

The Coxford Lecture

Arbitrariness

Timothy Endicott

Arbitrariness is a lack of reason. Whenever any government agency does anything wrong, it goes against reason. But that is not enough to make for arbitrary government. Arbitrary government is a distinctive form of unreasonable government; it is a departure from the rule of law, in favour of rule by the mere will of the rulers.

To clarify arbitrariness (and, therefore, the rule of law) I will discuss a Supreme Court of India decision and a Supreme Court of Canada decision in which judges held that other public authorities had acted arbitrarily. And I will discuss Jeremy Bentham's claim that the interpretive power of those judges is itself an arbitrary power. The claim is best articulated in Bentham's little-known account of the requirements of the rule of law. If you agree with Bentham, you should conclude that the interpretive power of judges in India and in Canada is hostile to the rule of law.

Bentham's exaggerations were sometimes extravagant; on this point, I will argue that he exaggerated only somewhat. The interpretive role of judges is not necessarily hostile to the rule of law. But there is a standing tension between that interpretive role, and the rule of law. In Canada and India, the judges' interpretive role gives them substantial power to determine the content of the law, and they have power to determine the limits of their own power. These powers can be used to reallocate decision making power to judges. Doing so will promote the rule of law, if it provides a technique for preventing governmental decision making that is arbitrary in the sense that is relevant to the rule of law. But I will argue that the two decisions under discussion reallocate power to judges, without any resulting enhancement in the rule of law.

Arbitrary decision making in India: the 2G Spectrum case

The Indian Constitution guarantees that 'the State shall not deny to any person equality before the law...'.¹ The courts have decided that this provision implies that natural resources cannot be handed out 'according to the sweet will and whims of the political entities and/or officers of the State.'² Public authorities, that is, cannot give public goods away to private persons *arbitrarily*; natural resources must be allocated in a way that is non-arbitrary.

Mobile phone spectrum is a natural resource. In 2008, the Indian government decided to hand out second generation spectrum 'first come, first served',

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1. Constitution of India, 1950, Article 14.
2. *Akhil Bharatiya Upbhokta Congress v State of Madhya Pradesh* (2011) 5 SCC 29 [65].

at cheap 2001 prices, to make it easy for multi-national corporations to invest in bringing mobile phone coverage to rural India. The purpose was to extend the access of the rural poor to telephone services.

In a public interest lawsuit in the Supreme Court of India, a two-judge bench held that the ‘first come, first served’ policy was arbitrary, and therefore contrary to the constitutional guarantee of equality.³ The government could have held an auction, and the judges concluded that an auction would have been a better technique of allocation; it would have compensated the Indian people for the public resource that was being allocated to private parties. And an auction might have made corruption more difficult. Having interpreted the guarantee of equality to mean that the government must not act arbitrarily in the distribution of natural resources, they decided that the government had acted arbitrarily (and therefore, against the doctrine of equality) by distributing mobile phone spectrum on a ‘first come, first served’ basis. The judges presented the proposition that an auction would have better promoted the public interest as sufficient justification for their decision that the government had acted arbitrarily by deciding not to hold an auction.

Arbitrary decision making in Canada: the *Insite* Case

According to the Canadian Charter of Rights and Freedoms, ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.’⁴ In the *Insite* case, the Supreme Court of Canada gave effect to a well-established doctrine that the fundamental principles of justice require that people not be deprived of those things *arbitrarily*.⁵ *Insite* is a clinic in Vancouver, where people can use prohibited narcotics in controlled conditions, with medical and other support. It was set up as a response to the effects of addiction, designed to alleviate some of the wreckage that results from drug use by destitute people. *Insite* had been set up through municipal, provincial, and federal cooperation; it was only possible because the federal government had used a statutory power to give an exemption from the prohibition on narcotics in the criminal law. When the federal government decided not to continue that exemption, the clinic sought a declaration that the decision was contrary to section 7 of the Charter, on the ground that it deprived clinic users of life, liberty, and security of the person, in a way that was not in accordance with the principles of fundamental justice.

The Supreme Court of Canada held that the objective of the statutory power to decide whether to extend an exemption from the ban (the objective that had presumably been pursued in the granting of the exemption) was ‘health and public safety’. The Court noted its previous holding, that a blanket ban on a narcotic, while it affects life, liberty and security of the person, is not necessarily an

3. *Centre for Public Interest Litigation & Others v Union of India & Others*, Supreme Court of India, Writ Petition (Civil) No 423 of 2010, decided on 2 Feb 2012 [*2G Spectrum*].

4. *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5. *Canada (Attorney General) v PHS Community Services Society* [2011] SCC 44, [2011] 3 SCR 134 [*Insite*] at para 127.

arbitrary way of affecting those interests.⁶ But the Justices held unanimously in the *Insite* case that withdrawing the exemption did not promote health and public safety. Quite the reverse, in fact: McLachlin CJ wrote for the Court that the trial judge's findings

suggest not only that exempting *Insite* from the application of the possession prohibition does not undermine the objectives of public health and safety, but furthers them.⁷

As they summed it up, '*Insite* saves lives'.⁸ The court concluded that because the exemption that allowed the clinic to operate furthers public health and safety, the government had acted arbitrarily in deciding not to renew the exemption. And because the decision was arbitrary, they held, it deprived persons of life, liberty and security of the person in a way that was not in accordance with the principles of fundamental justice. The judges presented the proposition that an exemption would further health and public safety as sufficient to justify its decision that the government had acted arbitrarily by deciding not to continue the exemption.

Arbitrary action as action contrary to reason

The Indian Supreme Court and the Supreme Court of Canada took a similar, striking step in their reasoning in these cases. From the premise that a decision went against the relevant public purposes, the judges concluded that the decision was arbitrary. You can see the attraction of it. A use of governmental power is arbitrary if it lacks reason. If a public decision goes against the relevant public purposes, then it goes against the reasons on which a public decision ought to be made. Acting against reason—you might well say—is arbitrary.

According to the Indian judges, choosing to distribute mobile phone spectrum 'first come, first served', rather than by auction, went against the public purposes at stake, and was therefore arbitrary. According to the Canadian judges, the federal government's aim of closing down the *Insite* clinic went against the public purposes at stake, and was therefore arbitrary. If legitimate public purposes could have been better promoted, it was arbitrary for the public authority to take the decision that it took. On this approach, any decision is arbitrary (other things being equal⁹), if a different decision would have promoted the relevant objective better.

By approaching governmental arbitrariness in this way, the Canadian and Indian supreme courts have taken upon themselves far-reaching powers to regulate health policy in Canada, and to regulate telecommunications policy in India. Jeremy Bentham would undoubtedly have said that it was the judges who were acting arbitrarily.

6. *Rodriguez v British Columbia* [1993] 3 SCR 519 at 594-95, *R v Malmo-Levine* [2003] SCC 74, [2003] 3 SCR 571 at paras 77-78.

7. *Insite*, *supra* note 5 at para 131.

8. *Ibid* at para 133.

