Legal Theory Seminar 3 — Law, interpretation and politics

Interpretation as a rule-governed system. What judges should apply during interpretation.

Understanding Jurisprudence, Chapter 3 'Law and Politics' — 61-88

Is there is a distinctive form of legal reasoning? Or is it random?
Remember **that if there** is **no objective way for answering legal questions**, the **result will be arbitrary**, anarchy, doom and destruction, subject to subjective, personal moral and political views of judges. It will be all over the shop.

3.1 The Mainstream view and its opponents:

Mainstream theorists believe that there is a **meaningful distinction between legal reasoning and the reasoning of political decision-makers or legislators.**

- Believe legal reasoning is special/distinctive and involves the *rational justification* of legal outcomes
- It applies pre-existing law NOT creating new law and responds to reasons *within* the system, not external to it.
- It is historical, faithful to the past
- When legal practitioners reason in a legal way, it is the *law* that determines the outcome, not personal belief or political pressures. → precedent and legislation
- Do not believe, however, that judges are mere mouthpieces. Or that an objective assessment is clear-cut or easy.

By way of contrast, the politician's job is to create the law. There is that separation. They're forward-looking and creating rules. However, ***Dworkin*** and other theorists believe that sometimes there is no objective way to reason and therefore, they must apply non-legal reasoning.

3.2 Hart and the partial determinacy of the law

Hart established the rules of recognition which tells us which of a society standards count as law and which does not. Therefore, goes logically that he should think **all judges have to do is apply the law that passed the recognition test.** But it is a misconception to think it is a 'closed logical system'.
Hart → legal standards are determinate in **most cases but *not all***.
The rules that make up the system are open-textured and have different meanings, subject to different interpretations. It is not a closed system, sometimes, there is no general agreement.
Hart has two claims

- **Conceptual claim** → cases can be **easy**, there are **legal rules relevant** to them for judges to apply.
- **Normative claim** → in such cases, **judges who refuse on the grounds of morality** conflict can be ***legitimately criticized*** for ignoring the law and taking into account considerations which are legally irrelevant

Hart acknowledges **that in cases of conflict → discretion can be used →** can use **non-legal considerations** (morality and policy). In hard cases, judges have to perform **law-making** instead of just law-applying. This necessitates a distinction between hard and clear-cut cases.

3.3 Fuller's criticism of the idea that language can constrain + 3.4 criticism of rigid adherence to rules

Two grounds of objection to Hart's theory

1. **Language cannot be the source of legal determinacy →** rules in isolation from their **purpose** are incoherent.
    a. ***Fuller*** asserts that there is **no such thing as contextual independent literal meaning**. Instead, rules function entirely in the context in which they're used → **Purposive**
    b. Therefore, language does nothing to constrain rules. **Context does.**
    c. Clear rebuttal to this is that language can convey meaning independently of the communicative intentions of speakers. (***Schauer***)
        i. Context merely increases understanding
        ii. Says just because language is not perfectly precise, doesn't imply that it is useless.
        iii. Schauer agrees with Hart.
            1. They say that there is no objective constraint on how words may be understood.
2. ***Fuller*** says that judges should ignore the plain meaning of legal rules when the plain meaning dictates a result which defeats the rule's apparent purpose (where Hart says judges should always follow the rules in clear cases).
    a. This is a **purposive approach**. …….

MODULE 2

SEMINAR 5 — RIGHTS

Rights as morality

- Rights are intrinsically individualistic → edifice of rights in our liberal tradition is one that understands and is being **possessed by individual**
- Particularly influenced by the moral philosophy of **Immanuel Kant** → do unto others as you would do unto yourself. → no human being should be used as a means to another's end
    - It is only human beings who have the capacity for reason and rationality. Preciousness to do with our unique **capacity for reason**.
    - Because of this **rationality**, creating the **need for this moral precept**, that is what it means to be human
- Problem with **Kant's individualism → utilitarianism →** theory about how to do things right. Significant for political people → maximising happiness for the greatest number of people → implicit in this is the necessary sacrifice for the individual in favour of the majority.
- **Libertarianism →** can be no encroachment by the government on individual's rights.

