Monday, May 17th, 2021

Law, State, & Citizen
Class 2 - Lecture

Theories of Law and the State: Part 2 of 2

Theories of Law:

- The theory will be more linked to Canada today.
    - Lecture outline:
        1. Role of the courts in Canadian society.
            - Thinking about the recent legal history in Canada and the developed world, the rise of quasi judicial institutions. Administrative law seeps in everywhere. 1 & 2 Tie into each other.
        2. Rise administrative tribunals/quasi-judicial institutions.
            - We will talk about the history of the courts to understand what they do now.
            - Ellis reading is important for this.
        3. Critiques and challenges for reform.
            - Dicey and E.P. Thompson.

Law & Society: Efficiency vs. Fairness:

- This is what animates ellis critique.
    - There is a tension between efficiency and fairness but you cannot have both. Fairness requires more work. How interventionist should law be? The more it is the closer to fairness/justice. The more interventionist it is though will make it less efficient.
- Key conceptual and practical tension:
    1) Efficiency of decision-making and the power of state, including state's desire to maintain future discretion.
        - States ability to make decisions, and states capacity to maintain future discretion. The state wants to ensure it holds power in the future and present. The less law, it might limit the states decision making powers = more efficient.

    VS.

    2) Principles of fairness, justice, impartiality and independent adjudication, and the related rights of those affected by the exercise of state power.
        - State decision making can effect the entire population. Decisions states make can have international consequences as well. The law ensures these principles are respected. Law becomes a mechanism of enforcement and protection.
- Why and how does this tension arise?

Why Does This Tension Arise?:

- Complexity of society under (modernity?).
    - Modernity - Modern era in Canadas case might be 1867 or even 1982 with the creation of the charter. Modernity excelerated with the dawn of the 20th century.
    - The history of social complexity maps and mirrors that massive explosion of modernization and modernity in the 20th century.
- As Canada's society, economy and politics got more complicated over past century, the state has grown into many spheres of our lives that were formerly considered beyond the legitimate scope of government.
- Is this state growth inevitable? Desirable? Alternatives?
- E.g. scientific and tech change, increased expectations of worker's rights, growth of human rights, landlord and tenant rules, immigration and refugees trends, disability rights, retirement pensions (people live longer), employment insurance, child services … List goes on!
    - Job of the state has gotten complex, big, and messy. So administrative law has got arguably, commendably big and messy with it.

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Marshall Berman, All That Is Solid Melts into Air:

- "To be modern is to find ourselves in an environment that promises us adventure, power, joy, growth, transformation of ourselves and the world – and at the same time that threatens to destroy everything we have, everything we know, everything we are."
    - ([1982] Penguin, 1988, p.15).
    - Berman argues modernity is paradoxical.
    - Climate change is an example that makes sense in regards to this proposition.
    - The paradoxes of modernity and the modern state are messy, complex, they are reflected in and understood through the law of modern administrative states.

Why Does A Tension Arise (Efficiency & Fairness)?:

- Ron Ellis notes in Unjust by Design that more and more quasi-judicial bodies were set up to decide disputes without replicating the institutional guarantees of the judiciary.
    - Tribunals, all kinds of others things that seem like courts but they are not.
- Why would we set up quasi judicial bodies why not expand the court system?
    - Ellis says to do otherwise would be contrary to the state interest. The courts are very powerful and have the power to compromise and force the state to do things different - which creates more work for them. Therefore it's easier for the state to have simple assistance with fewer checks and balances.
- Why have the institutional guarantees of the judiciary often been avoided?
- Viz. Elliott, p. 128: because doing otherwise would be contrary to the state's interests.
- Elliott notes separately earlier in the readings that using judges to resolve disputes is expensive and time consuming (court cases can take a long time).
    - Courts are expensive and time consuming - if we expanded the courts or made them the primary legal mechanism by which we do our administrative work then the court system would break down and get clogged up.

Supreme Court of Canada:

- The chief justice receives about $403,800 annually.
- Other justices receive $373,900 annually.
- Helps prevent corruption and ensure integrity.

VS.

