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WORLD LAW: AN ECUMENICAL JURISPRUDENCE OF  
THE HOLY SPIRIT

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# **WORLD LAW: AN ECUMENICAL JURISPRUDENCE OF THE HOLY SPIRIT**

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By Harold J. Berman

I propose to present the four parts of my topic in reverse order, speaking first about the Holy Spirit, next about the major competing schools of jurisprudence and the need to integrate them, then about the ecumenical—and more than that, the universal—character of such an integrative jurisprudence, and finally about the challenge of the Holy Spirit, and of a universal integrative jurisprudence, to create, as indeed we are now already beginning to create, a body of world law.

But first let me make a personal confession of faith. I believe that it is fitting, and perhaps imperative, in a series of talks such as that of which this is a part, for the speaker to disclose his own religious beliefs. If I am to talk, as I shall, about the Holy Spirit, you are entitled to know at the outset whether I believe in the Holy Spirit and, if so, why I believe in the Holy Spirit, and who I understand the Holy Spirit to be. And so let me state very briefly the sources of my own religious faith.

I am a Jew by birth and upbringing, and I am indeed grateful for my Jewish heritage. At the age of 21, at a moment of great despair, I had a powerful vision of Jesus Christ and I became – and remain—a follower of Him, a Christian. When I first became a Christian, I had never worshipped in a Christian church and I did not know to which denomination to turn. Each branch of Christianity seemed to me to have a portion of the

truth. Eventually, to make a long story short, I became a member of the Episcopal Church, which is, if nothing else, “comprehensive.” But I still mourn the disintegration of Christianity into mutually conflicting denominations, and the separation of Christian faith from other faiths that share similar spiritual values, and that fact no doubt helps to explain why I stress the ecumenical character of the belief in the sanctity of spiritual values, held not only by Christians but also by many who are not Christians.

(1)

Let me speak first of the Holy Spirit, whom I would call the God of History.

In the 65 years that I have been attending church services—mostly but by no means only Episcopalian—I have not heard a single sermon on the role that God has always played, and is now playing, in human history. I mean history in the conventional sense of that word: the history of Europe and America over the centuries, the history of the Church, world history in the 20th and 21st centuries. And also in theological literature, of which I confess I have only a limited knowledge, I have not found more than scattered references to God’s role in such history. We are often told that God had a plan for His people in the historical period from Abraham to Moses to Jesus, and again in the conversion of the Roman Emperor Constantine, but we are told little if anything about God’s plan for what have turned out to be almost two thousand years between early Christianity and the present, let alone between the present and Christ’s coming again.

To take a simple example, is it not, for a believing Christian, a matter of divine providence that after two thousand years since Jesus sent his disciples into the world to preach the Gospel there are now approximately two billion people, almost one third of the entire world population, who profess Christianity? And is it not a matter of divine

providence that ever since the emergence on this planet of the human species, the peoples of the various territories have gradually, over the many thousands of years, been coming into contact with each other, and that finally, in the twentieth and twenty-first centuries of the Christian era, all peoples, all cultures and civilizations of the entire world, Christian and non-Christian, have now for the first time in history been brought into continual communication with each other?

A basic reason for the paucity of both sermons and scholarly writings on the working of divine providence in history is, I believe, conventional theology's neglect of the Holy Spirit, who in biblical history spoke through the prophets and at Pentecost brought a common understanding to people of diverse languages. The Holy Spirit is, I believe, that person of the triune God who teaches us, inspires us, to fulfill our historical destiny as children of God, in whose trinitarian image we are created.

St. Augustine taught that God the Father, in creating us in His own image, has planted in our minds will, that is, the capacity to intend and to desire, including the will to create new life and to hand down just laws; and that the image of God the Son, our Brother and Redeemer, is planted in our minds in the form of reason, intelligence, knowledge, and conscience, including the knowledge that we live not only for ourselves but also for others; and that the image of God the Holy Spirit, our Teacher and Prophet, is planted in our minds as memory, our time-sense of past and future, which enables us to form lasting relationships of community. Indeed, it is this time sense and these lasting relationships of community that reconcile the tensions between our parental will and our fraternal reason.

