

Law, State, & Citizen

Class 5 - Lecture

Basic Values and Their Protection

Basic Values and Their Protection:

- Basic Values:
 - Values that societies consider to be especially important.
 - Even if basic they can be complicated. Basic is the sense they are essential for a certain type of life.
- Ideological (Basic values in one context/country is different from another):
 - 'Western':
 - Values pertaining to the individual rights.
 - Problematic term 'western', what does that mean? What about the places excluded from this category? In short it can mean capitalist states. Western is a made up ideology.
 - Socialist:
 - Values pertaining to community and equality.
 - Material and formal equality.
 - Democratic (Non-Dictatorial Societies):
 - Public control of government.
 - In some places there will be greater or lesser public control.

Basic values are not so basic. Dignity is hard to define and can you live a dignified life without shelter? Does Canada provide all citizens with a right to housing? That a socio-economic right. We can tell a story of enlightenment and progress in rights and protection, that story is easier to tell from formal material rights and values.

State Support and Characteristics:

- State Support
 - Recent tendency to protect basic values by recognising them as legal rights.
 - This was not always the case.
 - 'Jurdification':
 - Turning things into law. This is how the state is getting more complicated.

One way modern states become more complex is juridification.

- Viz. "We should not be forced to do our fighting in courts according to the rules devised for capitalism's maintenance and survival."
- Glasbeek & Mandel in textbook, p. 143
 - They suggest the courts are not an appropriate venue for ensuring protection of basic values, they suggest a preferred way to go would be to make society more democratic based on the principles of equality and pluralism.
- Are basic values desirable benefits or moral rights?
 - This is an open question. Keep this in mind while doing readings and lectures.
- How else can basic values be recognised?
 - Will be discussed as we talk about protection of basic values in Canada.
- Characteristics:
 - Jurdification basic values as basic rights changes their status, turns them into law, BUT if basic values were subjective before, the mere fact that they have status does not mean they are not subjective anymore.
 - Subjective or universal?
 - Controversial?
 - Relative or absolute?
 - Legal status does not end these debates.

Kinds of Basic Values(1):

- Individual; e.g.:
 - Freedom of speech.
 - Freedom of religion .
- Group; e.g.:
 - Collective bargaining.
- Society-wide:
 - Preservation of Law and order.
 - Preservation of Security.
 - Right to Education.
 - Social Welfare.
 - Depends on the place, Social welfare is a basic value in different forms depending where you are.

Kinds of Basic Values(2):

- “Individual and group values are normally thought to require protection against harmful action by the state or private actors ...”
 - Elliot (p.129)
 - Key point made by Elliott, He distinguishes between the kind of action a state is going to undertake in order to protect these categories of basic values.
 - You have these values, freedom of speech or freedom to practice your religion, groups have the right to form and have collective bargaining, these rights and values need to be protected. Not promoted, the point of Juridification these values is in order to give individuals and groups the weapons in which to defend themselves from state action or private actors.
 - Contrast this with society wide values, those that need protecting, those are the things the state needs to promote, they need to create institutions in order to deliver or promote those social values.
- “... general social values are normally thought to require promotion by the state or private actors.”
 - Elliot (p.129)

One hand individual and group values in order to flourish you need the state and private actors to stay away. But for general social values you need state involvement if you are going to nurture or promote them.

Basic Values in Canada: Phases:

- 3 phases:
 - (1) 1867 to the Second World War
 - (2) The Second World War to 1982
 - (3) 1982 to present.
 - Charter era.
- These three phases “correspond to shifts in emphasis from convention to statute to constitution. Throughout this time, the state has also undergone a gradual evolution in promoting general social values.”
 - Elliot (p.129-130).

Phase 1: 1867 to WW2:

- Basic values were mainly protected by self-restraint.
 - Juridification is not the order of the day.
- Politics bound to tradition of respect for rule of law and conventions of reasonable government.
 - Where did the sense of “reasonable government” come from?
 - As you recall from other lectures, reasonable government looks different depending on the philosopher, this helps to shed light on perhaps the weakness of this period. Which Elliot says is characterised by convention. Stuff is not written down if it is a convention, convention is just a tradition, a way of doing things.

- What do you do if something important and you don't want to forget it?
You write it down.
- Courts: marginal role.
- A sense of "decency" and a sense of community among individuals essential.
 - Which are essential to the protection of basic values.
- Only RARE constitutional protections:
 - Language rights.
 - Denominational school rights.

In this first phase of the story of protection of basic rights in Canada there were some weaknesses.

