DUE PROCESS OF LAW—A COMPARATIVE STUDY*

The late Judge Learned Hand, one of the present century's most illustrious jurists, when addressing himself in 1958 to the general subject of American judicial review, of which due process is a major part, said, "My subject is well-worn; it is not likely that I shall have new light to throw on it."(1) With such a caution from one so eminent, my own choice of subject for this lecture perhaps displays more temerity than wisdom. However, Judge Hand did go on to remark that the subject is always fresh. And it is really in that spirit that I approach it.

Although "fresh," it would, perhaps, be scarcely worthwhile if I were to attempt only to repeat the historical antecedents of the American doctrine, interesting though they are, or if I were to seek to re-examine its philosophical content, so often done before.(2) Rather, I wish to examine how the American courts have solved problems with this doctrine, for such relevance as this may have to other countries with the Anglo-American legal tradition. I am led to make this examination, at least in part, by a reaction to certain comments made when judges of other lands have purported to examine the meaning and use of this phrase in American life. For example, the Supreme Court of Burma in the 1950 case of *Tinsa Maw Naing* v. *The Commissioner of Police, Rangoon*(3) was invited by counsel to consider the meaning which courts in the United States give to the phrase "due process of law," in determining what is meant by section 16 of the Burmese Constitution, which reads: "No citizen shall be deprived of his personal liberty . . . save in accordance with law." The Burmese court noted the difference in language between "due process of law" and "in accordance with law;" and it concluded that the "law" of which the Burmese Constitution speaks is the "will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature." But the court went on to say:

* An inaugural lecture delivered from The Chair of Constitutional Law in the University of Singapore on 13 December 1961.

(1) Learned Hand, *The Bill of Rights* p. 1, Harvard University Press, 1958.

(2) See, for example, John C. H. Wu, *Fountain of Justice,* Sheed and Ward, New York, 1955.

(3) [1950] Burma Law Reports, 17.

> On principle also it seems to us difficult to accept the suggested contrary concept of "law" equating it with principles of absolute justice or the rules of natural justice . . . With changing social and political conditions notions regarding natural law change; all that remains constant is the appeal to something higher than positive law. Rules of natural law are as the mirage which ever recedes from the traveller seeking to reach it. They are no doubt ideals to which positive law should strive to conform. But to accept natural law as a higher law which invalidates any inconsistent positive law would lead to chaos. There is no certain standard and no measuring rod by which the so-called principles of natural justice can be ascertained or defined.(4)

Comment such as this poses immediate questions: Is the American system of judicial review chaotic? If not, why not? How different is American judicial review, in fact, from that of other countries? Even if not chaotic, is it desirable in the context of the American society? Has it any relevance to other societies?

It is, of course, necessary for me initially to place the American doctrine of due process of law in its historic context, the better to examine the fullness of its modern content.

The phrase is found in two articles of the United States Constitution. It appeared in the Fifth Amendment, one of the provisions of the Bill of Rights, adopted sufficiently soon after the promulgation of the Constitution as to be contemporaneous with it. Indeed, it was the promise of these amendments which assured adoption of the Constitution by some of the original States. The Fifth Amendment says, *inter alia,* "No person shall ... be deprived of life, liberty, or property, without due process of law . . ." This amendment, like the other provisions of the Bill of Rights, was, at the time of adoption, conceived of as a limitation upon the powers of the central government. The due process limitation was extended to the States in the Fourteenth Amendment, one of a trilogy designed to ensure certain rights to the slaves emancipated as a result of the Civil War, but limited by neither language nor interpretation to the former bondmen. The relevant words of that amendment are, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Philosophically, due process of law traces back at least as far as the stoic concept of a universal ideal of good conduct upon which all law should be founded and which ought not to be overridden by any other law, however made.(5) This, of course, is *jus naturale* or natural law, which acquired Christian content, notably in the philosophy of St. Thomas,(6)

(4) *Id.,* at 25.

(5) See Zeller, *The Stoics, Epicureans, and Sceptics,* translated by Reichel; Longmans, Green, and Co., London, 1870, at p. 226 ff.

