

ESSAY ROUNDTABLE

THEOLOGY AND JURISPRUDENCE: A GOOD PARTNERSHIP?

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In this essay, I argue for the fittingness of restoring in the era of secularization the dialogue between theology, the rational discourse about the divine, and the jurisprudence of the secular legal system. From a secular point of view, it is suitable for legal thinkers and legal philosophers to be familiar with theology, just as it is best for an architect to be familiar with the type of soil on which to build a structure. From a theological point of view, it is also appropriate for theologians to be familiar with the secular-legal, just as it is suitable for an environmental soil scientist to know the type of structures that can be built on a landscape. Interactions, synergies, and communication between sciences play an important role in the development of a scientist's knowledge.

It was once generally accepted by legal thinkers and theologians that jurisprudence is autonomous from theology and theology from jurisprudence, and that the distinction between the divine and secular orders shape Western legal culture. However, the time has come to rediscover the place of theology in the genealogy of legal reasoning. Acknowledgment, not resolution, of the tensions and contradictions that define the relationship between theology and jurisprudence is the necessary starting point for the reconstruction of this culturally important relationship in order to seek an understanding of theology and law as part of human knowledge.

Modern secular systems have been shaped and structured to be profoundly theological because jurisprudence, in some ways, is a distillation of religion. Ancient Roman law originally was made by priests—the so-called pontifical jurisprudence.¹ Litigant's pleadings in civil suits took the form of religious rituals, and there are extraordinary coincidences, analogies, and correspondences between both legal and theological concepts. As Leibniz, a connoisseur of Roman law, rightly emphasized, "in moving from theology to jurisprudence we have rightly transposed the example of our division into sections, because the similarity among the two disciplines is surprising."² Indeed, there are key ideas, concepts, and values with both theological and legal dimensions. Consider, for example, the concepts of law, justice, marriage, covenant, satisfaction, oath, freedom, dignity, obedience, authority, tradition, redemption, punishment, and person—and even those of intercession, grace, confession, and sacrament. Because of their common sources, from time to

1 See Franz Wieacker, *Römische Rechtsgeschichte*, 2 vols. (Munich: Beck, 1988), 1:310–40 (including bibliography).

2 See Gottfried Wilhelm Leibniz, *The New Method of Learning and Teaching Jurisprudence*, trans. Carmelo Massimo de Iuliis (Clark: Talbot Publishers, 2017), part 2, paragraph 4, page 33.

time it becomes historically complicated to determine whether the origin of a concept is jurisprudential or theological.

As Protestant ethics were instrumental in precipitating the factors that led to modern capitalism,³ theology was also instrumental to precipitating modern secular legal systems. No wonder Harold Berman stated that “Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted.”⁴ Although legal systems were submitted to different processes of secularization, especially during the Protestant Reformation and Enlightenment, the pillars of Western legal systems remain alive and operative. Secular legal systems are Western legal systems, and Western legal systems are traditionally and historically deeply theological.

Secular legal systems are based on social assumptions that depend, in many cases, on religious beliefs. Once these social assumptions change, legal systems should also change by incorporating new principles; however, they cannot change frivolously. The adoption of new legal principles requires knowledge of the old principles from which the legal systems were inspired; otherwise, any shift can become risky. To take advantage of the connections and analogies between theology and jurisprudence is consistent with the principles of secular legal systems. However, a legal theology, in the sense of a legal principle that emanates directly from theology as a legal dogma, which should be recognized by secular legal systems, would be against the essence of the secular legal system. A legal theology cannot provide any legal dogma. That is not its function. In this sense, a secular legal theology cannot be aligned with Schmittian propositions.⁵ Secular legal theology has no political intentions, let alone an ideology of sovereignty, as Carl Schmitt stated.

A distinction or separation between the legal and divine orders does not mean a break in the orders, let alone a rejection by either of the other. If a person embraces both legal and religious dimensions, it is the person, not the legal system or the religious community, that should integrate the two orders. Therefore, the legal order should at least recognize the existence of the religious order and protect it in order to facilitate the personal integration of both orders.

Knowledge of God is not required for the development of a secular legal system, since the nexus between God, man, and the world is not a secular legal nexus. However, knowledge of God can illuminate the idea of legal authority, legal order, and other legal ideas, since the legal constitutes a nexus between man and the world. Knowledge of God cooperates in the ultimate explanation of secular legal systems. Theology should not be isolated, let alone extinguished, from jurisprudence, since the presence of theology does not prevent jurisprudence from drawing on its own principles from human reason.

