Forum: The Coming of Age of the *Charter*

The "supremacy of God", Human Dignity and the *Charter of Rights and Freedoms*[1]

Lorne Sossin
Associate Professor
Faculty of Law
University of Toronto

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"Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:"[2]

I. Introduction

While the Canadian *Charter of Rights and Freedoms* is now two decades old, and past its natural adolescence, we have yet to grapple with some of the most fundamental precepts, premises and principles which animate it. This essay is intended to explore two of these: the concept of human dignity, which does not appear in the *Charter* and the concept of the supremacy of God, which are the first words to appear in the *Charte*r.

Human dignity is not a judicially cognizable concept. No evidence can prove or disprove its existence and no doctrinal test can precisely define its boundaries. It is a construction of personal conviction, individual belief, culture and social relations. It reflects, in short, a leap of faith. The Supreme Court has stated on several occasions that the *Charter* and the rights it guarantees are "inextricably bound" to "concepts of human dignity"[3] Human dignity, the Court has observed more broadly, is an underlying principle upon which our society is based.[4] It is, however, nowhere to be found in the *Charter*. It is a judicial contrivance, albeit a welcome one. It is welcome because it hints at a moral infrastructure to the *Charter*, supporting and welding together the various freedoms, rights and obligations outlined in the *Charter*. Thus far, though, this moral infrastructure has lacked coherence and clarity. In other words, what the *Charter* has lacked is a moral architecture.

If human dignity represents the concept outside the actual terms of the *Charter* about which the Court has said the most, the reference in the Preamble of the *Charter* to the "supremacy of God"

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[2] Preamble to the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11 (hereinafter the *Charter*)

[3] See the discussion of human dignity and the jurisprudence of the Court in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 76.

[4] *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 592.

represents the actual term in the *Charter* about which the Court has said the least. The supremacy of God, like human dignity, is not a justiciable concept. It cannot be substantiated nor can it be disproven. Unlike human dignity, however, the supremacy of God has not been the subject of creative judicial elaboration. Not even the most basic questions about its place and purpose in the *Charter* has been addressed. Whose God is supreme and supreme in what way? Are the supremacy of God and the rule of law intended to be complementary constitutional principles, or distinct? How can and should the supremacy of God be reconciled with the freedom of conscience and religion provisions under s.2 of the *Charter*?

The argument I advance in this essay is as follows. The reference to the supremacy of God in the *Charter*'s *Preamble* should be given meaning as an animating principle of constitutional interpretation, on a par with the rule of law with which it is paired. To embrace the rule of law while abandoning the supremacy of God is to neglect the governing premise of the *Charter*. The supremacy of God, in turn, can only play a meaningful rule in constitutional interpretation if it is taken as a general statement regarding the universal, normative aspirations of the *Charter*, rather than as a direction to privilege any one particular religious or spiritual perspective over another, or over those perspectives which deny the existence of God *per se*. The concept of human dignity represents a key normative aspiration of *Charter* jurisprudence. It has rarely been justified or elaborated, however, on normative terms. Rather, the Supreme Court has tended to treat its articulation of the scope and content of human dignity as an article of faith, simply to be invoked along the way to what the Court has deemed a just outcome of a *Charter* challenge. I argue that if the concept of human dignity were linked with the supremacy of God in the *Charter*'s Preamble, it would be incumbent on courts to justify their claims regarding human dignity as a leap of faith, and a more coherent and robust elaboration of the *Charter*'s moral architecture would result.

