is the economy. The a super structure around it. The super structure include law, culture, family, religion and other elements of society. The based determines the shape and the way elements of the super structure run.

Gramsci argues ruling class domination is enforced not only through economic relations and the states but through institutions such as media, schools and family. He argued many features of modern democratic states such as representation, justice, basic rights - all things that are in the recognisable elements of a political discourse creates hegemony. Which is what is consider right and appropriate. Certain things are justified by other discord’s going on.

Gramsci gives you a more complex model of the flows through the superstructure and the base.

Reading 1(g): Hunt on Gramsci Continued:

- Hegemony is rule by a dominant social group that is supported by both coercion (e.g. police and military) and by consent (e.g. ideas of legitimacy of state and rule of law).

- From this lens, Gramsci locates the law at the intersection between state and civil society because it involves processes both coercive and consensual.
 - This is the take away of Gramsci. Criminal law is the best example.
- Law is thus an area of struggle that is responsive and can be transformed by civil society movements.

Reading 1(h): Proudhon:

- Anarchist thinking.
- Could society exist without state coercion altogether? Without laws?
- "Laws! We know what they are, and what they are worth! Spider webs for the rich and powerful, steel chains for the weak and poor, fishing nets in the hands of the Government."
 - (p.19)
 - This dovetail with the orthodox, older marxist theory that law is an instrument of the ruling class.
- "Instead of a million laws, a single law will suffice. What shall this law be? Do not do to others what you would not they should do to you: do to others as you would they should do to you [...] this is not a law; it is the elementary formula of justice."
 - (p.19)
 - This illustrates that for some theorists that there is an identifiable gap between law and justice. Thinking critically about law, and doing legal studies is about thinking through this gap of law and justice and how we might limit it or eliminate it completely.

The Nation and the State:

- The idea of the 'nation' and the idea of the 'state' and the distinction between the two:
 - The state a political and legal entity.
 - The nation a political/cultural identity.
- The idea of the nation can be very useful to the state.
 - 'State nationalism' encourages loyalty to the state.
 - Holds the state together, a culture identity, loyalty to the state is very useful.
- The nation "is an imagined political community".
 - Benedict Anderson, *Imagined Communities* (Verso, 1983, rpt.1991): 8.
 - Anderson theory makes cultural activity very important because what is critical in terms of ensuring you have a working and healthy community is that you know how to relate to other people. For Anderson cultural identity flows from cultural activity.
 - Imagined as: *Limited* (finite), *sovereign* (free), a *community* (horizontal comradeship).
 - His particular terms of cultural activity included above.
 - Limited is exclusive - not everybody can be part of it.
 - Sovereign it is free to do as it wills.
 - A community in some meaningful sense.
 - Varies aspects of community are horizontal - such as in Canada the right to vote no matter who you are.

The State:

- "A political and legal entity".
- Weber:
 - "The primary formal characteristics of the modern state are as follows: It possesses an administrative and legal order subject to change by legislation, to which the organized activities of the administrative staff, which are controlled by regulations, are oriented." (reading 1(f), p.12).
 - The point here is to tease out the difference between the nation (Anderson definition - imagined political community) and the state (a concrete thing according to Weber).
- Characteristics common to all states:
 1. A defined territorial extent (a border).
 2. A population (citizens).

3. Central government (tax, law, administration etc.).
4. Sovereign (free from outside interference).
5. Recognized, legal standing, seat in the UN General Assembly.
6. Monopoly on the legitimate use of force (police).

The state and nation are two very different things. State blends it together without us realising they are separate. This is important to know because thinking about the state, Weber has given us an insight into what administrative law will be and why it is important for states.

State Anatomy 101:

- Administrative law mostly concerned with the executive branch of government.
 - Executive branch being the one to Initiates and administers policy, law, and state assets.
 - Cabinet (“ministers of state”), ministers of the crown.
- Compare with:
 - The legislative branch:
 - The Governor General, the Senate, the House of Commons.
 - The judicial branch:
 - The judges of the law courts.

From State and Nation to the ‘Nation-State’:

- The nation-state combines ‘state’ with ‘nation’.
- A system of organization in which people (citizens) with an (imagined) common identity live inside a country with firm borders and a single government.
- A system of economic, political, geographic, and cultural organisation.
- The modern world-system is comprised of sovereign nation-states.
 - All in relationship with on another - they are in an interstate system.

The Interstate System:

- States exist in the interstate system — this limits their power.
- There for limiting their Sovereignty: internal and external claim of authority.
 - Internal authority - what goes on in the borders.
 - External authority - a claim that you cannot interfere with me.
- For the theorist Immanuel Wallerstein, the state is the key actor in the protection of property rights which are the centrepiece of the capitalist system.
 - We are back at Locke here.
- “Strength of states is most usefully defined as the ability to get legal decisions actually carried out.”
 - Wallerstein, *World-Systems Analysis* (Duke UP, 2004): 52–3
 - You can have the best constitution in the world but it won’t mean a thing unless you have a machinery of state that enables you to make it more than just words on paper.
- “The peculiar structure of a world-economy [...] is peculiarly consonant with the needs of a capitalist system.”
 - Ibid: 58.
 - This interstate system is particularly useful to global capitalism and all this brings us back to Locke. The theorist who’s not been most intellectually influential but seems to be a theorist who speaks most clearly about the world in which we live.

States have their power limited by participating in this system but the bonus is the protection of property rights enables the capitalist system to do its thing. Protection of public property rights is the centre piece of a capitalist system according to Wallerstein.