

## Ronald Dworkin: Law as Novel Writing

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**Ronald Dworkin's innovative and politically ambitious work has become essential reading in political and legal theory. Taking issue with classical political liberalism, he argues that liberty and equality are not mutually exclusive, and are indeed inseparable. And against traditional interpretations of law, he argues that law must be understood by comparing it to a collective novel, a mixture of creativity and interpretation.**

The American writer Ronald Dworkin died in 2013, at the age of 81. He left a body of philosophical works which, like those of his contemporaries John Rawls and Jürgen Habermas, have become essential references, even for opponents. He was a student and then a teacher in some of the world's greatest universities. His studies began at Harvard College and as a Rhodes Scholar at Oxford University, and continued at Harvard Law School. His teaching career began at Yale in 1962, and advanced when he succeeded H.L.A. Hart in the Chair of Jurisprudence at Oxford in 1969. But he also had practical experience that was the envy of many other jurists. For example, at the outset of his career, he clerked for the famous judge Learned Hand, and then practiced law in New York; thus, in an interview for *The Guardian* in 2011, he would recount that in returning to academia, he had abandoned a well-paid job on Wall Street so he could go do “what I found most fulfilling, thinking about, arguing for the things that are hard, important and rewarding”.<sup>1</sup>

And he did indeed spend the rest of his life debating, and defending his innovative thinking about law and rights, which he considered to be the bases of all political and social thinking. His work can be understood as an unstinting effort to overcome a strict separation of law, morality and politics. For example, he defended a political liberalism that is less abstract than that of his contemporaries: although he accepted the axiom that the principles of political justice must not depend on different ethical ideas about the common good, which are necessarily particular, he nevertheless argued that liberalism cannot be indifferent to various ways of life, and cannot avoid preferring some to others. In other words, the freedom of individuals to determine their ways of life, their beliefs, and their ideas about the common good, does not mean that these topics must be excluded from public discussion. Likewise, Dworkin thought that all legal systems are based on values, and that therefore all interpretations of law are moral: “We all – judges, lawyers, citizens – interpret and apply these abstract clauses [of the Constitution] on the understanding that they invoke moral principles about political decency and justice”.<sup>2</sup> Because Dworkin was guided by these convictions, he tackled some of the very difficult practical issues that arise in contemporary liberal democracies.

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<sup>1</sup> See “Ronald Dworkin: ‘We Have a Responsibility to Live Well’”, *The Guardian*, 31 March 2011.

<sup>2</sup> R. Dworkin, “The Moral Reading of the Constitution”, *New York Review of Books*, 21 April 1996.

## Dworkin's Thoughts on Equality

As a politically committed writer from the 1960s onwards, Dworkin contributed to the defining debates of American politics, especially in his polemical articles in the *New York Review of Books*. For example, early in his career, he defended civil disobedience by Vietnam War veterans, and in the 2000s he made biting criticisms of the Bush administration in the war on terrorism, in particular regarding the Guantanamo Bay military prison. As a progressive on social issues, he also argued in favour of abortion, euthanasia<sup>3</sup> and same-sex marriage.

In these debates, Dworkin personified the left-wing American liberal, concerned with liberty but also with social justice. For example, he defended positive discrimination as giving minorities fair access to education and higher job positions, thus encouraging getting beyond an abstract concept of equal rights.

Dworkin's thinking, like that of John Rawls, is part of the current of "egalitarian liberalism" in the English-speaking world, which defended the welfare state against the neoliberalism embodied in the 1980s by the policies of Reagan and Thatcher that were focused on economic efficiency and individual liberty. Dworkin used a veritable philosophical arsenal to challenge these public policies and to support the welfare state's devices for redistribution. In particular, he challenged the idea that liberty, so dear to Americans, was somehow restricted or limited by the welfare state. He showed how liberty and equality are in fact complementary rather than opposed. So he tried to clarify the idea of equality, to demonstrate its importance to liberal political philosophy.

