Legal Theory

<u>MODULE 1</u>: Law, Authority and Interpretation

- **Week 1: Thinking about Law and Legal Traditions**
  - *Austin* – Command Theory
  - *Hart* – Union of Primary and Secondary Rules
  - *Davies*
  - *Tamanaha* – Rule of Law

- **Week 2: Law, Authority and Morality**
  - *Hart* – Positivism
  - *Fuller* – Natural Law
  - *Hart v Fuller debate*
  - *Al Kateb v Godwin*

- **Week 3: Law, Common Law and Interpretation**
  - *Hart* – Core and Penumbra
  - *Fuller* – Purposivism
  - *Schauer* – Formalism
  - *Dworkin* – Interpetivism/Law as Integrity/Herculean Judge
  - *Mabo*

- **Week 4: Law, Adjudication, Power and Politics**
  - *Realism*
  - *Llewellyn* – Realism (Institutional Constraints)
  - *Posner* – Law and Economics
  - *Cover* – Realism (Violence and the Word)
  - *Critical Legal Studies*
  - (*Feminist jurisprudence*)

<u>MODULE 2</u>: Law and Society

- **Week 5: Duties, Rights and Critical Accounts**
  - *Meyerson/Campbell* – defining rights
  - *Bentham* – Utilitarianism
  - *Rights Theory (Dworkin, Nozick)*
  - *West* – Tragic Rights
  - *Williams* – Critical Race Theory

- **Week 6: Legal Personality: Freedom and Autonomy**
  - *Mill* – Harm Principle
  - *(Devlin* – Conservative approach*)*
  - *Feminist Jurisprudence*
  - *Davies* – Persons, Property and Community
  - *Fineman* – The Vulnerable Subject

- **Week 7: Law, Justice and Fairness**
  - *(Utilitarism)*
  - *Rawls* – Original Position/Veil of Ignorance/Difference Principle
  - *Nozick*
  - *Sen* – Realisation-based Justice
  - *Watson* – Don't sign anything (Indigneous 'rights')
  - *Butler* – Spatial Justice

- **Week 8: Law and Governance**
  - *Davies* – New Materialisms
  - *Hunt* – Modern Anxieties and Moral Regulation
  - *Foucault*

MODULE 3: Law within and beyond

- **Week 9: Law, Human Rights and Interdisciplinarity**
  - *Lafont* – Global Governance and Human Rights
  - *Waldron* – Is Dignity the Foundation of Human Rights?
  - *Kaput* – Dark Side of Rights
  - *Pahuja* – Letters from Bandung/Nehru

- **Week 10: Law, Pluralism and Global Order**
  - *Grenfell* – Legal Pluralism, Building the Rule of Law in Post-Conflict States
  - *Berman* – Non-state Law-Making through Global Legal Pluralism
  - *McMillan* – 'Hope of Law'

- **Week 11: The Good Lawyer**
  - *Tamanaha* – Legal Instrumentalism/Law as a means to an end
  - *Luban* – Torture Lawyers of Washington
  - *Holmes & Rice* – Contextual Ethics in a Connected World

- **Week 12: Theorising Legal Concepts, Institutions, Procedures and Values**
  - *Cotterrell* – The 'Jurist'/Radbruch

EXAM FORMAT

Part A: Module 3 (Weeks 9 – 11)

Part B: Modules 1 & 2 (Weeks 1 – 11)

Do not substantially reproduce interim essay, or overlap between Parts A and B.

1.5: Law and Adjudication: Mainstream Accounts (Internal Constraints)

Mainstream theorists believe that **legal reasons *justify* legal conclusions**. Despite their differences, and acknowledgement that judges do sometimes fail to do so, they believe that interpretation of the law can and should be a ***rational* and *principled* process**, following standards or norms of legal decision-making.

What is legal reasoning? How is the law to be interpreted and applied by judges?

- **Hart:** core/penumbra, easy/hard case distinction – because language is 'open-textured', the legal system is not a closed system; the law can run out and when it does, judges must resort to non-legal reasoning such as considerating moral/policy values - (formalism and positivism)
- **Fuller:** because language does not constrain to create a literal, acontextual meaning, legal rules must be interpreted with a purposive approach, rather than rigidly applied. This purpose can be identified by having regard to the objective the judge feels the law *should ideally* be trying to achieve. To do so is to be faithful to the law - (natural law)
- **Schauer:** language constrains to create a literal, acontextual meaning. The legal system is a closed system in which judges apply the literal meaning of the law. Context and intention can be taken into account only to *help* or *sharpen* the meaning (formalism)
- **Dworkin:** law as integrity requires that judges not only seek an interpretation that fits past precedent, but also one that best justifies the existing legal record. All legal decisions require consideration of moral/political values, but this does not entitle judges to create new law.

