
Theories of the state, such as Locke and Hobbes

Four main social goals

→ Collective interests, private interests, citizen control, economic equality

- Other social goals such as gender and racial equality
 - Feminist movements push for greater gender equality
 - Critical race scholars push for greater race equality
- Rule of law as procedural sense
 - Feminists have argued formal equality is not enough
 - Law and state must be taken into account of circumstances unique to women and women's experiences, full economic participation, labour
- Liberal perspective, Radical and Marxist (socialist) feminists

- Other social goals e.g. protecting cultural and ethnic concerns, such as in Quebec
- SCC succession reference → issue in that reference was
 - Legal question: If Quebec can leave Canada under rule of law, can Quebec leave unilaterally, under existing domestic institutional law Quebec cannot laterally succeed

- Scientists have warned us that it's an existential threat of climate change, environmental goals can be emphasized
- Environmental concerns addressing climate change can be prioritized, addressing role of the state
- Hobbes; consent to a Leviathan, giving freedom away and letting a higher authority to take charge
- What is the point of a state and what is it for?
- What happens when these goals appear to conflict?
What happens when some Canadians conflict with rights of other Canadians regarding land, opportunity?
- What happens when social goals appear to conflict- when private interests and economic liberalism appear to conflict with environmental concerns or indigenous rights?

Case Study: Trans Mountain Pipeline Expansion

Facts of the issue

Challenges that are faced

- Alberta produces more oil than infrastructure that they can get out through rail on existing infrastructure through rail and solution is to expand pipelines to get oil through faster, and strengthen the economy (create jobs) political and economic issues at play
- Private company owned the pipeline and alberta government is for it
- BC government has been critical and alberta government has been for it, federal government bought the interest in the pipeline and is still trying to make the pipeline happen

- *Outcomes of those administrative bodies were reviewed and appealed in court system*
 - May 2018, aim of increasing export of canadian oil to strengthened
 - Federal court of appeal quashed the administrative approvals of the 1,500 km project (Key decision)
 - Ruled national energy board was flawed that federal government could not rely on it for expansion
 - Federal court of appeal said federal gov failed in its duty to engage in meaningful consultations with First nations before approving the project
 - Court ruled that the review failed to assess the impact on the environment.
 - For example southern resident orca whales- from increased tanker traffic and expanded pipeline
 - Point is to; not to debate legal merits of federal court decision, but to take tangible case that you will read in the paper and many canadians have strong opinions on it
 - Essentially, federal government received a mandate from people who vote from fed. Election
 - Tried pursuing climate change policies and pursuing sound economic policy and creating jobs
 - With this balance, they bought the pipeline from private company
 - Point:
 - One of many different administrative boards in canada,
 - Understanding the power of the federal courts
 - Court of appeal reviewed that the review was so flawed

Theories of Law

- **Rule of law**

What is and should be the relationship between the fed government, national energy board, Fed court of appeal, and indigenous communities

Provincial countries and national interest at stake, how do we address climate change and create jobs?

- 1) Efficiency of decision-making and the power of the state, including the states desire to maintain future discretion(challenges)

Vs.

- 2) Principles of fairness, justice, impartiality and independent of adjudication, and the related rights of those affected by the exercise of state power
- (inherent intention of what is coming up is between efficiency and fairness,
 - Everyone will have different value judgements on where we should lean towards (collective interest or individual rights)

Why and how do tensions arise between efficiency and fairness?

- State has grown over 70 years because canadians economy has arguably got more complicated (ellis does not focus on that
 - Is the growth of the state the creation of more administrative tribunals, inevitable, desirably, alternatives? *****MIDTERM QUESTION
- 70 years ago prior to WW2, in terms of social welfare state in terms of our infancy there are more government programs in terms of education, tax regulation, health... ,municipal, provincial and federal level than canadians 2 generations ago did, maybe we shouldn't but with increases in technological change, scientific advances, medical advances, and field of labour relations,increased expectations of workers rights and growth in human rights, canadian provinces have their own human rights regime in addition to canadian rights and freedoms regime..
- Provincial human rights regime that would deal with anti discrimination in employment context, increased expectations on how tenants and landlords interact and basic rules landlords have to follow... much of disagreements is over landlords trying to evict their tenants,
- important immigration and refugee regime (canada, legal component to it, domestic law, and national law regarding refugees and political considerations with canada and many ways as a nation as a nation of immigrants.

- Legal responses to that Political party have grown and reflected changed social norms, increased in recognition of people with disabilities, disability insurance regime, retirement pensions (people are living longer, advance in medical tech, and life expectancy, issue with pensions matter more, people used to die early, was not important to public policy concern to plan for retirement of people and administrative bodies touch on allocations of pension, and employee insurance, (fulfill to EI) child services for children in non traditional situations,, list goes on

Student loans? Who was affected

- As canadian politics and economy and tech. Changes and have gotten more complicated
 - We have responded by creating more statues and more administrative tribunals

ELLIS READING!!!

