SECTION SEVEN OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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This article presents a theory of how section 7 of the Charter of Rights and Freedoms protects life, liberty and security of the person. On the basis of a purposive and contextual interpretation, it is argued that section 7 is concerned with legal means rather than social ends. It confers a right not to be deprived of life, liberty or security except by means in accordance with the principles of fundamental justice. It requires that the standards of the rule of law be observed in the design of rules of conduct. It also permits judicial review of mechanisms of enforcement such as sanctions. It does not, however, permit judicial review of the substantive content of law in a sense which would cover the social objectives which the law is designed to achieve. It is argued that this interpretation fits well with what has been said in the leading decisions of the Supreme Court of Canada.

Dans cet article l'auteur propose une théorie de la façon dont l'article 7 de la Charte des droits et libertés protège la vie, la liberté et la sécurité de la personne. En interprétant l'article par son contexte et le but qu'il cherche à atteindre, l'auteur suggère que l'article 7 traite des moyens offerts par la loi et non de fins sociales. Il donne aux personnes le droit de ne pas être privées de vie, de liberté et de sécurité si ce n'est par des moyens qui sont en accord avec les principes de justice fondamentale. Il faut, selon l'article, suivre les normes du principe de droit dans l'établissement des règles de conduite. L'article permet aussi l'examen judiciaire du mécanisme employé pour appliquer ces sanctions. Il ne permet pas cependant un examen judiciaire des règles de fond de la loi qui toucherait aux fins sociales qui sont l'objectif de la loi. L'auteur affirme que cette interprétation s'accorde avec les décisions de la Cour suprême du Canada qui font jurisprudence.

Introduction

The most eloquent but mysterious provision of the Canadian Charter of Rights and Freedoms[1] is section 7. The section 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.

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[1] Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11.

The text invokes cherished ideals of civil liberty. Yet there are difficult questions about the ambit of the specific constitutional protections which have been conferred. Indeed, section 7 has been judicially described as "a conundrum".[2] Two questions have been at the forefront of the debates over the scope of section 7: (i) which interests are protected and (ii) how are these interests protected? The interpretation of the phrase "life, liberty and security of the person" determines which interests are protected by section 7. The manner of protecting these interests depends on the interpretations given to the phrase "the principles of fundamental justice" and to the reference to "rights". It is this second issue which is the central concern of the present article.[3]

The objective of this article is to present a theory of how section 7 protects life, liberty and security of the person. The thrust of the argument will be that section 7 is concerned with legal means rather than social ends, with the justice of the processes by which social objectives are pursued rather than with the justice of the ends which are sought. This interpretation will rely heavily on the context in which section 7 appears in the Charter. If the section had said, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except *by means* in accordance with the principles of fundamental justice", then the text would have indicated what the context implies.

This interpretation does not resurrect the now discredited view that section 7 permits no more than judicial review of adjudicative procedures. Legal means include but extend well beyond adjudication. They cover, for example, the sanctions with which rules of social conduct are enforced. The decision of the Supreme Court of Canada in the *Motor Vehicle Reference*[4] is an instance of the review of this dimension of means. It will also be argued that means should be taken to include the features of institutional design which are associated with the ideal of the rule of law, such as accessibility, certainty and rationality in the rules of conduct which the law prescribes. Some elements of the decision of the Supreme Court of Canada in *Morgentaler*[5] illustrate this form of review.

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[2] *Reference re s.94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 530, (1985), 23 C.C.C. (3d) 289, at p. 322, per Wilson J. (sometimes hereafter referred to as *Motor Vehicle Reference*).

[3] With respect to the scope of the interests protected by s. 7, it is now settled that psychological as well as physical health is covered by the concept of security of the person. See *Morgentaler, Smoling and Scott* v. *The Queen*, [1986] 1 S.C.R. 30, at pp. 54-57, 101-106, 162-163, (1988), 37 C.C.C. (3d) 449, at pp. 464-466, 500-504, 548 (sometimes hereafter referred to as *Morgentaler*). It is not yet clear, however, how far the psychological protections of s. 7 extend. See *infra*, footnotes 76-77. In addition, there has not yet been an authoritative ruling from the Supreme Court of Canada on the question of whether economic interests fall within the scope of the section.

[4] *Supra*, footnote 2.

[5] *Supra*, footnote 3.

On the other hand, the theory offers no support for the broad view that section 7 permits judicial review of the substantive content of law in a sense which would cover the social objectives which law embodies. Consider, for example, the legislation respecting abortions which was under examination in *Morgentaler*. The theory offers no support for the view that a court could use section 7 to review the justice of restricting abortions to those performed under medically safe conditions and for therapeutic purposes. This statement is not intended to imply that such restrictions would be constitutionally valid as long as they were implemented by appropriate means. It is, however, intended to mean that the question of whether or not such restrictions would themselves be constitutional is a question to be addressed in relation to the fundamental freedoms under section 2 of the Charter and not under section 7. The role of section 7 within the Charter is to set standards for the means used to pursue social objectives such as restricting abortions.

What will be presented is a theory of section 7 as a whole which focuses on the nature of the rights it confers. The theory builds upon the inclusion of section 7 in a set of Charter rights which are entitled "Legal Rights". The theory reflects a wider view of legal rights as a sub-category of rights generally. In contrast, debates about the reach of section 7 have tended to focus on the meaning of "the principles of fundamental justice" in the excepting proviso. Narrow interpretations of this clause have sometimes been proposed in order to confine the scope for judicial review of the substantive content of law. When, however, the special character of rights under section 7 is identified, this effort may appear to be based on ungrounded fears about judicial interference in the political arena.

In its basic conception, the theory is normative rather than descriptive. It purports to present the best interpretation of section 7 in light of the general principles of Charter interpretation which have now been recognized in judicial decisions. The article will also seek to demonstrate that the theory fits well what was said about section 7 in the leading decisions of the Supreme Court of Canada, the *Motor Vehicle Reference* and *Morgentaler*. The article will seek to articulate a theory for some of the ideas which were expressed in those decisions.

The article is divided in two main parts. The first part reviews the debates over procedural and substantive interpretations of "the principles of fundamental justice" and analyzes the decisions in the *Motor Vehicle Reference* and in *Morgentaler*. The second part presents the theory of how section 7 protects life, liberty and security from deprivation by unjust means. The discussion will be directed mainly towards the forms of law which seek to regulate social behaviour, since a role for section 7 is well established in this sphere. A brief third part comments on some current issues relating to the reach of section 7, including its potential role outside the sphere of regulatory law.

I. *Procedural and Substantive Review*

A. *Principles of Fundamental Justice*

On its face, section 7 might appear to establish two sets of rights: (i) the right to life, liberty and security of the person and (ii) the right not to be deprived thereof except in accordance with the principles of fundamental justice. Nevertheless, the possibility of a disjunctive interpretation, with two sets of rights of differing scope, has been generally ignored. The initial declaration of a right to life, liberty and security is treated as a mere declaration, with legal effect flowing only from the right not to be deprived thereof except in accordance with the principles of fundamental justice. The section is thus read conjunctively, as if it conferred just one set of rights, "the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice". This has sometimes been called the "single right" theory of section 7.[6]

The disjunctive structure of section 7 of the Charter borrows from section 1(a) of the Canadian Bill of Rights[7] which pronounced the existence of "the right to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of the law". Despite its phraseology, section 1(a) of the Bill was usually read in the same conjunctive manner as section 7 of the Charter has been. In both instances the rationale for a conjunctive interpretation has been largely unexamined. It can, however, be defended on the ground that only a conjunctive interpretation gives significance to the phrases "due process" and "fundamental justice". A free-standing right to life, liberty and security would cover any ground upon which guarantees of due process and fundamental justice might work. The latter guarantees would be otiose. The conjunctive reading of the provisions enables this result to be avoided. The cost, of course, is grammatical distortion. There is, however, no easy resolution of the problems presented by these provisions.