1. Is torture justifiable if it may pressure the terrorist to reveal information that would save thousands of lives?

- Making the point that terrorists have lesser rights than normal citizens. Saying they are **dehumanising** them to the point which justifies torture.
- How can you handle the moral and political dilemmas if you can't do it publicly and out in the open?
- What are the structure constituting this dilemma?
    - There is a default idea that it is possible to **understand the individual** as having different levels of rights. (you could equate the terrorist with the black slave)
    - **Rights** spoke default mind have dignity, rationality, sense of empathy…to alleviate that conception.

Rights as **moral enforceable through law**. Difference between this and the above is that the moral ideas are translated through law.

Rights as legal rights

- Specific creatures associated with law.
- Contracts → right to claim damages under breach of contract.
- **Justice is a side point**. Movement from what is just to what you can claim.
- **Filled with truisms →** 'there is no right without a remedy'.
- Generated out of **legal precepts**. When they are argued, they become the reason for the result.
- **Rights generate obligations**.
- Key figure → ***Hohfeld*** → the relational structure of rights. If there is a right, there is a correlating obligation/duty.
- A **legal right doesn't exist unless it can be enforced**, it attaches to a remedy.
- Legal rights attach to legal persons. A legal person possess legal rights.

Do people have fundamental interests that rightly constrain the law or the legal system?
Is there some basic or **fundamental interests** that we all have as humans that **can't be traded off** by the needs of society? What are these fundamental interests? Moral and political questions.

Robin WEST, Tragic Rights: Rights Critique in the Age of Obama,* William and Mary *Law Review

- [739] 162 **Legal liberalism →** your **protection against the monolith**
- Dictated by reason and professional structures which means that they can be trusted. But **legislature** and **executive** ruled by **irrational**, **whimsical** and '**infantile majorities' →** individuals rights need to be protected **→** the judiciary is the one to save everyone.
    - They are more sensitive, legal understanding, objective ability to reason to protect rights
- [719-21] 142-4 Rights subordinate, dominate, alienate, distract our critical gaze.
- The **inherent individualisation** of rights **displaces them to community.**
    - **Communitarians** say that everyone is more **connected** to **communities** that we're **born** in rather than the **individual always**.
    - Criticise liberal rights theory → universality → we can all understand rights, something that **transcends culture and time.** They say it is done small time, place to place.
- The **acknowledgment of rights** and achievement of equality in some spheres of society, at least rhetorically, cements the legitimacy of the subordination that of which the right is attempting to overcome [725–6]
- 'The human relation between the bank teller and the customer has become **so encrusted with rights that its humanity virtually disappears.'**

- Might that layering of rights be even implicated in the utter inability of the customer and teller to **acknowledge** each other's **mutual humanity**? [726-7]

