

RONALD DWORKIN'S LEGACY 1931-2013

THE END OF CHAPTER 1 OF THE 'CHAIN NOVEL'

With the passing of Ronald Myles Dworkin, one of the most prominent legal philosophers of our time, a chapter of jurisprudence and legal theory has come to an end. On the day of Professor Dworkin's passing, it was only fitting that I was glued to his very compelling criticism in his 1977 work, *Taking Rights Seriously*, of H.L.A Hart's theory of law as a normative phenomenon.

I paused for a while taking time to reflect on Professor Dworkin's contribution to jurisprudence and legal theory. Thursday, 14 February 2013, marked the end of a chapter written, lived and played out by a great man. But wait, we have gained a lot of insight from Professor Dworkin's contribution. Jurisprudence scholars would agree that a new chapter has begun. Could this be the continuation of an impeccable literary work?

Professor Dworkin meticulously described the nature of common law adjudication "*using a quasi-literary image to explain the way that judges can be both constrained and free in their decision-making*" (Bix, 2004, p 31). He used the metaphor of a 'chain novel' in the following passage:

"Deciding hard cases at law is rather like [a] strange literary exercise. The similarity is most evident when judges consider and decide common law cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law 'underlie' the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not only to discover what these judges have said, or their state of mind when they said, but to reach an opinion about what these judges have collectively done, in the way that each of [the] novelists [form] an opinion about the collective novel so far written. Any judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and political philosophies, in periods of different orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding new cases before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgement, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is." (Dworkin, 1986)

This stimulating passage is part of Professor Dworkin's ideal of 'law as integrity'. Judges should be perceived as authors in a 'chain novel', "*each one of whom is required to write a new chapter which is added to what the next co-novelist receives*" (Wacks, 2012, p 129). Each novelist in the chain attempts to add a chapter. The final novel, it is hoped, would be seen at the work of a single writer. The novelist would want to contribute a polished chapter to the overall novel and this means that the novelist in the

chain would need an antecedent understanding of the overall plot, the main characters and the objective of the novel.

In other words, “[w]hat has already been written in the novel (or decided in the prior cases) constrains what the later writers can say (or judges can decide) while still leaving a significant amount of freedom” (Bix, 2004, p 31).

Professor Dworkin’s ‘chain novel’ metaphor struck a chord with me. Although he used it in the context of common law judicial decision-making, I believe that scholars of jurisprudence can use the ‘chain novel’ metaphor to continue the legacy of Professor Dworkin.

The author of the first outstanding chapter is Professor Dworkin. As co-novelists beginning a new chapter, we have “*the dual responsibilities of interpreting and creating*” (Penner et al, 2002, p 390). We have a phenomenal base from which we can interpret. Professor Dworkin, through his various works covering many areas including abortion and euthanasia in *Life’s Dominion: An Argument about Abortion and Euthanasia* in 1993 and the ideal of equality in articles such as *What is Equality? Part I: Equality of Welfare* in 1981, *What is Equality? Part II: Equality of Resources* also in 1981 and *What is Equality? Part III: The Place of Liberty* in 1987, has provided this phenomenal base.

While the judges in the ‘chain novel’ metaphor are constrained by what has been written before them, scholars of jurisprudence are not constrained in the same way when using the ‘chain novel’ metaphor to continue Professor Dworkin’s legacy. His insight has, in fact, emancipated us academically.

Professor Dworkin’s infatuation with law and literature and the use of “*literary interpretation as a model for the central method of legal analysis*” (Dworkin, 1986) led him to distinguish between the artist and the critic and therefore recognise the “*difference between interpreting while creating and creating while interpreting*” (Dworkin, 1986).

The novelists in the chain, however, are both artists and critics. The judge in common law judicial decision-making interprets while creating and, at the same time, creates while interpreting. Using the ‘chain novel’ metaphor to continue Professor Dworkin’s legacy, jurisprudence scholars are the artists and critics. We may not agree with every single tenet of Professor Dworkin’s ideal of ‘law as integrity’, but we can interpret while creating and create while interpreting. We can continue the ‘chain novel’ – we can continue the legacy.

Professor Dworkin was a true artist and critic. He introduced into his theory the methodology of the ‘interpretive concept’. He introduced this methodology to interpret law as the best it can be. His genius in doing so cannot be pigeonholed as having created while interpreting or having interpreted while creating. His artistic genius converged with his awe-inspiring critical ability to make one of the greatest contributions to legal philosophy.

The ‘chain novel’ continues. The first chapter, perhaps the greatest chapter of all, may have come to an end. But, Professor Dworkin’s legacy is the plot and will live on in subsequent chapters. We, the scholars of jurisprudence, have a part to play in this ‘chain novel’.

Ronald Myles Dworkin, philosopher of law, born 11 December 1931; died 14 February 2013

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