In his political theory works, such as *Sovereign Virtue*<sup>4</sup>, Dworkin argued that the concept of liberty is included within the concept of equality. Therefore, the individual rights that flow from liberty - and that the Constitution must uphold - presuppose equality, in particular the idea of equal protection. There is no "right to liberty" independent of a political system that recognizes the equality of its citizens. In other words, liberal democracy is not defined by its formal procedures upholding individual liberties, but by its capacity to treat all citizens with equal respect and attention.

However, Dworkin's theses about equality are distinct from the Rawlsian theory of justice.<sup>5</sup> For example, Dworkin raises doubts about the primacy of Rawls' first principle of justice, which says that individuals must first and foremost have the benefit of a set of basic liberties that is as extensive as possible. Rawls asserts that individuals in the original position - i.e. in a hypothetical situation in which a system for distributing liberties and goods is negotiated - and under the veil of ignorance - i.e., with no knowledge of their own social position - would first decide to ensure that they would have a large set of basic liberties, equal for all. Rawls adds to this a second principle of justice, ensuring a fair distribution of goods, in which any positions with social or economic advantages must be open to all, and must in any case work to the greatest benefit of the least advantaged.

In contrast to Rawls, Dworkin believes that there is no proof that rational individuals artificially placed into such a situation would prefer liberty to well-being and wealth. Also,

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<sup>3</sup> See especially *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom*, New York, Knopf, 1993.

<sup>4</sup> See *Sovereign Virtue: The Theory and Practice of Equality*, Cambridge (MA), Harvard University Press, 2002, 2008.

<sup>5</sup> J. Rawls, *A Theory of Justice*, Cambridge (MA), Harvard University Press, 1971.

adopting a perspective closer to games theory, Dworkin believes that even behind the veil of ignorance, when individuals don't know their social positions, they could be prepared to bet by going for social inequality, which could benefit them. In any case, one cannot assume that the exercise of basic liberties will prevail over economic and social equality, which for Dworkin is rather a condition for the exercise of those liberties, because the original position itself presupposes a kind of equality: "the right to equal respect is not a product of the contract, but a condition of admission to the original position".<sup>6</sup> In other words, individual rights make sense only when they are required by equality.

### **Dworkin's Thoughts on Constitutional Law**

Dworkin, a constitutionalist both by education and by mental disposition, places law at the foundation of political communities. He was persuaded that we must "take rights seriously" (in the words of the title of one of his most celebrated books<sup>7</sup>), and this conviction inspired him to construct a fertile philosophy of law. In this field, Dworkin made a name for himself by reviving the debate about the application and interpretation of law. This earliest part of his work has been slow to enter into French consciousness. Thus, the three works on the philosophy of law that made Dworkin well known – *Taking Rights Seriously* (1977), *A Matter of Principle* (1985), and *Law's Empire* (1986) – were not translated into French until the 1990s. This delay came partly from a cultural difference: in these books Dworkin constructed his arguments essentially by drawing on American legal cases, and sometimes it seemed difficult to separate his reasoning from that context. Because his work focused on American constitutional law, it was not immediately accorded the place that it merited among French constitutionalists and philosophers<sup>8</sup>.

Dworkin presented his philosophy of law as a "third way" between legal positivism and legal realism. He had his own view of these two schools. By positivism, he meant mainly the dominant approach to law following H.L.A. Hart<sup>9</sup> (who was one of his teachers), although Dworkin was quite aware that the label "positivist" extends beyond that approach and (even though there are several different schools within positivism) refers more generally to seeing law in its "juridicity", with no extra-legal considerations such as values or social relationships. Dworkin also defined himself in relation to American legal realism (very powerful since Justice Oliver Wendell Holmes in the early twentieth century), more specifically to Critical Legal Studies, a school of critical thought that developed mainly in the United States in the 1970s and 1980s, at the same time that Dworkin was publishing his major works on the philosophy of law.

Dworkin built his arguments as reflections of and on these two schools of legal philosophy. Like realism, he questioned the scientific assumptions of positivism, in which law

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<sup>6</sup> R. Dworkin, "The Original Position", in N. Daniels, *Reading Rawls: Critical Studies on Rawls' Theory of Justice*, Stanford University Press, 1989, p. 51.

<sup>7</sup> R. Dworkin, *Taking Rights Seriously*, Cambridge (MA), Harvard University Press, 1977.

