Universality and Human Rights in a Postmodern World

Harold Shepherd, *St. David's Anglican Church and Citizenship and Immigration Canada, Toronto*[1]

The *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly Resolution 217A(III) on December 10, 1948, ushers in the modern era of international human rights protection. Its fundamental principles have found expression in the *International Covenant on Civil and Political Rights* (ICCPR)[2] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[3] both of which were signed in 1966 and came into force in 1976. Collectively, these three documents are referred to as the *International Bill of Rights*. In addition, numerous other international, regional, and domestic human rights instruments further develop principles of anti-discrimination. Despite recent developments in this area, there remains great diversity among and within cultures as to what constitute fundamental human rights. In this essay I propose to explore the theme of whether one can truly speak of *universal* human rights in a postmodern world that demonstrates scepticism towards metanarratives that purport to organise thought into universal truths. How, in a pluralistic, multifaceted, disjointed, and fluid world, can human rights discourse be considered normative? In light of these postmodern trends, is not a *Universal* Declaration of Human Rights anachronistic? Is it not rather an expression of Western cultural imperialism that naively presumes to bind all humans in all cultures at all times?

Background

A distinction has historically been made between laws that are common to all nations through principles that are inherent in nature (natural law) and laws enacted by the State or dictated by a deity (positive law). For example, Hebrew tradition supplemented Torah and covenant with Wisdom traditions that operate more at the level of self-actualisation than principles, enforceable by the State, which

concern questions of social order and interaction. However, the two are not mutually exclusive. A notable example of this can be found in Romans 2:14–15. Asked how Gentiles can be held accountable for violations of the Torah when God had never imposed it on them, Paul responded by citing natural law as an explanation. Precepts that are binding on Israel through the Torah are also binding on the Gentiles because God has revealed them to human conscience by means of the reason and wisdom that orders creation.

The belief in a universal natural law is well attested in Greek thought. Beginning in the sixth century B.C.E. with Heraclitus, who argued that all human laws are nourished by one divine law. Artistotle, Chrysippus of Soli and Cicero, among others, attributed the existence of universally-binding law to the ordering of the cosmos by some form of reason/*logos*. A well-known example of this can be found in Book three of Cicero's *The Republic*:[4]

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.

Classical natural law theories were taken up in the thirteenth century by Thomas Aquinas (c. 1224–1274), who considers eternal law to be a type of Divine Wisdom. He writes:

> Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence.[5]

> Unjust laws do not bind conscience, except to avoid scandal or disturbance. However, if the law is opposed to the Divine good, it must not be obeyed.[6]

He goes on to say: "Consequently every human law has just so much of the nature of law, as it is derived from the law of nature."[7]

Aquinas roots law in the common good, not private benefit, as understood by the whole people or a public official who has care of the people. He defines law as follows:

> Thus from the four preceding articles, the definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.[8]

In addition to containing eternal principles, natural law gives positive law, be it the law of nations or civil law, its legitimacy as interpreted in accordance with the motive of the lawgiver, not a narrow reading of the words alone.[9] On this point, Aquinas advocates use of "purposive" or liberal statutory construction.

The experience of the Spanish conquests in America led to reflection on the legitimacy of this enterprise in Spanish legal circles. Beginning with Francisco de Vitoria (1486–1546), classical and medieval natural law theory was used to develop a concept of international law. Just as domestic law has internal moral constraints by virtue of natural law, so must the community of nations conduct itself internationally in accordance with principles of universal reason that place limitations on State conduct outside its borders. Inspired by this approach, Bartolome de las Casas became a leading critic of Spanish mistreatment of first nations in the Americas in his advocacy before the Spanish throne. In 1612, Francisco Suarez (1548–1617) published *De legibus*, in which he affirmed that there is a universal norm that governs relations of people within the State, but also between States in the international community. Might does not make right on the global stage.

The medieval approach to international relations is generally considered to have broken down with the Treaty of Westphalia in 1648, leading to the development of contemporary notions of State sovereignty. One of the first to adopt a secular and humanistic interpretation of natural law was the seventeenth century Dutch scholar, Hugo Grotius. As a product of the Age of Reason and inspired by classical theories of natural law, he located the authority as it applies

to international relations in the human spirit through deductive reasoning that is independent of theological presuppositions.