The theological idea of God affects the secular legal system at its heart, but always from the outside. It illuminates the legal system by protecting and strengthening its pillars without exploiting its internal legal structure. The theological idea of God has foundational significance. While the foundational significance affects the grounds of the legal system, it cannot be translated into concrete legal norms or submitted to the standards of legal causation because God’s causality is not submitted to legal discourse. God’s causality is completely different from the causalities of created causes.

3 See Max Weber’s famous but much-contested essay, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons, 2nd ed. (Los Angeles: Roxbury, 1998).

4 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 165.

5 See the famous essays of Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005); and Carl Schmitt, *Political Theology 2: The Myth of the Closure of any Political Theology*, trans. Michael Hoelzl and Graham Ward (Cambridge: Polity, 2008).

By strengthening the commitment to respecting the universe and enhancing and embellishing the ideas of the human person, dignity, equality, moral freedom and responsibility, solidarity, and human rights, the theological God illuminates secular legal systems. All of these ideas are at the heart of secular legal systems. All of them can be defended and protected without any reference to God, but the existence of a personal God bolsters these crucial ideas. A legal system enlightened by God is more understandable and human than is a legal system in which God is not under consideration. Let me provide some examples. None of them formulates a conclusive argument, but all of them converge on the same idea: the theological God strengthens the foundations of the secular legal system, and there is no secular legal justification for not recognizing this fact.

RESPECT FOR THE UNIVERSE

The universe, understood as the entire space-time system and everything that exists therein, is an objective reality of nature and value. The objective value of the universe can be discovered by both believers and nonbelievers, even prior to the existence of God. Epistemologically, this value does not depend directly on the existence of God; it depends on the existence of the universe. However, the existence of God provides a reasonable justification (not a scientific explanation, of course) of the existence of a universe of value and, at the same time, provides important additional value to the universe.

If there is a God, he could have created the universe. The inevitability and necessity of a God of infinite power, knowledge, and freedom is stronger than the potential inevitability and necessity of a universe that cannot be completely explained and justified as a materialistic space-time process. As Thomas Nagel explained, consciousness presents an obstacle for evolutionary reductionism because of its irreducibly subjective character.⁶ Therefore, although there is no scientific argument, it is more reasonable to attribute the starting point of the universe to God than to attribute the starting point of the universe to its own inevitability. In God we can find the creative reason, the mind of the universe, which links subjective human reason and the objective reason of the reality of the universe, the intellectual structure of the human being and the intelligent structure of the universe as a whole.⁷ The existence of God makes the value of the universe ontologically higher, as it allows us to discover a divine order behind the universe, which is an expression of the goodness and love of God. If the universe comes from God, creation moves toward divinization. This divine teleological project implies that systematic and orderly features of the natural world are not mere coincidences. It also implies a human duty to manage the environment by legally banning all decisions and practices that lead to the destruction of the universe.

To fully understand the process of the creation and evolution of the universe would be amazing, of course, but it is not essential for my argument. Just as works of art ultimately belong to the artists, the universe ultimately belongs to its divine maker. God gave the universe, specifically the earth, to the entire human race for the sustenance of all its members, without excluding or favoring anyone. The dominion of human beings over the universe is not absolute; it requires a respect for the integrity of creation. The universe should be protected, shared, and enjoyed as a precious gift,

6 Thomas Nagel, *Mind and Cosmos* (New York: Oxford University Press, 2012), 71.

7 In this vein, see Joseph Ratzinger, *The Garden of God: Toward a Human Ecology* (Washington, DC: The Catholic University of America Press, 2014), 92. See also, Pope Francis, *Laudato Si'* [Encyclical on care of our common home] (May 14, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

but this gift does not constitute a legal transfer of ownership. If human beings as individuals are a part of the universe, the universe cannot be legally transferred to human beings, just as a whole cannot be legally donated to a part. If human beings as individuals constitute a part of the universe, human beings cannot be the full owners of the universe, just as one cannot be the owner of oneself. Ownership demands otherness: the owner and the item in ownership must be different; otherwise, no real and full ownership exists. Human beings can and should be administrators, limited owners, but not full and unconditional owners of the universe and everything that exists therein.