(6) See St. Thomas Aquinas, *Philosophical Texts,* translated by Gilby; Oxford University Press, 1951, at p. 354 ff.

and progressed through the medieval and canon lawyers into the common law of England as it was being developed.(7)

The cases appear to support the fact that the natural law was regarded as supreme, at least in theory, in England into the eighteenth century. Sir Edward Coke said in *Dr. Bonham's case* in 1610, "And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . ."(8) As late as 1701 the Coke dictum continued to commend itself to the English courts. In that year Chief Justice Holt in *The City of London* v. *Wood* said, "And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament . . ."(9) Both Coke's and Chief Justice Holt's statements were dicta, neither being necessary to the decision reached. But the clarity of their meaning is manifest. It was in this same period of time that legal theory was being developed in the United States, both through the continued institution of the received English common law and through the influence of European writers such as Montesquieu, Locke, Hobbes and Blackstone. It has been reported, for example, that some twenty-five hundred copies of Blackstone's *Commentaries on the Laws of England* were sold in the American colonies before the Revolution.(10) His influence in America continued into the twentieth century, his pronouncements on the natural law exerting an effect in the United States no longer manifest in England. Dean Pound, a decade ago, pointed out that, "the widest departure of American law from English law is in constitutional law. But in this departure Americans have been thoroughly English. We have continued and developed the doctrine of the English common-law courts from the Middle Ages to the seventeenth century, where England, having in 1688 substituted parliamentary absolutism for the royal absolutism claimed by the Stuarts, departed from the doctrine of the common-law lawyers." (11)

(7) H. H. Marshall, *Natural Justice,* p. 7, Sweet & Maxwell, 1959.

(8) (1610) 8 Co. Rep. 113, at 118a.

(9) (1701) 12 Mod. 669, at 688.

(10) Pound, "The Development of American Law and Its Deviation from English Law." (1951) 67 *L.Q.R.* 49, 51.

(11) *Id.*, at 59.

Now that aspect of due process of which Dean Pound was writing, legislative review, does divide American from English courts. But the division tends to be needlessly increased by a failure to note that due process in its other, and by far most frequently used, aspects is simply that which courts in the English tradition do and have always done without the rubric or the need for it.

All due process cases can be placed in three categories: (1) cases applying accepted English principles of natural justice, (2) cases in which due process is a procedural device to enable the Supreme Court to sit as the final court of appeal in litigation — usually criminal — rising in a state court, and (3) cases where the judicial will conflicts with and controls either the state or federal legislative will.

I. NATURAL JUSTICE CASES

It is necessary to distinguish "natural justice" from "natural law". Neither of these terms is widely used by American courts; and both are incorporated in the requirements of due process. Moreover, until about the eighteenth century they were often used in England as synonymous phrases, although since that time English writers have come to distinguish them. The two major modern elements of natural justice accepted in England and in those countries following English fundamental law are (a) that no man shall be judge in his own cause and (b) that both sides shall be heard. A very large number of American due process cases turn on these two rules. For example, the well-known case of *Tumey* v. Ohio[12] held that it violated due process for a judge to have a pecuniary interest in the outcome of the litigation. There a State statute had provided for judges of certain inferior courts to receive as their salaries a portion of the fines which they imposed after entering a guilty verdict. The vast number of American decisions which have required administrative agencies to provide a fair hearing to affected individuals could be classified as pure *audi alteram partem* decisions.[13] Even such a case as *Powell* v. *Alabama*[14] lends itself to this analysis. *Powell* held that a person accused of serious crime was entitled to be represented by counsel. This result was reached by starting with the right to be heard and deducing that the right is not meaningful unless one can be heard by counsel. It is only another step in this reasoning to the conclusion that due process requires the state to furnish counsel for an indigent defendant in a serious case,[15] a logical application of the *audi alteram partem* rule, just as *Tumey* v. *Ohio* is a logical application of the rule that no man

(12) 273 U.S. 510 (1927).

(13) For example, *Londoner* v. *Denver,* 210 U.S. 373 (1908) also, *Goldsmith* v. *United States Board of Tax Appeals,* 70 L. Ed. 494 (1926).

