FROM SUBSTANTIVE DUE PROCESS TO SUBSTANTIVE PRINCIPLES OF FUNDAMENTAL JUSTICE

by

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ABSTRACT

In April 1982, Canada entrenched in its constitution a Charter of Rights and Freedoms. Section 7 of this new document provides that "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". The Canadian Bill of Rights (1960), and the British and American constitutions, safeguarded those fundamental rights through the phrase "due process of law" instead of "principles of fundamental justice".

The phrase "due process of law" has often been analysed in terms of the dichotomy between "substantive due process" and "procedural due process". There is evidence that the drafters of the Charter rejected the phrase "due process" to avoid any introduction in Canada of the American concept of substantive due process. In their minds, "principles of fundamental justice" protect what is called "procedural due process".

The purpose of this thesis is to suggest an interpretation of the phrase "principles of fundamental justice" which fits into our Anglo-Canadian tradition of constitutional law. This interpretation has nothing to do with the American interpretation of "due process of law". The approach that I suggest should lead to the abandonment of the traditional dichotomy borrowed from the United States between

"procedural due process" and "substantive due process". It does not mean that section 7 of the Charter will never give the same result as the American jurisprudence, but the reasoning to reach such a result will be in accordance with our Canadian constitutional tradition.

I conclude that the British and the Canadian courts have been reluctant to adopt "substantive due process" because of the doctrine of supremacy of Parliament. I then examine in detail the evolution of "substantive due process" in the United States and show that the American interpretation arose out of a constitutional tradition different from that of Canada. I argue that it was unlikely that Canada could have imported the American interpretation of "substantive due process" without doing violence to its own constitutional tradition. I then suggest an interpretation of the phrase "principles of fundamental justice" which conforms to Canadian constitutional tradition. I argue that those principles of justice exist at common law and were already protected through the fiction of several "presumptions" created from time to time by the courts to interpret statutes.

Those principles of justice encompass both procedural and substantive matters, but the proposed approach makes that distinction irrelevant. The only relevant question in regard to section 7 is whether a "principle of fundamental justice" arising out of the Anglo-Canadian legal system is at stake in a given case.

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INTRODUCTION

In April 1982 Canada entrenched in its constitution the Charter of Rights and Freedoms[1]. Henceforth any governmental and legislative act which infringes any right or freedom recognized in the Charter must be declared of no force and effect[2]. Section 7 of this charter provides that:

> 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.

This section reminds one of the American constitution which provides that no one shall be deprived of his right to life, liberty or property "without due process of law"[3]. It also calls to mind section 1(a) of the Canadian Bill of Rights (1960)[4] which provides that:

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1. Constitution Act, 1982, as enacted by the Canada Act, 1982, c. 11 (U.K.), proclaimed in force April 17, 1982. It will be called the Charter or the Charter of Rights.

2. Section 52 provides that: "The Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect".

3. U.S. Const. amend. V, # 1: "No person shall be...deprived of life, liberty, or property, without due process of law..." And U.S. Const. amend. XIV, # 1: "Nor shall any State deprive any person of life, liberty, or property, without due process of law..."

4. R.S.C. 1970, Appendix 111. It will be called the Canadian Bill of Rights.

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

Therefore many authors and many courts have already referred to those due process clauses to interpret section 7 of the Charter of Rights and Freedoms[5]. The main question in regard to this section seems to be whether the phrase "principles of fundamental justice" is limited to the so-called "procedural due process" or whether it can be seen broadly in order to give effect to the so-called "substantive due process"[6]. This thesis will discuss the rationale underlying the interpretation of section 7 of the charter in "due process of law" language giving rise to the traditional dichotomy between "procedure" and "substance".

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5. See the recent decision, in the matter of the Constitutional Question Act, R.S.B.C., 1979, c. 63, and in the matter of the Reference Re Section 94 (2) of the Motor Vehicle Act, R.S.B.C., 1979, c. 288, as amended by the Motor Vehicle Amendment Act, 1982, S.B.C., 1982, c. 36, Feb. 3, 1983, Vancouver, Ca 821013, unreported (B.C.C.A.). It will be called The Motor Vehicle Act Reference. Hogg, Canada Act 1982 Annotated, Toronto: Carswell, 1982, at 26; Garant, "Fundamental Freedoms and Natural Justice", in Tarnopolsky, Beaudoin, The Canadian Charter of Rights and Freedoms, Commentary, Toronto: Carswell, 1982, 257, at 275; McDonald, Legal Rights in The Canadian Charter of Rights and Freedoms, Toronto: Carswell, 1982, at 23.

6. See e.g. The Motor Vehicle Act Reference; Westendorp v. The Queen, January 25, 1983, S.C.C.; R. v. A.N., January 13, 1982, Terr. C. Yukon; Q. v. D.A.C., November 5, 1982, Prov. Ct. Fam. Div. Man.

Though the parallel with the due process clauses is relevant in the interpretation and the scope of the words "life", "liberty" or "security", nothing in section 7 indicates that the phrase "principles of fundamental justice" must be interpreted in the light of the phrase "due process of law"as understood in American jurisprudence. If there is a parallel, it should exist by interpretation[7].

It is true that in one sense the phrase "principles of fundamental justice" follows the tradition established by "due process of law" and by "the law of the land"[8]. The origin of this tradition is found in the Magna Carta[9]. That Charter, which was signed by King John in 1215 was a treaty which recognized several feudal rights of the barons of Runnymede[10]. Section 39 of the Magna Carta provided that:

> No freeman shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him except by the lawful judgment of his peers or by the law of the land[11].

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7. I believe there has been no serious attempt to compare the meaning of those two sentences.

8. See Cohen in Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, First session of the thirty-second Parliament, 1980-81, p. 7:89 (November 18, 1980).

9. Stephenson and Marcham, Sources of English Constitutional History, New York: Harper & Row, 1972, at 115.

10. See McKechnie, Magna Carta, Glasgow: J. Maclehose and Sons, 1914.

11. Stephenson and Marcham, Sources of English Constitutional History, New York: Harper & Row, 1972, at 121.

This document has been reissued more than thirty times. Generally the authors refer to the reissue of 1225[12].

It is difficult to know what the barons understood by the phrase "the law of the land" (per legem terrae) in section 39. However the interpretation given to this phrase by several historians appears to be that it included not only the procedures of the time but also the common law (such as the good laws of Edward: the custom of the realm and the feudal law)[13]. Thus "the laws of the land" would have included not only procedural laws but also substantive laws.

By the early 14th century, the phrase "due process of law" appeared in French — process de ley — in a British legal document[14]. In 1354 it appeared in English for the first time in one of the reissues of the Magna Carta[15] in place of the phrase "per legem terrae". By the end of the 14th century, this due process clause was already understood as a safeguard against arbitrary acts of government. In the 17th century the Magna Carta was rediscovered. The phrase "the law of the land" was

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12. E.g. Coke, Inst., Vol. II, at 45, in the reissue of 1225, the phrase "law of the land" passed from s. 39 to s. 29.

13. McIlwain, "Due Process of Law in Magna Carta" 14 Col. L. Rev. 27 (1914). See also Gray, The History of the Common Law of England (Published posthumously, 1713), Chicago: University of Chicago Press, 1971, at 36.

14. See Miller, "The Forest of Due Process of Law", in Pennock and Chapman, Due Process, New York: New York University Press, 1971, at 5.

15. 28 Edw. III, c. 3. See Baker, An Introduction to English Legal History, London: Butterworths, 1971, at 83.

interpreted broadly as a guarantee that the British subjects had the right to liberty. In his Second Part of the Institutes of the Law of England, Coke assimilated into "the law of the land" the "common law, statute law or custom of England"[16]. He said that the "true sense and exposition of those words" are "without due process of law"[17]. In general[18] the authors agree that the phrase "due process of law" was interpreted as synonymous with the phrase "the law of the land"[19]. Any detention should not be arbitrary of unlawful and the British subjects were protected against monopoly[20]. Therefore, it seems that Coke interpreted the phrases "due process of law" and "law of the land" as a safeguard not only of proper procedure but also of substantive law. I will briefly discuss the substantive application of "due process of law" to the content of the law in England in the second chapter. We will see that this conception of judicial review ended when the courts conceded the principle that Parliament was supreme. Consequently this new principle was a break in the British tradition in regard to the phrase "due process of law".

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16. Coke, Inst., Vol. II, at 46.

17. Ibid.

18. Mott, Due Process of Law, New York: Da Capo Press, 1973, at 5.

19. Coke, Inst., Vol. II, at 50.

20. Id., at 47. "Generally all monopolies are against the Great Charter, because they are against the liberty and freedom of the subject."

In the 17th century in America several colonies began to entrench in their constitutional documents the idea of "due process of law"[21]. The first independant state, Virginia, adopted in June 1776 the first Bill of Rights. Section 8 provided that "no man be deprived of his liberty, except by the law of the land or the judgment of his peers"[22]. The federal constitution of the United States in 1787 did not contain any Bill of Rights. It created a government limited both in theory and in practice[23]. However, by the spring 1789 James Madison proposed an amendment to the American constitution which became the Fifth amendment in 1791. His proposal provided that

> No person shall be ... deprived of life, liberty or property, without due process of law.

Historians agree that the draftsmen of this Fifth amendment intended to protect and guarantee fair procedure[24]. However as we will see in the third chapter, the interpretation of this due process clause has imposed several substantive as well as procedural restrictions on the content of the law.

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21. See Hazeltine, "The Influence of Magna Carta on American Constitutional Development" 17 Col. L. Rev. 1 (1917).

22. This section which applies only to "liberty" was adopted later by Vermont (July, 1777) and Pensylvania (September, 1776). Massachussets (March, 1780), guaranteed also the right to life and property. See Mott, Due Process of Law, New York: De Capo Press, 1973, at 15.

23. We will come back more specifically on this question in the third chapter.

24. See Story, Commentaries on the Constitution of the United States, Boston: Hilliard, Gray and Company, 1833, # 1783.

The Fifth amendment applied only to the congress, not to the states[25]. The Americans adopted in 1868 the Fourteenth amendment which would require the states to respect "due process of law".

In 1960, the federal government of Canada adopted the Canadian Bill of Rights. Like the fifth and the Fourteenth amendments of the American constitution, section 1(a) of the Canadian Bill of Rights guaranteed that any federal statute shall be construed and applied so as to give effect to "due process of law". The Canadian interpretation of this phrase as we will see in the fourth chapter, seems to have restricted its scope to procedural matters[26]. But it appears that the idea of "substantive due process" has never been entirely rejected[27].

We will see in the fifth chapter that the drafters of the charter of rights prefered the phrase "principles of fundamental justice" in order to prevent the importation in Canada of the substantive side of "due process of law" also called "substantive due process". They wanted to secure what is rather called "procedural due process". Consequently, if their intention were recognized by the courts, henceforth all governmental conduct — particularly legislation — which would affect the right

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25. See Barron v. Baltimore, 7 Pet. 243 (U.S. 1833).

26. See Curr v. The Queen (1972), S.C.R. 889, at 898. However, as we will see in the fourth chapter, it is likely that since this case was decided the courts have interpreted the phrase "due process of law" as meaning "according to law". See e.g. Miller and Cockriell v. The Queen (1977) 2 R.C.S. 680.

27. See Curr v. The Queen, id., at 899.

to life, liberty and security first would have to be classified as a procedural or substantive act. Many times this distinction will be thin[28].

The purpose of this thesis is to suggest an interpretation of the phrase "principles of fundamental justice" which fits into our Anglo-Canadian tradition of constitutional law. This interpretation should lead to the abandonment of the traditional dichotomy borrowed from the American experience with "due process of law" between "procedural" and "substantive". Nothing in the phrase "principles of fundamental justice" implies that it should be limited to matters of procedure only as the words "process" in "due process of law" could have suggested. I will also show that nothing in the phrase "principles of fundamental justice" in itself suggests that it means "due process of law" as interpreted by the United States, England or Canada. Consequently any attempt to interpret section 7 of the Charter in terms of "due process of law" must necessarily fail. I will argue in chapter six that the concept of "substantive due process" which has been created in the United States where their own constitutional tradition allowed it, is a concept which cannot fit in our Canadian constitutional tradition without doing violence to it.

Consequently, I will suggest in a last chapter that those principles of fundamental justice" existed in the common law and that before the enactment of the charter they were generally protected through several

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28. See Hogg, Canada Act 1982, Annotated, Toronto: Carswell, 1982, at 27.

presumptions used in the interpretation of statutes. These presumptions protect principles which could be classified as either substantive or procedural. I will examine a principle of justice which is "substantive" and I will show that it is encompassed by the phrase "principles of fundamental justice". Therefore I will prove that this phrase contains both substantive and procedural principles and that this dichotomy does not resolve anything. Under the approach suggested in this thesis the relevant question will become whether a principle of fundamental justice recognized in the history of the common law has been violated by a governmental act which leads to the deprivation of an individual right to life, liberty or security. Consequently I will suggest abandoning the dichotomy.

While I will examine the distinction between "procedural due process" and "substantive due process", in the first chapter, in order to show what the interpretation of "due process of law" means, I will not examine in detail the procedural requirements incorporated into the term "principles of fundamental justice". This thesis will mainly deal with the concept of "substantive due process" because I want to show that the phrase "principles of fundamental justice" also allows the courts to control the substantive content of the law but through a reasoning which is in accordance with the Anglo-Canadian tradition.

CHAPTER I

DUE PROCESS OF LAW AND THE CONTENT OF GOVERNMENTAL ACTS

The interpretation of the phrase "due process of law" has created two important concepts: "substantive due process" and "procedural due process". Unfortunately they have never been clearly defined in Canadian jurisprudence or doctrine. Though it appears obvious that the first concept deals with substance and the second with procedure, it is not clear at all how they are guaranteed and protected by the phrase "due process of law". One is tempted to think that the dichotomy exists in relation to the governmental act controlled (executive or legislative). Consequently "substantive due process" would deal with the substantive law and "procedural due process" with the executive acts. Therefore the first concept would allow the courts to monitor the content of the legislative act (the law) and the second the acts of the executive. This understanding of the "due process of law" dichotomy reflects a confusion: "substantive due process" is seen as synonymous with the "content of the law", and "procedural due process" as synonymous with "according to law" in the British sense. The goal of this first chapter is to make it clear that the power of the courts to review the law is an independant question from the one which defines the content of the same law (which can be either "procedural" or "substantive").

Recently, the Court of Appeal of British Columbia gave an example of this confusion in the Motor Vehicle Act Reference. In this case, what was at stake was the right of a morally innocent person not to be deprived of his liberty. The amended Motor Vehicle Act[29] created an "absolute liability" offense for any person who drove a motor vehicle while he was prohibited from driving or while his driver's licence was suspended[30]. This type of offense was defined by Mr. Justice Dickson in the case of R. v. City of Sault Ste-Marie[31]:

> Absolute liability entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offense. There is no relevant mental element. It is no defense that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.

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29. This expression will refer to the Motor Vehicle Act, R.S.B.C. 1979, c. 288, as amended by the Motor Vehicle Amendment Act, S.B.C. 1982, c. 36.

30. Section 94 provided:
    94 (1) A person who drives a motor vehicle on a highway or industrial road while
    (a) he is prohibited from driving a motor vehicle under section 90, 91, 92 or 92.1, or
    (b) his driver's licence or his right to apply for or obtain a driver's licence is suspended under section 82 or 92 as it was before its repeal and replacement came into force pursuant to the Motor Vehicle Amendment Act, 1982 commits an offense and is liable.
    (c) on a first conviction, to a fine of not less than $300 and not more than $2,000 and to imprisonment for not less than 7 days and not more than 6 months, and...

    (2) Subsection (1) creates an absolute liability offense in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

31. (1978) 2 S.C.R. 1299.

Therefore guilt was established by the mere proof of driving. The defendant's knowledge or lack of knowledge of the prohibition or suspension was irrelevant. No defense of reasonable mistake of fact or of reasonable care was admissible. The penalty was a mandatory term of imprisonment for not less than seven days upon a first conviction.

One of the issues was whether the phrase "principles of fundamental justice" was limited to matters of procedure only[32]. The Court of Appeal, having considered the Canadian cases[33] concerning the interpretation given to the concept "substantive due process", held that:

> The meaning to be given to the phrase "principles of fundamental justice" is that it is not restricted to matters of procedure but extends to substantive law and that the courts are therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of legislation[34].

Therefore the Court of Appeal has assumed that the concept of "substantive due process" is synonymous with the content of the law itself. This confusion is even more obvious when the court deals with the argument of the Attorney General who pleaded that the phrase "principles of fundamental justice" of section 7 of the Charter should mean "principles of natural justice"[35]. The court rejected this argument, using section

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32. The Attorney General contended that s.7 should be equated with the principles of natural justice. The Motor Vehicle Act Reference, at 3 - 4.

33. E.g., Curr v. Q (1972) S.C.R. 889, Morgentaler v. Q. (1976) 1 S.C.R. 616.

34. The Motor Vehicle Act Reference, at 11.

35. Id., at 3 - 4.

52 of the Charter which declares that any law inconsistent with the Charter must be declared of no force and effect:

> Upon this view of the matter the effect of s. 7 is to enshrine in the Constitution the principles of natural justice. That is certainly one view of the matter. It does not, however, give any effect to s. 52 of the Constitution Act which can be viewed as effecting a fundamental change in the role of the courts. The Bill of Rights allowed the courts to test the content of federal legislation, but because the Bill was merely a statute, its effectiveness was hampered by the equally persuasive "presumption of validity" of federal legislation. The Constitution Act, in our opinion, has added a new dimension to the role of the courts; the courts have been given constitutional jurisdiction to look at not only the vires of the legislation and whether the procedural safeguards required by natural justice are present but to go further and consider the content of the legislation. In Curr v. The Queen, Laskin J. alluded to this consideration[36].

For the judges, thus, if the "principles of fundamental justice" guaranteed procedures only, such as the principles of natural justice, the courts could never review the content of the law. Therefore section 7 had to be substantive if the court asserted the power to review the content of the law.

This confusion is based on the interpretation given in England to the phrase "due process of law". It should be noted that we have to go back as far as Dicey to understand the British contemporary interpretation of that phrase because today there is no real attempt to define this expression[37].

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36. Id., at 4.

37. See Marshall; "Due Process in England"; in Pennock and Chapman, Due Process, New York: New York University Press, 1977, at 69.

Dicey wrote that "due process of law" — he wrote due course of law — meant that a person cannot be imprisonned except

> under some legal warrant on authority, and, what is of far more consequence, it is secured by the provision of adequate legal means for the enforcement of this principle[38].

Consequently, whoever interferes with the individual's right to liberty must act in accordance with the law. The right to liberty was defined as meaning

> In substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification[39].

In this sense we can say that "due process of law" in England requires that the executive act "according to law". The courts could never review legislative action because the only requirement of "due process of law" was precisely that there be authorizing legislation enacted by Parliament![40]

Before the entrenchement of the Charter of Rights in the constitution and before the Canadian Bill of Rights (1960), Canada shared with

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38. Dicey, Introduction to the Study of the Law of the Constitution (9th ed.), London: MacMillan, 1948, at 208.

39. Ibid.

40. Tarnopolsky said that "this means, then, that Parliament may pass any law, however unreasonable, to deprive an individual of his life, liberty or property. The only restriction or protection which the clause would provide is that an individual could not be deprived of these rights except by a pre-existing law." The Canadian Bill of Rights, McClelland and Stewart Ltd., 1975, at 223. The pre-existing law can deprive an individual of fundamental "procedural" standards such as habeas corpus or as fair hearing.

England this "narrow"[41] scope of "due process of law". For example in Curr v. The Queen[42] Mr. Justice Ritchie said in his dissent that the meaning to be given to "due process of law"

> is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that, in my opinion, the phrase "due process of law" as used in s. 1(a) is to be construed as meaning according to the legal processes recognized by Parliament and the courts in Canada[43].

It does not follow that the courts cannot monitor any governmental acts. The requirement that any executive act must be done "according to law" implies that the courts have a power to review these acts. It is a mere consequence of the fundamental constitutional principles of the "rule of law"[44] and of the "supremacy of Parliament"[45]. Parliament is free to "make or unmake any law whatever"[46] and no person or body is allowed in law to override the legislation of Parliament. The law is supreme and the rulers as well as the governed should be subject to it. Neither the

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41. Id., at 223.

42. (1972) S.C.R. 889.

43. Id., at 916. That definition was expressly rejected by the majority of the judges in this case because it would have meant that it was declaratory only. Id., at 897. However, it is likely that this "according to law-due process" later reached a majority of the judges. See Miller and Cockriell v. The Queen (1977) 2 S.C.R. 425.

44. Dicey, Introduction to the Study of the Law of the Constitution (9th ed.), London: MacMillan, 1948.

45. Ibid.

46. Id., at 40.

executive nor the judiciary can deny the force of law to any statute enacted by Parliament. Therefore judicial review of legislation in England is impossible because of its constitutional-law principles.

It would be wrong to extrapolate from what I have just said that the content of the law is necessarilly substantive and that the executive acts necessarilly deal with procedures only. In fact judicial review of any governmental act — legislative or executive — may always deal with substantive as well as procedural matters. In Sutt v. Sutt[47], Mr. Justice Schroeder tried to distinguish between the "substantive" and "procedural" matters. He said:

> It is vitally important to keep in mind the essential distinction between substantive and procedural law. Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated[48].

Indeed in general we can say that a review of the "substance" allows the courts to review the content of the law because it is generally through the law that the state creates rights and obligations and that a review of the "procedure" allows the courts to control the executive acts because it is generally the executive agents who deal

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47. (1969) 1 O.R. 169.

48. Id., at 175.

with the application of the law. However both legislative and executive acts can be substantive or procedural.

In the United States the review of the "substance" of a governmental act under "due process of law" is called "substantive due process" and the review of the "procedure" is called "procedural due process". It does not matter however whether a country such as England calls it otherwise. The question is whether or not the courts are allowed to look at the "substantive" governmental acts beyond its power to monitor the procedures.

"Substantive due process" guarantees that the individuals have right to a minimum of fairness in the "substantive" governmental acts which interfere with the fundamental protected rights (such as liberty). The courts called upon to control a governmental act under this concept look at the arbitrariness and unreasonableness of the substantive measure.

In the United States judicial review of a "substantive" measure is mainly illustrated in the control of the content of the law. The U.S. constitution provides that no person shall be deprived of life, liberty or property "without due process of law"[49]. In the case Griswold v. Connecticut[50] the court struck down a law which prohibited the use of contraceptives by both married and single persons because it

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49. See U.S. Const. amend. V and XIV.

50. 381 U.S. 479 (1965).

unnecessarily infringed their fundamental "right to privacy". This was not a procedural matter; the court looked at the "substantive" content of the law[51].

"Substantive" review of governmental acts are not limited to the review of the law. The court can review the substantive executive action. For example in the United States in O'Connor v. Donaldson[52], Donaldson was kept in custody in a State Hospital for mental patients. He received no treatment for his supposed illness. The hospital staff had the power to release a patient who was not dangerous to himself or others. Donaldson was not dangerous. The Supreme Court of the United States reversed the decision of the superintendent of the Hospital who had decided to keep the mental patient in custody. The Court held that a state (through its agents) has no right to lock a person up "against his will if he is dangerous to no one and can live safely in freedom".

Consequently the substantive content of the governmental action was reversed. The question was not whether the procedures were "fair" but whether the decision of the superintendent to keep the patient in the hospital was "fair" in the circumstances. Executive action, thus, as much as legislative action, may be defined within the "procedural" and "substantive" dichotomy.

We have seen that in England, the principle of the supremacy of Parliament prevents any review of the content of the law. On the other

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51. We will come back to this case in the third chapter.

52. 422 U.S. 563 (1975).

hand the rule of law allows the courts to control executive acts. Therefore, in Anglo-Canadian jurisprudence, we can find the court controlling "substantive" executive acts. A well known example is found in Canada before 1960 in Roncarelli v. Duplessis[53]. In that case the Alcoholic Liquor Act provided that "the (Quebec Liquor) commission may refuse to grant any permit". Premier Duplessis had ordered the cancellation of the restaurant keeper Roncarelli's liquor permit because he was a Jehovah witness. He pleaded that the commission had full discretion. Mr. Justice Rand refused to read absolute discretion within the act and said:

> To deny or revoke a permit because a citizen exercices an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred[54].

On the other hand "procedural due process" guarantees that the persons have the right to a minimum of fairness in the "procedural" content of the governmental acts which interfere with fundamental rights. When the courts control whether a governmental act is in accordance with the "procedural due process" standards they decide whether the procedures imposed by the law or adopted by the executive are or have been "fair". It is not true that "procedural due process" is limited to the review of the executive act.

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53. (1959) S.C.R. 121.