A significant exponent of this approach can be found in the person of John Locke, who set the stage philosophically for the American Revolution. Nature imbues all people with inherent fundamental rights discernable through reason. By means of a social contract, government is entrusted with the responsibility of promoting the common good, but can be overthrown when this trust is breached. The influence of natural law in eighteenth century England can be found in the writings of Sir William Blackstone, who cited Justinian's *Institutes* 1.1.3 in support of his view that there are "eternal immutable laws of good and evil" that can be summarised in three principles: live honestly, do not injure anyone, and render to every person.[10] For Blackstone, the origin of natural law lies in God and is of universal validity and application.

A view more compatible with the interests of the political establishment was expressed by Thomas Hobbes in his well-known work *Leviathan*. For Hobbes, human nature is essentially brutish and needs the strong hand of the State to be kept in line. As a result, questions of right are political choices that are entirely within the responsibility of Parliament to make.

An important expression of this approach is found in the writings of John Austin, who defined law in terms of process and principles of recognition rather than moral content. Contemporary theories of legal positivism by such academics as H.L.A. Hart emphasizes law as social phenomenon, rooted in commands by the sovereign, which are recognised so to be in the State and which are subject to enforcement. Law is understood from the point of view of the command of the sovereign that, by operation of principles of recognition, is accepted as binding and, to ensure effectiveness, is backed by the ability to exercise coercive measures. Positivism's deference to political institutions was not necessarily bereft of moral compass. Jeremy Bentham's utilitarianism, for example, served as one model to assist in making political choices.

The Origins of Functionalism

The rapid growth of industrialisation in the late nineteenth century drew many from rural areas into overcrowded, unsanitary and substandard urban housing. Long work hours, child labour and unsafe

working conditions were the order of the day. Social reformers like Wilberforce gave voice to those who were seen as insignificant cogs in the industrial machinery. Pressure began mounting for the introduction of regulatory schemes to further social policy objectives related to quality of life. The dominance of capital over labour that had prevailed under the *laissez-faire* principles of Adam Smith and nineteenth century liberalism needed to be replaced by an administrative state that could address issues of distributive justice. One of the best known examples of this can be found in Karl Marx's *Das Kapital*, drawing heavily on Hegelian dialectical reasoning as seen through the lens of scientific materialism. Its implementation, needless to say, proved to be less than successful.

Other, but related, responses to nineteenth century social conditions led to the development of the "functionalist" approach that has had a significant impact on contemporary legal theory. It can safely be said that it has emerged as the principle alternative to the normativism of legal positivism. Martin Loughlin has identified three main sources of contemporary functionalism: sociological positivism, evolutionary social theory and pragmatism.[11] Sociological positivism developed from the application of the scientific evolutionary principles of Charles Darwin to social studies. Loughlin traces it back to the eighteenth-century revolutionary movements which believed that social progress was possible. Sociological positivism itself began in the nineteenth century and flourished in French intellectual circles, particularly in the writings of August Comte,[12] Emile Durkheim,[13] and Léon Duguit.[14] The approach was empirical and modelled after the natural sciences. For Compte, evolutionary forces at a social level were fostering the triumph of humanity over one's animal nature, and intellect over instinct. Part of this development took the form of the division of labour resulting in interdependencies within society. In this context, the role of government is to provide co-ordination. From this point of view, the legitimacy of law does not reside in normative commands, but rather in the state's ability to create, co-ordinate and facilitate programs that will allow the latent humanity of society to take institutional form. This marks a significant shift from the idealism that adopts a metaphysical view of the state as custodian of social values to one which looks to society itself as identifier of normative values through collective interaction and brokerage.

Durkheim developed this approach, arguing that the state has an important role to play in fostering "organic solidarity" and functional interdependence through integrating elements of the "collective conscience." This is done through groups in society which foster an environment in which people can fully realize their potential. Duguit further developed this idea of social interdependence, but with a minimalist view of the role of the state—to preserve and promote social solidarity which is the repository of legitimate values. For him, rights can only be defined from the point of view of community. Loughlin summarises it this way:[15]

> Since people were unable to exist outside of society they were required, as a matter of prudence, to work for its preservation. This was the source of the basic duty to work for the preservation of social solidarity. It was from this basic duty that all rights were derived.

This has striking similarities to contemporary approaches to human rights in Africa, Latin America, and within Islam. Human dignity and rights are seen from the point of view of the community as a whole, not from the perspective of the person asserting individual rights against the collective as is the case with Western liberal political traditions.