HART ON INTERPRETATION: CORE & PENUMBRA

What is legal reasoning?

Adjudication does not always involve legal reasoning. On certain issues there is no objective answer to a legal question, and in these hard cases, law 'runs out' so judges have no choice but to reason non-legally.

- Judges reason differently depending on whether the case is **hard** or **easy**.
- Legal standards are determinate in *most* cases, but not all. This is because **language is 'open-textured'**; thus legal rules have a core of clear meaning, and a penumbra of uncertainty.

Core (easy cases)

- Easy cases fall under the core of rule's settled meaning and the judge **formalistically** applies the law as it is (**positivist idea** – if the law has been validly enacted, the judge cannot make a distinction between the law as it *is* and the law as it *should* be).
- The meaning of the words is 'clearly controlled' by the conventions of language (and purpose of the statute).
- The answer is uncontroversial and the law determines a uniquely correct outcome.

Penumbra (hard cases)

- Owing to the 'open-textured' nature of language, it is sometimes not clear whether the general terms apply. Another example of such indeterminacy is when legal rules use general standards of 'reasonableness'.
- Even reference to non-linguistic aids such as canons of statutory interpretation and purpose will be incapable of settling the issue.
- In these hard cases, the law does not plainly or unambiguously cover the particular situation – there is a 'gap' in the law, where the law has 'run out' – so the judge must resort to non-legal reasoning.
- The judge has the choice of subsuming the case under the rule or not. In exercising this discretion, they must rely on non-legal considerations such as moral values and policy.
- The courts are here performing a law-*making* rather than law-*applying* function – creating new legal rights, making a decision as to what the law *should* be.
- A legal system is therefore not a closed logical system – there are inevitably borderline cases in which there is no general agreement that the rule applies.

There is a sharp distinction between clear and hard cases, and a correspondingly sharp distinction between straightforward application of the law and the exercise of discretion unguided by the law.

Thus Hart occupies a position which is mid-way between formalism and the 'nightmare that the rules of law do not constrain at all'.

Application: 'No vehicles in the park'

- Core: motor cars and trucks
- Penumbra: bicycles, rollerskates, toy vehicles

FULLER ON INTERPRETATION: PURPOSIVE

What is legal reasoning?

Language does *not* constrain, or create a core of clear meaning (*rejects Hart*)**. There is thus no such thing as context-independent literal meaning** (*rejects Schauer*)**; the meaning of words and legal rules is entirely a function of the context in which they are used.**

- Language does not constrain the interpretation of legal rules to any extent.
- In determining the applicability of a law, judges must consider the words in light of the purpose for which the law was enacted.

Even in so-called 'core' or easy cases, judges should not always rigidly apply the rules (*rejects Hart*)**, but instead employ a purposive approach. The *purpose* of a law is the source of the 'real' legal rule.**

- Advocates a purposive approach to the interpretation of legal rules; judges should give effect to the 'spirit' of the law over the letter of the law, ignoring the plain meaning of a rule when it dictates a result which defeats the rule's apparent purpose.
- The *purpose* of the law is the source of the 'real' legal rule. By giving effect to the purpose, judges are being *faithful* to the law – the law which is latently in the statute, albeit not in its words as ordinarily understood.

How do judges identify the purpose of a law? Natural law/moralised lens

- The judge must have regard not to the law-maker's actual mental states, but rather the underlying policy goals of the legislation or the broad objectives it is intended to achieve
- The judge can even consider the objectives that can be *imputed* to *ideal*, rational legislators. The objective may be perceived 'more clearly by him who reads the statute than by him who drafted it'. In other words, judges can interpret the law so as to give effect to what they think it *should* be trying to achieve.
- Rules are a blunt instrument for achieving legislative purpose; they cannot cater for unimagined situations. They may also be badly drafted, incapable of being given sensible meaning. Fuller's **particularistic** approach creates a finer, more individualised approach which avoids the errors attendant on the rigid following of rules.
- We need not be 'enslaved by mere marks on a printed page' (Schauer) – this can result in inequitable results or results that do not seem to serve the rule's purpose. Judges should rather serve the 'fundamental principles of truth and justice' (Denning).

Application: 'No vehicles in the park'

- Asks us to consider a situation where local patriots wanted to mount a functioning truck used in WWII on a pedestal in the park as a memorial.
- Hart: the truck would fall into the 'core' of the meaning of 'vehicle' and be prohibited.
- But to prohibit the truck would be incompatible with any imaginable purpose behind the rule.

Application: 'No sleeping at the train station'

- A businessman dozing off while waiting for a train would fall under the 'core' meaning of 'sleeping'
- Recourse must be had to the purpose behind the law to interpret the word 'sleeping'.