54. Id., at 140. Another example is found in the case Bell v. The Queen (1979) 2 S.C.R. 212, where a by-law restricting apartments to a single person or family was defined in such a way that people not married or not blood relatives could not occupy the apartments. The by-law was declared ultra vires because of its unreasonability. See also Kruze v. Johnson (1898) 2 Q.B. 91.

Under "procedural due process" in the United States the courts can review the content of the law. Consider the example of Fuentes v. Shevin[55]: the Supreme Court of the United States held as unconstitutional two state laws permitting conditional sales contracts which "simply provided that upon default the seller "may take back", "may retake" or "may repossess" merchandise. It was ruled that before a person could be deprived of his property, there must be notification and a hearing at a "meaningful time" and in a "meaningful manner". The judicial review in this case was related to the "procedural" content of the legislation: the right to a fair hearing.

Again it should be remembered that in England the courts cannot review the "procedural" content of the law because Parliament is supreme. However the rule of law requires that other governmental agencies act "according to law". In the context of "procedural due process" — or any concept which reflects this idea — the jurisprudence has shown clearly that the word law as used in the expression "according to law" refers to unwritten as well as written rules of procedures. This view has been illustrated in a House-of-Lords decision in Ong Ah Chean v. Public Prosecutor (P.C.)[56]. The Court had to interpret the phrase "according to law" in the Singapore constitution.

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued

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55. 407 U.S. 67 (1972).

56. (1981) A.C. 648.

> enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution[57].

Indeed the House had to interpret this phrase written in a constitutional document. Therefore the Parliament was also bound. But, insofar as the phrase "according to law" is not found in such a document, the other agents of the state (who could be expressly exempt from respecting the principles of natural justice by act of Parliament) are bound to respect the principles of natural justice unless Parliament expressly enacts such an exemption.

In short, the question whether the court can review the content of the law is completely different from the question whether it can review its substantive content. The first question must be answered in the light of the constitutional law of the country. In the United States the courts can review the content of the law — whether procedural or substantive — because of the constitution which binds both the legislatures and the government. In England however, the supremacy of Parliament prevents such control. The second question deals with the scope to be given to the protection itself (to either "due process of law" or

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57. Id., at 670. It should be noted that the constitutional status of the document requiring "according to law" allowed the court to control also the procedural content of the law. Id., at 671.

principles of fundamental justice). Does it include procedural safeguard only or does it guarantee minimal substantive standards also?

In 1960, Canada adopted the Canadian Bill of Rights. The constitutional status of this document had been established in R. v. Drybones[58]. The court held that section 2 of the Bill of Rights indicated that every federal law inconsistent with the Canadian Bill of Rights should be declared inoperative. It found

> the clearest indication that s. 2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative[59].

Consequently the Canadian Bill of Rights (1960) was more than a mere rule of interpretation. It had the effect of overriding inconsistent federal statutes. It sounds a bit like a constitution which allows the courts to monitor the content of the law. Drybones's case dealt with a question which is in essence a constitutional one. The second question deals with the content of the phrase "due process of law" in Canada. That point was discussed in Curr v. The Queen[60].

The appellant challenged sections 223 and 224(a-3) (now subsections 237(1)(a), (b) and (c)) of the Criminal Code which provided that

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58. (1970) S.C.R. 282.

59. Id., at 294.

60. (1972) S.C.R. 889.

the refusal or failure of an accused to submit to a breathalizer test may be admitted in evidence against him. The Court was asked to interpret the phrase "due process of law" in section 1(a) of the Canadian Bill of Rights (1960)[61] as going beyond the English antecedents and to view it in the same terms as those in which the United States had interpreted it[62]. Therefore the due process dichotomy discussed in Curr had to be understood in the light of the American interpretation. Mr. Justice Laskin, speaking for the majority, said that in this case,

> What it amounted to was an invitation to this Court to monitor the substantive content of legislation by reference to s. 1(a)[63].

That issue dealt with the "substantive due process" side of "due process of law". "Substantive content of legislation" must be seen as contrasting with "procedural content of legislation". Otherwise the expression is redundant.

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61. Section 1(a) of the Canadian Bill of Rights (1960) provides that

    1- It is hereby recognized and declared that in Canada there havec existed and shall continue to exist without discrimination...

    (a) The right of the individual to life, liberty, security of the person and the enjoyment of property, and the right not to be deprived thereof except by due process of law.

62. (1972) S.C.R. 889, at 897.

63. Ibid. Emphasis added. See also Morgantaler v. The Queen (1976) 1 S.C.R. 616, at 632-633. The Court of Appeal quoted that passage from Morgentaler in Motor Vehicle Act Reference. However, they seem to have confused the expression "substantive due process" with the "content of the legislation" itself.

Mr. Justice Laskin stated first that traditionally the phrase "due process of law" in England pointed to procedural considerations[64]. Therefore section 1(a) of the Canadian Bill of Rights (1960) would allow the courts to review the "procedural" content of the legislation (beyond its traditional power to review executive act). In Curr Mr. Justice Laskin said that:

> It is evident from s. 2 of the Canadian Bill of Rights that its specification of particular procedural restrictions is without limitation of any others that may have source in s. 1[65].

However, while s. 1(a) can safeguard procedures not included in s. 2, he said:

> I am unable to appreciate what more can be read in s. 1(a) from a procedural standpoint than is already comprehended by s. 2(e) ("a fair hearing in accordance with the principles of fundamental justice") and by s. 2(f) ("a fair and public hearing by an independent and impartial tribunal")[66].

The procedures make one think of the principles of "natural justice".

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64. It should be noted that Mr. Justice Laskin gave no authority to support this affirmation. On the contrary he quoted McIlwain in "Due Process of Law in Magna Carta", 14 Col. L. Rev. 27 (1914) who gave a broader interpretation to the phrase "due process of law" in England beyond its procedural content. However, this view of Mr. Justice Laskin is more understandable in the light of the fact that the British courts never refer to the phrase "due process of law" when they control the substantive content of a governmental act other than legislative.

65. (1972) S.C.R. 889, at 898.

66. Ibid.

The Court was, therefore, allowed to look at the content of the legislation in order to decide if its "procedural" content was consistent with the Bill of Rights (either s. 1(a), or 2(f)). Mr. Justice Laskin monitored the procedural content of s. 223(1) (now 235(1))[67]. He said:

> In so far as s. 223, and especially s. 223(1), may be regarded as a procedural aid to the enforcement of the substantive offense created by s. 222, I do not find it obnoxious to s. 1(a) of the Canadian Bill of Rights[68].

Thus, section 223 was operative because the Supreme Court did not find that the procedural content of the federal legislation offended the minimal standard safeguarded in s. 1(a) of the Bill of Rights. If it had found otherwise, I believe that s. 223 of the Criminal Code would have been declared inoperative. At the very least section 1(a) of the Canadian Bill of Rights (1960) would have entitled the courts to review the procedural content of the law. That principle was an application of the case R. v. Drybones[69].

Consider this example. Section 459.1 of the Criminal Code excludes proceedings in habeas corpus relating to "interim release or for

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67. S. 223(1) provided: "Where a peace officer on reasonable and probable grounds believes that a person is committing or at anytime within the preceding two hours has committed, an offense under section 222, he may, by demand made to that person, forthwith or as soon as practicable, require him to provide then or as soon t thereafter as is practicable a sample of his breath suitable to enable an analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such a sample to be taken."

68. (1972) S.C.R. 889, at 898.

69. (1970) S.C.R. 282.

the purpose of reviewing or varying any decision ... relating to interim release or detention". In Ex Parte Mitchell[70] the Court of Appeal of British Columbia held that this section of the Code was in direct conflict with section 2(c)(iii) of the Canadian Bill of Rights which provides that the Bill should not be construed or applied so as to deprive a person who is detained or arrested of a "remedy by way of habeas corpus". Consequently section 459.1 was declared inoperative[71]. This decision was a direct application of the ruling in Drybones[72] though the issue dealt with a matter of "procedure" (the writ of habeas corpus is a procedural device which allows the Court to inquire into the cause of a person's detention)[73]. Thus, it is impossible to maintain that under the Canadian Bill of Rights a procedural right safeguarded in section 1(a) gives no effect to the power recognized in Drybones to declare laws inoperative.

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70. (1975) 23 C.C.C. (2d) 473 (B.C.C.A.).

71. Before the Bill of Rights, such a clear intention of Parliament would have been held. See Shin Shim v. The King (1938) S.C.R. 378, 384.

72. Such a conclusion was a logical consequence of R. v. Drybones because it was expressly held that the Bill of Rights was more than a mere statute of interpretation. The court expressly referred to that case. See also Ex parte Clarke (No. 1); Ex parte White (1978), 41 C.C.C. (2d) 511 (Nfld.T.D.).

73. The habeas corpus is a mechanism of the judicial system to provide "an avenue to vindicate substantive rights". Decker, A Constitutional History of Habeas Corpus, London: Greenwood Press, 1980, at 3. The substantive right which is at stake is "liberty". The writ is a legal process to secure it. It is a "procedural" right. In a lecture given at the University of Manitoba, Chief Justice Laskin said, "It is no accident that the growth of liberty depended on procedural guarantees such as the writ of Habeas Corpus". (1972) 5 Man.L.J. 235, at 237.

In short, it is wrong to believe that the content of the law is synonymous with the "substantive" side of "due process of law" and that "procedural due process" would not allow the courts to control the content of the law. Every governmental act (executive or legislative) may sometimes be procedural and sometimes substantive. Therefore the phrase "due process of law" and any other phrase which secures procedures only can give effect to the power of the court to review the content of the legislation. This power will be determined by the constitutional status of the right and, whether or not a court can override legislation.

The same logic should apply to the Charter of Rights. The phrase "principles of fundamental justice" can deal with procedural matters only and still give effect to section 52 which allows the judicial review of the content of the legislation. Under the Charter section 52 plays a role similar to that which Drybones attributed to the opening words of s. 2 of the Canadian Bill of Rights[74]. It allows a judicial review of the content of the law. This content can be "procedural" or "substantive". The scope of the review of the "substantive" content or of the "procedural" content depends on the scope of the phrase "principles of fundamental justice" itself.

In the Motor Vehicle Act Reference, therefore, the decision was based upon a wrong premise. The judges had assumed that the creation of an offense by statute and the express declaration that it is included in the category "absolute liability" was not a question of procedure because

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74. See, supra, note 2.

if it was so, section 52 would receive no effect. We just saw that the phrase "principles of fundamental justice" or "due process of law" could have secured procedures only and still given effect to section 52 as far as the court could have reviewed the procedural content of the law.

The "due process of law" limitation (such as it is with section 7 of the Charter) asks for two independent questions: First the court must specify whom it limits. The answer to this question is given in relation to constitutional law. Secondly the court must define what is guaranteed by this phrase. What is its content? Procedural standards only or also several substantive standards?

I will later present an alternative justification for the result in the Motor Vehicle Act Reference which held that the phrase "principles of fundamental justice" is not limited to procedural matters but allows the Courts to look at the substantive content of the law.

CHAPTER II

JUDICIAL REVIEW OF THE SUBSTANTIVE CONTENT OF THE LAW IN ENGLAND

In our preceeding discussion about "according to law", we describe the actual understanding of "due process of law" in England. It is clear that this generally deals with procedural safeguards against the agents of the government other than Parliament.

However according to several legal historians, it is quite likely that, historically, the British courts controlled from time to time not merely the content of an act of parliament but its "substantive" content. When the doctrine of Supremacy of Parliament became established at common law, the court ended judicial review of the legislation. But this theory is not unanimously accepted[75]. Even when the court claimed the legitimacy of judicial review, it would appear that it was not generally accepted among the judges[76]. It is not the purpose of this chapter to favour this theory. However it is necessary to see briefly what the theory is in order to understand why Canada has been reluctant to adopt the concept of "substantive due process".

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75. See McKechnie, Magna Carta, Glasgow: J. Maclehose and Sons, 1914.

76. Baker, An Introduction to English Legal History, London: Butterworths, 1979, at 182.

a) Supremacy of the Common Law

The main argument in favour of this thesis is that before the Tudor and the Stuart reigns, there was no clear distinction between the different governmental powers — executive, legislative and judicial. Consequently the King's acts could be seen either as executive or legislative[77]. The personal orders of the Kings were considered as acts of Parliament[78]. Moreover, the Parliament itself was not regarded as a legislature: "Parliament must have been thought of first as a court rather than as a legislature"[79].

As long as the King and the courts were bound by the provision of the Magna Carta, it is likely that the acts of Parliament were also bound to respect this document. For instance it is clear that the court must act in accordance with Magna Carta. In 1297, in one of its thirty confirmations it was provided that:

> If any judgment is henceforth rendered contrary to the particulars of the Charters aforesaid by our justices, or by our other ministers before whom pleas are held contrary to the particulars of the Charters it shall be null and void[80].

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77. See Vinogradoff, "Magna Carta, chapter 39" in The Collected Papers of Paul Vinogradoff, Oxford: At The Clarendon Press, 1928.

78. See e.g. Statute of Proclamations (1539) 31 Hen. VIII, c. 8.where the proclamations made by The King "shall be obeyed, observed, and kept as though they were made by act of parliament".

79. McIlwain, The High Court of Parliament, New Haven: Yale University Press, 1910, at 110.

80. Stephenson and Marcham, Sources of English Constitutional History, New York: Harper & Row, 1972, at 164.

Therefore, the parliament was bound to this charter because it was the higher court of England. To conclude otherwise would be to forget the confusion between the different functions of government which existed in medieval time.

Moreover, Parliament itself had limited its power in a way which would suggest a constitutional or a quasi-constitutional document. In 1368, a law was enacted providing that any statutes passed contrary to Magna Carta must be void:

> It is assented and accorded that the great charter ... be holden and kept in all points; and if any statute be made to the contrary, that shall be holden for none[81].

Meanwhile a convention that the enactment of statues was a matter for parliament became more and more established[82].

Therefore, Parliament was bound to respect section 39 of Magna Carta. This charter was regarded as a fundamental law though it is unlikely that the lawyers yet talked of "constitution".

But by the time of the Tudors and the Stuarts, judicial review of legislation under the authority of fundamental law was at its height.

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81. 42 Edw. III c. 1. It would be interesting to study this statute in parallel with a constitutional document (such as the Constitution Act, 1982) and with a quasi-constitutional document (such as the Canadian Bill of Rights).

82. This convention was clearly established in 1327 though it was not binding upon the King. See Sayles, The King's Parliament of England, New York: W.W. Norton & Company Inc., 1974, at 116.

The theory was based upon the conception of natural right and natural law. The lawyers linked together, law of nature, common right and reason, and common law[83]. The Magna Carta itself was also fundamental because its content was interpreted as such[84].

Coke wrote in his Institutes[85] that the Magna Carta

> was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law.

We can find in many dicta of decisions of that period, this idea of "judicial review" over the legislation[86]. For example in the famous Dr. Bonham's Case (1610)[87] Lord Coke had to decide whether the College of Physicians could impose a fine on the doctors practicing outside of London. He said:

> When an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such act to be void[88].

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83. McIlwain, The High Court of Parliament, New Haven: Yale University Press, 1910, ch. II.

84. Mott, Due Process of Law, New York: Da Capo Press, 1973, at 45.

85. Inst., vol. II, pin"A"proeme".

86. McIlwain, High Court of Parliament, New Haven: Yale University Press, 1910, at 262-298; Phillips, Constitutional and Administrative Law, London: Sweet & Maxwell, 1978, at 49 - 50. Mott, Due Process of Law, New York: Da Capo Press, 1973, at 48.

87. 8 Co. Rep. 114.

88. Id., at 118.

Though many authors interpreted the dicta as rules of construction[89] instead of affirmations of the supremacy of the common law, it is not wrong to say that these dicta suggest the judicial review of the legislation. It seems therefore that the common law was regarded as a fundamental law[90]. Therefore, the phrase "law of the land" or "due process of law" — as then equated[91] — was a part of the fundamental law which could control the content of the statutes.

However that phrase could not have allowed review of the "substantive" content of the law unless it received a broad meaning beyond its procedural content. And it appears that even at the time of King John in 1215, the phrase "law of the land" would have been understood in certain contexts as the common law, which included the good laws of Edward, the custom of the realm and the feudal law[92].

Consequently, the "substantive" content of the statutes could not deprive the subject of his rights either to his person or his goods[93].

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89. See e.g. Gough, Fundamental Law in English Constitutional History, Oxford: At The Clarendon Press, 1961, at 35; Phillips, Constitutional and Administrative Law, London: Sweet & Maxwell, 1978, at 50.

90. See Keir and Lawson, Cases in Constitutional Law, Oxford: At The Clarendon Press, 1967, ch. I.

91. Coke, Inst., vol. II, at 50.

92. McIlwain, "Due Process of Law in Magna Carta", 14 Col. L. Rev. 27.

93. Id., at 51.

b) Supremacy of Parliament

However that may be, the idea of judicial review had to die with the end of the Stuart reign. Soon after the death of Lord Coke, the doctrine of the supremacy of Parliament began to be recognized in England. Coke himself announced that new principle in his Institutes[94]. In 1653, in Captain John Streater's Case[95], Streater had been imprisoned by an order of Parliament. Before the King's Bench, he maintained that the imprisonment was illegal and contrary to the "law of the land". The court, after having distinguished between the judicial function and the legislative function, said that "we must submit to the legislative power"[96].

However it should not be thought that the doctrine of supremacy of Parliament had been easily conceded by the authors of the time[97]. As late as the time of Blackstone there were some doubts about the existence of this principle. Blackstone wrote in his Commentaries[98] that

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94. Coke, Inst., vol. IV, at 36; MacKay, "Coke — Parliamentary Sovereignty Supremacy of the Law", 22 Mich. L.R. 215 (1924). It seems that one way to reconcile this doctrine with his interpretation of the judicial review in Dr. Bonham's Case 8 C. Rep. 114, at 118, is to say that Coke did not make the distinction between legislation and adjudication. See McIlwain, The High Court of Parliament, New Haven: Yale University Press, 1910, at 148.

95. 5 How. State Trials 366 (1653).

96. Id., at 386.

97. See Mott, Due Process of Law, New York: Da Capo Press, 1973, at 56 ff.

98. Bl. Comm. 1, at 91. It should be noted that he thought that this view was wrong.

> Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely that acts of Parliament contrary to reason are void[99].

By the end of the eighteenth century the supremacy of parliament was generally accepted and recognized. As a consequence, any claim to judicial review of legislation (either substantive or procedural whatever) was irrelevant. For example, in 1861, the dicta of Lord Coke in Dr. Bonham's Case was expressly overruled[100].

Henceforth in England, Parliament will never be bound by the expression "due process of law". It can enact or not any law whatever and in the way that it decides. The law can be totally unreasonable or absurd[101]. The courts of law have no choice but to enforce the intention of the parliament[102]. The only control over the law (just or unjust) is public opinion[103]. It is in this sense that we have said in the preceeding

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99. Bl. Comm. 1, at 91.

100. Kemp v. Neville 10 C.B. (N.S.) 522 (1861).

101. It is quite possible that in the 16th century the courts would have invalidated an arbitrary statute. See McIlwain, The High Court of Parliament, New Haven: Yale University Press, 1910, at 63.

102. It should be noted that when an intention is ambiguous the court gives effect to the meaning which is not unreasonable, nor absurd. We will come back later on this question.

103. Dicey, An Introduction to the Law of the Constitution (9th ed.), London: MacMillan and Co., 1948, c. XV. It should be noted, however, that the principle of supremacy of Parliament is perhaps not so absolute since England's entry into the Common Market. See Wade, "The Constitution and the Common Market", 87 L.Q.R. 461 (1971).

chapter that in England today the phrase "due process of law" means "according to law" and applies to the executive and judicial branches of the government but not to Parliament.

CHAPTER III

JUDICIAL REVIEW OF THE SUBSTANTIVE CONTENT OF LAW IN THE UNITED STATES

This chapter is concerned with the American experience with "substantive due process". I will not discuss the notion of "procedural due process"[104]. I plan to raise two points. First, I will show that "substantive due process" existed in effect before there was explicit recourse to that concept. The American tradition never questioned the point that the states could not arbitrarily infringe on a citizen's right to life, liberty or property. This principle comes from natural law and I will show that the states were required to act "reasonably" even before they were subject to a constitutional guarantee of "due process of law". I will also explain how that expression received a substantive content. My second point is that "substantive due process" is a broad concept which still exists in American Law. I will deal with different tests of "reasonability" and will suggest that the rulings of 1934 and 1937 only had the effect of changing one of these tests.

"Substantive due process" is a "fascinating world"[105]. Though some passages will appear technical, I have tried to describe this phrase

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104. For a survey of "procedural due process" see Gora, Due Process of Law, Illinois: Nat. Textbook Co., 1977.

105. This expression is borrowed from a chapter title concerning due process of law in Abraham, Freedom and the Court, New York: Oxford University Press, 1967, ch. IV: "The Fascinating World of Due Process of Law".

in as straightforward a way possible. However, it is not an easy notion. Therefore, it will be impossible to present a comprehensive treatment of the American experience with "substantive due process"[106].

a) Limitations on government before substantive due process

American constitutional law is fundamentally different from our Canadian constitutional law. Though both countries are federal states, one difference between them is the way in which the powers are distributed between the central (national) government and the regional government (provinces or states). In Canada the B.N.A. Act exhaustively distributed all the legislative powers, with only a few exceptions, between the federal parliament and the provincial legislatures[107]. This means that every subject or class of subjects (sphere of human activity) can be regulated. Such a distribution was consistent with the supremacy of Parliament[108]. One of the main constitutional questions in Canada, therefore, is "who" has authority to regulate a specific subject?

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106. A very good study has been written by Tribes in his American Constitutional Law, Mineola: The Foundation Press Inc., 1978.

107. Hogg, Constitutional Law of Canada, Toronto: Carswell, 1977, at 198-199.

108. The new Charter of Rights and Freedoms has limited this general principle because henceforth any law that was inconsistent with the rights it protects would be declared inoperative. However, the Charter only put limitations upon the governments. It did not deal with the division of powers which remains exhaustive. Section 1 of the Charter provides that the Charter guarantees the rights and freedoms "set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." We will come back to this point later.

The American Constitution does not reflect the same principles. It did not exhaustively distribute the legislative power between Congress and the states. In the original text (1791) the Constitution enumerated only a few classes of subjects (head of powers) that Congress could regulate[109]. These powers were delegated to it by the states which retained the residue of powers. There was no defined list of powers attributed to the states[110]. However, this "residual" power was implicitly limited by the 17th and 18th centuries political theory that the people had certain inalienable rights that no state could interfere with. The theory was based on the philosophical principle that people had those rights in a state of nature (theory of natural law) and that when they agreed to come into society they created a government whose function was basically the protection of those rights (theory of social compact)[111]. The theories of natural law and social compact were used in part to justify the American Revolution[112].

The "higher law" protected some fundamental rights which had been violated by the British Crown[113]. Thus, the American Declaration of Independance (1776) was intended to justify the revolution against

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109. See Article I of the U.S. Constitution.

110. See Amendment X (1791), which specifically confirmed that the States had the residue of powers.

111. See generally Wright, American Interpretation of Natural Law, New York: Russell & Russell, 1962. See also Corwin, "The 'Higher Law' Background of American Constitutional Law", 42 Harv. L. Rev. 149 (1928-29).

112. Wright, id., at 97.

113. Corwin, "The Higher Law Background of American Constitutional Law", 42 Harv. L. Rev. 149 (1928-29), at 365.

constituted authority[114]. The second part of this document illustrates the general philosophy of that period. In it we read:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed[115].

But it became more than a "general philosophy". Those "inalienable rights" (life, liberty and the pursuit of happiness) and political theories soon reached the Courts and became constitutional doctrine with regard to no written Bill of Rights.

The judges relied on the theories of natural law and social compact to limit the restrictions on liberty imposed by government. Common Law and written constitutions did not create those rights. They only declared what already existed independently in natural law. No legislature could interfere with those natural rights and then contradict the principles which are at the basis of their society. Thus, Government had powers that should be controlled by the Courts. Calder v. Bull (1798)[116], was the first instance of a court considering whether it could overrule a statute on the basis of natural law. Mr. Justice Chase wrote for the majority that a legislative power is not absolute

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114. See Wright, American Interpretation of Natural Law, New York: Russell & Russell, 1962, at 97.

115. Emphasis added.

116. 3 U.S. (3 Dall.) 386 (1798).

and is limited both by its own nature and by the social compact. His opinion was very close to the spirit of the Declaration of Independence:

> I cannot subscribe to the omnipotence of a state Legislature, or that it is absolute or without control; ... the people of the United States erected their constitutions, or forms of government, to establish justice, to promote general welfare, to secure the blessing of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact: and as they are the foundation of the legislative power, they will decide what are the proper objects to it. The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require...[117].