9. Other things might not be equal if, e.g., the impugned decision has some other public benefit that can legitimately be pursued, or if the alternative to the impugned decision would be costly.

Jeremy Bentham: the rule of law and the rule of wax

Jeremy Bentham's work on the nature and the potential usefulness of law was original, brilliant and extraordinarily wide-ranging. He did not use the phrase 'the rule of law'—so far as I know—anywhere in his sprawling¹⁰ body of work—but the rule of law, as the state of affairs in which law regulates the life of a community, was at the centre of much of Bentham's thinking. In his bitter, eloquent, tendentious arguments against Blackstone,¹¹ there is a long, complex accusation that Blackstone's admiration for the rule of law was a sham, because the common law runs contrary to the rule of law. Bentham thought that English law was 'a piece of cobweb work, spun out of fantastic conceits and verbal analogies, rather than a mass of substantial justice cast in the mould of reason'.¹² His complaints against the English common law were that it lacks the virtues of the rule of law.

"Miserable," says that great Lord Coke, "miserable is the slavery of that people among whom the law is either unsettled or unknown." Which, then, do you think is the sort of law, which the whole host of lawyers, from Coke himself down to Blackstone, have been trumpeting in preference? That very sort of bastard law I have been describing to you, which they themselves call the *unwritten law*, which is no more *made* than it is *written*—which has not so much as a shape to appear in ... and which, so long as it is what it is, can never, by any possibility, be either *known* or *settled*. ... It carries in its hand a rule of wax, which they twist about as they please—a hook to lead the people by the nose, and a pair of sheers to fleece them with.¹³

From this invective against the common law, we can distil some requirements of the rule of law: the law must be *known* and *settled*; it must have 'a shape to appear in'. And if you rummage for ideas through the papers of this creative, angry and prolix thinker, you could find much material for a further articulation of the requirements of the rule of law. But you can jump straight to a comprehensive, numbered list, if you turn to the *Principles of the Civil Code* and go to chapter 17, with the terrific title, 'The Power of Laws over Expectation'.¹⁴

Expectation was crucial to Bentham's theory of law. The point of law, in his view, was to shape people's conduct, by offering them pain or pleasure as

10. Through the Bentham Project at University College, London, you can be part of a crowd-sourced programme to transcribe Bentham's mass of unpublished writings, for a projected seventy-volume collection of his works: blogs.ucl.ac.uk/transcribe-bentham.

11. Jeremy Bentham, *A Fragment on Government*, ed by JH Burns & HLA Hart (Cambridge: Cambridge University Press, 1988 (1776)).

12. *The Works of Jeremy Bentham*, ed by John Bowring (Edinburgh: William Tait, 1838-1843), vol 1, ch 4. Cf 'the species of *pseudonomia*—of sham, and Judge-made law, styled Common Law', *Principles of the Civil Code*, ch XVII, § XXI, art 14.

13. *Ibid* at vol 5, 231-37 at 235-36; www.ucl.ac.uk/Bentham-Project/tools/bentham_online_texts/truthvash.

14. *Ibid* at chapter XVII. *Principles of the Civil Code* was first published by Etienne Dumont in 1802, in French translation from papers that Bentham had given him in 1788. An English translation of Dumont's work was published in Bowring's collection of Bentham's works forty years later (from which the quotations here are taken); that version can be seen at <http://www.laits.utexas.edu/poltheory/bentham/pcc/pcc.pa01.c17.html>. Dumont had evidently done some extensive editing of the work; see the Introduction to Charles Milner Atkinson, ed, *Bentham's Theory of Legislation* (Oxford University Press, 1914).

motives for action; *good* laws motivate in ways that promote the general utility (that is, they have the effect of increasing the sum that you get when you add up all the pleasure and subtract all the pain). The potential for law to promote utility lies in its potential to create expectations. Law will fail, if it is at war with the expectations of the people subject to it (as it may be, if expectations that they have formed apart from the law lead them to resist it, or if they do not know what to expect from the law, or if the law is inept at generating new expectations).

The power of law over expectations is, in Bentham's approach, the rule of law. Bentham's account of the conditions for law's success in managing expectations is his account of the requirements of the rule of law. Here you will find Bentham's list of those requirements—a century and a half before the famous lists compiled by Lon Fuller and John Finnis and Joseph Raz.¹⁵ The laws must be:

1. anterior to the formation of the expectation
2. known
3. consistent with themselves
4. compatible with the principle of utility
5. simple in style and arrangement
6. 'present to the mind as about to be executed'
7. literally understood.¹⁶

In order to generate expectations, laws must be prospective—that is, anterior. If you come along after the event and reward or punish my behaviour, you will not be creating expectations that could have motivated my behaviour. Prospectivity is the first requirement of the rule of law. Laws must be known, if they are to generate expectations. They must be consistent with themselves, or we will have no idea what to expect. They must conform to the principle of utility, he says, because only then will they be sufficiently consistent with what people expect, to be obeyed. He admits that 'a law conformed to utility may be found opposed to public opinion', but he insists that such a situation will be transient; laws which favour 'the greatest number of interests' will secure compliance. Laws must be simple if you and I are going to understand them well enough to form expectations on the basis of the law. And we must have some expectation that the law is going to be enforced (or 'executed') according to its terms, or we will not bother to plan our lives on it.

All of these items are on the standard lists of the requirements of the rule of law. Bentham also mentions stability, an item that turns up in all the standard lists, which he does not enumerate separately: 'Innovations in the laws should be made with great caution'. If the laws are always changing, we cannot ground expectations on them.

And finally, consider the 7th condition. This is the important one for present

15. Lon Fuller, *The Morality of Law*, 2d ed (New Haven: Yale University Press, 1969) at ch 2; John Finnis, *Natural Law and Natural Rights*, 2d ed (Oxford: Oxford University Press, 2011) at 270-21; Joseph Raz, *The Authority of Law*, 2d ed (Oxford: Oxford University Press, 2009) at 214-18.

16. Jeremy Bentham, *Principles of the Civil Code* (W Tait, 1843) at ch XVII, 'The Power of Laws over Expectation': www.laits.utexas.edu/poltheory/bentham/pcc/index.html.

purposes: ‘The laws should be literally understood’. The first six conditions concern the laws themselves, or their enforcement; Bentham says that the 7th depends ‘partly on the laws themselves, and partly on the judges’. And the 7th condition becomes the starting point for Bentham’s diatribe against the interpretive role of judges:

To interpret has signified entirely different things in the mouth of a lawyer, and in the mouth of another person: to interpret a passage of an author, is to show the meaning which he had in his mind; to interpret a law... is to neglect the clearly expressed intention, in order to substitute some other, by presuming that this new sense was the actual intention of the legislator...when the judge dares to arrogate to himself the power of interpreting the laws, that is to say, of substituting his will for that of the legislator, every thing is arbitrary—no one can foresee the course which his caprice may take.¹⁷

To interpret a passage of an author is to show the meaning that he had in his mind, according to Bentham. But lawyers and judges do something else instead; they neglect the clearly expressed intention, in order to give some other sense to the passage by presuming that this new sense reflects the actual intention of the legislator. When the judge dares to arrogate to himself the power of interpretation, ‘every thing is arbitrary’.

