

CHAPTER I

Introduction

THE RELATIONS OF LAW AND RELIGION

Justice is the fundamental moral requirement of human life in community. Historically in Western culture, it has been a central concern both of law and of religion. Reflection on justice is a perennial theme not only in the classical political thought of Greece and Rome but also in the biblical understanding of the righteousness and sovereignty of God. Although justice has both a legal and a transcendent dimension in each of these traditions, its transcendent character achieves its fullest expression in the ethical monotheism of the Hebrew prophets of the sixth to the eighth centuries BC. While acknowledging that all three of these traditions have made major and distinctive contributions to the development of modern law, Harold Berman argues persuasively that the Western legal tradition as a whole rests upon the underlying religious “belief in a God of justice who operates a lawful universe, punishing and rewarding according to principles of proportion, mercifully mitigated in exceptional cases.”¹ In the twentieth century, however, this historical connection between law and its religious roots has been substantially broken. This erosion of its historical foundations constitutes the real crisis of modern law.

Berman’s study is primarily analytical rather than constructive. The secular and increasingly global context of present-day law precludes the possibility of return to the legal systems of the past. Nevertheless, a study of the tradition is an essential preparation for the constructive task which lies ahead. Such a study reveals the distinctive character of modern Western law: objectivity and

universality, rationality, reciprocity, participation, integration, and a capacity for organic growth and development.² These qualities were dependent, Berman believes, upon the theological presuppositions underlying the development of canon law (1050–1200), which constitutes the first modern legal system. In a broad sense, these theological convictions were generally shared in the West until the beginning of the twentieth century. During this time secular law was grounded in appeals to the divine law (revealed in Scripture) and natural law and, more recently, in human rights. Today, however, secular law, bereft of its original foundation, is left “suspended, so to speak, in mid-air.”³

Though the religious basis of the legal tradition has eroded, the story of the development of the latter provides an indispensable historical perspective for the creation of new forms of law in a secular, pluralistic and international society. Such a narrative provides insight into the processes by which the foundations were laid for a unified, objective, universal system of law in the West and how that system evolved through times of revolutionary change. Indeed, in the period that lies ahead, Western law may well serve as a new “*corpus juris Romani*” for the development of a common legal language and the formation of a new legal order for all humankind, an order that is both stable and just.⁴ The study of Western law will need to be supplemented, however, by similar attention to non-Western legal systems and traditions; for they, too, are indispensable participants in the creation of a global community of order and justice. They, too, will provide critical texts for the development of a common legal language and the creation of new forms of legal order.

Berman’s study is particularly pertinent to the present examination of justice for a number of reasons. First, Berman calls attention to the manner in which the legal system of the West has been shaped by a variety of traditions, including especially Greek and Roman law and the biblical understanding of God’s justice, as well as the customary laws of different peoples. Each of these traditions contained certain critical texts which have been rediscovered, reappropriated, and applied in new circumstances. These texts became important components of the developing legal system. In the course of rediscovery and reappropriation,

the texts themselves – the traditions which they symbolized – were mutually reinterpreted and transformed. This process of retrieval and reinterpretation continues into the present.

Secondly, Berman's study of the development of Western law points to the presence of a deeply rooted pluralism in that tradition from the beginning. This pluralism was expressed not only in terms of the duality between secular and ecclesiastical systems of law, but also in terms of a pluralism of largely autonomous secular legal systems. To be sure, acceptance of such forms of pluralism between ecclesiastical and secular jurisdictions and especially among national states was based upon the common acknowledgment of an objective and universal moral order grounded in the divine will. Under such circumstances the question of pluralism was ultimately transcended through confidence in the creative and ordering activity of a just and sovereign God. Today, however, the problem of pluralism arises at a far more fundamental level, namely, the erosion of the religious foundation of the entire Western legal tradition. The alternatives to order based on justice are subjectivism (fragmentation of community), order based upon coercion (power), and positivism.

In the third place, Berman's concept of the interaction of law and religion points to the dynamic character of the relationship between the two. On the one hand, law and religion are independent realities, each with its own identity and history so that neither is reducible to the other; yet, on the other hand, they are also mutually interdependent so that neither can be fully understood in isolation from the other. Each is most adequately comprehended in terms of a tradition which includes more than a body of rules (law) or a system of beliefs (religion); each also includes the expression of such rules or beliefs in practice. Like religion, law "involves not only reason and will but also emotion, intuition, faith."⁵

Law and religion are primarily concerned with different relationships. Law in the secular sense has to do principally with life in the "earthly city." Its goal is the provision of order and justice in human communities. In contrast, in its Judaic and Christian forms, religion is principally concerned with humanity's

relationship to God. Humanity's proper relationship to God includes both the exclusive worship of, and final obedience to, God. Yet, while the relationships involved in law and religion may be thus sharply distinguished for purposes of analysis, they are not mutually exclusive. The first requirement of prophetic religion is to love God with all of one's heart, soul, mind, and strength; and the second is to love one's neighbor as oneself (Mark 12:28:31; cf. Deut.6:5 and Lev.19:18). As previously noted, law is in turn grounded ultimately in certain fundamentally religious convictions which provide the basis for belief in a moral order that is rational, objective, universal, and dynamic. Berman describes this ongoing pattern of relationships between law and religion variously in terms of mutual interaction, dialectical tension, and transformation.

