Book Reviews

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1 Justice for Hedgehogs
by: Ronald Dworkin
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1.1 The hedgehog and the fox in Dworkin

With a metaphor inspired by the famous verse of the Greek ancient poet Archilochus, «Πολλ' οίδ' αλώπηξ, εχίνος δε εν, μέγα»"(=The fox knows many things and the hedgehog one big), which was the title of one of the most famous essays of the liberal philosopher Isaiah Berlin (*The Hedgehog and the Fox: An Essay on Tolstoy's View of History*, Weidenfeld & Nicolson, London 1953), Ronald Dworkin attempts to summarise in this recent book his central theory on value and its unity. Namely, the author attempts to condense the basic principles of moral theory in a general grand theory for truth, life, morality, ethics, democracy, interpretation, art, history, politics and justice. This theory reflects all of the author's previous theoretical work as well as his position regarding the modern challenges endangering the moral values of the globalised societies as illustrated by the triumph of technology over the ethics of life, humanity and dignity.

The entire text is written with a vivid, delightful and enchanting for the reader, manner. The author defends his arguments while 'playing' with the metaphor of the fox and the hedgehog and adopting the role of the second. His book incorporates comments and reviews referring to his entire work in an open minded, simply written text which allows the reader to enjoy the closest possible approach to Dworkin's thought.

The book is divided into five parts, a general introduction and a general conclusion regarding the indivisible character of dignity. In the introduction (the Baedeker, a reminder of the German classic series of travel guides) one can find mapped the basic arguments of the Ronal Dworkin's theory. In the book's first part, the author discusses issues of independence and skepticism while searching for a moral theory of truth. The second part is devoted to the question of interpretation in general and in particular of legal and conceptual interpretation, while the third focuses on the core of Dworkin's morality theory of the unity of value, autonomy and responsibility. The two last parts of the book focus on the issues of justice, equality, freedom and democracy. Finally, the overall conclusion of the book condenses the basic arguments of the author regarding the indivisibility of dignity.

What certainly characterises Dworkin's work is his attempt to found a general, grand moral theory on a single argument. This is the 'hedgehog' of Dworkin, a sole idea, which

can nevertheless direct towards the articulation of a complex, general philosophical theory of justice, equality and freedom. This idea is the unity of value as a field of personal ethics, but also public and social morality. According to Ronald Dworkin's view, these two considerations are interdependent, representing the two sides of a single coin. The concept of value is inextricably linked to the pursuit of authenticity and dignity of the subject, as a condition for claiming equal respect from others and especially those governing, thus functioning as a bridge leading from the public to the social and private sphere.

1.2 The three pillars of justice: equality, freedom and democracy

The author advocates a conception of justice which is built on three pillars: equality, freedom and democracy. The author's central point is that the actual legitimacy of the political decision making requires a system of distributive justice which respects the equality and autonomy of the citizens. In his view, neither the status of a market economy, a system of laissez-faire laissez-passé, but neither a regime of absolutely formal redistribution of goods satisfies the need to fully respect those two principles. Firstly, because the free market system violates the government's obligation to respect the equality of citizens. Secondly, because a system of formal redistribution only takes account of the individuals' autonomy, thus ignoring their personal responsibility towards the rights of others, towards the civil society in which they participate.

Dworkin's proposal lies in a model that ensures these two principles: personal autonomy and personal responsibility. Thus, an actual social redistribution system should seek not seek to equalise citizens but to address their distinct and varied needs. The success of such redistribution will be judged by the outcome, from the level of social inclusion achieved if the citizens feel that their needs are met in such a way that not even one of the participants of a political community would be benefited or wronged. In a similar context, the need to protect the autonomy of the individual on the basis of his/her personal responsibility does not only require to ensure an equality of opportunities for all, but a system that will permit to anyone to take advantage of his/her own distinct qualities depending on the degree of risk or of personal creativity that he/she would invest or undertake.

