University of New South Wales

University of New South Wales Faculty of Law Research Series

Year 2007 *Paper* 22

Law and the State

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Law and the State

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Abstract

Lawyers, legal philosophers and political theorists, not to mention ordinary folk, typically consider links between law and the state to be intimate, unseverable, and uncontroversial. Lively questions remain about the point of law, whether these are descriptive questions – what does law do? or normative ones – what should it do? but rarely about its proper location or source. These, it is assumed, are in institutionalized, centralized, and legally co-ordinated offices of state.

The major contribution of law and society studies to this discussion might be called cartographic. Researchers in this area have cast doubt on the common assumption that law and state need always be thought of as fused, like Siamese twins, as in the communist theoretical couplet, "theory of state and law." For at least a century, attempts have been made to decouple the apparently obvious and necessary connections between state and law and to produce accounts of the nature, place, and functions of law in society, accounts that include the state but 'de-center' it. Not everyone believes this detachment of law and state is a good idea, but it is a paradigmatically sociological idea.

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1. State-law as tautology.

The state, as a centralised political institution, with a claim to monopoly over the legitimate use of force, is not universal. It is relatively modern. Since it arose, it has been associated in fact, and according to many even conceptually, with law.

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Jurisprudence in the English speaking world has long been concerned, as one of its famous exemplars put it, to 'distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely, by a strong or slender analogy' (Austin 1832 (1968): 33). Austin himself, disciple of Jeremy Bentham, and heir in many commitments to Thomas Hobbes, found the central distinguishing mark of law to be that it is a command that moves from a 'political superior' to 'political inferiors', or in modern terms from a state to subjects. Later positivists, prominent among them H.L.A. Hart (1961), denied that the state source of law was necessarily fully *sovereign,* and pointed out that the state is a *product* of law as much as its source, but the *location* of law, and its proximity to states and officials, long remained uncontroversial in this tradition (but see MacCormick 1999). An enduring debate exists over whether public international law is truly law, but the very existence of this debate reflects the assumption that if law does not emanate from the state it is peculiar. And whatever conclusion lawyers reach on this, that law in any event *concerns* states above all.

This association of law and state is not eccentric. Most people in recent times have thought similarly. Many social theorists, too. Marx, for example, associated state and law indissolubly in modern society. Where one was, there alas you would find the other; when the state withered away, so, happily, would its legal mate. Similarly, those anthropologists in the 1930s who found African societies without offices or officials that they could easily analogize to their own, pronounced them 'stateless' or 'acephalous' (literally headless), as though something natural (and rather important) was missing. Stateless, headless, therefore law-less (see Evans-Pritchard 1968: 162).

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2. Instruments and frameworks

For Max Weber and many other legal positivists, it is the *created,* artificial and malleable character of modern state law that distinguishes it from law of yore, hallowed as that was by sacred tradition, hostile and resistant to human impertinence. Modern positive law is whatever modern law officers chose to make it, to *posit*. One might condemn what is posited, but if the state has validly enacted it, it is law. This is to overturn another tradition that distinguished, *inter alia,* between legitimate states that respected law and despotisms that knew no law (see Kriegel 1995). There it was assumed that the former is subject to restraint at least on *ways* of exercising power.

Quite apart from its implications for the *concept* of law, partisans of the 'rule of law', 'the government of laws and not of men', 'the morality of law,' are partisans of this restraining potential of law. This tension between law viewed primarily as an *instrument* of state power, on the one hand, and at least in significant part as a framework and medium within which and through which such power might be exercised, channelled and restrained, on the other, is a recurring one in political thought. The first conception is captured when one speaks of a state ruling *by* law, the latter when government *under* law or the rule of law are expressions of choice.

