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Dynamic Interpretation Amidst an Orgy of Statutes

by Johan Steyn

Je vais prendre un grand risque en français. Je suis ravi d’assister à cette célébration du travail d’un grand homme. Merci mille fois pour vos mots de bienvenue et votre hospitalité.

Brian Dickson was an outstanding jurist. Stendhal said that there is only one rule: style cannot be too clear, too simple. Brian Dickson followed this rule. His meticulous, carefully crafted and thoughtful judgments were and are admired throughout the common law world. With the advent of the Canadian Charter of Rights and Freedoms in 1982, the Supreme Court became seized of some of the most difficult and delicate issues in Canadian society, upon which reasonable people held strong and divergent views. Brian Dickson rose to the challenge. He set the Charter on track during its early years. He said that Canada had moved from a system of Parliamentary supremacy to constitutional supremacy where each Canadian was given individual rights which the Government or legislature could not take away. He placed Charter jurisprudence on solid jurisprudential and principled foundations that will continue to be of enduring benefit to Canadians. He had in full measure all the qualities of a great judge and great Chief Justice. It is a privilege for me to deliver the first Brian Dickson Memorial Lecture.

My subject is the interpretation of legal texts, and particularly the interpretation of statutes, seen inevitably from an English perspective. You may think that some of my reflections exaggerate the complexities of the subject. It is true that, unlike other professionals, judges are usually able to start with a comforting feeling that they have a 50 per cent chance of getting the answer to the question right. Moreover, judges can be reassured by the fact that Lord Reid advised judges that if their average success rate drops significantly below 50 per cent they have a moral duty to spin a coin.

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To set the subject in context I would mention two preliminary matters. In his influential book *A Common Law for the Age of Statutes*, Guido Calabresi described what he called the statutorification of the law. He referred to the modern phenomenon of an orgy of statute making. That description is particularly apt in the case of my country. In the last twenty years there has been an orgy of legislation in Britain, particularly in the criminal justice field. Almost every year there is a huge *Criminal Justice Act*. One feature of this frenzied statute-making in the criminal justice field is a legislative see-saw: measures based on half-baked ideas are adopted in haste, published with minimal consultation, and puffed up to be the ideal solution for solving problems of crime, but then abandoned very soon after and replaced by yet another solution said to be the perfect one. The complexity of each new statute defies belief. And so, to the bewilderment of the public and judges, the process continues. Year after year, the editors of our major criminal treatise have commented adversely on this phenomenon. They have said:

> Major criminal legislation is now an annual event; the quality of it borders on the scandalous. If testimony to this were needed, it is only necessary to look at the way in which each year’s Act is extensively amended or repealed by the next. If any government really wanted to improve the quality of the criminal justice it would announce a moratorium on criminal legislation for five or seven or, even, 10 years...**6**

The blame does not rest with Parliamentary draftsmen: they do excellent work. The packages of ill thought-out expedients are the result of governments seeking short-term political popularity. Often the legislation is an instant response to particularly outrageous crimes, which grabbed the headlines during the Parliamentary session. In this way the *Dangerous Dogs Act 1991* was enacted. In a strong field it won the accolade as the worst piece of legislation ever to go on the English statute book. In a forum where reasoned and balanced debate prevails, judges try to make sense of a system choked with legislation.

The second preliminary matter is that in my country, day-by-day tribunals, lower courts, the High Court, the Court of Appeal and the House of Lords are concerned with the interpretation of a variety of legal texts ranging from statutes, regulations, by-laws, rules, various types of “soft laws,” contracts, and so forth. Interpreting and applying various types of legislation amounts to the major part of the legal work of English judges, perhaps as high as 90 percent. I would be surprised to hear that the position is significantly different in Canada. But universities in England have not entirely adjusted to the

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reality that statute law is the dominant source of law of our time. They arrange courses very much as if statute law fills the gaps left by the beloved common law rather than the other way around. The truth is that the common law has an important, but nevertheless residual role to play. That this is the case should cause no surprise. The common law, entirely judge-made, is not in all respects ideally equipped to serve the needs of a modern social democracy. The mordant description of Anatole France springs to mind: “la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.”