The formulation of a theory of justice is hopeless if it lacks a parallel foundation of the concept of freedom. The question, however, is how freedom can coexist with equality without them being mutually exclusive. If in the opinion of Isaiah Berlin the tension between equality and liberty is indelible, in Ronald Dworkin's view their coexistence is possible. The author discerns between the *freedom* that the individual enjoys in order to act undisturbed by any state intervention and his/her *liberty* that the state should not arbitrarily violate. In his understanding, our rights derive not from one but from different but mutually complementary bases: equality, moral autonomy and personal responsibility. In his view, this approach can effectively resolve the apparent, intrinsic conflict between freedom and equality. Thus, for Dworkin, it is impossible to guarantee one's enjoyment of conditions of freedom without providing him/her with a system of redistribution of goods and equal access to opportunities. In the light of this mutually complementary relationship, the tension between freedom and equality becomes from inevitable, impossible.

In theory, the relationship between democracy, equality and freedom also appear as confrontational, especially in those cases where political freedom can possible limit personal freedoms (positive versus negative liberty). In Dworkin's view, the answer to this problem can only be provided if we distinguish between the different types of understanding democracy as majority or statistical democracy or as *partnership democracy*. It is to this last category in particular, that the author focuses his analysis. By partnership democracy we refer to a system that is formulated as a community of equal partners, an approach that substitutes the procedural conception of equal rights to participation and voting with a new conception of the citizen as an equal participant with a shared responsibility for the protection and function of the democratic institutions. According to this view, freedom and equality are not in conflict, but are the necessary conditions for the operation of an inclusive democratic community.

1.3 Law, interpretation and truth

Another important theoretical debate is the one concerning the relation between justice and law. As Dworkin characteristically underlines, "Nothing guarantees that our laws will be just· when they are unjust, officials and citizens may be required, by the rule of law to compromise what justice requires" (p.5). The question comes naturally. How then is it possible to guarantee justice through law? Dworkin's view is that this can be achieved through a conception of law not as a system of rules that are set against morality, but as a subsystem of morality itself. This kind of morality perceives law as the result of a procedural yet substantial justice; a fair governance that leads to fair laws. According to this line of thinking, such fair governance is possible only via the formulation of a coherent political morality, which incorporates personal morality and is based on a general theory of moral truth and value (*tree argument*).

According to Dworkin, interpretation is extremely critical for the development of a coherent political morality. This is one of the more focal points in Ronald Dworkin's work, the development of a general theory of interpretation aiming to interpret politics, law, theology, history, poetry, sociology and psychodynamics. The author's central argument contradicts the widely held belief that the goal of interpretation is the search for the author's intent or psychological predispositions. As previously supported, interpretation must be value-orientated and based to the responsibility of the interpreter. In this context, each interpreter must guide his/her interpretation towards the search for the value of law, philosophy, theology, poetry, literature, etc. How is this interpretative method works in politics? Through the formulation of any conceptual disagreement about what democracy, justice or any other concept means as a value-orientated rather than an ontological argument. This leads to the conclusion that the support of an opinion or a political argument, in order to be genuine, must be founded on principles and values that exceed the opinion or argument in itself. Thus, in order to support an argument concerning freedom we must turn to values that lie beyond freedom itself, in order to support an approach of democracy we must turn beyond democracy itself, etc. It is this interpretive process that according to Dworkin allows concepts and principles to harmonise with each other and also confirms his central argument concerning the unity of value.

Adding in his understanding that political morality is based on interpretation, and interpretation in its turn is guided by value, Dworkin supports one of his central arguments regarding the truth. The fact that our interpretative propositions concerning

the democratic institutions and the principles of equality and justice should be value-orientated does not necessarily means that they are evaluative. According to the author, value can be accessed in an objective manner, and in this context may be argued that a government is fair or unfair, a law is unjust or not, regardless of a counter argument or even a majority supported opinion. This approach opposes to the widespread view that 'values' are not of intrinsic value and thus depend on the pre-understanding, prejudice, convictions and intentions of the interpreter. Against this approach, Dworkin proposes the most radical argument of his theory, the metaphysical independence of value. In the context of metaphysical independence of value, it is possible according to the author to understand certain actions or choices as just or unjust, regardless of what it is generally believed or who believes the contrary (e.g., children's torture or the absolute prohibition of abortion can be considered as objectively unjust acts). In order to define the independence of a value in Dworkin terms, it is necessary to formulate a moral argument that can support the truth of a value statement contrary to any other view or opinion.