Loughlin associates evolutionary social theory with Herbert Spencer, Fabianism and New Liberalism. For Spencer, writing in the nineteenth century, society is a living organism whose growth is paralleled by the decay of state institutions which hamper its growth by inflexible and mechanical means of intervention. This has much in common with sociological positivism. Of more importance to contemporary functionalism is Fabianism. Often associated with George Bernard Shaw, H.G. Wells and Bertrand Russell, Fabianism adopted utilitarianism and evolutionary theory to advance a socialist platform rooted in an organic theory of social solidarity. Loughlin summarises their approach this way:[16]

> The State, albeit in an anti-metaphysical sense, was thus viewed as being of central importance. Through its control and regulatory functions it was viewed as the primary mechanism for transforming the anarchic tendencies of individualism to the collective good.

This is to be achieved through a strong civil service. Today it is found in political theories that advocate the role of government as social engineer. Loughlin's outline of the New Liberalism of such people as T.H. Green and L.T. Hobhouse develops this theme of social solidarity with a view to promoting freedom to pursue self-actualization. As with other evolutionary approaches, rights are rooted in society and collective values. They cannot exist independently.

The third influence which Loughlin suggests as a source of functionalism is the philosophical tradition of pragmatism, as expressed through the writings of C.S. Peirce, William James, and John Dewey. This is presented as a middle ground between empirical evolutionary approaches and forms of rational idealism that abstract normative values from a reading of the collective consciousness. On the one hand, pragmatism attempts to use an empirical approach by looking at the consequences of a given policy. On the other, collective values can be assigned some degree of normative weight through identifying what works to better society. Associated with this is the Legal Realist movement of Roscoe Pound and Oliver Wendel Holmes that viewed the law, not as an abstract exercise in logic, but rather as a practical exercise in social engineering.

These important movements start from the perspective of the underdog. Victorian social conditions and the intransigence of those who control capital to address concerns about distributive justice led to a paradigm shift. Rather than locating the legitimacy of law in the state as an overarching metaphysical institution which is the repository of, and agent for, positive social values, the *locus* shifted to society itself and its collective consciousness. Governments are not elected to command, but rather to foster and promote inherent human values while holding destructive forces in check. Democracy cannot be dissociated from core human values. It is more than the command of the uncommanded who has jurisdiction by virtue of principles of recognition, as maintained by legal positivism. A notable example of this approach can be found in Roosevelt's "New Deal" in the 1930's. The tradition of the U.S. Supreme Court had been to use constitutional law to thwart attempts by state legislatures to impose fair labour standards notwithstanding the opposition of big business. One infamous example of this can be found in the 1905 case of *Lochner v.*

New York[17] in which Oliver Wendel Holmes wrote an important dissent in a case dealing with a court challenge to an attempt to restrict hours in bakeries to 10 hours per day and 60 hours per week. The initial reluctance of the U.S. Supreme Court to support the New Deal in the 1930's led to a threat by the President to appoint six sympathetic judges in order to ensure that this policy would be implemented. The reversal of the Court's opposition is sometimes referred to as the "switch in time that saved nine." The New Deal gave rise to many new administrative agencies with a mandate to regulate, not only from the point of view of coordination, but also from that of substantive policy development.

Functionalism developed out of this history and attempts to interpret the law in terms of social policy objectives, collective engagement, rationality and fundamental human values. It has played an important role in defining the doctrine of the duty of fairness in Canadian law, as well as defining standards of review. Some, however, disagree with functionalist approaches. Advocates of critical legal studies dismiss both as having failed to recognize the degree to which institutional and ideological capture permeate the legal system. They favour the dethroning of the legal elite that perpetuate ideology in favour of personal participation and social solidarity.[18] Although their analysis of the problem is good, it is weak in suggesting how democratic participatory values can be injected into the legal order without running the risk of capture by public interest groups intervening on a very narrow basis. With all of its flaws, functionalism, as implemented by administrative agencies that develop decision-making by experts, provides a reasonable way forward in an increasingly complex and specialized world. It may not enfranchise ordinary people to the extent that advocates of critical legal studies would like, but at least it brings to the table those who know what they are doing while allowing interested parties to participate in the process and challenge decisions in the courts.