- Most canadians don't realize it unless they have been affected by this, where its the justice system that most canadians will encounter in their lives unlike the criminal justice system where most canadians or suing another canadian in court for breach of contract
- Examples of administrative body ?

Ellis reading emphasis the areas that they shape our lives and affect our lives are wide and sometimes misunderstood by average canadas

- As state grew in its role in our lives, ellis notes more and more QUASI-JUDICIAL bodies were set up to describe a myriad of important disputes without replicating the institutional guarantees of the judiciary
- Why have they been avoided when new administrative bodies have been created?
- Doing otherwise would be opposite than the canadian states interests, it's in canadian state interest to prevent the institution of guarantees of the judiciary to the administrative bodies that it creates at the federal level and it's in the interest of the provincial legislatures to avoid providing full institutional courts to their administrative bodies
 - Ellis provides a more general critique of the administrative justice system
 - Is it in the states interest to avoid providing people the rights that people have in court setting in administrative setting, david elliot notes that courts are expensive and time consuming, judges to have higher salaries than administrative tribunal members, courts can take a long time..
 - Administrative bodies cost less than judges
- Ellis critiques administrative bodies of canada meant to be unjust (book)
 - FLAG associate with :What we associate with courts and administrative tribunals
 - Theoretical context against which he is critiquing administrative law?

What we

What role should the courts play in Canadian Society?

Historical role of the courts

1. 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
 - a. Property and commercial interests with those with large stakes in the status quo, (who are these people? Ruling class, means of production or have commercial interest, we like it the way it is, no call for change) to protect their interest and status quo
 - b. Expecting greater *support* for an expanded judicial role from these groups than others

Institutional strengths and weaknesses of courts

Strengths

2. Courts have a number of distinctive institutional strengths and weaknesses to attract both supporters and opponents
 - a) We might not like the result they come to, minimum wage should not be increased but throughout this process the case will be heard, make decision based on the law that he sees it before them
 - b) Courts have reputation for procedural fairness and impartiality (informally but if they do enter legal system positive attribute is they provide authoritative resolutions of those disagreements
 - c) Courts are required to decide cases reference to rules, and to aim for consistency in similar situations (precedent)

Weaknesses

- a) Courts are slow, expensive, not accessible to the public at large
- b) Procedure is rigid, information resources are limited
 - i) Criminal matter: rely on police
 - ii) Civil: parties to dispute themselves
 - 1) Judges can't go find information themselves
- c) Courts are backward looking (remedying past problems, what did we do before) murder what happened 5 years ago and contrasted with the importance of being forward looking
 - i) Change law in Canadian society to give women to vote

- ii) If we look backwards we never progress, we would never learn to adapt to new movements of our society
- d) Civil: Winner vs loser results in civil action
 - iii) Criminal; one is guilty or not
 - iv) Limited opportunity with settlement or compromise
 - v) Judges are appointed and operated beyond normal reach of electoral controls?
- Judges decide based on law and not worried about if they are going to be re-hired there

Question: does ellis know the potential negatives of judicializing administrative bodies?

Thesis: admin justice system is unacceptable, unfair, might ask? Has he thought of the efficiency perspective and what would be the unintended consequences if we did increase the cost of the administrative decisions, the exams, merit for instance..

Rise and control of administrative tribunals

3. The impact of the courts have expanded by CCRF, providing extra ground for supporters' hopes about change of law and increasing recognition of rights and provided evidence for opponents to criticize what's happening

- a) Allocation of power, parliament left on the side? Parliament should be supreme not the courts, expansion of court power associated with charter
 - b) Federal, provincial government enacting statute or amending existing statute, how does it affect CCRF and cannot avoid it..
 - c) Charter control is more powerful , courts can do more, can strike down legislation prior to the charter and more removed, from traditional democratic checks, on the way we constitutionally organize and removed power parliamentary scrutiny of what judges are doing
- Is it better to repair weaknesses in our traditional control system or is it better to get rid of the status quo in favour of a new approach all together
 - Evolutionary vs. revolutionary?
 - Slowly improve things vs. ideas to change (different ways to pursue change)
 - Traditional theories to control admin process based on the related principles of parliamentary power, parliamentary accountability, and judicial interpretation (judge main goal; interpretation of law)
 - After 17th century, established all administrators must act to statutory power
 - Except: Royal prerogative (power of the (monarch) queen, and representatives in executive branch)
 - In theory the head of state is queen, the institution, who will take over if she passes?