In Bentham’s usage, too, we should understand ‘arbitrary’ to mean ‘lacking in reason’. The judges depart from the reason of the law when they interpret, and then you and I are ruled by caprice—by the sweet will and whims of the judges—rather than by law. That is a central element in Jeremy Bentham’s account of the rule of law, which John Finnis called ‘the specific virtue of legal systems’,¹⁸ and which Bentham himself calls ‘the excellence of the laws’.

Do the 2G Spectrum decision and the Insite decision represent departures from the rule of law? By giving the power of interpretation to judges, did the framers of the Indian and Canadian constitutions depart from the rule of law, so that ‘everything is arbitrary’? This is the Benthamite problem of arbitrariness: given the freedom that an interpreter has, to substitute his or her will for that of the lawmaker, how can we be ruled by law?

From Bentham’s approach to the rule of law, we can draw three putative ways to solve the Benthamite problem, by showing that judges could apply the law without substituting their will for that of the lawmaker. I will argue that none of them suffice to solve the Benthamite problem. There is, in fact, no solution.

Putative solution 1: applying the literal meaning of the law

The first solution is to say that we *could* be ruled by law, if only the interpreter gave effect to the literal meaning of the law. If a community met Bentham’s 7th condition—that laws must be literally understood—you might say that the judges would not be acting arbitrarily.

17. *Ibid.*

18. Finnis, *supra* note 15 at 270.

When Bentham said that the law should be understood ‘literally’, he cannot have meant it literally. Literal understanding, in its opposition to figurative understanding, is not in issue. Bentham was, presumably, trying to say that the judges should give effect to the law that the lawmaker made, instead of departing from it by making something else up. And there is, potentially, a sound maxim lurking in the 7th condition, for those judges who are too ready to depart from what the lawmaker said.¹⁹

But this does not solve the Benthamite problem. It would be pointless to say to the Indian Supreme Court judges and Canadian Supreme Court judges, ‘do not rule by your caprice, rule by the literal meaning of the Constitution instead’. The reason is not that there is no such thing as literal meaning, but that the literal meaning of phrases like ‘equality before the law’ or ‘principles of fundamental justice’ does not impose the constraint on judges that Bentham’s 7th condition must have aimed to impose. The Benthamite problem with the *Insite* case or the 2G Spectrum case is not that the judges ignored the literal meaning of the phrases; the problem is the freedom that the lawmakers’ phrases gave to those judges.

When Bentham said that the 7th condition depends partly upon the laws and partly upon the judges, he evidently meant not only that judges should not depart from what the lawmaker said, but also that lawmakers should use language that will give their provisions an obvious and uncontroversial application. The implication is that B. R. Ambedkar and the Indian Constituent Assembly, and Pierre Trudeau and the federal and provincial politicians who agreed to the Canadian Charter, all made big mistakes. They should not have used such open-ended phrases as ‘equality before the law’ or ‘the principles of fundamental justice’. By using that language, they were allowing their countries to be ruled by the sweet will and whim of the judges.

Doubtless, Bentham would indeed have considered the two constitutions to be deficient in precisely this respect. But he evidently exaggerated when he suggested that *any* use of open-ended language by a lawmaker reflects a deficiency in the rule of law. Even Bentham ought to agree that lawmakers should often use language that can be construed in a creative fashion. You cannot decide—as a general principle of the legislative craft—to use language that cannot be creatively construed. The public purposes to be pursued by a legislature must sometimes be pursued through extravagantly vague law making. A precise rule against entering an intersection on a red light can be very useful in a scheme of traffic regulation, but the scheme may also need rules imposing liability for harms caused by careless driving, and rules prohibiting dangerous driving.²⁰ A scheme of tort liability may have precise rules imposing liability to compensate

19. I do not mean that they should never do so; in fact, it would be damaging to a legal system if they had *no* jurisdiction or no willingness to depart from legislation on grounds of equity, or on grounds of perversity; Bentham himself gave the example—already a chestnut in his day—of a surgeon who operates on a person in an emergency after an accident in the street, and is prosecuted for an offence of drawing blood in public.

20. See Timothy Endicott, ‘The Value of Vagueness’ in Andrei Marmor & Scott Soames, eds, *Philosophical Foundations of Language in the Law* (Oxford: Oxford University Press, 2011).

for the consequences of offering a fraudulent cheque; it may also need to impose general liability for negligence. A code of public law ought to include many precise rules, but it may also need extravagantly vague rules requiring fair procedures and giving relief against oppressive decisions. Vagueness in the rules of traffic regulation and negligence law and administrative law will give discretion to the judges, and any discretion can be used capriciously. Yet those discretionary powers are not themselves arbitrary, where there is good reason (in the interests of justice and of the rule of law) for judges to exercise them.

Take one example of extravagant vagueness, from the United Kingdom's Unfair Contract Terms Act 1977, providing that exclusions of liability in consumer contracts must be reasonable in order to be enforceable, and defining reasonableness as follows:

the requirement of reasonableness ...is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made. (sec11(1))

Bentham might be horrified. But in fact, this was good law making. It amounted to saying to the judges, 'start giving relief from unacceptable exemption clauses in consumer contracts, and you decide which ones are unacceptable'. Bentham's argument quite rightly implies that vague legislative language allocates power to judges. But it was wise for the Parliament of the United Kingdom to allocate to the judges this particular power—to decide which exemption clauses are reasonable. Lawmakers should certainly avoid language of that sort, when it would allocate a power to judges that they should not be exercising. But Bentham exaggerated when he suggested that judges should exercise no such power.

If I am right that Bentham really meant, in saying that laws must be literally construed, that lawmakers should never use extravagantly vague language, then it is a doomed proposal. So it is not a practical proposition, to say that we could solve the Benthamite problem if only judges would never depart from what the lawmakers say and lawmakers would use language that does not allow for creative, contested interpretations.

Putative solution 2: reference to the lawmaker

If we do not want to be ruled by the sweet will and whims of the interpreter, why not have those who apply the law refer questions of its interpretation to the very maker of that law? This putative solution to the Benthamite problem has a certain sort of attraction; it had an attraction for Bentham.

It will evidently not serve as a practical general strategy, because it depends on continuity in the operation of the lawmaker. And legal systems cannot restrict lawmaking authority to continuously operative lawmakers. The interpretation of wills is one obvious illustration of the need for a community to give legal effect to the lawmaking decisions (even those using open-ended language) of lawmakers to whom disputes as to the meaning of their communications cannot be

referred, such as testators. The interpretation of contracts is another illustration: judges cannot go back to the framers of the contract to ask what they intended, because you and I were the framers, and we disagree, and I will want the issue to be resolved in the way that accords with my sweet will and whims and you with yours, and a reference to the lawmakers is not going to resolve the matter.