1.4 Personal responsibility and ethics

It is in the framework of moral theory like that of Ronald Dworkin, a theory that criticises any neutral or relativistic perception of justice that a perception of personal responsibility for the development of our moral arguments is needed. According to the author, a truly comprehensive theory of justice should possess the dynamic to ensure if not the acceptance of our moral arguments, the transfiguration of a morally responsible disagreement towards them. Such a theory should characteristically be addressed to the individuals and thus telling them: "I disagree with you, but I recognize the integrity of your argument. I recognize your moral responsibility. Or I agree with you but you have not being responsible in forming your opinion. You've thrown a coin or you believed what you heard in a biased television network. It is only by accident that you've arrived at the truth" (p.12).

According to the author's view, a theory of personal responsibility must respond to the criticism that personal responsibility cannot be achieved since the full enjoyment of personal autonomy and personal development become impossible in the context of modern societies. In Dworkin's view, a theory of moral responsibility as an aspect of moral epistemology is the necessary guarantee, a control mechanism of our value judgements. How, in what way a theory about personal responsibility can be formed? It can be formed via the creation of a theory of personal and public morality.

The distinction between personal *ethics* and public *morality* is the basis for the development of a theory on personal responsibility, but also the means to determine the unity of value. As the very heart of the concept of personal ethics, Dworkin distinguishes the personal responsibility of each to give value to life, thus to enhance the self-respect of his own authenticity and dignity. In this context, the subjects should, as part of their personal responsibility to take seriously the moral judgements that they, themselves are shaping and claim their equal respect by any state or private authority, or individual. Similarly, public morality is founded to the personal morality of the subject. Dworkin adopts here the Kantian argument that respect for oneself is in fact the necessary precondition of our respect for others. In this context, the need to protect public morals requires that the subject will extend his/her personal responsibility to society, to groups in which his/she participates and to communities which he/she embraces.

1.5 Conclusions

The real importance of 'justice for hedgehogs' lies in three main points. First, in that it summarises and illustrates the focal points of Dworkin's moral theory, as established during the last decades in his work concerning law, interpretation, rights, equality, freedom, morality and justice. Secondly, it integrates in the most substantial manner all the criticism and counter argument regarding the work of this great philosopher and theorist. In the frame of this book, the leading contemporary critic of relativism responds with a single and coherent argument to all of his critics. Thirdly, this book identifies the essential core of the theory of Dworkin, thus concentrating on the argument regarding the unity of value and consequently underpinning the concepts of personal and public morality with the idea of dignity.

The simplicity of this otherwise complex book is extremely clear on the way that each of the author's arguments focus on supporting a central thesis. As Dworkin argues from the first pages of this book, his intention is to convince via a single argument, that the big one that the 'hedgehog' knows, is the unity of value (*standpoint argument*), the importance of morality to law, interpretation, rights and politics. Adopting this approach, the internationally renowned theorist draws a red line against relativism and neutrality of value-judgements, against the theoretical and philosophical approaches of the 'fox', which have been strongly criticised in his highly progressive moral theory.

The importance of Dworkin's work for theory, methodology of law and in particular for constitutional interpretation, rights and the democratic institutions is given and undeniable. This book demonstrates the success of the author to create a real grand theory about the law and morality. The simplicity of his thought and yet the vivacity and persistence of his arguments can introduce even the most uninitiated reader in Ronald Dworkin's thought. This book certainly has the dynamic to affect the ongoing international constitutional dialogue concerning constitutional interpretation, the tension between morality and law, freedom and equality in the most fruitful way possible.

2 The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community

by: M. Rosenfeld
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2.1 Introduction. Constructing a pluralistic theory of constitutionalism

The 'identity of the constitutional subject' is the latest, already widely discussed in the international constitutional theory, book of Michel Rosenfeld (*Book Forum, I·CON 3/2010*). The book condenses the author's main arguments on topical issues of comparative constitutional law and rights and at the same time aims in proposing a pluralistic theory for rights and Constitutionalism in the era of globalisation and multiculturalism. Using as his tools arguments from philosophy, history, psychoanalysis and comparative law, the author gradually develops his basic position, namely the

reconstruction of the modern constitutional subject in such a way as to consolidate national and supranational identity. Rosenfeld's theory unlike other theoretical approaches, e.g., Habermas's 'constitutional patriotism' (*Verfassungspatriotismus*), does not aim to overcome or substitute the national identity of the subject with an alternative or supra-national one. Thus, the author's main goal is to discern those characteristics of the subject's identity that have been constructed within the nation state, not in order to abandon or negate them but in order to redefine them in the context of an ideal, common, transnational, multicultural and global citizenship.