(14) 287 U.S. 45 (1932).

(15) *De Meerleer* v. *Michigan,* 329 U.S. 663, 91 L. Ed. 584 (1947).

shall be a judge in his own case. Admittedly, both *Tumey* and some of the *audi alteram partem* cases can also be placed under our third category, because if the court agrees that legislation has violated either of these rules of natural justice, the legislation will fail; but most such cases do not involve an act in which the legislative will is clear in its intent to breach either rule; rather the majority of cases in this category concern administrative or judicial practices which would be amenable to the control of an English court.

II. Due Process to permit Supreme Court Review of State Cases

The Constitution of the United States created a federal system of government. The States in that system retained a very large degree of sovereignty. Among other elements of sovereign power they retained their own systems of law and their own courts to enforce the state law.(16) The result is that every State has its own complete set of courts. There are federal courts which cover the same geographical area, but their jurisdiction is not necessarily related to State lines. Subject matter and, to some extent, parties tend to keep these systems of courts separate. Some cases, in which the parties are residents of different States or which initially present a federal question, as where a federal statute gives a substantive right or where an accused is charged with the commission of a federal crime, may be started in a federal court and proceed in a direct way to the United States Supreme Court. But the bulk of litigation, both civil and criminal is State litigation, involving parties of the same State and presenting no initial issue of federal law. The Fourteenth Amendment to the United States Constitution, in both its equal protection and due process provisions, permits the Supreme Court a kind of appellate oversight of the State courts, which it would otherwise lack. It enables the United States Supreme Court in certain cases properly developed by the parties to review, much as would an appellate court in any unified system of courts, decisions of the highest courts of the States and to impose a unified standard of law on the courts of the country as a whole for those subjects it is able to reach for review. It is this area of due process review which is most rapidly expanding, which is most under attack by American critics for reasons of its alleged violation of federal concepts, and which as a practical matter ought to disturb foreign critics least. For the feature of American federalism which has brought it about has not been widely adopted elsewhere. To take three nearby examples, India, Burma and the Federation of

(16) The State courts also apply and enforce federal law. It is their duty to decide the case properly before them. It is immaterial to this duty that in its performance federal law may be applicable or controlling. Such factor merely introduces a federal question which may enable the dissident party to secure United States Supreme Court review.

Malaya, all of which have a federal form of government, all have a unified judiciary. This paper will not undertake the discussion of whether the United States Constitution, in fact, permits this expansion of federal jurisdiction at the expense of the States or even whether it is desirable, except to remark that it is only one element of many illustrating the growing unity rather than separateness of the American nation. Other elements include the high degree of mobility of the population, greatly increased federal taxation and federal spending and therefore federal legislative control, to name only the most obvious. In any event, but for an allegation that some action on the part of the State deprived the claimant of due process of law, a very great amount of State litigation would be completely removed from possible Supreme Court review. It is this allegation, which if substantial in the eyes of the Supreme Court permits that court to sit as an appellate court on the State decision. Due process in this instance is thus simply a device for United States Supreme Court review of State decisions. Admittedly such review might have been accomplished in some other way, as through a unified judicial system. But it is the thesis of this paper that having chosen to review the particular case by means of the due process argument, the Supreme Court simply acts like any court of review in any system. Let me illustrate. A case styled *Thompson* v. *Louisville* (17) was decided by the Supreme Court in 1960. Sam Thompson happened to be a Negro, although this fact did not appear in the decision and theoretically is not relevant to the holding. One evening Mr. Thompson was standing in the middle of the floor of what was doubtlessly a third-rate run down little restaurant shuffling his feet to the rhythm of a music box. Police officers entered on a "routine check," observed this solitary little dance and arrested Sam Thompson for loitering, although he advised them that he was waiting for a bus. He protested verbally, and not violently, his arrest and was promptly charged with disorderly conduct. This was the evidence which the city offered against him at his trial, together with a record of 54 previous convictions. The petitioner was able to show by uncontradicted evidence that he had been in the restaurant only about one-half hour, that he had bought and consumed food there, that he had money and a bus schedule showing that a bus was due to stop shortly which would have passed near his home. Moreover, the restaurant manager testified that Thompson was a frequent customer, that he had never objected to his presence and did not do so on this occasion and that no one else objected to the petitioner's presence. Nevertheless, Thompson was convicted on both charges and fined $10.00 on each count. By Kentucky law, police court fines of less than $20.00 on a single charge were not appealable to any other Kentucky court. But Mr. Thompson had been represented by an able lawyer, who by motion had put forward the argument that these proceedings on the evidence offered deprived Sam Thompson of his liberty and property without due process of law.