- The right to send armed forces abroad; not the decision of parliament, but the royal prerogative)
- By mid 20th century, administrative action, 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 (need a means of enforcement) courts, judiciary (17th century approach from prestige and relative independence)
- Courts tend to maintain judicial review, a major means of control- aspect of the normal judicial function of interpreting statutes
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- What is judicial review and appeal ! (2 different things)
- Court reviewing factual and legal findings of administrative body (not going to change the outcome, narrow change that can happen)
 - Administrative law (JR) legislative tells the courts how differential they want them to be
- Appeal (substantive re assessment of outcome, of what it could be and it could be different by the courts)

- Traditional approach that government is a chain of mandates
 - Electorate
 - voters who listened political candidates run for office (lower taxes, increase social spending)
 - Parliament
 - Administrators (regulations on how should they be implementing them)
 - Courts role: keep admin within terms of their statute mandates, keep the administrator bodies within their term of statute and provide relief if unauthorized action is brought to harm

- Trans mountain: did the federal court of appeal agree or disagree with Canada's energy board of that situation?
 - What did the fed court of appeal do?
 - Decision was flawed, duty to engage, failed to access the impact on the government
 - Is the public ultimately in control? Democracy?

- JR may be supplemented actions for damages, where illegal admin action amounts to tort (party would seek to sue someone) civil action

- Judicial appeal goes further than JR; particular administrative body, look at statute that created it, language to write of appeal, don't like a decision, you check the statute, do you have a right to appeal?

- Then that can extend to substantive merits of a decision
 - Appeal; can have admin body be reconsidered by judge, court
- Only available where a statute expressly provides for them

Criticisms of traditional approach

1) Decline of traditional accountability

- a) Traditional view on parliament is outdated, it is weakened, parliament's sovereignty has weakened, courts can review this through judicial review

2) Formalism

- a) Judges engage in JR they need to consider the social context of particular situation and impact of on people to whom its addressed
- b) Ellis argues (letter from mom that son received) denied life, not appeal (shot himself)
- c) Ellis argues that it is legally right, decision of the admin body can affect people's lives,
- d) With increase in decision making, they are affecting people's lives, if u are being evicted, that will be dramatically shape your life...

3) Intrusiveness

- a) Courts have tended to try to respect judicial restraint and stay out of areas that statues say they should stay out of

4) Narrow scope

- a) Does JR protect a narrow range of interests? What about social assistance applications have been rejected? Members of immigrants and refugees?
- b) JR may only protect narrow range

5) Functional limits of courts and judges

- a) Only so much we can ask them to do, trained in certain ways, they are not the only way to control the state, there are other forms, having more specialist monitoring body

6) Cost

- a) High cost to judicial control of state power, and limits these powers to those who can afford it, if they want to get it appealed
 - i) lengthy charter case can cost 1 million dollars
 - ii) Increase or reform legal aid provision (have been cut depending on which government has been in power)

Other non-judicial challenges

1) Appointments

- a) Issue of Patronage
 - i) Public service, in theory, advertised competition and merit,
 - ii) Contrast: orders in council, made without competitive exam, appointments based on patronage, favouritism

- iii) Critique from IRB, lack of competence, political pressures for people to be re appointed for a second term
- 2) Independent bodies and political controls
 - a) Should regulatory decisions be in the hands of an independent agency or made instead by people directly subject to ministerial responsibility

Four views on the rule of law

What is the rule of law?

- Courts are a key part for the rule of law
 - Preamble to Charter says Canada is founded “upon principles that recognize the supremacy of god and the rule of law

Different theories views on the rule of law

1. Albert Dicey →
 - i. Linked rule of law to the sovereignty of Parliament
 - ii. Profound influence on British and Canadian Constitutional law
 - a) Gov action must be authorized by law, not exercise of wide or arbitrary discretionary power
 - b) Every person- regardless of power and position- should be subject to the ordinary law (one law for all)
 - c) Peoples rights should depend on specific concrete judicial remedies, not abstract general principles (not the principles we are discussing today)
 - Locke’s right to rebel ? if it was so unjust...
 - In canadian context, Dicey’s concepts qualified
 - a. Parliamentary sov is shared by federal parliament and 10 dif provincial legislatures
 - b. Parliament sov is subject to constitution, (to charter)
 - c. In canada, rule of law includes specific remedies and general constitutional provisions
2. EP thomas
 - Rule of law and relationship to social inequality, did go against interest of lower income classes, but were constraint on exercise of power and reaffirmed the rule of law in British society
3. Harry Arthurs
 - For most lawyers, admin law is not the law of administration, but the law directed against admin, act against the power of the state and reaffirm how an individual's right has been breached

4. Reference re Secession of Quebec

- What the rule of law involves in canadian context
 - Rule of law vouchsafes to the citizens... a stable, predictable, and ordered society in which to conduct their affairs...
 - Stability and orderliness where groups and individuals in society conduct their affairs