<sup>8</sup> This changed quickly at the end of the 1990s and in the 2000s, and since then Dworkin's work has been the subject of a large number of articles in French. However, studies dedicated specifically to Dworkin remain relatively rare. See especially "Dossier 'Ronald Dworkin'", in *Droit et Société*, nos. 1 and 2, Paris, LGDJ, 1985 and 1986; S. Wesche and V. Zanetti (eds.), *Dworkin: Un débat*, Paris, Ousia, 2000; J. Allard, *Dworkin et Kant: Réflexions sur le jugement*, Brussels, Editions de l'ULB, 2001; and *Dworkin*, special issue of the *Revue internationale de philosophie*, Paris, PUF, 2005. To these must be added at least two fine introductions to French translations of Dworkin: in political philosophy, see J.-F. Spitz, "Égalité de bien-être ou égalité des ressources? Le principe égalitariste abstrait", in R. Dworkin, *La vertu souveraine*, Brussels, Bruylant, 2008; and in philosophy of law, see P. Bouretz, "Préface", in R. Dworkin, *Prendre les droits au sérieux*, Paris, PUF, 1995.

<sup>9</sup> H.L.A. Hart, *The Concept of Law*, Oxford University Press, 2012.

limits itself to stated positive law. At the same time, he also challenged the sceptical conclusions drawn by realists about the legitimacy of law and the rationality of judicial decisions: law is not just what judges want it to be.

Against positivism Dworkin asserted first of all that law is not essentially a system of rules, but is actually a political work in progress, which involves norms that are not always explicit in legal texts, notably values and principles such as dignity and the right to equal respect. Therefore, established law and legislation are not all there is to law. So Dworkin's view is that the work of judging – especially in the case of constitutional judges – is not limited to applying abstract rules to particular cases. Their role is much more deeply interpretative, and Dworkin gives interpretation a very broad meaning. He therefore questions the restricted role that positivism gives to interpretation in the practice of law. For example, although Hart clearly recognized that judges have a power to interpret, he limited this power to “hard cases”.<sup>10</sup> These cases arise when no legal rule applies to the situation, or when there are several valid rules but no easy way to choose among them. In this situation, when the rules are imprecise, obscure or silent, a judge must say more than what the rules on their own imply. This room for manoeuvre left to judges is referred to as judicial discretion: in the absence of clear rules, a court can exercise normative power to resolve the hard cases brought before it. In this positivist understanding, judges authoritatively intervene only in limit cases, i.e. in hard cases, as distinguished from ordinary cases. In other words, there is an assumption that in ordinary cases, judges can apply the law without bringing into it any personal power at all.

This assumption is challenged by legal realists, who assert that all judicial decisions are straightaway expressions of power or personal opinion, and that legal norms do not determine judges' decisions, they just help dress it up so it can take the form of law and thus adorn itself with the fineries of legitimacy.

Dworkin shares with the realists the belief that the positivist view of law does not correspond to reality. In his view, hard cases are not marginal cases, but central ones, which show that the law is a thoroughly interpretative activity. He also thinks that discretion is not marginal but constant: judges must always interpret the law and they always have several possible interpretations from which to choose.

Nevertheless, Dworkin rejects the moral scepticism that is characteristic of legal realism, and the “no right answer theory” which holds that there are no good answers to the legal questions that judges have to decide. Indeed, according to the realists, the law never imposes a decision on a judge. Dworkin does not accept the realist view that justice is by definition arbitrary – the result of the judge's mood – and is not in any way constrained by principles contained in the Constitution.

In other words, Dworkin accepts neither that law imposes on judges a single solution in most cases, nor that law imposes nothing on them and that consequently their decisions are always based on other criteria (political opinions or partisanship, religious beliefs, personal background, etc.). He does not accept that judicial decisions can be reduced to expressions of judicial power. To show this, he develops a theory that gives a central place to the interpretative (and evolving) dimension of law, and at the same time demonstrates the constraints involved in interpreting the law.

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<sup>10</sup> See especially H. L. A. Hart, *op. cit.*; and N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 2011.