This was said in 1798, less than twenty-five years after American independence. The social compact was to secure the rights that we see today in the due process clause. Mr. Justice Chase added:

> There are certain vital principles in our free Republican Governments, which will determine and overule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature... contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority[118].

He then established a rather vague standard saying that it was "against all reason and justice"[119]. That criterion, though vague was

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117. 3 U.S. (3 Dall.) 386 (1798), at 387 - 388.

118. Id., at 388.

119. Ibid.

fundamental. It will become the leading test for due process[120].

Natural law was a strong ground on which to invalidate legislation and as late as 1868, it could be used independently of constitutional authority. T.M. Cooley wrote in his famous treatise about Constitutional Limitations that,

> We must not commit the mistake of supposing that, because individual rights are guarded and protected by (the Bill of Rights), they must also be considered as owing their origin to them. These instruments measure the rights of the rulers, but do not measure the rights of the governed[121].

These implied limitations upon government were also supplemented by the written Constitution. In addition to the short enumeration of powers that Congress could rightfully exercise, the original text of the Constitution contains many sections which state what Congress could not do, so that individual liberty would be protected[122]. In 1791, the

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120. We will see later that the States have all the necessary powers to use a "reasonable" discretion when they regulate a matter related to their head of power. "Reasonableness" is therefore a limitation upon the "police power".

121. Cooley, A Treatise on the Constitutional Limitations (4th ed.), Boston: Little, Brown and Company, 1878, at 36.

122. "No state shall ... pass any ... law impairing the obligation of contracts ..." U.S. Const. Art. 1, # 10. That section applies only to the state. The Fifth Amendment would have the same effect upon federal law which impaired the obligations of contract: "No Bill of Attainder or Ex post facto law shall be passed". U.S. Const. Art. 1, # 9. "No state shall ... pass any Bill of Attainder, ex post facto law..." U.S. Const. Art. 1, # 10.

first eight amendments (known as the Bill of Rights)[123] expressly prohibited Congress — not the states[124] - from interfering with fundamental rights. It was only after the passing of the Fourteenth Amendment in 1868 that the States would find their powers explicitly limited in this way[125]. The American Constitution was "essentially a natural-law document"[126] which reflected the philosophical theory of the 18th century. This implicit philosophical limitation was made explicit in the terms of the American Constitution.

Thus certain spheres of legislative powers (classes of subjects) were implicitly or explicitly secured from all governmental regulation. It was unimportant whether or not an infringement of individual rights was prohibited by the written constitution.

> Though there may be no prohibition in the Constitution, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty and the social compact[127].

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123. The Bill of Rights refers to the first eight amendments because the Ninth and the Tenth amendments are not considered as specific guarantees of individual liberties. See Novak, Rotunga and Young, Constitutional Law, St-Paul: West Publishing Co., 1978, at 376.

124. See Barron v. The Mayor and City Council of Baltimore 32 U.S. (7 Pet.) 243 (1833) where the Supreme Court held that the amendments were not applicable to the states.

125. The Supreme Court later decided that some of the first ten amendments were applicable to the states through the privileges and immunities clause and the due process clause of the Fourteenth Amendment. The theory is called "selective incorporation" and is concerned with fundamental rights such as speech, religion press, etc. See, for example, Duncan v. Louisiana 391 U.S. 145 (1968).

126. Lloyd, The Idea of Law, Baltimore: Penguin Books, 1970, at 84.

127. Wilkinson v. Leland 27 U.S. (2 Pet.) 627 (1829), at 646-647. See also Fletcher v. Peck 10 U.S. (6 Cranch.) 87 (1810); Terrett v. Taylor 13 U.S. (9 Cranch.) 43 (1815).

In Fletcher v. Peck (1810)[128], natural law was used as an alternative ground to constitutional authority. Chief Justice Marshall invalidated a Georgia statute under these two alternative grounds. He said that

> "...the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing (that) law..."[129].

Consequently, from the beginning of the nation, one of the main constitutional issues was not "who" can regulate but "whether" a specific activity (or class of subjects) was subject to government regulation or "whether" it was forbidden by the Constitution or by natural law.

The phrase "due process of law" occurs in two Constitutional Amendments (the Fifth and the Fourteenth) which provide that the Government shall not deprive any person of "life, liberty or property, without due process of law"[130]. While the Fifth Amendment has limited Congress since 1791, the Fourteenth Amendment, which applies to the states, was

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128. 10 U.S. (6 Cranch.) 87 (1810).

129. Id., at 139. The state had rescinded a grant of land to original purchasers. The doctrine of "vested rights" invalidated such an act. Those "vested rights" existed when an individual had acquired under the law a right to do or to possess something. The legislature could not abridge a "vested right" without paying a compensation. Such a rescinding without compensation was regarded as a punishment ex post facto. It was illegal. Both natural law and the constitution forbade it.

130. Amendment V: "No person shall be... deprived of life, liberty, or property, without due process of law." Amendment XIV: "No state shall... deprive any person of life, liberty or property, without due process of law."

enacted only in 1868. It should not be assumed, however, that until 1868 the states were free to infringe an individual's right to "liberty" or "property"[131]. These two fundamental rights were already protected by natural law and by the social compact. It was understood that,

> The fundamental maxims of free government seem to require that the rights to personal liberty and private property should be held sacred[132].

From time to time, therefore, the Supreme Court of the United States would strike down a statute which violated this fundamental law by interfering with the right to property or to liberty[133]. The judges assumed that they could look at the "substantive" content of the law enacted by either Congress or the states in order to see if it violated natural law or the principle of social compact[134].

Thus, when the theories of natural law and of social compact were no longer popular in American constitutional law, the judges,

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131. See generally, Corwin, "The Doctrine of Due Process of Law Before the Civil War", 24 Harv. L. Rev. 366 (1911); Graham, "Procedure to Substance - Extra-Judicial Rise of Due Process 1830-60", 40 Cal. L. Rev. 483 (1952); Cooley, A Treatise on Constitutional Limitations Which Rests Upon the Legislative Power of the States of the American Union (4th ed.), Boston: Little, Brown, and Company, 1878.

132. Wilkinson v. Leland 27 U.S. (2 Pet.) 627 (1829), at 657.

133. See Fletcher v. Peck 10 U.S. (6 Cranch.) 87 (1810); Terrett v. Taylor 13 U.S. (9 Cranch.) 43 (1815).

134. See Corwin, "The Doctrine of Due Process of Law Before the Civil War", 24 Harv. L. Rev. 366 (1911), at 374. There was "a feeling on the part of the judges that to leave the legislature free to pass arbitrary or harsh laws, so long as all the formalities be observed in enforcing such laws, were to yield the substance while contending for the shadow."

consciously or not, turned to the due process clauses which expressly safeguarded the fundamental rights to "liberty" and to "property" to provide protection. It was already argued before the Civil War (1868) that "due process of law" should receive a "substantive" content beyond its merely procedural content of colonial days[135]. However, it was only after the passing of the Fourteenth Amendment in 1868 that the philosophy of "substantive due process" was really accepted[136].

Under this new concept of "substantive due process" the court would be allowed to look at the "substantive" content of the law in order to determine whether or not the natural rights guaranteed by the social compact had been violated[137]. The due process clauses were understood by many authorities to be substitutes for natural law and social compact.

In the very first case concerning the Fourteenth Amendment, the Slaughterhouse cases (1873)[138], Mr. Justice Field, speaking for four judges, said that,

> ...(the Fourteenth) Amendment was intended to give practical effect to the declaration of 1776 of

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135. See Wynehamer v. People, 13 N.Y. 378 (1856); Dred Scott v. Sandford, 19 How. 393 (U.S. 1857).

136. It should be noted that the first decisions concerning the Fourteenth Amendment did not accept the substantive due process approach. See the Slaughterhouse cases, 83 U.S. (16 Wall.) 36 (1873).

137. See Barbier v. Connolly, 113 U.S. 27 (1885).

138. 83 U.S. (16 Wall.) 36 (1873).

> inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes[139].

The theory was later adopted by a majority of the Supreme Court. In In re Kemmler (1889)[140], Mr. Justice Fuller said that the Fourteenth Amendment

> ...refers to the law of the land in each state, which derives its authority from the inherent and reserved power of the state, exerted within the limits of these fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property...[141].

Therefore, from the beginning of the nation, the governments were prevented from passing laws which could deprive the individual of his right to "liberty" and "property". These limitations, however, had to be balanced with the legitimate and permissible exercise of powers by the Congress and the States. This was fairly easy as far as Congress was concerned since the Constitution contained an explicit enumeration of its power. It has been much harder to define the positive power of the states, which had been given a limited residual power in the area falling between the express federal powers and the rights reserved to the people.

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139. 83 U.S. (16 Wall.) 36 (1873), at 105.

140. 136 U.S. 436 (1889).

141. Id., at 448.

In the 19th century the court determined the proper spheres of authority that a state had within its residuary power. Chief Justice Marshall in Gibbons v. Ogden (1824)[142] recognized that the states had the power

> ...to regulate its police, its domestic trade, and to govern its own citizens, (and) may... legislate on this subject to a considerable extent[143].

That description was very broad although not absolute. The States had discretion to decide what is "necessary for the public good".

The role of the court became understood as merely seeing "that the law operates upon the subject of the power"[144]. But Chief Justice Taney went further in Charles River Bridge Co. v. Warren Bridge Co. (1837)[145]. In that case Charles River Bridge Co., maintained that its charter implicitly endowed it with a monopoly in the right to furnish transportation across the Charles River. The court said that it was wrong.

> In public grant nothing passes by implication... the object and end of all government is to promote the happiness and posperity of the community by which it is established: ...while the rights of private property are sacredly guarded. We must not forget that

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142. 9 Wheat. (U.S. 1824) 1.

143. Id., at 208.

144. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

145. 11 Pet. 420 (1837).

> the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation[146].

Although it was contrary to their free institution to deprive somebody of his property[147] henceforth such a legislation would be upheld, because the court would assume that it was passed to promote the "public interest". The judges recognized the need of the legislature to act in favour of the welfare of its citizens. However, that power should be within "the extent of its dominions"[148]. Consequently, the police power balanced the weight of implied limitations concerning property rights[149]. The public interest generally prevailed against such rights.

However, in 1851, Chief Justice Shaw gave a definition of the "police power" which later became a fundamental pillar of "substantive due process". He said in Commonwealth v. Alger (1851)[150] that the "police power" of a state is

> ...the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be

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146. 11 Pet. 420 (1837), at 547-548.

147. See Fletcher v. Peck 10 U.S. (6 Cranch.) 87 (1810).

148. Chief Justice Taney in the Licenses' Cases, 5 How. (U.S. 1847) 509.

149. Two written clauses also protected private property rights: the contract clause and the supremacy clause.

150. 7 Cush. (Mass. 1851) 53.

> for the good and welfare of the commonwealth, and of the subjects of the same[151].

Soon it was generally understood that a law enacted to promote the order, safety, health, moral and general welfare of society[152] was passed to promote legitimate ends of government[153]. These ends became known as the "police power"[154]. That was important because any statute which was enacted to promote another purpose and which interfered with the individual right to liberty or property would be void as inconsistent with "due process of law". Generally speaking the only legitimate goal of government was the protection of individual rights and the promotion

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151. 7 Cush. (Mass. 1851) 53, at 85. Emphasis added. That definition came from the Massachussetts Constitution of 1780 which empowers the general court "from time to time, (to) make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances..." It recalls the famous dictum in Dr. Bonham's Case decided by Lord Coke in 1610: "When an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void", 8 Co. Rep. 114 (1610), at 118. See Plucknett, "Bonham's Case and Judicial Review" (1962), 40 Harv. L. Rev. 30. In any event, that opinion of Chief Justice Shaw was fundamental. It established the standard of "reasonableness".

152. Corpus Juris, Vol. XII, at 904. See also Field, J., concurring in Butcher's Union Co. v. Crescent City Co., 111 U.S. 746 (1884), at 755. See Beer Co. v. Massachussetts, 97 U.S. 25 (1878), at 33; Barbier v. Connolly, 113 U.S. 27 (1885), at 31.

153. Cooley, A Treatise on the Constitutional Limitations (4th ed.), Boston: Little, Brown & Company, 1878, ch. XVI.

154. The first use of this term is found in Brown v. Maryland, 12 Wheat. 419 (U.S. 1827), at 443. Today the concept of police power is much broader. Therefore the legitimate ends of the states were extended. The notion follows the role of government and the needs of society. The concept of general welfare is broader now than it was a century ago. Such is the police power of the states.

of the general welfare[155]. The states were forbidden to violate the right to property or to liberty.

b) Substantive due process before 1937

"Substantive due process" can be understood as the relationship between the exercise of "police power" of the States and limitations on it. It appears that it defines the boundary between fundamental rights and public regulations. The States were limited in their powers. They could impinge on individual rights only within their jurisdiction. On the one hand it meant that their territory had limitations, and on the other hand it meant that morals, health, safety and public welfare had limitations. The territorial limit is easily understood. A state x could not deprive a citizen who resided in a state y of his rights in that state y. The police power limitations however were more subtle. Who was entitled to decide whether a legislation comes under a legitimate power such as health? The legislature or the court? The history of "substantive due process" was designed to provide an answer to these questions.

The best illustration of this American tradition is found in the states' regulations of economic matters before 1937. This period is often called one of "economic due process" even though that phrase

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155. See Tribe, American Constitutional Law, Mineola: The Foundation Press Inc., 1978, ch. 8-4.

referred to only one branch of "substantive due process" before 1937[156].

The problem can be stated as follows: The American Constitution has almost nothing to say about economic regulation by such means as business and labour laws. But neither Congress nor the state legislatures could interfere with individual property or liberty (applying either the due process clauses or natural law). Congress had to limit its regulations to the specific powers enumerated in the Constitution. The only legitimate goal of the state was to protect individual rights and the public welfare. Thus, no state government could take property from A to give it to B[157]. Such an act would be an impermissible end of government and would be invalid. Therefore, certain laws which interfered with certain types of economic liberty were not seen as permissible ends of government. The issue was whether such businesses were subject to governmental regulation or whether they were not a permissible end subject to regulation.

1. Before Lochner

At an early date, the judges of the Supreme Court of the United States limited governmental authority over economic matters. In 1795,

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156. It should be noted that many authors equate the two expressions. They thus suggest that the abandoning of economic due process also means the end of substantive due process. See Tarnopolsky, The Canadian Bill of Rights (2nd ed.), Carleton Library, McClelland and Stewart Ltd., 1975, at 231.

157. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), at 388.

in Van Horne's v. Dorrance[158] it was held that,

> It is evident that the right of acquiring and possessing property, and having it protected, is one of the natural inherent and inalienable rights of man... the legislature therefore had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without just compensation. It is inconsistent with the principles of reason, justice and moral rectitude...[159].

This natural law wording allowed the courts to look at the "substantive" content of the legislation. Three years later in Calder v. Bull (1798)[160] Mr. Justice Chase said:

> The people of the United States erected their constitution, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence... there are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established ... a law that destroys, or impairs, the lawful private contracts of citizens; ... or a law that takes property from A and gives it to B ... is against all reason and justice...[161].

During the 18th and the 19th century, the Court focused on the right to "property". It is not by chance that the majority of the cases

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158. 2 Dallas 304 (1795).

159. Id., at 310.

160. 3 U.S. (3 Dall.) 386 (1798).

161. Id., at 388.

already quoted dealt with "property" rights[162].

But the broader the scope of fundamental rights, the broader will be the sphere preserved from government regulation. And the court found that the rights to liberty and property included "freedom of contract"[163]. Again, it was easy to make this interpretation, considering the general belief in natural law. In Butcher's Union Co. v. Crescent City Co. (1884)[164] Mr. Justice Bradley said:

> The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence. ...This right is a large ingredient in the civil liberty of the citizen... if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him, to a certain extent, of his liberty...[165].

This opinion was later approved by Mr. Justice Peckham in Allgeyer v. Louisiana (1897)[166] dealing with the due process clause of the Fourteenth Amendment. He said for a unanimous court:

> The Liberty (of the Fourteenth Amendment) means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of

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162. See also the Railroad Commission Cases, 116 U.S. 307 (1886).

163. Barbier v. Connolly, 113 U.S. 27 (1885).

164. 111 U.S. 746 (1884).

165. Id., at 764.

166. 165 U.S. 578 (1897).

> the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above[167].

Consequently the legislatures could not interfere with the "freedom of contract", except by "due process of law". And a statute which exceded the "police power" of the states and infringed that "freedom", violated the due process clause.

The court could decide whether a statute interfered with the right to life, liberty or property. The judges also assumed that they could review whether the legislature had gone beyond its "police power"[168].

Allgeyer is often quoted as the first case using "substantive due process" in order to void a state law. The statute prohibited any person whose property is within the territory of Louisiana from contracting with a marine insurance company which had not complied in all respects with Louisiana law. In this case the State convicted Allgeyer because he had mailed a letter to a company which was not licensed in Louisiana. The appeal court held that there was a deprivation of liberty without due process of law. The state could prohibit or regulate such a company from doing business within its limits. However, the contract was made outside the limits of the State. The court ruled:

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167. 165 U.S. 578 (1897), at 589. Emphasis added.

168. Mugler v. Kansas, 123 U.S. 623 (1887).

> Where the contract was made outside the state and as such was a valid and proper contract... to deprive the citizens of such a right as herein described without due process of law is illegal. Such a statute... is not due process of law because it prohibits and act which under the Federal Constitution the defendants had a right to perform... Yet the power (of the state) does not and cannot extend to prohibiting the citizen from making contracts of the nature involved... outside the limits and jurisdiction of the state...[169].

The same right could be prohibited within the territory of the State. "Due process of law" can be understood as a respect of the constitutional jurisdiction.

While the territorial limits required a rather easy test, the difficulty increased with the limitations upon the "police power". The jurisprudence had established that the State could enact legislation to promote public morals, health, safety and welfare. However, there was a strong tradition of natural law which required that the statutes should be void if they were forbidden by "the general principles of law and reason"[170].

The first cases dealing with the Fourteenth Amendment followed a policy of noninterference with legislative judgments. Thus, in Munn v. Illinois (1876)[171] Mr. Justice Waite said that

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169. 165 U.S. 578 (1897), at 591.

170. See e.g. Calder v. Bull, 3 Dall. 386 (1798), at 388.

171. 94 U.S. 113 (1876).

> for protection against abuses by legislatures the people must resort to the polls, nottto the courts[172].

The Court refused to look at the "reasonability" of a statute if it dealt with a private property clothed with a public interest[173]. Moreover, in Barbier v. Connolly (1883)[174] the Court said that the Fourteenth Amendment was not intended "to interfere with the power of the States"[175]. However, such an affirmation raised the question of whether the court could decide when a legislature is outside its police power. In that case, Mr. Justice Field said:

> Regulations for these purposes (health, safety...) may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote... the general good[176].

He did not say, however, who should decide if a regulation were enacted for that purpose and if it were designed to impose unnecessary restrictions upon citizens. The only indication was his statement that in the

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172. 94 U.S. 113 (1876), at 134.

173. The criterion of business "affected with a public interest" will not be studied in this paper. The scope of such a business had often varied before the final drop of that criterion in 1934. But it appears that when a business had no such affectation, the State could not regulate it. At least the "reasonability" would be ascertained judicially. Where a business was "affected with a public interest" the court decided that there was no review of the "reasonability". (See Munn v. Illinois, 94 U.S. 113 (1876). The role of the Court was therefore to decide the question of whether a business was "affected with a public interest".

174. 113 U.S. 27 (1883).

175. Id., at 31.

176. Id., at 32.

Fourteenth Amendment it was "undoubtedly intended that there should be no deprivation of life or liberty or arbitrary spoliation of property"[177]. But how can an arbitrary act be prevented if the court cannot review the legislation?

The policy of noninterference ended. The court assumed that its role was to review the laws. The judges understood that they had to look at the substance of the law in order to strike down arbitrary laws. Corwin said that there was

> ...a feeling on the part of the judges that to leave the legislature free to pass arbitrary or harsh laws, so long as all the formalities be observed in enforcing such laws, were to yield the substance while contending for the shadow[178].

Thus in Mugler v. Kansas (1887)[179], the Court filled the gaps. The statute prohibited the sale of alcoholic beverages. The question was whether the statute was in conflict with the due process clause. Obviously the state could prohibit some drinks which were injurious to the "public health", because it was understood that a legislature could regulate human activities in order to protect individual rights and public good.

But the court first asked that question:

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177. Id., at 31.

178. Corwin, "The Doctrine of Due Process of Law before the Civil War", 24, Harv. L. Rev. 366 (1911), at 374.

179. 123 U.S. 623 (1887).

> By whom, or by what authority, is to be determined whether the manufacture of particular articles of drink... will injuriously affect the public?[180]

Mr. Justice Harlan for the majority answered that the legislature initially could decide what the welfare of the people demand:

> Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety[181].

However, the courts reserved for themselves the power to decide whether a statute is "to be accepted as a legitimate exertion of the police power of the states"[182]. Consequently, the court would control the "substantive" content of the law[183]. In Mugler v. Kansas (1887) it was held:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty — indeed, are under a solemn duty — to look at the substance of things whenever they enter upon the inquiry whether the legislature had transcended the limits of its authority[184].

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180. Id., at 660.

181. Id., at 661.

182. Ibid.

183. Ibid.

184. Ibid.

That inquiry was constitutional. The State could not say with finality that the act was to promote health if it had an effect on private matter. The State did not have such a power. It could legislate only within its police power and the Court could control whether the act was beyond those powers. The question was whether the legislative object of a given statute was permissible (whether the end was legitimate).

Mr. Justice Harlan went further. He set out a "standard" to review an act under "substantive due process". He said:

> If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution[185].

In that case, the statute was upheld. However, the case indicated what due process would become. It was a jurisdictional question. The state could not exceed its "police power" and invade individual rights. Determining the limits of such a power would lead to an extension of "substantive due process". A state could regulate a business in the public interest or for the public health. However, the court would review any statute which did not meet the test proposed by Mr. Justice Harlan[186].

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185. 123 U.S. 623 (1887). Emphasis added.

186. I will call this test the "Harlan" test.

This "substantive due process" test can be rephrased as follows[187]:

1. The end must be permissible or legitimate;

2. The means must have a substantial relation to the end; and

3. Fundamental rights must not be infringed.

Later cases have added that where a law has a legitimate end it still must not be unreasonable, arbitrary or oppressive[188].

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187. See Brown, "Due Process of Law, Police Power, and the Supreme Court", 40 Harv. L. Rev. 943 (1926-27).

188. Ibid. See Holmes, J., in Otis v. Parker, 187 U.S. 606 (1903); McKenna, J., in Eubank v. City of Richmond, 226 U.S. 137 (1912); Lochner v. New York, 198 U.S. 45 (1905); see also Murtado v. California, 110 U.S. 516 (1884); Manachino v. Rohen, 178 N.Y.S. 2d 246 (1958). The whole idea of "reasonableness" would come from the opinion of Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. (Mass. 1851) 53, at 85. He said: "The power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances..." See generally Corwin, Liberty Against Government, Baton Rouge: Louisiana State University Press, 1948, at 146 ff. It appears that from the beginning, the legislatures could not arbitrarily deprive the individual of his fundamental liberty. Whatever grounds had been used to limit the legislature — natural law or the due process clause — the Court had always been reluctant to leave the government free to pass any arbitrary acts. For example, in White v. White, 5 Barb. 474 (1845), a Court said: "The security of the citizen against arbitrary legislative action rests upon the solid ground of natural rights", id., at 485. The question of whether the Fourteenth Amendment had the same purpose was not difficult: We saw that this Amendment was understood as a substitute for natural law. Thus, in In Re Kemmler, 136 U.S. 436 (1889), at 448, the Court said that the Fourteenth Amendment required that the actions of the states be "exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights". An "arbitrary" act was understood as an "unreasonable" act. Already in Calder v. Bull,

2. Lochner v. New York

The best example of the effect of the "substantive due process" test in economic matters is the case of Lochner v. New York (1905)[189]. The State of New York had prescribed a maximum number of hours a baker could work (60 hours a week or 10 hours a day). The court recognized without difficulty that this statute interfered with the right of contract between the employer and employees[190]. Thus two questions arose: (a) Was the end legitimate? and (b) Was the means substantially related to a permissible end?

The majority of the court discussed, first, whether the statute had a legitimate purpose (end). The judges enumerated the ends that would have been legitimate. Therefore they rejected the contention that such a statute, seen as a mere "labour law" without other legitimate ends, was sufficient to be legitimate:

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3 U.S. (3 Dall.) 386 (1798), the Court had struck down a statute deemed to contravene "the general principles of law and reason" or "all reason and justice". Id., at 388. Thus, the court soon required "reasonable" legislation. It was therefore not by accident in Holden v. Hardy, 169 U.S. 366 (1898), at 398, that Mr. Justice Brown, speaking for the majority said that "the question in each case is whether the legislature had adopted statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class". Emphasis added. The reasonable discretion was precedented. Mr. Justice Brown quoted the passage from Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. (Mass. 1851) 53, who had written that fundamental rights were subject to "reasonable limitations by legislation". See Holden v. Hardy, 69 U.S. 366 (1898), at 392.