The question may legitimately be posed: what is the justification for unelected judges deciding the meaning and effect of laws enacted by Parliament? How does this fit into so-called majoritarian and counter-majoritarian arguments? There is a defensible explanation. The democratic ideal has two strands. The first premise is that the people entrust power to the government to carry on its business in accordance with the principle of majority rule. The second premise of the democratic ideal is that the basic values of liberty and justice for all and respect for human rights and fundamental freedoms must be guaranteed. Where a tension develops between these two premises, a balance has to be struck. And in a democracy the guarantor of that balance can generally only be an impartial and independent judiciary carrying out its task in accordance with principles of institutional integrity. The language used by Parliament does not interpret itself. Somebody must interpret and apply it. A democracy may, and almost invariably does, entrust the task of interpretation to the neutral decision-making of the judiciary. Alone the judiciary would be unequal to this task. It is critically dependent on a free and courageous legal profession, academic and practising, all serving the course of justice.

It may be useful to look at interpretation in a general way. The subject is too elusive to be encapsulated in a single theory. But as a result of the work of legal philosophers, academic and practising lawyers, and judges, it is possible to take stock of some modest insights.

The first general proposition is that the aim of interpretation of a legal text, whether it be a private instrument or a public statute, must be to derive a meaning from its nature and contents. The starting point must be the text itself. The primacy of the text is the first principle of interpretation for the judge considering a point of interpretation. External materials ought therefore to be subordinate to the text itself. Often lawyers argue cases on the reverse hypothesis. Justice Frankfurter recalled the lawyer who said to the

United States Supreme Court "the legislative history is doubtful so I invite you to go to the statute." The apparent meaning of statutory language is the starting point, but not the end of interpretation. A judge must consider all relevant contextual material in order to decide what different meanings the text is capable of letting in and what is the best interpretation among competing solutions. But the judge’s task is interpretation, not interpolation. Interpretation is not infinitely expandable. What falls beyond that range of possible contextual meanings of the text will not be a result attainable by interpretation. There is a Rubicon which judges may not cross: principles of institutional integrity forbid it.

Secondly, words can only be understood in relation to the circumstances in which they are used. Adapting one of Wittgenstein’s memorable examples, one can imagine parents telling a baby-sitter, who agreed to look after their five year old twins for some hours, that if the children become troublesome, teach them a game. The parents return to find the baby-sitter playing poker with the children. Poker is a game. Did the context give a more restrictive colour to the word “game”? Wittgenstein thought the answer was yes. Judging by my own grandchildren, I am not so sure.

Let me now attempt to extirpate what I regard as two jurisprudential heresies. In English law, the interpretation of the meaning of a legal text is always a question of law, with attendant consequences for the possible reversibility of decisions judged to be wrong. In other words, English law does not subscribe to the United States Chevron doctrine, which holds that an interpretation by a federal agency is protected from review if it is a permissible or reasonable interpretation. So much is clear. But sometimes loosely worded dicta create the impression that the task of an interpreter is to find the meaning of a word or words. Such an enquiry is of no legal interest. The aim of interpretation is emphatically not a search for the meaning of words. Instead the purpose of interpretation is to ascertain the meaning of the language employed in a text, taking into account syntax, background, and social context.

The next heresy is the assumption that one must identify a relevant ambiguity as a pre-condition to taking into account evidence of the setting of a legal text. Enormous energy and ingenuity is employed by lawyers in trying to find relevant ambiguities. This is the wrong starting point. Language can never be understood divorced from its context. The symbols of language convey meaning according to the circumstances in which they were used. The true purpose of interpretation is to find the contextual

meaning of the language of the text, i.e. what the words would convey to the reasonable person circumstanced as the parties were. Speaking of contracts, Lord Wilberforce said that there is invariably a setting in which the language has to be placed.\textsuperscript{13} The court is always entitled to be informed of the contextual scene of a contract. The same principle applies to the interpretation of all legal texts. The failure to understand this fundamental principle of linguistic jurisprudence and legal logic has caused great injustices. An example in the field of wills is instructive. Consider the decision in \textit{re Fish; Ingram v. Rayner.}\textsuperscript{14} The testator gave his estate to “his niece Eliza Waterhouse” during her life. The testator had no niece named Eliza Waterhouse. But his wife had a legitimate grand-niece named Eliza Waterhouse and also an illegitimate grand-niece of the same name. The illegitimate grand-niece was living with the testator and he was in the habit of calling her his niece. This was powerful objective evidence that the words in the will referred to her. With wringing protestations about the painful nature of their task, the Court of Appeal refused to admit the evidence. They held that there was no ambiguity. The illegitimate grand-niece lost what had been left to her. What a grotesque result. The will could not be understood without knowing the context.