I learned from a great—and greatly neglected—Christian historian and philosopher of the twentieth century, Eugen Rosenstock-Huessy, that God acts in our collective history over generations and centuries, and more specifically, that the three persons of the Trinity are represented in different ways in the three millennia of the Christian era. In the first millennium Christian missionaries taught the European peoples to give up their multiple gods and their worship of tribal chiefs and kings in favor of the one true God, the Creator, the Father of the risen Christ. Their common faith in one God was a necessary foundation for the tribal peoples of the West eventually to come together as a visible hierarchical Roman Catholic Church under the papacy.

In the second millennium of the Christian era, emphasis was placed on the second person of the Trinity as first the Roman Catholic Church, and later the Lutheran and Calvinist churches, took on the mission of reformation of the world; and eventually Christian rulers sent to all continents of the world military, merchants, and missionaries, to conquer, to exploit, and to convert in the name of Jesus the incarnate Son, Jesus the Savior.

The historical challenge of the third millennium of the Christian era, Rosenstock-Huessy taught, is to create out of the many peoples of the world a single community; and in seeking to accomplish that goal, the emphasis of Christian faith must be on the third person of the triune God, the Holy Spirit, who prophesies unity and, taking many different forms, inspires people of diverse belief systems and loyalties to listen to each other, to learn each other's languages, and to overcome their mutual hostilities.

In Rosenstock-Huessy's words, "The story of salvation on earth is the advance of the singular against the plural. Salvation came into a world of many gods, many lands

many peoples. Over against these it sets up a singular: one God, one world, one humankind.”

Surely it is providential that starting with the most ancient civilizations, all humanity has gradually, over the centuries, been brought into a condition of daily—indeed, almost instantaneous—world-wide economic and political interaction. What St. Paul said to the Athenians as a matter of faith, that “God has created all races of man of one blood to dwell on the whole surface of the earth” (Acts 17:26), has now been proved as a matter of fact. And now God the Holy Spirit, active in many different belief systems, challenges us to transform our common humanity from a material also to a spiritual reality. This is the great challenge of the third millennium of the Christian era: to create out of the many peoples of the world one humankind, a world community. In accomplishing that goal, the emphasis of Christian faith should be on the third person of the triune God, the Holy Spirit, who inspires people of diverse languages, diverse cultures, diverse belief systems, diverse loyalties, to listen to each other, to learn each other’s languages, to discover what they have in common, and to join in overcoming the forces that divide them. It is the Holy Spirit who challenges us now to transform the world economy and the emerging world society into a world community.

(2)

Turning now to the second part of my topic, jurisprudence, it is obvious that there cannot be a world community without a body of world law to maintain both order and justice among its different constituents. In this respect it is important to recognize that in all cultures of the world there are what the anthropologists call “justice forums,” with

procedures for the lawful resolution of conflict. What is meant by “lawful” and what is meant by “law” is, however, a matter of dispute.

In the West today there are two rival schools of legal theory: on the one hand, the positivists, who now predominate, believe that law is essentially a body of rules promulgated, “posited,” by lawmakers in order to effectuate their will, their policy, and enforced by coercive sanctions imposed by official authorities; and on the other hand, against the positivists, fighting a rear guard action, the believers in so-called natural law, a law of reason inherent in human nature, contend that the essence of law is not its political dimension but its moral dimension, and that rules laid down by the political authority are not “law” if they violate fundamental principles of justice. Almost totally disregarded today by legal philosophers in America and Europe is a third school, which in the late nineteenth and early twentieth century predominated, called the historical school, whose advocates believe that both the political dimension of law, expressing the will of the lawmakers, and the moral dimension of law, derived from inborn reason and conscience, are subordinate to the historical traditions of the society whose law it is, society’s memory of the past and its anticipation of the future. In Anglo-American law the historical school is reflected dramatically in the doctrine of precedent; judges in deciding cases look back for guidance to previous decisions of similar cases and, at the same time, are conscious of the fact that their decisions will be guides to judges—precedents—in future cases. In Western countries that do not accept the Anglo-American doctrine of precedent, the writings of leading legal scholars preserve the time dimension of law, its traditions of the past and its movement into the future.