## **The Chain Novel Metaphor**

To explain his own theory, Dworkin used a metaphor that was to become the central idea of his philosophy of law: the chain novel. This image has loomed large in discussions about judicial interpretation, in the same way that the Rawls' image of the "veil of ignorance" has in debates about political justice.

This metaphor rests on an analogy between law and literature. Law is compared to a novel, but a collective one, which Dworkin describes in these terms: "In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on."<sup>11</sup> Wanting to emphasize the dual task of the judge – creating and interpreting – Dworkin invented a literary genre in which critics are also narrators of the stories that they critique.

This collective work also involves some constraints, especially for the sake of coherence. In fact, each writer is obliged to write a chapter that respects the logic and the chronology of the work as a whole. Moreover, each of the writers has to form an idea of the overall story conveyed by the novel, and use his or her chapter to try to enhance that idea.

Applying this metaphor in the field of law, Dworkin shows how judges are both narrators and interpreters of the law. In their decisions they reinterpret law and contribute to its evolution. This metaphor thus brings two things to legal theory. First, it clarifies the temporal character of the practice of law. The chain novelist has to make a link between the written chapters and those to come. Thus Dworkin gives us an image of legal temporality, in order to get beyond the alternative between conservatism and scepticism about the American Constitution.

## **Dworkin's Thoughts about Principles**

But the chain novel metaphor has a second advantage: it helps in understanding the constraints that affect judges' reasoning, which Dworkin puts together into the idea of "narrative coherence", an imperative to which the narrators of a collective work submit, in order to insert their chapters into the work as a whole in the most satisfactory way. A judge, says Dworkin, is this chain narrator who has to strive to connect his or her particular interpretation with the law as a whole. In his view, it is not just a matter of making a decision that is compatible with the law, but of making a decision that enhances the law, especially by portraying its moral essence. Moreover, with this criterion a judge can choose among several different interpretations, all compatible with the law as a whole. For Dworkin, this involves a fundamental hypothesis, which he calls the aesthetic hypothesis: all interpretations try to make the work being interpreted appear at its best.

So in the analogy between law and literature, interpreting law consists of presenting the law in its best light, which obviously assumes that not all interpretations of law are equal. Interpreters claim in effect that their interpretation is the best possible one. According to Dworkin, there is a ruling principle at the base of judgements: to decide a legal dispute, the judge has to assume that there are some solutions that are better than others. To demonstrate this, Dworkin introduces the idea of "principles", which he distinguishes both from legal rules

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<sup>11</sup> R. Dworkin, *Law's Empire*, Cambridge (MA), Harvard University Press, 1986, p. 229.

properly so called and from arguments that are purely political (which can be called strategic arguments). This is clearly the most controversial part of his chain novel theory.

The distinction between “rules” and “principles” is basically logical. Rules form a bivalent system that works on the principle of the excluded middle. For any given case, a legal rule is either clearly true or clearly false. Putting it differently, if two rules are contradictory, one must be valid, at the expense of the other. Dworkin shows how such rules work by taking an example from tennis, where the umpire confronts the problem of applying the rules, which demand only a decision based on the facts – whether the ball was in or out – and there are only two options. There is no argument that can allow the umpire to qualify the decision. In other words, the umpire applies the rule, but does not interpret it.

In law, however, the rules are not enough to decide a case, and judges are not umpires: they have to interpret the rules before applying them, and for these interpretations they need principles. These principles, about which Dworkin, in spite of his attempts to clarify things, remains somewhat unclear, refer indiscriminately to the political and moral values that support legal systems. Here Dworkin evidently has in mind the American model, based on the principles of liberty and equal protection. He clearly accepts that these principles are not objective, but all of the examples he gives suggest that they are argumentatively effective; moreover, the use of these principles shows why not every decision, even if it is completely legal, is as acceptable as any other. Principles have to be understood as arguments that judges use in order to justify their interpretations of rules, to demonstrate that the interpretation that they are giving puts the law into the best light.

### **Criticisms of Dworkin’s Philosophy**

Dworkin’s readers have found many difficulties in his chain novel metaphor and *a fortiori* in his reliance on “principles”.<sup>12</sup> There are basically two kinds of criticism: first, that understanding law as a kind of novel written by judges is very idealized; and second, that depending on moral justifications is politically untenable.