In the interpretation of legal texts, the most frequent source of error is the failure to understand the matrix of a legal text. Often judges in my country are not provided with all the contextually relevant raw materials. Doing so requires imaginative preparation of cases. The essential setting of a text may include in a contract case how a market works, in a breach of statutory duty case interacting social policies, the structure of a complex statute, the historical development of legislation, and so forth. There is scope for the development of something like a Brandeis brief but concisely targeted to the relevant context.

But at this point a question arises: if one accepts the premise about context giving colour to the meaning of language, does it not follow that the case for interpretation in accordance with the original intent of the framers of the text is made out? It will be necessary to return to this question.

In the meantime, I turn to my third general proposition. In 1882, Sir Frederick Pollock described the approach of English judges to statutes as follows:

\begin{quote}
[...] Parliament generally changes the law for the worse, and [...] the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.\textsuperscript{15}
\end{quote}

This was an accurate description of the judicial mindset in Victorian times. This approach led to restrictive interpretation by literalist methods which

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often blocked social progress. It remained the approach of English judges until some time after the Second World War. But the legal world has changed. Like Canadian judges, English judges now apply purposive methods of construction of statutes. Almost sixty years ago, Learned Hand J. explained the merits of purposive interpretation:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or objective to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.16

Having identified the legislative purpose, the question then usually becomes one of determining which of the competing interpretations is most consistent with the goal. That will often depend on policy choices. The pendulum has swung towards purposive methods of construction. This change was accelerated by European ideas. Nowadays the shift towards purposive interpretation is not in doubt. On the other hand, the degree of liberality allowed in interpretation is crucially dependent on the context. A comparatively strict interpretation of a documentary credit issued in an international sale may be necessary because a third party (the bank) must be able to rely on a meaning gathered largely within the four corners of the text. In a network of contracts governing a construction project, parties ought generally to be able to rely on the obvious meaning of the interlocking texts. Similarly, fiscal legislation may sometimes require a stricter approach than social welfare legislation. In law, context is everything.

I now move on to consider directly the position in regard to statutes. A statute is a unique document. It has a public character. It speaks in monotonous and its language is compressed. It is the law. Lord Reid observed that “[w]e often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.”17 This is not a recipe for excluding consideration of the setting of a statute. Legislative language can only be understood against the background of the world to which it relates. Sometimes judgments do not fully take into account the different levels of reasoning at which the context is relevant. As in the case of other legal texts, the setting is relevant to what different meanings the language of the text may let in. But it is also relevant when the judge comes to select among the possible interpretations the best one. It is a fundamental misconception to think that the background to the

16. *Cable v. Markham*, 148 F.2d 737 at 739 (2nd Cir. 1945).
statute may only be admitted in the event of an ambiguity. Interpretation requires judges to make informed choices.

That brings me to the subject of intentionalism, originalism and textualism. In England the interpretation of private instruments, such as contracts and wills, focuses on the colour given to the language of the text by the circumstances existing at time of the making of it. That is so even if, for example, the contract is a long term one. The position is different in regard to the interpretation of statutes. There is no statutory provision equivalent to section 10 of the federal Interpretation Act,\(^{18}\) which provides that statutes shall be considered as always speaking. But our courts developed a similar principle: it is now accepted that interpretation is not an archaeological dig. The controlling decision is \(R. v. Ireland.\)^{19} The question arose whether the phrase "bodily harm" in the Offences Against the Person Act 1861\(^{20}\) covers psychiatric harm done to a victim by a stalker. In 1861, the idea of psychiatric harm was not known. It was certainly not in the mind of the Victorian legislators. The question was whether the House had to treat the meaning as having been fixed at the time of enactment. The House held that the words of the statute must be interpreted in the light of contemporary scientific knowledge. The statute was interpreted as covering psychiatric harm. The House decided that it is a question of interpretation whether a statute is to be treated as always speaking or is to be given an historic interpretation. Since indications of an intent to tie the meaning to circumstances existing at the time of the enactment of the legislation is rarely to be found in a statute, statutes will generally be found to be of the always speaking variety. The logic of dynamic interpretation is inescapably that the meaning of a statute may change over time. It is a fairy-tale to think otherwise.