This is the period where if there are violations of individuals or communities basic values not necessarily clear what the recourse or remedies were for this.

Phase 2: WW2 to 1982:

- After WW2 there is an energy behind what we see as rights.
- Tendency to regard important values as rights.
- Protection of 'moral' rights in law
- E.g. Human rights codes, bills of rights
 - Remember the global socio-political context: Canadian developments did not occur in isolation.
 - E.g. UNDHR (1948), Canadian Bill of Rights (1960, US Civil Rights (1964).
- Bills of rights directed against state abuse.
 - The state is the potential transgressors, the state is the danger to basic values and rights.
- Also, protections against potential abuses from private sector.

This is a historical period in which recognising values as rights, Protecting them in law, human rights codes, bills of rights, it sweeps the world in a sense.

Constitutions almost became the trend. This is obviously because of the mass loss of life in the war. They never wanted something like that to happen again, there for universal declaration to protect human rights.

Phase 3: 1982 to the present:

- Constitutional guarantee: Constitution Act 1982
 - "The latest step in the general movement not only toward greater state protection, but also toward greater judicial protection, of basic individual and group values."
 - (Elliot, p.130)
- Does this history chart a movement of increasing enlightenment and progress?
 - This is a complicated question, how do you measure progress and what is enlightenment.
Example:
 - Christie v. York Corporation (1941)
 - Black man refused a drink in a city-operated tavern because he was black; Supreme Court did not want to restrict freedom of commerce.
 - This case clearly is outrageous and racist action of discrimination, does not trump the basic value of freedom of commerce. You have a right to contract with whoever you like. If you don't want to sell them a beer you don't have to according to the SCC.
 - This was a conflict, a basic value of radical equality and a basic value of contract.
 - The reason for this example is to show you that if it is progress it is slow progress.

Progress?:

- Timeline of some basic democratic rights in Canada:
 - 1918: Women receive right to vote in federal elections.
 - 1940: women receive right to vote in Quebec provincial election.
 - 1948: Japanese Canadians receive the right to vote in federal elections.
 - 1960 Registered Indians on reserves receive right to vote in elections.
 - 1964: Laws requiring separate schools for black in Ontario are removed.
 - 1968: homosexuality decriminalised.
 - 1976: Capital punishment abolished (but still permitted in the military).

Why is progress so slow, looking at this list, none of these are an instance of increasing socio-economic equality or material equality. These are basic values that are non disrupting the demands of the market society.

The national state and interstate system is compatible with demands of the world economic system. This is the same here in the national context not the International context.

A question that flows from this is a market society a basic value.. it seems to be curious that market society is untouched as we tell this story of basic democratic rights in Canada.

Slow Progress? Or Continuing Failure?:

- Is this really a story of progress? Examples include:
 - Canadian Bill of Rights (1960):
 - Left behind a trail of conflicting case law - not entirely successful.
 - Unentrenched status; specialised, limited, specific. No status of constitutional rights. It was limited and specific.
 - Basic values can be “extraordinarily complex, relative and policy-laden” (Elliot, p.131).
 - For example the Canadian bill of rights had a provision for equality that the only time the equality guarantee as set out in the bill, was one used in the example below.
 - Only time equality guarantee used to defeat government statute: Drybones (1970).
 - Mr. Drybones charged with drunkenness off reservation, contrary to Indian Act; territorial ordinance only penalised drunkenness in public.
 - This was inequality.
 - Legal failures: viz. Lavell (1974):
 - Indian woman loss of Indian status on marriage to non-Indian (reverse did not apply to men).
 - BUT the SCC kind of fudged the issue. They were interested in the case on the grounds that the equality provision was insufficiently specific, vis a vie Canadas indigenous populations.

Basic Values: Problems and Complexity:

- Is the market society a basic value...it seems to be the case in western states.
- A Market society includes economic freedoms.
- Economic freedoms
 - Property rights of limited use without property.
 - If you don't have property than this is not useful for you they might be a n impediment to you.
 - Redistributive vs protection.
- Freedom of Speech
 - Or slander? Where to draw the line?
 - This is the case where it is not obvious where you draw the line, there is no obvious middle ground. The middle ground might not be the right place, drawing the line closer to one end than the other.
- Individual workers rights vs. collective bargaining interests.
 - Do collective bargaining interest undermine workers rights.
- Enforcement

- “The drama, costs, and adversarial format of litigation are poorly suited to compromise and accommodation. Judicial enforcement can overshadow other priorities such as education, ethics, and development of a greater sense of social involvement and responsibility among individual citizens.”
 - Elliot (p.131).