3. Non-state 'law'

On views such as these, talk of non-state law is contradictory, something like snowballs in Hell. However, there is a rich stream within sociology of law, with many tributaries,

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according to which such law is all around us. Perhaps unsurprisingly, partisans of such views first emerged in empires – the Russian (Petrażycki), Austro-Hungarian (Malinowski; Ehrlich), and sundry colonies (Malinowski again; legal anthropologists) – where 'customary', 'folk', or 'indigenous' normative orderings seemed to have more salience in people's lives than the often distant and normatively suspect dictates of imperial authorities. More recently, however, these insights, wherever born, have come to be generalized and broght home to cosmopolitan centres, full as they are of 'indigenous orderings' (Galanter 1981), 'semi-autonomous social fields' (Moore 1978), and more generally legal pluralism. The more polemical pluralists have identified the enemy as 'legal centralists', roughly those who believe in an inextricable connection between law and state. More recently still, observers of 'globalization' have suggested that competitors to states as sources of law, among them NGOs, non-state official agencies, transnational capitalist enterprises, can be found not merely within but outside states as well.

Petrażycki contrasted 'intuitive' with 'official' law. Ehrlich spoke of 'living law', found in the on-going, often smooth and routine operations of 'the inner order of associations', to be contrasted with the mere 'norms for decision' which tell officials what to do about the often exceptional disputes that reach them, and 'state law', which is intended to effect political projects. Lawyers typically mis-take the second and third of these for the real and only law, not realizing that it is the first that is perennial and governs people's lives, while the others are only late and reactive layers added to, but never replacing living law. For 'the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.' (Ehrlich 2002: lix).

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Those persuaded by such distinctions, among them some in the anthropological wing of legal pluralism, might eschew interest in state law altogether, certainly deny it any special semantic priority, and find law wherever they find norms. In doing so, they open our eyes to the sources of normativity all around us, yet open themselves to the criticism, already made of Malinowski, that so capacious a conception of law threatens to envelop the whole of life. Or at least whatever is considered obligatory, wherever it occurs. This is to distinguish 'law properly so called' from nothing much. Given that the modern state retains distinctive features and roles in social orderings, *some* conceptual acknowledgment of such distinctiveness has its place. If 'law' ceases to be involved in that acknowledgment, we need another concept to capture the peculiarities of state norms. When we get it, we may not have advanced very far.

Yet even if one is reluctant to acknowledge that law is simply everywhere, legal pluralism can lead to a more layered, sociologically informed and yet still state-sensitive alternative to orthodox law talk. A number of leading law and society scholars (e.g., Galanter; Moore; de Sousa Santos) have sought to reconfigure our picture of the ways that state law affects and is affected by the many, often overlapping, sometimes mutually reinforcing, sometimes subverting, normative orderings that constrain and constitute our lives.

The primary impact of state institutions and rules is not as magnets for social disputes, a very small proportion of which ever come to them, but as beacons, sending signals about law, rights, costs, delays, advantages, disadvantages, and other possibilities, into the community. These signals figure as cues, standards, models, 'bargaining chips' for citizens in relations with each other and with the state.

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Sometimes the signals are obscure. Or, in ways that vary greatly among individuals social strata and groups and between societies, people might not be listening. But even when state signals are bright and audible, and people hear them, they are not the only ones that are sent out or received in a society. This goes well beyond the tame truth that 'law in action' is often a pale and dilute reflection of 'law in the books'. For, the question is not merely the strength or weakness of the state's signals. Non-state normative orders send signals too.

Few of us are simply waiting to hear from officials and their law. We have other things on our minds, and we participate in plural, different, often distinct, sometimes and in some respects overlapping, 'semi-autonomous' groups which affect us, often deeply and in different ways.

State law thus competes with many other normatively-charged signals, pressures and sources of guidance and dispute resolution in our lives, many of them closer and more salient to us and the groups within which we move than the laws which officials fabricate and on which lawyers and legal philosophers concentrate. Whether one calls these normative signals 'law' or not, they will not only compete with the state's laws for our attention, and often win, but they will be parts of the contexts in which those laws are understood, use is or is not made of them and they are heeded or ignored. So too, state law will enter and affect, in many and varying ways, those contexts.

Since people live most of their lives in such semi-autonomous fields of which state legislators know little, it is not surprising that the life of the 'law in action' is difficult if not impossible for the legislator, or anyone who merely relies on lawyers' folk understandings of human behaviour, to predict. So even if our only concern was with

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what is made of state law in people's lives, any simple extrapolation from the content or character of legal provisions to their systematic effects in the world, is simply uninformed guesswork. One has to look at the play of law in the world. All the more so, if one comes to believe it makes sense to talk of law as emanating from both infra and supra state entities in that world.

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