The Indian and Canadian Constitutions provide illustrations, too: in trying to decide whether the Insite clinic can lawfully be deprived of its exemption by the Canadian government, we cannot go back to the framers of the Charter, and ask them how they would wish it to apply in the case. The Indian and Canadian legal systems are not deficient in lacking a continuously operative constituent assembly that could resolve disputes as to the application of their constitutional instruments. Giving questions of application to an ongoing assembly would make constitutional issues into matters of day-to-day politics. A body like the Indian Constituent Assembly would become an entirely different institution, if it were established to go on from year to year, considering questions of interpretation of the Constitution. A constituent assembly ought to design a constitution that will endure and that will be interpreted by other bodies. The separation of constitution making from dispute resolution is a central aspect of the craft of constitution building.

So there is no good way to adopt reference to the lawmaker as a general mechanism for resolution of disputes over interpretation. Bentham had toyed with the idea. He thought that lawmaking authority should lie with the legislature and that the judges should just give effect to the code laid down by the legislature. He knew that there would be cases in which the import of the code might be controversial and that experience in its application might show that it could be improved in some respect. He wanted the judges to be able to propose an amendment to the legislature.²¹ When the parties contested the interpretation of the code, he wanted judges to make a ‘contested interpretation report’ to the legislature, so that the code’s ‘clearness, correctness, and comprehensiveness of expression’²² might be improved. A resulting change by the legislature would not ordinarily have retrospective effect in the case before the court. But if application of the law would be ‘productive of injustice, and thence of contravention to the intentions of the legislature’, then the judge was to have a ‘suspensive’ power, and the effect of the law was to be stayed ‘until the will of the legislature shall have been made known’.²³ Apart from that special provision, Bentham wanted the judges to decide the case on the basis of the code as it was at the time of the court’s decision, with no doctrine of precedent. If the judges thought that they had found a defect in the civil code, they would ask the legislature to make a change for the future.

Bentham did actually think that these proposals were the solution to the Benthamite problem of judicial arbitrariness:

21. Jeremy Bentham, *Constitutional Code*, ed by F Rosen & JH Burns (Oxford: Oxford University Press, 1983) at ch XII, § XX, art 2. Bentham wrote this Code in the early 1820s.

22. *Ibid* at ch XII, § XIX, art 1.

23. *Ibid* at ch XII, § XXI, art 1-3.

By these means will, and by no other means can, the practice of strained construction in judicature, with its all-pervading and boundless evils, be eradicated.²⁴

But the problems with wills and contracts and constitutions show that there can be an advantage, in opposing arbitrary power, in dispute resolution by an interpreter that is independent of the lawmaker. Even in the case of ordinary legislation (or in the case of a code of the kind that Bentham had in mind), I think that Bentham was being unrealistic. Bentham's proposal would give the legislature an arbitrary power to decide the effect of legislation. In his own terms, a reference would not solve the problem of the law's power over expectations; this is because we would be subject to a new decision by the legislature. You might think (perhaps Bentham thought) that references would secure interpretations that give effect to the intention with which the legislature was passed. But even supposing that the legislature had, at the time of the enactment, an intention that resolves the question, the legislature itself cannot be expected to serve as a faithful guide to that prior intention. One reason is that in order for legislation to endure in time (which is essential for the rule of law), the references may need to go to a legislature whose membership differs from that of the body that passed the legislation. Another, deeper reason is that even if the same persons were still in the legislature to consider the reference, they would be making a new decision, and their institutional arrangement would be calculated to motivate them (as Bentham would put it) to decide on the basis of present political considerations.

If we could get the lawmaker to resolve disputes, erasing the separation of power between legislator and adjudicator, we would lose something essential for the rule of law. The community can benefit by having a constitution or a statute or a town by-law interpreted by an institution other than the lawmaker. A court may be more cautious in the effect it ascribes to an enactment, precisely because it is evident to the judges and to others, that the enactment was made by another institution, to which the enactment owes whatever authority it has. If we could arrange references for interpretation to the lawmaker, we would generate new possibilities for arbitrariness in that body's tendency to do what suits its own sweet will and whims, case by case. And such a tendency would lead to instability in the policy of the law when lawmakers are invited to revisit their purposes *ad hoc*.

It is a very positive aspect of the rule of law that legislators know that they need to frame enactments so as to secure their future application by another body in a way that they cannot control; to give that control to the lawmaker would war against the publicity of the law (which Bentham himself, of course, knew to be a requirement of the rule of law) and would give an occult quality to the law. Through the need to communicate in a way that will constrain an independent adjudicator, the legislature is motivated to communicate in a way that will be transparent to members of the community (or at least, to those who have good legal advice). To put it in Bentham's terms, it would not enhance the law's power over expectation, if the lawmaker could decide the application of its

24. *Ibid* at ch XII, § XXI, art 13.

laws according to its caprice or changing political needs. The separation between lawmaker and adjudicator is an important part of the rule of law.

So references from the adjudicator to the lawmaker cannot be a general solution to the Benthamite problem about the extent of freedom accorded to the interpreter. In constitutional interpretation in particular, sending the law back to the very body that enacted it would often be impossible; sending it to a separate assembly tasked with constitutional interpretation on a reference would give that body a power that would be no less arbitrary than the power of judges.

Putative Solution 3: give effect to the intention of the lawmaker

This is, you might say, the most promising solution. You may say that we can still have the rule of law, and not the arbitrary rule of the judge, if the judge gives effect to the intention of the lawmaker. It is *the* popular solution in the ideology of legal systems and the way judges talk. I think that it is a deep and interesting mistake.

Suppose your mom says ‘you can have half the dessert in the fridge’ and you open the fridge and find a piece of chocolate cheesecake and a pot of yogurt. The chocolate cheesecake is dessert. It is a paradigm of dessert. Suppose you find yourself thinking, ‘If the yogurt is dessert, then I can eat all of the chocolate cheesecake, because I will be eating half the dessert. If the yogurt is not a dessert, then I can only eat half the chocolate cheesecake’. Your own sweet will and whims may favour an interpretation of what your mom said, which counts yogurt as a dessert. But you find yourself thinking that it may not really be a dessert, but something for breakfast. You are a good natured child and you know that your mom’s word is law. The obvious thing to do is to ask her: ‘does the yogurt count as dessert?’ At this point, if your mom is in the kitchen, there is some appeal in Bentham’s idea of reference to the lawmaker.²⁵ But suppose that she is not home. She wrote ‘you can eat half the dessert’ on a sticky note on the fridge and went out to visit your aunt. You have to decide for yourself, whether yogurt counts as dessert.

The third putative solution to the Benthamite problem of arbitrariness is that you will be acting non-arbitrarily if you give the sticky note the effect that she intended it to have. Then you will not be deciding what to eat on your own sweet will and whims. But I propose that it is not a good general principle that the right way to respond to the sticky note is to treat it as requiring what she meant it to require. I think that if you come to a reasonable view as to what counts as dessert

25. In fact, the good sense of asking your mom, if she is available, reflects a difference between the authority of a parent and the authority of a legislature; in political community we need the virtues of the rule of law, which include the value of dispute resolution by an interpreter that is independent of the lawmaker. Even a household may well need certain analogues of the rule of law (certain forms of stability, openness, intelligibility, and consistency in the rules). Yet it may be just and convenient in a household, for a parent to have a power in a form that would be tyranny in a political community. We might say that a parent’s power to decide what you get to eat is an arbitrary power. ‘Because I said so’ may actually be all the justification that the parent needs to give to a person subject to the power. If so, it is all right for parents to have certain forms of arbitrary power.

in the circumstances, and she wrote that you could eat half of it and you do eat half of it, you have done all that could be asked of you in this respect of your response to her note.