(17) 362 U.S. 199, 4 L. Ed. (2d) 654 (1960).

A petition to the United States Supreme Court for review of this $10.00 police court case was successful. Justice Black, speaking for a unanimous Court, said

> There simply is no semblance of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering or loafing there ....
>
> Thus we find no evidence whatever in the record to support these convictions. Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt.(18)

Compare, if you will, *Thompson's* case with this one:

In 1911 Louis Edouard Lanier was convicted by the Supreme Court of Seychelles on a charge of embezzlement. The evidence showed that the appellant was appointed guardian of some children. The facts are not particularly involved, but I should here like to quote directly from the opinion:

> In November, 1910, a sum of Rs. 35,313 became payable to the minors by M. d'Emmerez de Charmoy. This gentleman proposed at first to pay by an order in favour of the appellant and drawn upon the appellant's bankers, Messrs. Said & Co., but the transaction took the shape of crediting the amount to Messrs. Lanier & Co. in their account with their bankers, which account was overdrawn. This was an undoubted irregularity. Their Lordships incline to think that it occurred simply because the firm had been acting in the minors' interest and had had direct account with them for many years. No concealment of any kind was practised. The minors' account with Messrs. Lanier & Co. was duly credited and all the entries throughout are openly and regularly made. After this date the firm continued to make advances as before out of the money which was lying with it at interest ... So far as M. d'Emmerez de Charmoy was concerned, he also saw no objection to his payment being thus dealt with. Instead of making it to Mr. Lanier and getting that gentleman's receipt, he was aware that the bankers had simply credited their customers Lanier & Co. with the amount . . .
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> On June 20, 1911 ... a family council was held . . . Thereupon the appellant stated fully and with almost complete exactness how the matter stood. [A] Mr. Gemmel suggested that the amount be invested or paid or that a guarantee be given by Mr. Lanier . . . Mr. Lanier acquiesced; and on June 27 a guarantee for Rs. 34,000, with a mortgage over the properties, was offered by Mr. Lemarchand, and this offer was, of course, unanimously accepted. One would have thought that everything was now satisfactorily arranged and ended. The minors' interests were completely protected .... It seems incredible, but it is the fact, that it was after all this had been done that criminal proceedings were instituted against the appellant under the Seychelles Penal Code.

After considering the statute, the form of the proceedings and the trial judge's rulings, the opinion concluded:

> The appeal will be allowed, but not on any matter of form. Having carefully examined all the evidence, their Lordships are of opinion that the facts did not, on any just or legal view of them, warrant a conviction. It is unnecessary

(18) *Id.* at 658-59.

> to consider arguments as to the rushing of the procedure or the harshness of the sentence, for, in their Lordships' view, even although the proceedings are taken to have been unobjectionable in form, justice has gravely and injuriously miscarried.(19)

The similarity between *Thompson* v. *Louisville* and this case goes even further; for the Judicial Committee of the Privy Council called attention to its normal reluctance to interfere in criminal cases, a reluctance invariably expressed by the United States Supreme Court when it sits in review of State criminal proceedings.