In the past two-and-a-half centuries, with the decline of commitment to Christian faith on the part of political and legal scholars, the three schools have split apart from each other into the positivist school, which emphasizes order, the political dimension of law, what St. Augustine called “will”, voluntas, or velle, the natural-law school, which emphasizes justice, the moral dimension of law, what St. Augustine called “reason,” “knowledge,” intelligentia, or nolle, and the historical school, which emphasizes tradition, continuity, what St. Augustine called “memory”, memoria, or esse, which he defined as the time-sense of past, present, and future.

In pre-eighteenth century, pre-Enlightenment Western Christian thought, it was almost universally presupposed that the triune God is the ultimate source of order, of justice, and of human destiny—all three. Thus it was possible to integrate in theological terms the political, the moral, and the historical dimensions of law. Pre-Enlightenment writers on law such as Thomas Aquinas, Hugo Grotius, and John Locke, who, despite their diversity, are usually characterized as believers in natural law, also accepted major parts of both the positivist concept of law as a body of rules laid down by the lawmaking authority and the historicist concept of law as an expression of the developing customs and beliefs of the society whose law it is. Even a rabid pre-Enlightenment positivist such as Thomas Hobbes was addressing the extreme dangers of rebellion and invasion that threatened England in his time, arguing that survival depended on the absolute authority of the monarch, and further, that such authority was based in part on natural justice, an underlying social contract, a covenant.

Roman Catholic jurisprudence and Protestant jurisprudence certainly differed from each other in important respects, the Roman Catholic leaning more toward natural



law and reason, the Lutheran more toward positivism and the will of the state, and the Calvinist toward the normative character of historical tradition; but all three postulated that God has ordained earthly rulers with power to make and enforce laws, that He has implanted reason and conscience in human minds and hearts, and that the Western legal tradition represents a providential fulfillment of God's plan. Tensions among the political, the moral, and the historical dimensions of law were recognized, but they were finally resolved by finding their common source in the triune God, who is an all-powerful lawmaker, a just and compassionate judge, and the inspirer of historical progress, and whose "vestiges" in the human psyche, as St. Augustine taught, are will, reason, and memory, respectively.

In recent generations what has been missing, above all, from the debate between legal positivists and legal naturalists is a recognition of the normative significance of the historical dimension of law. In history, in time, what is morally right in one set of circumstances may be morally wrong in another; likewise, what is politically good in one set of circumstances may be politically bad in another. Conflict between the morality and the politics of law, between what philosophers call the Right and the Good, may often be resolved, however, in the context of historical circumstances; history, the remembered experience of society, may permit or even compel an accommodation between morality and politics. This is, indeed, a fundamental characteristic of law, which may be defined as the balancing of justice and order, of reason and will, in the light of historical experience, in the light of memory.

Historical jurisprudence, which was implicit in the development of the Western legal tradition from the twelfth century on, and which played a critical role in the

development of the English common law in the seventeenth and eighteenth centuries, only emerged as a separate school of legal philosophy in the nineteenth century in the context of the debate between positivists and naturalists. Indeed in the late nineteenth and into the first decades of the twentieth century, historical jurisprudence became the dominant school of legal theory of law both in Europe and in the United States, both among legal scholars and in the courts. Only in the twentieth century the historical school came under attack, partly for its exaltation of the historical traditions of the nation as the ultimate source of all law and partly for its demeaning of the positive role of legislation in the development of law. In the United States it was attacked also, and chiefly, for its assumption that judges, in deciding cases, do not “make” law but “find” it in precedents of the past or in customary law or in other historical sources. To be sure, it has always been recognized that judges play a creative role in adapting past precedents to current and future conditions; nevertheless, the historical school stressed the organic growth of the law, while in the twentieth century emphasis was increasingly placed on the need for innovation. This, in turn, was linked with the “will” theory of law—that judges, like legislators and administrators, decide not according to what the law “has been” or “is” but according to what they will it to be, that is, according to what they consider to be sound policy.