When judges say that they are giving effect to the intention of Parliament, or of the parties to a contract, or of a testator, I think they are usually just thinking about what would be a reasonable way of dealing with the application of this text in the circumstances, adding the premise that the institution that promulgated the text was reasonable, and concluding that the lawmaker intended the conclusion that they favour.

Suppose you reason with yourself as follows,

1. I am to do what my mom intends me to do.
2. The most reasonable understanding of dessert counts yogurt as dessert.
3. My mom is reasonable.
4. Therefore, my mom intended to include yogurt when she referred to ‘dessert’.
5. Therefore, I may eat all of the chocolate cheese cake.

By putting into this syllogism the premise that your mom is reasonable, you have given the note the same effect as if her intention were irrelevant. You have given yourself licence to act on the understanding of dessert that you deem to be reasonable—under the guise of doing as she intended. If it is legitimate to take that power on yourself, it is also legitimate (and it has the same effect) to reason as follows:

1. I am to do what my mom said to do.
2. She said that I could eat half the dessert.
3. There is reason to count yogurt as a dessert.
4. Therefore, there are two desserts in the fridge, and I may eat all of the chocolate cheese cake.

Your mom will have no ground for complaint, concerning your conduct or your reasoning. And the reasons for and against counting yogurt as dessert (in these circumstances) are not facts about your mom’s intention (although the reasons may, of course, include facts about what your mom and others have done in counting yogurt as a dessert, or not).

Most reasoning framed as giving effect to the intention of the framer (of the constitution or legislation or a will) in matters of interpretation is what you might call ‘inferential’ intentionalism. It is trivial, because it includes the silent or explicit premise that the framer is reasonable.

Suppose that you eat all of the chocolate cheesecake, and your mom comes home and hits the roof, because she did *not* count the yogurt as dessert. If it was reasonable to count yogurt as dessert, she has no complaint. This conclusion reflects no scepticism about the authority of a mom; if she only allows you to eat half a piece of cheesecake, you have conclusive reason not to eat more than half of it. The authority of parents is august (within their jurisdiction): they can scrawl something on a sticky note on the fridge that changes the right and the wrong. Their capacity to do that gives them the opportunity to order things as

they intend. But your task as an interpreter is to work out what they did, and not what they intended.

Yet there can be a non-trivial way of using intention as a guide to interpretation. The approach that I have proposed reaches a crunch point, when you have a collateral reason for understanding the authority to have had one result in mind, rather than another. Suppose that your sister comes into the kitchen, just as you are puzzling about what to do, and says, 'mom told me that the yogurt is for breakfast, it is not dessert'. And suppose that your sister is reliable. Now you know something about your mom's intention. Does that matter? You may say that it obviously matters, and that it gives you conclusive reason not to eat all of the chocolate cheesecake; it shows that an interpretation that conforms to the intention of the authority is the only correct interpretation.

I think that such a collateral reason for understanding an authoritative communication one way rather than another could indeed matter deeply, but I do not think it necessarily does. If you know something about the intention of somebody who said something, it is not a general truth that this information makes a difference to the interpretation that you should adopt. This is the controversial point in the view of the relation between intention and interpretation that I am proposing. I am not sure that the collateral information as to intention necessarily makes a difference even in the case of your mom. And if there is general force in collateral information about what she counts as dessert, I think that implies that you ought generally to do what your mom *wishes*. The information acquires no general import from the fact that you ought to do what she *says*.

Even if you disagree, and conclude that collateral information as to your mom's intention is a ground for interpretation of what she says, you may be prepared to agree that there is an important difference in this respect between the authority of parents and of lawmakers in a political community. Collateral information about the intention of a lawmaker has no general relevance to *legal* interpretation. Suppose that we knew from B. R. Ambedkar's diaries, that he intended the guarantee of 'equality before the law' in Article 14 of the Indian Constitution to entrench a rule that demands that natural resources should be allocated by auction. Suppose his diaries reliably report that the whole Constituent Assembly understood itself to be enacting such a rule, when it agreed on the text. We do not yet have reason to treat Article 14 as having that effect.

It may seem that I am suggesting that what the Constituent Assembly meant does not matter. On the contrary: it matters that they said (and meant) that the State should not deny to any person equality before the law. It is a matter of obligation for the Supreme Court of India to adhere to that. But if the Constituent Assembly had an intention as to what effect their communication would be given, which they did not communicate in the exercise of their authority, I see no general reason why that effect must be given to their act of constitution making.

Indians have reason to treat the Constituent Assembly as having made the Constitution that it made. But there is no general reason to treat that Constitution as having the effects that the members of the Assembly thought it would have. Can an authority say, 'you know what I wanted, so you should have done it?' I

am not even sure that your mom can justly say this as a general proposition, but perhaps she can. The framers of your country's constitution cannot.

If you disagree with this approach (as many do²⁶), keep in mind that if your mom has gone to visit your aunt, you are quite likely to face the predicament of not knowing what your mom intended, and then you have to go ahead and interpret what she said without knowing her intention—if she had any—as to how this matter ought to be determined. A court very often has no collateral information about what—if anything—the lawmaker intended concerning the issue at hand. The court must still make something of what the lawmaker did. So it is an illusion to think that the Benthamite problem of the arbitrary freedom of an interpreter will be solved, if the interpreter gives effect to the intention of the lawmaker.

There is no solution to the Benthamite problem. Interpreters have freedom to run your life and my life, in giving effect to law made by other institutions. And if this is a problem, I do not think that Bentham faced up to its depth, when he vainly insisted that the common law's 'rule of wax' could be remedied by codification.

Resolving the Benthamite problem of arbitrariness

But I think we can resolve the problem. By a resolution instead of a solution, I mean a way of showing that the problem is not a problem, or at least not the problem that it seemed to be. We do not need to show that judges have no significant freedom in deciding what to make of a legal instrument, before we can understand their role as potentially compatible with the ideal of the rule of law. Jeremy Bentham, in his characteristic fashion, got angry and went overboard. There is no general objection to the idea of the rule of law, simply in the fact that an interpreter has extensive freedom in deciding what effect to give to a legal instrument.

We have seen the first reason for thinking that there is not actually a problem: there is no alternative that would abolish arbitrariness. If we tried to abolish the distance between the interpreter and the lawmaker, and have the lawmaker interpret the law, we would be equipping the lawmaker to decide what is going to happen to us on his or her own sweet will and whims as we go along.