The due process holdings of the Supreme Court, when reviewing State criminal proceedings, are most frequently criticized for their failure to provide definite standards for State conduct. Indeed, Justice Black is himself one of the Court's most severe critics in this regard.(20) But what are the criteria which can be articulated when any court, as the Judicial Committee in *Lanier's* case, reverses a lower court holding not on form but on substance, for the reason, as the Judicial Committee says, that "justice has gravely and injuriously miscarried." American judges have felt that the obligations of federalism have imposed upon them the necessity of trying to define that which is not defined by other courts performing a similar appellate function. One can compare the painful effort of Justice Frankfurter in *Rochin* v. *California*(21) to justify the Court's result with the uncomplicated directness of the Judicial Committee of the Privy Council. Justice Black seems eminently correct in concluding that a lower court could be but little enlightened as to definition by holding that due process is violated by "conduct that shocks the conscience," (22) or by convictions "brought about by methods that offend 'a sense of justice,' "(23) or by confessions which "offend the community's sense of fair play and decency."(24) The Privy Council in *Lanier's case* did discuss such factors as the meaning of the word "embezzlement;"(25) it observed that the trial judge had apparently overlooked the distinctions between civil and criminal liability,(26) that the rules laid down by the trial judge were "in no respect safe guides in a matter of criminal responsibility."(27) Indeed, Justice Frankfurter could have used one

(19) *Lanier* v. *The King,* [1914] A.C. 221 at 224-30. (P.C.).

(20) See Justice Black's concurring opinion in *Rochin* v. *California,* 342 U.S. 165 at 175-77 (1951),

(21) 342 U.S. 165 (1951).

(22) *Id*., at 172.

(23) *Id*., at 173.

(24) *Ibid.*

(25) [1914] A.C. 221 at 228 (P.C.).

(26) *Id*., at 229.

(27) *Ibid.*

sentence of the English opinion by only changing the words "their Lordships" to "the Court"; for the Privy Council said, ". . . the sentence pronounced against the appellant formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere."(28) There may be those who would condemn the Frankfurter approach as a resort to the principles of natural law. If so, what can they say of the *Lanier* holding? I suggest that in the context of these two cases the method of decision of the courts is indistinguishable. Due process, I submit, in this category, would be completely meaningful and would avoid the entirely apposite complaint of the indefiniteness of its standards if it were admitted that in such instances its only function is to permit the Supreme Court to have the final word on those State cases in which it feels justice may have miscarried. Due process, in sum, is here a procedural device to get the case before the court, not a useful formula for its decision once there. Standards of appellate decision in all such cases are indefinite because of the infinite variety of facts and the endless ways in which the law may be grievously misapplied to them. Appellate procedure affords here no more formulae of mathematical nicety in England than it would in the United States. What distinguished the trial judge in *Lanier's case* from the appellate judges who overruled him was not a different understanding of the law but a quality of the spirit as applied to the facts of that particular case. He obviously did not think that justice had "gravely and injuriously miscarried"; or if he thought so, he did not care.

I should like to bring this discussion full circle by returning to the first case cited, that of *Tinsa Maw Naing* v. *The Commissioner of Police, Rangoon.*(29) It will be recalled that the opinion, seeing chaos in due process, was concerned with the absence of "measuring rods." It is interesting to observe the Burmese Court in the actual process of deciding that case. The action was one in the nature of *habeas corpus* in which the petitioner was seeking the release of her husband, held under an order of preventive detention. The particular statute which the Court was obliged to construe was the Public Order (Preservation) Act, 1947, particularly the portions of it reading as follows:

"If the President is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public order it is necessary so to do, the President may make an order . . . directing that he be detained."(30) Having pronounced that "law" in the Burmese Constitution meant "an enactment by Parliament or other competent legislative body . . . [and that] The Parliament and legislative bodies have their powers defined and circumscribed and within

(28) *Id.*, at 230.

(29) [1950] Burma Law Reports 17.

