The Supremacy of God and the Rule of Law in the *Canadian Charter of Rights and Freedoms*: A Theologico-Political Analysis

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This note examines the key pair of terms in the prefatory words to the *Canadian Charter of Rights and Freedoms*, "the supremacy of God" and "the rule of law", which are said to be recognized by the "principles" upon which "Canada is founded". The author studies these notions in light of the distinction which Spinoza makes between theology and philosophy, and his concept of sovereignty. With Spinoza's distinction between God and Law, that each is sovereign only insofar as both are sovereign, we can develop a theory of interpretation which allows us to view the principles of the *Charter* as our absolute or sovereign authority while eschewing all notions of both proletarianism and relativism.

Cette note porte sur les termes principaux du Préambule de la *Charte canadienne des droits et libertés*, « la suprématie de Dieu » et « la règle de droit », deux notions « reconnues » par les « principes » sur lesquels « le Canada est fondé ». L'auteur examine ces notions à la lumière de la distinction qu'effectue Spinoza entre la théologie et la philosophie, ainsi que son concept de souveraineté. Avec la distinction de Spinoza entre Dieu et Droit, que chacun n'est souverain que dans la mesure où les deux sont souverains, il est possible de développer une théorie de l'interprétation qui nous permet d'envisager les principes de la *Charte* comme une autorité absolue ou souveraine, tout en évitant les écueils du prolétarianisme et du relativisme.

*Of the Department of Humanities and History, York University. This paper is a revised version of the paper prepared for the Workshop on the *Canadian Charter of Rights and Freedoms* held on 4 June 1986 in Winnipeg in conjunction with the Canadian Society for the Study of Religion. The general principles of interpretation underlying this paper are presented in B. Polka, *The Dialectic of Biblical Critique: Interpetation and Existence* (London: Macmillan, 1986). For a trenchant critique of the jurisprudence underlying the *Charter*, see R.A. Macdonald, "Postscript and Prelude — The Jurisprudence of the Charter: Eight Theses" (1982) 4 Sup. Ct L. Rev. 321. Macdonald includes what he calls (at 321 n. 3) "the explicit paradox in the preamble and its relationship to sections 2(a) and 7" among the *Charter*'s "serious unresolved constitutional difficulties ...". He concludes by noting (at 350) that "[r]ead as metaphor and not as simile, the Charter engages the entire literary tradition of western civilization. Those who ignore the codex of that tradition forfeit any claim to participate in the dialectic of Charter interpretation."

The thirty-four sections of the *Canadian Charter of Rights and Freedoms*,[1] which became constitutionally entrenched in 1982, are prefaced by seventeen words:[2] "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law". *Whereas* the rights and freedoms guaranteed in the *Charter* are declared to be founded upon principles which recognize the supremacy of God and the rule of law, it is essential that these two critical terms, including their relationship, their dynamic interaction, their dialectic, be analyzed to help us not only to understand their import as the ground of our rights and freedoms but also to be ever alert to the false conceptions to which both "God" as supreme and "law" as human rule are perpetually subject. To that end this paper hopes to make a contribution.

It is only when judges, not to mention lawyers, legislators, administrators and citizens, recognize that the rule of law is not relativistic but involves the absolute notion of relationship, which the theological tradition of the Bible calls God, and that the supremacy of God is not absolutist fiat but the insistence that our supreme values be worked out in the lawful relationship of freedom, equality and solidarity, that the prefatory words of the *Charter* will support fruitful interpretation of the thirty-four sections that follow (including their inevitable confliets and paradoxes). It is our intention to show here that, just as the rule of law threatens to become equated with the supremacy of fact (the *status quo*) when it is not subject to the supremacy of interpretation (God), so the supremacy of God threatens to become equated with authoritarian rule when it is not subject to lawful interpretation.[3] Insofar as the dialectic between God and law, between God as supreme and law as human rule, is observed, maintained, nurtured, developed and practiced, Canadians will be blessed with rights and freedoms truly worthy of men and women. There is much we can learn here from Spinoza who was the first consistent theorist of democratic sovereignty precisely because he profoundly understood that neither the supremacy of God nor the rule of law could be true unless both were equally true. How that is possible is to understand the genius inhabiting the prefatory words of the *Charter*.

