

– **The Practice of Law in His Footsteps** –
Some Dimensions of the Metajudicial Foundation and
Architecture of Law and Human Rights

by

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Speech presented to the Thomas More Lawyers' Guild of Toronto
Barrister's Hall, Osgoode Hall Law School
Toronto, Ontario
September 22, 2010

Thank you for the invitation to speak with you this evening. At the outset, I wish to set you at ease by advising that my Senate staff has reminded me that my present title in Parliament of “Speaker of the Senate” does not carry with it a license to speak without limit. My notes covering metajuridical principles from the time of Moses to the present have since been abbreviated.

While it may seem a little odd to have a politician speak to a lawyers’ guild, it is fully appropriate. Sir Thomas More was known as a lawyer, but he was also a very important member of the court of Henry VIII until that rather unfortunate argument over the Supremacy Act which saw Thomas More, quite literally, lose his head. In 1935, Pope Pius XI recognized his martyrdom, and he was canonized a saint. In 2000, Pope John Paul II named Saint Thomas More the heavenly patron of statesmen and politicians. I am here, then, to speak as one who shares with you the patronage of that remarkable man who practiced law in the footsteps of the one Lord who was the Person of his Faith.

I have, therefore, chosen as the topic of my remarks: “the Practice of Law in His Footsteps – Some Dimensions of the Metajuridical Foundation and Architecture of Law and Human Rights.”

Permit me to begin with the following, albeit somewhat apocryphal, story of a country lawyer in the small village of Hampton, New Brunswick, during the early 1900s. A railway train passing through the country-side ran into a local farmer’s cow and killed it. Our intrepid farmer with the assistance of the village lawyer sued the railway for damages and was

successful in the court of first instance. The railway company with its significant resources appealed again and again until the matter reached the Supreme Court of Canada. And so it was that the country lawyer travelled to Ottawa from rural New Brunswick to find himself standing before the learned and erudite Justices of our highest court. Their Lordships, wishing to place the Hampton village lawyer at ease, began with some small talk at which time one of the most widely read Justices joined in the discussion. Leaning over the bench, he asked whether the people of Hampton, New Brunswick, ever consider Horace's counsel, "semper aude in res iuris". Without a blink or a pause, the Hampton village lawyer replied "Aye My Lord, the people of rural New Brunswick hardly speak of anything else!"

Times have changed and we in New Brunswick no longer speak daily of the importance of the rule of law and the role it plays in safeguarding peace, order and good government in Canada. However, we do recognize that the practice of freedom has had a grand success in Canada because the rule of law is a cornerstone of our nation, and respect for human rights and justice are core Canadian values.

Sometimes an attempt is made to draw a distinction between rights and obligations. Often, an attempt is made to bring relativity to human rights. It is my submission that the Man from Galilee indicates that a proper understanding of rights includes obligations and responsibilities. Rights and responsibilities are essential co-elements of one and the same concept. Rights and responsibility require an "other" in order to be of any significance or to have practical meaning. Human rights require a duty to oneself and to others. If we want to have our own rights respected, we must

respect the rights of others. And if we have rights by virtue of being human, then so do all others. The “law” or the legal notion “ius” also includes rights and responsibilities in a collective fashion, not just of the individual. I would like to emphasize that I believe that any dichotomy between rights and responsibility is contradictory.

Picture a single individual on a distant island. Our solitary islander mounts the highest peak of the atoll, holds up a pencil and cries out: “This is my pencil! I have a right to this property!”

