

Law and legal instrumentalism

Law



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Law, a set of coherent rules and values within a society, is a human process. As such, it is crucial to approach its application within society in a pragmatic and realistic sense rather than a formal one, which views law as a set of mechanical and abstract principles. A legal realist approach on law takes into account extra-legal factors which help shape how law is used within a social context. This approach does not view the discipline of law as a literal set of principles to be formally detected and applied, but recognizes that the interpretation of law by legal actors is manipulated by situational factors.

Brian Tamanaha in *Law as a Means to an End: Threat to the Rule of Law* examines how law, originally understood as an “instrumental to serve the social good”, is now just a mere instrument to further the goals and agendas of those who have access in its use (Tamanaha, 4). In essence, the notion of a common “social good” is no longer a qualifiable condition of law. In a complex, multi-faceted society, it is optimistic to presume that there is a true identifiable social good. Thus, lawyers, legislatures, judges and other legal actors are capable of using law to further their personal or collective political, social and economic interests.

Tamanaha examines the ways in which legal actors, specifically cause litigants and judges, instrumentally exercise law. Thus, the term instrumentalism, a form of legal realism, is a pragmatic method which stems away from a formal application of law by critically examining cause litigation and judicial activism. Although law may be used as a mechanism to achieve a certain outcome, it is not used lawlessly and without merit as lawyers are advocating for a broad social cause and judges use law based on the merits

of the constitution, given the benefit of time and postulated reason of their decision making.

Brown, a case regarding segregation within the United States emerged with lawyers stirring up lawsuits by informing African American citizens of their legal rights (Tamanaha 159). The process of instigating litigation was previously prohibited in common law practice; it was not professionally ethical for lawyers to set lawsuits in motion. However, it became increasingly common for lawyers to achieve change in public policy and legislation by fighting for a specific cause within the judicial arena. This method was forward-looking in that the courts became a battle field for interest groups seeking remedial change; the decision of the law was not necessarily to compensate for any harm inflicted in the past, but to change the policy in the future. This expansion from the traditional bilateral litigation no longer was to award the affected parties with compensation, but became a method to attain a reformative decree (Tamanaha 161). Eventually, cause litigation was an encouraged means to advance societal goals, in the sectors of environment protection, political reform and mental health, to name a few (Tamanaha 160).

Although such issues of public policy appear to benefit society as a whole, the intent of the cause lawyers who instigate such legal actions is questionable to Tamanaha. The lawyers in these situations are no longer amoral technicians of law, but individuals who seek their own ideological implementation (Tamanaha 156). The cause which lawyers strive towards becomes the primary concern, whereas the clients themselves are

secondary, fulfilling the standing requirement before the court (Tamanaha 156).

This can be very detrimental to the clients because they may not be aware of the consequences of their legal actions. For instance, *Baehr v. Lewin*, 1993 was a successful lawsuit brought forth to legalize same-sex marriage in Hawaii. Although the litigants won, the ultimate consequence was detrimental; following it was a series of amendments nation-wide which prohibited same-sex marriage (Tamanaha 167). The battlefield within the court became not a place to determine legal rights, but a remedial catalyst in public policy. Such political battles focus on adversarial ideologies rather than legal rules and merit.

However, the work of cause litigants cannot be narrowly categorized as one that is purely self-serving. More often than not, cause lawyers instigate lawsuits by informing the oppressed and disadvantaged of their rights. By doing so, they use law to encourage political change to the otherwise uninformed public. These causes often grow to become social movements as it “ provides the basis for a sustained series of interactions between power holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation (Austin 2)”. This formal representation demands change from the power holders with a strong backing of social support. Often, these groups lack the resources and skills which lawyers can provide, offering their advice to enlighten the marginalized group to “ initiate and nurture political mobilization” (Austin 4). The instrumental use of law by judges is immensely threatening to the judicial system and to a democratic society as a whole. Judges who use law

to achieve a certain outcome undermines the rule of law. The legal system requires that judges be objective arbitrators of the law.

As independent bodies, it is essential that they remain impartial in their decision making and delegate based on rule, and not personal preferences (Tamanaha 227). This is a crucial aspect of the rule of law, which binds the action of the state to pre-fixed rules, placing judges equal under and before the law, just as all other subjects of society. The rule of law ensures transparency and predictability which prevents the government from ruling coercively. It is an essential component to a democratic state.