This principle is not restricted to giving an updating interpretation in the light of new scientific developments. Sir Rupert Cross stated:

\[\text{[A statutory provision] has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required.}^{21}\]

In \textit{McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd,}\(^{22}\) the question arose whether under a statute dating from 1888 a qualified privilege which

\(^{20}\) (U.K.) 24 & 25 Vict., c. 100, ss. 18, 20, 47.
attaches to things said at "a public meeting" covers a press conference. If it did, there was a defence to a claim in defamation. But in 1888 press conferences did not exist. The argument was that under the statute public meetings did not include press conferences. The House rejected this argument. The House construed the legislation in the light of the utility of press conferences in the modern world, taking into account the law of freedom of expression as it exists today. Again, the appeal to the original intent was rejected. In our system, these are beneficial developments which enhance the utility of statutes. Parliament must be deemed to contemplate that generally its statutes will endure for a considerable time, and that unless statutes evince a contrary intention, they will be judged to be constantly speaking.

On a broader basis, judges are inevitably influenced by changes in public attitudes. For example, in 1996 the Court of Appeal was dismayed by the fact that it was unable to hold that a ministerial decision excluding homosexuals from service in the army was not reviewable. Three years later the European Court of Human Rights declared that restriction was unlawful. In the Second World War such individuals had fought and died for their country in large numbers. Two years ago the House ruled that under the Rent Act, a same-sex partner of a tenant qualified for purposes of succession as "a member of the original tenant's family." The House reached this conclusion on the basis of changing social habits and opinions. On the other hand, earlier this year the re-assignment of gender, after surgery, for the purposes of marriage was a step too far for the House. Interpretation is an evolutive process.

Our courts have, over the last few years, developed constitutional principles which protect the rule of law. Parliament legislates for a European liberal democracy. Even outside the field covered by the Human Rights Act 1998, Parliament is presumed not to legislate contrary to the rule of law and fundamental rights. If Parliament wishes to do so it must squarely confront what it is doing and accept the political cost. General words cannot achieve such a result: only an unmistakeable Parliamentary intent will be sufficient. This is called the principle of legality. It is a strong presumption. In 1999, it was reaffirmed and explained in R. v. Secretary of State for the Home Department, Ex parte Simms. The Home Office interpreted prison rules as authorizing a ban on visits by journalists to prisoners who wanted to use the

interviews to mount media campaigns to demonstrate their innocence. The House declined to follow a decision of the United States Supreme Court denying to prisoners such a right, read down the prison rules in accordance with the principle of legality, and declared the ban unlawful. Another example is R. (Anufrijeva) v. Secretary of State for the Home Department. In that case there were legislative indications that an uncommunicated decision denying asylum status to an individual was immediately binding. Invoking the constitutional principle requiring the rule of law to be observed, the House by a 4:1 majority held as one of the grounds of decision:

That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. [...] there must be exceptions to this approach, notably in the criminal field, e.g. arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category.

The House held that a decision can take effect only upon notification to the individual concerned.

There is yet another constitutional development in England which touches on interpretation. Although the United Kingdom has no written constitution, the courts have recognised certain fundamental rights as constitutional. This development pre-dates the Human Rights Act 1998 and is the common law at work in protection of fundamental rights. Thus the courts protect as constitutional the right of participation in the democratic process, equality of treatment, freedom of expression, religious freedom, and the right of unimpeded access to the courts. Even before the incorporation of the European Convention on Human Rights into English law, the courts held that everybody has an absolute constitutional right to a fair trial which, if breached, must lead to the setting aside of the conviction. What is the significance of classifying a right as constitutional? It is meaningful. It is a powerful indication that added value is attached to the protection of the right. It strengthens the normative force of such rights. It virtually rules out arguments that such rights can be impliedly repealed by subsequent legislation. Generally, only an express repeal will suffice. The constitutionality of a right

30. [2003] 3 W.L.R. 252 (H.L.)
31. Ibid. at para. 28.
is also important in regard to remedies. The duty of the court is to vindicate
the breach of a constitutional right, depending on its nature, by an appro-
priate remedy.