The meaning of "the principles of fundamental justice" has been controversial since the enactment of the Charter. Two sharply differing interpretations have been at the forefront of debate. These are commonly known as the "procedural" interpretation and the "substantive" interpretation. They lead to radically divergent views of the reach of section 7.

The procedural interpretation gives the narrowest possible scope to "the principles of fundamental justice". It is contended that these are

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[6] See *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 204-205, (1985), 17 D.L.R. (4th) 422, at p. 458.

[7] S.C. 1960, c. 44, R.S.C. 1985, App. III.

confined to principles of procedural fairness in adjudication. Section 7 is viewed as no more than a constitutional expression of the common law rules of natural justice for adjudicative procedures. On this interpretation, the section would require such elements of adjudicative fairness as a hearing for someone threatened with deprivation of life, liberty or security. There would, however, be immunity from judicial review for pre-adjudication procedures, post-adjudication sanctions, and also for the substantive content of legislation. In contrast, the substantive interpretation gives the broadest possible scope to "the principles of fundamental justice". The phrase is taken to encompass principles of substantive as well as procedural justice, in a way which makes a broad range of legislative policies amenable to judicial review. The only fetters upon judicial interference in matters of legislative policy would be the requirement of a deprivation of life, liberty or security and the requirement that the violated principle pertain to a matter of justice which is "fundamental".

There is competing support for each of these interpretations. The primary support for the procedural interpretation is the extrinsic evidence respecting the intentions of the federal officials involved in the drafting of the Charter. Some of these officials apparently understood "the principles of fundamental justice" to mean "procedural due process" or "natural justice" in adjudicative procedures.[8] The background to this narrow conception was some words of Fauteux C.J.C., interpreting the phrase "the principles of fundamental justice" in the context of section 2(e) of the Canadian Bill of Rights:[9]

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

This is, however, weak authority on which to rely for the interpretation of the same phrase in section 7 of the Charter. The context in which the phrase is used in the Bill clearly indicates an application which is exclusively adjucative: section 2(e) of the Bill states that no one is to be deprived of "the right to a fair hearing in accordance with the principles of fundamental justice. . .". Section 7 does not contain this express reference to a hearing. Moreover the text of the Charter offers no support at all for so narrow an interpretation.

The primary support for the broad, substantive interpretation is the text of section 7 itself. As a matter of ordinary language, the term "fundamental justice" covers substantive as well as procedural justice. A straightforward reading of section 7 should therefore lead to the conclu-

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[8] *Reference re s. 94(2) of the Motor Vehicle Act*, *supra*, footnote 2, at pp. 504-505 (S.C.R.), 303 (C.C.C.).

[9] *Duke* v. *R.*, [1972] S.C.R. 917, at p. 923, (1972), 28 D.L.R. (4th) 129, at p. 134.

sion that its reach extends to both forms of justice. This conclusion would, however, run counter to the extrinsic evidence of drafting intent. Indeed, there is evidence that the drafters were fearful of establishing anything comparable to the American doctrine of "substantive due process"[10] and therefore deliberately sought to avoid conferring any power of substantive review.[11] The substantive interpretation is also weakened by a consideration of the context of section 7. This interpretation fails to explain the location of section 7 under the general heading of "Legal Rights". Its location associates section 7 with sections which are concerned mainly with aspects of the criminal process, and separates it from the rights respecting the substantive content of laws which are conferred in other parts of the Charter.

The procedural and the substantive interpretations of section 7 are equally unattractive in terms of both the ambit which they ascribe to section 7 and the methodology of interpretation which they use. With respect to ambit, the competing interpretations present unacceptable extremes. The procedural interpretation devoids the section of most of its potential significance whereas the substantive interpretation threatens unbridled judicial interference in matters which are presumptively the preserve of governmental policy.[12] With respect to methodology, neither interpretation gives adequate weight to the range of concerns which fall to be addressed in exercises of constitutional interpretation. The challenge is not to choose between these competing interpretations but to transcend the weaknesses of both.

B. *The Decisions of the Supreme Court of Canada*

The challenge to transcend the weaknesses of the procedural and the substantive interpretations of section 7 has been recognized by the Supreme Court of Canada in its leading decisions, the *Motor Vehicle Reference* and *Morgentaler*. In different ways, these decisions both move away from the traditional distinction between procedural and substantive review. In the *Motor Vehicle Reference*, an attempt was made to escape the distinction in interpreting the scope of section 7. In *Morgentaler*, the language of procedural review was retained, but section 7 was applied

[10] The Fifth and Fourteenth Amendments to the United States Constitution guarantee, *inter alia*, that there will be no deprivation of life, liberty or property "without due process of law". The "due process" guarantees have been held to permit judicial review of some substantive legislative provisions: see *infra*, footnotes 17-22, and accompanying text.

[11] *Reference re s. 94(2) of the Motor Vehicle Act*, *supra*, footnote 2, at pp. 504-505 (S.C.R.), 303 (C.C.C.).

[12] The safeguard of s. 1 of the Charter has little role to play in relation to s. 7. See the *Reference re s. 94(2) of the Motor Vehicle Act*, *ibid.*, at pp. 517-518 (S.C.R.), 313 (C.C.C.).

in a way which bears little resemblance to the traditional idea of procedural review.

In the *Motor Vehicle Reference*, the Supreme Court of Canada forthrightly rejected the narrow interpretation of fundamental justice as a purely procedural concept.[13] Several considerations were mentioned. It was said that this interpretation could not give the section the significance indicated by the ringing declaration of the right to life, liberty and security of the person.[14] It was also said that the extrinsic evidence of drafting intent, though admissible, should be given minimal weight in view of its unreliability and of the problematic status of the federal officials in the constitutional process.[15] Finally, it was said that, if actual legislative intent were to be determinative of meaning, the import of the Charter would be fixed permanently without the possibility of future change.[16] This last consideration rests upon the foundation of a theory of constitutional interpretation which will be examined in the next part of this article.

Some commentators have read the Supreme Court's rejection of the procedural interpretation as an affirmation of the full-blown substantive interpretation. Yet, the *Motor Vehicle Reference* did not itself involve a question of legislative substance of the kind which is usually contemplated in debates about substantive review. Moreover the remarks of the Supreme Court on the reach of section 7 fell well short of clearly endorsing a power of full substantive review.

What is usually contemplated in debates about substantive review is review of the social arrangements which are prescribed by law. Consider, for example, some cases which are often thought to represent substantive review under the "due process" provisions of the United States Constitution.[17] *Lochner* v. *New York*[18] concerned a limitation on hours of labour in bakeries; *Adair* v. *United States*[19] concerned a prohibition against discharging an employee because of union membership; *Adkins* v. *Children's Hospital*[20] concerned a prescription of a minimum wage; *Griswold* v. *Connecticut*[21] concerned a ban on the use of contraceptive devices; *Roe* v. *Wade*[22] concerned a prohibition on abortions.

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[13] *Ibid.*, at pp. 500-513 (S.C.R.), 299-310 (C.C.C.).

[14] *Ibid.*, at pp. 501-502 (S.C.R.), 300-301 (C.C.C.).

