



A Legal Black Hole

Excerpt from the first Brian Dickson Memorial Lecture

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By Johan Steyn

(Johan Steyn of the United Kingdom is a Law Lord in the British House of Lords, which is also Britain's highest court. He concluded his lecture with the following comments on the “black hole” of Guantanamo Bay. Lord Steyn's footnotes are in brackets at the appropriate points.)

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 before it”.

(The citation relies on the magisterial essay of President Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, Harvard L.R. Vol 116, No. 1, November 2002 at page 148.)

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 on 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.

(*R (Abbasi) v Secretary of State for Foreign Affairs* [2002] EWCA Civ 1598.)

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”. Professor Ronald Dworkin has rightly said that the procedures contemplated are the kind of trials one associates with the most lawless totalitarian regimes.

(The Threat to Patriotism, New York Review of Books, 28 February, 2002, 44.)

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. The Court of Appeal has upheld this action.

(A, X and Y and Others v The Secretary of State for the Home Department [2002] 2 WLR 564.)

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 réguliers entre nos pays.

(Translation: At the present there is a dialogue between the courts of appeal of last resort of several democracies. Numerous contacts already exist between Canada and the United Kingdom. The values we share surpass the things that separate us. We have a lot to learn from each other. Perhaps the time has come to create regular exchanges between our countries.)