Today the historical school has almost vanished from the academy. Occasionally, it is discussed as a relic of a bygone age. Occasionally it is mentioned as an example of an indefensible “traditionalism.” Indeed, not long ago a leading American legal comparatist and historian, in examining positivist and natural-law justifications for the validity of customary law, expressly stated that he would not consider the matter from the

point of view of historical jurisprudence on the ground that the historical school “is today universally rejected.”

If in the United States historical jurisprudence is considered to be dead, it is partly because it has been caricatured to death by its opponents. Its best exponents endorsed not historicism but historicity, not traditionalism but tradition. Historicism is the return to the past; historicity—what St. Augustine called “memory” and what psychologists of memory today call “the temporally extended self”—emphasizes the interaction of past and future in the human psyche and in the development of the culture of a society, including its legal culture. In the words of the distinguished contemporary church historian Jaroslav Pelikan, “Tradition is the living faith of the dead; traditionalism is the dead faith of the living.” Rapid change, even periodic revolutionary change, has been part of the evolution of the Western legal tradition. On the other hand, historical jurisprudence is not, as some scholars have supposed, merely a sociological statement; it did, indeed, in the hands of some social theorists become part of a sociology of law, a study of the influence of social and economic and ideological factors on legal development over time. As a legal theory, however, it stresses a belief in organic development, not just a belief that such development exists. It looks to the past heritage of the law as an important source of its self-conscious growth in the present and future.

If it is granted as a matter of legal theory that history, tradition, group memory, ranks with politics and with morality, with will and with reason, as a foundation of law, then we must take the next step and ask what our history tells us about our law—tells us not only what to think about our law but also what to do about our law. Here we must look back to the past and forward to the future, asking not only what has happened in the

past and what the past tells us is likely to happen in the future but also what in the past we are bound by, what our tradition requires of us now.

(3)

In addressing the third part of my topic, namely, the universal character of a jurisprudence that integrates positivist theories, natural-law theories, and historical theories, I have in mind that this is not only an ecumenical Christian jurisprudence that integrates Roman Catholic, Lutheran, and Calvinist concepts of law, but it is also an inter-religious jurisprudence acceptable to Judaism, Islam, and other non-Christian religions that recognize the God-given character of the human qualities of will, reason, and memory; and now I would add that it is a jurisprudence that is also acceptable to those secular belief systems, those civil religions, as they are sometimes called, that accept the supremacy of spiritual values over material values. I believe that the Holy Spirit is present in those secular belief systems and that the Holy Spirit challenges them, as She challenges us all, to endorse a jurisprudence that integrates the political objective of law to maintain order with the moral objective of law to foster justice and the historical objective of law to preserve continuity in the process of reforming society's institutions of order and justice.

Here I am helped by theological movements within the Roman Catholic Church since Vatican II—movements that affirm the activity of the Holy Spirit even in societies that do not profess Roman Catholic or other Christian faith. Vatican II, I have read, emphasized that the Holy Spirit speaks to, and may be understood by, not only Christian believers but also persons of other faiths; also Pope John Paul II has emphasized that the Holy Spirit is present and active not only in Christian but also in non-Christian religious

traditions; and prominent Roman Catholic theologians have stressed that such traditions themselves can play a positive role in the divine plan for humankind. As the prominent Jesuit theologian Jacques Dupuis has written, “Recent [Roman Catholic] church teaching has insisted on the universality of the active presence of the [Holy] Spirit.” “The Spirit’s presence and activity,” he has said, “affect not only individuals but also society and history, peoples, cultures, and religions.”

(4)

This leads me to the last part of my presentation and the first words of its title: “World Law”.

Let me repeat that for the first time in the history of the human race all the peoples and all the cultures of the world have been brought together in continual interrelationships. This has been most apparent in the economic sphere. Business enterprises and other kinds of economic actors, communicating together from all nations to conduct their common affairs and to establish common norms of intercourse and common institutions, constitute an important element of a world civil society. Other constituent elements of world civil society include multinational religious associations, information and news media, educational and research organizations, professional societies, sports associations, and a host of other types of voluntary associations which, in the words of a leading scholar, are “made up of individuals and groups without regard to their identities as citizens of any particular country and outside the political and public dominion of the communion of nations.”

