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COMMENTARY ON MACDONALD: THE PRINCIPLES OF FUNDAMENTAL JUSTICE— PROSPECTS FOR CANADIAN CONSTITUTIONALISM

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[In the early Spring of 1982, a few months before the enactment of the Constitution Act, 1982 and with it the Canadian Charter of Rights and Freedoms, the Faculty of Law of the University of Toronto hosted a conference on Canada's new constitutional document. I recall that Professor Jesse Choper was a member of one of the panels and was called upon to comment on the Charter from the American perspective. The gist of his remarks was that Canadians had wisely chosen to adopt an American-style constitution and with it protections of individual rights and freedoms. Minorities could now be protected from the majority while courts would be vested with powers of judicial review sufficiently strong to monitor, and if necessary limit, the right-infringing capacities of legislatures. During the question period someone asked Professor Choper what his opinion was of section 1 of the Charter, which permits reasonable limits on Charter rights, and the legislative override in section 33. Turning to his neighbour panelist, Professor Choper asked to borrow a copy of the Charter. With amazement in his eyes he said, "This changes *everything*."]

In the concluding portion of his extremely rich and valuable paper, Dean Macdonald has remarked that post-Charter commentary has tended to reiterate the pre-Charter adoration of the liberal legalist models of law and state.[1] He reminds us that there are important features of Canada's Charter which, by revealing distinctly Canadian cultural preoccupations, should hinder the complete Americanization of Canadian constitutional law. Although these features may not "change everything," as Professor Choper thought, if Canadian courts resist the temptation to read the Charter as a liberal manifesto, a distinctive Canadian constitutionalism may flourish. I agree with Dean Macdonald's analysis; moreover, I too think that Canadian courts

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1. Macdonald, *Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice*, 39 U. FLA. L. REV. 217 (1987).

should guard against the urge to subordinate legislative attempts at achieving justice in distribution to judicial attempts at securing commutative justice.

In this comment I am fortunate in being able to rely on Dean Macdonald's perspicuous discussion of Canada's due process standards of natural justice and procedural fairness as well as his review of the interaction of these and the Charter's fundamental justice standard. Thus unburdened, I feel entitled to plunge into murkier, if not deeper, jurisprudential waters.

I count myself among those Charter-watchers who believe it would be great error for our courts to disregard Canada's history and traditions and uncritically adopt American doctrine. I happen to value those anti-individualistic, anti-minimal state and socialist strains that Dean Macdonald has shown both inform the Canadian political morality and help to mould Canadian institutions and processes. Yet I am convinced that if a suitably "un-American" theory of Canadian constitutionalism can be generated it must first be possible to ground it in a vision of the purpose or point of law, a purpose or point that in turn can be shown to comport with Canada's traditional models of state and law.

In general, a constitutional theory that cannot be grounded in a conception of the point of the law will be philosophically and legally incoherent. An ungrounded theory is simply indeterminate as an explanatory and justificatory tool. More important, though, a constitutional theory must also be faithful to the political and legal traditions of the community whose constitution it is a theory about. It must be a presumption of constitutional theorizing, in other words, that constitutional doctrines are historically situated, that they are products of particular forces — ideological, economic, cultural, geopolitical, and doubtless others. Constitutional doctrines and documents are simply not detachable from their concrete historical setting.

It is certainly not my aim to engage in the grand endeavour of disclosing the fundamental basis of Canadian constitutional law. Instead I want to offer some impressionistic evidence for the view that there is a *distinctive* Canadian perspective on the point of the law, which both reflects and is faithful to Canada's political and legal traditions. Happily, Canadian procedural due process doctrines provide a particularly fruitful source of this impressionistic evidence.

Since my aim is to give reasons for thinking that the emerging Canadian constitutionalism is not only coherent but distinctive, I begin by setting out what I take to be an accurate characterization of the liberal legalist conception of the point of law, one which, I assume without argument, is compatible with many, if not most, theories of American constitutionalism. In addition, I will describe an interpretive

theory of rights adjudication that corresponds to this liberal legalist conception.