[15] *Ibid.*, at pp. 505-509 (S.C.R.), 304-307 (C.C.C.).

[16] *Ibid.*, at pp. 509 (S.C.R.), 306-307 (C.C.C.).

[17] *Supra*, footnote 10.

[18] 198 U.S. 45, 49 L. Ed. 937 (1905).

[19] 208 U.S. 161, 52 L. Ed. 208 (1907).

[20] 261 U.S. 525, 67 L. Ed. 785 (1923).

[21] 381 U.S. 479, 14 L. Ed. (2d) 510 (1965).

[22] 410 U.S. 113, 35 L. Ed. (2d) 147 (1973).

The issue in all these cases was the constitutional propriety of a legislative determination respecting the arrangements by which society is to be ordered. This was not what was at issue in the *Motor Vehicle Reference*.

The *Motor Vehicle Reference* involved a challenge to an offence under the British Columbia Motor Vehicle Act.[23] Section 94(1) of the Act made it an offence to drive while prohibited or while under suspension and prescribed a minimum penalty of seven days' imprisonment. The constitutional challenge was not, however, directed at section 94(1). Moreover, there was no examination of the "substantive" question of the circumstances under which driving can justly be banned. The challenge was instead directed at section 94(2), which said: "Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension." The issue on the reference was the constitutionality of associating a penalty of imprisonment with an offence which could be committed without fault. In ruling that section 94(2) violated the constitutional right not to be deprived of liberty except in accordance with the principles of fundamental justice, the Supreme Court said nothing about, for example, the type of driving infractions which might justify a prohibition on driving. The question addressed by the court was whether or not culpability is a precondition for the sanction of imprisonment to be just. This is a question about how substantive rules of conduct can be enforced. It is a question about the means by which substantive goals can be pursued.

The Supreme Court ruled that (i) the conviction of someone who had acted without fault always violates the principles of fundamental justice and that (ii) where imprisonment is available as a penalty, there is also a breach of the right to liberty under section 7 of the Charter.[24] In reaching these conclusions, the Supreme Court expressly rejected the position that the application of section 7 is exclusively procedural in the narrow sense of being restricted to adjudicative procedures. The position of the court with respect to the debates over substantive review was not, however, expressed in clear terms.

Throughout his judgment for the majority, Lamer J. avoided endorsing the idea that the reach of section 7 extends to the substantive features of criminal and regulatory legislation. The label of "substantive" review was used in the other judgments in the case[25] and was subsequently

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[23] R.S.B.C. 1979, c. 288, as am. by the Motor Vehicle Amendment Act 1982, S.B.C. 1982, c. 36.

[24] *Reference re s. 94(2) of the Motor Vehicle Act, supra*, footnote 2, at pp. 513-515, 518-519, 521-522 (S.C.R.), 293, 310-311, 314-315 (C.C.C.).

[25] *Ibid.*, per McIntyre J., at pp. 521-522 (S.C.R.), 293 (C.C.C.), and per Wilson J., at pp. 530-531 (S.C.R.), 323 (C.C.C.).

accepted by Lamer J. himself.[26] In the *Motor Vehicle Reference*, however, he did not use this expression. Indeed he questioned the value of thinking about section 7 in terms of a dichotomy of procedural and substantive justice.[27] His analysis of the principles enshrined in section 7 focused upon the distinction between the legal system and the political system rather than the distinction between procedure and substance. The principles of fundamental justice with which section 7 is concerned were said to be those "found in the basic tenets of our legal system",[28] lying "in the inherent domain of the judiciary as guardian of the justice system" rather than in the realm of "general public policy",[29] and recognized "as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law".[30] These phrases are ambiguous. Yet they appear to indicate an attraction for some middle-path between the extremes of the substantive and the procedural interpretations of section 7.

Ambiguity and reserve about the reach of section 7 were again apparent in the decision of the Supreme Court in *Morgentaler*.[31] The case involved a challenge to a section of the Criminal Code[32] which provided that abortions would be illegal unless performed in an "accredited or approved hospital" and unless a "therapeutic abortion committee" of the hospital had certified that an abortion was necessary to preserve the life or health of the pregnant woman. The substantive goals of the legislation were apparently to confine abortions to those performed for therapeutic reasons and to ensure the safety of women undergoing abortions. In the constitutional challenge to the legislation, it was argued that the restrictions upon access to abortions deprived pregnant women of liberty and security of the person in violation of principles of both procedural and substantive justice.

A majority of the court held that the legislation contravened section 7 of the Charter. Only Wilson J., however, decided the case on grounds which were explicitly substantive. She held that the restriction on abortions to those performed for therapeutic reasons was unconstitutional.[33]

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[26] See *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636, at p. 652, (1987), 60 C.R. (3d) 289, at p. 324.

[27] *Reference re s. 94(2) of the Motor Vehicle Act*, *supra*, footnote 2, at pp. 498 (S.C.R.), 298 (C.C.C.).

[28] *Ibid.*, at pp. 503 (S.C.R.), 302 (C.C.C.). See also *Morgentaler, Smoling and Scott* v. *The Queen*, *supra*, footnote 3, per Dickson C.J.C., at pp. 70 (S.C.R.), 476 (C.C.C.).

[29] *Ibid.*

[30] *Ibid.*, at pp. 512 (S.C.R.), 309 (C.C.C.).

[31] *Supra*, footnote 3.

[32] R.S.C. 1970, c. C-34, s. 251.

[33] *Morgentaler, Smoling and Scott*, *supra*, footnote 3, at pp. 163-184 (S.C.R.), 548-564 (C.C.C.).

The other majority judges said that the injustice lay in the *procedures* prescribed for authorization and performance of abortions.[34] It was held that these procedures could deny or delay access to therapeutic and medically safe abortions and thereby deprived women of security of the person in a manner inconsistent with the principles of fundamental justice. Beetz J. did not address the question of whether there could be judicial review of substantive aspects of the scheme for restricting abortions. Dickson C.J.C. suggested that section 7 does confer some power of "substantive" review but he did not explain what this meant and he declined to examine its implications for the abortion legislation.[35] He may well simply have been using the term in the special sense in which it has been used in the interpretation of the *Motor Vehicle Reference*.

A curious feature of *Morgentaler* was that the term "procedure" was used in an extremely broad sense. Objection was not taken to the manner in which therapeutic abortion committees adjudicated claims for abortions. Objection was instead taken to the overall scheme through which Parliament had sought to confine abortions to those performed for therapeutic reasons and to ensure the safety of women undergoing abortions. For example, Beetz J. held that there was no medical justification for the requirement that all abortions take place in hospitals.[36] The issue he raised concerned the rationality of the connection between ends and means, which is one of the issues addressed by the Supreme Court in cases on section 1 of the Charter.[37] In effect, Beetz J. ruled that the in-hospital requirement was arbitrary. A separate list of procedural deficiencies was presented by Dickson C.J.C. His list included the vagueness of the standard of danger to "health" which the authorizing committees were supposed to apply.[38] He also objected to how administrative barriers to obtaining abortions had made the apparent defence of therapeutic purpose practically illusory for many women.[39]

If such arbitrariness, vagueness and illusion are matters of "procedure", then the realm of "substance" must be severely confined. In effect, the realm of substance is no more than the social goals of legislation or, in other words, the states of affairs which legislated rules of conduct are designed to produce. Even the rules of conduct which are expressed in legislation are merely procedural devices for the attainment

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[34] *Ibid.*, per Dickson C.J.C., at pp. 63-73 (S.C.R.), 471-478 (C.C.C.), and per Beetz J., at pp. 106-122 (S.C.R.), 504-516 (C.C.C.).