2.2 Layout and contents of the book: constructing the constitutional subject

The book is divided into three parts. The first part raises the question of why and for whom the constitutional identity of the subject is necessary and consists of two chapters examining the subject in relation to the *other*, the ethnically or culturally different individual, and the possibility of transfiguring citizenship in a supranational level. More specifically, the author explores the concept of the constitutional subject within the historical, ideological and theoretical framework of constitutionalism in which it has been developed ever since the enlightenment to the modern and post modern era. In this context, Rosenfeld attempts to synthesise the constitutional role of the subject as the sovereign subject and the *author* of the constitution, but also to produce a theory of identity, that goes beyond the issue of ethnic, religious or cultural homogeneity and focuses on the diversity and uniqueness of the human self.

The second part of the book provides the comparative foundations for a theory of the identity of the constitutional subject. In this frame, the third chapter focuses on the connection between constitutional identity and rights as illustrated in the USA constitutional jurisprudential tradition. Thus, the *unenumerated* rights of the USA constitutionalism are according to the author the basic components of the US subject's constitutional identity. In the fourth and most interesting chapter of the book the author explores the construction of the subject's identity in the specific context of the birth of the Spanish Constitution of 1978. In Rosenfeld's view, the Spanish Constitution of 1978 is in fact an example of a *pacted transition* constitution, a category which prevailed during the last quarter of the 20th century, especially in Europe (e.g., the Greek Constitution of 1975). Those kinds of pacted transition constitutions illustrate a degree of independence from both pre-constitutional and supra-constitutional identities, therefore introducing a novel category of identity for the constitutional subject.

The third part of the book enters the main contours of the author's theory of constitutionalism and the constitutional subject of globalisation. Specifically, in the fifth and sixth chapter, via the lenses of specific national constitutional paradigms, the author approaches the concept of the constitutional subject both as a constitutional pre-requirement and also as a result of the genesis of a new constitutional legal order. The articulation of certain arguments of general constitutional theory through reference to specific paradigms (*models*) of national jurisdictions is an acknowledged comparative method, rooted in the *ideal types* of Max Weber and has been extensively analysed by the famous Serbian comparatist Mirjan Damaška (*The Faces of Justice and State Authority*, Yale University Press, New Haven & London 1986).

In this context, the author approaches the matters of constitution making and the construction of the constitutional subject through the empirical examples of national

constitutions and transnational constitutional models. In these terms, the author examines the German, French, American, British, Spanish constitutional model, the transnational EU constitutional model and the post-colonial one. Similarly, the author introduces a unique taxonomy of abstract constitutional models based in the historic and political origins of their creation, the level or form of the political concerns of their adoption, their transnational or international character and their unwritten character. Thus, he analyses the *revolution-based* model, the *invisible* British model, the *war-based* model, the *pacted transition* model, the *transnational* and *internationally* grounded model.

The seventh and eighth chapters of the book concentrate on the author's central arguments on identity and citizenship in a globalised, multicultural and transnational context. More specifically, the author attempts to define at what level citizenship is still connected nowadays to the nation state and to what extent its transnational understanding alters its initial content and dynamic. The author takes account of the two dimensions illustrated in the constitutional subject's identity, the national and supranational one, analysing them via the lenses of functional and identity theories of citizenship. Finally, the author adopts his main thesis, namely that a pluralistic understanding of citizenship is possible through the synthesis, the dialectic and reconciliation of the singular, the other, the plural and the universal. This synthesis can be achieved through the interplay and interconnection between constitutional and human rights. In this context, the book ends with a critic of Habermas's theory of 'constitutional patriotism'.