Both the conception and the interpretive theory I borrow from Ronald Dworkin's recent work. What Dworkin has offered by way of an abstract description of the point of law is, indeed, very relevant to this discussion since it is expressed in terms of the specific legal practice of deciding questions about individual rights in general and due process protections in particular. Dworkin writes:

> [T]he most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[2]

Dworkin's interpretive theory follows from his familiar distinction between arguments of principle and arguments of policy.[3] To recall, an argument of principle justifies a political or legal decision by showing that it respects or secures what the community's background political morality takes to be fundamental individual rights, whereas an argument of policy justifies such a decision by showing how it will advance or protect a collective goal of the community as a whole. Dworkin has argued that when courts interpret constitutions, arguments of principle ought to be treated as prior to, and potentially capable of trumping, arguments of policy. By so interpreting constitutions, Dworkin believes, the judiciary ensures a coherent grounding for constitutional law — or as he would now say, it ensures integrity in law.

My task in what follows is twofold. First, I sketch a contextualized interpretation of section 7, consistent with recent judicial remarks, that addresses itself to Dworkin's principle/policy distinction. I then argue that the emerging conception of the point of law suggested by this interpretation is subtly different from that which Dworkin has offered. This difference can be traced to Canada's cultural preoccupations, although I do not propose to do so here. Obviously, even if I manage to make out both of these claims, much more would be required

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2. R. DWORKIN, LAW'S EMPIRE 93 (1986).
3. *See* Dworkin, *Hard Cases*, in TAKING RIGHTS SERIOUSLY (2d ed. 1978).

to prove a grander claim about the overall coherence and distinctiveness of Canadian constitutionalism.

By suggesting that the interpretative structure of the Charter, and recent section 7 jurisprudence, evidence a fidelity to a distinctive conception of the point of law, I am assuming among other things that the enactment of the Charter has preserved rather than undermined a coherent and distinctively Canadian theory of due process. I am mindful that to put this claim of general fidelity on secure foundations I would at least have to confront an alternative scenario that many commentators have implicitly or explicitly suggested is more realistic.

Some have argued that this fidelity will prove to be a transitory phenomenon, a preliminary, and in the long run relatively unimportant, stage in a relentless political and legal paradigm shift. Even granting that Canadian political and legal cultures have differed in interesting ways from those of the United States in the past, we have no reason to suppose that they are invulnerable to fundamental, ideological alteration. Although I know of no serious attempt to demonstrate that the evolution to legal liberalism in the American style is inevitable, two arguments purport to show just that.

First, states like Canada, whose histories disclose a genuine diversity of ideological influences (and, as Dean Macdonald notes, a consequent absence of ideological hegemony) are inherently unstable. Ideological pluralism creates a vacuum that will sooner or later be filled by a more unified political/legal ideology — in particular, that unified ideology which, for purely geopolitical reasons, is capable of gaining ascendancy. The label of "un-Canadian" may inevitably develop a determinate meaning.

Second, a move to constitutionalize basic policy choices itself manifests the decline or radical revision of central political traditions like the sovereignty of Parliament, the rule of law, and separation of powers, as well as more specific traditions like the recognition of linguistic and cultural rights, and deferential attitudes towards public institutions. In short, the move to a written constitution is a mere symptom of another historical process. This process is characterized by profound political re-evaluation and is manifested in a variety of complex phenomena: a general pessimism about the ability of the state to fulfill its positive and negative duties to its citizens, an irreparable breakdown in the vitality of political debate, and a blunt rejection of the notion that political compromise is a viable method for securing individual rights.

