

## TRIBUTE TO RONALD DWORKIN

My relationship with Ronald over forty years falls into more or less two equal parts. In the first twenty, it was almost entirely social. In the last twenty, friendship has been combined with a powerful influence upon my work. The fact that during the first period, from about 1967 to 1986, I took very little interest in Ronald's jurisprudential thinking was due entirely to the narrowness of my interests. When Ronald arrived at University College Oxford in 1967 to succeed Herbert Hart as professor of jurisprudence, I had been there six years as a tutor in law. But I was already beginning to dabble in practice at the Bar, and my academic work, which had never been very profound, had contracted to routine teaching of common law subjects. The cause of the *éclat* with which Ronald and Betsy arrived in Oxford was not, in my case, the new ideas which he brought and which, as I now see, compelled people to think about aspects of law in which Herbert Hart, brilliant as his own insights had been, showed little interest, but the glamour of their personal lives. It was Ronald's general conversation and Betsy's elegance, beauty, and sense of style that made them so attractive. I vividly remember the place where they first lived in Oxford, a small box-like dwelling near the law library which a well-meaning friend had rented for them in advance. When I first called on them, I could see that, although she made no complaint, Betsy could hardly have looked more out of place in a stable. And soon afterwards, they retreated to a manor house in the country, which was more suited to their social life, and afterwards to the house in Belgravia from which Ronald commuted for the rest of his time in Oxford. During the whole of that period we were friends but spoke little about law or philosophy.

The second period began with my appointment as a judge in 1985, which more or less coincided with the publication of *Law's Empire*.<sup>1</sup> When I read that book, I realised that it offered the best explanation I had found for what I was trying to do as a judge. I would like to dwell upon this a little. So much of Ronald's most influential work has been about a theory of adjudication, the way to decide hard cases, that it may be of interest to see it from the point of view of an adjudicator, a practising judge, no Hercules, who has from time to time to decide hard cases. Some might find this a somewhat vulgarised, even garbled version of his teachings. But

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1. RONALD DWORKIN, *LAW'S EMPIRE* (1986).

that is the fate of most intellectual theories when given practical application.

The first thing that I found helpful was the notion that in hard cases, the judge has a choice, but that his power of choice is constrained. It is constrained by the need for loyalty to established doctrine and, in cases of statutory construction, fidelity to the language of the instrument. It is constrained by principles of democracy, such as the separation of powers, which sometimes means having to acknowledge that certain decisions ought not to be made by judges. It is constrained by the very nature of a free enterprise capitalist society. But, subject to all these constraints, one sometimes has a choice, and I liked the frank acknowledgement that one makes the choice according to one's own judgment of what seems likely to fit with the kind of society in which one wants to live.

I liked the somewhat controversial thesis that hard cases always had a right answer. President Barak of Israel, for example, says that judges are exercising a discretion.<sup>2</sup> It may be a matter of language, but to my mind a discretion means a power to make a decision which, whether decided one way or the other, will be equally valid. Of course, looking at the matter from outside and in a somewhat trivial sense, it is true. If the decision had gone the other way, that would have been the decision. But that is not how it looks from the inside. If we have heard a case argued and one of my noble and learned colleagues arrives at a different answer from mine, I do not think that he is merely exercising his discretion differently. I think he is wrong. It is hard to explain the sometimes passionate language in which majority opinions and dissents are written except on the basis that judges decide cases on the footing that there is only one right answer.

One of Ronald's ideas that has had particular resonance with me is the notion that judicial development of the law must fit with the legal system as a whole. This may have led me into ways of thinking of which Ronald would not necessarily approve. But I think that judges should be true to the history and traditions of their own legal system. For example, it is part of the tradition of our British legal system to place a greater value upon a fair trial by a jury than upon press freedom to comment upon issues in a pending trial. It is part of the American First Amendment tradition, on the other hand, to place a greater value upon free speech. The different hierarchies of values are understood and accepted in each

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2. *See generally* AHARON BARAK, JUDICIAL DISCRETION (Yadin Kaufman trans., Yale University Press 1989) (1987).

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country, and the notion of some international court of human rights being able to say that one is right and the other wrong seems to me to be ludicrous. Judges must be loyal to the values of their own society. That is why my own decisions on human rights issues have a somewhat nationalist flavour and a Scalia-like suspicion of international norms and the decisions of international courts. If I want to try to persuade the people of Britain that they do not want to live in a society that locks people up without trial or relies upon evidence obtained by torture, I think it is more likely to be effective if I appeal to the history and traditions of the common law than to the decisions of a court in Strasbourg.

Ronald may be unenthusiastic, perhaps even embarrassed, to acknowledge the paternity of some interpretations of his thinking by a less than Herculean judge. But to me, the derivation has been very clear. So it is a great privilege to be able to come and pay this tribute to someone who has not only been a great friend for many years but, for good or ill, has had more influence upon my professional life than any other legal writer.

LORD HOFFMANN  
House of Lords