[35] *Ibid.*, at pp. 53, 63, 73 (S.C.R.), 463, 471, 478 (C.C.C.).

[36] *Ibid.*, at pp. 114-119 (S.C.R.), 510-514 (C.C.C.).

[37] See *R.* v. *Oakes*, [1986] 1 S.C.R. 103, at p. 139, (1986), 26 D.L.R. (4th) 200, at p. 227.

[38] *Morgentaler, Smoling and Scott* v. *The Queen, supra*, footnote 3, at pp. 68-69 (S.C.R.), 474-476 (C.C.C.).

[39] *Ibid.*, at pp. 70-73 (S.C.R.), 476-478 (C.C.C.).

of these substantive goals. When Beetz J. held that the rule requiring all abortions to be performed in hospitals was unconstitutional, he was taking objection to arbitrariness in one of the legislated rules of conduct respecting the performance of abortions. Similarly, when Dickson C.J.C. complained about how the apparent defence of therapeutic purpose was often practically illusory, he was complaining that these legislated rules of conduct were misleading. Admittedly, the legislated rules for the performance of abortions were not in issue in the complaint that danger to "health" was too vague a standard for the authorizing committees to use. The vagueness of the criteria for authorization did not extend to the rule requiring that, for the performance of an abortion, there eventually be a certificate stating that the pregnancy endangered health. Nevertheless, if the vagueness was objectionable in the scheme for prior certification, it is difficult to imagine why it should not also have been objectionable in a rule which would simply have made abortions illegal except where they were performed to preserve the health of women.

Defects in the legislated rules of conduct respecting the performance of abortions can be regarded as matters of "procedure" only if the realm of "substance" is confined to the social objectives which are pursued through the use of legal means. On this view, legal formulations of rules of conduct would become part of the means by which social objectives are pursued, even though these legal formulations provide the behavioural standards which the law is directly concerned to enforce. This approach stretches the idea of procedural review. Nevertheless, it still does not amount to substantive review in the sense contemplated by the American doctrine of substantive due process. Substantive review in the United States has involved inquiry into whether or not the behavioural constraints of legal rules produce states of affairs which are consistent with certain constitutional rights.[40] Substantive review has therefore involved engagement with the social objectives which are pursued through legal rules of conduct. *Morgentaler*, however, examined legal rules of conduct with reference to the general qualities of legal rules as instruments of social direction and guidance. The legislation was found unconstitutional, not because it was designed to produce results which were unjust, but because flaws in its design made it an unjust means of achieving these results.

On this approach, the entire apparatus for enforcing legal rules of conduct would also constitute part of the realm of procedure. The Supreme Court could therefore be said to have engaged in procedural rather than substantive review when it held the sanction in the *Motor Vehicle Reference* to be unjust in the absence of an opportunity to address culpability. Indeed, the decision in the *Motor Vehicle Reference* fits the characteriza-

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[40] *Supra*, footnotes 17-22 and accompanying text.

tion of "procedural" review more easily than does that in *Morgentaler*. The *Motor Vehicle Reference* was concerned only with mechanisms of enforcement. Unlike *Morgentaler*, there was no review of the design of rules of conduct.

The Supreme Court has therefore used two different devices to escape the narrowly procedural interpretation of section 7. In the *Motor Vehicle Reference*, the propriety of some types of "substantive" review was accepted; in *Morgentaler*, the notion of "procedural" review was extended. In both cases, the Supreme Court reviewed features of legislative schemes which could be viewed as means to the achievement of social ends. Neither case, however, offers much support for a power to review the justice of the social ends which are pursued through legal means. Moreover, the *Motor Vehicle Reference* contains explicit suggestions that the Supreme Court is seeking a middle-path between the narrow, exclusively procedural interpretation of section 7 and the full-blown substantive interpretation.

The direction of this middle-path has not been articulated with any precision by the Supreme Court. In the *Motor Vehicle Reference*, a distinction was drawn between political principles and principles embedded in the legal system.[41] If this distinction were to be directed to matters of substance in the sense of social objectives, it would be untenable. Political principles remain so whether they are articulated and adopted by politicians or by judges. The distinction between political and legal principles only makes sense as a distinction between principles respecting ends and principles respecting means. Yet the Supreme Court did not discuss how a means-end distinction could be operationalized. Moreover, the theoretical underpinnings for a middle-path have not been examined.

The aim of the remainder of this article is to remedy these deficiencies and to present a theory of section 7 which is consistent in spirit with the language used by the Supreme Court. The enterprise will involve a shift of focus away from the phrase "the principles of fundamental justice" and towards the title "Legal Rights" which heads sections 7-14 of the Charter.

II. *Legal Rights*

A. *The Purpose of Section 7*

"Purposive interpretation" has been accepted by the Supreme Court of Canada as the mode of interpretation which is best suited to the Charter. The idea of this mode of interpretation was first broached in *Hunter*

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[41] *Reference re s. 94(2) of the Motor Vehicle Act*, *supra*, footnote 2, at pp. 503, 511-512 (S.C.R.), 302, 309 (C.C.C.).

v. *Southam Inc.*[42] where it was said that a purposive analysis "interprets specific provisions of a constitutional document in light of its larger objects".

The nature of purposive interpretation received its fullest exposition in *R.* v. *Big M Drug Mart Ltd.*[43] where Dickson C.J.C. identified purposive interpretation with understanding a provision "in the light of the interests it was meant to protect". He went on to say:[44]

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meanings and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

This passage was quoted in the *Motor Vehicle Reference*,[45] where it formed a key element in the reasoning leading the Supreme Court to reject the exclusively procedural interpretation of section 7. It was concluded in the *Motor Vehicle Reference* that the purpose of section 7 was to secure a substantial measure of protection for life, liberty and security, greater than that which the procedural interpretation could provide.[46] The Supreme Court did not, however, examine systematically how the principles of purposive interpretation might assist in circumscribing a broader reach for section 7.

Purposive interpretation is attuned to the values which lie behind the verbal formulations of the constitutional text. It is also clearly meant to involve careful attention to the context in which specific rights and freedoms appear within the Charter. In the passage quoted from *Big M Drug Mart*, it was said that the purposive interpretation of a provision demands reference to "the meaning and purpose of the other specific rights and freedoms with which it is associated" and to "the character and larger objects of the Charter itself". In other words, an interpretation of a specific Charter provision has to fit with a theory of the Charter as a whole and of the part in which the provision appears.

The words used in *Big M Drug Mart* might seem to suggest that the "purposes" which are relevant in interpretation are those of the framers of the Charter. The Supreme Court has, however, had occasion to note the difficulty of ascribing any particular intent to the multiplicity of persons who participated in the process leading to the adoption of the

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[42] [1984] 2 S.C.R. 145, at p. 156, (1984), 14 C.C.C. (3d) 97, at p. 106, per Dickson J.

[43] [1985] 1 S.C.R. 295, at p. 344, (1985), 18 C.C.C. (3d) 385, at p. 423.

[44] *Ibid.*, at pp. 344 (S.C.R.), 423-424 (C.C.C.).

[45] *Supra*, footnote 2, at pp. 500 (S.C.R.), 299 (C.C.C.).

[46] *Ibid.*, at pp. 501-502 (S.C.R.), 300-301 (C.C.C.).