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

[2]There are twenty words in the equally authoritative French version: "Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit."

[3]It will become apparent that I regard lawful interpretation as necessary to a true rule of law. In other words, the rule of law demands a conception of interpretation which overcomes both relativism and authoritarianism. If citizens, the courts, etc., are not committed to lawful interpretation, it will be fruitless to discuss what the rule of law may mean.

In his *Theologico-Political Tractatus*,[4] published anonymously in 1670, Spinoza shows that, in order to develop what we today know to be the first conception of sovereignty as democratic rule (the first conception of democracy as sovereign rule) in history,[5] one must undertake to separate philosophy from theology. Spinoza conceives of the separation of philosophy from theology (or the separation of the secular from the religious) in terms of his conception of sovereignty: the sovereignty of God, the sovereignty of the Bible, the sovereignty of the reader (the faithful individual) of the Bible, the sovereignty of the ruler, the sovereignty of the subject, the sovereignty of the covenant, the sovereignty of a democratic people. The concept of sovereignty is articulated as "the cause of itself" by Spinoza at the beginning of, and as the ground of, the *Ethics*,[6] of which Part 1 is entitled "On God" and the fifth and last Part is entitled "On Human Freedom".[7]

Spinoza defines the cause of itself (*causa sui*), which he understands as God, God sovereign over all, in terms of the ontological argument for existence. The cause of itself, Spinoza writes in the first words of the *Ethics*, is "that whose essence involves existence, *or* that whose nature cannot be conceived except as existing."[8] But Spinoza understood implicitly that the cause of itself, that which is its own sovereign cause, refers no less to the human than to the divine, no less to the human rule of law than to the supremacy of God. The cause of itself, both human and divine, is sharply distinguished from merely natural (scientific) causation in the first Axiom of Part 1: "whatever is, is either *in itself* [as the infinite cause of itself] or *in another* [through the indefinite regress or progress of the finite causes of nature which but reflect another effect]."[9]

The cause of itself is sovereign: it involves existence; its very conception expresses existence. What Spinoza shows in the *Theologico-Political Tractatus*, in separating philosophy from theology, is that both are sovereign: each is the cause of itself, and neither is caused through another. The su-

[4]The Chief Works of Benedict de Spinoza, trans. R.H.M. Elwes, vol. 1 (New York: Dover, 1951) 13; see also E. Curley, ed. & trans., *Theologico-Political Tractatus*, The Collected Works of Spinoza, vol. 2 (Princeton, N.J.: Princeton University Press, [forthcoming]).

[5]The irony of the conception of sovereignty which Thomas Hobbes develops in the *Leviathan* is that, although theologically and politically consistent only with democracy, he presents it in order to uphold absolutist monarchy which, however, it absolutely contradicts: see C.B. Macpherson, ed., *Leviathan* (Harmondsworth, G.B.: Penguin, 1981).

[6]E. Curley, ed. & trans., *Ethics*, The Collected Works of Spinoza, vol. 1 (Princeton, N.J.: Princeton University Press, 1985) 408. Although published subsequent to Spinoza's death in 1677, the *Ethics* is now thought to have been substantially complete by the time of the publication of the *Theologico-Political Tractatus* in 1670.

[7]The full title of Part V is "On the Power of the Intellect, or on Human Freedom".

[8]*Supra*, note 6 at 408 (Part I, Definition 1).

[9]*Ibid.* at 410 [emphasis added].

preme test of all thinking and, we may say, the supreme test of all democratic practice is how to develop a conception of separation — of difference, uniqueness, otherness — such that that which is separate recognizes the dignity of that from which it asserts its separateness. Spinoza, in demonstrating the separation of philosophy from theology, reason from faith, the secular from the religious, the State from the Bible, is very careful to show, in rigorously precise terms, that the separation of philosophy from theology does not involve the subordination either of theology to philosophy or of philosophy to theology. Rather, he holds that for philosophy to be sovereign it must recognize the sovereignty of its opposite — theology; and that for theology to be sovereign it must recognize the sovereignty of its opposite — philosophy. To conceive of something as separate but not subordinate involves and expresses the dialectic of truth: for one to be true the other must equally be true.