These facts have legal implications, specifically for understanding the foundations of the right to public and private property. The ownership of property, which is fundamental for the autonomy and development of persons and communities, is not absolute and unconditional. The right to property, therefore, cannot be reduced to a legal response to the human desire to have possessions. It is not a source of exclusiveness. It is justified as an instrument of personal flourishing and an expression of the human duty to actively contribute to the development of the universe. Therefore, the right to property should be exercised in accordance and in harmony with the intrinsic rules of the universe and the universal destiny of all gods of the universe. Legal systems should safeguard the conditions of a universal ecology by avoiding arbitrary use of the universe, which subjects the universe without restraint to human will. On the other hand, exercising the right to property is not for the benefit and advantage of the owner so much that he or she can licitly destroy the property. The right to property has an inherent social purpose, so it must be limited by legal systems in accordance with the common good and social interest of political communities.

HUMAN DIGNITY

The existence of God strengthens the centrality of each individual person, since each individual has the capacity to assume responsibility for the development of the created order of the universe. Each person collaborates with God. This inalienable condition of the priority of each person over the political community and natural order is called dignity. Dignity is, therefore, not just a quality among other empirical data; it is the human being's most radical and inherent quality. It is more than a right, basic good, value, and principle. It is the transcendental ground for the fact that human beings have rights and duties.

The concept of the dignity of each person has been rooted for centuries in the notion of his or her creation in the image and likeness of God (Genesis 1:26–27). The notion of an image of God is an empowering idea that summarizes and validates the place of each person in the universal order. It is an expression of the precious value that is intrinsic to all humans. Each person is substantially a mirror of God, and, thus, each person can have a personal relationship with God. In other words, the relationship or representation and resemblance to God are constitutive of, that is inseparable from, the human being.

The theistic approach to dignity provides an objective validity to the general idea of dignity that no agnostic or atheistic approach can match. Without a theistic approach, dignity can be reduced to a subjective substantial self, a pure capacity for rational autonomy, a mere self-respect as a necessary condition for living well and taking seriously moral responsibilities,⁸ or a simple right to be recognized as legal persons. In the worst case, it can be transformed into a formal and empty concept.

⁸ See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011), 13–14.

HUMAN EQUALITY

The theological God also provides a relevant argument in favor of basic ontological human equality. The proposition that all human beings are fundamentally equal, despite the differences between them, is coherently supported by a theistic argument. It is a consequence of sharing the same transcendental dignity of creatures according to the image of God. Locke derived the principle of human equality, including gender equality (Adam and Eve), from this *imago Dei* (image of God) doctrine.⁹ According to Locke, basic equality is the strongest grounding that a theological axiom can have and probably the divine truth with the most far-reaching political and social implications. The Lockean concept of equality is not a secular doctrine. It makes sense in light of the relationship between the maker and creatures.

Important political theorists such as John Rawls,¹⁰ Ronald Dworkin,¹¹ and Bruce Ackerman¹² ignored the theological foundations of the theistic approach as irrelevant to their egalitarian argument; however, these foundations are not irrelevant. Basic equality, understood as treating people with equal concern and respect, is found within the secular argument. An ontologically theistic foundation of equality strengthens the legal approach to the principle of equality. Equality is not merely a matter of treatment, respect, and concern, or a condition for being able to reach general agreement on common political aims in political communities. It is, rather, an ontological matter: all human beings are equals before God, since all of them share some divine features. In any person we can see a creature of God, a free and responsible contributor to God's plan for creation. Without this ontological perspective, it is easy to transform the concept of equality from an ontological principle to a mere legal rule that assigns burdens of arguments in the justification of the application of the law.

MORAL FREEDOM AND RESPONSIBILITY

With free will, people can shape their own lives and exercise dominion over the universe. If people consider freedom a gift of the metalegal God, they are prone to search for the good. Just as individuals exercise their dominion over the universe and shape it in accordance with their own intelligence and will, so too do they use freedom to search for and adhere to the good and strengthen and consolidate their likeness to God. At the same time, considering freedom to be a gift instead of an independent human power makes people likelier to accept responsibility for their own actions. Just as individuals can become more conscious of responsibility by caring for others' items entrusted to them than by caring for items they own (for example, a leased car requires more attention than does an owned car), by considering freedom a gift from the outside, individuals are more conscious of their own responsibility. Responsibility is the human response to the divine gift of freedom; it is a normative implication of being creatures. For that reason, responsibility is not just for something, but to someone. The existence of God helps people understand that responsibility to

9 See John Locke, *First Treatise*, in *The Selected Political Writings of John Locke*, ed. Paul E. Sigmund (New York: W. W. Norton, 2005), chapters 1 and 5, pages 6–10; John Locke, *Second Treatise*, in *The Selected Political Writings of John Locke*, ed. Paul E. Sigmund (New York: W. W. Norton, 2005), chapter 2, no. 4, page 18.