II. Human Dignity as the Unity of Faith and Reason

Joel Bakan has observed, "constitutional argument may best be understood as a call to faith rather than persuasion by reason".[5] The Preamble to the *Charter* proposes that Canada was founded "upon principles that recognize the supremacy of God and the rule of law". It contains, as Rod MacDonald noted, "an explicit paradox" by which our constitution recognizes both the sovereignty of God and of law.[6]

I suggest that the Preamble contains not so much a paradox as a "call to faith" regarding the nature of the *Charter*. The reference to the supremacy of God in the *Charter* should not be construed so as to suggest one religion is favoured over another in Canada, nor that monotheism is more desirable than polytheism, nor that the God-fearing are entitled to greater rights and privileges than atheists or agnostics. Any of these interpretations would be at odds with the purpose and orientation of the *Charter*, as well as with the specific provisions regarding freedom of religion and conscience under s.2.[7] Rather, I argue that the supremacy of God should be seen as a twin pillar to the "rule of law" – as a moral complement to the descriptive protections and rights contained in the *Charter*. The concept of human dignity may serve to

[5] J. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) Osgoode Hall LJ 123 at 193.

[6] R. MacDonald, "Postscript and Prelude: The Jurisprudence of the Charter: Eight Theses" (1982) 4 Supreme Court Law Review [insert page].

[7] Interestingly, however, the *Constitution Act of 1867* expressly does privilege certain religious groups (Catholics and Protestants) over others with respect to educational rights in particular provinces.

bridge these pillars, and unite faith with reason in constitutional discourse. Because the Court's articulation of human dignity has been disconnected from any appeal to moral authority, however, it has served as a shifting, ineffective, and often incoherent constitutional norm.

In *Law v. Canada (Minister of Employment and Immigration)*, the Court offered the following articulation of human dignity as a constitutional norm in the context of the equality analysis under s.15 of the *Charter*:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of difference individuals, taking into account the context of their underlying differences. Human dignity is harmed when individuals and groups are marginalized, ignited or devalued, and is enhanced when laws recognize the full place of individuals and groups within Canadian society.[8]

While many may agree that human dignity ought to be a cornerstone of Canada's system of justice, there is far less agreement as to the content of human dignity and what role it should play in constitutional interpretation. Does human dignity encompass only negative freedoms, such as the right not to have one's bodily integrity or privacy violated or may it extend to positive freedoms, such as the right to adequate food, shelter, clothing, health care, legal assistance and education? The concept of human dignity is inherently subjective, informed by personal predilection, community values, religious doctrine, ethnic identity, gender, race, age and ideological conviction, just to scratch the surface. It is also expressly normative. Every attempt to describe its essence or apply it as a constitutional principle embodies a claim regarding morally good and socially just relations between individuals, groups and the state. In short, adopting a particular understanding of human dignity requires a leap of faith.

A review of the major Supreme Court decisions featuring a discussion of human dignity and the *Charter* discloses that it has been invoked by the Court most often in six legal settings: psychological integrity; 2) physical security; 3) privacy; 4) personal autonomy; 5) professional reputation; and 6) personal affiliation or group identity.[9] What links together these concerns? In most of these categories, human dignity appears as a manifestation of the liberal, individual ethos – in other words, human dignity is about what makes individuals unique and self-contained. The Court, however, does not justify its use of this concept on those terms – or on any terms. Human dignity appears to the Court as a self-evident meta-norm of Canadian society – as the underpinning of what some observers have identified as "legal humanism".[10]

If one looks at human dignity through the lens of the supremacy of God, a different set of claims regarding its content and scope may emerge. For example, if I take the supremacy of God to reflect the conviction that all people have equal moral worth, then human dignity is not just what separates us as individuals but also rather what binds us together as a community of mutual obligation. On this view of

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[8] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para.153.

[9] This is drawn from a "human dignity database" of approximately 60 cases. This database is on file with author and will form the basis of a larger research project on the content and scope of human dignity as a constitutional principle in Canada.

[10] See D. Feldman, "Human Dignity as a Legal Value – Part 1" [1999] Public Law 682.

human dignity, it would be untenable to see the loss of professional reputation as an issue of human dignity, but not the right to a roof over your head, or food to feed your family, or adequate health care, are not. Human dignity, if taken as a social as well as individual norm, renders untenable the sharp line between negative and positive constitutional liberties.