Finally, in regard to the interpretation of statutes, the relaxation of
the old rule prohibiting the courts from using Hansard has caused difficul-
ties. In the landmark case of Pepper v. Hart, the House sanctioned resort to
Hansard where an explanation given by a minister promoting the bill was
directly in point on an ambiguous provision in an Act. For my part, such
use of Hansard was fully justified. Whether one calls it an estoppel, legiti-
mate expectation, or a principle of fairness, that was a sensible tempering of
the traditional exclusionary rule in favour of the citizen in the interests of
justice. It is also sensible to allow Hansard to be used to identify the mischief
which Parliament tried to correct. What I regard as constitutionally wrong
in the English system is to treat the intentions of the government as revealed
in debates as the will of Parliament. That is how the dicta in Pepper v. Hart
had, until recently, been interpreted. Slowly, these distinctions and clarifica-
tion of Pepper v. Hart are gaining ground in England.

Now I turn to constitutional interpretation. An eloquent explanation
was given in Hunter v. Southam Inc. by Chief Justice Dickson. He said:

The task of expounding a constitution is crucially different from that of constru-
ing a statute. A statute defines present rights and obligations. It is easily enacted
and as easily repealed. A constitution, by contrast, is drafted with an eye to the
future. Its function is to provide a continuing framework for the legitimate
exercise of governmental power and, when joined by a Bill or a Charter of Rights,
for the unremitting protection of individual rights and liberties. Once enacted,
its provisions cannot easily be repealed or amended. It must, therefore, be capa-
able of growth and development over time to meet new social, political and his-
torical realities often unimagined by its framers. The judiciary is the guardian of
the constitution and must, in interpreting its provisions, bear these considera-
tions in mind.

As Cardozo said "A constitution states or ought to state not rules for
the passing hour, but principles for an expanding future."

The United Kingdom is a newcomer among countries which have
adopted bills of rights. Today is the third anniversary of the Human Rights
Act, which incorporated the European Convention on Human Rights into our
law. The essential shape of the European Convention is very different from, for
example, the Bill of Rights under the United States Constitution and much

37. Wilson v. First County Trust Ltd, [2003] 4 All E.R. 97 at paras. 58-59, per Lord Nicholls of
Birkenhead (H.L).
at 83.
40. U.S. Const. amends. I-X.
closer to your *Bill of Rights*. The framers proceeded on the basis that, from time to time, the fundamental right of one individual may conflict with the human rights of another. Thus the principles of free speech and privacy may collide. They also thought that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance, but those rights are not unlimited: we live in communities of individuals who also have rights. Thus, notwithstanding the danger of intolerance towards ideas, the Convention system draws a line which does not accord the protection of free speech to those who propagate racial hatred against minorities. This is to be contrasted with the categorical provision of the First Amendment to the United States Constitution that “Congress shall make no law [...] abridging the freedom of speech.” The *European Convention* requires that where difficult questions arise, a balance must be struck. Subject to a limited number of absolute guarantees such as the one against torture, the scheme and structure of the *Convention* reflects this balanced approach. The *European Convention* is today an aging instrument in urgent need of updating. For example, there is no freestanding guarantee against discrimination. The United Kingdom government is opposed to the incorporation into our law of a freestanding non-discrimination guarantee modelled on such a guarantee in the *International Covenant of Civil and Political Rights*. The constitutional principle of equality developed by the courts has therefore an important role to play.