Although I cannot refute these arguments here, I suggest that on their face they are highly implausible. Each argument assumes much of what it purports to prove; for example, that American political and legal cultures are ideologically homogeneous and that the American

pattern of constitutionalism is inevitable. Neither these arguments nor the scenario they purport to explain are convincing, and I will leave it to others to dispel the grounds of my optimism about the prospects of a coherent and distinctive Canadian constitutionalism.

Section 7 of Canada's Charter of Rights and Freedoms reads: "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." Because the Canadian Charter was enacted as a single, organic document, rather than over time as a series of amendments, pivotal sections like section 7 contain an important contextual logic. Most Canadian courts have recognized this; the Supreme Court of Canada in particular has conscientiously endeavoured to fit section 7 within the Charter's interpretative matrix. The emerging consensus is that the interpretation of section 7, and in particular the phrase "principles of fundamental justice," depends on links to other Charter sections. Although many potentially significant linkages affect the character of Canada's protection of due process, I will comment on only four.

First, section 7 must be linked to the assertion in section 52 that the Charter forms part of the supreme law of Canada, and as such any law inconsistent with it is, to the extent of the inconsistency, of no force or effect. The sweeping and unambiguous force of section 52 ensures, as has been amply affirmed in Supreme Court and Appellate decisions, that courts have a wide mandate for judicial review. More important, section 52 implies that any limitation on the power of constitutional review must be found within the four corners of the Charter itself.

Second, section 7 leads a group of sections that fall under the general heading of "Legal Rights." Although future courts may expand their scope, on their faces sections 8 through 14 are free-standing provisions that speak to specific, and for the most part traditional, common law rights of persons who have found themselves involved in one or another stage of the criminal process. These sections protect against unreasonable search and seizure (which in fact greatly expands the English common law protections) and arbitrary detention or imprisonment. Here too are the classic guarantees of accused persons' rights to counsel, habeas corpus, and a speedy trial before an independent and impartial tribunal governed by the presumption of innocence. Finally, these sections protect against self-incrimination and cruel and unusual punishment.

These first two linkages affect the interpretation of section 7 in at least two important ways. First, a court coming to section 7 need not preliminarily consider whether it can review putative due process violations. Although the Canadian judiciary traditionally defer to Par-

liament, Canadian courts have quickly adjusted to their new powers of review. Although in the United States *Marbury v. Madison*[4] judicially settled the question of jurisdiction over constitutional interpretation, in Canada the question is political and settled by political compromise.

Second, the specific guarantees of due process in sections 8 through 14, many of which involve familiar judicial standards like reasonableness, arbitrariness, and impartiality, imply that the general language of section 7 entails a basic, open-ended constitutional commitment to due process. After a brief flirtation with the inherently implausible view that the sum of the contents of sections 8 through 14 exhausts the content of section 7, Canadian courts now seem to view section 7 as a separate and general statement of due process. Courts are interpreting section 7 as requiring them to direct their attention to individual rights and to scrutinize legislation that may infringe those rights. In short, courts see section 7 as a general constitutional commitment to argument from principle in Dworkin's sense.

Two other linkages that remind us of the countervailing authority of arguments from policy affect the interpretation of this commitment to argument from principle. Although these linkages clearly limit Charter guarantees, in practice they relieve judicial anxiety rather than create judicial frustration. Aware that the Charter expressly provides for the legal effect of countervailing arguments from policy, courts have boldly given the Charter guarantees a "large and liberal" interpretation to secure for persons "the full benefit of the *Charter*'s protection."[5]

First, the *non obstante* provision of section 33 limits section 7. Section 33 empowers Parliament or any provincial legislature to expressly declare an act operational notwithstanding certain central freedom protecting provisions of the Charter. Such a legislative declaration would sunset five years after it comes into force, but the later legislature may reinvoke section 33.

Section 33 was the product of a political compromise, animated by provincial fears of a centralization of judicial power. The Charter's drafters considered section 33 to be of little practical significance since, as was repeatedly claimed, the government of the day would likely be risking its political future if it opted out of the Charter.[6] But

4. 5 U.S. (1 Cranch) 137 (1803).