The second basis for resolving the Benthamite problem is that judicial law making is not necessarily more arbitrary than legislative law making. Here is where I think Bentham exaggerated in his fierce disapproval of the common law. Law making is not a substantive category of activity. There are different kinds of law, some of which can be better made by judges and some of which can be better made by legislatures (and yet others can best be made by town councils or testators or contracting parties or constitutional conventions or international organisations or...) and there is no general reason to think that a judicial power to make law is an arbitrary power.

26. See, e.g., Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012).

This claim implies by the way, something that may seem surprising: that the very important principle of prospectivity, which heads Bentham's list of requirements of the rule of law, is not as wide-ranging a principle as some people might think. It is not generally unjust, and it is not generally contrary to the rule of law, for a court to resolve a dispute today over a transaction that happened last year and to do so using a ground of decision that was not part of the law last year.²⁷ I believe that you have to agree to this claim, if you think that it is legitimate for judges to develop the common law.

Do the Canadian and Indian approaches reduce or increase arbitrary power?

Judicial law making is not arbitrary in itself, but there is a standing tension between the freedom of the interpreter and the rule of law. If judges interpret their constitutions to give them power over telecommunications policy or over health and public safety policy, there is a standing potential for the interpreters to govern the lives of their fellow citizens according to their arbitrary will, rather than according to law. But then, if the judges had not developed the remarkable Canadian and Indian arbitrariness doctrines, their fellow citizens' lives would be governed by less-constrained executive officials, who would have more scope to govern the lives of their fellow citizens according to their arbitrary will. Is there any reason to think that the approach of the 2G Spectrum case and of the Insite case increase or decrease the scope for arbitrary decision making?

It is tempting to say that arbitrariness will be decreased if judges give effect to the *law*, but that it will be increased if judges interfere with *policy*. The Canadian Supreme Court quashed a federal government's health and public safety policy decision. The Indian Supreme Court quashed a telecommunications policy decision. It might seem that by making policy, these two courts abandoned the sort of reason that is the concern of courts and therefore, in a sense, acted arbitrarily.

It would be a mistake to reserve policy making to politicians exclusively. A governmental policy of shooting suspected drug traffickers on sight would be contrary to the Canadian Charter of Rights and Freedoms. It would not be a good policy that is impermissible because it infringes the Charter; it would be a *bad policy*, for reasons that are articulated by section 7 of the Charter. Those reasons are the very reasons why an executive or legislative policy maker ought not to adopt the policy. There is no way to define 'policy', so as to use the term as an analytical device to delimit the appropriate role of an institution such as a court. The judges have no general responsibility for policy, but they do have responsibility to give effect to the law's constraints on policy formation and implementation. And the judges have responsibility for developing those elements of the law.

Both the Canadian and Indian Supreme Courts are aware that not all questions of policy are for them to decide, but that it is their job to decide whether a policy is lawful:

27. For a defence of this claim, see Timothy Endicott, 'Adjudication and the Law' (2007) 27 Oxford J Legal Stud 311.

There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*. . . . The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with *Charter*.²⁸

There cannot be any quarrel with the proposition that the Court cannot substitute its opinion for the one formed by the experts in the particular field and due respect should be given to the wisdom of those who are entrusted with the task of framing the policies. . . . However, when it is clearly demonstrated that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded.²⁹

I think, with respect, that these explanations of the Courts' role are entirely sound. The fact that a decision is a policy decision does not mean that judges, on review, should not quash it when it is unlawful. On the other hand, the fact that another policy would be better does not mean that the judges have any ground for quashing it on review.

But this sound and fairly simple explanation of the Courts' role rather points out the tension between that role, and the role of the authorities that are responsible in the first instance for the policies in question. In both cases, the law (i.e., the law made by judges in their interpretation of the respective constitutional rights) requires judges to quash arbitrary policy decisions. If they quash policy decisions on the ground that another policy decision would have been better, their countries may or may not get better policy making as a result. But there is no gain to be made in adherence to the rule of law.

The 2G Spectrum case involved apparent irregularities in the process by which the 'first come, first served' allocation was organised and publicised. The Supreme Court suggested that the process was corrupt. The judges said that 'first come, first served' allocations of natural resources 'are likely to be misused by unscrupulous people'.³⁰ And it was not a merely hypothetical danger; the judges say that the Minister of Communications 'wanted to favour some companies at the cost of the Public Exchequer'.³¹ They concluded by asserting (without particulars) that a 'scarce natural resource . . . has been grabbed by those who enjoy money power and who have been able to manipulate the system'.³²

If the Indian Supreme Court had held merely that the allocation was arbitrary because it was corrupt, that would have given a content to the doctrine of arbitrariness that would promote the rule of law. If a public decision was made for

28. *Insite*, *supra* note 5 at para 105.

29. *2G Spectrum*, *supra* note 3 at para 79.

30. *Ibid* at para 76.

31. *Ibid* at para 77.

32. *Ibid* at para 80.

the personal gain of an official, and not for the relevant public purposes, then it was indeed a decision that lacked reason.³³ Selling a public resource to secure a bribe is arbitrary in the sense of arbitrariness that is relevant to the rule of law. If judges can craft and apply a rule against it, and if it can be shown in a judicial process that an allocation of resources was corrupt, then the judges have the opportunity to stand up for government by law, and not by caprice.³⁴

But the judges based their decision—bribery aside—on the proposition that an auction would have been better than a ‘first come, first served’ allocation; the judgment presents that conclusion as sufficient ground for holding that the allocation had been unlawful. The government’s policy against holding an auction was not invented by the allegedly corrupt Minister, it was recommended by the Telecom Regulatory Authority of India. The judges rejected the Authority’s view, and held that ‘the doctrine of equality ... demands that the people ... are adequately compensated for the transfer of the resource to the private domain’³⁵ and that an auction would best meet that demand.

The guarantee of equality in the Indian Constitution was a central element in Ambedkar’s prodigiously ambitious plan—backed by Nehru and the whole leadership in the founding of the nation—to engineer a social revolution while putting together a vast, complex new polity that was fragmenting even as the Constituent Assembly set about its work, and that could barely aspire to stay in one piece. In that remarkable social revolution, it is impossible to see a justification for the proposition that there should be a judicial power to decide whether an auction of mobile spectrum would be better for the nation, than a low-cost distribution designed to stimulate investment. The Indian public can be confident that rule by judges on matters of corruption is calculated to promote the rule of law. But they cannot be confident that rule by judges on the question of how best to allocate mobile phone spectrum is either less arbitrary or more likely to promote the public interest, than rule by politicians and regulators.

What about the *Insite* case? Was the Canadian government’s action arbitrary? The Supreme Court concluded, based on the findings of the trial judge, that there was no reason to expect any discernible reduction in drug use in the Downtown Eastside of Vancouver, through the application of a blanket ban on narcotics. The Court also concluded that *Insite* saves lives. So exempting *Insite* from the application of the possession prohibition does not undermine the objectives of

33. Securing a bribe is, you might be tempted to say, a reason for action, but it is a reason that the law ought to treat as no reason at all.