2.3 Constructing the constitutional identity: the US paradigm of unenumerated rights

One of Michel Rosenfeld's main arguments is that the identity of the constitutional subject is based on the dialectic between singular and plural, national and supranational. In this context, the identity of the constitutional subject can be considered both as a unity and as a bundle of varied components. On the basis of its specific components (e.g., national identity) it is feasible that the identity of the constitutional subject can be reshaped and reconstructed. The emphasis given to this ongoing dialectic between the singular and the plural obliges for the contextual approach of the constitutional subject's identity. Thus, for example, the conviction in the symbolic significance of free speech in the USA does not reflect the faith to yet another one of the US subject's rights but a principle on which the identity of the US constitutional subject is founded. In this perspective, it is the national identity that defines the constitutional identity of the subject and not the opposite. In the author's view, these two identities find themselves in a constant dialectic communication thus creating a bridge also embracing the extra-constitutional identities of the subject (e.g., those created by tradition, customs, religion, etc.).

This dialectic communicative relationship between the subject's pre-constitutional and constitutional identity as an open evolving process guided by the constitutional principles is analysed by Rosenfeld through the example of the unwritten, *unenumerated* rights of US constitutionalism. These are rights acknowledged by the jurisprudence on the bases of the Ninth (1791) and Fourteenth (1868) Amendments. In this context, the US Constitution rejects tradition, thus negates the national identities of the subjects in order to build a single constitutional identity, common for all and as pluralistic as possible in order to include them in a positive manner. This is why freedom of speech bears such a symbolic importance in US constitutionalism. Because it provides each minority with the

ability to express and protect its rights against the majority, thus claiming via the protection of a common identity the protection of its distinct identity features.

This ongoing dialectic process of transforming tradition into a single, unified constitutional identity that is at the same time non-traditional in the sense that it leaves to the subjects a space where they can freely develop their diversity, is analysed by Rosenfeld through the paradigm of the US Supreme Court jurisprudence in the field of privacy (among others he comments on the cases of Eisenstadt v. *Baird*, Roe v. *Wade*, Bowers v. *Hardwick*, Lawrence v. *Texas*). This is a jurisprudence which elaborates the ability of US constitutionalism to establish a non-traditional interpretation of the constitutional rights of the individual.

2.4 Constructing constitutional models. Towards a new transnational taxonomy

One of the author's most interesting arguments is that every constitution is a unique historical event, which develops in a particular socio-political context. In the same perspective, the constitutional subject and his/her relationship with the others is defined as unique and diverse due to the specific features of the constitutional model within which is constructed. So a constitutional ethnocentric model, developed on a dominant ethnic group will tend to determine the constitutional identity based on this group and therefore identify the *others* on the basis of their membership in minority ethnic groups. Instead, a constitutional model which is based on the concept of *demos* and not the nation and ethnicity, thus bearing multicultural characteristics in its social structure, will tend to construct a constitutional identity that will be deprived by any ethnic or cultural characteristics.

The author, in order to guide this conjunction, namely the formation of the constitutional identity of the subject in the socio-political environment of a specific constitutional system, introduces a taxonomy of constitutional models by constructing general and abstract categories on the basis of specific politico-historical models. Therefore, he first examines six empirical national constitutional systems and a supranational one, that of the EU which then theorises, thus forming broad and abstract categories of *constitutional ideal types*.

In this context, Rosenfeld argues that for instance the German constitutional model has been configured on a nation based on pre-political bonds such as common language, common culture, ethnicity and religion in contrast to the French model of *demos*, where the ideal of national identity becomes almost blurry. The US constitutional model resembles the French, though the concept of nation and ethnicity has not even served as a primary historical background for the emergence of the US constitutional subject. Moreover, it is difficult for a constitutional paradigm which evolves as a living organism, like the British one, to discern between pre-constitutional, extra-constitutional and national identity. In its turn, the Spanish constitutional model reflects in a characteristic manner the constant dialectic between unity and autonomy of ethnical groups, producing a unique, asymmetrical kind of citizenship. Finally, the *quasi-constitutional* model of the EU is exemplary as a project aiming in bridging the *nation* and the *demos* mainly via the introduction of rules and institutions that go beyond the nation-state constitutional *loci*.