In the *Theologico-Political Tractatus*, in particular, Spinoza argues that the Bible, as the sovereign cause of itself, must be interpreted separately — "from itself alone" — that is, on its own terms. The Bible, in other words, must not be subordinated to a conception of reason (or political authority) which is either superior or inferior to it, either its master or its slave. Thus Spinoza is unique as a philosopher and as a political theorist in recognizing that, if we are to comprehend the dialectic of God and law, our conception of interpretation must be applicable no less to philosophy (the secular world) than to the Bible. The supremacy of God is not merely compatible with but fundamental to the rule of law, just as the rule of law (including the rule of lawful interpretation) is not merely compatible with but fundamental to conceiving of God as supreme.

Spinoza shows that the separation of philosophy from theology, involving as it does the sovereignty of the Bible and the sovereignty of theology, expresses the sovereign content of the Bible, that without which the Bible cannot exist or be conceived — the golden rule of willing to do unto others as you would will them to do unto you. The golden rule itself embodies the differentiation between self and other such that for one to be true both must be true. In the beginning is relationship, Buber says in *I and Thou*. Original beginning is that which, having begun, presupposes and thus tolerates, supports, and embodies distance in the sense of difference, uniqueness, independence and otherness. The separation of philosophy from theology expresses the golden rule of existence, the ontology of life, that which cannot be conceived without existing. The golden rule is the sovereign cause of itself, that which is both theological and philosophical, both religious and

political. It simultaneously involves separation from and expresses relationship with others as ourselves.[10]

In terms of the linguistic "turn" of contemporary philosophy, we may say that the golden rule of the separation of philosophy from theology expresses the rule of the separation of our two great streams of discourse, secular and religious (rational and theological, human and divine) or, in the dualistic terms of philosophy, materialism and idealism (empiricism and rationalism, scepticism and dogmatism). The dualism of language is unavoidable (just as the separation of languages, and thus of peoples, according to the story of the Tower of Babel in Genesis 11, is inevitable). Whether we involve ourselves in theological or philosophical expression, in religious or political discourse, what we must comprehend is that our linguistic involvement, any involvement in language, in order to be true and not merely one-sided, must express the ontological commitment of the golden rule — that than which there is nothing more perfect. Our commitment must be to the supreme sovereign — that which cannot be conceived without existing. We must comprehend that there is no political involvement that does not express the supremacy of God and that there is no theological involvement without political expression. This is not to say that any one speaker or any particular Charter would be required, as such, to employ both ranges of discourse; although, whether we use materialism or idealism, each, properly understood, always involves the other (if only indirectly or implicitly). But it is doubtless true that our foundation (founding) texts, both literary and political, not to mention theological, invoke both streams of discourse (metaphor) without fail in their dialectic, indicating that, to cite the proverb recalled by Spinoza in the *Ethics, "hominem homini deum esse"* (man is god to man, or god is man to man, but *not*, be it noted carefully, man is man to god).[11] When either of our two separate ranges of discourse is forced to test out its worth, its dignity, its truth, its expressiveness in relationship to its opposite, in true obedience to the golden rule of truthful discourse, then it must explicitly recognize the sovereign standard enunciated by Spinoza in the *Ethics*: truth is its own standard, the standard of both what is true and what is false.[12] Opposites, in their separation or dualism, are sovereign only in their mutual (dialectical) recognition of the truth. They are not sovereign or true in their subordination of otherness.

When Pilate, the pagan representative of imperial Rome, asked Jesus: "What is truth?", Jesus, the theological Jew of the covenant whose *logos* was God and who had declared that he had come to bear witness to the

[10]See M. Buber, "Distance and Relation" in *The Knowledge of Man: A Philosophy of the Interhuman*, trans. M. Friedman & R.G. Smith (New York: Harper & Row, 1965) 59.

[11]*Supra*, note 6 at 563 (Part IV, Prop. 35, Corolary 2, Scholium).