Tamanaha: LAW AS A MEANS TO AN END
The Threat of Instrumentalism to the Rule of Law

An instrumental view of law means that law (legal rules, institutions and processes) are *consciously* viewed by people and groups as a *tool* or *means* with which to achieve *ends*; it is an empty vessel to be filled and manipulated as desired.

- Personal ends – lawyers advancing their client's ends rather than respecting the integrity of legal rules; parliamentarians promoting whatever law will help secure their re-election.
- Ideological ends – judges manipulating the legal rules to arrive at a preferred end.
- Social goals – cause lawyers incite litigation to bring about desired social change.

Contemporary legal culture pairs a pervasively held instrumental theory of the *nature* of law with instrumental *attitudes* toward law, in which the combination of attitude and theory are mutually reinforcing.

- Conscious attitude toward law: an attitude that law is a tool to be utilised to achieve ends.
- Theory of the nature of law: the theory that law is purely a means to an end, an empty vessel devoid of any inherent principle or binding content or integrity unto itself.

Ramifications of the instrumentalist view of law

1. Rather than maintain social order/resolve disputes, law will generate disputes as much as resolve them.

- Where the law is perceived as a powerful instrument, individuals/groups within society will endeavour to seize the law in every way possible; to fill in, interpret, manipulate and utilise it to serve their own ends.
- Combatants will fight to control and use law as a weapon in social, political, religious, economic disputes.
- These battles will take place in every arena (legislative, executive, judicial), in struggles over the content, enforcement, application and interpretation of laws, and by whom.

2. The spread of instrumental thinking about law corrodes the rule of law.

Views on instrumentalism

Non-instrumentalists (a few centuries ago)

Law was understood to possess a necessary content and integrity. It was the right ordering of society, binding on all, and not entirely subject to our individual or group whims and wills.

- Law was rules and principles inherent within the customs or culture of society, God-given principles discovered through human reason, or dictated by human nature (natural law ideas).
- Link to earlier weeks: what are law's central values?

Dewey and Jhering (Realism)

The law can be whatever we want, for it is the product of our will – it should be used for the public good.

- Both were critical of prevailing non-instrumental views of law, and went on to inspire Legal Realism.
- Jhering: 'the driving force behind legal development is continuous struggles among individuals and groups within society to have their interests reflected in and backed up by legal coercion'.
- The realists were optimistic reformists: despite noting that law was a means to an end, they believed that it could be used as an instrument to advance the public good.
- **Since then, faith in the existence of common social purposes and our collective ability to achieve them has disintegrated. Rather than representing a means of advancing public welfare, the law is becoming a means pure and simple, with the ends up for grabs.**

CLS/Radical Sceptics

Law has always been used instrumentally to advance particular interests, even when it was characterised on non-instrumental terms.

- The law has always served elite or particular interests. Lawyers have always manipulated the law to achieve ends, and judges have always shaped and interpreted legal doctrine with class or personal biases.
- Non-instrumental accounts of law have simply served to conceal these interests.

- The law originated in and changed through instrumentally motivated contests.
- *Once we identify this, we can begin to deconstruct the interests and power imbalances underneath.*

Instrumentalism in the legal profession

Public distrust for lawyers is and always has been high. Lawyers are seen as 'amoral technicians' who do whatever their clients require, no matter how morally repugnant or socially harmful (*torture memos, Enron*).

There are three respects in which lawyers have long acted instrumentally:

1. Lawyers act as the instruments of their clients – they are tools to advance a client's ends.
2. Lawyers have an instrumental attitude toward law itself, wielding and manipulating legal rules to advance the client's goals.
3. Lawyers may use the law as a means to their own enrichment, to further their personal ends and ideals.

The 'brutish conditions' of contemporary legal practice accelerate the move towards instrumentalism.

- The legal industry has become more competitive.
  - There are more lawyers today, in total and per capita.
  - The cost of becoming a lawyer has gone up astronomically, so that lawyers graduate with immense debt and compete for the best-paying, usually corporate positions.
  - There is less loyalty between firm and client; corporate clients are sophisticated customers who can shop around. If a firm do not assist a client to achieve their end, the client can simply move on to another firm who will. This results in firms competing fiercely for work.
- The legal industry has become more commercial and profit-based.
  - The billable hour system creates an irresistable incentive for private lawyers to work more hours.
  - Because partners share in the profit, they hustle to bring in more clients, and push associates to work more hours.

The tradition conception of the lawyer is as owing devotion to the client and the public good. But any devotion to the public good has largely been discarded.