To illustrate the shortcoming of the present paradigm, consider the recent decision of the Supreme Court in *Gosselin v. Quebec*.[11] In this case, the Court considered, *inter alia*, whether the state owed a positive obligation of providing social welfare as a result of the right to life, liberty and the security of the person under s.7 of the *Charter*. The majority concluded that no person had a right to welfare under the *Charter*. Earlier case law from the Court had left open the possibility of "economic rights fundamental to human … survival" being protected by the *Charter*.[12] In *Gosselin*, the majority held that this section related at its core to protecting the individual in the administration of justice. While they did not close the door on recognizing positive obligations on the state in "special circumstances", a duty on the government to ensure the economic survival of vulnerable citizens was, in the majority's view, beyond the scope of the *Charter*.

Thus, the concept of human dignity has been harnessed thus far by the Court, as often to underscore the limitations of the *Charte*r as to extend its grasp. There is no discussion of where human dignity comes from, except to say it is "fundamental" and "essential" to the operation of the *Charter*. It is in precisely these circumstances, where the animating principles of a constitutional document are at issue, that a Preamble may take on special significance.

III. The Significance of the *Charter*'s Preamble

Preambles serve as an important interpretive tool, but they do not have the force of law. For this reason, they enjoy uneven influence over courts in the interpretation of statutes. While not all preambles attract judicial attention or reflect legislative aspiration,[13] it is fair to observe that Constitutional preambles often do. Indeed, the Preamble to the *Constitution Act of 1867*, which establishes that Canada's Constitution is "similar in principle" to that of the United Kingsdom, has been the foundation for a variety of judicial innovations from the "implied bill of rights" to "judicial independence". [14]

Preambles are arguably even more significant when the object of a constitutional document is to protect rights and freedoms rather than apportion political and legislative authority. While God does not make an appearance in the preamble of the Constitution Act of 1867, the reference to the supremacy of God in the Canadian *Bill of Rights* is instructive. It reads, in part:

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[11] 2002 SCC 84.

[12] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1003.

[13] For a recent study, see Kent Roach, "The Uses and Abuses of Preambles in Legislation" (2001) 47 McGill LJ 129.

[14] See Mark Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 U Toronto LJ 91.

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions…

The Preamble goes on to assert that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;…" Thus, the connection between human dignity and the supremacy of God, between moral and spiritual values on the one hand and the rule of law on the other which I suggest is implicit in the *Charter* was set out explicitly in the *Bill of Rights*. Or, put differently, the conception of God as a constitutional concept in Canada is intimately bound up with our affirmation of the moral worth and inherent dignity of all people. As Polka has written: "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 God as supreme."[15]

IV. The Supremacy of God

Where did the "supremacy of God" come from and how did it find its way into the *Charter*? On the one hand, the provenance of the term is an important issue. Its inclusion was advocated by religious groups and linked by those groups with a particular conservative social agenda (hostile to gay and lesbian rights, staunchly pro-life, etc). This conservative agenda also had political overtones, as those who supported the amendment justified it as a bulwark against Soviet Union style atheistic tendencies. The term "supremacy of God" was inserted as an amendment to the *Charter*'s Preamble as a result of a motion late in the process made in the House of Commons by the Honourable Jake Epp, MP in February, 1981. It was accepted by Prime Minister Trudeau (albeit, one must imagine, reluctantly). Thus, the first words of the Charter were more or less the last ones to be drafted.

Perhaps in part because of its inglorious origins, the "supremacy of God" reference in the *Charter*'s preamble has been all but ignored by the Supreme Court,[16] and by most constitutional observers as well.[17] David Brown observed that, "Although the Preamble suggests that all other rights and freedoms set out in the *Charter* are founded on these two principles, courts and academics have treated the Preamble, especially in its reference to the "supremacy of God**,**" as an embarrassment to be ignored." Peter Hogg has referred to the Preamble as "of little assistance". Dale Gibson viewed "its value as an interpretative aid is seriously to be doubted". The British Columbia Court of Appeal recently characterized the Preamble's reference to the "supremacy of God" as a "dead letter".[18] Below, I briefly summarize the treatment of the Preamble by Canadian courts and commentators.