[12]*Ibid.* at 479 (Part II, Prop. 43, Scholium).

truth, remained silent, although on another occasion he was reported to have said that we must render unto Caesar that which is Caesar's and unto God that which is God's. What we are to understand by this exchange between Pilate, the descendant of Alexander the Great, himself the fateful *telos* of the Greek *polis*, and Jesus, the descendant of Abraham, Isaac, and Jacob, the founders of the covenant, is that the proper question can not be expressed in terms of a Greek (or pagan) *agon* between politics and theology. It is not a blind struggle between a representative of the rule of law and a representative of God. Pilate does not embody a rule of law which would support a charter of rights and freedoms, for he lacks a conception of God in whose image all humans are created.

Jesus, in contrast, is quintessentially Jewish in bearing faithful witness to the truth of God's word, to the covenant whose word is both divine and human, both theological and political, the covenant between God and man which divinely embodies the human rule of law. God's word, always a parable, is revealed to those who have ears to hear (who recognize that truth is its own standard of interpretation). To render unto Caesar that which is Caesar's and unto God that which is God's is to render nothing to imperial Rome and everything to the covenant, to render nothing to Athens and everything to Jerusalem. It is to recognize that the golden rule of the covenant — to love God above all others and your neighbor as yourself — involves both God and neighbor, both theology and politics. God does not belong to some Platonic realm of unchanging, finite perfection, with politics identified either with the contradictions of actual appearance or with the possible *logos* of the law of contradiction in opposition to human practice (the practice of democracy), which is how Socrates describes politics in the *Republic*. God's word is the archetype of human practice, the standard by which men and women are to live — the standard simultaneously political and theological. The standard of divine justice is that which is sovereign for human beings; their rule of law is just insofar as it embodies the supremacy of God.

The invocation of Spinoza, and behind Spinoza of the Bible, with the sharp delineation of the liberating dialectic of the biblical covenant from the fatal dualism of the Greek *polis*, serves to underline the two fundamental truths which a theologico-political analysis of the prefatory words of the *Canadian Charter of Rights and Freedoms* reveals. That Canada is founded upon principles which recognize the supremacy of God and the rule of law means, first, that God and law involve a dialectic of separation and unity such that for one to be true both must be true and, second, that conceptions (practices) of theology and politics, of God and man, whose separation does not involve their unity and whose unity does not involve their separation, express dualistic oppositions. Such conceptions engender either relativism,

which is conscienceless and thus unfree and unjust, or totalitarianism, which violates conscience and thus all the other rights and freedoms of the Canadian *Charter* which are grounded in the dialectic of divine supremacy and the human rule of law.

Principles which recognize the supremacy of God and the rule of law embody the critical truth that, first, they are absolute or sovereign (but neither certain nor uncertain) and, second, they absolutely eschew all so-called principles (beginnings or authorities) which either claim certainty (totalitarianism) or deny certainty (relativism).[13] The absolute sovereignty (authority) of God and law constantly puts us humans into crisis, demanding that we be responsible for the lawful embodiment of supreme truth, that we subject all that we do and think to the highest critical standards — simultaneously political and theological. The distinction between absolute truth and certainty is precisely that which the Bible makes between truthful,

[13]Hegel, in the context of presenting the process of mutual recognition as the master-slave dialectic, in which the slave, modeled on the ancient Israelites enslaved to the Pharaoh, repeats the story of Exodus by initiating history as the story of liberty, systematically distinguishes between (finite or immediate sense) certainty and truth (as the principle of absolute or infinite knowledge — sovereign recognition of otherness). See *The Philosophy of Mind*, trans. W. Wallace & A.V. Miller, The Encyclopaedia of the Philosophical Sciences, vol. 3 (Oxford: Clarendon Press, 1971) at 157 and 176-77:

> Ordinary thinking does not distinguish between certainty and truth. What it is *certain* of, what it holds to be a subjective thought that agrees with the object, this it calls *true*, no matter how trivial and bad the content of this subjective thought may be. Philosophy, on the contrary, must essentially distinguish the Notion [Concept] of *truth* from mere *certainty*; for the certainty which mind has of itself at the stage of mere [immediate or natural] consciousness is something as yet untrue and self-contradictory, since here, along with the abstract certainty of being at home with itself, mind has the directly opposite certainty of being related to something essentially other to it. This contradiction must be resolved; the urge to resolve it lies in the contradiction itself. Subjective certainty must not find itself limited by the object but must acquire true objectivity; and, conversely, the object, on its side, must become *mine* not merely in an abstract manner but with regard to every aspect of its concrete nature.... The result of the struggle for recognition brought about by the Notion of mind or spirit is universal self-consciousness.... In this stage, therefore, the mutually related self-conscious subjects, by setting aside their unequal particular individuality, have risen to the consciousness of their real universality, of the freedom belonging to all, and hence to the intuition of their specific identity with each other. The master confronted by his slave was not yet truly free, for he was still far from seeing in the former himself. Consequently, it is only when the slave becomes free that the master, too, becomes completely free. In this state of universal freedom, in being reflected into myself, I am immediately reflected into the other person, and, conversely, in relating myself to the other I am immediately *self*-related.

loving obedience to God and idolatry,[14] between men and women made in the infinite image of God and the reduction of human beings to finite images of nature whose comparisons engender domination of one over the other in terms of differences in class, race and sex.

The critical point to grasp, the crisis which we must constantly render creative, is that sovereign authority — the ontological argument of existence: the supremacy of God and the human rule of law — is neither certain nor uncertain because it demands interpretation. Whereas the dualism of certainty and uncertainty applies to the realm of immediate (finite) nature and is the domain of the quantitatively exact sciences, absolute sovereignty embodies the infinite dialectic of divine and human such that its truth involves interpretation and its interpretation expresses truth. The critical distinction between absolute truth and certainty shows us that, while truth is neither certain nor uncertain, it can be falsified by being denied, oppressed or enslaved. It is precisely that absolute sovereignty of God and human law which always demands interpretation for, in good faith, neither God nor law can be either certainly known as a finite whole or reduced to the relative uncertainty of finite parts.

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[14]In O. Barfield, *Saving the Appearances: A Study in Idolatry* (New York: Harcourt, Brace & World, 1965) at 185-86, distinguishing between original and final participation, Barfield concludes as follows:

> [A]s Augustine of old could contemplate the greatest of evils and exclaim *Felix peccatum!* so we, looking steadily on that world, and accepting the burden of existential responsibility which final participation lays on us, may yet be moved to add: *Felix eidolon!* 'Peor and Baalim [in Milton's poem "On the Morning of Christ's Nativity"] Forsake their temples dim ...' The other name for original participation, in all its long-hidden, in all its diluted forms, in science, in art and in religion, is, after all — paganism.

We may note that there is no choice between what Barfield calls original participation and final participation and between what I here call paganism and faithfulness or idolatry. It is precisely final participation in the principles which recognize the supremacy of God and the rule of law which guarantees, which creates choice. We cannot choose not to choose, we are not free not to be free; for not to choose is to exercise choice, just as the state of unfreedom (or slavery) is a condition revealed only in and through freedom. Kant recognized the absolute constraint upon freedom — that we are not free not to be free — when he viewed the Genesis narrative of Adam and Eve's expulsion from the Garden as the story of freedom; see I. Kant, "Conjectural Beginning of Human History" in L.W. Beck, ed., *On History* (New York: Bobbs-Merrill, 1963) 53 at 59-60:

> From this account of original human history we may conclude: man's departure from that paradise which his reason represents as the first abode of his species was nothing but the transition from an uncultured, merely animal condition to the state of humanity, from bondage to instinct to rational control — in a word, from the tutelage of nature to the state of freedom. Whether man has won or lost in this change is no longer an open question, if one considers the destiny of his species. This consists in nothing less than progress toward perfection, be the first attempts toward that aim, or even the first long series of attempts, ever so faulty.