In the fourth place, Berman's developmentalist interpretation of the growth of the Western legal system implies a relational conception of law and justice. This does not mean that law and justice are therefore subjective. In the debate between legal formalism and policy-oriented forms of legal reasoning, Berman's sympathies clearly are much closer to the former than the latter.⁶ The answer to an excessive emphasis upon logical consistency in the law is not an attack upon the general rules of law and justice but rather "a balance among rule, precedent, polity, and equity."⁷ Such a balance has been struck in the Western legal tradition, and an attack upon any one of these four elements tends to diminish the others and threaten the system as a whole. In the name of antiformalism, a "public policy" approach to law tends to view law as "wholly contingent, contemporary, and arbitrary." As an alternative both to rigid formalism and to "public policy" forms of legal reasoning, Berman stresses "the autonomy, the integrity, and the ongoingness" of the legal tradition itself. In this tradition, law and justice are viewed as objective, rational, and universal; as such, they stand in judgment upon all historical political systems.

Such a relational conception of law is implicit in the process of adaptation of Western law to different forms of positive law from the Papal Revolution of the eleventh and twelfth centuries onward. It is evident more particularly in the acknowledged

legitimacy of pluralistic forms of secular law, not only within nation states but across national boundaries. Law involves custom and equity, not just statutes and court decisions.⁸ Particularly in its earlier, formative era, Western law was derived largely from custom, which was interpreted in the light of equity (reason and conscience). For Berman, law is a *process* of interpretation and application of general rules in the light of particular institutions, procedures, values, and patterns of thought. Thus understood, law involves reciprocity, participation, and growth.⁹ It is subject to reinterpretation and new forms of application as evidenced, for example, by evolving and changing conceptions of social justice and human rights.

A STUDY IN THEOLOGICAL ETHICS

The present work focuses upon one aspect of the relations of law to religion, namely, the question of the meaning and sources of justice. In pursuing this question one is led necessarily to a consideration of justice both from the perspective of religion and from that of law. In Judaism and Christianity, God is just and righteous. Not only is he just in his relationships with humankind; he also requires justice in the human, earthly community. He rules over all nations, and his judgments and salvation extend to the ends of the earth. Such a concept of the divine justice does not mean, however, that the divine will is revealed primarily in codes of religious and civil law. Belief in a God who demands justice does not so much provide an answer to the concrete meaning of justice in the secular realm as it sets an agenda, gives motivation, and provides a perspective by which all human forms of justice are finally measured. Protest against injustice and the promise of justice are constant themes of biblical faith. They are fundamental elements in the biblical conceptions of the kingdom of God, the messianic hope, and the final judgment.

If one begins, on the other hand, with an examination of justice from the perspective of secular law, one cannot escape the issue of the criteria of justice, particularly of just laws. Moreover, one is brought face to face with the question of the

foundations of justice. What is the basis for the claims of justice? What is the source of the obligation to act justly? How is justice related to human fulfillment? Many answers have, of course, been given to such questions in the past, and many are still given today. These include natural law, positivism, and critical skepticism (legal realism). In part, the justifications which have been given for such positions are philosophical; they are also intentionally religious, as in appeals to natural and divine law. In either case, reflection upon the meaning and foundations of legal justice raises issues that go beyond law itself and pose questions about the justice of particular laws and, most importantly, about the final basis of authority of the system itself. The answers to such questions are rooted in underlying conceptions of human nature and the moral order. As such they rest finally upon faith – whether secular or religious – rather than upon empirical data. In this sense, the questions themselves are fundamentally religious in character.

While the following study is interdisciplinary both in intent and in design, it is basically an essay in theological ethics. Its purpose is to provide a basis for the mutual engagement of theology and law in the common task of justice. Historically, Roman Catholicism has provided a language for such a discourse in the form of natural law. Protestantism, on the other hand, has generally rejected the latter as a basis for a social ethic. In contrast to Lutheranism, it should be noted, the Reformed tradition, represented by Calvin and Puritanism, has retained a stronger basis for a modified conception of natural law. On the whole, however, the concept of justice has either been neglected or separated from the work of love in Protestantism. Justice has tended to be understood primarily in terms of obedience to existing institutions, and the maintenance of order in society. Love, on the other hand, has tended to be limited to interpersonal relationships.¹⁰ Where justice has been taken most seriously, it has been interpreted primarily in formalist categories. Adequate attention has not been given either to the relational character of justice or to its social and psychological sources.