The emerging world society is creating transnational legal institutions. The world economy is supported by a growing body of transnational law of trade and investment

and finance. Worldwide communications are also increasingly subject to a body of transnational legal regulation. A multitude of transnational organizations and associations, formed to advance a myriad of different causes, work to introduce legal measures to reduce world disorder and overcome world injustices, to prevent destruction of the world environment and pollution of the world atmosphere, to prevent the spread of world diseases, to eliminate the abject poverty of the billion or more people of the world living on an income of less than a dollar a day, to remedy violations of universal human rights, to counter worldwide terrorism, to resolve ethnic and religious conflicts that threaten world peace. People from all parts of the world have come together in calling for the development of worldwide legal protection against these and other global scourges through the development of official and unofficial legal institutions. They have also come together to promote world travel, world sports, world leisure activities, and other kinds of good causes that affect all peoples and that require transnational regulation to be carried out in a just and orderly way.

The growing body of world law includes not only public international law, that is, the law created by nation-states in their relationships with each other, including the law governing the United Nations and its subordinate intergovernmental organizations, but also the enormous body of contractual and customary legal norms that govern relations among persons and enterprises engaged in voluntary activities that cross national boundaries. World law is a new name for what was once called jus gentium, the law of nations, the common law of mankind, embracing common features of the various legal systems of the peoples of the world.

The emerging world society and its accompanying body of world law are, to be sure, gravely threatened by extremists of the various world cultures. But the “clash of civilizations,” in Samuel Huntington’s phrase, is taking place on the background of intercultural communication and interaction. Even the antiglobalists form a global network. Even the terrorists are part of a transnational conspiracy.

An integrative jurisprudence, which accepts the measure of truth residing in each of the three major schools of legal theory and which seeks to integrate them, is needed to recognize and interpret and support the growing body of world law.

Such a jurisprudence builds on the positivist theory in its analysis of the 20,000 or more international treaties and conventions that are registered with the United Nations, which constitute legislation not only of the individual states that have ratified them but also of the international confederation of states—constitute law in the positivist’s sense of that word, despite the absence of an overriding international sovereign. Also positivist jurisprudence today has no difficulty in recognizing the law-making role of some thousands of intergovernmental organizations charged with the administration of such treaties and conventions. Moreover, positivist jurisprudence has not only accepted the validity of a body of law that emanates from contractual relationships of independent sovereign states but has also contributed important techniques of making, interpreting, and applying such law.

Also natural-law theory, which once dominated the analysis of public international law, continues to play a significant role in its formation and implementation. Public international law presents itself as an instrument of universal moral values, of human rights, of justice. This is nowhere more apparent than in international conventions

proscribing slavery, war crimes, so-called crimes against humanity, genocide, apartheid, and torture. In addition, in the so-called private sphere of international relations, natural-law theory supports the formation and application of norms of justice by individual persons, enterprises, and voluntary associations engaged in transnational activities. These are what Jesus called “the weightier matters of the law”: you will recall that he rebuked the Pharisees, saying “Woe unto you lawyers, for you tithe mint and dill and cumin but you neglect the weightier matters of the law, which are justice and mercy and good faith. These you should do, without [he added] neglecting the others”—without neglecting the technicalities! Jesus respected the legal positivists’ concern for order, provided that it complemented the legal naturalists’ concern for justice!

Above all, both the political aspects of world law, viewed from a positivist perspective, and the moral aspects of world law, viewed from the perspective of natural law, are also to be viewed from the historical perspective of the coming together in the twentieth and twenty-first centuries of virtually all the peoples of the world in continual relations with each other.

In closing I return to where I started: The Holy Spirit is the God of History, the God of past and future, the nurturing God who inspires us to adapt our parental and fraternal heritage, our will and our understanding, to the prophetic challenge of the times in which we live—today the challenge of the new millennium, the challenge to fulfill our mission of universal community. And She is present in the creation of common legal institutions among the multiple cultures of the world, guiding all races of men, in St. Paul’s prophetic words, to dwell together on the face of the earth in peace and in justice.