- Tamanaha is sceptical about the idea of lawyers serving the public good: 'most lawyers today see their role as instruments for their clients, plain and simple'.
- The change in professional ethics codes across the century shows clearly the abandonment of any such notion of the 'public good':
  - 1908: 'compliance with the *strictest principles of moral law*'
  - 1969: 'it is *often desirable* for a lawyer to point out factors which may lead to a morally just decision'
  - 1983: 'a lawyer *may* refer not only to law but to other considerations such as moral factors'
- Nowadays, clients often expect and demand that their lawyer take a morally dubious or socially detrimental course of action, so long as it is not strictly prohibited by the law. The client simply wants to be told how to do what they want to do.
- **The 'brutal conditions' of the legal industry today make it extremely difficult for lawyers to choose to serve the public good over the interests of their clients.** Every case is a 'previous revenue resource that can walk down the street to find a competitor eager to comply'. The bottom line is money, and clients spell money – lawyers must ensure their financial survival in a relentlessly competitive environment.
- **Lawyers are socialised by legal education, which tends to entrench the instrumental view of the law.**
  - By the late 1970s, the 'ordinary religion of the classroom' was legal instrumentalism.
  - Llewellyn: students are taught to 'knock your ethnics into temporary anesthesia…you are to acquire the ability to analyse coldly…and manipulate the machinery of the law'.

Instrumental manipulation of legal rules and processes *(see also Luban)*

Note that instrumentalism can be seen as a mainstream acceptance of positivism. If laws are simply posited, and have no necessary moral content, they have no inherent integrity and therefore can be manipulated at will.

- Little respect for the binding quality of legal rules: do whatever it takes when pursuing the client's end, including manipulating or circumventing the law, stopping only at clear illegality.

- Take advantage of the indeterminate quality of legal rules, stretching to the outer limits of the law, no matter how far from its underlying spirit (purpose).
- Expected to exploit every loophole, take advantage of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favour their clients.
- Lawyers are 'creative business problem-solvers', not obstructionists who tell the client what it can't do.
- Selective reading of the applicable body of law to arrive at a desired result – torture memos identifying an extraordinarily high threshold to define torture, so that they could torture prisoners with impunity.
- **Although the subject of torture is anything but routine, the memo is indeed routine stuff in the sense that every lawyer who reads it will find intimately familiar the style of instrumentally manipulating the law to reach the end desired: 'It is what lawyers do.'**
- This attitude is ingrained in students at law school. They are taught to devote themselves entirely to one side and block out the other; that the law is all about making arguments, and there is *always* some argument to be made, by manipulating the 'machinery of the law' (Llewellyn).
- Example: firm circulated internal messages discussing questionable activity to their legal counsel, with the aim of cloaking the messages in attorney-client privilege.
- Example: lawyers are heavily involved in helping clients evade taxes.

Conditions surrounding the practices of law have dramatically changed, in ways that make it almost demand heroic behaviour to expect lawyers to comply with an independent duty to serve the public good.

Lawyers at every level in every type of job, from solo general practitioners to prosecutors, defenders, in-house lawyers at corporations to partners in elite firms to the Attorney General **have been taught to see and treat legal rules and processes in purely instrumental terms.**

The solution to these problems does not require repudiation of the view that law is an instrument, but in setting limits and restraints on this view, in recognising the situations where it is inappropriate, and recognising that certain uses of this instrument are dangerous and must be guarded against.

Luban: 'THE TORTURE LAWYERS OF WASHINGTON'

Extreme example of Tamanaha's instrumentalism.

Background

International criminalisation of torture

- The post-WWII human rights revolution led to the legal abolition of torture and inhumane treatment (*Geneva Conventions*, *ICCPR*, *Convention Against Torture*).
- But legal abolition did not mean real abolition: scores of states, including democracies, engage in it anyway.

***Convention Against Torture* (*CAT*)**

- Defines torture as 'the intentional infliction of severe physical or mental pain or suffering on someone, under official auspices or instigation' – this was the definition that the Bybee Memo had to circumvent.
- Prohibits 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture' – Bybee Memo also had to circumvent this.
- There are no exceptions whatsoever, including war, threat of war, and dire public emergency.
- These provisions were implemented domestically by US Congress, and the US became a leading campaigner in the worldwide effort to prevent torture, championing their respect for the rule of law and human rights.

US legal policy in the wake of 9/11: the 'War on Terror'

- The legal approach to terrorism was 'forward-leaning'; aggressive and risk-taking, acting with utmost urgency to prevent even the most minimal chance of attack ('the one percent doctrine').
- CIA techniques for interrogating high-value captives included waterboarding, long-time standing, cold cells – all of which easily fall under the *CAT* definition of torture. There were also practices of 'outsourcing torture', sending captives to other countries for interrogation (Guantanamo Bay).
- The most crucial portions of the 'forward-leaning strategy' were formulated in secrecy by a group of elite government lawyers in the OLC, who intentionally excluded anticipated dissenters.