- Landlord and Tenant Board member - $115,000 – 125,000 approx.

We pay judges well as it prevents corruption and enables integrity. Whereas the tenant board makes significantly less and the cheaper option and more efficient for the state to have a particular category of disputes resolves by this quasi judicial body/institution.

Approaches and Criticisms of Judicial Control:

- So, what role should the courts play?
- First, historically, the courts have been important as a way of controlling the administrative process, and have been traditionally associated with private interests that conflict with this (public interest) process.
- These have often been property and commercial interests of those with large stakes in the status quo.
    - The courts have been been far from revolutionary you can say. The court system has been about preserving property rights and the status quo.

Historical Role of the Courts:

- If the private interests furthered by courts have often been property and commercial interests of those with large stakes in the status quo, we might expect greater support for an expanded judicial role from these groups than others.
    - The people with those interest who might wish for an expanded judicial role that is not why ellis is requesting for reform.
- But that's not why, in the contemporary Canadian context, Ellis is advocating for administrative law reform.

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Institutional Strengths of Courts:

- Second, the courts have a number of distinctive institutional strengths and weaknesses.
    - Strengths:
        - Procedural fairness & impartiality (rules).
            - Courts don't decide things based on morality and feelings, there are rules, they enforce them with authority.
        - Authoritative.
            - They are authoritative and have enforcement powers. They are consistent or supposed to be. Courts strive to decide cases that raise the same question on a different issue - those future cases are decided in accordance with precedent (previous case decisions)- therefore somewhat predictable.
        - Judges are appointed not elected (In Canada).
            - Beyond reach of electorate.
                - There will be consistency overtime is the idea of why we don't elect judges.

Institutional Weaknesses of Courts:

- Weaknesses:
    - Inaccessibility?
        - "Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now […] I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third." The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks.:
            - Franz Kafka, "Before the Law," (1915).
            - We see so much we might relate to modern law in Canada. Yes courts are accessible but there are barriers - you need money. You can represent yourself - but they you need to figure out how it works. There are all these levels of gate keepers - its like a hierarchy of the courts - you need to work your way through the system. Formally the law is accessible but materially accessibility is more complicated than it seems.
            - https://www.kafka-online.info/before-the-law.html
    - Slow, expensive
    - Rigid, backward-looking.
        - Not flexible systems. Everything is done in a particular way.
    - Limited opportunity for negotiation and compromise.
        - Backward looking not forward looking. They try to resolve disputes that have occurred in the past, a dispute between to parties. Courts decide who's right or wrong. Theres no room for negotiation or compromise. It's a winner/ loser system.

Institutional Weaknesses of Courts Continued:

- On negative side, courts are usually slow, expensive, and not very accessible to the public at large
- Their procedure is rigid, and their investigative and information resources are limited
- Tend to be backward looking, remedying past problems, and tied to precedent (vs. forward looking)
- Courts tend to produce winner and looser results, with limited opportunity for negotiation and compromises, especially between large social groups.

Charter Increased Court Power:

- Third, the impact of courts has greatly expanded by the advent of the Charter of Rights and Freedoms.

- In the charter era (1982- to present) the power of the courts to impact upon everyday life is that much greater.

- When Charter control imposes procedural constraints, these constraints can affect statutes as well as administrative decisions pursuant to statutes, and they cannot be avoided by ordinary statutory amendments.
- Charter control is both more powerful, and more removed, from traditional democratic checks (than is judicial control exercised outside of Charter context).
    - The power of the courts has being enormously enhanced in the charter era.

Traditional Approach to Control:

- After 17th century, it was established that normally all administrators must act pursuant to statutory power.
- Only exception was government action under the Royal Prerogative (i.e. the power of the Queen, and her representatives in the Executive Branch).
    - It means there are certain decisions that are not parliamentary decision, parliament is not sovereign in this regards.
    - E.g. in Canada, right to send armed forces abroad is not a Parliament decision. The Queen decides this.
- But in general, even Royal Prerogative has been historically subject to statutory limit, and could not permit government action that adversely affected individuals.

