

**THOMAS HOBBS ON SECTION 7 OF THE CHARTER:
HOW ARE THE FUNDAMENTAL PRINCIPLES OF JUSTICE FUNDAMENTAL?**

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“Justice is truth in action.”

- Benjamin Disraeli

“People who love sausage and people who believe in justice should never watch either of them being made.”

- Otto Bismark

“It is hard to say whether doctors of law or divinity have made the greater advances in the lucrative business of mystery.”

- Edmund Burke

No enlightened commentator on the Canadian justice system can believe that the legal process is the simple adjudication of known, settled, and clear laws to varying circumstances. Judges are called on, at nearly every level of Canada's courts, to constantly make judgment calls about the propriety of laws and actions, as well as of what is consistent with the laws. Nowhere is this task more evident than when the Supreme Court of Canada engages in judicial review of legislation or executive action. One particularly troublesome avenue for judicial review has been and is likely to continue to be section 7 of the Charter of Rights and Freedoms, which 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."

At first blush, the Canadian provision of "accordance with the principles of fundamental justice" appears to be the most ambiguous and vague constitutional provision possible. What are the principles of fundamental justice? The Charter does not specify those principles. To what source are judges to appeal to find the principles of fundamental justice? Justice has yet to be satisfactorily defined. Biblical scholars and philosophers continue to debate it. Why did the constitutional framers choose this vague wording, without supplying some list of sources or legal technique for determining what the principles of fundamental justice are?

This paper explores s.7's principles of fundamental justice. The first part of the paper explains how and why the phrasing was chosen as a result of consulting due process cases from the United States and was designed to avoid a substantive due process interpretation in the courts. The second part of the paper examines the Supreme Court of Canada's application of s.7, and especially its evolution in two 21st century cases, *U.S. v. Burns* and *Suresh v. Canada*. I contend that these two cases signify a willingness on the part of the Court to adopt conventionalist subjective standards for justice, which imply that the principles of fundamental justice are variable. The third part of the paper frames this idea of justice as a social or political creation in the thought of two philosophers, Thomas Hobbes and Epicurus. While Canada has some roots in the Hobbesian tradition of thought, the Court's interpretation of s.7 appears to be more consistent with Epicurus. The paper concludes with the question of where the Court's s.7 jurisprudence leaves us, and where it may be leading.

Framing the Principles of Fundamental Justice

One is left to wonder why the Canadian framers chose the wording of fundamental justice, rather than "due process of law." The 1960, non-entrenched Canadian Bill of Rights had used the "due process of law" wording in a clause comparable to s.7 of the Charter. Section 1.a. guarantees the individual's right to "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." However, the Bill of Rights also uses the phrase "fundamental principles of justice" in another clause, specifically dealing with criminal procedural rights. Section 2.e. states that no law of Canada shall "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." The structure of the Charter is different than that of the Bill of Rights. The phrase "fundamental justice" is not found in the Charter's section on criminal procedures. The Charter departs from the Bill of Rights' "due process," which is more obviously inspired directly by the American Constitution's fifth and fourteenth amendments. Why was this language discarded with the Charter? While the Bill of Rights' use of "due process" is a clear following of the American Constitution, the Charter's language in s.7 was no less inspired by the same source. However, the different language was specifically selected in an attempt to avoid the American debate over "substantive versus procedural" interpretations of due process that the authors of the Charter selected the wording "principles of fundamental justice:"

[T]he 'fundamental justice' clause was designed to be a procedural, not a substantive provision. Indeed, it was chosen as an alternative to the traditional 'due process' phrasing because of the 'substantive' interpretation given to the latter in the United States. The drafters of the Charter hoped to avoid the incorporation of American 'substantive due process' by choosing a different wording.¹

In an effort to avoid the ambiguity and legal morass which the competing interpretations of the due process clause had wrought in American jurisprudence, the Canadians chose the phrase "principles of fundamental justice." Canadian drafters would have been wary of the use of the due process clause to mean substantive due process in the United States, particularly during the period of 1900 to 1937. The substantive due process interpretation had been used by the American Supreme Court to strike down numerous pieces of social welfare legislation. Federal drafters of the Charter were persuaded to steer clear of the American wording and avoid its potential complications. "Provincial negotiators [of the Charter] . . . objected to the use of the 'due process' terminology. They feared it would encourage Canadian judges to import the 'substantive due process' jurisprudence fashioned by the American Supreme Court to strike down legislative efforts at social and

