Week 3

Dworkin's Critique of Positivism: Judicial Role, Interpretivism, and Law as Integrity

Introduction to Critiques of Positivism

Positivism has been identified with the thesis that the validity of individual laws depends upon their sources and not their merits. A particularly powerful model for this approach is provided by Hart’s conception of every legal system having a ‘rule of recognition’, establishing criteria by which standards can be identified as legal standards. The rule of recognition of a particular legal system identifies the sources of law which are valid in that system (legislation, precedent, …), and laws are valid because they either belong to one of those sources or are validated by other laws which do (e.g. delegated legislation).

The idea that the validity of a legal standard depends upon its sources rather than its merits is not uncontroversial, since many legal standards in both private and public law seem to derive at least part of their force from their intrinsic merits (e.g. no one is to profit from their own wrong, no one is to be a judge in their own cause). How is positivism to account for the status of such standards, often described as ‘legal principles’? Dworkin claims that positivism cannot, and that principles show that law is not necessarily source–based.

Many positivists, on the other hand, think they can, since laws can specify moral conditions for the validity of other legal standards (e.g. inhuman and degrading treatment, unconscionable conduct). But does this deal adequately with the problem raised by the existence of principles?

So far as Dworkin’s critique of positivist accounts of validity goes, the original argument merely claims that the positivist account is inadequate. Which leaves the question, what alternative account of legal validity is there? This is the challenge to which Dworkin responded in his work on ‘hard cases’.

Dworkin argues for a much more liberal conception of the scope of legal considerations than positivists. For Dworkin law encompasses not only court decisions and legislation considered discretely, but the totality of law seen as an internally coherent and consistent set of individual rights and duties. Law has to be seen as an enterprise with underlying values which inform its content and interpretation.

But does this work, or does it make any type of consideration which a court relies upon in reaching its decision a ‘legal’ consideration? Does it obliterate the idea that courts rely on both legal and non–legal considerations in deciding cases?

Dworkin and Interpretative Approaches to Law

To resolve legal disputes, courts often need to interpret sources of law such as constitutions and statutes and precedents, and they need to interpret the communications by which parties try to order their own and others’ legal rights and duties (such as leases and wills). Is interpretation a technique for dealing with uncertainties and controversies as to the effect of such legal instruments? Or does it take interpretation to answer any question of law? Is legal reasoning a form of interpretation, or is it a form of reasoning that often requires interpretation?

Ronald Dworkin argues that law is an ‘interpretive concept’, by which he means that any true statement of law is true because it follows from the best interpretation of the legal practice of the community. We will consider Dworkin’s claim that all questions of legal rights and obligations (in what he calls ‘easy cases’ as well as what he calls ‘hard cases’) are to be answered by interpreting the community’s legal practice in a way that shows that practice (as well as it can be shown) to respect the rights of the members of the community.