However, when judges decide a cases, they may be inclined to achieve a particular result. In essence, they are using laws to achieving another end, namely one that strengthens their own ideological beliefs and interests. Whether it is a certain political philosophy or a particular social policy which they seek, arbitrarily decided cases and manipulated law enforcement defeats the characteristics of the judicial branch of the state. Because there is no particular hierarchy of values, judges are able to promote some while extinguishing others.

The general terms of legal rules allows judges to focus on the consequences of their decision. Their decisions will naturally be based on their political affiliations or ideological tendencies. Consequently, it is difficult to believe that judges are truly impartial in decision making. The result of judicial activism is that private attitudes become public law (Tamanaha 234). Furthermore, the procedural process of the case takes a backwards approach; the decision is made first, then it is justified by the legal rules which judges find applicable (Tamanaha 236)

Nevertheless, there is a certain form of procedure which judges are bound to. Although values are not ranked hierarchically, there are two forms of rights obtained from the constitution: specified rights and secondary rights (Bork 17). The latter is of utmost importance as it addresses the values held by the constitution, such as the right to vote or procedures in criminal processing, all which the courts need to protect (Bork 17). The former alludes to the principled rules which the original framers of the text intended to convey (Bork 17).

Because constitutional law does not have a concrete theoretical premise on which adjudicators are required to base their decision making processes on, they are founded on neutral principles. That is, issues are addressed based on general principles postulated on reason to ensure that conflicting values are not lawlessly chosen over one another (Bork 2). Granted, there are adversaries in the legal principles to which judges ascribe. Therefore, it is critical for the judges to recognize that in deciding cases, they are setting legal precedent, and therefore should have a firm belief that the values being applied are done so lawfully.

These beliefs are in relation to the legal system as a whole, not their personal preferences (Bork 2). Ultimately, Bork's concern lies not with the decisions made by judges but what makes their decisions legitimate. The courts essentially work as advocates for the minority who otherwise would have no say on the issue at hand. Helping the powerless realize their rights is a form of advocacy that judges take. It is not about undermining the rule of law, but giving opportunity to access the law (Bork 3).

Nevertheless, it is crucial for judges to base their decisions off of neutral principles; just as principles and values cannot be applied lawlessly, they just the same cannot be defined lawlessly (Bork 8). The critical examination of judicial review goes beyond it's obvious implications and expositions of undermining the rule of rule. It is unfair to presume that judges are completely unreasoned in their decision making. There is a level of predictability as judges are bound to legal precedent and cannot decide cases in an tyrannical manner.

Although the courts are not elected officials who are granted the power to delegitimize legislation, they are in many ways better equipped in making such decisions. For instance, the courts are distanced from political or social pressure allows them to make sound decisions in a timely matter. Elected officials tend to act on expediency and pressure when it comes to making value-based decisions (Bickel 25). Essentially, they are inclined towards one side of the issue in order to appeal to the interest of the predominate voters, as opposed to abiding to the fundamental values of law (Bickel 25).

Judges on the other hand make decisions far from societal pressures, with more leeway in terms of time. This gives the courts the ability to make more calculated decisions, taking into consideration not only the fundamental values of the state but also the unforeseen implications of a decision. (Bickel 26) In dealing with the pith and substance of a case, decisions are argued to be “sober second thoughts” (Bickel 26). Ultimately, the use of law within a judicial context by judges and lawyers is not an arbitrarily unfair process.

Such legal actors are bound to the values of the laws within society. Such values are premised on the rule of law, the foundational concept of a <https://assignbuster.com/law-and-legal-instrumentalism/>

democratic society. Cause litigants are often involved in social issues and advocate for those who require a formal delegate. These cause lawyers may use law in such a way to achieve a certain outcome, but this outcome results in change in public policy to those who are otherwise be unaware of their legal rights. Moreover, although judges may have their own social desires and political preferences, they cannot easily sway towards them.

Their professional duty requires them to be consciously rule-bound and rely on the precedent. Further, the basis of their decision is on neutral principles. Such principles are not vague and abstract, but stem from the precedent of previous judges in common law. Instrumentalism is pragmatic in that it recognizes that law is not a math; there is not a formula which judges rely on. However, social movements and changes through the judiciary ensures that fresh insight is continuously brought about within society, giving room for social change and progress.