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[15] B. Polka, "The Supremacy of God and the Rule of Law in the *Canadian Charter of Rights and Freedoms*: A Theologico-Political Analysis" (1987) 32 McGill L.J. 854 at 857.

[16] The rule of law component of the Preamble has been cited more often: see, for example, Canadian *Council of Churches v. Canada (Minister of Employment)* [1992] 1 S.C.R. 236, *British Columbia Government Employees' Union v. British Columbia (Attorney General)* [1988] 2 S.C.R. 214, *Reference re Motor Vehicle Act (British Columbia) S 94(2)* [1985] 2 S.C.R. 486, and *Reference re: Manitoba Language Rights (Man.)* [1985] 1 S.C.R. 721.

[17] See Polka, supra note 15.

[18] *R.* v. *Sharpe*, [1999] B.C.J. No. 1555 at § § 78 to 80, per Southin J.A

1) The Jurisprudence

At a conference some years ago, I once asked a Supreme Court Justice about what he thought the supremacy of God's role was in *Charter* analysis. He looked visibly uncomfortable. He stammered something about the importance of freedom of religion in section 2 of the *Charter* and invited the next question as soon as he could. This seems to me to sum up the collective orientation of the Court. What can a secular Court in a multicultural society say about the supremacy of God except to look away and ask for the next question? And yet, how can the Court sidestep the principles on which rest the "supreme law" they are charged with giving life.

The one notable instance where the Supreme Court has opined on the meaning of the "supremacy of God" revealed a fairly one-dimensional approach to its meaning, focussing on the question of the primacy of Christian values in Canada's legal order. The case was *Big M Drug*,[19] in which a drug store sought to have the Sunday closing provisions of the *Lord's Day Act* struck down as offending the freedom of religion guaranteed under s.2 of the *Charter*. A dissenting judge of the Alberta Court of Appeal had defended the legislation by recourse to, *inter alia*, the "supremacy of God" provision in the Preamble. About this, Dickson C.J., had the following to say:

> Mr. Justice Belzil said it was realistic to recognize that the Canadian nation is part of "Western" or "European" civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society. The judge quoted a passage from The Oxford Companion to Law (1980) expatiating on the extent of the influence of Christianity on our legal and social systems and then appears the cri du coeur central to the judgment at pp. 663-64:
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> I do not believe that the political sponsors of the Charter intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loath to assume that role. With the Lord's Day Act eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such interpretation would make of the Charter an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.[20]

Ultimately Dickson CJ declined to offer its own interpretation of the "supremacy of God" clause in the *Charter*'s Preamble, although, of course, the impugned provision in the *Lord's Day Act* was in fact struck down. Importantly, *Big M Drug* was also the case in which the Court affirmed that the *Charter* was to be given generous and liberal interpretation.

Later references by the Supreme Court to the Preamble have been to contrast the Preamble with substantive guarantees under s.2 of the *Charter*. Take, for example, the judgment of Wilson J. in *R. v. Morgentaler*,[21] in which she observed that conscientious beliefs which are not religiously motivated enjoy the same constitutional protection under s.2(a) of the *Charter* as those which may be.

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[19] [1985] 1 S.C.R. 295.

[20] Ibid. at paras. 30-31.

[21] [1988] 1 S.C.R. 30.