What is wrong with this image? Probably many things. However, for pedagogical purposes, I wish to suggest that the cry of our incongruous character demonstrates an apparent pointlessness – here one person is making a claim of “right” when that person is in isolation. This helps to illustrate, at a minimum, that the conceptualization of “right” requires a dyad. That is, right by essential definition is a social reality. Aristotle would say that “people” constitute the *material cause* of human rights. This foundational relation between human rights and duties was emphasized by Paul VI in his Message to the United Nations on the occasion of the 25th anniversary of the *Universal Declaration of Human Rights*:

“While the fundamental rights of man represent a common good for the whole of mankind on its path towards the conquest of peace, it is necessary that all men, ever more conscious of this reality, should realize that in this sphere to speak of rights is the same as spelling out duties.”ⁱ

When speaking of the *Universal Declaration of Human Rights* we recall the Canadian contribution made by another lawyer from Hampton, New Brunswick, namely Professor John Peters Humphrey who had his beginnings and now has his final resting place in that same village. Professor Humphrey worked closely with Eleanor Roosevelt, the Chair of the UN Human Rights Commission that was charged with the drafting of the Declaration. Indeed, the first secretariat draft was hand written by John Humphrey and the copy he gave to me is one of my most prized possessions. John would often tell us that the *Universal Declaration* is the “Magna Carta” of the 20th century.

In his famous encyclical “Pacem in Terris”, Blessed Pope John XXIII also underscored the foundational importance of the *Universal Declaration* which he described as, “an act of the highest importance performed by the United Nations.”ⁱⁱ Pope Roncalli wrote that it was his earnest wish:

“... that the day may come when every human being will find therein (the UN) an effective safeguard for the rights which derive directly from his dignity as a person and which are therefore universal, inviolable and inalienable rights.”ⁱⁱⁱ

Throughout the history of ideas, philosophers, theologians and jurists have informed the notion of law and right. The insight of St. Thomas Aquinas concerning the idea of “right” is especially helpful. He writes that the name *ius* was first applied to mean the “just thing” itself^{iv}. That is, *ius* is not derived from the just thing, but rather it is applied to it as its proper denomination. For St. Thomas, as with Aristotle, the *ius* or notion of rights

refers to something equal. It is a sort of a middle measure or rule, and when our actions correspond to this measure they are said to be correct, or right; that is, they are said to be just. In other words, Aquinas finds that “right” is that measure or rule by which our actions regarding other people are to be measured. Right is seen as the object of justice, and hence justice is determined by rights, and not *vice versa*. St. Thomas is saying that rights are the object of justice, because they are rights; that is, because they are just.

Further on in his analysis of right, St. Thomas says that right is composed of three essential elements: (i) a measure (equal or mean); (ii) due to; (iii) somebody, *alteritas*^v. It is an equality due to somebody. It is due because it is equal, and similarly, it is due to somebody else because it is equal.

“Somebody”, “other”, *alteritas* is taken in the juridical sense of independence ‘*sui juris*’, that is, a person who is juridically independent and not subordinated to the other person from whom he claims or to whom he owes a right.

The Metajudicial Foundation

Beginning with the earliest codes of law, human rights and law have always had a relation with the *metajudicial* – the idea that some laws are higher than those created by man. The image of Moses on Mount Sinai receiving the Ten Commandments, their text “written by the finger of God”, comes to mind. This relationship continues to this day as we have enshrined our rights in the highest of our instruments of positive law – our constitution and international law.

One of the oldest known codifications of law is the *Code of Hammurabi*. In order to formalize his rule, Hammurabi, the Sixth King of Babylon, made a single body of laws for his people. He collected all the old laws and customs stretching back to Sumerian times, and arranged and improved upon them. Finally, he had them carved into stone and placed in the temple of the chief god, Marduk, so all could read it. It thus became the earliest code of laws of which we have a record.

For some, the *Code of Hammurabi* represents the first charter of rights. A number of important dimensions of this Code can be underscored in this respect. First is the fact the Code was promulgated, thus the right for the people to know what the law held was protected. The second dimension relates to the special status the law held by being placed in the temple of the *chief* god.