5. 13 Can. Rights Reporter 64, 103 (SCC 1985) (per Dickson, CJC).

6. Soon after the enactment of the Constitution Act, 1982, the province of Quebec passed "Loi 62," which at a stroke added a *non obstante* clause to all of Quebec's legislation. Although

invoking section 33 need not always be an act of political suicide, especially if it becomes a legislative commonplace, which is plausible. Section 33 clearly empowers federal or provincial legislatures to pursue policies that potentially limit individual rights and freedoms. In Canada, policies may constitutionally trump principles — but the courts may continue to rely on their extensive common law jurisdiction to protect against breaches of the rules of natural justice.

Finally, section 7, like all substantive sections of the Charter, is subject to section 1: "The *Canadian Charter of Rights and Freedoms* 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." Section 1 envisions a constitutionally permissible legislative limitation on a Charter right: the limitation must be both reasonable and demonstrably justified in a free and democratic society. Clearly, an argument directed to reasonableness and justifiability will typically be an argument of policy, founded on the state's interest in furthering some collective goal. Once again, the Charter envisions the possibility of policies constitutionally trumping principles.

Unfortunately, one crucial preliminary question about section 1's effect on section 7 remains unresolved. The structure of section 7 raises the question whether one's section 7 rights are violated if one is deprived of the right to life, liberty, and security of the person by means of procedures that were completely in accordance with the principles of fundamental justice. In a section 7 context, does section 1 apply to *any* deprivation of the right to life, liberty, and security, or only to deprivations of these rights executed without due process? The Supreme Court has yet to face this important question directly. Much will depend on courts' view of the scope of the principles of fundamental justice.[7]

Any plausible interpretation of section 7's protection of due process will respond to the interpretative matrix just outlined. This matrix recognizes the potential conflict between arguments of principle and

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the Court of Appeal of Quebec struck down the Act in *Alliance des professeurs de Montreal v. A-G of Quebec*, 18 Can. Rights Reporter 195 (1986), the grounds for doing so were simply that the form of section 33 was not adhered to, and in particular that the Act did not indicate precisely which sections of the Charter were being overriden in each instance. I do not read this case as saying that legislatures are constitutionally prevented from a wholesale use of § 33.

7. *See* Reference Re Section 94(2) of the Motor Vehicle Act (B.C.), 18 Can. Rights Reporter 30, 39-41 (SCC 1986) (Lamer, J.); *id.* at 61-62 (Wilson, J.).

arguments of policy. More important, this matrix suggests that Dworkin's claim that constitutional adjudication should be based on the priority of arguments of principle over arguments of policy does not adequately capture the Canadian model. This in turn suggests that the Canadian doctrine of procedural due process may presuppose a subtly different conception of the point of law.

At this early stage in the evolution of Charter jurisprudence, it is somewhat dangerous to extract a constitutional theory from a few authoritative decisions. But recent trends in the interpretation of section 7 might best be understood as courts' attempts to characterize their new constitutional role in a manner consistent with traditional Canadian political and legal cultures. Courts are coming to realize that "the principles of fundamental justice" include principles governing the inherent powers and limitations of their own role in considering due process issues. Two recent trends, which Dean Macdonald has also remarked upon, are of particular interest in this regard.

The Supreme Court of Canada seems now committed to the view that the "principles of fundamental justice" that govern state action with respect to the individual's right to life, liberty, and security include, but are not limited to, the principles of natural justice and procedural fairness. Yet whenever affirming this view, the Court is quick to add that questioning the policy or wisdom of legislation is beyond the Court's competence or authority. However invigorated by the expanded review powers of section 52, no court has hesitated to reaffirm its commitment to the ultimate separation of law and politics. The motivation for this reaffirmation is a concern with attending to deep-seated principles of fundamental justice that apply to the relationship between the point of the law and the legitimate activities of the state.