The third force in social policy theory is that of liberalism. With its roots in nineteenth century *laissez-faire* market capitalism, it has resurfaced as the contemporary neo-liberalism that advocates government downsizing, usually on the basis of the belief that the private sector and market economy are better placed to develop regulatory systems than bureaucracy. Neo-liberalism does not go so far as to support anarchy; it realizes that a certain degree of State regulation is

necessary. The agenda seems to be to minimize red tape by involving the State only when necessary to ensure that the system remains functional. When intervention is required, it would prefer a functionalist approach, given the view that expertise in the community is much more valued than well-meaning obstruction from the centre. Neo-liberalism, then, does not constitute so much a rejection of functionalism as an attempt to confine and domesticate it. It could be argued that its commitment to polycentric, decentralized and sectoral decision-making makes it a contributing influence in the development of functionalism, despite the significant differences.

Functionalism and Human Rights

In the postmodern era, many have dismissed natural law and legal positivism as being reflective of antiquated patriarchal and hierarchical social systems that are sometimes laced with theological assumptions, but always expressive of ideologies that have subdued competing ones through the political and judicial process, usually to the benefit of the dominant social classes. In this environment, is it possible to find a language for human rights discourse that is normative? Can there be a *universal* standard for human rights? Can one distil a set of values that are equally "true" throughout Europe, Africa, Latin America, Asia and the Islamic world, with their wide range of cultures, political systems, and religions?

According to the preamble of the United Nations Charter, one of its goals it to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The *Universal Declaration of Human Rights* uses this formulation in its preamble: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ." The preamble to the *International Covenant on Civil and Political Rights* contains similar language: "Recognizing that these rights derive from the inherent dignity of the human person . . ." The *International Covenant on Economic, Social and Cultural Rights* refers to "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family . . ."

According to these United Nations instruments, fundamental human rights are rooted in the "inherent dignity" of all members of the human family. All share equally in inalienable rights. The use of the term "inherent" distinguishes the nature of dignity for purposes of international human rights from that which constitutes a social construct based on status and perceived importance within a shared value system. One must note, however, that there can never be unanimity of thought with respect to assigning value to people and positions in society. Notwithstanding this, there is a relationship between function and perceived worth and dignity within the community, despite the fact that different members may perceive it differently. The UN documents speak of a sense of dignity and worth that do not depend on one's place in society or one's ability to contribute to its development. An Alzheimer's patient in a chronic care facility has the same inherent dignity and worth as the president of a major corporation.

The texts do not provide a philosophical, theological or ethical explanation for this proposition. However, they do express an important value. Rather than think in terms of a subject acting against an object, it speaks of subjects who interact and share common rights equally. An important interpretative element is found in Article 29(1) of the UDHR: "Everyone has duties to the community in which alone the free and full development of his personality is possible." Similarly, the preamble to the ICCPR states: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." Similar language can be found in the preamble to the ICESCR. One cannot speak of individual rights without also speaking of duties owed to the community to promote respect for the inherent dignity of all. One is not a subject who asserts individual rights against the community, nor is one the object of society's largesse as a category of the needy. Although all may be equal in inherent dignity and access to fundamental rights, not all are equal with respect to ability to contribute or need to receive. Rights and responsibilities form a seamless web of interaction between subjects who each have something to share with the other, and something to receive as well, regardless of social status. Jean Vanier has illustrated this point well in his work at L'Arche with developmentally challenged people who together form caring communities.

An example of this in early Christian literature can be found in Matthew 25. According to this text, people at the margins of the dominant culture—the hungry, thirsty, naked and incarcerated—have an intrinsic value because their plight is felt by Jesus himself and treated as his own. The secular perspective of the UN documents does not assign an origin or metaphysical basis for belief in intrinsic worth. It appears to begin with the experience of self as a rational, emotional and socially-interconnected being with goals, aspirations and a sense of self-worth. It then proceeds to postulate that there are no external value systems that change this at a core level. This conceptual framework is quite at home in postmodernism. However, it recognises that there must be some constraints on personal liberty in order to promote the common good. Rather than impose an external moral code, it talks of obligations owed to build community with others.