(30) *Id.*, at 28.

the limits so defined and circumscribed they make laws, binding on all in the Union," [31] it is not surprising that the Attorney-General invited the court to hold "that only express prohibitions, and not a prohibition by implication in the Constitution would invalidate an Act of Parliament or other competent legislature in the Union of Burma."[32] But without the slightest indication of how it arrived at the doctrine and with no attempt to supply the criteria for what is "clearly implied," the court held that "no distinction can be drawn between a prohibition in so many words and a prohibition clearly implied."[33] The court then proceeded to read into the Public Order (Preservation) Act, 1947, that it did "not grant to the President or his delegate arbitrary powers to order the detention of a citizen for an indefinite period."[34] From there the court went on to apply the objective test to the issue of the detaining authority's satisfaction as to the existence of grounds for the detention and concluded on its own examination of the facts that the detention was not justified, and therefore ordered the detainee's release. I happen to believe that this decision was a good one. I applaud the court's rejection of the subjective test as to the detaining authority's satisfaction permitted by *Liversidge* v. *Anderson*[35] in cases of detention without trial. I think this decision in the best tradition of judicial conduct for the same reason that I believe the conclusion reached by Justice Frankfurter in *Rochin* to be entirely right. Moreover, I suggest that, in light of what the Burmese Court did in this case, any distinction it may have expressed between the meaning of "law" in Burma and the meaning of "law" in the United States is only apparent, not real. It is made apparent because the United States courts have stumbled in trying to define, under the rubric of due process, the substance that is "clearly implied" in the United States Constitution. The Burmese Court has wisely proceeded as though the substance of what is implied in the Burmese Constitution were clear for all to see and that definition would, therefore, be tautological.

III. DUE PROCESS IN CONFLICT WITH THE LEGISLATIVE WILL

Although the vast majority of due process cases fall within the two categories already mentioned and are, therefore, cases which should not disturb a court following the English tradition of judicial review, it is the third category which occupies the paradoxical position of being the least used by the American courts but nevertheless the best known and

(31) *Id*., at 26.

(32) *Id*., at 27.

(33) *Id*., at 28.

(34) *Id*., at 29.

(35) [1942] A.C. 206.

at the same time perhaps the least understood by foreign observers. This is the employment of the due process clause to strike down acts of the legislature — either State or federal. It is not the purpose of this paper to discuss the historical support or lack of it for this power in the United States. It does distinguish the English from the American courts, for the former have not even spoken as if they possessed such authority since Justice Holt commented on *Dr. Bonham's Case* in 1701. It is true that English courts through the power and necessity of statutory interpretation are able to give considerable direction to, if not control over, the legislative intent. But, in the final analysis, when the intent of Parliament is clear, the courts enforce the enactment whatever may be the effect on pre-existing constitutional rights.(36) In this area of litigation the function of the English court is to seek definitions and apply precedents. Robert M. Hutchins doubtlessly sums up the prevailing American criticism of this philosophy in the statement that, "It is obviously impossible to raise questions of freedom and justice if the sole duty of the court is to decide whether the case at bar falls within the scope of the duly issued command of a duly constituted sovereign."(37) The right of the courts to strike down legislation under the due process clauses is only one aspect of legislative review in the United States. Clearly it does permit the raising of questions of justice and freedom in the courts, to which the courts may apply, in the fullest extent, their reasoning in a search for the common good. However, the absence of this power in the courts of England negatives any argument that freedom and justice in a country are dependent upon its exercise by the courts. It is apparent that the legislature may be the proper possessor of this ultimate authority, a fact which raises the question of why one system of legislative-judicial relationship may work in England while its apparent opposite seems more suitable for the United States. I suggest that the answer may lie in three important distinctions between the two countries: (A) Ministerial and Parliamentary responsibility, together with effective party control of politics, in England, compared with a contrary practice in the United States. (B) A unitary, as opposed to a federal state. (C) The absence of strong motivation and will for a majority of the population to oppress any minority in England, contrary to the existing situation in the United States.

(*a*) Ministerial and Parliamentary Responsibility and Party Politics

The most populous House of the American Congress is the House of Representatives. Its members customarily represent a comparatively

(36) *Lee* v. *Bude and Torrington Junction Railway Company,* (1871) L.R. 6 C.P. 576.