34. Even then, such a rule would be a novel creation out of a guarantee of equality in the Constitution. The guarantee in Article 14 that ‘the State shall not deny to any person equality before the law...’ does obviously entail a rule that the State should not draw certain sorts of arbitrary distinction between people (in an appropriate sense of arbitrariness). But the Court seems to have extended this rule into a general prohibition on arbitrariness, detached from equality between persons. The Court has crafted a rule that even if no person’s equality is denied, it is unlawful for natural resources to be allocated in a way that is corrupt. You might say that the doctrine does arise from Article 14, because a public official who sells a public good for private profit is denying everyone else’s equality with himself or herself. But then Article 14 would become a source for any conceivable rule prohibiting wrongdoing that affects the public; and that would treat it as an unruly authorisation for judicial law making.

35. *Ibid* at para 69.

health and public safety; the exemption *further*s those objectives. Withdrawing the exemption, therefore, is contrary to the purposes that the government ought to be pursuing. The Court concluded that it was arbitrary, and therefore contrary to the principles of fundamental justice, for the government to act on an incorrect conclusion as to how to further health and public safety.

It is, of course, conceivable that the government was acting on some whim or in the pursuit of some ideological agenda that had nothing to do with health and public safety, so that its decision was arbitrary in the sense that it was taken in disregard to the purpose of the narcotics control legislation, rather than in the government's judgment as to what would further that purpose. Perhaps the judges of the Supreme Court thought that this is what was happening: that instead of reasoning that a restoration of the blanket ban would further health and public safety, the government was merely ignoring that issue in its policy decision. McLachlin CJ comments that the trial judge's findings were consistent with information available to the Minister—the same information on which 'successive federal Ministers' had granted exemption orders for Insite over almost five years.³⁶ Perhaps the Justices felt that the federal government had not been attending to the facts at all.

But what they held was that the facts found by the trial judge supported the conclusion that it would be better for health and public safety to keep the exemption in place. The decision presents that conclusion as sufficient ground for holding that withdrawing the exemption had been unlawful. That makes the judges the arbiters of health and public safety.

It follows that in its review of the government's policy on health and public safety the Supreme Court of Canada ought to be prepared to ask whether a decision is based on the best policy. If a different decision would be better for the purposes of public health and safety, then other things being equal,³⁷ the Court should order the authority to take a different decision (because that different choice would further health and public safety). The doctrine of arbitrariness in section 7 has become a doctrine that the principles of fundamental justice require public authorities other than courts to reach the right conclusion on questions of public health and public safety. And then the justiciability of section 7 gives the judges the responsibility of reviewing the correctness of those conclusions.

This approach does not promote the rule of law; it needs some other rationale. It makes for good governance, you may say, if and only if the judges are better than the federal government at making a decision such as whether keeping the Insite clinic open is a better way of pursuing the purposes of the narcotics control legislation. A doctrine of correctness on conclusions of fact and assessments of policy options in narcotics control does not enhance 'the power of laws over expectation', as Bentham put it. It does not enhance the rule of law.

Bentham would say that it detracts from the rule of law. And you can see his point, when judges reinterpret guarantees to equality or to the principles of fundamental justice, so as to give themselves power to decide what

36. *Insite*, *supra* note 5 at para 131.

37. See *supra* note 9.

telecommunications policy or what health and public safety policy would be best. This judicial law making changed the Indian and Canadian Constitutions, so as to reallocate power to the judges from their parliaments, and from their governments. Yet even so, it seems to me, the doctrines do not necessarily lead to arbitrary rule by judges. The reallocation of power to judges in the 2G Spectrum case and in the *Insite* case do not mean allocation of power to a body that will abandon reason; all the judges in both cases did, after all, attend to reasons in favour of or against the policy choices they made. It would be hasty to conclude (as Bentham presumably would) that these cases lead to arbitrary judicial decision making, even though the judges ought not to have interpreted their constitutions to give them the powers that they took upon themselves. Whether the judges' decisions can be distinguished from unreasoned acts of will depends on the constraints under which the judges, in turn, operate. And there are constraints, even in India and Canada.

The limits of the judicial role

The Supreme Court of Canada is not managing the country's hospitals. The Supreme Court of India, even though its remedial orders can be as creative as its constitutional interpretations, is not managing the Indian mobile phone industry. The two Courts have adopted doctrines of arbitrariness that authorise them to assess telecommunications policy and health policy, and to impose those assessments on their governments. But that role has limits.

First, the two institutions still operate as courts. This means that they respond to claims brought by litigants. It is not hard for litigants to invoke their jurisdiction; there are generous rules of standing in both systems and the Indian Supreme Court in particular has become a very active forum for public interest litigation (as in the 2G Spectrum case). But the structure of litigation places a limit on the courts' role in governance, because the judges only hear challenges to the constitutionality of laws, or of government decisions. Claimants cannot ask the Indian judges to allocate mobile phone spectrum, but only to pass judgment on the lawfulness of the government's allocation. You might be tempted to say that judges make telecommunications policy in India and judges make health policy in Canada. But that would be misleading: the judges do not set the policy agenda. They hold that a policy is unlawful, if it is in their view the wrong policy. Even in Canada and India, the courts do not make policy; they only strike down policies of which they disapprove. And in Canada at least, the court's power to impose the best policy on government depends on an assertion of right by a person; the Court's role in regulating health and public safety policy is only available in respect of decisions affecting interests protected by Charter rights (such as life, liberty or security). Even in India, where the Court's role under Article 14 has been expanded beyond any assertion of right by any person, the 2G Spectrum doctrine is restricted to allocations of natural resources; it is not a doctrine that all government decisions must accord with the judges' view as to what is to be done.

Secondly, these creative doctrines of judicial governance in the two Courts depend on the ability of judges to find the facts on which good decisions must be based and to decide the relevant policy questions. Judges act in an artificial decision-making framework; what they have to go on is what the parties (including intervenors) and their lawyers give them. The Courts do not have the resources that the government has. As a result, the doctrines are consistent with (in fact, they necessitate) some significant forms of deference to other public authorities on those questions. No judicial deference was shown in the *Insite* case and the 2G case, you might well say. Yet the reasoning in those cases leaves scope for judicial deference to the government: the doctrine of arbitrariness in the 2G Spectrum case only applies ‘when it is clearly demonstrated that the policy ... is contrary to public interest’.³⁸ So at least in principle, it is not enough to ask the judges to make a different policy decision; the judges have to hold that the impugned decision was demonstrably contrary to the public interest. If the necessary facts cannot be established in a judicial proceeding or if the necessary assessments of the public good cannot be made by the court, then a challenge to a public decision ought to fail. For other public officials, it is often simply necessary to make policy decisions (the Canadian government had to decide either to continue the exemption for *Insite* or not); judges, in their reviewing role, can decline to interfere with the decision under review, when grounds for doing so are not established in court.