Briefly put, international human rights discourse is not about affirming changeless individual rights against the community, but rather about offering to the community one's own talent and resources to promote an environment in which the goals and aspirations of others can develop. In so doing, one also receives something back from the community. Human rights is more about brokering the mutual exchange of gifts than it is about asserting a right to act. It recognises that every human being has something to offer and something to receive. The notion of intrinsic worth is not, as with Locke, associated with natural law theories, nor with any religious or philosophical justification. It abandons the idea that one can find a "common good" that can be discerned by divine wisdom or universal reason. It moves from a view of society as a community of shared values and experiences with a "common good" toward a functional approach that is polycentric, decentralized and culturally sensitive.

This is reflected in a commonly-used categorization of international human rights. In 1979, a French jurist named Karel Vasak proposed a tripartite division based on terms coined during the French Revolution: Liberté, Égalité, Fraternité. First-generation human rights concern liberty (civil and political rights). Second-generation human rights deal with equality (economic, social and cultural rights). Third-generation human rights promote solidarity (collective, group or people's rights to such things as self-determination, control of natural resources, and political, economic, social and cultural development). Diversity and self-expression are celebrated, subject to a responsibility

to allow others space to find their own path and fully develop their human potential. Choices with respect to self-expression are circumscribed in order to coordinate competing interests. Given human nature, the coercive power of the State sometimes needs to intervene based on principles of public order. From this point of view, value judgments arising from one's own cultural or religious views cannot be imposed on others unless they can be justified on principles that relate to criminality, social order or other pressing public policy objectives that are non-discriminatory in nature. The intrinsic worth of religious, ethnic, visible, or other minorities trumps attempts to promote a common good defined by the majority. This is the essence of protection under the Canadian *Charter of Rights and Freedoms* as well as federal and provincial human rights legislation, as they reflect international human rights principles.

To give a concrete example, if one begins with the premise that gays, lesbians and bisexuals have an intrinsic worth as human beings that extends to committed and supportive partnerships (and that this is not a question of public safety or order), one will interpret the nature of same-sex relationships differently than if one begins with the premise that natural law, as universally perceived through wisdom, reason or divine order, shows that procreation of the species requires relationships between males and females that in turn leads to the conclusion that same-sex conjugal relationships are against nature and not worthy of State recognition. This issue has been resolved in favour of the former approach in international human rights law. However, few countries have fully implemented it through domestic law as a question of equality. Canada, like other countries, is struggling with the issue. Many religious communities are divided between these two views, resulting in acrimonious debates. Biblical texts are being quoted by both sides, either with respect to the intrinsic worth of human beings or from the point of view of natural law. Some have attempted to read contemporary human rights values into ancient documents, with an anachronistic result that is less than convincing.

The breakdown of the idea of universal wisdom or reason that can order society (natural law) or the belief in the need for a strong central State to establish the common good (legal positivism) has led to a crisis of authority. Human rights cannot be defined in absolute terms as universal, propositional truth. Rather, they concern process and result, not dogma. There is no room for the imposition of values

derived from the experiences of the majority on questions of funda-
mental self-expression that relate to the inherent goals, aspirations
and self-identity of the minority, absent an issue of public safety, order
or security. The onus lies on the State to justify why such rights need
to be restricted. An example of this principle can be found in
Canadian jurisprudence with respect to the Canadian *Charter of Rights
and Freedoms*—whether infringements of Charter rights and freedoms
"can be justified in a free and democratic society."[19]

Process values work within the framework of functionalism
to foster an environment in which the latent dignity of each human
being finds recognition and support in social programs and institu-
tions, despite those who believe there is a common, universal value
system that should be used to supress it. In my experience in the field
of refugee protection, one of the significant contributing factors to
intolerance and persecution lies precisely in this belief that universal
moral or religious truth resides with one's own group. Belief in univer-
sal human rights interpreted in strident, individualistic and doctrinal
terms can also lead to the same result. In all cases, an "us versus them"
mentality pits competing value systems against each other for the
purpose of achieving dominance. The starting point must be the
inherent dignity and worth of each human being as understood by
the person herself or himself. The next step is to respect differences
by promoting equality of access within society (which is different from
equal treatment which can promote exclusion for some). Limitations
must be restricted to pressing and substantial public policy consider-
ations. This contemporary context of human rights law is linked
more to process in community building with its inherent rights and
responsibilities than to ensuring the protection of an individual's right
to exploit the environment or other human beings. It is only when
rights exercised and obligations owed are kept in balance that a
society can promote first, second and third generation human rights.