189. 198 U.S. 45 (1905).

190. Id., at 53. "The statute necessarily interferes with the right of contract."

> Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act[191].

Therefore the court had to decide whether the statute could stand as a "health" measure for the individual engaged in the occupation of baker.

The general question to be answered was:

> Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?[192]

The judges thus turned to the second question, the "substantive due process" test or whether the limitation of hours on a bakery employee's work was substantially and "directly" related to this legitimate end (health). The majority looked at the content of the law and rejected this contention. First, it was held that it was not a "reasonable" exercise of the "police power" because in the judgment of the court there was

> ...no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the (health) ... there can be no fair doubt that the trade of baker in and of itself is not an

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191. 198 U.S. 45 (1905), at 57.

192. Id., at 56.

> unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and ... of free contract...[193].

Second, the judges ruled that there was no real and direct connection between the means and the end.

> It is manifest to us that the limitation of the hours of labor... has no such direct relation to, and no substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees... in a private business[194].

The New York statute thus dealt with a matter which was beyond the "police power" of the states. The end was not legitimate, and the means not sufficiently related to any legitimate end. The statute was struck down.

That test of "reasonability" was rather severe. The law had to be a "fair, reasonable and appropriate" exercise of the police power. Though Mr. Justice Peckham said that this was not "a question of substituting the judgment of the court for that of the legislature"[195], the application of that test did so in fact. The court controlled the "wisdom" of the legislation. This test may be called the "strict scrutiny test. It means that the court looks at the factual basis for the

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193. 198 U.S. 45 (1905), at 58-59. It should be noted, however, that Mr. Justice Harlan in dissent concluded that the evidence showed the bakers that working conditions posed a serious threat to their health. Id., at 70 ff.

194. Id., at 64.

195. Id., at 56-57.

legislation in order to decide whether the means were fair, reasonable and appropriate in relation to a legitimate end.

Mr. Justice Harlan, for the minority gave a test less severe. In the case of Mugler v. Kansas (1887)[196], he had explained which test should guide the judges: He had said that the court should see if the statute had a "real and substantial relation" to a proper purpose (such as health) and whether it was a "palpable invasion of rights secured by fundamental law"[197]. In the Mugler case he had said:

> It is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas... is not fairly adapted to the end of protecting the community against (various) evils... For we cannot shut out of view the fact, within the knowledge of all, that the public health... maybbe endangered by the general use of intoxicating drinks... if, therefore, a State deems the absolute prohibition of the manufacture and sale, within her limits... to be necessary to the peace and security of society, the courts cannot, without usurping legislative functionss override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation[198].

Mr. Justice Harlan in Mugler v. Kansas went on to say that nobody can sell or manufacture what the legislature, "on reasonable grounds, declares to be prejudicial to the general welfare"[199].

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196. 123 U.S. 623 (1897). See supra, text accompanying note 185 ff.

197. Id., at 661.

198. Id., at 661-662.

199. Id., at 663. Emphasis added.

In Lochner v. New York (1905) the minority opinion of Mr. Justice Harlan restated those principles. He agreed that the "police power" of the state, though without precise boundaries, should be enacted in good faith and needed an "appropriate and direct connection" with an end — such as the protection of the health, life or property of the citizens. However, he repeated that while the due process clause was not designed to interfere with the power of the State, the State cannot "unduly" interfere with the rights of the citizen[200].

For Harlan, J.,"a large discretion is necessarily vested in the legislature", to determine

> ...not only what the interests of the public require, but what measures are necessary for the protection of such interests[201].

Consequently the test would differ from the "strict scrutiny" test. For Mr. Justice Harlan,

> So long as there are reasonable grounds for believing that it is so (detrimental to health) its decision upon this subject cannot be reviewed by the federal courts[202].

Thus, the end could not be reviewed when the legislature acted upon "reasonable grounds". The court could only review if there were no "reasonable grounds".

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200. See 198 U.S. 45 (1905), at 65.

201. Id., at 66.

202. Ibid.

Fundamental rights were subject to "reasonable conditions" prescribed for the public good. These conditions were not subject to review, unless they were "beyond question, plainly and palpably in excess of legislative power"[203]. The courts would overturn a law when the means had "no real and substantial relation" to the end, or was "beyond all question, a plain, palpable invasion of rights secured by the fundamental law"[204]. That test had nothing to do with the "wisdom" of the policy. The learned judge said:

> If the means employed to that end (understood as a proper purpose) although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere[205].

Then the minority applied those principles to the maximum-hours statute. Mr. Justice Harlan found that it was enacted to protect the health of the bakers. However he did not discuss the question of whether those employees needed such protection. "Whether or not this be wise legislation it is not the province of the court to inquire"[206]. The law was based on two grounds. These grounds sounded "reasonable", therefore, the end was justified.

Mr. Justice Harlan turned next to the question of whether the means had a "real and substantial relation" to that end. It was judicially known that the number of hours had been a subject of serious

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203. See 198 U.S. 45 (1905), at 68.

204. Ibid.

205. Ibid.

206. Id., at 69.

consideration by those having special knowledge of health laws. He gave some statistics to show that there was a relation between health and such factors as the number of hours worked. It was impossible to say that there was no "real or substantial relation" between the means and the end. The statute had an appropriate and direct connection with the protection of the bakers' employees' health. It was not utterly unreasonable and extravagant nor wholly arbitrary. Obviously the question of whether sixty hours a week was wise could be debated. However, the court was not the appropriate forum for such a discussion[207].

The third opinion was written by Mr. Justice Holmes. He did not reject the definition of "liberty" as including the "freedom of contract". But he said that the word "liberty" was perverted when it (was) held to prevent the natural outcome of a dominant opinion"[208]. For the judge, this case was decided "upon an economic theory which a large part of the country does not entertain"[209]. "The constitution" he said, "is not intented to embody a particular economic theory"[210].

Mr. Justice Holmes agreed with the proposition that the State must use its "police power" in a way which is "reasonable". But his

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207. The majority had said: "The connection...is too shadowy... If the man works ten hours a day it is all right, if ten and a half or eleven his health is in danger... This we think, is unreasonable and entirely arbitrary..." Id., at 62.

208. Id., at 76.

209. Id., at 75.

210. Ibid.

test is that the Fourteenth Amendment can void a statute when

> ...it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law ...A reasonable man might think it a proper measure on the score of the health...[211]

In short, the Lochner case was a "substantive due process" case which succeeded. The judges agreed that the legislature could not pass any law which was not reasonable. The three judgments agreed that if such were the case, the statute should be void. Their disagreement however lay in the fact that the standard of "reasonability" is as vague as due process itself. Which test would be the proper one? Three opinions, three tests.

The first test, applied by the majority, requires both an appropriate and legitimate end. The majority inquired whether the bakers needed protection. They concluded that such was not the case. Moreover the means needed a more direct relation to the end. With those principles in mind, the judges were invited to control the wisdom of the legislation. Thus I have called this standard, the "strict scrutiny" test.

Mr. Justice Harlan held that the end was legitimate if it was based on "reasonable grounds". The means should have a "real and substantial relation" to the end but did not have to be the wisest or the

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211. 198 U.S. 45 (1905), at 76. Emphasis added.

best way to achieve it. For the purpose of analysis, I have called this standard the "Harlan" test. Lastly, Mr. Justice Holmes proposed that a statute should be void only when it can be said that no "reasonable man" would think that it is a proper measure for the end. I have called this test the "rational basis" test.

That case showed a gradation from the "rational basis" test, allowing judicial review, to the "strict scrutiny" test. The first test is based on the doctrine of judicial restraint, the second on the doctrine of judicial activism[212]. During the whole period, from 1905 to 1937, the court was divided between the advocates of restraint and the advocates of activism. These two approaches created the controversy that marked the Lochner Era.

3. After Lochner

The next case dealt with a Nebraska Statute requiring bread sold in quantities to maintain a specified weight twenty-four hours after baking and allowing a tolerance in excess weight of two ounces per pound. It was challenged in Burns Baking Co. v. Bryan (1924)[213].

Mr. Justice Butler speaking for the majority, applied the strict scrutiny test:

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212. See Novak, "Economic Activism and Restraint", in Halpern and Land, Supreme Court Activism and Restraint, Lexington: Lexington Books, 1982.

213. 264 U.S. 504 (1924).

> A State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them[214].

Consequently it was the role of the court to determine whether the statute had a "reasonable relation to the protection of purchasers of bread"[215]. Then the judge inquired into the "wisdom" of the statute. He concluded that the regulation was difficult to perform, and "unreasonable". The statute was not a sanitary measure but merely a control of weights. The designated maximum was "not necessary" for the purpose, was not calculated to effectuate it, and was "essentially unreasonable and arbitrary"[216].

Mr. Justice Brandeis dissented. He said that "with the wisdom of the legislature we have, of course, no concern". He proposed the following test: the court

> must determine whether the prohibition of excess weights can reasonably be deemed necessary... (and) appropriate means... (and to be) practicable[217].

The distinction is obvious. A means which can be "reasonably deemed necessary" is different from a statute which is found to be "necessary". Mr. Justice Holmes agreed with that dissent. Therefore the "Brandeis"

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214. 264 U.S. 504 (1924), at 513. Emphasis added.

215. Ibid.

216. Id., at 517.

217. Id., at 519. Emphasis added.

test appears to be close to the "rational basis" test as stated in the Lochner case. However, Mr. Justice Brandeis did inquire into the facts. The inquiry itself can be interpreted as a review of "necessity". But, the learned judge asked only if in view of these facts:

> Can it be said... that the legislators had not reasonable cause to believe that prohibition of excess weight was necessary?[218].
>
> Had no reason to believe that this provision is calculated to effectuate the purpose?[219]
>
> Had no reason to believe that the excess weight provision would not unduly burden the business of making and selling bread?[220].

Lastly, the dissenting judge said of the opinion of the majority that their decision was

> ...an exercise of the powers of a super-legislature — not the performance of the constitutional function of judicial review[221].

These cases were examples in which the court applied "strict scrutiny" test[222].

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218. 264 U.S. 504 (1924), at 527. Emphasis added.

219. Id., at 530. Emphasis added.

220. Id., at 533. Emphasis added.

221. Id., at 534.

222. Many other statutes were struck down on the implicit or express contention that the legislations were not wise. See e.g. Adams v. Tanner 244 U.S. 590 (1906), where a statute prohibiting collection of fees from workers by employment agencies was invalidated because the court thought that there was "nothing inherently immoral or dangerous to public welfare in acting as a paid representative of another to find a position in which he can earn an

However, the Lochner Era is not characterized only by the test which would control the wisdom of the law. Many statutes were struck down on the ground that the legislature did not have the power to pass them with no regard to the "reasonability" of the statute.

A good example of that proposition is found in Adair v. US (1908)[223], Mr. Justice Harlan quoted Lochner and said:

> Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation[224].

By quoting Lochner, Mr. Justice Harlan adopted the test which asked:

> Is it a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?[225]

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honest living. On the contrary, such service is useful, commendable and in great demand", at 593. This "strict scrutiny" test appears to have been one of the primary objections to substantive due process. See e.g. A.F. of L. v. American Sash and Door Co., 335 U.S. 538 (1949), (Frankfurter, J.); Boudin, Government by Judiciary, New York: Russell & Russell, 1968.

223. 208 U.S. 161 (1908).

224. Id., at 174.

225. Ibid.

However, while this test suggests a review of the "wisdom" of the law, in this case such an inquiry was not necessary. The Congress had adopted a law which outlawed "yellow dog contracts" by which the employee agrees not to join a labor union. The statute made it a "crime" for an employer to discharge an employee simply because of his membership in a labor union. Mr. Justice Harlan held that this statute interfered with the freedom of contract. Therefore the act was inconsistent with the Fifth Amendment. However, it was argued before the Court that Congress could enact such an act under its power to regulate interstate commerce without regard to any question of personal liberty arising under the Fifth Amendment. Consequently the Court inquired into the scope of the power to regulate commerce. Mr. Justice Harlan said that Congress had a large discretion in the selection of the means to be employed in the regulation of interstate commerce. However those means had to be related to the commerce regulated. In this case, the labor organization did not have such a relation. "Labor organizations have nothing to do with interstate commerce, as such"[226]. He then concluded that there was no connection between an employee's membership in a labor union and his carrying on of interstate commerce. Congress thus had no authority to make it a crime against the United States for an employer to discharge an employee because of such membership[227]. The Court said that the power to regulate

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226. 208 U.S. 161 (1908), at 178.

227. In Canada the court held that labor laws was a provincial matter but that the federal government can regulate labor relations within its legislative authority. See Toronto Electric Commissioners v. Snider (1925) A.C. 396 and Stevedores Reference (1955) S.C.R. 529. Therefore each government can enforce its own labor law. However

commerce was broad but could not be repugnant to the due process clause which protected the individual right to liberty and property.

This case looks like Lochner's because the Court hold that the means — to make it a crime for an employer to discharge an employee on the ground of his membership in a labor union — was not related to a power of the Congress — regulation of commerce. In Lochner the means — to impose maximum hours for labor in bakeries — was not related to the power of a state — health. However Adair has an important distinction. In Adair the Court did not inquire whether or not the means was necessary or appropriate to promote a legitimate end in this particular case. In Lochner, it was through this question that the Court concluded that the law was not to promote a legitimate end. In other words, in Adair Mr. Justice Harlan did not seem to look at the "wisdom" of the law whereas in Lochner the Court scrutunized this "wisdom". Consequently Adair indicated that Congress could never adopt such a law because a regulation of an employee's membership in labor organization had nothing to do with a power to regulate interstate commerce. On the other hand, it appears from Lochner that a state could enact a law which fixes a maximum number of hours in bakeries — or somewhere else — if it is proved — from statistics or otherwise — that the health of the employees

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if it appears that a Provincial legislature through its general competence over labor law, has adopted a prohibition whose pith and substance is the creation of a new crime, the law will be void. On the other hand the federal government could create such a crime. In the United States, the Congress could not create it. The case is therefore not very relevant in Canada.

or the public was in danger. Adair dealt with the scope of the regulation of interstate commerce, whereas Lochner dealt with the "wisdom" of the means in a particular case.

An illustration of this proposition is found in the case Muller v. Oregon (1908)[228] three years after Lochner. In this case the Court had before it an Oregon statute limiting the number of hours women were allowed to work to sixty hours a week or ten hours a day. The Court sustained the statute. Unanimously the judges refered to Lochner v. New York "without questioning in any respect the decision in Lochner"[229]. The Court only distinguished both cases. For the judges it appeared that the women needed protection while the men working in the bakery did not. It was necessary to protect the women from excessive work which would threaten their essential reproductive functions!

The point in this case which allows the distinction between Lochner and Muller was supported by two pages of legal arguments and over a hundred pages devoted to reviewing scientific opinions as to the detrimental effect that long hours of labor had on women[230]. The Court took judicial cognizance of these matters and was convinced that the statute was justified.

Therefore the States had to be prepared to show a sufficient evidence to convince the Court that a legislation was a proper exercise

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228. 208 U.S. 412 (1908).

229. Id., at 423.

230. It is known as the Brandeis Brief.

of its police power. It seemed henceforth that the Court would sustain a statute only where evidence would convince it that the legislation was "wise". Another way to put it would be to say that the freedom of contract will be protected or not according to scientific opinions and statistics.

In this way, the Supreme Court of the United States in Bunting v. Oregon (1917)[231] upheld a statute which limited all workers in industry, with certain exceptions, to ten hours a day. Mr. Justice McKenna wrote:

> There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employees in mills, factories, and manufacturing establishments". The record contains no facts to support the contention...[232].

This could be interpreted to mean that if facts supporting the proposition that the policy was not "necessary" had been in the record, the Court would have struck down the statute. At the very least, the Court would have inquired into the "necessity" of such legislation. That can be construed as a recognition that the "wisdom" test was underlying the decision though the Court did not inquire into the "wisdom" of that law. Otherwise, the case overruled Lochner "sub silento"[233].

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231. 243 U.S. 426 (1917).

232. Id., at 438.

233. See e.g. Mr. Justice Taft in Adkins v. Children's Hospital 261 U.S. 525 (1923), at 564.

Such was "substantive due process" before 1937. To summerize, it was a substitute for natural law[234]. It required the legislatures to exercise their own sphere of authority in accordance with the constitution. The Court established a test in three steps: the end must be legitimate; the means must have a real and substantial relation to a legitimate end; and the fundamental rights must not be infringed. But often through the "strict scrutiny" standard the Court reviewed the "wisdom" of a given policy underlying a law[235]. The "necessity" of a measure, its appropriateness, and even its reasonableness were very subjective and led the Supreme Court to play the role of a "super Legislature"[236] which reflected the idea of a majority of the bench[237].

c) The revolution of 1937

After 1937, the Supreme Court of the United States changed its

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234. See Schwartz, The Law in America, A History, New York: McGraw-Hill Book Co., 1974, at 49.

235. See Schwartz, Constitutional Law, A Textbook, New York: MacMillan Publishing Co., 1979, at 205. It should be noted, however, that the majority in Lochner said: "This is not a question of substituting the judgment of the Court for that of the Legislature. If the act be within the power of the state it is valid." 198 U.S. 45 (1905), at 56-57. When the Court abandoned the "strict scrutiny" test in the 1930's, the judges who disagreed with this departure said: "But plainly, I think, this court have regard to the wisdom of the enactment." See Nebbia v. New York, 291 U.S. 502 (1934), at 556.

236. See Brandeis, J., dissenting, in Burns Baking Co. v. Brian, 264 U.S. 504 (1924), at 534.

237. North Dakota Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973), at 164.

understanding of judicial review under the due process clauses[238]. The judges adopted two tests of judicial review depending on whether or not a fundamental right was at stake in a given statute. They also realized that the so-called "freedom of contract" was not a fundamental right protected by the constitution.

That was a real constitutional switch. In the 19th century, the concept of "liberty" in the due process clause then covered the "freedom of contract". That freedom was interpreted very broadly. In Adair v. US (1908)[239], Mr. Justice Harlan said that,

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the rights of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell... In all such particulars the employer and employee have equality of rights, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land[240].

In Coppage v. Kansas (1915)[241], Mr. Justice Piney said:

> Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and

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238. See Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

239. 208 U.S. 161 (1908).

240. Id., at 174-175.

241. 236 U.S. 1 (1915).

> other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich;...[242].

In Adkins v. Children's Hospital (1923)[243], Mr. Justice Sutherland said that""freedom of contract is... the general rule and restraint the exception"[244].

However, 1937 was part of the "New-Deal" period. Many laws were enacted to regulate the economy, which had been laid low by the depression. The broad definition of "freedom of contract" was contrary to the avowed purpose of the New-Deal program. The Court chose to change course.

In the case West Coast Hotel v. Parrish (1937)[245], a statute prohibited wages below a certain level deemed adequate for the maintenance of women and minors. The standards of wages and work conditions were determined by a commission. Parrish was a woman who claimed the difference between the wage she was receiving and the legal minimum wage. The Hotel argued that such a statute was against the "freedom of contract" protected in the due process clause. Mr. Justice Hughes responded:

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242. 236 U.S. 1 (1915), at 14.

243. 261 U.S. 525 (1923).

244. Id., at 546.

245. 300 U.S. 379 (1937).

> What is this freedom? The constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law[246].

That was a "revolution". Soon the legislatures could pass any regulation though it limited the freedom of contract.

The Court thus abandoned the "strict scrutiny" test applied throughout the Lochner Era (1900-1937), because it felt that it had no jurisdiction to enforce a right not protected by the written Constitution. In U.S. v. Carolene Products Co. (1938)[247], the judges held that any law which deals withethe "freedom of contract" – generally dealing with economic matters – is valid unless there is no rational relationship between the means and a legitimate end of government[248]. They applied a presumption of validity to any law which was rationally supported by facts. This new test in regard to economic regulations can be called the "rational basis" test. The Court would not "strictly" scrutinize a law which did not violate fundamental rights. Thus the wisdom of such a law would no longer be reviewed[249].

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246. 300 U.S. 379 (1937), at 391.

247. 304 U.S. 144 (1938).

248. In the post-1937 period, they adopted the test suggested by Justice Holmes in his dissent in Lochner v. New York which was the test of the "reasonable man". See Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952).

249. The courts review a law only where it is demonstrably arbitrary or irrational. See Duke Power Co. v. Carolina Environmental Study Group Inc., 438 U.S. 59 (1978), at 83-84.

In West Coast Hotel v. Parrish (1937), Mr. Justice Hughes defined "liberty":

> Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people[250].

That new definition of "liberty" had its consequences. Liberty in a "social organization" required the legal protection against certain evils. It therefore ratified the legitimacy of the intervention of the state[251].

The minority in West Coast Hotel rejected this new approach. The rule which included Freedom of Contract within the concept of "liberty" was "so well settled as to be no longer open to question"[252]. Their understanding followed the conception set out in Adair, Coppage and Adkins.

With the new definition, "liberty" would become a "social" right rather than an "individual" right. A government which acted in favour of social rights, necessarily respected the "due process" requirements.

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250. 300 U.S. 379 (1937), at 391.

251. It can be called a "positive state". See Miller, The Modern Corporate State, Westport: Greenwood Press, 1976, at 91.

252. 300 U.S. 379 (1937), at 406.

Two weeks after that case, the court had the occasion to restate this new approach. In National Relation Board v. Jones and Laughlin Corp. (1937)[253] the court upheld the power of Congress to compel employers to permit their employees to organize and to bargain with them collectively. The company argued that it was against the "freedom of contract". Mr. Justice Hughes said, for the majority, that if there existed a freedom of contract, for the employer:

> Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work... Restraint for the purpose of preventing and unjust interference with that right cannot be considered arbitrary or capricious[254].

The statute, said Mr. Justice Hughes,

> ...goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without a restraint or coercion by their employer that is a fundamental right[255].

So the legislature could protect that right from government as well as private party interference.

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253. 301 U.S. 1 (1937).

254. Id., at 44.

255. Id., at 33. Emphasis added.

d) Substantive due process after 1937

1. The rational basis test

With the 1937 switch, the court became more "restraintist" about economic issues[256]. Some cases even suggested total abstinence[257]. The decline of "freedom of contract" could no longer be open to question[258]. The due process clause now sounded like a very last resort. However, this decline in its use, was parallel to the birth of another promising clause: the equal protection clause. Its standard was the equality between classes. It required that governmental classifications as between groups have a rational relationship to a legitimate government end. That test was the same as the one under due process, with the sole distinction that it was the classification which had to be rationally related to the end. Recourse to the due process clause was necessary only where a statute did not classify people. However, those two grounds — the equal protection clause and the due process clause — could easily protect the same liberty[259].

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256. E.g. U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

257. E.g. Ferguson v. Skrupa, 372 U.S. 726 (1963).

258. E.g. U.S. v. Arby, 312 U.S. 100 (1941).

259. The Sterilization cases are good examples. In 1927 (Lochner Era) a statute providing compulsory sterilization for "imbeciles" was upheld. It was a valid exercise of the police power. The due process of law was not offended. "Three generations of imbeciles are enough." The court found that it was a reasonable statute. Moreover, it seems that they also found it wise. See Buck v. Bell, 274 U.S. 200 (1927). In 1942 (post 1937) the challenge was under the equal protection clause. The majority found no rational basis to justify the classification between those who have to be sterilized and those who do not. See Skinner v. Oklahoma, 316 U.S. 535 (1942).

In Railway Express Agency v. New York (1949)[260], an ordinance prevented owners of delivery vehicles from placing advertisements on the outside of their vehicles unless the advertisement was for the owner's business. The court upheld the statute because the classification had relation to the purpose for which it was made and did not contain the kind of discrimination against which the equal protection affords protection. Mr. Justice Jackson said that Governments

> ...must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation[261].

The court did strike down a statute under the equal protection clause, in Money v. Doud (1957)[262]. The legislation required currency exchange companies to meet certain requirements before being granted a licence. American Express was excluded by name. Mr. Justice Burton said:

> The Equal Protection Clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary... One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis but it is essentially arbitrary[263].

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260. 336 U.S. 106 (1949).

261. Id., at 112.

262. 354 U.S. 457 (1957).

263. Id., at 463. Emphasis added.

The judge then looked at the purpose and at the classification. He found that "the discrimination in favour of American Express Company does not conform to that purpose"[264]. For the court there was only a "remote relationship". The statute was ruled void[265].