The crisis of justice constitutes, therefore, one of the most fundamental crises not only in law but also in ethics, including

both philosophical and theological forms of the latter. Even in Catholic thought, natural law – at least in its traditional usage – no longer proves viable as the basis for secular law in a pluralistic age.¹¹ Attempts to address the problem of justice in the present day lead inevitably to the reality of pluralism. Confronted with pluralism, Alasdair MacIntyre suggests that the quest for justice has been replaced by struggles for power in modern society. This is true, he believes, because society has lost that underlying sense of unity and purpose which alone makes agreement about justice possible. A renewal of justice is therefore dependent upon a rebirth of homogeneous moral communities based upon a common narrative and a shared moral vision.¹² Although the contemporary crisis of Western law is unprecedented in its depth, Berman seems less pessimistic about the prospects of pluralism, perhaps because the story of Western law includes an account of the ways in which less radical forms of pluralism have been incorporated into the tradition itself. Others, including Milner Ball, Michael Walzer, and Donald Lutz find in the biblical image of covenant a contemporary metaphor for understanding political community and law.¹³ In the pages which follow, attention will be given to the resources which the traditions of virtue, natural law, and covenant provide for dealing with the problem of justice in a pluralistic society. Throughout, an attempt will be made to bring philosophical and political writers into conversation with theologians and ethicists about the nature, sources, and criteria of justice. Such an approach to the contemporary problem seems promising since it follows a pattern which is present in the historical development of Western law and theology.

METHOD OF INQUIRY

While the study is normative and constructive in its intent, its method is basically phenomenological. An effort will be made, first of all, to identify the moral dimensions, or components, and the underlying structures of justice as these appear in certain major traditions – or “texts” – which have deeply influenced our contemporary thinking about justice. Aristotle is particularly helpful in this regard on account of the method which he employs

in analyzing moral experience. In the *Nicomachean Ethics* Aristotle speaks of four dimensions of justice: just person, just acts, just laws, and transcendent justice. All are included in the common idea of justice. In addition, he describes certain fundamental structures of community life, each of which is related to a corresponding form of justice. First, there are the relationships of individuals to one another (reciprocal or exchange justice). Secondly, there are the relationships which the community as a whole has to its individual members (distributive justice). Finally, there are the relationships which individuals have to the community as a whole (general justice). Through Aquinas the ethics of Aristotle were incorporated into traditional Catholic moral thought as part of a synthesis of reason and revelation.

Although the interpretations of justice in the ensuing chapters do not generally use Aristotle's terminology as their primary language, they nevertheless deal with the same basic dimensions and structures of justice. A major purpose of the present inquiry is to examine the specific forms in which both the continuities and the differences between the various traditions appear. The task itself is twofold. It includes an investigation of the primary metaphors in each tradition; but it also includes an exploration of the extent to which the primary images of each tradition are supplemented or reinforced by secondary images which are present in the moral language of the community as a whole.¹⁴

Analysis of the structures of justice points to the underlying relationships in which the claims of justice are grounded. The structures of justice constitute basic patterns of interaction of the self with others. As such, they are present in all collective forms of human life. In the chapters which follow, we will encounter sharp differences regarding the nature and substantive claims of justice in the various texts which will be examined. An investigation of the underlying human relationships provides a framework for analyzing not only the differences but also the commonalities among these traditions. Such a study will help to clarify the historical relationships between these traditions; it also points to their continued presence and mutual interaction in Western society. Clearly, they cannot be reduced to a single idea of justice

without losing much of their individual richness and vitality. Rather, their relationships to each other are best understood in dialogical or dialectical terms. Together they contribute to the renewal and transformation of justice in modern, pluralistic forms of society. By focusing upon the forms of justice in human experience, we are able to see more clearly the relationship between beliefs and values, being and doing, rules and virtue, reason and the affections both in moral agency and in the fulfillment of human life in community.

Certain common questions run through all of the ensuing chapters. The following in particular are especially pertinent to the present inquiry: is justice understood primarily in terms of virtue? If so, does it include certain rules or laws as well? Conversely, if justice is perceived primarily in terms of law, does it likewise entail some notion of virtue? If justice includes both virtue and law, how are the two ideas related? Does the idea of justice presuppose some essentially religious referent in terms of which all systems of positive justice are finally judged? If such a transcendent norm is presupposed, how is it understood, and what relationship does it bear to historical forms of justice?

PROCEDURE

Taking a cue from Berman, the procedure of the present essay will be to examine selected traditions or “texts” which have been historically influential in the formation and shaping of the Western tradition of justice. Separate chapters are devoted to the classical tradition of virtue (Aristotle and Aquinas), the biblical conception of God’s righteousness, the idea of covenant in Puritanism, and Locke’s theory of social compact. Chapter six is a case study of the moral foundations of the American Republic. The concluding chapter represents an attempt to provide a theological interpretation of the relations of justice to law based upon a covenantal understanding of community.

Understood in terms of covenant, justice is perceived fundamentally as promise. A covenantal conception of community provides the basis for an affirmation of pluralism rooted theologically in Creation and the divine ordering of human life. In this

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context, the relationship between theology and secular systems of justice is dialectical and interactive. It involves a process of mutual transformation. Covenantal justice is relational and developmental, rather than formal and static. It also implies participation of all members of the political community in the determination of particular forms of civil justice and public policy.