This mixture of a willing acceptance of powers of constitutional review with a refusal to judicially assess questions of policy has provoked courts to refine their conception of due process review. As was inevitable, the Supreme Court of Canada has had to consider the question of whether courts, as guardians of the principles of fundamental justice, are empowered to engage in substantive review of legislation. The Court recently held that the Charter, although extending the scope of the values to be protected, has not fundamentally altered the nature of that review. The Court argued that courts have always been empowered to consider the content of legislation when adjudicating upon the vires of legislation, but the "overriding and legitimate concern" that courts should avoid questioning the wisdom of enactments should not lead courts to assume that there is only a procedural content to the principles of fundamental justice. In the end, it was argued, the substantive/procedural dichotomy ought to be avoided as

it harkens to American jurisprudence, which is of little relevance in light of the internal checks of sections 1 and 33 in the Charter.[8]

What is the source of these principles, where do we acquire our sense of due process, and to what should we appeal to identify concrete instances of its violation? On these questions the Supreme Court has also recently spoken, although it probably will be required to say more in the future. The Court held that the principles of fundamental justice are to be found in the basic tenets of the Canadian legal system. They do not arise from the sphere of public policy, but rather from the inherent domain of the judiciary viewed as guardian of the justice system.[9] The requirements of due process, in short, arise from the legal culture, and it is wholly a judicial matter to define them and make them concrete. The proper function of courts as guarantors of due process also flows from this background legal culture.

The first judicial trend, then, involves a whole-hearted acceptance of the view that section 7 embodies a general commitment to due process; the scope of that commitment extends beyond the particular and familiar guarantees found in sections 8 through 14, as well as beyond the common law protections of natural justice and procedural fairness. Although the fundamental principles of justice are to be given a broad and open-ended interpretation, and they arise primarily as considerations of principle and form part of the legal culture, no inconsistency is seen in refusing to countenance judicial review of legislatively implemented policies. This can only be because the background legal culture to which the principles of fundamental justice respond itself embodies this judicial restraint.

The second trend of interest involves the difficult question of the impact of section 1's limitation clause on the interpretation of the principles of fundamental justice. Setting aside the unresolved question of the scope of section 1 as it applies to section 7, section 1 on its

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8. *Id.* at 46. Compare Council of Civil Service Unions v. Minister for the Civil Serv., [1984] 3 ALL E.R. 935, 951 where, considering the standard of "reasonableness" of administrative decisions, Lord Diplock noted that "[w]hether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."

9. Compare Lord Scarman's remarks in McLoughlin v. O'Brian, [1982] 2 ALL E.R. 298, 310 that

> [b]y concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.

face invites the judiciary to consider matters of legislative policy, to look behind the words and effect of legislation and consider the actual processes by which social benefit and burden are to be distributed. Yet the courts have been exceedingly cautious about how they are to proceed when assessing section 1 responses to section 7 violations.

Several courts have addressed the question of what would count as a limit on section 7 rights that was nonetheless reasonable and demonstrably justified in a free and democratic society. Courts have not found it difficult to dismiss submissions purporting to demonstrate the reasonableness of criminal reverse onus provisions and absolute liability offences carrying penal sanctions. But they have repeatedly worried about setting the standards of reasonableness and demonstrable justification too high. They argue that the higher the standard, the more likely that a court would find itself evaluating arguments of policy, a function Canadian courts have steadfastly refused. In addition, high standards of reasonableness might provoke legislatures to resort to the use of section 33.[10]

What can be made of these trends? Many courts have realized that the principles of fundamental justice capture the basic elements of their legal culture, and that the constitutionalization of these elements has empowered them to insist that legislatures acknowledge the demands of that culture. Yet courts acknowledge that they too must answer to the legal culture. Moreover, the interpretative matrix, which partially determines how due process is to be interpreted, also partially determines the proper function of Canadian courts as protectors of due process. The Charter envisages a specific role for Canada's judiciary, one that is recognizably different from that of the American judiciary.[11]

In this regard it might be helpful to recall Alexander Hamilton's famous remark in *The Federalist No. 78* that in the absence of an independent and autonomous institution of judicial review of federal and state action, "all the reservations of particular rights or privileges would amount to nothing." Ronald Dworkin has recently echoed this sentiment in his bald statement that "The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions."[12]

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10. *See* Madam Justice Wilson's remarks in Re Singh & Minister of Employment and Immigration, 17 D.L.R.4th 422, at 467 (1985).