International human rights law is not a quest to enthrone the
individual as a subject who is free to act as long as it is within the scope
of domestic law, but rather to acknowledge individuals as social beings
with inherent worth and dignity, who recognise the same in others and
seek to build a society in which all people are not only free but also
provided the means to develop their full human potential, subject
only to pressing issues of public order, not personal moral preferences.
This new wine has been imported by some religious institutions that

recognise God in this process, threatening to burst the old wineskins. Natural law theories, contemporary human rights principles, and postmodernism are competing at multiple levels within civil society, State legislation, jurisprudence, and religious institutions, creating a cacophony of voices.

In my respectful submission, if one starts from the premise that all human beings have intrinsic dignity and self-worth and that the selfish and destructive side of human nature can be adequately dealt with through positive law and coercive State intervention, there is ample room left to give others space to define how they can best develop their own latent potential, fulfil themselves as human beings and help build their community (even if this is the gift of presence offered by the person with Alzheimer's disease who lives in a chronic care facility). The creative tension between rights and responsibilities exercised by the human spirit will ultimately foster a more genuinely human and humane community. Rather than attempting to make others in one's own image (after having perhaps made God in one's own image), contemporary human rights principles challenge religious communities to shift the focus from the morality of a universal, ideal and changeless ethical being, to polycentric but interdependent social relationships that are always growing and changing, as is the culture in which they are situated, but are nevertheless informed by the right to express fundamental selfhood in the context of civil and political rights, while actively fostering growth in others through the promotion of economic, social, cultural and people's rights. In so doing, one may discover wine for the messianic banquet that needs new wineskins.

Notes

1. Harold Shepherd is part-time Priest-in-Charge of St. David's Anglican Church, Toronto and has a Ph.D. in Biblical Studies from McGill University (with Professor Wisse as thesis supervisor). He is also a refugee lawyer with an LL.M. in administrative law from Osgoode Hall Law School. Shepherd currently works for Citizenship and Immigration Canada as a pre-removal risk assessment officer, examining applications to the Minister of Citizenship and Immigration. The views expressed in this article are his own, and do not represent the policies or opinions of the Government of Canada.

2. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.

3. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force January 3,1976, in accordance with article 27.

4. *Republic* 3.22, trans. Paul Shorey (LCL; Cambridge: Harvard University Press, 1950), http://www.scaevola.com/deism/ciceros_republic.htm

5. Aquinas, Thomas *Summa Theologiae, Prima Secundae Partis*, Q. 93, "Whether every law is derived from the eternal law?" http://www.newadvent.org/summa/209303.htm.

6. Ibid, Q. 96, "Whether human law binds a man in conscience?" http://www.newadvent.org/summa/209604.htm.

7. Ibid, Q. 95, "Whether every human law is derived from the natural law?"

8. Ibid., Q. 90, "Whether promulgation is essential to a law?" http://www.newadvent.org/summa/209004.htm.

9. Ibid, Q. 96, "Whether he who is under a law may act beside the letter of the law?" http://www.newadvent.org/summa/209606.htm.

10. *Commentaries on the Laws of England* (4 vols.; Oxford: Clarendon, 1765), 1:40.

11. Martin Loughlin, "Foundations of Functionalism" in *Public Law and Political Theory* (Oxford: Clarendon, 1992).

12. A. Comte, *Introduction to Positive Philosophy* (1830–1842) (Indianapolis, 1946).

13. E. Durkeim, *The Division of Labour in Society*, trans. G. Simpson (1893: New York, 1964).

14. L. Duguit, *Law in the Modern State,* trans. F. And H.J. Laski (London, 1921).

15. *Ibid*, at 110–11

16. *Ibid,* at 118.

17. (1905) 198 U.S. 45 (U.S.S.C.)

18 See Allan C. Hutchinson, "Crits and Cricket: A Deconstructive Spin (or was it a Googly?)" in *Canadian Perspective on Legal Theory*, ed. R.F. Devlin (Toronto: Montgomery, 1991), 181–205.

19. See *R. v. Oakes* (1986) 1 S.C.R. 103 in which the Supreme Court of Canada developed the "Oakes test" that requires that the objective of legislation that infringes a *Charter* right must be "pressing and substantial." In addition, the means chosen must be rationally connected to the objective, with no reasonable alternative that would impair less. Its effects must be proportional to the objective.