¹ Rainer Knopff and F.L. Morton, *Charter Politics*, (Toronto: Nelson Canada, 1992), p. 130.

economic reform."² Though the motivations behind the choice of wording may be clearer, the phrase itself certainly is not. In the above citation, Knopff and Morton indicate that the Canadian drafters believed "principles of fundamental justice" to refer to procedure. The drafters are officially on record as expressing that very intent. Then assistant deputy minister of justice for public law Strayer testified:

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 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. . .³

Strayer's position could not be clearer. The intent of the fundamental justice clause is synonymous with what is referred to as procedural due process in the United States. As then Justice Minister Chretien describes, it was devised to avoid the substantive due process interpretation:

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 [Parliament's] decision on abortion was not the right one, [Parliament's] decision on capital punishment was not the right one, and it is a danger, according to the legal advice I am receiving that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words 'due process of law.'⁴

Nevertheless, the clause has not been interpreted as Strayer, Chretien, and others intended it to be.

² F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter, and the Courts*, (Toronto: McLelland and Stewart, Inc., 1992), p. 114.

³ *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada*, First Session of the 32nd Parliament, 1980-81, 46:32 (27 January, 1981).

⁴ *Ibid.*, 46:43.

In *B.C. Motor Vehicle Reference*, the Supreme Court of Canada gave notice in an otherwise fairly unremarkable case that it was not going to be bound in its reading of the Charter by the intentions of the Charter's drafters. "While conceding the admissibility of the 'framers' intent' as relevant to determining the proper interpretation of Charter rights, Justice Lamer cautioned against granting such extrinsic evidence anything more than 'minimal weight.'"⁵ The argument in support of the British Columbia law providing for summary conviction was that the law did not infringe the section 7 right not to be deprived of liberty except in accordance with the principles of fundamental justice, because the principles of fundamental justice referred to procedural concerns and not a substantive right. Lamer, writing for the court, rejected this position and interpreted the section 7 fundamental justice clause to include substantive considerations. To do otherwise, Lamer wrote "would strip the protected rights of much, if not most, of their content and leave the 'right' to life, liberty and security of the person in a sorely emaciated state. . ."⁶

The circumstance is somewhat remarkable. In an effort to avoid the American Supreme Court's interpretation of the due process clause as "substantive" due process, the drafters of the Canadian Charter of Rights and Freedoms select the wording "principles of fundamental justice." Less than three years after the Charter is adopted, the Chief Justice of the Supreme Court of Canada explicitly rejects the framers' intent, and pronounces a judgment on the section 7 rights to life, liberty, and security of the person similar to the substantive interpretation of the due process clause in the United States.

While the use of the "principles of fundamental justice" wording first looked like a difference between the Canadian and American constitutions, in effect it represents a far greater similarity with the due process clause, both in intent and in judicial interpretation. While the similarity in the intent and interpretation of the two clauses may be clearer, one question remains. Why did the Canadian drafters select the wording "principles of fundamental justice" if they were intending something synonymous with procedural due process?

Legal Roots of “Fundamental Justice”

The answer to this question may come from an unsurprising source: The United States Supreme Court. In *Hurtado v. California*, the Court provides an interpretation of the due process clause which stresses procedural fairness. The case appears an obvious one for the drafters of the Charter's section 7 to consult, particularly if they want to entrench a procedural limitation on the deprivation of life, liberty, or security of the person. In *Hurtado*, Justice Matthews explicitly states that "Due process of law . . . refers to that law . . . which derives its authority from the inherent and reserved powers of the State, exerted *within the limits of those fundamental principles of liberty and justice*

⁵ Peter H. Russell, Rainer Knopff, and Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions*, (Ottawa: Carleton University Press, 1990), p. 439.