11. Consider § 33 again. Section 33 grants to legislatures the constitutional authority to determine the fundamental question of justiciability: not only is § 33-insulated legislation non-reviewable, legislative decisions to invoke § 33, if unobjectionable in form, are also non-reviewable.

12. Dworkin, *supra* note 2, at 356.

In the United States, where constitutional adjudication standardly reflects the ideology of liberal legalism, the review role of courts is principally conceived as that of constraining or licensing collective coercive force. On this account, a society is just when a plurality of interests can be served, and when resource distribution is left, whenever possible, to the efforts of individual enterprise. On this conception of the point of law, moreover, courts must avoid basing resolutions to conflicts between principle and policy — between individual right and community goal — on the interests of the social whole as such.

One strain of Canadian constitutionalism closely follows the American approach. Yet this strain is tempered by other features of the judicial mandate. As the interpretative matrix of section 7 and the trends I have outlined suggest, the Canadian judiciary are determined to carry out their Charter role in accordance with traditional limits on their activism. Canadian decisions reflect a tone suggesting that although Canadian courts may occasionally nod in the direction of the liberal conception of the point of law, they will nonetheless retain more traditional attitudes about how the relationship between law and the political process should be conceived.

It is part of the Canadian legal culture to assume that conscientious, rigorous, and extensive judicial review is fully compatible with an inherent respect for, and faith in, the political process. In this the Canadian legal culture clearly reflects the influence of English judicial traditions. Our courts protect their legal domain, and the broadly worded judicial mandate found in section 52, coupled with the general commitment to due process found in section 7, reflects this aspect of the Canadian legal culture. At the same time, respect for the political process is reflected in the absence of a judicial tradition of deciding questions that require a political will (e.g., abortion, capital punishment, or preferred strategies of national defence).

In addition, Canadian courts readily grant that their role as guardians of due process must be integrated with an agenda of distinctive Canadian political and cultural imperatives — for example, linguistic and multicultural integrity, regional differences, redistributive and welfare programmes, and the demands of federalism. This traditional respect for the political process and the Canadian political and cultural agenda is evidenced by the general absence of the American, adversarial conception of the separation of powers. Canada's is a doctrine of separation of responsibilities rather than powers.

Does all of this add up to a distinctive conception of the point of the law? At the outset I only promised impressionistic evidence, so at best I can only conclude with an impressionistic answer to this question: appearances suggest that Canadian constitutionalism is

grounded in a distinct, and recognizably un-American, point of the law that seems to comport with Canada's own distinctive legal and political traditions.

Section 7 of the Charter does not simply empower Canadian courts to, in Dworkin's words, "guide and constrain the power of government" by insisting that collective coercive force not be used except as licensed by individual rights. In the interpretative matrix of the Charter as a whole, section 7 preserves the distinction between distributional aims and commutative remedies by entrenching the traditional separation of legislative and judicial responsibilities in the phrase "principles of fundamental justice." Sections 7 and 52 on the one hand, and sections 1 and 33 on the other, represent part of a delicate dialectic that secures the integrity of the institutions and processes of both distributive justice and commutative justice in a manner that need not imply an adversarial or even countervailing relationship between the two. This is possible only because Canada, for good or ill, answers to a diversity of ideological traditions, individualistic and communitarian, liberal and socialist. Whether this diversity can be preserved is, of course, another question.