Promotion of General Social Values:

- Shifting towards more general social values - which requires more promotion. Most general social values have not been Juridified as individual or group rights.
 - Sometimes overlooked - be careful.
 - While individual and group rights often have status of moral or legal rights, most general social values do not.
 - Why?
 - They are not individual rights, instead of private entitlement (freedom of speech, freedom of religion ...etc), these social values don't work the same way, the emphasis is less on the individual and more on the communal public responsibility. Or responsibility of the state to provide something instead of staying out of the way.
 - Emphasis is on public responsibility, not private entitlement.
 - State intervention tends to be schools, police workers compensation programs, rent control, environmental regulations, and state health insurance.
 - There is a long list here obviously.
 - Rather than legislative codes or constitutional charters.

Promotion of General Social Values:

- If we saw slow progress if there was any progress, in the reaction to individual and group values was slow it is even more so for group values.
 - Change here has usually been a gradual process, rather than a series of observable shifts in protection mechanisms.
 - Main feature here is increasing state involvement in promoting general social values.
 - Before confederation in 1867, states role was limited many to defence, law and order, and helping with transportation and colonial settlement.
 - Most social help left to religious or local charities or the communities themselves.

This maps back to the story of the increased complex of the state, the states job has gotten bigger and bigger, and we see that in the promotion of general social values.

Promotion of General Social Values:

- Towards end of century, state expanded role in education.
- WWI brought state pension and other social welfare initiatives, and national income tax to pay for them.
- War (and its human and financial costs) is expensive.
 - The role of the citizen is someone who is owed duties to its state and the state in the return provides them with certain things such as an education or pension.
- Changing social norms (e.g. women's equality) and political expectations from working class people who disproportionately died in WWI.
- Depression of 1930s and WWII led to key elements of modern welfare state - employment insurance, medical insurance, pension plan.
 - This economic disaster results in the creation of key elements of the modern welfare state. Its extremely clear that there is certain basic social values that can only be upheld with a certain provision of welfare from the state ... that's when we get medical insurance, pension plan..etc.
 - There is a difference in what Canada looks like after WW2 compare to before WW1.

Promotion of General Social Values:

- Provinces increased role in education and other social programs.
- Increase state regulation of industry to promote public interests such fairness to consumers, health, safety, and environmental concerns.

- This was not necessary before. These public interests had not been on the radar until industrialisation.
- For advancing most general social values, law is more facilitator than enforcer.
 - What the law is trying to do is facilitate or make it easier for the educational institutions to establish themselves, for public health and safety...etc.

The state is trying to nurture, grow, and assist in the development of certain institutions and social relations.

Promotion of General Social Values:

- Has progress occurred?
 - Formal? Material?
 - Formally yes, women can vote, racist institution have been prohibited, individuals have been given all sorts of guarantees for rights.
 - Materially..are people living dignified lives? Is there greater dignity now than before? This is arguable.
- Canada still has severe income inequality.
 - Some studies have ranked Canada 12th out of 17 peer countries for inequality.
 - Income inequality in Canada has increased over the past 20 years.
 - Income inequality is getting worse in Canada.
- Since 1990, richest group of Canadians has increased its share of total national income, while poorest and middle income groups have lost share.
- Country of haves and have-nots?
 - If you are a have not is that a dignified right.
 - Consider international context.
 - Its not just Canada, but it is the country we are focusing on obviously.
 - what has happened in Canada and is continuing to happen, is also happening around the world.

Promotion of General Social Values:

- Also, there can be disagreement about which general social values to support (politics!!)
- E.g. in 1990s, heated debate between proponents of deficit reduction, and those who wanted to maintain existing social programs.
- Both fiscal responsibility, and benefits of welfare state, were portrayed as basic social values shared by whole community.
- Deficit reduction voices gained upper hand.

Politics are big in this category.

General social values will forever flow. Right now in times of covid there are all sorts of arguments about fiscal responsibility vs. ensuring all small business don't go bankrupt.. there are many other examples.

- You cannot take politics out of social general values.

Practice Questions:

- Possible questions you could be asked on your midterm. It will be comprised of short answer question.
 - Q1:
 - What are the different ways that basic values can be protected in society?
 - Q2:
 - What values or moral rights are not yet protected by law in Canada? Should they be?
 - Q3:
 - How do politics and economics impinge on the legal discourse (conversation or debate) surrounding the protection of basic values in Canada?
 - Q4:
 - Has there been progress in the promotion of social values since the turn of the 20C?

These are not on the mid term just prep questions to prepare you.