⁶ *Reference Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486, in *ibid.*, pp. 443-4.

which lie at the base of all our civil and political institutions. . ."⁷ It is not strictly coincidence that the drafters of the Canadian Charter of Rights and Freedoms selected the phrase "principles of fundamental justice" as the wording for the limitation on the deprivation of the right to life, liberty, and security of the person and that Justice Matthews happened to use the phrase "fundamental principles of liberty and justice" in describing the application of the due process clause.

In another due process case, *Palko v. Connecticut*, Justice Cardozo writes of the due process clause as referring to "a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as *fundamental*.'"⁸ Justice Cardozo invoked Justice Harlan's language from *Hurtado* to write a decision that retrying a defendant at the state level does not offend the Fourteenth Amendment. While in *Hurtado*, the Court provided the Canadian drafters with a procedural due process interpretation that relies on the phrase "principles of fundamental justice," in *Palko*, years later, a very different United States Supreme Court used the same language rendering another procedural due process interpretation. It is the *Hurtado* interpretation of procedural due process that led the drafters of section 7 of the Canadian Charter to use the phrase "principles of fundamental justice." Had the drafters paid closer attention to the *Palko* case, they might have anticipated that the principles of fundamental justice wording would not assure procedural due process interpretations of section 7. The *Palko* decision was later overruled, as the U.S. Court rejected Cardozo's reasoning in *Benton v. Maryland*. In *Duncan v. Louisiana*, the U.S. Court also rejected the procedural due process arguments of Cardozo in *Palko* and *Snyder v. Massachusetts*. In *Duncan*, Justice White goes so far as to "respectfully . . . reject the prior dicta."⁹

The legal history of the "principles of fundamental justice" as an interpretation of the due process clauses of the fifth and fourteenth amendments in the United States suggests reasons why the Canadian Bill of Rights would have used the due process language in section 1.a. dealing with rights to life, liberty, security of the person, and enjoyment of property, and used the more specific fundamental justice language in section 2.e. referring only to the procedures involved in a fair hearing. It indicates that the Canadian legislators in the late 1950s were aware of the history of the due process clause in the United States when they drew up the Bill of Rights, and that they embraced the phrase "principles of fundamental justice" as referring to fairness in criminal proceedings. The Bill of Rights appears to do a better job of making this distinction clear than the Charter does, at least in its construction, and of limiting the "principles of fundamental justice" to their application to criminal procedure. The intentions of the framers in 1981 were also consistent with this understanding. Nevertheless, the Court's interpretation has led elsewhere.

⁷ *Hurtado v. California*, 110 U.S. 516, 28 L. Ed. 232, 4 S. Ct. 111 (1884), in Donald P. Kommers and John E. Finn, *American Constitutional Law: Essays, Cases, and Comparative Notes*, (Belmont: Wadsworth Publishing Company, 1998), p. 360. Emphasis added.

⁸ *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937), in *ibid.*, p.367. Emphasis added. See also *Snyder v. Massachusetts*, 297 U.S. 97 (1934).

⁹ *Benton v. Maryland*, 395 U.S.784 (1969), *Duncan v. Louisiana*, 391 U.S. 145 (1968).

It first appears that "due process of law" and "principles of fundamental justice" are a grounds of contrast between the American and Canadian constitutions. In fact, the Canadian phrasing was selected from American Supreme Court jurisprudence. The fundamental justice clause was intended to be interpreted as the same thing as procedural due process. Even still, the Canadian Supreme Court rejects original intent in *Reference re British Columbia Motor Vehicle Act*, and gives a reading similar to the substantive interpretation of the due process clause. This point bears some emphasis: The framers' intentions were to entrench a "fundamental fairness" procedural guarantee under s.7, which was virtually immediately swapped out by the Court for a substantive interpretation of the "principles of fundamental justice." Since *B.C. Motor Vehicle*, this understanding that the principles of fundamental justice are much more meaningful than mere procedural guarantees has been consistent and predominant in s.7 analysis. That interpretation is carried through in the Canadian Court's more recent decisions dealing with s.7. However, beginning with the *U.S. vs. Burns* ruling, the interpretation undergoes a further evolution. The Court seems to be seeking to pin down more authoritatively the source of the substance of the principles of fundamental justice, and is taking increasing judicial notice of indicators of the Canadian "collective conscience" as its guide.