The first complaint is that Dworkin devised an idealistic and impractical model far removed from reality. The chain novel is a fiction invented to portray the temporality of law and to justify judges’ actions. This metaphor serves a heuristic purpose, but it embodies a purely artificial language act that doesn’t even qualify as some kind of narrative. In addition, it makes judges responsible for the coherence of law as a whole. In each judgement the judge all alone must justify the whole body of the law. So it must be admitted that the task facing the judge can appear superhuman. So much so that Dworkin appeals to a mythological image of the judge: to flesh out his thesis, he compares the judge to the heroic Hercules, far-seeing and, in his individual decisions, responsible for law as a whole. The Herculean judge has to accomplish a superhuman task (making the law appear in the best light), on which depends law’s legitimacy.

This Herculean fiction shows the effect that philosophy has had on Dworkin’s work, making him fail to think about law as a social practice. For example, Habermas<sup>13</sup> – who shares with Dworkin many philosophical and political premises – thinks that Dworkin has a romantic view of law, looking for coherence where in fact there are tensions, struggles, power relationships, and institutional constraints, all disturbing the peaceful life of the chain-novelist

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<sup>12</sup> See especially M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London, Duckworth, 1984.

<sup>13</sup> See J. Habermas, *Between Facts and Norms*, Boston, The MIT Press, 1998.

judge. In fact, says Habermas, no legal system can be justified as a whole, because its history always consists of breaks and discontinuities.

By also assuming that there is an interpretation that is better than the others, and that this interpretation depends on the integrity of judges and their appeals to principles, Dworkin is saying that legal interpretations are not equal from the moral point of view, and that this makes it possible to decide among them. His positivist<sup>14</sup> as well as his realist<sup>15</sup> opponents think that Dworkin is here reintroducing natural law, by making morality the criterion for evaluating positive law. Dworkin sees current law, through its application, as being limited and guided by higher norms, which the law itself contains but doesn't quite manage to identify. Thus, for the critics, Dworkin's "principles" constitute a kind of transcendence that is characteristic of natural law.

Dworkin is also criticized for having merely produced in the form of "principles" an *a posteriori* justification for a form of judicial activism, which consists of dressing up judges' preferred decisions with the community's (assumed) values. His fiercest critics see in Dworkin's ideas a way of giving philosophical legitimacy to the dominant morality, characteristic of the clear American conscience. Behind his discourse about values is really no more than a cultural and social model that he desires to export, through values that he assumes to be inherent in "law" and "democracy", rather than asking questions about the intellectual and social genealogy of those values. So Dworkin's ideas about constitutional law and the role of judges are the legal battalion of the imperialism of liberal thought and values.

This kind of criticism, like the criticism aimed at Dworkin's natural law leanings, can extend to his political thought, seeing it as a self-righteous liberalism. Sharing with liberals an individualistic view of social life, but rejecting liberalism's formal character in order to reintroduce a more substantial morality, Dworkin is stuck between the more radical (formalist) liberals and the communitarians, both of whom find his defense of equality unconvincing.

Clearly, the key elements of Dworkin's philosophy have fuelled more controversies than they have helped to end. However, almost all the protagonists in these debates agree that Dworkin's work contains thinking that is fertile and philosophically dense; some praise his intellectual integrity, others emphasize his originality. With his death, debates in political and legal philosophy have lost a prominent participant. But the rest of us can take his work on board, and those who wish to can try to present it in its best light.

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<sup>14</sup> For positivist critiques, see especially H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed., New York, Oxford University Press, 1994 (Dworkin's response can be found in the postface to this second edition); J. Raz, "Legal Principles and the Limits of Law", *Yale Law Journal*, no. 81, 1971-72; E. Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute", *Michigan Law Review*, no. 75, 1976-77.

<sup>15</sup> For a reading from the Critical Legal Studies point of view, see especially D. Kennedy, *A Critique of Adjudication [fin de siecle]*, Cambridge (MA), Harvard University Press, 1997; and A. Altman, "Legal Realism, Critical Legal Studies, and Dworkin", *Philosophy & Public Affairs*, vol. 15, no. 3, Summer, 1986.