Thirdly, we should remember that in Canada and India, the development of the common law means that the doctrines of arbitrariness are in flux, and subject to adjustment, and the role of the judges may be moderated by the Courts’ decisions in future. In fact, this has already happened in respect of the 2G Spectrum case. The Indian government brought a reference to the Supreme Court to ask for clarification of the implications of the decision.³⁹ In the reference, the Court insisted that the legal effect of the decision in the 2G Spectrum case was not in issue. But the Court did what common lawyers know as confining a case to its facts: they insisted that the decision depended on the whole pattern of that particular resource allocation as the government had engaged in it, and did not establish general rules in the terms that the Court had used in giving its reasons for decision. There is ‘no constitutional mandate in favour of auction under Article 14’.⁴⁰ ‘Article 14 does not pre-define any economic policy as a constitutional mandate’,⁴¹ and the Court held that the potential susceptibility of other techniques of resource allocation to abuse does not make them unconstitutional.⁴² The reference marks a striking retrenchment on the issue of deference to a public authority’s judgments as to the economic logic of an allocation technique.

And in Canada, the arbitrariness doctrine is unsettled. Its furthest frontier may be the decision in *Chaoulli v Quebec* [2005] SCC 35, [2005] 1 SCR 791, in

38. *Supra* note 29.

39. Supreme Court of India, Special Reference No.1 of 2012, opinion handed down on 27 September 2012.

40. *Ibid*, para 129.

41. *Ibid*, para 120.

42. *Ibid*, para 135.

which the Supreme Court struck down legislation in Quebec that prohibited private health care insurance, in order to support a single-tier public health care system. Six of seven justices adhered to the established doctrine that a limit on life, liberty or security of the person is contrary to the principles of fundamental justice if ‘it bears no relation to, or is inconsistent with, the objective that lies behind the legislation’.⁴³ The notion that such a limit is arbitrary where a policy is inconsistent with the relevant objective lies behind the approach in the *Insite* case. In *Chaoulli*, three of the seven justices dissented vigorously, arguing that the Court should not hold that the rule against private insurance was inconsistent with the relevant purposes, because that would require the Court to resolve the complex policy debate, which ‘does not fit easily within the institutional competence or procedures of courts of law’.⁴⁴ The seventh of the justices decided against the Quebec government on grounds other than the Charter, so the tension over policy making and section 7 of the Charter is partly unresolved.⁴⁵ The judges will have the opportunity in future, if they so choose, to moderate the notion that it is for them to decide whether the government could have adopted a better health and public safety policy.

Finally, there are evidently intangible limits on the Courts’ willingness to follow through on the doctrine that a decision contrary to good policy is arbitrary. In the *Insite* case, McLachlin CJ said that the issue was ‘not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use’,⁴⁶ but whether section 7 had been violated; of course, the Court went on to hold that section 7 had been violated *because* harm reduction was in that context the best way to deal with drug use. But the Court was careful not to adopt a general rule that it will order the government to take the decisions that best promote health and public safety:

The conclusion that the Minister has not exercised his discretion in accordance with the *Charter* in this case, is not a licence for injection drug users to possess drugs wherever and whenever they wish. Nor is it an invitation for anyone who so chooses to open a facility for drug use under the banner of a “safe injection facility”. The result in this case rests on the trial judge’s conclusions that *Insite* is effective in reducing the risk of death and disease and has had no negative impact on the legitimate criminal law objectives of the federal government.⁴⁷

What if a trial judge in a future case finds that (1) safe injection clinics are generally effective in reducing the risk of death and disease, and (2) the government could approve or establish similar clinics across Canada with no negative impact

43. *Chaoulli v Quebec* [2005] SCC 35, [2005] 1 SCR 791 at paras 130, 231-33, citing *Rodriguez v British Columbia* [1993] 3 SCR 519 at 594-95.

44. *Chaoulli*, *ibid* at para 164.

45. As noted by the Court in the *Insite* case at para 132, although in the *Insite* case, the unanimous Court held that the government’s decision should be struck down on either of the two views expressed in *Chaoulli*. For an account of *Chaoulli* and of the unsettled state of the arbitrariness doctrine, see Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 249-52.

46. *Insite*, *supra* note 5 at para 105.

47. *Ibid* at para 140.

on the government's other legitimate objectives, and without disproportionate cost? Then the Court's reasoning in the *Insite* decision would support the proposition that the Court should require that the government approve or establish similar clinics across Canada. Yet the Court is evidently not going to rush into that.

Political culture undoubtedly imposes significant limits on the Courts' role. When judges' constitutional interpretations give them the sort of role that would horrify Jeremy Bentham, they incur a need not to horrify their own community too much. The limits of the judicial role will, as a result, depend on the political culture of the community. And in a country like India, where disenchantment with political institutions is wide and deep, political culture will not impose the same limits on the courts' role that might be taken for granted elsewhere.

Even in such a situation, there ought to be limits. If executive and legislative institutions are not carrying out their responsibilities, it does not follow that judges can solve the problem, or that they ought to try to solve it.

Conclusion

A country is not ruled by law when it is ruled by the arbitrary caprice—by the sweet will and whims—of executive or legislative or judicial officials. An arbitrary decision in general is one that is not distinguished, by reasons in favour of it, from an unreasoned choice. In the special sense in which arbitrariness is a departure from the rule of law, a decision is arbitrary whenever the law itself ought to demand a justification other than the fact that the decision maker made it, and there is no such justification.⁴⁸

The law does not generally require executive officials to have any justification for adhering to a judicial order other than the fact that the court made it. It is a valuable feature of political culture in India and in Canada that it was taken for granted that their governments would go along with the judgments in the 2G Spectrum case and the *Insite* case. The *Insite* clinic celebrated its tenth anniversary in 2013. And in the very fact that the Indian government brought a reference to clarify the 2G Spectrum case, we can see the government's presupposition that judicial orders are to be complied with. Executive officials cannot come closer to the ideal of the rule of law by demanding a justification for a judicial decision other than the fact that it was the decision of the court.

But it may be right—and a vindication of the rule of law—for judges to quash an executive decision on the ground of arbitrariness. We have seen that any doctrine to that effect will give judges an open-ended role in governance. As the *Insite* and 2G cases show, there is a standing tension between an interpreter's exercise of his or her freedom and the ideal of the rule of law. In the resolution that I have offered to the Benthamite problem of arbitrariness, perhaps the central point is that we do not need to eliminate this tension in order for a community to be ruled by law. The rule of law and the interpretive role of judges, even in

48. See Timothy Endicott, *Administrative Law*, 2d ed (Oxford: Oxford University Press, 2011) at 7-9.

Canada and India, are not irreconcilable. This is only a tension, not a contradiction. But the judges need to work on the reconciliation.

We should not exaggerate or understate the significance of the tension; there are so many ongoing, imperfectly resolved tensions in any scheme of governance according to law, between change and stability, between general rules and equity, between certainty and flexibility (not to mention all the substantive tensions, as they might be called, among the interests of persons). Here is one striking feature of the tension between the role of judges and the rule of law: as long as executive officials hold on to their presupposition that judgments are to be complied with, it is the judges, who have a stake in the game, who decide its outcome. That is why it is useful for the rule of law that they should be painfully aware of the tension.