Reading the Canadian Conscience

Once the Court has rejected the notion that the principles of fundamental justice should be interpreted to mean merely procedural fairness and admit a more substantive reading, the next logical question is, of what will that substance consist? Now that the principles of fundamental justice are much deeper than originally might have been thought, what are those principles? In order to characterize the substance of the fundamental principles of justice, the Court must first decide *how* they will seek that substance. In *B.C. Motor Vehicle Reference*, then Chief Justice Lamer wrote that "the principles of fundamental justice are to be found in the basic tenets of our legal system."¹⁰ Lamer seems to indicate here that he believes the principles of fundamental justice can be found in looking to the concepts underlying the rule of law. The Court in *Burns* accepts this basis, but uses it as a starting point, and adds considerably to it. "The important inquiry is to determine what constitutes the applicable principles of fundamental justice... The outcome of the appeal turns on an appreciation of these principles, which in turn are derived from the basic tenets of our legal system."¹¹ The

¹⁰ *Reference Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 503. See also *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, para 19, where Chief Justice McLachlin writes that "Section 7 of the *Charter* requires that laws that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process." The Court's unanimous ruling in *Charkaoui* relies on an interpretation of s.7 consistent with the fundamental fairness doctrine, although the court does note that the *IRPA* in that case violates the "minimum" standard of the principles of fundamental justice.

¹¹ *United States v. Burns*, 2001 SCC 7.

Court does not explore the common law tradition in Canada or elsewhere, however, or look to legal justifications of the rule of law. Rather, the Court in *Burns* focuses on a variety of indicators of the Canadian public mind on the issue of the death penalty to determine whether extraditing the accused to a jurisdiction with capital punishment, without first seeking assurances that the death penalty will not be sought, violates the s.7 protection in accordance with the principles of fundamental justice. In doing, so, the Court begins with the tenets of the legal system, the same place Lamer did in *B.C. Motor Vehicle Reference*, but ends up in a very different place.

With *Burns*, the Court attempts to locate the basic tenets of the legal system referred to in *B.C. Motor Vehicle Reference* in the collective conscience of the Canadian people. In order to give a usable standard, the Court adopts the language used previously in *Canada v. Schmidt* to gauge whether an extradition would violate an individual's s.7 protection. In *Schmidt*, although the extradition was found constitutional, Justice La Forest considers a circumstance in which extradition might be found to violate the principles of fundamental justice. "Situations falling far short of [torture] may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s.7."¹² In *Burns*, the Court seizes on this phrase to create a standard by which the principles of fundamental justice may be sought. "The rule is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience."¹³ The logic here should be elucidated. Any extradition that violates the principles of fundamental justice will necessarily shock the conscience. However, this does not mean that every extradition that shocks the conscience must necessarily violate the principles of fundamental justice, although that is one possibility. The question of the nature of the relationship between the principles of fundamental justice and shocking the conscience remains incompletely examined by the Court. The simple logic of "if A, then always B," cannot be read to necessarily imply "if B, then always A." The question is *why* will any extradition that violates the principles of fundamental justice always shock the conscience? Is it shocking to the conscience because it is a violation of the principles of fundamental justice, or is it a violation of the principles of fundamental justice because it shocks the conscience?

The Court does not examine this relationship explicitly. In the interest of resolving practical disputes, the Court will not go further in its reasoning than necessary to discover what is necessary to determine a resolution. If in the particular instance before the Court, a law or executive action is found to violate the principles of fundamental justice, there is no need for the Court to explore the issue of whether all such cases would. Nevertheless, the year following the *Burns* extradition case, the Court seized again on the phrase "shocks the conscience" as the indicator of whether something violates the principles of fundamental justice. In *Suresh v. Canada*, the Court notes that "A variety of phrases have been used to describe conduct that would violate fundamental

¹² *Canada v. Schmidt*, [1987] 1 S.C.R. 500 para 47.