Although interpretation is infinite, this is not to say that all interpretations are equal or that there are not inadequate or false (inhuman) interpretations. Interpretations which are inadequate or false are precisely those which, in failing to recognize that they must will to interpret others as they would will to be interpreted, reduce the sovereignty of God and the rule of law to either certain knowledge or uncertain relativity. The absolute is the relationship — the golden rule of interpretation — which guarantees the difference (uniqueness or separation) of that which is different, sharply distinguishing the truly different from either the relatively certain or the relatively uncertain. The founding principles of Canada, which recognize the supremacy of God and the rule of law, are precisely those which acknowledge the truth of all gods and the rule of all laws, insofar as those gods and those laws are compatible with the absolutes of conscience, religion, thought, communication, peaceful assembly, and association. But the principles which recognize the supremacy of God and the rule of law equally deny the validity of all gods and of all laws which violate the fundamental freedoms and rights of humankind.

In this context it is important to appreciate the critical significance of the fundamental distinction which the Bible makes between *Idolatry*, of which only members of the covenant (those committed to the God of the chosen people) may be guilty, and *Paganism*, as that from which, being nothing in itself, God creates the human rule of law, the covenant binding on all its members. It is only the faithful members of the covenant, not pagans, who can become faithless through the practice of idolatry, through whoring after false idols whose finite supremacy involves the hierarchical subordination of otherness. In being seduced by idols, members of the covenant become pagans, something impossible for and inconceivable to pagans, who cannot become what they naturally are. It is precisely members of the covenant who, in bearing responsibility for living the complex and demanding dialectic of the supremacy of God and the rule of law, are ever wont to unshoulder their burden of freedom and to take comfort in the certain idols of hierarchical difference which deny the validity of the differences of others. It has frequently been the God of the Bible, above all, the God of Christians (in their various sects), to which we may add the God of Islam, in whose name the most horrendous acts eclipsing the supremacy of God and violating the rule of law have been done.

It is not at all inconceivable that the atheism of modernity will be viewed, *sub specie aeternitatis*, as more profoundly religious than the faiths of past and present ages whose *theos I deus* has frequently been rationalized as supporting ideologies of domination and oppression. It is precisely because God is the supreme rule of law that he (she) can (in bad faith) be turned into one or another idol justifying the rule of legal discrimination,

something inconceivable to the pagan. Thus it is the atheist, and not the pagan, who is either a faithful or a faithless person. The atheist can constantly strive to overcome idolatry, discrimination rationalized as "natural", by recognizing that all persons are equal as created in the image of God, or the atheist can succumb to the anxieties of uncertainty and become a pagan (that is, an idolater), something inconceivable to one who is a pagan by nature, and thus cannot become what he (she) already is naturally. Just as the pagan cannot be an idolater, so the pagan cannot be an atheist. The Bible is the unique (universal) source of a-theism, theism taken so seriously that, in the tradition of Job, the opponent risks, in his struggle against (with) God, nothing less than the integrity of his being. To oppose God, in truth, is nothing less than to acknowledge the principles that recognize the supremacy of God and the rule of law. To champion the God of the Bible in words, but not in deeds, is nothing less than to deny the supremacy of God and the rule of law.

A theologico-political analysis of the *Canadian Charter of Rights and Freedoms*, undertaken in the spirit of Spinoza, shows us that Canada's foundation upon principles that recognize the supremacy of God and the rule of law embodies the separation between theology and philosophy, between the divine and the human, between the religious and the secular. But Spinoza shows us that the only way in which we can, in truth, separate philosophy from theology is through the elaboration of a concept of sovereignty such that that which is separate, different or unique recognizes the difference and uniqueness of that from which it is separate. Spinoza's very conception of separation or difference embodies the sovereignty of the golden rule. If separation or difference is not founded upon mutual recognition which grounds differences in the sovereignty of truth as its own standard, then separation is reified either as certainty ruling over that which is viewed as uncertain or as uncertainty which is vulnerable to rule by that which claims certainty for itself while denying it to others. Spinoza shows us that we must conceive of the separation between the supremacy of God and the rule of law which, the *Charter* declares, are recognized by the principles upon which Canada is founded, as the critical ground of sovereign or absolute authority. It is only in light of the paradox of sovereignty (universality) and uniqueness (difference or separation) that we can overcome both the uncertain (or relative) differences that falsely divide us and the certain (or totalitarian) similitudes which falsely unite us. It is in their very difference that the supremacy of God and the rule of law are our truly sovereign authority.