Charter.[47] In addition, the Supreme Court has several times stated that the meaning of the Charter provisions is not fixed in time. There is the possibility of "growth", "development" and "adjustment".[48] Thus, when "purpose" is offered as a guide to interpretation, the term must be understood in a figurative sense. The reference cannot be to real purposes which lie behind the constitutional text. The reference must instead be to such purposes as might be ascribed to the text in order to explain its content. Only in this way can the various statements by the Supreme Court be reconciled. Of course, such purposes could vary over time as the culture of the community shifts. The common sense of one era can be the nonsense of another era. Thus, purposive interpretation does not appear to mean that the correct interpretation of a Charter provision is that which provides the best fit with the intentions of the persons who originally chose the text. Instead, the message appears to be that the correct interpretation is that which provides the best fit with the present rationality of the text.

Some features of the text of the Charter tell against interpreting section 7 so as to confer a full power of substantive review, including the power to measure the substantive objectives of legal rules against the standards of fundamental justice. Section 7 appears in a part of the Charter which separates it from the provisions which most obviously confer power to review substantive content. For example, section 2 lists a set of fundamental freedoms which are to be protected against governmental interference. There would be a good deal of overlap between these freedoms and a substantive guarantee of liberty under section 7. Yet the arrangement of the Charter does not put the promise of life, liberty and security together with the fundamental freedoms. Instead, it puts the promise of life, liberty and security together with a set of provisions (sections 8-14) which are mainly concerned with the processing of criminal cases. Moreover, some homogeneity of content in this part of the Charter is suggested by the special heading of "Legal Rights" under which sections 7-14 are subsumed.

The headings for the different parts of the Charter are clearly items to be taken into account in contextual interpretation. Indeed, it has been said that "these headings were systematically and deliberately included as an integral part of the *Charter*. . .".[49] What then are "legal rights"? How do they differ from rights generally? In the context of the Charter,

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[47] See, for example, *ibid.*, at pp. 508 (S.C.R.), 306 (C.C.C.).

[48] See *ibid.*, at pp. 509 (S.C.R.), 307 (C.C.C.); *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357, at p. 366, (1984), 11 C.C.C. (3d) 481, at p. 488; *Hunter* v. *Southam Inc.*, *supra*, footnote 42, at pp. 155 (S.C.R.), 105 (C.C.C.).

[49] *Law Society of Upper Canada* v. *Skapinker, ibid*, per Estey J., at pp. 376 (S.C.R.), 496 (C.C.C.). See also *Morgentaler, Smoling and Scott* v. *The Queen, supra*, footnote 3, per Beetz J., at pp. 89 (S.C.R.), 491 (C.C.C.).

the term "legal rights" cannot simply mean rights which are recognized in law. All Charter rights would be legal rights in this sense. The use of the term to describe a sub-category of Charter rights suggests that the included rights are of a special kind, different from the rights respecting the substantive content of law which are conferred in some other parts of the Charter.

The argument that legal rights are to be understood as rights of a special and limited kind is supported by the character of sections 8-14. None of these sections is directed to the substantive content of legal rules. Instead, these sections confer rights with respect to the machinery by which a legal system makes its rules of social conduct effective. Sections 8, 9 and 10 are concerned with the preliminary stages of rule-enforcement, especially with techniques of investigation and with preparations for trial. Sections 11, 13 and 14 contain a bundle of rights with respect to adjudicative proceedings. Section 12 imposes certain standards for the treatment or punishment of offenders. Most of these provisions of the Charter are expressly or impliedly directed primarily towards the criminal process, where deprivations of liberty and security are routinely effected in the pursuit of social objectives.

It makes sense to conclude that rights under section 7 are of a similar kind, at least in the rough sense of being rights with respect to legal means rather than social ends. This interpretation gives meaning to the grouping together of the varied rights under sections 7-14. Section 7 provides a general guarantee that the principles of fundamental justice will be observed in the means by which deprivations of life, liberty or security are effected. Some detailed implications or developments of this general guarantee are then specified in sections 8-14. This interpretation also gives meaning to the labelling of these rights as distinctively "legal" rights. Many contemporary theories of law build on the basic idea that law is an instrument through which states of affairs are brought into being. What distinguishes law from other phenomena is the manner in which it operates rather than the states of affairs which it realizes.[50] Thus, there is nothing in the content of any particular behavioural constraints which makes them either "law" or "not-law". Law is just one of the means by which behaviour can be constrained.

There are two steps in the argument which has been presented. The first step is the proposition that "Legal Rights" in the Charter are not simply rights which are recognized in law; they are rights with respect to certain things which are distinctively "legal". The adjective "legal" does not just acknowledge the legal recognition of the rights; it specifies the subject-matter of these rights. The second step is the proposition that

[50] This view of law is held even by some contemporary natural lawyers. See J. Finnis, Natural Law and Natural Rights (1980), p. 34.

what is distinctive about law is the means by which social ends are pursued rather than the character of those ends. Thus, section 7 does not confer rights with respect to the substantive content of law in the sense of its social objectives. For example, section 7 does not confer rights with respect to what might justify a prohibition on driving or on the performance of an abortion. Instead, section 7 confers rights with respect to how such prohibitions can be effected. It confers rights to the use of legal machinery and to the quality of this machinery.

These ideas about the scope of section 7 find some echoes in the judgment of the majority of the Supreme Court of Canada in the *Motor Vehicle Reference*. The terminology of legal rights was not stressed in the judgment. Nevertheless, there was much which fits well with the approach adopted here. Lamer J. insisted that sections 7-14 be read as a group, so that sections 8-14 can be taken to address specific aspects of the general right under section 7, and section 7 itself can be interpreted in light of the contents of sections 8-14.[51] Moreover the domain of section 7 was identified with principles for "the administration of justice".[52] This phrase is usually used to refer to the processing of cases through the legal system. An orientation to matters of institutional process is also suggested by the statement that the principles with which section 7 is concerned "do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system".[53] Any claims which the judiciary can make to an "inherent domain" must be claims about means rather than ends. The judiciary should have some special expertise in matters of institutional process. The judiciary may also have certain limited powers to review governmental decisions of social policy. There is, however, no constitutional basis within the Western democratic tradition for the judiciary to claim any area of substantive policy-making as its exclusive preserve.

I do not intend to suggest that the distinction between ends and means is ever unproblematic. This is a distinction which will need to be conceptualized in different ways depending on the form of law which is under scrutiny. Even in regulatory law, where most of the cases on section 7 have arisen, the distinction could be drawn in two main ways. First, it could be drawn simply as a distinction between legal rules of conduct and the mechanisms by which these rules of conduct are enforced. This would fit neatly with the content of sections 8-14. Throughout this article, however, the end-means distinction is drawn as a distinction between, on the one hand, social objectives and, on the other hand, all the arrange-

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[51] *Reference re s. 94(2) of the Motor Vehicle Act, supra*, footnote 2, at pp. 502-503 (S.C.R.), 301-302 (C.C.C.).

[52] *Ibid.*, at pp. 503, 512 (S.C.R.), 302, 309 (C.C.C.).

[53] *Ibid.*, at pp. 503 (S.C.R.), 302 (C.C.C.).

ments for pursuing these objectives including legal formulations of rules of conduct as well as mechanisms for enforcing these rules.

These alternatives are illustrated by the different forms of judicial review which were practised by the Supreme Court of Canada in the *Motor Vehicle Reference* and in *Morgentaler*. In the *Motor Vehicle Reference* it was held that liability to the liberty-depriving sanction of imprisonment could not justly be attached to an offence which could be committed regardless of fault.[54] The issue was the justice of a particular mode of sanctioning for the violation of a rule of conduct. This would be an issue of "means" even if means are confined to mechanisms of enforcement and exclude rules of conduct entirely.