- 'Rights that **facilitate** the **mechanisation** of our **interactive lives** alienate our withdrawn selves from community' even **more blatantly than** did the **non-discrimination rights** and identity rights that formed the target of various rights critiques in the 1980s (Original rights critique). [727]
- Rights have become transparent.
- Depicted in West's work is the steady progression of rights towards a more liberalist and individualistic light. Using the example of the right to self-defence; under the traditional liberal account, the individual gives up their right to use violence to defence in exchange for the state's promise to provide equal protection against threats posed by others inclined to invade one's legal rights. This has gradually become a 'quintessential Obama-era right' to 'resort to the violence necessary to defend oneself.'
    - Modern Obama-era rights empower individuals with legal rights and are more dangerous than the original rights critique. [728-32]
    - McDonald v Chicago at the beginning of Obama's presidency → 'quite **directly created a right to kill**.'
- 'The tragic rights of our age **grant the citizen the right to withdraw from those bonds of citizenship**, and they **presuppose a state incapable of performing basic functions**. They are **rights to withdraw** from the risks lethality, and **irresponsibility of a shredded social compact**. They are rights to choose a state of nature over a state of a badly tattered and increasingly dangerous civil society.'
  It is an 'individual defensive right of withdrawal from the liberal social compact' envisioned by the major liberal thinkers (Rawls and Nozick).
    - The right to self defence arises from the presumed incompetence of the state and its ability to protect.
        - Resulting in more deaths and murders. And loss of life.
    - The right to equal marriage arises from the institutional failure of supporting unmarried parents, who rely upon the welfare and benefits of child-care.
        - Resulting in poor family situations.
    - The right to home-school education arises from the inadequacies and expenses of the public schooling system. They're no longer minimally competent to look after children.
        - Resulting in a large percentage of unsupervised home-schooling
- There is an interplay here between State and the Individual. The new age rights critique is **shifting towards individualisation** because the State is held to be incompetent. It is a fragile balance between 'individual freedom' and 'public' policy.
    - According to the rights critique, these rights first presupposed and then propagated a particular conception of the human being, the citizen and the state. And these conceptions of these three groups were harmful: its good was overshadowed by its 'legitimising, subordinating and alienating consequences.'
    - Therefore legal liberalism and individual rights protected individuals against the policies and utilities of the state. [738-40]
    - View of unrestrained states as paternalistic, excessively moral, nanny-state interference, too much redistributive tinkering, all directed at protecting the weak and vulnerable. It is overly punitive.
    - Critique of legal liberal: The **irony** of private realm of rights → individuals going about their 'idiosyncratic, free-wheeling, dissenting business but also *individuals wilfully subordinating others*…in the name of liberty.' [742]
    - Liberal envisions a world where nanny state is overly intrusive, but constrained by principles, governed by benign paternalistic courts, and where citizens can thrive autonomously. Versus
    - Critic → '**world constructed** by those **same rights** as one in which the state **perpetuates subordination, alienation**, and **injustice and does so in the name of individual liberty**.
- The world is caught between in a state of tragic rights. Where there is a **pessimism towards the states** such that the world is envisioned and constructed by lethal and exit rights. Dark and romantic.
    - Vision of the heroic individual triumphing over the state's incompetence.
- 'The state and the community is nowhere; it is shattered.' It is not reasonably constrained by courts. It is annihilated as it was more prone to malignancy rather than nannyism. It cannot educate, cannot support the poor, it cannot support entitlements to a living wage, health-care…etc. 'so the sate gives its needy citizens' rights instead: rights to kill, abort and die…it gives them death or carnivals.' [744]
- The **response is to rebuild community and domestic state. It is to reactivate the citizens to create bonds of mutual assistance. Citizens are responsible for each other.**

Fineman, *'The Vulnerable Subject*: Anchoring equality in the human condition'*

- Vulnerable is universal and constant, inherent in the human condition
- Equal protection analysis: It is concerned with privileges conferred on limited segments of the population by the state through its ***institutions*** and therefore must concentrate on social structures established to manage common vulnerabilities.
- **Conceptual impediments to a more responsive state:**
    1. Equality and understanding of equality has deferred to 'formal terms', the focus is on discrimination and inattentive to underlying societal inequities

2. Understood that the state's proper role is one of restraint and abstention → rhetoric of non-intervention prevails in policy discussions, deterring positive measures designed to address inequalities.

- The way equality is understood is individual focused → identifying victims and perpetuators of discrimination and defining prohibited activities. System aspects of existing societal arrangements are left out of the picture. Existing material, cultural, and social imbalances appear to be the product of natural forces (but they are not), beyond the law's ability to rectify.
    - These are proponents of the free market, those who are against interference on the grounds of liberty and freedom.
    - But this framework sidelines many disadvantaged categories.
    - Reduced to the 'sameness' of treatment, 'equality' is an inadequate tool to resist or upset persistent forms of subordination and domination…unable to address and correct disparities in economic and social well-being among groups.

Restrained State: common conceptions that the idea of family privacy protects the family from state interference and individual privacy shields intimate decisions from state control.

- But non-**intervention has facilitated a skewed and unequal society**; **some form of prevailing power** is essential to counter unfettered self-interest.
- A **new vision of equality** must be how to modernise this conception of the state and define its appropriate relationship with individuals and institutions.
- Everything is defined by law. Look at the family. That 'institution' is constructed and legitimated in law → the state's mechanisms bring them into existence. The state is *always* a player in 'private' arrangements, fashioning the background rules that shape those agreements.
    - Since the State exercises a unique role as creator of legitimate social organisations susceptible to its ongoing authority, it should assume a corresponding responsibility to see that these organisations operate equitably.

