

Topic 3: Liberalism

Characteristics of liberalism

Liberty: all human beings are free

- **Positive liberty**: there needs to be active intervention in social order to create or increase range of real and affective choices necessary for indiv to be truly autonomous
 - To be truly autonomous, indiv must have range of choices available to them, from which they can make rational choices in favour of self interest
 - Includes legisl around affirmative action - govt intrusion to create opportunities for real choice about careers
- **Negative liberty**: limited, passive role for govt - does not take positive steps to help indivs achieve desired outcomes
 - Extreme version (Robert Nozick): govt to only protection against violence, theft and fraud

Private v public spheres

- Regulation of private affairs is outside proper role of govt

Harm principle

- Mill's theory: indiv freedom/ liberty is limited to the extent they cause harm to others
- Mill supported some behaviour being decriminalised- it did not cause harm; victimless

Individualism

- Liberalism centres on importance of indiv, **rather than** strongly community-oriented picture of society
- Social organisations composed of atomic indivs who form series of r'ships at various levels- family, social, economic
- Focus on capacity of indiv to determine what goals to pursue + how go about achieving goals (w/in certain limits; preventing harm to others)

Equality

- Formal sense: no legal barriers put in way of indivs achieving goals
- Substantive sense: no formal barriers but in practice some indivs are **more equal than others**
- Therefore, need govt to **regulate** to ensure disadvantaged indivs can achieve **actual equality**
- Liberalism emphasis of all indiv's being treated equally also influences **natural law + positivism**

Rights

- Universal
- Inalienable
- Equal
- Source of rights
 1. Exist simply because an indiv = a person (universality)
 2. Arise because the consequences of giving people rights is good; contributes to desirable social outcome
- **View one: Immanuel Kant**
 - Indivs are ends unto themselves

- **Deontological** view of rights: rights are pre-legal: exist independently of whether or not found in law or legisl
- Rights exist simply because it is morally right to see human beings in this way
- **View two: desirable outcome**
 - Indivs are given particular rights to ensure desirable outcomes
 - If outcome achieve, rights are justified + should be incorporated into law
 - i.e. statutory limitation periods on certain legal actions = in best interests of society (not the best for indiv unable to pursue a claim)

Rule of law

- In exercising power, govts themselves should be subject to the law
- Lord Bingham's exposition of rule of law

Dworkin

- Criticised utilitarianism- promoted equality of the legal system
- Rights as trumps
- All legal problems have single correct answer
- Difference b/ween policy and principles (law should relate to principles, not policies)

Law requires interpretation

- Policies and principles are different things
- When law uncertain: only principles (statements about indiv's rights) should influence judge's interpretation of situation to make decision in **hard cases**
 - **Hard cases**: such cases test fundamental principles, giving overall shape to law
- Interpretation = process of developing a theory which best explains what law actually is in particular situation

3 stages of interpretation

1. Pre-interpretive: assemble all working materials in legal system- case law, statutory provisions
2. Interpretive: think about what the materials mean + show the rules in best possible light
3. Post-interpretive: rule may be subject to re-formation, if req'd to establish best fit with the **full law** → positive law + positive political morality taken together to provide best interpretation of the law (Dworkin, Law's Ambition for Itself p 176)
 - a. Judges are to consider the historical legal record - Hercules J

Principles v policies

- **Unlike positivists**: law consists of **both** rules + principles and policies
- **Policies** = description of goals hoped to be achieved by adopting particular measures (Dworkin, Taking Rights Seriously p 90)
 - Do not consider consequences of measure on indivs, but only to overall effect of measure on community as a whole
 - Province of legislature to enact law in pursuit of specific community goals
- **Principles** = not conclusive; rights of indiv
 - Provide reasons for why case **should** be decided in particular way
 - Province of the courts to decide law in circ's when rule unclear
 - **True basis of the law**

- To determine a case: answer lies in whether a right is sponsored by principles providing best justification of legal practice as a whole (Dworkin, Law's Empire p 152)
- To resolve competing interests b/w community goals and indiv rights: give weight to principles over policies
 - Also echoed by JS Mill (Mill, On Liberty and Other Essays, p 20)

Pornography

- Defends distribution of pornography:
 - Right to freedom of speech
 - No good reason why social goal of making society better by banning pornography should intrude on right to distribute pornography
 - Despite fact that many people might want ban pornography, indiv's right to moral independence should prevail
 - The right of moral independence is part of same collection of rights as right of political independence + justified as a trump over unrestricted utilitarian defence of prohibitory laws against pornography in a community of those who find offence that their neighbours are reading dirty books (Dworkin, Do We Have a Right to Pornography? pp 177-212)
- Recognises harms of pornography:
 - Harm might be in form of special danger of personal harm narrowly conceived (Dworkin, A Matter of Principle, p 340)
 - **BUT** concludes that studies show violence to women is largely formed in childhood, before child has exposure to pornography (Dworkin, Women and Pornography p 38)
- Rights exist to support or maintain fundamentally egalitarian nature of liberalism
 - Rights safeguard indiv's equality
 - Entirely different from natural rights- such rights exist when collective goal is not sufficient justification either for preventing indiv from doing something which they want or imposing some loss on them
 - Role of govt = make decisions which service justifiable mix of collective goals **BUT** nevertheless respect indiv's rights (Dworkin, Taking Rights Seriously, p 115)
 - Where a right exists (i.e right free speech; distribute and access pornography): inconsistent to say it can be overturned because there is community benefit in denying person right to exercise such freedom
 - **Against utilitarianism:** equal concern + respect = safeguard against majority imposing its will on majority
- One instance where individual rights can be curtailed: **compelling state interest** (Dworkin, Taking Rights Seriously, p 200ff)

One right answer

- Always one right answer to hard cases- discoverable by interpretive process

Criticism of Dworkin

- Dworkin's picture of law = seamless web of idealisation
- Dworkin's nature of rules: doesn't reflect what happens in real world
- Concept of 'hard cases' inadequately defined
- HLA Hart:

- Under rule-based theory: in hard cases where no explicit rule covering specifics of dispute → appropriate law identified by social sources of law (legisl, case law, social customs) (Hart p 269)
- Normative values don't play role in law, unless incorporated into law
- **Dworkin argues:** legal argument = moral argument → judges decide which of competing principles provides morally most compelling justification for decision