Morgentaler, however, is a more complex case. It was there held that the scheme for authorizing abortions and regulating the manner of their performance constituted an unjust deprivation of security of the person because it could deny or delay access to abortions in ways unrelated to the apparent objective of providing safe access to therapeutic abortions. Dickson C.J.C. and Beetz J. differed with respect to which particular features of the scheme were unconstitutional.[55] Nevertheless, they both found objections to features of the rules of conduct which the regulatory scheme established for the performance of abortions. Beetz J. complained of arbitrariness in the requirement that all abortions take place in hospitals; Dickson C.J.C. complained of the frequently illusory nature of the proffered defence of therapeutic purpose in relation to the commission of an abortion.[56] Both judges claimed to be engaged in "procedural" review.[57] They were, however, concerned with issues of means only if means are understood to extend beyond mechanisms of enforcement and to encompass legal formulations of rules of conduct. The claim not to have engaged in substantive review then rests upon the absence of any judgment about the justice of restricting abortions to those carried out for therapeutic reasons and under safe conditions.

I do not mean to suggest that *Morgentaler* endorses the idea of confining the scope of section 7 to questions about means. Although the *Motor Vehicle Reference* can be read as support for this view, the majority in *Morgentaler* left the scope of section 7 as an open question. The

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[54] *Ibid.*, at pp. 521-522, 513-515, 518-519 (S.C.R.), 293, 310-311, 314-315 (C.C.C.); and see the text at footnote 24, *supra*.

[55] *Morgentaler, Smoling and Scott* v. *The Queen*, *supra*, footnote 3, per Dickson C.J.C., at pp. 63-73 (S.C.R.), 471-478 (C.C.C.), and per Beetz J., at pp. 106-122 (S.C.R.), 504-516 (C.C.C.).

[56] See footnotes 36-39, *supra*, and accompanying text.

[57] *Morgentaler, Smoling and Scott*, *supra*, footnote 3, per Dickson C.J.C., at pp. 63-73 (S.C.R.), 471-478 (C.C.C.), and per Beetz J., at pp. 106-122 (S.C.R.), 504-516 (C.C.C.).

case is introduced here only to illustrate the range of matters which could be open to review on the interpretation of section 7 as a guarantee of just means.

B. *Conceptions of Legal Rights*

The two ways in which the ends-means distinction were drawn in the preceding section reflect different theories of law and hence different conceptions of what legal rights are. The narrower view of legal means, which would focus exclusively upon the machinery of enforcement, bears some similarity to structural theories of law such as Hart's theory of law as the union of primary and secondary rules.[58] The broader view, which would also include legal formulations of rules of conduct, is reminiscent of purposive theories of law and of the doctrine of the rule of law. This part of the article examines the differences in the resulting conceptions of what are distinctively "legal" rights.

Structural theories of law seek to identify the components of a legal system and to explain their operational relationships, without commitment to any view of the purposes for which this system should be used. Perhaps the best-known and most popular theory of this kind is Hart's theory of law as the union of primary and secondary rules. Hart argued that law is best conceived as a combination of (i) "primary rules" governing natural conduct and (ii) "secondary rules" governing rule-related activities such as the recognition and change of rules, their adjustment in contractual and other special relationships, and their application to particular cases by way of adjudication, sanction and other mechanisms of enforcement. The primary rules of a legal system are the rules of conduct which it prescribes. For example, the primary rule in the *Motor Vehicle Reference* prohibited driving after certain orders had been made; the primary rule in *Morgentaler* prohibited abortions except in certain hospitals and with prior certification of therapeutic need by a special committee. The primary rules of a legal system specify what persons may do and may not do in the same way that non-legal rules, like rules of morality or etiquette, specify what persons may do and not do. In Hart's view, primary rules are essential features of a legal system but not distinguishing features. It is the development of extensive structures of secondary rules which differentiates law from other normative phenomena. The role of secondary rules is to prescribe how the various activities involved in the operation of an effective rule-system are to be performed.

The distinction between primary and secondary rules can be viewed as a distinction between ends and means, with "means" here being interpreted relatively narrowly. The primary rules would be taken to express the objectives of the system; the secondary rules would be taken

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[58] H.L.A. Hart, The Concept of Law (1961), pp. 78-79, 89-96.

to express the means chosen to attain these objectives. Moreover, rights with respect to secondary processes can be meaningfully designated "legal rights", with this term covering only part of the gamut of rights which are recognized in law. Such rights are distinctively "legal" because they are rights with respect to institutional features of law which differentiate it from many other normative phenomena. This interpretation of the title "Legal Rights" is in line with the content of sections 8-14. These sections all establish standards for particular secondary processes. A contextual interpretation of section 7 could put this section in the same mold. Section 7 would then require that all secondary processes which deprive persons of life, liberty and security meet the standards of fundamental justice.

The "secondary processes" interpretation of section 7 gives it a scope broader than that afforded by the narrow "procedural" interpretation but still well short of the full-blown "substantive" interpretation. Unlike the procedural interpretation, it does not confine section 7 to the justice of adjudicative processes. It covers pre-adjudication processes such as search, seizure and detention. Moreover, it permits review of the justice of penal sanctions, as in the *Motor Vehicle Reference*. It does not, however, permit review of the justice of the primary rules of conduct through which the law seeks to direct social life. It does not permit review of these rules with respect to the social objectives which they express. More problematically, it does not permit review of primary rules on the basis practised in *Morgentaler*, with respect to their design as instruments for the achievement of social objectives. Among the defects canvassed in *Morgentaler* were (i) arbitrariness in the requirement that all abortions be performed in hospitals and (ii) illusion in the implication (from the requirement of a therapeutic purpose) that legal barriers would not prevent access to an abortion in cases of therapeutic need.[59] These defects could not in themselves violate section 7 on the "secondary processes" interpretation of the section.

There is an important qualification to be made to this exclusion of primary rules under the theory that section 7 protects the justice of secondary processes. What the theory does not permit is the review of primary rules in their function as behavioural standards. It does not permit prohibitions on types of social conduct to be held constitutionally invalid on grounds of fundamental justice. Nevertheless, insofar as primary rules also function to establish conditions for secondary processes such as the imposition of penal sanctions, they may become part of a section 7 analysis. To explain why this is so, a distinction has to be drawn between two different ways in which secondary processes can become unjust.

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[59] *Supra*, footnotes 36-39 and accompanying text.

Some secondary processes can be held unjust without reference to the primary rules of conduct which they support. Examples are trying a person without affording a hearing, refusing prior disclosure of the case which an accused must answer and imposing cruel punishment. The *Motor Vehicle Reference* provides another example, since the offence there carried penal liability regardless of whether or not there was fault. In these instances, the secondary process is unjust whatever the content of the rule of conduct to which the process is applied.

Sometimes, however, a secondary process becomes unjust because of its relationship to a particular rule of conduct. Consider, for example, the imposition of a severe punishment for a trivial harm. It may be that lengthy terms of imprisonment are unjust responses to offences respecting highways or shopping hours even though lengthy terms of imprisonment may be justified for violent attacks upon people. Similarly, a particular measure of penal liability may be just when attached to an offence which gives a reasonably clear indication of what has been proscribed, but unjust when attached to an offence which is vague. In these instances, an inquiry into the justice of the secondary process requires an examination of the nature of the underlying conduct-rule. The secondary process is an unjust means of enforcing that particular conduct-rule, even though its use under other circumstances may not violate section 7. The content of the primary rule is then an integral part of the section 7 analysis. Nevertheless, making the primary rule part of the analysis is not the same thing as putting the justice of the primary rule itself in issue. Amendments to the secondary process may enable the primary rule to survive in its original form.