The metajuridical dimension of law found dramatic expression in Sophocles' play *Antigone*. In the second of the Greek dramatist's Theban trilogy, the story begins in the aftermath of the civil war fought between the sons of Oedipus as to who would be Thebes' full-time ruler. Both sons perish in the conflict and the kingship is assumed by their uncle, Creon, who decrees that the body of Polyneices, as the brother who instigated the conflict, will be left on the battlefield to the carrion birds and without a proper funeral. His sister, Antigone, defies Creon and buries Polyneices. When she is discovered, Creon asks if she knew what she was doing was wrong, to which she replies:

“Yes; for it was not Zeus that had published me that edict; not such are the laws set among men by the justice who dwells with the gods below; nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth.”^{vi}

For Antigone, Creon’s edict had no force of law because it ran counter to the higher laws of Zeus, the highest of the gods of Ancient Greece.

The 1960 *Canadian Bill of Rights* provided in its preamble the metajudicial proposition “that the Canadian nation is founded upon principles that acknowledge the Supremacy of God.”

The same proposition can be found in the preamble to the 1982 *Charter of Rights and Freedoms* which provides that:

“Canada is founded upon principles that recognize the Supremacy of God and the rule of law.”

Notwithstanding the level of attention, or lack thereof, given to this passage by the courts, lawyers and legal scholars, its presence does speak to an important history which students of human rights learn, namely that people possess universal and inalienable rights derived from sources beyond the state. In an interesting article published in 2003 in the *University of New Brunswick Law Journal* by Lorne Sossin of the Osgoode Hall Law School, entitled “the ‘Supremacy of God’, Human Dignity, and the *Charter*

of Rights and Freedoms”, Sossin stated, “it is argued that if the concept of human dignity was 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.”^{vii}

In a June 2010 address to politicians and diplomats in Cyprus, His Holiness Benedict XVI indicated that a Christian in public service should strive to promote moral truth. As the practice of law is, in fact, a form of public service, lawyers and judges might take note that one of the Pope’s principles to promote moral truth is the call for a constant effort to base positive law upon the ethical principles of natural law. An appeal to natural law was once considered self-evident, but the tide of positivism in contemporary legal theory requires the restatement of this important axiom. Individuals, communities and states, without guidance from objective moral truths, would become selfish and unscrupulous and the world a more dangerous place in which to live. On the other hand, by being respectful of the rights of persons we protect and promote human dignity. When the policies we support are enacted for the common good and our common humanity, such actions become sounder and more conducive to an environment of understanding, justice and peace.

As we enter the second decade of the 21st century, this appeal to the metajudicial is urgently needed. Positive law is simply insufficient to combat some of the existential threats we face. Significant challenges to life and liberty over the last decade have increased our awareness of the threat of terrorism. Terrorists do not recognize our positive laws and, moreover,

reject them outright. Positive law alone will not help us with climate change or food security. Only an appeal to the higher laws will create the change that is required.

It is this appeal that the members of the Thomas More Lawyers' Guild of Toronto are ideally suited to make. By following the tradition of your namesake, Saint Thomas More, you will speak the truth to power, and enhance the meaning of positive law with an appeal to metajudicial principles. Take with you an understanding of the foundation and architecture of law and human rights into your service to your clients and your proceedings before the courts.

As you practice law in His Footsteps, we must remember that we are always on trial; we are always judged. The final verdict may not be delivered for years or decades to come, but in the fullness of time it will be delivered. If you live your life like you are the Hampton village lawyer before Justices of the Supreme Court, I am sure the verdict shall be a favourable one.

ⁱ Paul VI, "Message to the United Nations on the 25th Anniversary of the Universal Declaration of Human Rights", 10 December 1973. AAS, LXV (1973), 677

ⁱⁱ John XXIII, Encyclical "Pacem in Terris"; 11 April 1963; para. 143

ⁱⁱⁱ Ibid.

^{iv} St. Thomas Aquinas; *Summa*, II-II, q.57, a.1, ad1

^v Ibid.

^{vi} Sophocles; *Antigone*; 441 BC

^{vii} Lorne Sossin, "The 'Supremacy of God', Human Dignity and the Charter of Rights and Freedoms" in *the University of New Brunswick Law Journal*; vol. 52, no. 227; (2003)