She then added, “In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God…” But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.”[22] Wilson J. offered no explanation for the apparent conflict between the supremacy of God on the one hand and the values of a free and democratic society on the other.[23]

Almost universally, and without serious inquiry, Canadian lower courts have equated the “supremacy of God” with a claim to religious orientations generally and Christian ones specifically. For example, in *McBurney v. Canada (M.N.R.)*, [24] Muldoon J. referred to the support religious institutions receive from the state in the form of charitable deductions and concluded that

> Those Canadians who profess atheism, agnosticism or the philosophy of secularism are just as secure in their civil rights and freedoms as are those who profess religion. So it is that while Canada may aptly be characterized as a secular State, yet, being declared by both Parliament and the Constitution to be founded upon principles which recognize "the supremacy of God", it cannot be said that our public policy is entirely neutral in terms of "the advancement of religion".

Revealingly, tax litigation has been the most common forum for the “supremacy of God” to be discussed. To take another example, in *O’Sullivan v. Canada (Minister of National Revenue)*,[25] the Federal Court dismissed a taxpayer’s claim to withhold $50 from his income tax return because such money might ultimately fund abortions. The taxpayer urged the Court to consider the “supremacy of God” clause in its analysis. The Federal Court responded by tracing the importance of religion in the development of Canada and then offered the following conclusion:

> [T]he late amendment to the Charter in 1981 cannot be construed to have converted Canada into a Roman Catholic theocracy, a Mennonite theocracy, an Anglican theocracy or a Jehovah's Witnesses' theocracy any more than Canada was thereby converted into an Islamic theocracy (whether Sunnite or Shiite), a Hindu theocracy, a Sikh theocracy, or a Buddhist theocracy. What then is meant by this preamble? Obviously it is meant to accord security to all believers in God, no matter what their particular faith and no matter in what beastly manner they behave to others. In assuring that security to believers, this recognition of the supremacy of God means that, unless or until the Constitution be amended -- the best of the alternatives imaginable -- Canada cannot become an officially atheistic State, as was the Union of Soviet Socialist Republics or as the Peoples' Republic of China is understood to be.

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[22] Ibid. at para. 251.

[23] The scholarly literature has often equated the two as well. William Klassen points out: "To mention God with a capital letter in the preamble to the Charter and then to go on to say that the Charter provides a fundamental freedom of conscience and religion, is a contradiction which even a theologian, to say nothing of all the lawyers, must surely recognize." W. Klassen, "Religion and the Nation: An Ambiguous Alliance" (1991) 40 U.N.B. L.J. 87 at 95.

[24] [1984] FCJ No. 707

[25] [1992] 1 FC 522.

On this view, the significance of the "supremacy of God" provision is to preclude any official recognition of atheism by the state, but not to preclude the secular nature of the state.[26] This narrow and literalistic approach does not seem in keeping with either the purpose or spirit of the *Charter*. Suffice it to say that, to date, the Canadian courts have not brought the vigor to the elaboration of the supremacy of God that has been directed to enlarging concepts such as the rule of law.

2) The Commentary

While the dividing line between the sacred and the profane has rarely been an object of great interest among constitutional law scholars in Canada, it is fair to say that interest in this area is picking up as the *Charter* matures. This emerging literature, moreover, has been far more creative in approaching the Preamble than has the more literal-minded judiciary. For example, in his article, "Notes Toward the (re)Definition of the Secular",[27] Iain Benson criticizes the use of "secular" by Canadian courts in relation to the *Charter*:

> The term "secular" has come to mean a realm that is neutral or, more precisely, "religion-free." Implicit in this religion free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding, however, is in error. Parse historically the word "secular" and one finds that secular means something like non-sectarian or focused on this world, not "non-faith." States cannot be neutral towards metaphysical claims. Their very inaction towards certain claims operates as an affirmation of others. This realization of the faith-based nature of all decisions will be important as the courts seek to give meaning to terms such as secular in statutes written some time ago.[28]

In a similar vein, David Brown suggests the Preamble itself may help to reconcile the tension between the *Charter*'s secular and sacred claims.[29] What the Preamble instructs, according to Brown, is that "legal freedoms must be interpreted with humility stemming from man's "creatureliness", as well as with the objective of ensuring all human beings enjoy fundamental legal protection for their human dignity as creatures. The supremacy of God thus mandates that all humans be treated in accordance with the rule of law." A similar view of the complementary nature of the supremacy of God and rule of law was espoused by David Crombie, then an MP, during the debate on the Preamble in 1981. He observed, "…when legal orders relate to spiritual principles, it allows for diversity and dissent. The roots of

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[26] See also *Canada (Canadian Human Rights Commission) v. Canada (DIAND) (Re Prince)* [1994] FCJ No. 1998.