10 John Rawls, *Theory of Justice*, rev. ed. (Cambridge, MA: The Belknap Press of Harvard University Press, 1999), 441–50 (paragraph 77).

11 See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000).

12 Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), 15–17, 53–58.

themselves is objective. The degree of responsibility does not depend exclusively on their own standards, terms, and conditions. If it did, it would render meaningless the idea of responsibility, as responsibility would be an empty and vacuous concept. On the other hand, the theological God helps people understand that they as creatures cannot have a universal responsibility. Being responsible for everything would weaken the very idea of responsibility.

HUMAN SOLIDARITY

The theological God constitutes a source of solidarity among human beings. Humans are God's gift to humans, on whom he has impressed some reflection of his own essential constitution: love and the capacity to love and to be loved. Just as God wanted to share his love, beauty, and goodness with creatures by creating the universe, people should share with others the gift of creation. Human solidarity embodies sharing spiritual and material goods; it transcends reciprocity.

God strengthens the "spirit of brotherhood" on which the Universal Declaration of Human Rights was founded.¹³ Although the Universal Declaration of Human Rights does not mention God, the idea of God informs the document; its spirit of brotherhood can be fully understood based on a common paternity—God, the Creator and Father. The theological God helps humans feel responsible for one another, increasing individual awareness and collective responsibility; he helps us become aware that people can give only what has been given to them before, but what they have been given never belongs only to them. The theological God helps explain that fraternity has its own proper place in political and legal affairs, and promotes an equitable distribution of the goods of the universe in the spirit of solidarity. The theological God makes an important contribution to the appreciation of the legal ideas of mercy, compassion, forgiveness, and equity, since God, as creator, is benevolent and provident toward all his creatures.

HUMAN RIGHTS

The idea of human rights is endemic to democracy, but not to secularism. The theory of human rights is religious in origin, not secular.¹⁴ The doctrine of *imago Dei* is at the heart of human rights. As God is master of himself, so each person, as an image of God, is also master of himself or herself. In order to fulfill his or her own destiny, each person must bear inalienable rights. Human rights are the expression of one fact: that people transcend political society. Human destiny is superior to political purposes; the political is merely a dimension of the human being and should serve the person.¹⁵ For that reason, every person has the right to make his or her own decision in transcendent matters with regard to his or her personal and transcendent destiny. In other words, a human is a person before he or she is a citizen. A political community that does not recognize this in practice becomes unjust and tyrannical.

Metalegally, a connection between God and human rights is desirable. The fact that the secular approach to human dignity currently enjoys the broadest assent in the human family does not imply

13 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 1.

14 For an overview of the relation between religion and human rights, see John Witte, Jr. and M. Christian Green, eds., *Religion and Human Rights: An Introduction* (New York: Oxford University Press, 2012).

15 In the same vein, see Jacques Maritain, *Christianity and Democracy* (San Francisco: Ignatius Press, 2011), 107, 112.

that the theistic approach should be abandoned. A theistic approach can support and strengthen the concept of human rights based on the idea of dignity. International documents and instruments in human rights should provide a flexible framework within which the most divergent religions, first philosophies, and cultures converge, but they should not close the door to metalegal approaches, which provide strong support to these legal documents. If that happens, human rights could be reduced to individual claims on society. The Chinese civilization is not grounded upon theistic foundations. A different paradigm, according to Anthony Yu,¹⁶ should be used to address the idea of human rights in China. However, the fact that the theistic approach is not universal is no reason to discount it as an optional approach that deeply protects and preserves the very idea of human rights.

In sum, theological concepts and ideas strengthen the foundations of secular legal systems from the outside by prioritizing rationality, morality, and love and blocking the assumption of a divine role by legal authorities.

¹⁶ Anthony C. Yu, "Enduring Change: Confucianism and the Prospect of Human Rights," in *Does Human Rights Need God?*, ed. Elizabeth M. Bucar and Barbra Barnett (Grand Rapids: William B. Eerdmans, 2005), 104–32.