I mention those two examples to illustrate that the court did not end judicial review of economic regulations under the "rational basis" test. There was still a good recourse to that argument. However, that test was argued under the equal protection clause rather than the due process clause[266].

It should not be thought from what I had said that, after 1937, the court never talked about "rational basis" in considering "due process of law" in the context of business regulation. That approach was reaffirmed in Williamson v. Lee Optical of Oklahoma (1955)[267]. Mr. Justice Douglas repeated the principles underlying the due process clause. He said:

> The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it[268].

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264. 354 U.S. 457 (1957), at 466.

265. This decision has probably been overruled in City of New Orleans v. Duke, 427 U.S. 297 (1976), at 306.

266. For a Canadian importation of this test see McKay v. Q (1980) 2 S.C.R. 370, (McIntyre, J.).

267. 348 U.S. 483 (1955).

268. Id., at 487-488.

Since there was a rational basis, the statute was sustained. The same reasoning had been used in Wickard v. Filborn (1942)[269] where the Agricultural Adjustment Act providing wheat marketing quotas was challenged under the due process clause and under the commerce clause. The court justified the "rationality" underlying the legislation. Mr. Justice Jackson then concluded:

> This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices[270].

It would be redundant to give more examples. Judicial review under the idea of "substantive due process" continued to test legislation at least through the test of equal protection. The due process clause itself would hardly ever be a ground to overturn the legislation. It appeared to have been used more as an alternative ground to control socio-economic regulations, than as an autonomous recourse. Where the equal protection clause could apply there was no need to discuss whether or not the due process clause was violated.

Such was the situation in the famous case Brown v. Board of Education (1954)[271]. It was unanimously held that racially segregated public schooling violated the equal protection clause of the Fourteenth

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269. 317 U.S. 111 (1942).

270. Id., at 128-129. Emphasis added. It should be noted that this passage comes from a discussion about the power to regulate commerce.

271. 347 U.S. 483 (1954).

Amendment[272]. Mr. Justice Warren said that this ground (equal protection) "makes unnecessary any discussion whether such segregation also violates the due process clause of the Fourteenth Amendment"[273]. That argument was an alternative. The court did not suggest that it was an argument which no longer had any validity.

On the contrary the Supreme Court expressly used the due process clause when it became necessary. In Bolling v. Sharpe (1954)[274] the validity of segregation in the public schools of the District of Columbia was challenged. There was a legal problem. This District was not a part of any State. Therefore the equal protection clause of the Fourteenth Amendment did not apply to it. Moreover the Fifth Amendment which was applicable to that District did not contain an equal protection clause. The petitioners alleged the only argument available: the denial of "due process of law" under the Fifth Amendment. In this decision, Mr. Justice Warren recognized that there was a "liberty" at stake:

> Although the Court has not assumed to define "Liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective[275].

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272. See Perry, The Constitution, the Courts, and Human Rights, New Haven: Yale University Press, 1982, at 1 and at 167, note 8.

273. 347 U.S. 483 (1954), at 495.

274. 347 U.S. 497 (1954).

275. Id., at 499-500.

Then he turned to the "reasonability" of the legislation which had to pass the "rational basis" test. He said:

> Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause[276].

This case was a direct application of the due process clause. The court invalidated a legislation which did not meet the standard of "reasonability" safeguarded in the "substantive due process".

In Brown v. Board of Education, the equal protection clause was sufficient grounds. The opinion in Bolling v. Sharpe indicates that the court could have relied on the due process clause as well as on the equal protection clause in the Brown case. However, it was not necessary. "Equal protection" and "due process" could give the same results under identical reasoning[277]. For our purpose, which is to show that judicial review under "substantive due process" understood as a test was not rejected, it does not matter on what grounds a particular law is challenged; it is the reasoning behind it which is more important.

Mr. Justice Warren explained the relationship between those two clauses:

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276. 347 U.S. 497 (1954), at 500.

277. In their famous article, Tusman and Tenbrock gave examples of cases where "the equal protection clause" is placed in opposition to the State's police power in a manner typical of the use of "substantive due process". See "The Equal Protection of the Laws", 37 Calif. L. Rev. 341 (1949), at 362.

> The concept of equal protection and Due Process, both stemming from our American ideal of fairness, are not mutually exclusive. The "Equal Protection of the Laws" is a more explicit safeguard of prohibited unfairness than "Due Process of Law", and, therefore, we do not imply that the two are always interchangeable phrases. But, as this court has recognized, discrimination may be so unjustifiable as to be violative of due process[278].

2. The strict scrutiny test

However, it should not be thought that the "strict scrutiny" test under "substantive due process" was completely abandoned after 1937. On the contrary, shortly after the important shift taken by the court over economic regulations in 1937, the judges reaffirmed that they would continue to strictly scrutinize a law which interfered with "fundamental rights"[279]. The "strict scrutiny" test meant that the court would continue to carefully scrutinize the factual basis for a statute interfering with a "fundamental right". The word "liberty" was broadly interpreted, including henceforth other substantive rights. These fundamental rights are generally the First Amendment rights, the right to association[280], the right to vote[281], the right to travel[282], the right

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278. Bolling v. Sharpe, 347 U.S. 497 (1954), at 499.

279. United States v. Carolene Products Co., 304 U.S. 144 (1938), footnote 4.

280. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960).

281. It is also called the right to participate in the electoral process. See Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965).

282. Shapiro v. Thompson, 394 U.S. 618 (1969).

to privacy[283] and the right of fairness in the criminal process[284]. The majority of the Supreme Court found that the Constitution guarantees these rights[285]. Therefore, a more stringent test is justified[286]. After 1937, the "strict scrutiny" test can be read as follows: Where a fundamental right is at stake, the law must be necessary to promote a compelling and overriding interest of government. There will be no presumption of validity. If the law is found not necessary or if it could have had a narrower scope or if the government does not show a compelling interest to pass it, the court will invalidate it[287].

One of the best examples of the "strict scrutiny" test after 1937 was Griswold v. Connecticut (1965)[288]. In that case a statute prohibited the use of contraceptives by both married and single persons. Six opinions were written. Mr. Justice Douglas wrote the opinion for the court but it appears that only two judges fully agreed with him.

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283. This right is not specifically written in the constitution. In Griswold v. Connecticut, 381 U.S. 479 (1965), the majority held that it came from the "penumbras" of several specific guarantees. For an example of this right to privacy, see Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services International, 97 S. Ct. 2010 (1977).

284. See, for example, Douglas v. California, 372 U.S. 353 (1963); Mayer v. Chicago, 404 U.S. 189 (1971).

285. See Murdock v. Pennsylvania, 319 U.S. 105 (1943), at 115. They are sometimes called "preferred rights".

286. See Thomas v. Collins, 323 U.S. 516 (1945), at 530.

287. See Griswold v. Connecticut, 381 U.S. 479 (1965).

288. Ibid.

For him the right of "privacy" was protected by the "penumbras formed by emanations" of other specific guarantees[289]. Mr. Justice Douglas refused to base his decision on the "substantive due process" approach. However, he applied a test which is closer to the "strict scrutiny" test in the Lochner case than to the "rational basis" test. He said:

> A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom[290].

At the very least, what is deemed "necessary" remained a subjective test which could necessitate inquiry into the wisdom of the law.

Three other judges invalidated the statute under the due process clause. Mr. Justice Goldberg said:

> Although I have not accepted the view that "due process" as used in the Fourteenth Amendment includes all of the first eight amendments, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights... the concept of Liberty is not so restricted and... it embraces the right of marital privacy though that right is not mentioned explicitly in the constitution...[291].

What is more interesting, however, is his rejection of the "rational basis" test as applied to this social regulation. He said:

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289. See Griswold v. Connecticut, 381 U.S. 479 (1965), at 484.

290. Id., at 485. Emphasis added.

291. Id., at 486.

> Yet if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy...[292].

Mr. Justice Goldberg seems also close to the "wisdom" test. He said, that rights,

> ...may not be abridged by the state simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose... the law must be shown necessary, and not merely rationally related to the accomplishment of permissible state policy [293].

One would think we were in the heart of the Lochner Era. That test sounds like a "strict scrutiny" test: "the law must be shown necessary". There is still much room for subjectivity. Mr. Justice Black rose up against that opinion. He said that it "reinstates the Lochner... Coppage... Adkins... line of cases"[294]. Less than ten years later, Mr. Justice Stewart said:

> The Griswold decision can be rationally understood only as a holding that the (anti-contraceptive) statute substantially invaded the "Liberty" that is protected by the Due Process Clause" of the Fourteenth Amendment. As so understood, Griswold

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292. See Griswold v. Connecticut, 281 U.S. 479 (1965), at 497.

293. Id., at 498. Emphasis added.

294. Id., at 524.

> stands as one in a long line of pre-Skrupa cases decided under the doctrine of "substantive due process[295].

In Roe v. Wade[296] it was held that that same right was broad enough to "encompass a woman's decision whether or not to terminate a pregnancy"[297] (abortion). Therefore, a state which interferes with the right to have an abortion must show that it is justified by a compelling and overriding interest, and that the legislative enactment is narrowly drawn[298]. In this case the Supreme Court held that the states had two "legitimate" interests[299]: the mother's health and the foetus' potential life. However, those interests were distinct and varied during pregnancy. For example, the court stated that during the first trimester the state has no interest in protecting the health of the woman by regulating abortion, because the operation at that time is not any more dangerous than a "normal childbirth"[300]. The interest of protecting the foetus by prohibiting the abortion is not compelling either in the first trimester. However, during the second trimester

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295. In Roe v. Wade, 410 U.S. 113 (1973), at 168, Mr. Justice Renquist has also suggested that Lochner and Griswold (and Roe v. Wade too) are "sisters under the skin". Renquist, "Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?" 23 U. Ken. L. Rev. 1 (1974); Roe v. Wade, at 174 (dissenting opinion).

296. Ibid.

297. Id., at 153.

298. Id., at 155.

299. Id., at 154.

300. Id., at 163.

of pregnancy the mother's health would be more endangered by the abortion than by a normal childbirth. The state thus has an interest in adopting "reasonable" regulations related to the protection of the mother's health[301]. But there is still no compelling interest in protecting the foetus. During the third trimester, however, the foetus becomes viable[302]. The state has therefore a compelling interest in prohibiting abortions except when the health or the life of the mother is in danger[303].

In summary, it would be wrong to assume that "substantive due process" is dead in the United States[304]. After 1937 the courts established a double standard. When a law interferes with a "fundamental right", the government has to prove to the court that the measure is necessary to promote a compelling interest. When a law does not interfere with such a right, the law only needs to be rationally related to a legitimate end of government. Therefore, the concept of "substantive due process" still allows the review of statutes in order to decide whether or not they are "reasonable".

Many parallels can be drawn between the pre-1937 period dealing with the "freedom of contract" and the post-1937 period dealing with "fundamental rights". But the most important parallel is certainly

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301. 410 U.S. 113 (1973), at 163.

302. Ibid.

303. Id., at 163

304. See Corwin, The Constitution and What it Means Today (13th ed.), Princeton: Princeton University Press, 1973, at 330

the relation means-end. Before 1937 the court required a substantial connection leading the court to review whether the measure was necessary to protect a legitimate end (such as health) — see Lochner. After 1937 the means had to be necessary to promote a compelling governmental interest — see Griswold[305].

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305. We must add that because neither the freedom of contract nor the right to privacy are written in the U.S. Constitution, it sounds like the same line of case. In Griswold v. Connecticut, 381 U.S. 479 (1965) Mr. Justice Black in dissent said that the majority "would reinstate the Lochner, Coppage, Adkins, Burns line of cases...", at 524. In Roe v. Wade, 410 U.S. 113 (1973), Mr. Justice Stewart said: "The Griswold decision can be rationally understood only as a holding that the (anti-contraceptive) statute substantially invaded the "liberty" that is protected by the due process clause... As so understood, Griswold stands as one in a long line of pre-Skrupa cases decided under the doctrine of substantive due process." See also Renquist, "Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?", 23 U. Ken. L. Rev. 1 (1974) and Professor Ely in "The Wages of Crying Wolf: A Comment on Roe v. Wade", 82 YalesL.J. 920 (1973), who criticized the point that the Supreme Court enforces some values which are not written in the Constitution nor based on history.

CHAPTER IV

JUDICIAL REVIEW OF THE SUBSTANTIVE CONTENT OF THE LAW IN CANADA

This chapter will review the short experience with "due process of law" in Canada. The cases which have dealt with this concept were decided in the period before 1982. At that time, the principle of the supremacy of parliament was not curtailed by a constitutional document such as the Charter of Rights. The phrase "due process of law" is found in a "quasi-constitutional"[306] document, the Canadian Bill of Rights which provides since 1960 that:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law[307].

Such a concept was unknown to Canadian tradition[308]. However, the language used in section 1(a) of the Canadian Bill of Rights was similar to the British Laws which have recognized from time to time the

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306. See Hogan v. The Queen (1975) 2 S.C.R. 574 (Laskin, J.).

307. Emphasis added.

308. Rand, "Except by Due Process" (1961) 1 O.H.L.J. 171, at 174.

Magna Carta[309] and to the American amendments to the Constitution[310]. Therefore the courts were asked to decide whether the phrase "due process of law" in Canada should receive the narrow according to law content — such as in England today — or whether it allows the importation in Canada of "substantive due process" — as in the United States[311].

It appears from the first important case dealing with the concept of "due process of law" in Canada, Curr v. The Queen[312], that the Supreme Court rejected the narrow "according to law" interpretation. In that case the Court had to decide whether ss. 223 and 224 (a-3) (now s. 237(1) (b)(c)) of the Criminal Code which provided that the refusal or default of an accused to agree to a breathalizer test, without reasonable excuse, may be admitted in evidence against him, were compatible with ss. 1(a) and (b) and s. 2(d), (e) and (f) of the Bill of Rights.

Mr. Justice Laskin spoke for the majority[313]. He rejected the English interpretation saying that:

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309. See supra, ch. I and II.

310. See supra, ch. III.

311. See Tarnopolsky, The Canadian Bill of Rights, Toronto: McClelland and Stewart Ltd., 1975.

312. (1972) S.C.R. 889. Before 1972, the Canadian Courts had been reluctant to define "Due Process of Law". See Rebrin v. Minister of Citizenship and Immigration (1961),S.C.R. 376; Yuet Sun v. Q. (1961) S.C.R. 70; Regina v. Martin (1961) 35 C.R. 276 (Alta. C.A.). For a review of these cases, see Tarnopolsky, id., at 229.

313. See also supra, ch. I. Four other judges endorsed his opinion: Abbot, Hall, Spence, and Pigeon.

> It is obvious that to read "due process of law", as meaning simply that there must be some legal authority to qualify or impair security of the person would be to see it as declaratory only. On this view it should not matter whether the legal authority is found in enacted law or in unenacted or decisional law[314].

However, in dissent, Mr. Justice Ritchie took the narrow view. Only one judge concurred[315]. He said:

> I prefer to base this conclusion on my understanding that the meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that, in my opinion, the phrase "due process of law" as used in s. 1(a) is to be construed as meaning "accordance to the legal processes recognized by Parliament and the Courts in Canada"[316].

Though the majority in the Curr case rejected the narrow interpretation of "due process of law", a majority of the Supreme Court of Canada seems to have adopted it in 1977. In Miller v. Q.[317], Miller had been condemned to death for the murder of a police officer. He argued that the death penalty was inconsistent with the Canadian Bill of Rights. Mr. Justice Ritchie wrote the opinion for the majority[318]. He said:

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314. (1972) S.C.R. 889, at 897.

315. Mr. Justice Fauteux.

316. (1972) S.C.R. 889, at 916.

317. (1977) 2 S.C.R. 680.

318. Justices Martland and Judson who did not adopt any final definition in Curr will henceforth adopt the "narrow" view. Mr. Justice de Grandpre was new on the bench and agreed with Mr. Ritchie. Mr. Justice Pigeon changed his mind between Curr and Miller.

> The declaration of the right of the individual not to be deprived of life which is contained in s. 1(a) clearly qualified by the words "except by due process of law", which appear to me to contemplate a process whereby an individual may be deprived of life... in my view, the "existing right" guaranteed by s. 1(a) can only relate to individuals who have not undergone the process of such a trial and conviction[319].

The Bill of Rights recognized "existing rights". As far as "due process" was concerned, this meant "according to the legal process recognized by Parliament and the courts in Canada"[320].

The concept of "substantive due process" as interpreted in the United States was also discussed in Canada for the first time in Curr. The Supreme Court was asked to

> ...monitor the substantive content of legislation by reference to s. 1(a). The invitation (was) to take the phrase "except by due process of law" beyond its antecedents in English legal history, and to view it in terms that have had sanction in the United States...[321].

On the one hand, Mr. Justice Laskin, who wrote for the majority, rejected the American experience with "substantive due process". He said that,

> American judicial experience with the Fifth and Fourteenth Amendments, in respect of substantive due process, does not provide any ground upon which

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319. (1977) 2 S.C.R. 680, at 704.

320. Tarnopolsky, The Canadian Bill of Rights, Toronto: McClelland and Stewart Ltd., 1975, at 234. Since that decision, the Canadian Courts in general have adopted the narrow view.

321. (1972) S.C.R. 889, at 897.

> this Court might stand for the purpose of resorting to due process in s. 1(a) as a means of controlling such federal laws as s. 233 of the Criminal Code...[322].

He added further that,

> The very large words of s. 1(a) tempered by the phrase ("except by due process of law") whose original English meaning has been overlaid by American constitutional imperatives, signal extreme caution to me when asked to apply them in negation of substantive legislation validly enacted by a Parliament in which the major role is played by elected representatives of the people. Certainly, in the present case, a holding that the enactment of s. 223 has infringed the appelant's right to the security of his person without due process of law must be grounded on more than a substitution of a personal judgment for that of Parliament...[323].

The Canadian Courts had to respect the Canadian tradition in constitutional law. In Morgentaler v. The Queen[324], Chief Justice Laskin wrote in his dissent about the Curr case that,

> This Court indicated in the Curr case how foreign to our constitutional traditions, to our constitutional law and to our conceptions of judicial review was any interference by a court with the substantive content of legislation. No doubt, substantive content had to be measured on an issue of ultra vires even prior to the enactment of the Canadian Bill of Rights, and necessary interpretative considerations also had and have a bearing on substantive terms. Of course, the Canadian Bill of Rights introduced a new dimension in respect of the operation and application of federal law, as the judgments of this Court have attested. Yet it cannot be forgotten

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322. (1972) S.C.R. 889, at 900.

323. Id., at 902.

324. (1976) 1 S.C.R. 616.

> that it is a statutory instrument, illustrative of Parliament's primacy within the limits of its assigned legislative authority, and this is a relevant consideration in determining how far the language of the Canadian Bill of Rights should be taken in assessing the quality of federal enactments which are challenged under s. 1(a)[325].

However, it appears from a dictum in his decision in Curr that sometimes Chief Justice Laskin would be ready to monitor the substantive content of the law:

> In so far as s. 223 be regarded, in the light of s. 223(2), as having specific substantive effect in itself, I am likewise of the opinion that s. 1(a) of the Canadian Bill of Rights does not make it inoperative. Assuming that "except by due process of law" provides a means of controlling substantive federal legislation — a point that did not directly arise in R. v. Drybones — compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionnally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North America Act, 1867. Those reasons must relate to objective and manageable standards by which a Court should be guided if scope is to be found in s. 1(a) due process to silence otherwise competent federal legislation. Neither reasons for underlying standards were offered here. For myself, I am not prepared in this case to surmise what they might be[326].

In Morgentaler, he said that section 1(a) of the Canadian Bill of Rights was not necessarily limited to procedural matters.

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325. Id., at 632; R. at 632.

326. (1972) S.C.R. 889, at 899-900.

> I am not, however, prepared to say, in this early period of the elaboration of the impact of the Canadian Bill of Rights upon federal legislation, that the prescription of s. 1(a) must be rigidly confined to procedural matters. There is often an interaction of means and ends, and it may be that there can be a proper invocation of due process of law in respect of federal legislation as i improperly abridging a person's right...[327].

Therefore it appears from the opinions of Mr. Justice Laskin in Curr (speaking for the majority) and in Morgantaler (dissenting) that the phrase "due process of law" should be interpreted somewhere between "according to law" and the broad "substantive due process". In his mind, it safeguarded at least some procedures. In Curr he wrote that

> It is evident from s. 2... that its specification of particular protections is without limitation of any others that may have a source in s. 1.:. (But) I am unable to appreciate what more can be read into s. 1(a) from a procedural standpoint than is already comprehended by s. 2(e) (a fair hearing in accordance with the principles of fundamental justice) and by s. 2(f) ("a fair and public hearing by an independent and impartial tribunal")[328].

We saw in the first chapter that this interpretation allowed the court to monitor the procedural content of the law.

In a word, though the recognition in Curr that the phrase "due process of law" allowed the court to control the "procedural" and perhaps the "substantive" content of the law, subsequent decisions suggest

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327. (1976) 1 S.C.R. 616, at 633.

328. (1972) S.C.R. 889, at 898. Patrice Garant said that the drafters of the Charter of Rights adopted "principles of fundamental justice" to constitutionalize that conception of Laskin's. In Tarnopolsky, Beaudoin, The Canadian Charter of Rights and Freedoms, Toronto: Carswell Co., 1982.

that the Supreme Court of Canada reads into s. 1(a) of the Canadian Bill of Rights, the narrow English "according to law" protection. Therefore, it seems fair to say that Curr is an isolated case[329].

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329. See Re State of Wisconsin and Armstrong (1973) 32 D.L.R. (3d) 265; Levitz v. Ryan (1972) 29 D.L.R. (3d) 519; See also Tarnopolsky, The Canadian Bill of Rights, Toronto: McClelland Stewart Ltd., 1975, and Garant, "Fundamental Freedoms and Natural Justice", ibid.

CHAPTER V

THE AMERICAN SUBSTANTIVE DUE PROCESS, THE PRINCIPLES OF FUNDAMENTAL JUSTICE AND THE DRAFTERS OF THE CHARTER

The preceeding chapters discussed "substantive due process" in England, in the United States and in Canada before April 1982. We saw that the American jurisprudence seems to be the only one which allows the court to control the substantive content of the law[330]. While England might have allowed such judicial review at times in its history, that approach was rejected when the supremacy of parliament was affirmed. Canada, which is a legatee of the British constitutional traditions, has never clearly established in jurisprudence, the idea of the American "substantive due process". Part of the reason was that in Canada the phrase "due process of law" was written in a "quasi-constitutional" document which gave a statutory — as contrasted with a constitutional — jurisdiction.

The entrenchment in the constitution of a due process clause would remove this legal objection raised in Curr v. The Queen by Mr. Justice Laskin. Before the final draft of the Charter, many drafts had been written. They all provided that:

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330. It should be reminded that several decisions in the United States expressly rejected such a jurisdiction. See Ferguson v. Skrupa 372 U.S. 726 (1963) and Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U.S. 525 (1949).

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except by due process of law[331].

This phrase "due process of law" was amended in September, 1980. It was replaced by the phrase "principles of fundamental justice"[332]. At first glance, two reasons could have motivated the drafters to make such a change in a phrase long known in English Law. On the one hand, they could have rejected the narrow interpretation given by Ritchie to the effect that "due process" meant "according to law". On the other hand they could have been afraid that the constitutional jurisdiction of the Charter would allow the court to monitor the legislative content and particularly its "substantive" content through the introduction in Canadian law of "substantive due process". This second hypothesis reflects the concern of the majority of the witnessess before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. Obviously something was wrong with the concept "substantive due process".

The Honorable Jean Chrétien explained the possible effect of the due process clause:

> If you write down the words "due process of law" here, the advice I am receiving is the court could go behind our decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of

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331. See Elliot, "Interpreting the Charter-Use of the Earlier Versions as an Aid" (1982) U.B.C.L. Rev. 11.

332. Section 7 of the Charter.

> the power of legislation by the Parliament and we don't want that; and it is why we do not want the words "due process of law"... we do not want the courts to say that the judgment of Parliament was wrong in using the constitution...[333].

Professor Tarnopolsky shares this point of view. He said that there

> remains a fear in many circles that any reference to a due process clause, even without reference to property in this clause, could reintroduce the substantive "due process" interpretation in the United States[334].

Also, Dr. B.L. Strayer, the Assistant Deputy Minister, Public Law, of the federal Department of Justice, gave the view of the drafters of the Canadian Constitution:

> Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question... this has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness... Due process would certainly include the concept of procedural fairness that we think is covered by fundamental justice but we think that "due

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333. Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. First Session of the thirty-second Parliament, 1980-81, at 46:43 (Jan. 27, 1981).

334. Id., at 7:21 (Nov. 18, 1980).

> process" would have the danger of going well beyond procedural fairness and to deal with substantive fairness which raises the possibility of the courts second guessing Parliaments or legislatures on the policy of the law as opposed to the procedure by which rights are to be dealt with. This has been the experience at times in the United States in the interpretation of the term "due process"[335].