In a similar context extremely important for the construction of the identity of the constitutional subject seems to be its understanding in the framework of the constitution making process. This is due to the fact that the process of constitutional making is in fact

a constitutional birth *ex nihilo*, during which all links with the pre-constitutional order are intercepted, reconfigured or revised in order to produce a new constitution and a new constitutional identity for the subjects. From this point of view, the most likely to create an entirely new and distinct citizenship is the *revolution-based* model, to the extent that it interrupts any previous relationship with the *ancient régime*. Of a similar effect is the *war-based* constitution making model which differs only that in most of the cases the negation of any pre-constitutional identities and the construction of a new ones is dictated by the winners and thus in general does not prove to be sustainable as a constitutional system in the long run.

At the heart of the *pacted transition* constitution making model lies, according to Rosenfeld, the Spanish system. This model undoubtedly includes also the Greek Constitution of 1975. Its uniqueness lies in the fact that constitution making is based in a wide socio-political consensus that ensures and guarantees the peaceful transition from the pre-constitutional to the new constitutional order. However, the most interesting constitution making models are the *transnational* and the *internationally* grounded model models, as reflected in the European Union evolving institutional framework and in the international community's interventions in the field of human rights protection and international legality. Rosenfeld's highly original taxonomy of constitution making models ultimately strengthens his central argument concerning the dynamic and evolving nature of the identity of the constitutional subject. An identity, the unity of which requires the understanding of the constitutional subject within distinct yet pluralistic contexts, thus constantly bridging the singular and the plural.

2.5 Conclusions. The constitutional subject as singular, plural and universal

One of Rosenfeld's central arguments is that the identity of the constitutional subject in the modern globalised era is developed simultaneously at both national and supranational levels. According to the author, these two dimensions can be bridged only if they are placed in a pluralistic context. This finding is based on the idea that those two faces of the identity of the subject are not given or granted but constructed via constitutional making processes taking place simultaneously in a national and transnational level. Although, the transnational identity of the subject is clearly much more pluralistic, both of them are nevertheless subjected to the same necessity. Namely, they are subjected to the obligation to limit their boundaries in favour of each other and to mutually transform their inherent conflict to a positive for the subject dialectic relationship.

In this context, each of the two dimensions of the subject's constitutional identity plays its own role. The subject's constitutional identity looses a part of its symbolic function and its one-dimensional character in favour of a transnational identity which allows the subject to adopt plural and diverse identities. From an opposite perspective, national identity still constitutes the sound basis on which the subject is developed without being 'lost' in the plural and complex conditions of globalisation. It is an argument that combines negation and composition. These twin dimensions of the identity of the constitutional subject of globalisation should be mutually recede in order to be eventually synthesised. The validity of this argument is vividly illustrated in the modern dialectic relationship between human and constitutional rights, which embrace these two dimensions of the subject (the national and the transnational) that collide, recede and finally compose in order to maximise the subject's protection in the pluralistic and complex conditions of globalisation and multiculturalism.

Michel Rosenfeld's book offers an exquisite account on the issue of the subject's constitutional identity and on how it is constructed in the unique, historical framework of a constitutional system. By focusing in the concrete paradigms of six national constitutional orders Rosenfeld succeeds to convince for one of his central arguments, namely that the construction of the constitutional identity of the subject is a product of the unique and specific circumstances of each particular national legal order. However, his pluralist argument concerning the connection between the two dimensions of the constitutional subject, the national and the transnational identity is not as persuasive. As far as the author considers that the national identity is the only safe 'basis' and the necessary precondition for the articulation of the transnational identity of the subject, his account remains ethnocentric in its core.

Closing this brief account one should underline that Michel Rosenfeld's book represents a contribution of international significance in the field of constitutional theory, constitutional law, theory of rights and citizenship. The book is rich in strong and bold arguments, comparative constitutional examples and introduces a whole new methodology regarding the taxonomy of constitutional systems and constitutional making process. However, the significance of the book also lies in the importance of the issue it explores. To address the issue of *who* is today the constitutional subject means represents one of the more crucial questions of the current constitutional dialogue regarding the rapid transformation of state sovereignty and citizenship in the emerging multicultural societies of globalisation. With this book, Michel Rosenfeld really lays the foundations for a modern and more necessary than never before theoretical dialogue on the fields of identity, rights and citizenship.