[27] (2000) UBC L.Rev. 519.

[28] Ibid. Benson takes issue with Lamer CJ.'s characterization in *Rodriguez* (dissenting), supra note 4, that the *Charter* has established the essentially secular nature of Canadian society and therefore ensures a central place to freedom of conscience in public institutions. The dichotomy between secular as conscience enhancing and non-secular as conscience undermining is, in Benson's view, both unsupported and counterintuitive.

[29] D. Brown, Freedom From Or Freedom For?: Religion As A Case Study In Defining The Content Of Charter Rights (2000) UBC L. Rev. 551 at 563.

democratic dissent have always been religious dissent; laws imposed by government were always fought on the basis of an appeal to God."[30]

If supremacy of God is seen as the place where normative claims about Charter rights take on moral legitimacy (again, the example I focus upon in this essay is the normative concept of human dignity), one might well question what remains of God at all in this analysis. Isn't God, cleansed of religious particularity, simply the embodiment of general and metaphysical claims about the sources and scope of law. The answer, I think, is probably yes. Moreover, I would argue that this is precisely the reading of the term most compatible with the values of the *Charter*. Thus, ironically, the process of breathing life into the idea of the supremacy of God in the *Charter* may well alienate precisely those groups seeking the advancement of religion or religious agendas through the courts,

Klassen concludes his analysis of the Preamble by suggesting that it would have been preferable to leave God out of the *Charter* altogether, and assert instead that Canada was founded on "transcendent principles" and the rule of law:"[31] While inelegant, I agree that this more precisely captures the approach to interpreting the Preamble advocated in this essay. Precise language, however, is far from the norm in the *Charter*. Indeed, in its ambiguities have been found, arguably, its most expansive and progressive protections. To take but one example, consider the "principles of fundamental justice" under s.7 of the *Charter*. The term had a largely uneventful history as an adjunct to the "fair hearing" right under s.2(e) of the *Bill of Rights*, and was selected by the drafters of the *Charter*, in large part, to distance the *Charter*, and s.7 specifically, from the substantive due process jurisprudence of the US (which led to, among other maelstroms, *Roe v. Wade*). Faced with an ambiguous term, the Supreme Court of Canada gave the legislative history of the *Charter* a vote but not a veto over the content of "fundamental justice". In *Re B.C. Motor Vehicle Act*,[32] the Court affirmed that, notwithstanding the intent of the drafters as expressed in Parliamentary debates and other records of the time, the principles of fundamental justice indeed contained a substantive as well as procedural content. In *Suresh*, the Court held that this content is informed not just by the "basic tenets of our legal system" but also by international law.[33] Just as the principles of fundamental justice could be read as a repository for the tenets of our legal system, so I contend the supremacy of God should be read as a repository for the tenets of our moral system and commitments to social justice (notwithstanding that the drafters' intent for this clause in the Preamble may have been something quite different).

In light of this alternative view of the Preamble's effect, it is clearly necessary to move beyond religious sectarianism in order to understand God as a constitutional paradigm. It is to a brief sketch of the contours of such a paradigm, and the proper place within it of human dignity, that I now turn by way of conclusion.

V. Dignifiying the *Charter* by Constitutionalizing God

I have suggested that there is a larger role for the supremacy of God in the Preamble to the *Charter* that has nothing whatever to do with religious convictions or particular religious traditions but

[30] Excerpted in Klassen, supra note 23, at 94.

[31] Ibid. at 95.