The other conception of the ends-means distinction can be illustrated by *Morgentaler*. The Supreme Court of Canada there identified defects of arbitrariness and illusion in the primary rules respecting the performance of abortions. This could have led to the conclusion that the sanctions for violating the provisions of the Criminal Code were unjust. The Supreme Court appears, however, to have ruled that section 7 was violated by the defects in the primary rules themselves, not by the sanctions which were attached. This ruling involves conceiving legal rights in a broader sense, so as to include some rights with respect to the design of primary rules of conduct as well as with respect to secondary processes. If a distinction from substantive review of social objectives is to be maintained, the approach has to rest upon a theory of law which identifies certain distinctively "legal" attributes for primary rules. The assertion that there are such attributes is usually associated with purposive theories of law which incorporate ideas about the social role to which it is suited as well as about its structural components.

Some widely-held ideas about the role which law should play are embodied in the doctrine of the rule of law. The significance of this doctrine for the interpretation of section 7 was noted in the *Motor Vehi-*

cle Reference.[60] It was said that sections 8-14 of the Charter illustrate the meaning of "the principles of fundamental justice"; sections 8-14 show these to be principles "recognized as essential elements of a system for the administration of justice which is founded upon a belief in 'the dignity and worth of the human person' (preamble to the *Canadian Bill of Rights* . . .), and on 'the rule of law' (preamble to the *Canadian Charter of Rights and Freedoms*)".[61] The doctrine of the rule of law extends, however, well beyond the content of sections 8-14 and the aspects of the administration of justice which they illustrate.

In modern legal theory, the doctrine of the rule of law is associated with a special conception of the legal ordering of social life.[62] The doctrine builds upon the premise that a legal system is distinctively suited to the purpose of shaping social order through voluntary compliance with rules of conduct. The doctrine of the rule of law proclaims the virtues of law over other mechanisms for shaping a social order. It also proclaims the virtues of those institutional forms of law which are best suited to shaping a voluntary social order in which rules of conduct are freely accepted as guides for behaviour. Underlying the doctrine is a view of law as primarily an instrument of reasoned communication, which secures social order through persuasion rather than coercion.

The ideal of the rule of law provides a standard for the institutional design of law, for the manner in which legal rules are formulated, organized and promulgated. The ideal expresses the requirements of good institutional design for success in the enterprise of getting legal rules accepted as guides for behaviour. Requirements are imposed for both primary rules of conduct and secondary processes of enforcement.[63] With respect to secondary processes, the law should be administered in ways which ensure that the rules applied are the same as those promulgated. With respect to both primary and secondary rules, the rules of the system should be designed in ways which permit conduct to be oriented to them. They should therefore be reasonably accessible, comprehensible

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[60] *Reference re s. 94(2) of the Motor Vehicle Act, supra*, footnote 2, at pp. 503, 512 (S.C.R.), 302, 309 (C.C.C.).

[61] *Ibid.*, at pp. 503 (S.C.R.), 302 (C.C.C.).

[62] See L.L. Fuller, The Morality of Law (Rev. ed., 1969); J. Rawls, A Theory of Justice (1971), pp. 235-243; R.M. Unger, Law in Modern Society: Toward a Criticism of Social Theory (1976), pp. 48-57; J. Raz, The Rule of Law and its Virtues, in The Authority of Law: Essays on Law and Morality (1979), pp. 210-229; Finnis, *op. cit.*, footnote 50, pp. 270-276; E. Colvin, Criminal Law and the Rule of Law, in P. Fitzgerald (ed.), Crime, Justice and Codification (1986), pp. 127-137. The modern theory of the rule of law owes much to Fuller, although he himself preferred the terms "principles of legality" and "the inner morality of law".

[63] For analyses of the institutional requirements of the rule of law, see Fuller, *ibid.*, pp. 33-39, 46-91; Raz, *ibid.*, pp. 214-218; Finnis, *ibid.*, pp. 270-271; Colvin, *ibid.*, pp. 130-134.

and certain. Moreover, if these rules are to be held in any substantial degree of respect arbitrariness, inconsistency and illusion need to be kept at a minimum. The rules must present themselves as rational, coherent and open to scrutiny.

The defects of arbitrariness and illusion which *Morgentaler*[64] identified in the primary rules respecting abortions were therefore failures to observe the standards of the rule of law. Arbitrariness violates the principle of formal justice which underpins any stable structure of legitimacy. Illusion creates serious dangers of alienation in the event that the pretence is exposed. Dickson C.J.C. also objected to the vagueness of the standard of danger to "health" which the authorizing committees were to apply. It was earlier suggested that any force to this objection should apply equally to a rule simply making abortions illegal except where they are performed to preserve the health of women.[65] Vagueness in rules violates the rule of law because it makes law uncertain and because it risks arbitrariness or inconsistency in the application of the rules to particular cases.

In the more extreme versions of the doctrine of the rule of law, it is sometimes argued that poor institutional design produces no true "law" at all.[66] This idea is also reflected in some cases interpreting clauses in constitutional documents which permit rights and freedoms to be subjected to reasonable limitations which are "prescribed by law". It has been held that "law" in this context means law with some qualifying attributes. *Sunday Times* v. *United Kingdom*[67] concerned a limitations clause in the European Convention on Human Rights. It was held that "prescribed by law" means prescribed by law which is reasonably accessible and sufficiently precise to make the legal consequences of action reasonably foreseeable.[68] Similar reasoning was used in *Re Ontario Film and Video Appreciation Society* and *Ontario Board of Censors*[69] with respect to the phrase "prescribed by law" in section 1 of the Charter. It was there said: "It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable . . . such limits must be articulated with some precision or they cannot be considered to be law."[70] These cases select qualifying attributes which form part of the ideal of the rule of law.

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[64] *Supra*, the text at footnotes 36-39.

[65] *Supra*, the text following footnote 39.

[66] See, for example, Fuller, *op. cit.*, footnote 62, p. 39.

[67] (1979), 2 European Human Rights Reports 245.

[68] *Ibid.*, at p. 271.

[69] (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.), aff'd (1984), 5 D.L.R. (4th) 766 (Ont. C.A.).

[70] *Ibid.*, at p. 67 (Ont. Div. Ct.).

The ideal of the rule of law is used more commonly as a standard for evaluating law than as a criterion for identifying legal phenomena. Yet, whichever way the ideal is used, rights with respect to its institutional requirements can be meaningfully designated "legal rights". If the definition of law requires some approximation to the ideal, then such rights are distinctively legal for the same reason that rights respecting secondary processes are distinctively legal: they are rights with respect to institutional features of law which differentiate it from many other normative phenomena. In addition, regardless of whether the ideal is viewed as a definitional or as an evaluative device, such rights are distinctively legal because they are rights with respect to the special uses of law. Rights to the observance of the ideal of the rule of law are rights to have law used in ways which enable it to make its distinctive contribution to the achievement of social order.

Failures to meet the ideal of the rule of law can vary in their seriousness. In some instances severe harm can be caused. For example, there may be detrimental reliance on a misleadingly designed law in a matter of importance. Principles of fundamental justice may thus be violated. Where the resulting harm is a deprivation of life, liberty or security of the person, section 7 of the Charter may then come into play. Such an interpretation of section 7 is consistent with the reasoning in *Morgentaler*. Defects of institutional design in the legislation were held to violate principles of fundamental justice because they led to the denial of therapeutic abortions and thereby caused psychological harm.