¹³ *United States v. Burns*, 2001 SCC 7 para 68.

justice. The most frequent is conduct that would ‘shoc[k] the Canadian conscience.’”¹⁴ Here, the Court engages in reasoning that opens the door to the category mistake discussed above. Whereas in *Burns*, the reasoning was that whatever violated the principles of fundamental justice would shock the conscience, in *Suresh*, the Court takes notice of something that shocks the conscience as an indicator of a violation of the principles of fundamental justice.

In reversing the logic, *Suresh* continues the trend started in *Burns* of rooting an understanding of justice in subjectivity. If we hold to an objective conception of justice, then the justice of an act or law does not operate as a function of anyone’s opinion of it. According to an objective view of justice that holds torture to be unjust, torture is equally unjust whether 30 million people approve or disapprove. The *Schmidt, Burns, Suresh* line of reasoning is a further evolution of the substantive interpretation of s.7 begun by the Court in *B.C. Motor Vehicle Reference*. Specifically, while *B.C. Motor Vehicle Reference* signals that the principles of fundamental justice will be substantive standards, the extradition cases stamp that substance as subjective, relying on the Canadian conscience. Since the Court cannot be considered to have direct access to the Canadian conscience, the Court takes notice of certain indicators thereof.

In *Burns*, according to the Court, extradition without assurances that the death penalty will not be sought contravenes the principles of fundamental justice referred to in s.7 of the Charter. The Court lists Canada's own abolition of the practice, moratoria and *de facto* moratoria by retentionist states, the growing concern about wrongful convictions, and Canada's support for international initiatives opposing capital punishment. The Court then takes judicial notice of all this as evidence that Canada has already adopted "a principle of fundamental justice . . . namely the abolition of capital punishment. Canada's support of international initiatives opposing extradition without assurances, combined with its international advocacy of the abolition of the death penalty itself, leads to the conclusion that in the Canadian view of fundamental justice, capital punishment is unjust and should be stopped."¹⁵ It is far from clear why Canada's foreign policy and own abolition of capital punishment should be seen to establish abolition as a principle of fundamental justice. If the actions of the legislature were sufficient to constitute principles of fundamental justice, there would be no need for the Courts to interpret section 7.

While the Canadian Court is careful in *Burns* to claim that it is not overturning its rulings in previous death penalty extradition cases, namely *Kindler v. Canada (Minister of Justice)* and *Reference re Ng Extradition (Can.)*, the Court has clearly moved on from the reasoning used to decide both of those cases.¹⁶ In its decision of *Burns*, the Court contends that circumstances have changed since *Kindler* and *Ng*. Concern about possible wrongful convictions is greater now than then, as is Canada's support and indeed, international ratification of initiatives to abolish capital punishment. The Court notes that Canada abolished any remaining traces of capital punishment in 1998, when the death

¹⁴ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 para 49.

¹⁵ *United States v. Burns*, 2001 SCC 7 para 84.

¹⁶ *Kindler v. Canada (Minister of Justice)*[1991] 2 S.C.R. 779; *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858

penalty was removed from the National Defence Act. The Court duly notes that this occurred seven years after the *Kindler* and *Ng* cases. The Court notes that the basic framework of the legal system is the same in *Burns* as in *Kindler* and *Ng*. However, the Court contends that "times have changed," and so too must the Canadian view of the principles of fundamental justice. "The outcome of this appeal turns on an appreciation of the principles of fundamental justice, which in turn are derived from the basic tenets of our legal system. These basic tenets have not changed since 1991 when *Kindler* and *Ng* were decided, but their application in particular cases (the 'balancing process') must take note of factual developments in Canada and in relevant foreign jurisdictions."¹⁷

The subjective standard of the Canadian conscience combined with the Court's willingness to embrace the fact that times have changed and so must the Canadian mind have changed suggest that the principles of fundamental justice themselves can change. The Court has accepted that "in the Canadian view of fundamental justice capital punishment is unjust." This suggests that there are other views of fundamental justice in which capital punishment is not unjust. Cultural relativism aside, however, it also suggests that if there comes a time in the future when the Canadian mind becomes accepting of capital punishment, then the death penalty at that time will not be unjust. If the legislature were to reinstate the death penalty and abandon international abolition initiatives, and if public opinion polls or elections began to show an acceptance of the capital punishment, would the Court have to admit once again that "times had changed?"