The fear about "due process of law" however was not unanimous. It would be true to say that the scope and the meaning of "due process of law", as opposed to "principles of fundamental justice" created some confusion in the minds of many witnesses. Some people, such as Max Cohen, believed that both expressions were synonymous. For them the phrase "principles of fundamental justice" was only the continuity of the law of the land, natural law, fundamental law and due process[336]. In any event, there was a general repulsion concerning "substantive due process" as interpreted in the United States.

"Substantive due process" as we have earlier seen, is a notion quite complex which developed in the United States in accordance with the constitutional traditions. It is not clear to what extent its scope was understood by those who drafted the Canadian Constitution. There was no serious attempt to define the scope and the meaning of "substantive

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335. Id., at 46:32 (Jan. 27, 1981).

336. Cohen said: "You can trace a whole systematic approach to what began as a simple phrase, I think in the Magna Carta... up through ideas of natural law, up through the idea of fundamental law, then due process of law, now fundamental justice which is a high bred term and which the Diefenbaker Bill of Rights used quite successfully in its own limited way and I see it has been taken into here... I would prefer a nice old term that lawyers know for a couple of hundred years such as due process of law. But if the draftsmen believe they are better off with fundamental justice, we will not cavil about it." Id., at 7:89 (Nov. 18, 1980).

due process" before the joint committee. The only reference made to it concerned a fear of a review of the Judgment of Parliament or a control of the policy of the law.

The Canadian understanding of "substantive due process" is more explicit elsewhere. In Curr, Mr. Justice Laskin reviewed the American jurisprudence concerning that concept in economic matters before 1937[337]. He said:

> It appears that so-called economic due process has been abandoned (in 1937), in the realization that a Court enters the bog of legislative policy-making in assuming to enshrine any particular theory, as for example, untrammelled liberty of contract, which has not been plainly expressed in the constitution[338].

This American experience led him to use "extreme caution when he was asked to overrule an Act of Parliament. There was nothing in the record "by way of evidence" or "admissible extrinsic material", upon which such a holding could be supported"[339]. Mr. Justice Laskin added that the Supreme Court "must resist making the wisdom of impugned legislation a test of its constitutionality"[340]. A test based on the wisdom of the law could have caused the "fear" created by""substantive due process".

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337. The use of "substantive due process" in economic matters before 1937, has been called "economic due process". But we should not confuse these two terms. They are not synonymous. The first term is much broader and includes the second.

338. (1972) S.C.R. 889, at 902.

339. Ibid.

340. Id., at 903.

In his Canadian Bill of Rights[341], Professor Tarnopolsky reviews the American experience as well. He suggests that "substantive due process" came to an end in 1934. He briefly reviews the American application of the due process clause which invalidated many socio-economic laws during the 19th century and, the first third of the 20th century. Tarnopolsky claims that "the change came finally with the 1934 case of Nebbia v. New York[342].

He adds that "due process" meaning that "no person shall be deprived of property"[343] no longer applies today. And when he reviews the opinion of Laskin in Curr he assimilates substantive due process with economic due process:

> He (Laskin) referred to the abandoning of the economic (or substantive) due process interpretation in 1937...[344].

It would not be wrong to say that the drafters in general, understood the concept of "substantive due process" as having ended in the 1930's[345]. In other words, they thought the introduction of this concept in Canada would have led the Canadian courts to review the

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341. Tarnopolsky, The Canadian Bill of Rights, Toronto: McClelland and Stewart Ltd., 1975.

342. Id., at 229.

343. Id., at 225.

344. Id., at 231. Here Mr. Tarnopolsky confused "economic" and "substantive" due process. Mr. Justice Laskin in Curr did not make such an assimilation. We saw that they are not synonymous terms.

345. It is likely however that Dr. Strayer referred to the "strict scrutiny" test in general. See his passage accompanying note 335.

substantive content of the legislation in a way which would have been similar to the American decision held throughout the Lochner Era (1900-1937).

It is true that the years 1934 and 1937 respectively marked a constutional switch in the Court's approach to "substantive due process". However, as we earlier saw, the real "constitutional revolution"[346], was not in regard to this concept. To conclude that "substantive due process" died after 1937 is to take the result for the reasoning. And the result, in itself is misleading. Tribe said that between 1897 and 1937, "more statutes, in fact, withstood due process attack in this period than succumbed to it"[347]. "Due process of law" is not a result. It is a means of protecting the individual from arbitrary government. "Substantive due process" requires standards[348]. These standards can be more or less severe. We saw that in the Lochner Era the "strict scrutiny" test had the favour of the court. Then, judicial review consisted in the review of the "wisdom" of the policy.

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346. Corwin, Constitutional Revolution, Claremont: Claremont Colleges, 1941.

347. Tribe, American Constitutional Law, Mineola: The Foundation Press Inc., 1978, at 435. It seems that 197 cases have been invalidated while a larger number of regulations have survived the due process test. See e.g. Village of Euclid v. Amber, 272 U.S. 365 (1926); Bunting v. Oregon, 243 U.S. 426 (1917); Chicago v. McGuire, 219 U.S. 549 (1911); Miller v. Oregon, 208 U.S. 412 (1908); Holden v. Hardy, 169 U.S. 366 (1898).

348. It is perhaps what Mr. Justice Laskin meant when he said that he needed "compelling reasons... (and) those reasons must relate to objective and manageable standards by which a Court should be guided if scope is to be found in s. 1(a) due process to silence otherwise competent federal legislation..." Curr v. Q. (1972) S.C.R. 889, at 899-900.

If the control of the "wisdom" of the policy of the law was the sole test or standard possible in order to give effect to reasonable laws, perhaps the fear of "due process of law" would have been justified in a society the traditions of which were firmly rooted in the rule of law and in the supremacy of Parliament. However, we saw earlier that the "strict scrutiny" test was only one of many tests that a court could apply. Moreover, we also saw that the concept of "substantive due process" is not an experience which died in the 1930's. On the contrary it appears that the American courts continued to use this concept in order to control the substantive content of the law. By the end of the 1930's, the courts began to use two standards. Therefore it appears that it is likely that the drafters of the Charter who decided to replace "due process of law" by "principles of fundamental justice" were misled. "Substantive due process" does not necessarily imply the review of the policy of the law.

In any event, we should conclude that the drafters wrote the phrase "principles of fundamental justice" in order to avoid the introduction in Canada of the "strict scrutiny" test such as applied before 1937 in the United States.

Therefore it is likely that the drafters of the Charter did not intend to reject any standard of "reasonability". The test which allows the court to review the "wisdom" of the law was only one test underlying the standard of "reasonability". Therefore it could be maintained that the drafters would have agreed with a standard beyond the "wisdom" test

such as a "rational basis" test within the new phrase of "principles of fundamental justice" or within the phrase "due process of law"[349].

The phrase "principles of fundamental justice" has never been clearly defined in Canadian Law[350]. However the Canadian Bill of Rights (1960) provides in its section 2(e) that:

> 2. ...no law of Canada shall be construed or applied so as to
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> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

This section had been interpreted in the case Duke v. The Queen[351]. In this case Duke asked in vain a breath sample to the police in order to analyze it himself. Before the court he maintained that he was deprived of a right to a fair hearing in accordance with the principles of fundamental justice (s. 2(e) of the Canadian Bill of Rights) because of the consequent failure to provide the sample. It was according to this context that Mr. Justice Fauteux said that:

> Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in

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349. We will see, in the last chapter, that the "rational basis" test was known to our Canadian tradition.

350. However, Garant said that this notion is synonymous with "natural justice" and therefore known at common law. See "Fundamental Freedoms and Natural Justice", in Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms, Toronto: Carswell, 1982, at 277-278.

351. (1972) S.C.R. 917.

> a judicial temper, and must give to him the opportunity adequately to state his case[352].

One might conclude that this passage suggests that section 2(e) of the Canadian Bill of Rights was synonymous with the "principles of natural justice"[353]. However it would be difficult to affirm that this passage of Mr. Justice Fauteux referred to the portion "principles of fundamental justice" only. It seems instead that he took section 2(e) of the Canadian Bill of Rights as a whole: "right to a fair hearing in accordance with the principles of fundamental justice". It is therefore difficult to separate the two concepts. And because the right to a fair hearing is procedural in itself[354], it is logical to infer that the principles of fundamental justice related to this right are necessarily procedural.

This reasoning alone shows that it would be wrong to hold that the phrase "principles of fundamental justice" in section 7 of the Charter means what Mr. Justice Fauteux said it meant in Duke. First he refused to adopt any final definition on the subject and secondly it would be an extrapolation of his opinion out of the context in which it was given.

However the approach of Mr. Justice Fauteux can be relevant so as to indicate that the phrase "principles of fundamental justice" should

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352. Id., at 923.

353. See e.g. Hogg, Canada Act 1982, Annotated, Toronto: Carswell, 1982, at 27.

354. Pépin, Ouellette, Principes de contentieux administratif, Cowansville: Yvon Blais Inc., 1982, at 225.

be read with the right it is related to. Consequently, the right not to be deprived of his life, liberty or security except in accordance with the principles of fundamental justice should be interpreted as a whole. Consequently the phrase "principles of fundamental justice" would, in effect, be interpreted according to its context.

In section 7 of the Charter, the context in which is written the phrase "principles of fundamental justice" is completely different from s. 2(e) of the Canadian Bill of Rights. It is related to the deprivation of the rights to life, liberty and security rather than the right to a fair hearing.

Those three fundamental rights are not in themselves procedural rights. They are "substantive". Their scopes are much broader than a right to a fair hearing. Therefore, in so far as the phrase "principles of fundamental justice" must be read in relation to these three fundamental rights — life, liberty and security — protected in section 7 of the Charter, the principles required may be, at first glance at least, much broader than those required in section 2(e) of the Canadian Bill of Rights. Consequently all the principles interpreted as being of fundamental justice by the courts that apply a law which has the effect of depriving an individual of his right to life, liberty or security should be prima facie included in section 7 of the Charter of Rights. These principles may vary according to the right deprived. Some rights — such as liberty, for example — could have more principles of fundamental justice related to it than the right to a fair hearing

or to security. The question reminds one of the nature of those principles of fundamental justice related to a particular right, and bears on the means to recognize them. We will discuss this point in the last chapter.

CHAPTER VI

AMERICAN SUBSTANTIVE DUE PROCESS AND CANADIAN CONSTITUTIONAL TRADITIONS

Assuming that the drafters of the Charter of Rights have adopted the phrase "principles of fundamental justice" in order to avoid the introduction in Canada of the concept "substantive due process"[355], it would appear at first glance that this intention has been recently thwarted by the decision of the Appeal Court of British Columbia in the Motor Vehicle Act Reference. The Court has decided that,

> The meaning to be given to the phrase "principles of fundamental justice" is that it is not restricted to matters of procedure but extends to substantive law and that the courts are therefore called upon in construing the provision of s. 7 of the Charter, to have regard to the content of legislation[356].

This passage indicates that the spectre of "substantive due process" is still looming on the horizon of the Charter of Rights. In this case the judges had to decide whether an "absolute liability" offense leading to a mandatory seven days' imprisonment was in accordance with the "principles of fundamental justice". The councel opposing the validity of section 94(2) contended, as Mr. Justice Dickson stated in Sault

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355. See supra, ch. V.

356. The Motor Vehicle Act Reference, at 11.

Ste-Marie, that there was "aggenerally held revulsion against punishment of the morally innocent". He therefore claimed that all "absolute liability" offenses were inconsistent with the Charter. This argument, which will be examined later[357], was rejected by the Court of Appeal[358]. The judges agreed with the proposition stated by Dickson, J., but held that there will remain "certain public welfare offenses, e.g. air and water pollution offenses, where the public interest requires that the offenses be absolute liability offenses"[359].

However, the Court of Appeal ruled that section 94(2) was inconsistent with section 7 of the Charter because the legislature, though it can create "absolute liability" offenses, did not respect the criteria which underly such a category of offenses and which characterize it[360]. Those criteria were set out by Mr. Justice Dickson for a unanimous court in Sault Ste-Marie[361]. In that case the Supreme Court of Canada created a third category of offenses called "strict liability" — the "half-way house"[362] — between the two traditional categories of offenses, one requiring the mens rea (to have a guilty mind) and the

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357. See infra, ch. VII.

358. The Motor Vehicle Act Reference, at 11-12.

359. Id., at 12.

360. Id., at 11.

361. (1978) 2 S.C.R. 1299.

362. See Williams, Criminal Law (the General Part) (2nd ed.), London: Stevens, 1961.

other irrespective of fault and called "absolute liability". Mr. Justice Dickson said:

> Offenses which are criminal in the true sense fall in the first category. Public welfare offenses would, prima facie, be in the second category. They are not subject to the presumption of full mens rea. An offense of this type would fall in the first category only if such words as "wilfully", "with intent", "knowlingly", or "intentionally" are contained in the statutory provision creating the offense. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offenses of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offense falls into the third category[363].

The penalty for "absolute liability" offenses is usually "slight"[364]. The Court of Appeal held that the principles (or criteria) underlying the division of offenses into three categories must receive "consideration"[365]. The judges concluded that Mr. Justice Dickson in Sault Ste-Marie "makes it clear that the nature of the penalty imposed is important"[366].

> In the case of section 94(2) what the Legislature has done is declare the offense to be absolute, denying to the accused the opportunity to show that

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363. (1978) 2 S.C.R. 1299, at 1326.

364. Id., at 1311.

365. The Motor Vehicle Act Reference, at 10.

366. Ibid.

> he drove without knowledge that his licence was suspended. The penalty imposed is a mandatory seven days imprisonment. The conclusion can only be that the legislation is inconsistent with the principles stated by Dickson J. and which should be applied in determining into which of the three categories an offense falls[367].

The Court of Appeal has included the principles stated by Mr. Justice Dickson in Sault Ste-Marie in the content of "principles of fundamental justice"[368]. Did the Court of Appeal through section 7 of the Charter of Rights, introduce the American concept of "substantive due process" into Canadian constitutional law? I will show that this is very unlikely. It seems that the Court of Appeal of British Columbia did not rely on the American interpretation of substantive due process in the Motor Vehicle Act Reference. Neither the test applied before 1937 nor the post-1937 standard has been introduced into Canadian constitutional law. It takes more than a review of the "substantive" content of the law to infer the adoption of "substantive due process" in the American sense. "Substantive due process" was created in the United States because American constitutional traditions needed it at a given time. It played a specific role which fitted their conception of judicial review. Thus it is questionable whether it could have been transplanted to Canada.

We have seen that limitations upon the American federal and state legislatures concerning the legitimate goals of government or the

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367. The Motor Vehicle Act Reference, at 11-12.

368. Id., at 12.

"police powers", preceded the due process clause. Natural law and the social compact had established that the only legitimate end of government was to protect the public welfare instead of dealing with purely private interests[369]. In the absence of such a tradition in Canadian constitutional law, it is relevant to ask whether section 7 of the Charter of Rights can introduce in Canada a doctrine (the exclusion of certain ends) that its American counterpart (the due process clauses) did not create but merely applied and developed. The limitations on government enforced by substantive due process were a substitute for the prior natural-law approach and thus fitted into the American political tradition.

In Canada, as we have seen earlier, the constitutional tradition before the enactment of the Charter of Rights contained no such implied limitations imposed by the theories of natural law or social compact[370]. Canadian federalism had been built upon the "Legislative Supremacy of Parliament", a British principle[371] which had exhaustively distributed the totality of the legislative power between the federal Parliament and the provincial legislatures[372]. That means

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369. See supra, ch. III.

370. I am not denying, however, that these theories had an impact on the common law. We will see in the next chapter that the courts created several rules of interpretation in order to protect natural rights.

371. See Dicey, Law of the Constitution (9th ed.), London: MacMillan and Co., 1948, ch. 1-3.

372. Bank of Toronto v. Lambe (1887) 12 A.C. 575, at 587; Union Colliery Co. v. Bryden (1899), A.C. 580 (P.C.), at 585.

that together the two levels of government could pass laws on any topic affecting any person[373]. Consequently, there is no "end" of legislative power that implicitly no level of government could regulate[374]. Such a limitation would have been inconsistent with the principle of exhaustivity which was the federalist version of the principle of parliamentary supremacy.

In Canada the legitimate "ends" of power are mainly found in sections 91 and 92 of the Constitution Act, 1867[375]. When a court cannot attribute the specific "matter" of a law to one of the express classes of subjects enumerated, that law falls within the total residuary power of the federal Parliament (the opening words of section 91 of the Constitution Act, 1867)[376]. That explains why the main Canadian constitutional question has been "who" can regulate such and such "matter"

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373. We have already mentioned that there were only a few exceptions to this tradition. For example take s. 93 and 133 of the Constitution Act, 1867.

374. It can be maintained, however, that the federal system itself imposes some implicit limitations. For example, the impossibility of a legislature to do "legislative interdelegation" or to preclude judicial review of the constitutionality of a statute. See Hogg, Constitutional Law of Canada, Toronto: Carswell, 1977, at 199-200.

375. I am not speaking about the concept of "valid federal objective" as developed under the equality clause of the Canadian Bill of Rights. See Q. v. Burnshine (1975) 1 S.C.R. 693. However it would seem that this concept — which can be synonymous with a "legitimate end" — is synonymous with the legislative power that we find under section 91 of the Constitution Act, 1867. See MacKay v. The Queen (1980) 2 S.C.R. 370 (McIntyre, J., concurring at 405-406).

376. See, however, A.G. Ont. v. A.G. Can. (Local Prohibition) (1896) A.C. 348, at 365 (Lord Watson) which would have recognized that s. 92(16) Constitution Act, 1867, was a provincial residual clause.

instead of "whether" this "matter" is subject to regulation. Thus, where the "matter" of the law does not fall within the classes of subject allocated to the enacting legislature, the law is ultra vires, which means that it is invalid under the distribution of power provisions.

It is unlikely that one of the effects of section 7 would be to exclude from the power of Parliament or of the legislatures certain "ends" or subject matter that had been exhaustively distributed in the Constitution Act, 1867. There are two compelling arguments to support that proposition. First, section 1 of the Charter of Rights, itself, provides that the rights guaranteed are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Therefore, Parliament and the legislatures are only limited in the means to achieve an end otherwise valid under the distribution of powers. Second, Parliament or the legislatures may always use the "notwithstanding" clause of section 33 of the Charter to expressly declare that a law inconsistent with section 7 of the Charter shall be in effect.. These two sections lead to the conclusion that the principle of exhaustivity is not curtailed by the passing of section 7 in particular. Such a conclusion would probably also explain the dicta of Chief Justice Laskin in Westendorp v. The Queen[377]:

> It appeared in the course of argument that counsel for the appellant not only sought to infuse a substantive content into section 7 beyond any procedural

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377. Jan. 25, 1983 (S.C.C.) unreported.

> limitation of its terms, but also to rely on section 7 to challenge the validity of the by-law provision without accepting as a necessary basis for the section 7 submission that it could only apply if the by-law was to be taken as valid under the distribution of powers between the legislative authorities[378].

This passage seems to assume that an argument based upon section 7 of the Charter can be raised only if the law challenged is valid under the division of powers or if it is presumed to be so. If, and only if, this law is assumed to be valid under the division of powers, the court will look at its content to decide whether or not it is consistent with section 7 of the Charter. Consequently, the question of "legitimate end" is still resolved by the traditional question of "who" can regulate such and such matter. The Charter of Rights has nothing to do with that question.

The Court of Appeal did not have recourse to the Charter of Rights to answer the question whether the Motor Vehicle Act had been passed to promote a "legitimate end"[379]. It is unlikely that such a question determined by the Charter would have fitted in our constitutional tradition which is based upon the principle of "exhaustivity". It was clear that the provision in the Motor Vehicle Act was designed to achieve a legitimate end.

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378. Id., at 3.

379. It is assumed that the provinces have the power to deal with highway traffic regulations. See Provincial Secretary of Prince Edward Island v. Egan (1941) S.C.R. 396.

In addition, assuming that the "end" was legitimate, it should be noticed that the Court of Appeal did not introduce into Canada the American standards controlling the "means-end" relationship. The invitation to do so was even stronger in light of a dictum of Chief Justice Laskin in Morgentaler[380] and quoted in the Motor Vehicle Act Reference[381]. He said about section 1(a) of the Canadian Bill of Rights which guaranteed "due process of law" that,

> I am not, however, prepared to say, in this early period of the elaboration of the impact of the Canadian Bill of Rights upon federal legislation, that the prescriptions of s. 1(a) must be rigidly confined to procedural matters. There is often an interaction of means and ends, and it may be that there can be a proper invocation of due process of law in respect of federal legislation as improperly abridging a person's right to life, liberty, security and enjoyment of property. Such a reservation is not, however, called for in the present case[382].

Perhaps Laskin C.J. was willing to introduce the "means-ends" control under the due process clause of the Bill of Rights. However, it was not an issue in the Motor Vehicle Act Reference.

The Court of Appeal did not look at the "substantive" content of the law in order to determine whether the means (section 94(2) of the Motor Vehicle Act as amended) which interfered with the right to liberty, were substantially, directly or necessarily related to a

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380. (1976) 1 S.C.R. 616.

381. The Motor Vehicle Act Reference, at 6.

382. (1976) 1 S.C.R. 616, at 633.

legitimate end of government. The means-end relationship which allows a number of more or less "strict" standards was not an issue in the Motor Vehicle Act Reference.

The "rational basis" test is applied in the United States where a law interferes with a "right" not seen as "fundamental" in the Constitution[383]. In so far as the Motor Vehicle Act interferes with a right not deemed "fundamental" (e.g. the right to drive a car) it is likely that it would have passed the test. The means (the prohibition to drive on suspension or the creation of an "absolute liability" offense leading to seven day's imprisonment) was rationally related to its legitimate end (the provincial power over the safety of circulation and traffic on highways)[384].

However, in so far as the Motor Vehicle Act interferes with a "fundamental" right (e.g. freedom from incarceration) the phrase "principles of fundamental justice" could have been argued as an invitation to the court to "scrutinize" more severely the means of this Act[385]. But, beside the fact that the Constitution Act, 1867 expressly provides that the provinces can enact laws providing for prison sentences in otherwise "valid" provincial laws such as the Motor Vehicle Act (see section 92(14) of the Constitution Act, 1867), the application of any

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383. See United States v. Carolene Products Co., 304 U.S. 144 (1938).

384. See O'Grady v. Sparling (1960) S.C.R. 804 and Mann v. R. (1966) S.C.R. 238.

385. See United States v. Carolene Products Co., 304 U.S. 144 (1938), footnote 4.

"strict scrutiny" standard would appear to be akin to a "wisdom" test[386], and as Chief Justice Laskin warned in Morgentaler, in the application of "substantive due process",

> There is as much a temptation... as there is on the question of ultra vires to consider the wisdom of the legislation, and I think it is our duty to resist it in the former connection as in the latter[387].

To summarize, then, I believe that the Court of Appeal of British Columbia did not introduce into Canada the American "substantive due process". The standards which gave shape to this concept were not even discussed in the decision. The importation of this concept, either in its pre-1937 or post-1937 form, would have been foreign to our Anglo-Canadian traditions founded, along with other principles, on the exhaustivity of power and on judicial restraint.

Such an importation would have been easier to justify under section 1(a) of the Canadian Bill of Rights because of the wording which suggested the wording of the American due process clauses. Such reasoning would be very weak in light of the substitution of the phrase "principles of fundamental justice" in the Charter which contains nothing indicating that it means "due process of law". The mere fact that both phrases secure the same substantive rights, such as life, liberty and security, is not sufficient ground to assimilate them. Other rights could have been written into section 7 of the Charter and

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386. See supra, ch. III.

387. (1976) 1 S.C.R. 616, at 632-633.

the "principles of fundamental justice" would have applied to them in the same way. Who would maintain that the rights to life, liberty and security mean that the individual has a right to a fair hearing because both section 7 of the Charter and section 2(e) of the Canadian Bill of Rights guarantee that those fundamental rights would not be deprived except in accordance with "the principles of fundamental justice"?

The phrase "principles of fundamental justice" and the phrase "due process of law" should be interpreted in their own context. The fact that many authors read into the phrase "principles of fundamental justice" the interpretation given to the phrase "due process of law" is possible only because both phrases are at first glance so amorphous. Their broad and vague content invites the parallel[388].

It is misleading to talk about section 7 of the Charter in a way which suggests that the phrase "principles of fundamental justice" is synonymous with "due process of law". These phrases are quite different. If section 7 allows the court to control the substantive content of the law, it should be through a reasoning which fits into our canadian traditions. To reach such a result through a reasoning which suggests that section 7 contains a "substantive due process" would be to adopt a foreign tradition. In any event, the Court of Appeal of British Columbia in the Motor Vehicle Act Reference did not introduce into Canada the concept of "substantive due process" such as developed in the United States.