Traditional Approach to Control:

- This all meant that administrative action was subject to public oversight, at first by relatively privileged electorate, and then larger population as more people achieved right to vote.
- By mid 20th century, administrative action, like all government action, was subject to the ultimate control of the general adult public.
- A requirement of statutory authorization is most effective if there is a mechanism available to enforce it on individual occasions.

The general control of the adult public, we authorize government action, but to prevent the government exceeding from that which it is authorized to do is you need a control mechanism, and that mechanism has been historically courts.

- Courts still enforce the requirement of statutory authorisation, the idea that administrators have to act pursuant to statutory power.

Traditional Approach to Control:

- The mechanism that has been used for his purpose is the judiciary, an institution that emerged from 17th century with both prestige and relative independence
- Today, courts are still meant to enforce the requirement of statutory authorization, and can provide relief to victims of unauthorized or illegal administrative action
- However, since the statutory authorization requirement applies to courts as well, they have had to minimize any claims to independent (e.g. common law) power in carrying out this monitoring and relief role.
    - In exercising their control powers to ensure the administrator has not acted beyond their powers, the courts show minimise claims to judge made law - independent common law- that grants powers to monitor and provide relief.
    - The courts are not immune from this principle that administrators can only do that which they are authorized to do through statute. Courts can't decide for themselves what they can do.

Traditional Approach to Control:

- And so courts (and their supporters) tend to maintain that judicial review – a major means of control – is simply an aspect of the normal judicial function of interpreting statutes.
- Note that judicial review can mean different things, but for our current purposes today it is associated with a court reviewing the factual or legal findings of an administrative body.
- Level of deference expected to a particular admin body will generally be outlined in the relevant statute.

Traditional Approach to Control:

- This approach that has been described - this control approach - you have a electorate, a parliament, administrators and courts - you have 4 different actors all doing their own things - this theory going on here is a chain of mandates.
    - Traditional approach grounded on assumption that the government is essentially a **chain of mandates.**
    - What does that mean?
        - Electorate
            - Vote in a government.
        - Parliament.
            - Then you end up with a parliament, which is mandated by the electorate to do certain things.
        - Administrators.
            - Parliament then tells administrators to carry out policy.
        - Courts role: keep admin within terms of their statute mandates, and provide relief if unauthorised action harms.
            - Courts keep everything in check.
    - **BUT**:
        The theory chain of mandates suggest the electorates in charge.
        - Is the chain of mandates theory naive?
        - Is it excessively formal (lacking socio-economic context)?
            - Does it assume a certain level of engaged citizenry.
            - Does it assume that the electorate pays attention in parliament.

    - The value judgements are being made throughout this chain

Traditional Approach to Control:

- Within this conceptual framework, courts have enhanced their subservient role by intervening on implicit and explicit statutory conditions
- If legislators fail to make their intention clear, courts often infer a legislative intent to attach implied restrictions to mandates
- All the while, courts insist their review is just interpretation
- JR may be supplemented actions for damages, where illegal admin action amounts to tort

-This slide is additional detail in which courts have enhanced their role, they are not as subservient as they seem. Courts function is they interpret in this mandate. They do not create law themselves.

Traditional Approach to Control:

- Another possibility is judicial appeal, which can extend to reconsideration (not just of the procedures of the process but) of the substantive merits of a decision
- Appeals are generally only available where a statute expressly provides for them
- Since 1982, the above traditional controls have been supplemented by constitutional control under Charter
- In effect, a new set of “negative” mandates has been added to the chain of mandates noted earlier
- Courts assess statutes and admin action here also.

- Another way in which the courts fulfil their necessary feature of control and checks and balances , and making sure administrators are making decisions within their powers as opposed to judicial review is. Another possibility is judicial appeal - which can extend to a reconsideration to the procedures of the process and the substantive merits of the decision.

- Judicial review - concerned with the process.

- Judicial Appeal - is wider scope. If the appellant has the right to make appeal than merits fo decision can be taken into consideration. However, you can only appeal a decision made by an administrator whereas statute expressly provides the possibility of an appeal.

- The control mechanism is supplement by the constitution control of the charter.