The willingness of the Court to consider public opinion or political indicators as points of access to the principles of fundamental justice shifts slightly between *Burns* and *Suresh*. In *Burns*, the Court is very careful to make absolutely clear that "the phrase "shocks the conscience" and equivalent expressions are not to be taken out of context or equated to opinion polls."¹⁸ The Court is not quite as careful in *Suresh*, where after expressing that they would "hesitate" to draw direct equation between public opinion "at any particular moment" and the principles of fundamental justice, they conclude "the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system."¹⁹

If extradition without assurances that the death penalty would not be sought were found *not* to shock the Canadian conscience, then would such extradition pass s.7 muster? In consulting indicators of the Canadian mind in order to discern what the relevant principles of fundamental justice are, the Court has opened the door to the possibility that the principles of fundamental justice may vary across time and culture. This subjectivist perspective on justice is not consistent with the liberal-democratic tradition in Canada, where public opinion in the form of a tyranny of the majority is to be feared as much if not moreso than minority tyranny. The principal role of the Court's power of judicial review is to protect the rights of minorities against infringement by an intolerant majority. Attempts to represent the public mind in the Canadian constitutional scheme of government are typically left to the provincial and federal legislatures.

¹⁷ *United States v. Burns*, 2001 SCC 7 para 144.

¹⁸ *United States v. Burns*, 2001 SCC 7 para 67.

¹⁹ *Suresh v. Canada*, para 50.

Interestingly, the Court's consultation of the public conscience, while it represents a departure from the procedural spirit of the United States Supreme Court decisions which inspired the Canadian framers to phrase s.7 the way they did, nevertheless echoes those earlier American decisions. In *Palko*, the American Court finds that the prohibition against double jeopardy is not "essential to an ordered scheme of liberty," and abolishing the right not to be subject to double jeopardy does not "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁰ The language in subsequent due process cases such as *Palko* makes reference to the conscience (usually citing this particular passage of *Palko*). The "fundamental fairness" interpretation of the due process clause focused on legal procedures. If a procedure was found not to be essential to an ordered scheme of liberty, it did not have to be followed. If declining to follow a specific procedure did not violate a principle of justice so rooted in the traditions and conscience of the people as to be ranked fundamental, the due process clause's protection was not found to have been breached. It may seem that the American Court would have had to rely on as subjective and changeable a standard as the Canadian Court now does. However, it only seems that way.

The Canadian Court's consultation of what "shocks the conscience" as an indicator of a violation of the principles of fundamental justice is for considerably higher stakes than were in play in *Palko* and other procedural due process cases in the United States. The American Court limited the question to the topic of legal procedures such as double jeopardy, Grand Jury hearings, and reading the accused their rights at the time of arrest. In limiting consideration of the due process clause to criminal procedures, the American Court left questions of the substance of justice insulated from the influence of the public conscience. Deciding whether capital punishment is just falls far outside the scope of the due process jurisprudence. If there is a public conscience on that matter, the American Court's "fundamental fairness" interpretation of the due process clause leaves the task of divining it to the legislature. Essentially, consulting those principles of justice rooted in the traditions and conscience of the people means consulting the common law tradition inherited from England.

In the Canadian case, however, the question of whether capital punishment is just is taken on directly by the Court. Further, rather than consulting some objectivist theory of justice such as an Aristotelian or Augustinian theory, the Court decides to locate the roots of fundamental justice in the Canadian conscience, as indicated in the acts of the legislature, foreign policy, and public opinion. On this approach, insofar as the Canadian conscience is changeable, so too are the principles of fundamental justice. This strikes one as counterintuitive; specifically in the interpretation of the word "fundamental." Fundamental means foundational; from the Latin *fundus*, or bottom. *Fundamentum* literally translates to "foundation." That which is fundamental is not generally understood to be changeable. A shifting foundation is not desirable. Fundamental usually implies something is fixed, firm, and unmoving. It is safest to build one's house on a foundation that does not shift.²¹ The idea that principles of fundamental justice can be impacted if not dictated by political actions and opinions reveals an implicit conception of justice as not only subjective, but politically created.