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388. See Brockelbank, "The Role of Due Process in American Constitutional Law", 39 Corn. L.Q. 561.

CHAPTER VII

THE CANADIAN SOURCES OF SUBSTANTIVE PRINCIPLES OF FUNDAMENTAL JUSTICE

In this last chapter I will propose a general standard for the interpretation of the phrase "principles of fundamental justice". I will show that these principles should be interpreted in the light of the history of our common law. Though this original approach can give results similar to the American idea of "due process of law" in general and "substantive due process" in particular, the reasoning to reach such a result will differ completely. Consequently we will come to the conclusion that section 7 of the Charter allows the court to control the substantive content of the law as well as its procedural content but in a context which will respect the Canadian constitutional traditions. Since the standard suggested in this thesis will be identical whether the issue concerns the substantive or the procedural content of the law (in contrast with the United States) the traditional dichotomy between procedural and substantive laws will become irrelevant.

The content of the phrase "principles of fundamental justice" in section 7 of the Charter of Rights must be broad enough to encompass the principles of justice previously protected through the fiction of the common law presumptions generally used to interpret the intention of the legislature. It does not mean, however, that those presumptions are the only means to find the principles of fundamental justice. Other

"principles" can be found elsewhere and even created in jurisprudence.

Throughout the history of the common law, presumptions have played an important role. They were created to protect and safeguard fundamental principles of the common law, and to deal with statutory violations of those principles.

We saw earlier that there was a brief time when it appeared that the English common law might develop an approach similar to that of the American constitutional law. The common law, itself, was regarded as fundamental law. We find, therefore, many cases where the courts said that a statute which would be contrary to the reason of the common law would be void[389]. For example, I have earlier cited the famous dictum of Lord Coke in Dr. Bonham's case (1610):

> When an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void[390].

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389. It seems, however, that only one law has been invalidated on these grounds. The law was impossible to apply anyway. See MacKay, "Coke-Parliamentary Sovereignty or the Supremacy of the Law?" 22 Mich. L. Rev. 215 (1924).

390. Dr. Bonham's Case (1610) 8 C. Rep. 114, at 118. See Plucknett, "Bonham's Case and Judicial Review" (1926) 40 Harv. L. Rev. 30; and Thorne, "Dr. Bonham's Case" (1938) 54 L.Q.R. 543. This obiter appears to have been inconsistent with what Coke said in his Institutes, vol. IV, at 36. As a judge Coke supported the supremacy of the common law and as a parliamentarian (when he was dismissed from his position of Chief Justice of the King's Bench in 1616) he supported the supremacy of Parliament: "(Parliament) is so transcendant and absolute as it cannot be confined either for causes or persons within any bounds." See Gough, Fundamental Law in English Constitutional History, Oxford: At the Clarendon Press, 1961. According to Gough, Coke meant only that the court would interpret statutes in such a way as not to conflict with these principles of reason and justice. Id., at 35.

In Day v. Savage (1615), Hobart C.J. said:

> Even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself...[391].

In Callady v. Pilkington (1701), Holt C.J. held that "if an Act gives away the property of a subject it ought not to be countenanced"[392]. The reason of common law deemed as fundamental has been enforced in history by the theory of natural law developed mainly by Locke[393] who held the right to liberty or property to be sacred[394].

However, that strong position taken by Lord Coke and other judges soon became a mere presumption to be applied where the intention of Parliament was ambiguous[395]. The idea of supremacy of Parliament was a growing notion which had been conceded by the courts in the 18th century[396].

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391. Hobart 85, at 97.

392. Callady v. Pilkington (1701), 12 Mod. 513. See also City of London v. Wood (1701), 12 Mod. 669.

393. Locke, Second Treatise of Government.

394. City of London v. Wood (1701), 12 Med. 669; Callady v. Pilkington (1701), 12 Med. 513 (per Holt C.J.); Bricy's Case (1697), 1 Salk. 348. It would appear that the lawyers of the time agreed that there was a body of law deemed to be fundamental because it was reasonable. See MacKay, "Coke-Parliamentary Sovereignty or the Supremacy of the Law?" 22 Mich. L. Rev. 215 (1924).

395. See generally, Baker, An Introduction to English Legal History, London: Butterworths, 1979, at 183.

396. See Corry, "The Interpretation of Statutes", in Driedger, The Construction of Statutes, Toronto: Butterworths, 1974, at 121 ff.

England rejected the idea of fundamental law[397], such as the reason of common law, and created the idea of the constitution though it remained unwritten.

Indeed the constitution reflected the principle of the Supremacy of Parliament. However, it also reflected the ideal behind the old fundamental principles of common law in a more limited way.

> The judges seem to have in their minds an ideal constitution, comprising those fundamental rules of common law which seem essential to the liberties of the subject and the proper government of the country. These rules cannot be repealed but by a direct and unequivoccal enactment. In the absence of express words or necessary intendment, statutes will be applied subject to them...[398].

Therefore the fundamental principles of common law still existed through the rules of construction of statutes in general and presumptions in particular. The courts assumed that several principles of common law were fundamental.

> The principles perhaps may be called fundamental, not so much because they could not legally be assailed as because it was assumed that no legal authority would wish to assail them[399].

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397. See Stewart v. Lawton 1 Bingham 374 ff. (1823), where the counsel pleaded Dr. Bonham's case. The court rejected the argument based upon the idea of fundamental law.

398. Keir, Lawson, Cases in Constitutional Law (4th ed.), Oxford: At the Clarendon Press, 1967, at 11.

399. Gough, Fundamental Law in English Constitutional History, Oxford: At the Clarendon Press, 1955, at 23.

It was the duty of the judges to protect those fundamental principles. In his book, Fundamental Law in English Constitutional History, W. Gough explained that in practice those principles meant

> ...that liberties and rights of the subject, notably the rights of property and of personal freedom, were ordained for men by the will of God, so that indeed, justice and equity consisted mainly in upholding them. There was a presumption that the law would protect these, and that no statute could be intended to damage them[400].

The courts created a range of presumptions in order to do "justice and equity". As Professors Keir and Lawson explain in their book Cases in Constitutional Law[401]:

> Here the canons of interpretation followed by the judges embody in an attenuated form the ancient doctrine, already referred to, that there was a sense in which the common law was fundamental. A statute which is contrary to the reason of the common law or purports to take away a prerogative of the Crown is none the less valid, but it will, so far as is possible, be applied in such a way to leave the Prerogative or the common law rights of the subject intact. To this extent the reason of the common law still prevails; we cannot say that Parliament cannot do any of these things, but we can still say that there is a presumption against its doing them[402].

Originally, therefore, the presumptions were an attempt to determine the true intent of Parliament where a statute was not clear. Those

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400. Gough, Fundamental Law in English Constitutional History, Oxford: At the Clarendon Press, 1955, at 23.

401. Keir, Lawson, Cases in Constitutional Law (5th ed.), Oxford: At the Clarendon Press, 1967.

402. Id., at 9.

intentions became so important that today the presumptions themselves have taken on a new function[403]:

> Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are a means of controlling that intent. Together they form a sort of common law "Bill of Rights"[404].

However, the supremacy of Parliament requires that, in a statute, a clear intention that a presumption should be rebutted must be enforced by the courts. No law could be declared inoperative because of a violation of the fundamental principles safeguarded by the presumptions[405].

The enactment of the Charter of Rights has obviously curtailed the Supremacy of Parliament[406]. To the extent that the presumptions

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403. See e.g. Q. v. Estabrooks Pontiac Buick Ltd., Dec. 31, 1982, C.A. N.B. Laforest J.A., at 7-13.

404. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. B. Rev.1, at 17.

405. Dicey said in his Introduction to the Study of the Constitution (9th ed.), London: MacMillan, at 39-40, that: "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."

406. In Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983) 140 D.L.R. (3d) 33, Mr. Justice Deschene said: "Previously... the courts only intervened if Parliament purported to invade an exclusive field of jurisdiction of a province, or vice versa. The latter prerogative of the courts still exists, but under the Charter, a new and considerable responsibility has been added. The Charter is part of the "Supreme Law of Canada": no Parliament and no Legislature may detract from it except within the limits that it allows."

protected "principles of fundamental justice", section 7 of the Charter gives them a constitutional status, which means that the Parliament or the Legislatures henceforth cannot rebut the principle even with a clear intention[407]. Any statute which leads to the deprivation of one fundamental right, concerning life, liberty or security will be bound to respect those "principles of fundamental justice". And the fact of going back to these presumptions established at common law, gives the court "objective and manageable standard"[408].

The purpose of this paper is not to enumerate all the "principles of justice" previously protected or recognized at common law. My point is only to show that several presumptions, because of their specific role and historical importance, must be understood as safeguards of the principles of fundamental justice that the Constitution now requires.

This does not mean that the whole set of presumptions concerning statutory interpretation are included in section 7 of the Charter. For example, unless the right to property can be attached to one of the rights enumerated, the range of presumptions created to protect the

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407. It should be noted however that the Parliament and the Legislatures can always enact a law contrary to the "principles of fundamental justice" if they respect the limit of section 1 of the Charter or the requirement of section 33 of the Charter.

408. Those standards were already claimed by Mr. Justice Laskin in Curr v. The Queen (1972) S.C.R. 889, at 899.

right to property[409] remain mere presumptions without constitutional protection. It is also difficult to see how the presumption against change in common law[410] can become a "principle of fundamental justice" in the sense of section 7 since it was not a presumption related to the protection of individual right to life, liberty or security[411]. However, it will be up to the courts to decide which presumptions must be included.

The field of administrative law, for example, provides a good indication of what has been considered at common law as "principles of justice". The principles of "natural justice" must, without doubt, be entrenched in section 7 of the Charter of Rights because

> Natural justice means no more than justice without any epithet... (it means) those desiderata which... we regard as essential, in contradistinction from the many extra precautions, helpful to justice, but not indispensable to it, which by their rules of evidence and procedure, our courts have made obligatory in actual trials before themselves... But

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409. See Colet v. The Queen (1981) 119 D.L.R. (3d) 521 (S.C.C.). However, in so far as property rights are interpreted as being included in the right to security, the court should read within the context of the phrase "principles of fundamental justice" the individual citizen's right not to be deprived of his property without compensation. See The Queen in the Right of New Brunswick v. Fisherman's Wharf Ltd. (1982), 135 D.L.R. (3d) 307, discussed in Brandt, "Right to Property as an Extension of Personal Security — Status of Undeclared Rights" (1983), 61 Can. B. Rev. 398.

410. Arthur v. Bokenham (1708), 11 Mod. 148.

411. See Côté, Interprétation des lois, Cowansville: Les Editions Blais Inc., 1982.

> we do require that they shall observe those unwritten rules and take those precautions which are fundamental essentials of justice...[412].

Those principles previously could only be violated by a clear intention of Parliament[413]. With the enactment of section 7, henceforth the legislator will also be bound to respect them.

Under this line of reasoning the rules against "sub-delegation"[414] or against total "discretionary powers"[415] should be prima facie included in the content of "principles of fundamental justice" where a law which allows them interferes with the right to life, liberty or security. However, such an application has still to be demonstrated.

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412. Green v. Blaker (1948) I.R. 242, at 268. See generally, Garant, "Fundamental Freedoms and Natural Justice", in Tarnopolsky, Beaudoin, The Canadian Charter of Rights and Freedoms, Toronto: Carswell, 1982, at 278. See also Hopkins v. Smethwick Local Board of Health (1890) 24 Q.B.C. 712, at 716 where the judge speaks expressly of "fundamental justice". See also L'alliance des professeurs catholiques de Montréal v. Labor Relation Board of Quebec (1953) 2 S.C.R. 140, at 147.

413. L'alliance des professeurs catholiques de Montréal v. Labor Relation Board of Quebec, id., at 154: "A mon avis, il ne faudrait rien de moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence (audi alteram partem) qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu."

414. The maxim delegatus non potest delegare is a rule of construction. See R. v. Harrison (1977) 1 S.C.R. 238. It is justified by the rule of law and by the strict construction of statute. See Willis "Delegatus non potest delegare" (1943) 21 Can. B. Rev. 257. The rule, however, is not absolute. The courts have already departed from that rule in order to adopt an interpretation in accordance with the modern government. See Willis, id., at 264. It is obvious, therefore, that the incorporation of this maxim in s. 7 will require nuances when it is time to apply it to the act of Parliament.

415. Padfield v. Minister of Agriculture, Fisheries and Food (1968) A.C. 997; Roncarelli v. Duplessis (1959) S.C.R. 121.

We can find some of those "principles" in texts concerning the construction of statutes[416]. Therefore, the presumption against retrospective operation[417], against interference with vested rights[418], against injustice, unreasonableness or absurdity[419], against impairing obligation[420], must, in so far as their violation would affect the fundamental rights to life, liberty and security, be included in section 7 of the Charter of Rights[421].

Perhaps the most controversial presumption at common law which could be included in section 7 is the presumption against an unreasonable

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416. See generally Driedger, The Construction of Statutes, Toronto: Butterworths, 1974; Maxwell, On Interpretation of Statutes (12th ed.), London: Sweet & Maxwell, 1969; Côté, Interprétation des lois, Cowansville: Les Editions Blais Inc., 1982.

417. Phillips v. Eyre (1870), L.R. 6 Q.B. 1, at 23; West v. Gwynne (1911), 2 Ch. 1 per Kennedy L.J. See also Re Regina and Potma (1982) 136 D.L.R. (3d) 69. Traditionally this presumption applied only when the content of the law was substantive. See Re Athlumney (1898) 2 Q.B. 551 at 551-552. Ironically this principle of "fundamental justice" can reintroduce the dichotomy between substantive and procedural content of the law in this context.

418. Spooner Oils Ltd. v. Turner Valley Gas Conservation Board (1933), S.C.R. 629, at 638; A.G. for Canada v. Hallet S. Carey Ltd. (1952), A.C. 427, at 450.

419. Arrow Shipping Co. Ltd. v. Tyre Improvement Commissioners (1894), A.C. 508; Coutts & Co. v. I.R.C. (1953), A.C. 267; and see A.G. v. Prince Ernest Augustus of Hanover (1957), A.C. 436.

420. Ditton's Case (1704), 2 Selk. 490; Re A Debtor, No. 612 of 1960 (1964), 1 W.L.R. 807, at 817.

421. Other rules could be included in the phrase "principles of fundamental justice". Even, perhaps, several rules of interpretation such as the strict construction of penal statutes: see Tuck & Sons v. Priester (1887), 19 Q.B.D. 629, at 638; Kelly v. O'Brian (1942), O.R. 691, at 694.

law[422]. This presumption is more related to the intention of the legislator than to the protection of the life, liberty and security of the citizen. It is sometimes assimilated to the "Golden Rule" which provides that a court can ignore the literal meaning of words if the literal meaning would lead to an absurdity understood as unreasonable[423].

However assuming that the presumption against unreasonable law is now entrenched in section 7 of the Charter — in so far as the unreasonable law interferes with the right to life, liberty and security — it brings to mind the concept of reasonable law developed in the United States under the doctrine of "substantive due process"[424]. But, it should be noted that the word "reasonable" in this context must receive prima facie an interpretation in accordance with the common law. The invalidity of an Act deemed "unreasonable" has generally been raised in the field of administrative law. In Kruse v. Johnson[425] it was stated:

> If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification

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422. Artimiou v. Procopiou (1966) 1 Q.B. 878, at 888; Luke v. I.R.C. (1963) A.C. 557, at 577; A.G. v. Prince Ernest Augustus of Hanover (1957) A.C. 436; Gordon v. Cradock (1964) 1 Q.B. 503. See generally Maxwell, On the Interpretation of Statutes, London: Sweet & Maxwell, 1969, at 199 ff.

423. See The Queen v. Quon (1948) S.C.R. 508.

424. See supra, ch. III.

425. (1898) 2 Q.B. 91.

> in the minds of reasonable men, the court might well say "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires" [426].

Another statement of the meaning of "unreasonable" acts of authority has been given in Secretary of State for Education and Science v. Tameside Metropolitan Borough Council[427]. Lord Denning said:

> No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take the view.
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> All the more so when a man — be he a judge or a minister — is entrusted by Parliament with the task of deciding whether another person has acted, is acting or is proposing to act unreasonably. Especially when the one who has to decide has himself his own views — and perhaps his own strong views — as to what should or should not be done. He must be very careful then not to fall into the error — a very common error — of thinking that anyone with whom he disagrees is being unreasonable. He may himself think the solution so obvious that the opposite view cannot be reasonably held by anyone. But he must pause before doing so. He must ask himself: "Is this person so very wrong? May he not quite reasonably take a different view?" It is only when the answer is: "He is completely wrong. No reasonable person would take that view" that he should condemn him as being unreasonable[428].

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426. (1898) 2 Q.B. 91, at 99. See also Associated Provincial Pictures Houses Ltd. v. Wednesbury Corporation (1947), 2 All. E.R. 680, at 683.

427. (1977) A.C. 1014. This case has been quoted by Chief Justice Deschene in Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983) 140 D.L.R. (3d) 33, in the context of s. 1 of the Charter of Rights and Freedoms.

428. Id., at 1025-1026.

In the same case, Lord Scarman said:

> Moreover, the word "unreasonably" means not "mistakenly" nor even "wrongly" but refers only to a situation in which the authority is acting or proposing to act in a way in which, in the circumstances prevailing and on the expert advice available, no reasonable authority could have acted[429].

That interpretation of the word "reasonable" has been adopted in Canadian law in Bell v. The Queen[430]. Mr. Justice Spence, speaking for the majority, said:

> The by-law in its device... comes exactly within Lord Russell's words as to be found to be "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men"[431].

The idea of reasonableness is also a very old one in the common law[432]. It was already a strong legal concept in the 16th century[433]. We saw that Lord Coke considered it to be a fundamental principle of law overriding even a statute. As far as one can convince the court that

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429. Id., at 1032.

430. (1979) 2 R.C.S. 212.

431. Id., at 223.

432. The test of "reasonableness" appeared at common law in the context of custom. See Allen, Law in the Making, Oxford: At the Clarendon Press, 1951, at 587 (Appendix - "Reasonableness of Custom").

433. St. Germain, Dialogues in English between a Doctor of Divinity and a Student in the Laws of England (1523), f. 4 recto, quoted in Gough, Fundamental Law in English Constitutional History, Oxford: At the Clarendon Press, 1961, at 17-18. See also Hill v. Grange (3 & 4 Philip and Mary), 1 Plowden, 164 (1557-58); Earl of Leicester v. Heyden (13 Eliz.), id., at 384 (1571); and Fulmeston v. Stewart, 1 Plowden, 109.

it is now entrenched in section 7 of the Charter of Rights, the counsel opposing the validity of the law still would have to reverse the burden imposed by the test of reasonableness as understood at common law. It seems probable that the test would apply a standard similar to the standard used in the "rational basis" test in American law after 1937[434]. Experience withtthat test suggests that with a very few exceptions, all statutes will pass the test.

This "rational basis" test is known to our Canadian tradition. It has nothing to do with the "judgment" of parliament. It has nothing to do with the "wisdom" of the legislation. Such a test of "rational basis" has been applied in the well-known Anti Inflation Reference (1976)[435]. Laskin C.J. with whom Judson, Spence and Dickson J.J. agreed held that the court

> ...would be unjustified in concluding, on the submissions in this case and on all the material put before it, that the Parliament of Canada did not have a rational basis for regarding the Anti-Inflation Act as a measure which in its judgment, was temporarily necessary to meet a situation of economic crisis impending the well-being of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole[436].

The Anti-Inflation Act was passed under the opening words of Sec. 91 of the Constitution Act of 1867. This power, calling for the

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434. See, supra, ch. III.

435. (1976) 2 S.C.R. 373.

436. Id., at 425. Emphasis added.

"peace, order, and good government of Canada" (p.o.g.g.), is residuary and therefore can be compared with the American states' "police power". However, the court included four "tests" under the p.o.g.g. power. One of them was the "emergency" test. One of the questions in that case was whether the extrinsic evidence put before the court or judicially known showed that there was a rational basis for the Act "as a Crisis measure". It is much like the American "rational basis" used to test an Act passed as a "Health measure". Chief Justice Laskin said:

> When, as in this case, an issue is raised that exceptional circumstances underlie resort to a legislative power which may properly be invoked in such circumstances, the court may be asked to consider extrinsic material bearing on the circumstances alleged, both in support of and in denial of the lawful exercise of legislative authority. In considering such material and assessing its weight, the court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment... The extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity[437].

Thus, if it appeared that there was no "rational basis" the legislation would have been an unconstitutional infringment of the provincial power. In the United States, the power over "Health" invoked without "rational basis" was an unconstitutional infringment of individual rights. That test could be adopted in the context of the Charter.

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437. (1976) 2 S.C.R. 373, at 423. Emphasis added. Indeed this case was a review of the end. However it is an example which shows that the "rational basis" test is not unknown to our constitutional law. On the other hand, I am not saying that section 7 of the Charter will necessarily allow the courts to review the rational basis of the end of any statute. See supra, ch. VI.

Nevertheless the justification for this standard of "reasonability" would have been different from that used in the United States. In that country, the "reasonability" of an act appeared before the use of "due process of law". It was implicit in the constitution itself. The States were limited. Their tradition concerning Natural Law never left that proposition in question. Therefore "due process of law" enforced the constitution and Natural Law. In Canada, such a standard of "reasonability" (understood as "rational basis") would appear after the entrenchment of section 7 and because of it. In Canada, before the enactment of the Charter of Rights, the power of each level of government was unlimited within its head of powers. There was no limit of "reasonability". That standard would be contrary to the principle of the "supremacy of Parliament".

The drafters were not afraid to see such a standard in the Canadian constitution. They even wrote in the very first section of the Charter that it guarantees the rights and freedoms set out in it subject only to such "reasonable limits". In Quebec Assn. of Protestant School Boards v. A.G. Quebec (1982)[438], Chief Justice Deschenes said that "a limit is reasonable if it is proportionate to the objective sought by the legislation". That conclusion came from a list of precedents which had tried to define what would be a reasonable limitation of fundamental rights. The test generally adopted was the "rational basis" test

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438. (1983) 140 D.L.R. (3d) 33.

requiring a "reasonable relationship" between the means and the end[439].

While the Anti-Inflation Reference asked for a "rational basis" in order to justify Parliament's legislating under its residuary power, other cases in Canadian law used it to scrutinize whether there was a rational relationship between the means and the end. Such is the case in MacKay (1980)[440], where Mr. Justice McIntyre suggested that the test for equality before the law would require a rational relationship between the classification (means) and the end.

These presumptions enumerated above deal with substance as well as procedure. Therefore, once the principles of justice they protect are entrenched in section 7 of the Charter of Rights, the courts can be allowed to control the substantive as well as the prodedural content of the law. This judicial review is explained because the principles themselves concern procedure and substance. For example, the principles of natural justice are generally procedural. The right to a fair hearing is procedural. However, the principle of justice which asks for a reasonable law deals with the substantive content of the law.

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439. It can be argued that the adoption of "substantive due process" requiring "reasonable" law would be absurd in the light of s. 1 of the Charter. A statute which would infringe on the liberty of the citizen would have to survive the same test twice. The statute would have to show a "rational basis" (i.e. a rational relationship between the means and the end) under section 7 of the Charter. And if it failed, it would have to show again a "rational basis" (i.e. a rational relationship between the means and the end) under section 1. Obviously it would fail again. It somehow seems rather redundant. There is no "reasonable" "unreasonable" legislation possible under an identical test. One could read together section 1 with a "reasonability" standard insofar as the respective tests differ.

440. (1980) 2 S.C.R. 370, at 407.

The best example of this proposition to date is given by the Motor Vehicle Act Reference. In this case the Court of Appeal of British Columbia had to decide whether an "absolute liability" offense leading to a mandatory seven days' imprisonment was consistent with the "principles of fundamental justice". The judges did not look at the question as a procedural problem. They monitored the substantive content of the law.

It was held that it is a "principle of fundamental justice" that only a slight penalty may be given to an accused if a law creates an absolute liability offense — that is, one which is violated without knowledge of the essential fact of the infraction even if the accused took all reasonable care to know it[441]. Before Sault Ste-Marie (1978), a slight penalty was one of the characteristics of the "absolute liability" offenses[442]. With this case it became one of the "criteria" stated by Dickson J. to determine whether or not a particular public welfare offense belongs to the category of "absolute liability"[443]. Consequently it began to have some legal significance. But while those "criteria" were guides for the courts, with the Motor Vehicle Act Reference they became an absolute requirement, binding both Parliament and the Legislatures.

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441. The Motor Vehicle Act Reference, at 11.

442. (1978) 2 S.C.R. 1299, at 1311.