- In effect you have a whole set of new mandates - negative mandates - that have been added to the previous mandates.

Criticisms of Traditional Approach:

1) Decline of traditional accountability:
    - Judicial Review needs rethinking because its conception of Parliament is outdated.
        - Parliament has weakened, so power not sufficiently accountable to public.
        - Parliament is not the boss, the executive is a lot stronger. Power is sufficiently not accountable to the public.
2) Judicial Review Formalism
    - JR should consider the social context of an administrators decision and its impact. It's about process.

Criticisms of Traditional Approach:

3) Intrusiveness
    - Until recently, some argued traditional approach permitted excessive judicial intervention (e.g. on labour relations).
    - But recently, courts have tended to try to respect judicial restraint, and stay out of areas that statutes say they should stay out of.
4) Narrow Scope
    - Does JR only protect a narrow range of interests? What of social assistance recipients, immigrants and refugees?
        - JR is not the tool with which to fight for social equality. Its not that far reaching.

Criticisms of Traditional Approach:

5) Functional limits of courts and judges
    - The problem becomes do judges always have the specialist knowledge they need? No, nobody can know everything about everything. So should their be specialist in these areas?
    - Should other forms of control be used more (e.g. specialist monitoring bodies, ombudspeople.
    - E.g. new Independent Canadian Ombudsperson for Responsible Enterprise mandated to investigate allegations of human rights abuses linked to Canadian corporate activity abroad.
        - Someone to give quick and ready determinations based on a close knowledge and understanding of a particular context and legal principles that can change that context.
    - https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng

Criticisms of Traditional Approach:

6) Cost
    - High cost of judicial control limits its protections to those who can afford it.
    - Lengthy Charter case can cost over $1 million
    - Should Legal Aid be expanded?
    - Note that Carleton has satellite U of O legal aid clinic available for eligible students to seek legal advice (e.g. on landlord and tenant issues).

Four (two) Views on the Rule of Law:

- A key ideological justification for law is the idea of the rule of law.
- What does rule of law mean?
- Preamble to Charter says Canada is founded “upon principles that recognize the supremacy of God and the rule of law”
- But no formal written part of constitution defines rule of law.

- This is tricky, the centrality of law to the way in which an administrative state works it is key.

Two Views on Rule of Law:

- Elliot beings by giving you the views of the thinker of who has most influenced both Canadian and British constitutional law - Dicey.
  - Dicey formulated two principles - the rule of law and the soverignty of parliament. They are intertwined.
    1) 19th century constitutional lawyer Dicey linked rule of law to the sovereignty of Parliament
       - Profound influence on British and Canadian constitutional law.
       - Three key things that Diceys is getting at:
         A) Government action must be expressly authorized by law, not by exercise of wide or arbitrary discretionary power.
            - This whole system of judicial oversight and limiting the power and the decisions of the state and administrators only works if you think there is a legal system that authorises this action and ensures that action is not exceeded.
         B) Every person – regardless of power and position – should be subject to the ordinary law in ordinary courts (one law for all).
         C) People's rights should depend on specific concrete judicial remedies, not abstract general principles.

Dicey:

- For Dicey, rule of law linked to sovereignty or supremacy of Parliament, subject to ultimate political sovereignty of electorate (recall Locke's right to rebel)
- In Canadian context, Dicey's concepts qualified:
  - First, here, Parliamentary sovereignty is shared by federal Parliament and 10 different provincial legislatures
  - Second, Parliamentary sovereignty is subject to constitution, particularly the Charter
  - Third, in Canada rule of law includes specific remedies and general constitutional provisions.

For Dicey remember for him the rule of law is linked to sovereignty (supremacy, the sovereignty of parliament) subject to the ultimate political sovereignty of the electorates.

- Sovereignty truely resides in the electorate.