[32] [1985] 2 S.C.R. 486.

[33] *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 3 at paras. 45-7.

rather with universal aspirations to moral good and social justice. No one religious or secular or political or judicial leader has unique or superior insight into the meaning or mandate of God; rather, this term's incorporation in the *Charter* should be seen as an invitation to contest and engage in dialogue about the normative foundations of *Charter* rights, and first among these foundations is the content of human dignity. In short, claims on the scope and content of human dignity are leaps of faith, not in the name of a supernatural deity, but rather in the name of our own collective moral aspirations.

This is not to say that spirituality and religious conviction are irrelevant to the enterprise of constitutional interpretation. Interpretations of human dignity may, and in my view, should include perspectives derived from religious literatures. My own interest has been in the development of human dignity as a legal norm in Jewish law,[34] but it may just as easily flow from the cosmological implications of aboriginal justice, the philosophies of Kant or Levinas, or the revelations of artists, physicists or mathematicians. To do justice to the Preamble's "call to faith", all must agree only that a set of justifiable, moral convictions must reside alongside the rule of law and animate the rights and freedoms guaranteed in the *Charter*. David Brown attempted to capture this distinction between the positive and normative dimensions of the Preamble in the following terms:

> Now the *Charter* is very much the product of positive law; but, in addition to setting out some political principles particular to Canadian government, the *Charter* purports to articulate certain universal principles and import them into Canadian law--freedom of religion, equality before the law, *etc.* By pointing to certain universal freedoms which positive law is required to protect, the *Charter* (intentionally or unwittingly) draws on sources which lie outside of positive law. Part of the task which Canadian courts must undertake when interpreting the content of those universal freedoms is to explore and understand the principles which flow from those other sources. Theology and philosophy are those other sources; faith and reason are the methods by which their principles are discerned. Looked at in this way, "the supremacy of God" and "the rule of law" are the principles upon which Canada is founded, and the Preamble demarks the point from which courts must depart in their efforts to interpret and apply the general principles of the *Charter* to the particular acts of Canadian governments. The Preamble challenges courts to engage in the politically necessary analysis of the relationship between the transcendental and the temporal in democratic life. [Emphasis added.]

The supremacy of God, in other words, is what infuses the *Charter*'s provisions, its "supreme" laws, with a claim to social justice and a foundation of moral legitimacy. It is from this aspirational quality of *Charter* interpretation, I would suggest, that the primacy of human dignity derives. This connection is not unknown to *Charter* jurisprudence. For example, in *R. v. Beare*,[35] human dignity was parsed with recourse to the supremacy of God in the *Charter* and *Bill of Rights*:

> It would be incongruous if a Charter which expressly recognizes the supremacy of God (in the preamble) and impliedly (no less than the Canadian Bill of Rights, R.S.C. 1970, App. III, expressly in its preamble) the dignity and worth of the human person were to shield a person from the loss of a finger but not from the loss of his self respect. (I note that the inherent dignity of a person has at least two aspects: first, that threshold level of dignity and worth which defines

[34] See, for example, N. Rakover, *Human Dignity in Jewish Law* (Jerusalem: The Library of Jewish Law - Ministry of Justice - The Jewish Legal Heritage Society, 1998).

[35] [1987] S.J. No. 282.

humanness and which is the birthright of every individual regardless of societal perceptions of human worth and regardless of individual perceptions of self-worth; second, that dignity and self-worth that an individual derives from his own sense of self-respect).

Of course, such judicial experimentation with the possible meaning of the Preamble have been the exception and not the rule. To return to the problem posed at the outset, how would the Court's elaboration of human dignity as a constitutional norm differ if it were primarily rooted in the supremacy of God as a normative framework? For one thing, I believe dignity would no longer be understood solely as individual autonomy, but also as social interdependency. In *Gosselin*, such a view would tend to cast suspicion on the majority judgment of McLachlin CJ, discussed above.