²⁰ Op. Cit.

²¹ See the Gospel of Matthew, 7:26

Conventionalism: Epicurus over Hobbes

The conception of justice as a political creation is most powerfully expressed by Thomas Hobbes. Hobbes' third law of nature is that "men perform their covenants made... and in this law of nature, consisteth the fountain and original of *justice*."²² According to Hobbes, covenants cannot exist in the state of nature. Covenants can only exist if they can be enforced by the coercive authority, and are only possible after a commonwealth has been formed. "Therefore before the names of just, and unjust can have place, there must be some coercive power, to compel men equally to the performance of their covenants, by the terror of some punishment."²³ For Hobbes, no action in the state of nature can ever be unjust. Anything and everything goes in the state of nature, which in Hobbes' theory means that justice does not even exist in the state of nature. Justice only exists once men enter into a compact, and that entry into a compact under a sovereign authority is what creates justice. The Court cannot be seen to explicitly embrace the Hobbesian conception of justice; rather, what is comparable is implicit. If the *Suresh* evolution of the *Burns* s.7 reasoning continues, and that which "shocks the conscience" is taken to be that which violates the principles of fundamental justice, the Court would be operating under logical premises that accept justice as having been socially created.

This doctrine that moral rules are not fixed by nature but are created by human conventions is *conventionalism*, and in this case, moral conventionalism. Hobbes is not the theorist best associated with this doctrine, and so is perhaps not the best guide to understanding the implicitly philosophical position embraced by the Court's s.7 reasoning. Epicurus is, in fact, the philosopher whose thought fits the subjective conventional logic of the *Suresh* and *Burns* decisions.

Epicurus sounds a bit like Hobbes in his discussion of justice. He writes that "Those animals which are incapable of making covenants with one another, to the end that they may neither inflict nor suffer harm, are without either justice or injustice. And those tribes which either could not or would not form mutual covenants to the same end are in like case."²⁴ Here, Hobbes, and Epicurus are in agreement. Justice (and consequently, injustice) does not exist without a social contract sort of arrangement. However, whereas for Hobbes, justice is created by the sovereign enforcing covenants, for Epicurus, justice is a function of what is advantageous to the society, or, more specifically, a function of what the members of the society believe is advantageous to the society. "Among the things accounted just by conventional law, whatever in the needs of mutual association is attested to be useful, is thereby stamped as just, whether or not it be the same for all; and in case any law is made and does not prove suitable to the usefulness of mutual association, then this is no longer just."²⁵ Epicurus' philosophy of justice is subjective in its reliance on convention in the same way that the Court's reasoning ends up in *Suresh*. Epicurus is not shy about the necessary logical conclusion that justice is

²² Hobbes, *Leviathan*, Part 1 ch 15.

²³ *Ibid.*

²⁴ Epicurus, *Principal Doctrines*, 32.

²⁵ *Ibid.*, 37.

therefore highly malleable. “Where without any change in circumstances the conventional laws, when judged by their consequences, were seen not to correspond with the notion of justice, such laws were not really just; but wherever the laws have ceased to be useful in consequence of a change in circumstances, in that case the laws were for the time being just when they were useful for the mutual association of the citizens, and subsequently ceased to be just when they ceased to be useful.”²⁶

Let us try to make the two possibilities admitted by Epicurus more concrete by applying them to the Court’s decisions. First, where we have looked at the consequences of a law or legal action and discovered that their consequences do not correspond with our notions of what is just, then the law or legal action in question was never just. In the *Burns*’ case, it may be that the death penalty, or extradition of prisoners to foreign jurisdictions without assurances that the death penalty would not be sought, was never just, because we can now judge the consequences of those actions not to accord with our vision of justice. The Court hints at this first notion in *Burns* when taking judicial notice of the greater attention paid today to possible wrongful convictions. The alternative is that circumstances have changed, and that while the laws or legal actions in question were just, they are no longer just. For Epicurus, justice has more to do with our perceptions of what is useful or advantageous to our society. In the *Burns* case, this interpretation would be that while it was previously advantageous to our society to extradite prisoners to foreign jurisdictions without assurances that the death penalty would not be sought, it is no longer useful or advantageous to do so and therefore no longer just. This reasoning sounds a good deal more like what the Court employs in *Burns*. Specifically, the Court states emphatically that *Burns* does not overturn the decisions in *Kindler* and *Ng*. According to the Court, what has changed in *Burns* in the ten years since *Kindler* and *Ng* is the circumstances. Certain facts such as the abolition of the death penalty from statutory law and a commitment to international initiatives against capital punishment are taken as indicators of this change in circumstances. The Court refrains from stating that the extraditions of Mr. Kindler and Mr. Ng were unjust, or more specifically, that their s.7 rights had been violated. In refraining in *Burns* from stating that the Court erred in those prior cases, the Court seems to accept Epicurus’ second scenario from his 38th Principal Doctrine, namely that the principles of fundamental justice are changeable.