2. E.P. Thompson, Whigs & Hunters (1):

- E.P. Thompson (1924–1993): British cultural historian
  - https://www.theguardian.com/books/2013/mar/06/ep-thompson-unconventional-historian
- "And if the actuality of the Law's operation in class-divided societies has, again and again, fallen short of its own rhetoric of equity, yet the notion of the rule of law is itself an unqualified good." Thompson (1975, 267)
  - There is a gap between legal ideals and reality.
- How the forests and hunting-grounds of 18C south-eastern England became sites of legal, environmental and social transformation and contestation.
- In Thompsons mind Law a medium of expressing social / political struggle and inseparable from those struggles.
  - **Not Objective.**
  - **Law was not neutral and objective.**
  - **The law itself is coloured by the social and political context of its time.**
- 11 pages at end of the book on the rule of law that generated vigorous debate.

This idea that yes the law might be a weapon of the ruling class BUT the rule of law as a principle is an unqualified good because there is "a tremendous difference between [the exercise of] arbitrary power and the rule of law".

2. E.P. Thompson, Whigs & Hunters (2):

- Rule of law according to Thompson
    - An "unqualified human good" (267) [in book's conclusion].
- Black Act (1723): made hunting red and fallow deer punishable by death.
- Showed the burdens of law lesser on gentry than others – law used to benefit the ruling classes
    -How then did he reach his conclusion?
    - A tremendous "difference between [the exercise of] arbitrary power and the rule of law" (266).
    - The rhetoric of law might be "a mask" but it could still be turned against the ruling class.
        - Its not in its core a weapon of the ruling class, it just happens to be so in particular moments.
- Links "the violent realization of private property in 18C rural England with distressingly similar experiences in sites across the globe in the 21C." (Peluso, 312).
    - We can also see in the rule of law, reason for optimism because there is a difference between brute force/power/arbitrary power and power exercise via the rule of law - simply because if everybody adheres to the rule of law and the law can change, change for the better, than you have an instrument for progress social transformation.

The law is made to benefit the ruling class, the thing to grasp here is the black act is not something that helps the poor class of England but the fact that hunting of these deer was made illegal is a demonstration that arbitrary power, the exercise of power that is not tempered by law could be worse.

Is the Rule of Law Imperialist Oppression?

- "The chaotic and bloody world around us is the rule of law."
    - China Miéville, Between Equal Rights: A Marxist Theory of International Law (Pluto, 2005): 319. [Emphasis in original]
- "The only thing more oppressive than a lawless world might be a lawful one."
    - See: China Miéville, "Multilateralism as terror: international law, Haiti, and imperialism," (2009). London Birkbeck ePrints.
    - http://eprints.bbk.ac.uk/783/2/HaitiBirk.pdf
- What does Miéville mean?
    - Consider:
    - (i) the Iraq war of 2002 (which international lawyers regard, in the mainstream, as having been illegal sinc there was no UN Security Council Resolution authorizing it.
        - What Melville is getting at is the Iraq war released destruction and devastation and there are consequences we are still seeing today.
        - The point is Melville is arguing this illegal action under the rule of IL unleaded violence and suffering on a vast scale.
    - (ii) the 2004 coup d'etat in Haiti – which was lawful under the rules of IL.
        - Democratic elected president of Haiti was removed from power in a military coup that was backed by International community.
            - It was lawful according to IL there was a UN resolution that authorised it. But it too unleashed a wave of violence and human suffering that Haiti is till suffering from today.

Mieville says we need to be more self reflective, and critical of the rule of law than perhaps we are. We need to think about more critically whether the rule of law is a qualified good. Through that case study above there is a question of the difference between process formality and materiality.

- Process can be lawful doesn't mean it will be good.
- In this quest of the state for efficiency and fairness, we can see the scope and quality of law and its relation to decision makers in society is of profound importance.

Thompson holds out a hope that the rule of law will be different and through the rule of law social transformation is possible.

- The rule of law is better than arbitrary power for Thompson.

China Mieville gives us a more pessimistic version. Law fails.

- For Mieville would rather take his chances with arbitrary power. A lawless world. He phrases it as both being bad and oppressive.
- In brief that quote about the lawless world being the lesser of two evils comes from an article where he compared the legal mechanisms that permitted the two wars mentioned above.

How via the rule of law you might find a better balance between efficiency and fairness for Mieville there is no hope of that.