443. Id., at 1326.

The Court of Appeal said:

> The conclusion can only be that the legislation is inconsistent with the principles stated by Dickson J. (in Sault Ste-Marie) and which should be applied in determining into which of the three categories an offense falls... Applying the reasoning of Mr. Justice Dickson in the Sault Ste-Marie case it is our opinion that section 94(2) of the Motor Vehicle Act is inconsistent with the principles of fundamental justice[444].

The effect of this decision, therefore, is to constitutionalize those "criteria" through section 7 of the Charter of Rights. However, the Court of Appeal did not suggest any standard justifying why it should "give consideration to the principles which underlie the division of offenses into three categories"[445]. In so far as the judges held that Sault Ste-Marie dealt with one or more principles of fundamental justice, the Motor Vehicle Act Reference should be taken seriously. It appears, however, that the Court of Appeal relied on factors which should not have been considered as "principles of fundamental justice" in themselves. The court should have returned to these presumptions established at common law in order to decide whether the Motor Vehicle Act interfered with the right to liberty in violation of a "principle of fundamental justice" previously protected by them. The judges would have concluded that the law was inconsistent because it violated the principle that no one should be punished without fault instead of holding

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444. The Motor Vehicle Act Reference, at 11.

445. Id., at 10.

that it was so because it violated a criterion given by Mr. Justice Dickson in Sault Ste-Marie. If they had given effect to the truly fundamental principles, the Motor Vehicle Act Reference would have suggested a manageable standard which would have been consistent with our Anglo-Canadian tradition[446].

The presumption in favour of mens rea, has been created in common law to protect the individual right to liberty[447]. It applied to Acts imposing penalties[448]. In R. v. Beaver[449] the Supreme Court of Canada recognized the importance of this principle. The majority quoted the dictum of Lord Goddard, C.J.:

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446. One of the reasons why Mr. Justice Laskin in Curr v. The Queen (1972) S.C.R. 889, at 889-900 was reluctant to introduce the concept of "substantive due process" was precisely this lack of standards. "...Compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament... Those reasons must relate to objective and manageable standards by which a Court should be guided... Neither reasons nor underlying standards were offered here." In his Canadian Bill of Rights, Professor Tarnopolsky added: "The various reasons given by Laskin, J. (in Curr) for applying a substantive due process interpretation should surely be considered by our judiciary even if the Bill of Rights were one day to be included in the B.N.A. Act!", Toronto: McClelland and Stewart Ltd., 1975.

447. Driedger, The Construction of Statutes, Toronto: Butterworths, 1974, at 137. See Brand v. Wood (1946) 175 L.T. 306; Harding v. Price (1948) 1 K.B. 695; R. v. Cugullene (1961) 1 W.L.R. 858, at 860; R. v. Curr (1967) 2 Q.B. 944; R. v. Tolson (1889) 23 Q.B.D. 168 and Sherras v. DeRutzen (1895) 1 Q.B. 918.

448. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. B. Rev. 1, at 24.

449. (1957) S.C.R. 531.

> The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in Brend v. Wood (1946) 62 T.L.R. 462, 463: "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offense against the criminal law unless he has a guilty mind[450].

The presumption in favour of mens rea had been considered by the common law courts as a principle of fundamental justice protecting the right to liberty where a crime was at issue.

For example it was held in Fowler v. Padget (1798)[451] that:

> Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural justice, and of our law, that actus non facit reum nisi mens sit rea.

The concept of mens rea appeared by the end of the 12th century under the influence of Roman law and particularly of canon law[452]. The idea of punishment came to appear inconceivable in the case of a person who was morally blameless. Consequently the common law courts created several defenses to criminal liability (such as insanity, infancy, intoxication, mistake of fact) because moral guilt was based upon theppremise

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450. Harding v. Price (1948) 1 K.B. 695, at 700.

451. (1798) 7 T.R. 509. See also Jodoin, "La Charte canadienne des droits et l'élément moral des infractions" (1983), 61 Can. B. Rev. 211, who reaches also the same conclusion.

452. See Sayre, "Mens Rea", 45 Harv. L. Rev. 974 (1931-32), at 982 ff. for a good history of the concept of mens rea.

that the accused could know and choose between good and evil. Mens rea was then always required in common law crimes and presumed in statutory offenses. The decline of this presumption appeared in the 19th century when legislators began to create different "public welfare" offenses[453]. The problem faced by the courts was that the offense was not a crime in the true sense and that the statute did not specify any fault requirement[454]. Glanville Williams would have preferred that the courts interpret such statutes in the light of general principles of law, including the presumption of mens rea. He said:

> If the courts insisted upon a requirement of fault this would almost certainly influence Parliament in the same direction, while the ready concession of liability without fault by the judges naturally has the effect of devaluing the principle of justice[455].

Sault Ste-Marie should be understood as a case following the tradition of common law. The Supreme Court created a new "presumption" that in the absence of an indication to the contrary a defense of due diligence is allowed for an individual accused of a "public welfare" offense[456]. This presumption is based upon the same fundamental principles underlying the "presumption" of mens rea as a constituent of a

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453. R. v. Woodrow (1846) 15 M. & M. 404; R. v. Stephens (1866) L.R. 1 Q.B. 702; and see Sayre, "Public Welfare Offenses", 33 Col. L. Rev. 55 (1933).

454. See Williams, Textbook of Criminal Law, London: Stevens & Sons, 1978, at 905-906.

455. Id., at 906. Emphasis added.

456. (1978) 2 S.C.R. 1299, at 1325.

"crime" in the real sense: the court "should not assume that punishment is to be imposed without fault"[457].

The context in which Sault Ste-Marie has been decided was straightforward[458]; there were only two categories of offenses: those requiring the mens rea and those irrespective of fault[459]. The first applied to a crime in a true sense[460] unless a clear intention of the legislator was to dispense with proof of mens rea[461]. The second, called absolute liability, applied to "public welfare" offenses (not a true crime) unless the legislator had indicated that a proof of mens rea was required[462]. Therefore, prior to Sault Ste-Marie, Canadian courts had generally no choice but to apply one of those "two stark alternatives"[463]. However, in Australia, New Zealand, sometimes in England, and in several provincial decisions[464], there were several

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457. The Queen v. Chapin (1979), 2 S.C.R. 121, at 134.

458. See generally, Stuart, Canadian Criminal Law, Toronto: Carswell, 1982, at 149 ff.

459. It should be noted, however, that it was not clear how or when one category was to be chosen over the other. See generally Stuart, id., at 161 ff.

460. I will assume that a "true crime" is an offense which requires prima facie the mens rea. E.g. murder.

461. R. v. Beaver (1957) S.C.R. 531, at 537.

462. R. v. Pierce Fisheries Ltd. (1970) 5 C.C.C. 193 (S.C.C.).

463. R. v. City of Sault Ste-Marie (1978) 2 S.C.R. 1299, at 1312.

464. Proudman v. Dayman (1941) 67 C.L.R. 536 (Aus. H. L.); Sweet v. Parsley (1920) A.C. 132 (H.L.). See generally Stuart, Canadian Criminal Law, Toronto: Carswell, 1982.

attempts to adopt a "halfway house" between those two traditional categories of "mens rea" and "absolute liability". The Supreme Court of Canada in Sault Ste-Marie recognizes that there was a difference between "true crime" and "public welfare" offenses, because thellatter

> ...involves a shift of emphasis from the protection of individual interests to the protection of public and social interests[465].

However, the judges were obviously not at ease with the simple possibility of "absolute liability" for "public welfare" offenses. They adopted this "halfway house" approach[466]. This new category has been called "strict liability" which preserves an element of fault. Henceforth, any "public welfare" offense which is not criminal in the true sense will prima facie fall into this category. Thus we have three categories of offenses:

> 1. Offenses in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

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465. (1978) 2 S.C.R. 1299, at 1312.

466. "The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defense of reasonable care." Id., at 1325.

> 2. Offenses in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offense leaving it open to the accused to avoid liability of proving (on a balance of probabilities) that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defense will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offenses may properly be called offenses of strict liability...
>
> 3. Offenses of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault[467].

It is obvious from the decision that this "strict liability category did not have the purpose of weakening the presumption of mens rea when a "true crime" is at stake.

> In the case of true crimes there is a presumption that a person should not be liable for the wrongfulness of his act if that act is without mens rea... I would emphasize at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle[468].

One of the purposes of the decision was clearly to give to the accused charged with a "public welfare" offense a new defense which

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467. (1978) 2 S.C.R. 1299, at 1325-1326.

468. Id., at 1303. See also The Queen v. Prue; The Queen v. Baril (1979) 2 S.C.R. 547, at 553. Chief Justice Laskin, for the majority, said: "Several passages in his reasons (Dickson J. in Sault Ste-Marie) make clear that mens rea continued to be essential to prove commission of a Criminal Code offense."

was not available under the "absolute liability" category[469]:

> In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendants as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defense whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant must only establish on the balance of probabilities that he has a defense of reasonable care[470].

Therefore, the Supreme Court of Canada added a new presumption: "public welfare" offenses must fall into the second category[471] which allows a defense of due diligence[472] - unless a clear intention of the legislator[473] indicates otherwise.

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469. In Strasser v. Roberge (1979) 2 S.C.R. 953, at 991. Mr. Justice Dickson said that the decision "embodies a principle for the benefit of the accused on a public welfare offense by the introduction of a defense of reasonable care to avoid the structures of absolute liability..." It should be noted, however, that many commentators have criticized this opinion on the grounds that the "strict liability" category can absorb many offenses which used to require the proof of mens rea. See Harrison, "Sault Ste-Marie, Mens Rea and the Halfway House: Public Welfare Offenses Get a Home of their Own" (1979). 17 O. H. L.J. 415, at 441; Braithewaite (1980). 1 Sup. Ct. L. Rev. 187; Stuart, Canadian Criminal Law, Toronto: Carswell, 1982, at 171.

470. Sault Ste-Marie (1978) 2 S.C.R. 1299, at 1325.

471. That category was the innovation of Sault Ste-Marie in Canadian Law. "Public welfare offenses would, prima facie, be in the second category." (1978). 2 S.C.R. 1299, at 1326. See Fortin, Viau "La réforme de la responsabilité pénale par la Cour Suprême du Canada", (1979). 39 R. du B. 526, at 552.

472. Id., at 1325-1326.

473. For a discussion of the clear indication, see Fortin, Viau, "La réforme de la responsabilité pénale par la Cour Suprême du Canada", (1979). 39 R. du B. 526, at 552 ff.

In order to determine this clear intention, Mr. Justice Dickson indicated different "criteria" which can be viewed as guides to help the Courts find into which category of offenses a particular offense enacted by statute should be classified:

> Offenses which are criminal in the true sense fall in the first category. Public welfare offenses would, prima facie, be in the second category. They are not subject to the presumption of full mens rea. An offense of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offense. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offenses of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offense falls into the third category[474].

These are the "criteria" that were constitutionalized by the Court of Appeal in the Motor Vehicle Act Reference. Some of these "criteria" indicated only whether the legislator had a clear intention to create an offense of "absolute liability". By incorporating them into section 7, the court used them to determine when the legislator would be allowed to create such an offense.

The rationale behind Sault Ste-Marie was fundamental. Mr. Justice Dickson set out the conflicting values underlying the "public welfare" offenses:

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474. (1978), 2 S.C.R. 1299, at 1326.

> It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent[475].

The last sentence of this passage justified the creation of a "strict liability" because "arguments of greater force (were) advanced against absolute liability"[476]. The court said that "the most telling is that it violates fundamental principles of penal liability"[477]. It appears from this context that those fundamental principles were the requirement of mens rea[478] or more generally the principle of non-punishment when an accused was totally morally innocent[479].

The real goal of Sault Ste-Marie was to restore as far as possible those basic principles. The court created the category of "strict liability" defined as a middle position "fulfilling the goals

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475. (1978) 2 S.C.R. 1299, at 1310.

476. Id., at 1311.

477. Ibid.

478. See Stuart, Canadian Criminal Law, Toronto: Carswell, 1982, at 158.

479. Furthermore Mr. Justice Dickson showed that the injustice created by the absolute liability offense does not necessarily lead to a higher standard of care: "If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defense in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked." (1978) 2 S.C.R. 1299, at 1311.

of public welfare offenses while still not punishing the entirely blameless"[480]. Essentially it gives a new defense to the accused. Mr. Justice Dickson said, "there is nothing wrong with rejecting absolute liability and admitting the defense of reasonable care"[481].

The creation of the "strict liability" category had the purpose of enforcing that fundamental principle of justice[482]. The Supreme Court has tried to restore it as far as it can be reconciled with the goal of the "public welfare" offenses[483]. However, because of the doctrine of supremacy of Parliament the Court had to yield to a clear intention in a statute which would violate that principle of justice. Before the Charter, the "strict liability" category, like the "mens rea" category, could be at most a presumption.

It seems plausible to infer that the Supreme Court of Canada would have been willing to completely reject "absolute liability". However, it had to respect the principle of the supremacy of Parliament. If a legislature had the intention of creating such an offense, the courts would have no choice but to give effect to the intention. However, the courts would never presume that the legislature intended to punish the morally innocent[484]. They would enforce such "absolute

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480. (1978), 2 S.C.R. 1299, at 1313.

481. Id., at 1325.

482. Id., at 1313.

483. Id., at 1310.

484. See The Queen v. Chapin (1979), 2 S.C.R. 121, at 134.

liability" offenses only where the intention of the legislature to do so was clear[485]. Thus the courts would hold that any "public welfare" offense is prima facie in the second category — which gives a defense to the accused — unless a clear intention of the legislator indicates the contrary.

In April 1982, the enactment of the Charter of Rights has curtailed the supremacy of Parliament. As far as the fundamental rights are concerned, the Constitution is supreme. One of these rights is personal liberty, and the Constitution provides that no person can be deprived of this right "except in accordance with the principles of fundamental justice"[486]. In light of the history of common law, we must conclude that under penal law, no person who is without fault should be deprived of his liberty. Any law which provided that an individual be imprisoned even if he is morally innocent must be declared of no force and effect by the courts[487]. Thus the category of "absolute liability" offenses, clearly intended in a statute, is always inoperative in so far as it interferes with the personal right to liberty[488].

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485. We have already seen that the famous criteria were a guide to discover such a clear intention.

486. Section 7 of the Charter of Rights and Freedoms.

487. See section 52 of the Charter of Rights.

488. It will be the duty of the courts to establish an appropriate standard to enforce the principle of fundamental justice. We have seen that Mr. Justice Dickson stated that the defense of due diligence was a good compromise between the requirement of full mens rea and absolute liability (1978), 2 S.C.R. 1299, at 1325. He said that "strict liability was not unfair because the "alternative is absolute liability which denies the accused any defense whatsoever" (see text accompanying note 470). The judges can then decide that this defense is always an appropriate standard

In the same way, section 7 of the Charter of Rights has curtailed the supremacy of Parliament which allowed the legislator to rebut the requirement of mens rea as a constituent part of a crime. As far as mens rea is a principle of fundamental justice, any law which does not require mens rea as a constituent part of a crime must be inoperative[489].

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sufficient to enforce the principle of justice which is at stake. However, this defense was a very minimum standard. There were other possible compromises between the requirement of full mens rea and absolute liability. Professor Stuart in his treatise on Canadian Criminal Law, Toronto: Carswell, 1982, at 164, enumerated five of them:

1. mens rea, with the onus of proof reversed;
2. Gross negligence, tested objectively;
3. Simple negligence, tested objectively;
4. Category (2), with the onus of proof reversed; and
5. Category (3) with the onus of proof reversed.

Professor Stuart then commented that: "It would seem that the Sault Ste-Marie choice was the fifth category — the least favourable to the accused. Mr. Justice Dickson nowhere explored the other possibilities." Nothing should prevent the courts from adopting a category more favourable to the accused where it would appear that the principle of fundamental justice (now guaranteed by the constitution) would receive better enforcement. (Especially since such a category should be read in relation to the presumption of innocence which is also entrenched in s. 11(a) of the Charter of Rights for any person charged with an offense. That presumption can also be read within s. 7 itself in so far as it can be demonstrated that it secures a principle of fundamental justice; see R. v. Anson, June 8, 1982, Cty. Ct. B.C., Wetmore, J. On the other hand, the defense of due diligence will always be a minimum standard allowed to the accused in every case dealing with public welfare offenses and interfering with the right to liberty.

489. It is likely that the Court of Appeal would have concluded in this way too. The "criterion" underlying the first category was that every true crime requires prima facie mens rea as an element of the offense. However, it appears more in accordance with the common law tradition to say that a real crime does not require a mens rea because it was a "criterion" given by Dickson to recognize the offense of the first category, but because the mens rea has always been considered as a principle of fundamental justice established to protect the right to liberty. On the other hand, the mens rea can be viewed as a way to enforce the principle that no one be punished without fault. This principle is now entrenched in the Constitution.

Thus, any crime must contain a mental element (mens rea) and any "public welfare" offense leading to a deprivation of liberty must allow at least a defense of due diligence because there must be no punishment without fault.

Indeed, this approach would have led to the same conclusion drawn by the Court of Appeal of British Columbia in the Motor Vehicle Act Reference. However, the distinction between the two lines of reasoning is more than a mere rhetorical difference. In an appropriate case, the conclusions drawn from the two different lines of reasoning can be quite contrary. Suppose, for example, that one day the Supreme Court of Canada held that a "fine" imposed by statute interferes with the individual right to liberty[490]: take a statute which creates an "absolute liability" offense entailing a fine of $25.00 on conviction. With the reasoning of the Court of Appeal the statute would not be inconsistent with section 7 of the Charter of Rights. It would appear that the fine in such a case is a slight penalty. In the Motor Vehicle Act Reference it was held that the nature of the penalty must be slight when an individual is deprived of his liberty under an absolute liability offense. On the other hand, according to the approach suggested in this article, the statute would be inconsistent with section 7 of the Charter because it would appear that any statute which interferes with the individual right to liberty violates the

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490. The payment of a "fine" can be directly interpreted as a deprivation of life, liberty or security of the person. Or, it can be a deprivation of individual liberty if the person so punished does not pay and has to go to jail.

principle of fundamental justice which underlies the Sault Ste-Marie case which is that no one be punished without fault. According to this approach the nature of the "penalty" would indicate whether or not an individual was being deprived of his "liberty", not if the statute violates a "principle of fundamental justice". The approach suggested in this article would have led to the conclusion that "absolute liability" offenses are always inconsistent with the principle of fundamental justice[491]. However, they are only inoperative when the penalty, such as imprisonment — whether it be one or seven days — interferes with the right to liberty, life or security.

The "principles of fundamental justice" established in Sault Ste-Marie and in the common law in general allows the Court to control the substantive content of the law. They become therefore, supra-legislative. However, whatever "principles of justice" will be included in section 7 of the Charter of Rights, it should not be forgotten that they are guaranteed only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[492]. Therefore in proper circumstances it is probable that a legislature would be justified to depart from our "principles of fundamental justice" (e.g. in times of emergency). Such an intention can also be carried out by the "notwithstanding" clause[493] which

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491. This conclusion affects the one suggested by the defendant in the reference. See The Motor Vehicle Act Reference, at 11.

492. Section 1 of the Charter of Rights and Freedoms.

493. Section 33 of the Charter of Rights and Freedoms.

enables Parliament and the legislature to override section 7 by an express declaration to this effect[494]. Otherwise the courts must give effect to section 7 of the Charter.

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494. See Hogg, Canada Act 1982 Annotated, Toronto: Carswell, 1982, at 79.

CONCLUSION

The phrase "principles of fundamental justice" in section 7 of the Charter of Rights and Freedoms must receive an interpretation in accordance with our own common law traditions in constitutional law. Such a premise follows the opinion written by the Privy Council in Minister of Home Affairs v. Fisher[495]. In this case the judge discussed the philosophy underlying the interpretation of a constitution written in the British constitutional tradition:

> This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the tradition and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences[496].

I have shown that the phrase "principles of fundamental justice" should be interpreted in the light of the common law presumptions generally used in the interpretation of statutes. We saw that generally those presumptions have protected several principles that the

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495. (1980) A.C. 319.

496. Id., at 329. See also A.G. v. Commonwealth (1975) 7 A.L.R. 599, at 604-606.

courts have judged of fundamental importance to the system of justice. However, before April 1982, they were always threatened by a clear contrary intention of the Parliament or the legislatures. The constitutionalization of these principles in section 7 of the Charter of Rights curtailed the principle which established the supremacy of Parliament. Henceforth the Parliament and the legislatures cannot deprive an individual of his life, liberty or security in a manner contrary to the principles of fundamental justice, unless it is done within the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"[497] or through section 33 of the Charter which allows the Parliament or the legislatures of a province to derogate from section 7.

Those "principles of fundamental justice" can be procedural, such as the principles of natural justice, or substantive such as the principle which requires that no one be punished without fault. I insisted upon the "substantive" side of the phrase "principles of fundamental justice" in order to show that the dichotomy between "procedure" and "substance" must be abandoned. We saw that the standard used by the court to control the content of the law under section 7 of the Charter must be the same whether the content is classified as procedural or substantive. In either case, the question must be whether a law which deprives an individual of his life, liberty or security does so according to the range of principles that

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497. Section 1 of the Charter.

the courts in the history of the common law have deemed of fundamental justice to the point that they should be protected through means such as legal fictions about the presumed intent of the legislature.

It is quite likely that most of the principles protected in section 7 of the Charter of Rights will be procedural. From time to time the judges have repeated the proposition that the history of liberty is closely related to the history of procedural safeguards. Chief Justice Laskin, for example, said that,

> It is no accident that the growth of liberty depended on procedural guarantees such as the writ of habeas corpus... The history of common law traditions shows how perceptively judges and theorists of the law saw the centrality of rational procedures as the safeguard of the liberty of those who were in opposition to the wielders of power[498].

This opinion is shared by judges in the United States. For example, Mr. Justice Douglas in Joint Anti-Facist Refugee Committee v. McGrath[499] said:

> It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice.

Mr. Justice Frankfurter said in McNabb v. U.S.[500] that "the history

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498. Laskin, "The Judge and Due Process" (1972) 5 Man. L. J. 235, at 237.

499. 341 U.S. 123 (1951).

500. 318 U.S. 332 (1943).

of liberty has largely been the history of observance of procedural safeguards."

Therefore it is quite likely that section 7 of the Charter of Rights protects what the American courts protect through the phrase "due process of law". For example[501] their "procedural due process" sometimes has been interpreted in the light of the "principles of justice" so rooted in the tradition and conscience of our people as to be ranked as "fundamental" and therefore "implicit in the concept of ordered liberty"[502] or of the principles "fundamental to the American scheme of justice... necessary to an Anglo-American regime or ordered liberty"[503]. Those American considerations about due process of law, though written in the context of the theory of "incorporation" can obviously be used as a guide to interpret section 7 of the Charter[504].

However, as far as section 7 allows the courts to control the substantive content of the law, the Canadian approach must be fundamentally different from the American experience with "substantive due process". We saw that the Americans have a constitutional tradition

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501. See Ratner, "The Function of the Due Process Clause", 116 U. Pal. L. Rev. 1048 (1948), at 1054-1055.

502. See Palko v. Connecticut, 302 U.S. 319 (1937), at 325 (Cardozo, J.), quoting Snyder v. Massachussets, 291 U.S. 97 (1934), at 105.

503. Duncan v. Louisiana, 391 U.S. 145 (1968).

504. The "incorporation" is the absorption of the first eight amendments into the Fourteenth Amendment. See supra, note 125.

which has rejected from the beginning the idea of supremacy of Parliament. The legislative powers were not exhaustively distributed. Canada cannot merely borrow this doctrine of "substantive due process" without doing violence to its own constitutional traditions.

Consequently I have suggested an approach which respects our Canadian constitutional tradition and which gives effect to the supremacy of the constitution. As was the case with "procedural due process", it is likely that the phrase "principles of fundamental justice" gives some results which are similar to the american "substantive due process". To what extent it does so will depend mainly on which principles the courts will incorporate into section 7. For example, the constitutionalization of the principle that any governmental act must be reasonable, could require the courts to apply certain tests which would be similar to the tests defined in the United States through the doctrine of "substantive due process".

However, it should not be concluded from this thesis that the "presumptions" found at common law are the only means of identifying the "principles of fundamental justice". Other "principles" of fundamental justice can exist elsewhere in jurisprudence. It also should not be concluded that those principles are frozen at the date of the enactment of the Charter of Rights. Those principles have always evolved and should continue to do so. The courts are at liberty to find and create new principles of fundamental justice where it appears necessary. For example, the defense based on

"ignorance of the law" can hardly be claimed as a principle of justice firmly rooted at common law[505]. It does not mean that it could never be so under section 7 of the Charter.

505. See Hale, Pleas of the Crown (1680), at 42; Blackstone, Commentaries (1772), Vol. IV, at 27.

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