The foregoing analysis has presented two differing conceptions of legal rights as a sub-category of Charter rights. One conception would confine the role of section 7 to reviewing the justice of the secondary processes through which a system of rules is administered. The other would extend the role of section 7 into reviewing the justice of the institutional design of primary rules of conduct. Both conceptions of legal rights are compatible with the basic idea that section 7 is concerned with legal means rather than social ends. The narrower conception fits well with the character of sections 8-14 of the Charter. The broader conception of legal rights can, however, be justified by general principles of Charter interpretation. It has been said that purposive interpretation of Charter provisions should take account of "the character and larger objects of the Charter itself".[71] The preamble to the Charter declares the rule of law to be one of the sources for the principles upon which Canada is founded.[72] In light of this declaration, the broader con-

[71] *R.* v. *Big M Drug Mart Ltd.*, *supra*, footnote 43, at pp. 344 (S.C.R.), 423 (C.C.C.); and see the text following footnote 43.

[72] The preamble reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law . . .".

ception is to be preferred. Thus, the text and proximate context of section 7 allow the ideal of the rule of law to become an operational standard of Canadian constitutional law; this interpretation is then dictated by the character and larger objects of the Charter.

III. *The Reach of Section 7*

The view that section 7 is concerned with legal means rather than social ends does not involve the rejection of substantive review throughout the whole Charter. Indeed, emphasis has been put on the contrast between the legal rights and other parts of the Charter. Thus, it has not been an objective of this article to argue that Wilson J. was wrong in *Morgentaler* to conclude that the Charter protects a degree of autonomy in making decisions of fundamental personal importance and limits the capacity of Parliament to compel a woman to carry a foetus to term.[73] From the perspective adopted in this article, however, these conclusions would have to be based on the fundamental freedoms of expression and conscience under section 2 of the Charter and not on section 7.[74] Nor has it been an objective of this article to oppose claims that the Charter confers a range of substantive entitlements to benefits from the State. Such claims should, however, be framed with reference to the promises of equality under the law and the equal benefit of the law under section 15 of the Charter, not with respect to section 7.

Although this article has cast a limited role for section 7 in the protection of life, liberty and security of the person, this limited role is compatible with an expansive view of the scope of these protected interests. Indeed generous interpretations of the scope of life, liberty and security may become more attractive if there are recognized limits to how these interests are protected by section 7. In *Morgentaler*, the Supreme Court accepted that there are psychological as well as physical dimensions to security of the person, so that a person's security may be violated by the infliction of psychological trauma.[75] Dickson C.J.C. went so far as to characterize the infliction of emotional stress as a violation of security of the person.[76] Bayda C.J.S., of the Saskatchewan Court of Appeal, has further argued that all the elements of section 7 have psychological dimensions and that what is protected is "the right not to be seriously hurt in body and mind (i.e. in the functioning of the intellect

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[73] *Morgentaler, Smoling and Scott* v. *The Queen*, *supra*, footnote 3, at pp. 166-184 (S.C.R.), 550-564 (C.C.C.).

[74] Wilson J. stated that her conclusion could be grounded on s. 2(a) as well as s. 7, *ibid.*, at pp. 176, 180 (S.C.R.), 558, 561 (C.C.C.).

[75] See footnote 3, *supra*.

[76] *Morgentaler, Smoling and Scott* v. *The Queen*, *ibid.*, at pp. 57 (S.C.R.), 466 (C.C.C.).

and the will) and not to be seriously restricted in the enjoyment of the body and the mind and its attributes''.[77] The present theory of section 7 offers no opposition to developments along these lines.

Moreover, the present theory of section 7 offers no reason for confining the role of the section to the sphere of criminal law or to regulatory law generally. It is to be expected that criminal law will provide many of the cases on section 7, because criminal sanctions are potent instruments for depriving persons of liberty and security. The association with criminal law led the Supreme Court of Canada in *Morgentaler* to raise the question of whether the role of section 7 might be confined to this sphere.[78] There are, however, other ways in which governmental action can deprive a person of liberty and security.

Some of the other ways in which governmental action can deprive a person of liberty or security are close to the model of criminal law. For example, the civil processes for restraining a mentally disordered person or isolating a contagious person should be subject to review under section 7. Proximity to the model of criminal law need not, however, be a precondition to review under section 7. For example, there is force to the argument that the denial or withdrawal of some State benefits can be so physically dangerous or psychologically traumatizing as to create a deprivation of security of the person.[79] Decisions about entitlements may then have to be made by a process which accords with section 7.

The distinction between ends and means may need to be reconceptualized with the shift away from the regulatory model for which criminal law is the paradigm. In particular, the idea of law as a union of primary and secondary rules requires qualification. In the case of State benefits, the secondary processes may form part of a scheme for ensuring that people can exercise all their capacities as human beings rather than a scheme of behavioural regulation. The secondary processes would not then be supporting a set of primary rules. Nevertheless, in this instance as well as in the regulatory model, a distinction can be drawn between issues of substantive ends and issues relating to the means by which substantive ends are effected.

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[77] *Beare* v. *R.; Higgins* v. *R.* (1987), 57 C.R. (3d) 193, at pp. 202-203 (Sask. C.A.). The decision in the case was reversed in *R.* v. *Baere; R.* v. *Higgins* (1988), 45 C.C.C. (3d) 57 (S.C.C.). The reversal occurred on the question of whether a breach of fundamental justice had occurred, not on the question of whether interests protected by s. 7 had been infringed. There was, however, a suggestion that the Saskatchewan Court of Appeal may have conceived the interests protected by s. 7 too broadly.

[78] *Morgentaler, Smoling and Scott* v. *The Queen, supra,* footnote 3, at pp. 55, 89-90 (S.C.R.), 465, 491 (C.C.C.).

[79] See, for example, J. Whyte, Fundamental Justice (1983), 13 Man. L.J. 455, at p. 474; I. Johnstone, Section 7 of the Charter and Constitutionally Protected Welfare (1988), 46 U.T.L. Rev. 1.

Conclusions

The ambiguities and potentially broad reach of section 7 have made it the repository of the highest hopes for a Charter-generated revolution in the quality of Canadian government. They have also made it the repository of the worst fears about judicial interference in the political arena. From the perspective adopted in this article, the hopes are fanciful and the fears are groundless. Section 7 serves a more modest role. It is concerned with the means of pursuing social ends, not with the ends towards which these means are directed. It confers a right not to be deprived of life, liberty or security of the person except by means in accordance with the principles of fundamental justice. It requires that these principles be observed in the institutional design of rules of conduct and in secondary processes for the administration of the system. It constitutionalizes what is a "legal right" because it is a guarantee of the use of legal machinery and of the quality of this machinery. It is therefore directed to the corner of the political arena in which lawyers have traditionally been supposed to have some special expertise.

It has been argued that this interpretation is dictated by the general principles of purposive and contextual interpretation which have been adopted for the Charter. It has not, however, been suggested that precise lines of demarcation between ends and means are dictated by the theory of section 7 which has been presented here. It has been argued with respect to regulatory law that the distinction can be drawn in two main ways, one of which would open the design of primary rules of social conduct to review and the other of which would not. The claim has been made that the broader view of legal means is to be preferred in this context. This is, however, a claim made from outside the framework of the theory presented here. The theory that section 7 is concerned with legal means rather than social ends cannot resolve all questions about the provision. Its function is to point the direction for seeking answers.