More kindred with the perspective on human dignity advanced through the lens of the supremacy of God is the vigorous dissent Arbour J. offered in *Gosselin* (although, unsurprisingly, no reference to the Preamble is found in her reasons). She focused on the right to life contained in s.7 as a necessary prerequisite to all other *Charter* rights and concluded:

> One should not readily accept that the right to life in s. 7 means virtually nothing. To begin with, this result violates basic standards of interpretation by suggesting that the *Charter* speaks essentially in vain in respect of this fundamental right. More importantly, however, it threatens to undermine the coherence and purpose of the *Charter* as a whole. After all, the right to life is a prerequisite C a *sine qua non* C for the very possibility of enjoying all the other rights guaranteed by the *Charter*. To say this is not to set up a hierarchy of *Charter* rights. No doubt a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning. Nevertheless, the centrality of the right to life to the *Charter* as a whole is obvious. Indeed, it would be anomalous if, while guaranteeing a complex of rights and freedoms deemed to be necessary to human fulfilment within society, the *Charter* had nothing of significance to say about the one right that is indispensable for the enjoyment of all of these others.[36]

As a further and related example of this different approach to human dignity, consider the case of Kimberley Rogers, the Ontario welfare recipient who, while in the third trimester of a pregnancy, was sentenced to house arrest for fraud because she had received student loans and failed to disclose these amounts to the welfare authorities. Rogers' case gained notoriety because she died while confined to her apartment of an apparent overdose of medications. Rogers succeeded in obtaining a constitutional exemption from the effect of a ban on receiving welfare which would have left her confined to her apartment with no source of income whatsoever. In granting this exemption, Epstein J. offered the following rationale based on a social notion of human dignity:

> If the applicant is exposed to the full three month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus thereby adversely affecting not only mother and child but also the public – its dignity, its human rights commitments and its health care resources. For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.[37]

The implications of this approach to human dignity are far reaching. If our collective dignity is

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[36] Ibid. at para. 346.

[37] *Rogers v. Sudbury (Administrator of Ontario Works)* (2001) 57 O.R. (3d) 460 at para 19.

undermined by members of our community being "deprived of basic sustenance" by the failure of the state to provide sufficient support through welfare benefits, then the *Charter* may require of the state proactive obligations to care for its most vulnerable citizens. What could justify this judicial intrusion into the sovereignty of Parliament to decide how it wishes to allocate resources? The answer surely cannot be the rule of law, which restrains government action rather than compelling it. In my view, the supremacy of God provides a basis for subsuming the will of Parliament to certain, higher constitutional obligations – obligations of the kind Epstein alludes to in *Rogers*, and Arbour J. emphasizes in *Gosselin*. While recourse to the Preamble and the supremacy of God is not necessary to achieve this interpretation of s.7 or of the *Charter* generally, it serves to focus the debate on the universal aspirations contained in the concept of human dignity. It provides the moral architecture of the *Charter* with a series of blueprints.

Finally, while I have strong convictions about the relationship between the "supremacy of God", human dignity and the obligations which ought to be imposed on the state by virtue of the *Charter*, it is important to reiterate that such interpretive conclusions require a leap of faith. The blueprint is not complete and waiting to be uncovered – rather, it is a collaborative work in progress. My advocacy for a rejuvenated role for the supremacy of God in constitutional jurisprudence does not depend on a court adopting my version of its content – rather, my position depends on courts acknowledging that all interpretive conclusions regarding the content and meaning of the *Charter* require a leap of faith. Such leaps of faith require justification and can only be sustained, in the long run, by social consensus. The difference is that while I am prepared to support my leap of faith with reasons, derived from a normative conviction based on the equal moral worth of all people (whether this conviction has a spiritual or secular source, it seems to me, is beside the point), judges have been unwilling to put their leaps of faith to the test of reason. What I have contended in this essay is that until they do so, the purposes of human dignity will remain unrevealed, and the edifice of the *Charter* will remain a façade.