Conclusion

This understanding of the principles of fundamental justice, if the Court pursues it in future cases, poses challenges to the legal system. The U.S. Court went through a period of difficulty with its substantive interpretation of the due process clause, especially in the *Lochner* era in the first half of the 20th century. The U.S. Court has yet to arrive at a legal reasoning which provides a perfectly clear method of applying the due process clause, and some form of substantive interpretation remains in effect. Nevertheless, the American Court backed away from its initial substantive due process approach, after recognizing the dangers of a variable and subjective standard of justice to be applied by judges. A particularly subjective substantive standard was introduced by U.S. Supreme

²⁶ Ibid., 38.

Court Justice John Harlan first in *Twining v. New Jersey*²⁷ and then in subsequent cases, notably in a dissent to the aforementioned case of *Duncan v. Louisiana*. By the time the *Duncan* came down, Harlan's *Twining* substantive due process interpretation was discredited. His dissent in *Duncan* continued its attempt to revive that interpretation however, and elicited this response from Justice Black in that case:

"Thus due process, according to my Brother Harlan, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that 'no person shall be deprived of life, liberty, or property except by laws that judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government.' It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power."²⁸

The U.S. Court already went through a well-documented and painful series of growing pains with their due process clause. It remains to be seen whether the Canadian Court will learn from the American experience and avoid the same pitfalls, or if the *Burns* and *Suresh* cases signal that Canada will struggle with subjectivist standards or justice. The conventionalism I find in the *Burns* and *Suresh* cases may be contained somewhat, given that the Court has only engaged this reasoning in cases dealing with extradition. The Court also appears to have backed away from conventionalist standards in two more recent s.7 cases, *R. v. Malmo-Levine*; *R. v. Caine* and *Charkaoui v. Canada*. In *Malmo-Levine*, the Court articulates a very clear standard for the s.7 principles of fundamental justice, and one that sounds much more consistent with a fundamental fairness or procedural due process interpretation. "For a rule or principle to constitute a principle of fundamental justice for the purposes of s.7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person."²⁹ The standard here seems to resurrect and make more specific Justice Lamer's standard of rooting the principles of fundamental justice in the basic tenets of our legal system. The requirement that the standard be identifiable with some precision, in order to create a manageable and measurable framework for assessing violations appears designed to avoid the variability that *Burns* and *Suresh* allow. The standard, however, remains rooted for the Court in "significant societal consensus." Of course, so does the fundamental fairness doctrine from the United States. More recently, the Court in *Charkaoui* makes no mention of social consensus or conscience at all in formulating the s.7 standard, but does make an explicit connection between justice and process.

²⁷ *Twining v. New Jersey*, 211 U.S.78 (1908).

²⁸ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

²⁹ *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74, para 5.

“Section 7 of the *Charter* requires that laws that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process.”³⁰

The Canadian s.7 jurisprudence is still too young for us to be able to comment definitively as to its character, or to predict with any confidence whether it will follow the *Lochner* period of the American Court with a “*Suresh*” period of its own. Certain difficulties arising from the Court’s interpretations present themselves. Perhaps the only thing that can be clear at this point is that, as Justice Lamer wrote in *B.C. Motor Vehicle Reference*, drawing a separation between procedure and substance in interpreting s.7 is virtually impossible.

³⁰ *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, 2007 SCC 9, para 19