(37) Hutchins, *Two Faces of Federalism,* Center for the Study of Democratic Institutions, Santa Barbara, California, 1961, p. 18.

small geographical area within a given State. The candidate must be a resident of that State and normally physically resides within the district which he seeks to represent. Importantly, general elections are preceded by primary elections for which anyone qualified by age and residence may select himself, by simply paying a filing fee and identifying himself with the party of his choice. A political party may not deny this right to anyone, although it may seek to deny its support to any one or more primary candidates, normally by its overt support of one of its own choice. Generally the successful primary candidate, even if he was anathema to the party leadership, is able to claim the active support of the party in the general election, because the party would prefer not to lose the seat to an opposing party or suffer the other unpleasantness of having an uncontrollable political maverick as a winner in the general election. A major result of this system is that the successful candidate is most likely to feel his deepest loyalty to that small group of friends, relatives, associates and neighbours who made his primary victory possible by their votes and by contributing to the heavy expenses of his campaign. These same people, of course, also form the core of his supporters in the general election. Such a system necessarily emphasises and reinforces the narrowly local and parochial in the Representative's approach to his position. By contrast, in England, a candidate for the House of Commons does not select himself, in any real sense; he is selected by the local leaders of the party, a selection in which the national leaders of the party may, on occasion, participate. Manifestly, this system is less democratic than is that of the United States. But it would tend to make the candidate's outlook more national and to produce a sense of obligation to the party leadership and to local constituents as party members, rather than to a personally-oriented faction within the local constituency. As a result, the English Member of Parliament may be able to approach his position, *vis-a-vis* his constituents, somewhat as an advocate — interested, concerned, but objective. By contrast, the American Representative is inevitably of his district, partaking of its provincialism, its regionalism, its prejudices. A comparison in this regard of the Senate of the United States with the House of Lords is even more striking. Most of the members of the latter body are there quite independently of any factor of regionalism. But in the United States each Senator resides in and specifically represents his own State. The American system, naturally, assumes that once brought together these local representatives will merge their local interests in the enactment of legislation for the national good, and, more or less, this is the case. But, coupled with the feature of the local orientation of Congressmen is the absence of Parliamentary Ministers and Parliamentary responsibility. There is a Cabinet in the United States, consisting essentially of men of great character, of high purpose and of a national outlook. But they represent the President. They are members of neither House and they have no direct control over legislation, either as to its introduction or as to its enactment. Congress can defy the Cabinet with impunity;

and nothing can bring the Congress down. It is there for the period for which it was elected. In consequence, much legislation is the result of compromise within the dominant party and of what is called logrolling, the agreement of one or a group of legislators to vote for a bill in which some other individual or group is interested, in return for a like favour. Naturally all this legislation may not be in the broadest national interest. The constitutional scheme does provide a check in the form of the Presidential veto, which may be exercised against any Congressional enactment. But sometimes party politics may dictate the unwisdom of a veto and, in any case, a concurrence of two-thirds of the members of both Houses can override the Presidential objection. The ultimate bastion between partisan legislation and the fundamental personal rights of life, liberty and property has been constructed by the courts through judicial review, including an application of the due process provisions of the Constitution. In the institution of the Supreme Court the country does possess a body trained in an objective discipline, national in outlook and, by personal stature and life-tenure, above partisan politics.

(b) Unitary and Federal Nations

Federalism is, by its nature, that form of government which gives recognition to and, by recognizing, emphasizes, entrenches and probably fosters regionalism and those elements which divide, rather than unite a people. Federalism is traditionally the second choice of governmental structure, an expedient resorted to because the elements of separatism are too strong to accept a unitary state. Federalism supplies the conceptual base which gives orthodoxy to the struggle for narrowly local ends, as opposed to the common good. Federalism implies the existence of minorities, geographical, if nothing else; and geographical divisions frequently reflect more fundamental one's of race, religion, language, tribe or other. Partisan legislation may be enacted as a result of the political pressures generated by logrolling for considerations of regional or State interests, as well as by the more personal considerations discussed in the preceding category. The need for judicial review of legislative action may well be greater in a federation than in a unitary state. It is, of course, relevant that most modern federations have accorded their courts some control over legislation,[38] although the courts may exhibit reluctance in the use of such powers.[39]

(*c*) The Absence of Strong Motivation for Oppression of Minorities

England has enjoyed a long era in which no significant portion of the electorate has sought to oppress minorities within the country.

