Law & Philosophy Workshop

9.22.08

Questions for Waluchow

1. Himma’s argument about directed power is presented as an “empirical” claim about the rules of recognition in the US and Canadian legal systems. (p. 5) We were wondering whether the empirical nature of this claim does not open Himma’s argument to the charge that (1) it might be false, as a matter of fact and, (2) that in other legal systems, a rule of recognition might be practiced which would be in line with the inclusive version of legal positivism? It seems that a better interpretation would be to construe the argument about directed power as a conceptual one, deriving from the essential authoritative nature of law, as it has been suggested originally by Raz. And, if it is not an empirical claim, how can it be refuted (or vindicated, for that matter) by observation of legal practice?

2. We were wondering whether you would agree that Himma’s argument is running together two separate versions of inclusive legal positivism: according to one version (Coleman’s?) the rules of recognition itself may condition legal validity on some moral grounds; according to another version (Waluchow’s?), the rule of recognition is that the constitution is the supreme law of the land, and it is the content of the constitution that imposes moral constraints on legal validity of other norms. The distinction might be important (for Himma) because the argument from directed power would seem to apply only to the latter version.

3. About the argument from nullity: you seem to take the legal doctrine of nullity to count in favor of the inclusive version of positivism, because it shows that a norm that violates a constitutional constraint is taken to be void ab initio. We were wondering whether this aspect of constitutional decisions really proves the point. Is it not, generally, a feature of judicial decisions that (for better or worse) they tend to have a retroactive effect? In other words, it seems that the doctrine of nullity can be explained on grounds that pertain to the nature of judicial decisions, in general, and does not necessarily lend support to the inclusive version of positivism.

4. We were not entirely sure how to understand the distinction between legal validity as existence and systematic validity; would it be fair to say that the former is putative or assumed validity, and the latter is actual (or true) validity? Or is it a distinction between legal validity that is fully constituted by social practice (actions, beliefs and attitudes of a population), and legal validity that is not fully constituted by practice? (The formulation seems to suggest the former, the argument would suggest the latter.)
5. About the argument from fallibility: it seems to us that this argument cuts against exclusive positivism only if one assumes that social practice (and “acceptance”) constitute the validity of individual norms. According to a more plausible version of positivism, however, social practice constitutes only the content of the rules of recognition; but then it would not follow that whatever norm a community of lawyers think that is legal, is, indeed, legal; a norm is legally valid iff it is valid according to the rules of recognition. Hence it is possible for a community of lawyers to be wrong about the legal validity of any particular norm. Fallibility, therefore, seems to be quite consistent with exclusive positivism.

Perhaps another way to put it: there is only systematic validity; validity as existence only applies to the rules of recognition.

6. We were not quite sure about your interpretation of Raz’s argument about legal validity and its relation to moral obligation. (p 24) In interpreting Kelsen’s conception of the basic norm, Raz seems to suggest that the normativity of law can only be understood in terms of justified normativity; to consider a norm as binding is to consider it as justified. But for Raz (and Kelsen) this only raises the question: “How can it be that in stating what the law is we are not endorsing its moral merit?” [The Authority of Law, p 150]. Is it part of your argument here that by stating what the law is, we are committed to endorsing its moral merit?