The very purpose of a bill of rights is to give rights to individual citizens against an all-powerful state. It creates a culture of justification. But techniques used in bills of rights vary. The *Canadian Charter of Rights and Freedoms* requires judges to interpret an impugned law in a way that conforms to the *Charter*. If it cannot be reconciled, the court declares the inconsistency and to the extent of the incompatibility, the law is void. The *New Zealand Bill of Rights 1990* is a weaker model. While the court must strive to reach an interpretation compatible with the bill of rights, there is no express power for the court to go further. But the New Zealand Court of Appeal has strengthened the regime by holding that there is an implied power to make a declaration of inconsistency. With the advantage of these earlier models

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44. U.S. Const. amend. 1.
45. *Supra* note 33 at art. 14; see Professor Bob Hepple, Race and Law in Fortress Europe, Chorley Lecture, London School of Economics, 11 June 2003.
the South African Constitution, and its bill of rights, have entrenched human rights strongly. 48 There is a Constitutional Court to adjudicate on constitutional issues. It has the power to declare legislation unconstitutional. In the United Kingdom Human Rights Act 1998, there is a strong interpretative obligation on the court to interpret legislation so far as it is possible to do so as compatible with the European Convention. The court is not entitled to interpret black as white, but the obligation is much more than a mere obligation to adopt a purposive approach. It is clearly based on the obligation in European Community law for national courts to reach an interpretation compatible with European law unless the language makes such an interpretation impossible. As a last resort, the court must make a declaration of incompatibility. Parliamentary supremacy is respected. On the other hand, the Human Rights Act is no ordinary statute: it has a constitutional status. 49 The expectation is that Parliament will consider the law on an early occasion and amend it. The Canadian Bill of Rights is stronger than the United Kingdom one. In practice, however, the results produced by our two systems are not very different.

Bills of rights apply vertically, viz. they protect fundamental rights of individuals against the State and its agencies. The question may be raised whether a bill of rights also has direct horizontal application between private parties. Generalisations on this subject are unwise. It depends crucially on the terms of each instrument. There has been a vigorous debate on the point in England. The importance of the point can be illustrated by the potential scope of the guarantee of privacy in the European Convention. English law knows no tort of privacy. Does the guarantee of privacy under the Convention empower the English courts to create a free-standing tort of privacy? The matter is not settled and any view must be provisional. I am inclined to think that the structure of our Act rules out direct horizontal application. If this is right, it may be beyond the power of the English courts to develop a general tort of privacy. On the other hand, as your Chief Justice has pointed out, bills of rights influence the common law and are in turn influenced by the common law. 50 Like your bill of rights, ours has or should have a radiating effect on the general law. After all, ultimately common law, statute law and constitutional law coalesce in one legal system. In my country this may indirectly lead to the incremental development of remedies which protect rights of privacy, e.g. the duty of confidentiality in a relatively broad sense. Some may be disappointed by this unheroic stance. For my part, freedom of expression in a democracy is the most fundamental of all rights and without it an effective rule of law is impossible. Restraints on free-

49. Supra note 44 at 703G, per Lord Bingham of Cornhill.
dom of expression must therefore be admitted only when compelling considerations of public interest and justice demand it.

There are many areas of bills of right jurisprudence where we in England have much to learn from your jurisprudence. I would in particular single out one field. A key question is when and to what extent should the courts defer to the decisions of other branches of government. In England, the spatial metaphor of a “discretionary area of judgment” on the part of Parliament or the executive with which the courts should not interfere is frequently employed.\(^1\) It has overtones of a decision beyond the reach of judicial review. It has in effect been said that on constitutional grounds the court may not adjudicate on matters of national security.\(^2\) It has further in effect been said that a decision on policy or allocation of resources is on constitutional grounds not for the courts.\(^3\) While I respect these views, I cannot accept them.

A core characteristic of a constitutional democracy is the protection it offers to the rights of individuals against the majority view as reflected by an elected government. In our new constitutional order, Parliament itself has placed this duty on the courts. It permits judicial review of acts of Parliament. The scope of the duties of the courts under our bills of rights are not limited in respect of subject matter. There are no zones of immunity. The doors of the court must always be open to anyone with a complaint. The courts may not abdicate their responsibilities by developing self-denying constitutional limitations on their powers. McLachlin J. put the principled position as follows:

\[\ldots\] care must be taken not to extend the notion of deference too far. \[\ldots\]

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is so serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and nation is founded.\(^4\)

Making due allowance for the fact that, unlike the Canadian Charter, the Human Rights Act preserves Parliamentary supremacy, this is also an

\(^{51}\) A powerful critique of this spatial label with its overtones of a decision beyond the reach of judicial interference is to be found in Murray Hunt, “Sovereignty’s Blight: Why Contemporary Public Law Needs The Concept of ‘Due Deference’” in Nicholas Bamforth & Peter Leyland, eds., Public Law in a Multi-Layered Constitution (Oxford: Hart Publishing, 2003) 337.