(38) See, for example, the Constitution of the Federation of Malaya.

(39) See, for example, *Chia Khin Sze* v. *Mentri Besar, State of Selangor* (1958) 24 M.L.J. 105.

Of course, this has not always been so. The succeeding oppressions of Protestants by Catholics, Catholics by Protestants and Protestants by other Protestants, which covered most of two centuries,[40] were as frightful examples of discrimination as any that America has experienced. But they tend to be rather more associated with royal, or at least executive, absolutism than with Parliamentary absolutism; and, in any event, Parliament has proved a safe repository for the rights of minorities for over two hundred years.

In the United States, Congress, although not often an active oppressor of individual rights, has often been a passive witness to their subversion; while at the same time many of the States, particularly in the South, have openly and wilfully enacted legislation to oppress, on the basis of race, those of their own citizens who were Negroes. The Supreme Court is not reluctant to employ due process to strike down this type of discriminatory legislation. [41] But in fact the resort to due process even here is infrequent because manifestly discriminatory state legislation is usually held to violate the equal protection, rather than the due process, provision of the 14th Amendment.[42] Since the depression era in the United States due process has been but little used to annul any legislation, State or federal. The courts approach legislation with the greatest deference, giving it the widest benefit of the presumption of constitutionality. When observers view the powers of the Supreme Court to void legislation under the due process rubric, they are probably much more likely to be thinking in terms of the period when the Court used the due process clauses to protect laissez faire economics from state planning and control. [43] It is perhaps, overlooked that since 1937 the court has declined to use due process for this purpose. And with a completely free hand the legislatures have produced an economy but slightly less regulated than that of many frankly socialist countries. In this connection the observer may wish to consider in the United States the graduated income tax ultimately reaching ninety per cent of income, a closely regulated stock exchange, highly regulated and heavily subsidized interstate transportation, a regulated and tremendously subsidized agriculture —

(40) 16th and 17th under the Tudors, Stuarts and the Protectorate.

(41) In *Boiling* v. *Sharpe,* 347 U.S. 497, 98 L. Ed. 884 (1954), a companion decision tc *Brown* v. *Board of Education,* 347 U.S. 483, 98 L. Ed. 873 (1954), the Supreme Court used the due process clause of the Fifth Amendment to prevent the District of Columbia from continuing racially segregated schools. The District of Columbia, not being a part of any State, is not amenable to the Fourteenth Amendment, the equal protection provision of which had been used to void school segregation laws in the States.

(42) The courts have not always sharply defined in a given case whether the decision was based upon the equal protection or the due process provisions of the 14th Amendment, where the provisions were alternative grounds for decision.

(43) For example, *Williams* v. *Standard Oil Company of Louisiana,* 73 L. Ed. 287 (1928).

only to initiate the list. Although the period of time has been shorter, it is no more realistic to regard the modern United States Supreme Court as a stumbling block to legislative control of the economy than it is to expect the modern English Parliament to persecute Catholics.

CONCLUSION

In its opening paragraphs this paper posed, without promising to answer, several questions which seemed relevant. Perhaps answers may now be suggested. To the implication that judicial review in the United States is made chaotic by due process interpretations, surely a refutation must be given. The system has its critics in its own country; but a framework within which lawyers and courts have been able to operate without noticeable breakdown for one hundred and seventy years in the case of the Fifth Amendment and nearly one hundred years with the Fourteenth Amendment may be difficult to comprehend, but it could scarcely be chaotic. If the classification offered by this paper has validity, then comprehension may be simpler; for it is apparent that in their widest area of operations under these provisions the American judges are really simply performing the same judicial functions as those performed by judges in other countries the law of which is based on that of England. As to the only point of significant distinction, that of judicial review of legislation through these articles — the courts use it but little, yet it remains as an important judicial tool possessed by the American courts which when the occasion arises enables one to address a meaningful argument of freedom and justice to the reasoning of the judges. Of course, other countries must decide for themselves the appropriateness of such a procedure in the context of their own societies.

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