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10 Berman Non-State law-making through the lens of global pluralism

- The '**liberal legal theorists'** generally presume that state-based law **wipes out all competing norms**.' [334]
- '**Pluralists challenge** the **centrality** of the state'. State is not the only legal actor that is relevant.
- The liberal framework already embraces non-state action and importance → so long as non-state normative community does not infringe unduly on the rights of others, it allows them freedom and scope.
- Overall aim → recognise the **efficacy** and **utility** of pluralism → hybrid is necessary.
- Pluralists and legal liberalists can merge. 'State is the most powerful lawmaker; but allows scope for non-State norms as it has **strong emotional pull**…should be accorded **deference** given it doesn't get out of hand'
    - Analogous to ***Grenfell*** → it is to co-opt the people into participation.
    - This is the view of the **CRITIQUE** on ***Berman***. IT IS **NOT BERMAN'S VIEW**.
    - ***Berman*** says this is not actually pluralism but merely **legal liberalism in another guise.**
    - This pseudo-pluralism is of the view that liberalism is completely consonant with liberalism → essentially conventional. It is the easy way out for the standard critique on pluralism that it is too destabilising.
- Legal liberalists are not unalterably opposed to non-state norms → allows if freedoms and individual rights intact.

Critiques:

- '**Sovereigntist'** → nation-state should never account for international, transnational or non-state, customary norms. Fear that pluralism will fragment the system and diminish state-norms
- **'IL Triumphalists'** → IL norms should not be subordinated to local practices that may be less liberal or less rights-protecting.
- These critiques are concerned that global legal pluralism will result in too much fragmentation and too much deference to what are viewed as ***illegitimate norms***.

But Pluralism is different to Liberalism — both descriptively and normatively.

Because of this Berman asserts: 'the pluralist perspective is likely to lead to a more nuanced descriptive understanding of the world and a more desirable legal and political framework for addressing the hybridity that surrounds us every day.'

Pluralism's Normative Account

❖ **Normative**: As legal pluralism develops in its normative pull → goal is to justify procedural mechanisms, institutional designs and discursive practices aimed at '**developing habits of mind'** in decision makers encouraging them to use restraint in insisting jurispathically on their own norms to the exclusion of the norms of other communities. [336]
  - Favouring hybrid institutional designs and practices embedding itself in **'principles of toleration and accommodation'** into day-to-day operations.

- There's more chance for experimentation and variation as opposed to hegemony and stagnancy. [346]
- Greater participation makes it more likely to engage all communities and make them more likely to acquiesce in the ultimate decision (even if they don't agree). [346]
- The key is to create spaces of collaboration and broader sharing without insisting on normative agreement.
- Encourage decision makers to wrestle explicitly with questions of multiple community affiliation rather than shunting aside normative difference. [346]
  - The procedural pluralist approach 'adds in a preference for greater dialogue among multiple communities to improve the quality of decision making, to **build habits of mind that inculcate tolerance**.'
  - Adds an additional set of considerations to weigh in the institutional design
  - Rather than simply tolerate minority view-points → 'require hybrid participation.' Building **'into the very structures of institutional arrangements.'**
- Need to foster 'careful and repeated consideration of other potential lawmaking communities.' [349]
  - This requires any infringements of the autonomy of the local level by pre-emptive norms on the higher level to be ***justified.***
  - Example in the religious school not admitting the black guy and the tax exemptions. → They did a disservice by avoiding the constitutional question [351].
  - Practice should have even more leeway if the non-state legal practice is largely internal and primarily reflects individuals' affiliation with non-state community [351]
- It is essentially a balancing of the strength of the commitments at stake → it would lead to the best outcomes, and the outcomes that do occur are moulded by the others.
- The whole point of the justification and consideration aspect is to make sure the imperial law is 'not done blindly or arrogantly, but with intentionality and a respect for the other sources of lawmaking that are being displaced.' [354]
- Berman acknowledges that the State and Judiciary has literal power and coercive power (through its police force) making its judgment count the most.
  - A criticism is that it is not pluralist enough and looks like liberal constitutionalism as it lets them decide how much leeway and consideration to give. [355]
  - But it will ***always*** be one community being asked to make an exception to its norms because of deference to another community. ***Berman*** says the **approach** is the things that matters.
    - **CRITIQUE:** True, but still, does it change anything? They can just ignore. It seems romanticised and overly optimistic.
    - There are practical impossibilities of legal pluralism in a legal liberal state, it is inevitable that they will have control. His proposition is relying on the goodwill and maturity of the state, but why would they ever do it.

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