\(^{52}\) Secretary of State for the Home Department v. Rehman (2000), [2003] 1 A.C. 153 at paras. 50-54, per Lord Hoffmann.


accurate description of the function of the English courts under the *Human Rights Act*. The courts are charged with the adjudicative function of deciding whether *Convention* rights have been breached: in point of principle there are not any no-go areas.

On the other hand, the courts may recognise that in respect of a particular dispute, Parliament or the executive may be better placed to decide certain questions. The courts should not take such decisions on *a priori* grounds without scrutiny of the decision since one cannot know in advance whether it has not been infected by manifest illegality. So far as the courts desist from making decisions in a particular case, it should not be on grounds of non-justiciability, separation of powers, or constitutional principle. The true justification for courts exceptionally declining to decide an issue is the relative institutional competence or capacity of the branches of government.

The ideological storms of our age, and the rise of international terrorism, threaten allegiance to the rule of law in many countries. The tragic events of 11 September 2001, and the response to them, have fractured the international legal order, interrupted the development of international law and placed in jeopardy the protection of human rights far and wide. Recognising the dangers of terrorism, Aharon Barak, the President of the Israeli Supreme Court, said that it is a defining feature of a liberal democracy that "not all means are acceptable to it, and not all practices employed by its enemies are open to it." Such restraint is the very core of democratic values. Yet at Guantanamo Bay hundreds of foot soldiers of the Taliban, denied prisoner of war status because they did not wear uniforms, have already been detained for some eighteen months in what is a legal black hole. Despite its long tradition of allegiance to the rule of law, the United States is, for the moment, engaged in a process which has not a vestige of legitimacy in municipal or international law. Our Court of Appeal has expressed its deep concern that such prisoners may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of their detention before any court or tribunal. There is no rule of law at Guantanamo Bay: that is the whole idea. The United States courts have so far firmly declined jurisdiction in respect of the prisoners. Military tribunals with power of imposing death sentences will try the prisoners with an ultimate review by a President who has described the prisoners as "killers".

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trials one associates with the most lawless totalitarian regimes.\textsuperscript{58} What must authoritarian regimes, or countries with dubious human rights records, make of the example set by the most powerful of all democracies? It is also a perilous course: far from discouraging terrorism the outcome may further inflame passions in the Muslim world. Guantanamo Bay must be one of the lowest points in the distinguished story of United States jurisprudence.

There has so far been no Al Qaeda attack on British soil. Nevertheless, the United Kingdom Parliament agreed to a derogation from the terms of the European Convention under article 15 in order to permit detention without trial of foreign nationals suspected of links with terrorism. Article 15 permits such a derogation in time of war or other public emergency threatening the life of the nation.\textsuperscript{59} The Court of Appeal has upheld this action.\textsuperscript{60} Later in this year, the issue comes before the House sitting with seven rather than the usual five members. It would be wrong for me to say anything about the merits of the case. It may turn out to be one of the most important cases ever to come before the House of Lords.

Il y a de nos jours un dialogue entre les cours d'appel en dernier ressort de plusieurs démocraties. Nombreux contacts existent déjà entre le Canada et le Royaume-Uni. Des valeurs que nous partageons surpassent des choses qui nous séparent. Nous avons beaucoup à apprendre des uns des autres. C'est peut-être le temps venu de créer des échanges judiciaires réguliers entre nos pays.

\textsuperscript{58} Ronald Dworkin, "The Threat to Patriotism" \textit{New York Review of Books} 49:3 (28 February 2002) 44 at 44.
\textsuperscript{59} Supra note 32 at art. 15.
\textsuperscript{60} \textit{A, X and Others v. Secretary of State for the Home Department} (2002), [2003] 2 W.L.R. 564.