

HAROLD BERMAN AND CONFLICTS LAW—AN APPRECIATION

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Harold Berman's most visible monument is his *Law and Revolution*, hailed both in this country and abroad. The German weekly *Die Zeit*, one the Continent's most influential and prestigious literary reviews, saw it as "groundbreaking" ("*bahnbrechend*").¹ His earlier work on Soviet law, both in academic writing and in his active involvement and teaching in the Soviet Union and, later, Russian Federation, made him both the leading American expert and the teacher of the next generation of Russian law specialists.²

He never tired to praise the value of Comparative Law, to urge the study of other legal systems—not for any esoteric purpose, but in order better to understand the nature of legal problems and the variety of possible ways to resolve them, as well as the change and the adaptability of law over time. The last was as important as the understanding of solutions—of rules—themselves: the historical context of law and the circumstances surrounding its change and evolution.

His comparative view of legal systems in their historical development led him to deal with and to develop insights into areas of the law that, as such, were not focal points of his research but were a part, like so much else, of the story of the law's evolution.

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¹ Uwe Wesel, *Die Revolution von 1075*, DIE ZEIT, Aug. 30, 1991, at 45. Hubert Treiber described Berman as "a kind of Marcel Proust of legal history" in 16 SOZIOLOGISCHE REVUE 117, 122 (1993) (author's transl.). See also Gerhard Dilcher, *Eine Leseempfehlung—Die Juristischen Bücher des Jahres*, 1995 NEUE JURISTISCHE WOCHENSCHRIFT 234, 237 (including *Law and Revolution* in his recommended reading list of "books of the year"); Gerhard Dilcher, 1994 POLITISCHE VIERTELJAHRESSCHRIFT, 525, 525–27.

² An example can be found in the introduction to *Law After Revolution*, a volume edited by three of Berman's former students, each by then a renowned scholar in his own right, on the occasion of Professor Berman's seventieth birthday. See William E. Butler, Peter B. Maggs & John B. Quigley, Jr., *Introduction to LAW AFTER REVOLUTION*, at xi (William E. Butler, Peter B. Maggs & John B. Quigley, Jr. eds., 1988) ("[H]is books and articles on Soviet law . . . have fundamentally configured Soviet legal studies in the West. And through his several students and proteges that impact has endured . . ."); see also Peter B. Maggs, *International Trade and Commerce*, in THE INTEGRATIVE JURISPRUDENCE OF HAROLD J. BERMAN 51, 74 (Howard O. Hunter ed. 1996) ("Professor Berman's work on international trade law is a 'struggle for law' through which the law indeed will be advanced.").

Conflict of laws (*private international law*, in European parlance) is an example. Classic conflicts, as it was reflected in European codifications and case law of the early 1900s and in the *First Restatement* in the United States, was territorial in orientation—for instance, grounding a choice of law in tort on the place of the happening. The latter could be fortuitous, of course. Choice of law might therefore disregard party expectations (in the sense of working an unexpected surprise) as well as other factors and concerns, such as the victim's home state's concern for compensation by the tortfeasor to relieve it from a public assistance responsibility. Legal systems sought to give cognizance to these non-territorial concerns in a number of ways. The forum might simply disregard the law of the place of injury on local public policy grounds: such a forum-favoring orientation became the heart of *Brainerd Currie's* "interest analysis,"³ still a powerful force in American conflicts law today.⁴

A European solution began to emerge with the 1942 German decree, born of wartime stringencies, that German law should govern claims between Germans for torts committed and suffered abroad.⁵ The rule was later generalized to focus on any common nationality, still later on the common domicile of the parties.⁶ The common-domicile rule today applies throughout the European Union (except Denmark) as the principal exception to the place-of-injury rule.⁷

The common-domicile rule has been applied in much of American tort conflicts law since 1963, when the New York Court of Appeals first used it, although it left its formulation as a rule to a later day.⁸ These decisions belabor party expectations, state interests, the quantity and quality of contacts suggesting a different choice of law, and so forth. They could have had it

³ For a summary, see Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon Symeonides, CONFLICT OF LAWS §§ 2.9–2.11 (4th ed. 2004). An application is *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964), which stated, "Courts are instruments of state policy."

⁴ See Peter Hay, *Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation*, 7 EUR. LEGALFORUM, I-137, 140–41 (2007).

⁵ Germany, Reichsgesetzblatt 1942, I, 706. See LEO RAAPE, DEUTSCHES INTERNATIONALES PRIVATRECHT 365 (2d ed. 1945).

⁶ See GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 710, 737 (9th ed. 2004).

⁷ Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007, L 199/40. For discussion, see Hay, *supra* note 4; for additional countries, see *id.* at I-139 n.25. See also Tim W. Dornis, "When in Rome, Do as the Romans Do?"—A Defense of the *Lex Domicilii Communis* in the Rome-II-Regulation, 7 EUR. LEGALFORUM I-152.

⁸ See *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963); *Neumeier v. Kuehner*, 286 N.E.2d 454, 457 (1972) (establishing rules); *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (1985) (defining the reach of *Neumeier*).

easier, as a look at history would have revealed. The interest-weighting, the qualitative assessment of shared common attributes of the parties (common nationality, common habitual residence) over possible other connecting factors, had been done for them by the much earlier German and Continental developments. Those, in turn, had had still earlier precursors.⁹ Indeed, as Berman reminds us, “neither Roman nor Greek law applied foreign law in cases involving only their own citizens.”¹⁰

American courts and commentators have been and remain ambivalent about the relevance of and the appropriateness of reference to foreign law. Can it provide insight, even guidance for the resolution of legal problems we face? Writes Justice Scalia: the idea “that American law should conform to the laws of the rest of the world ought to be rejected out of hand”¹¹ and “I do not believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles”¹² This categorically insular view not only rejects the relevance of others’ value systems but also ignores America’s own constitutional history. As Justice O’Connor pointed out: “Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to the assessment of evolving standards of decency”¹³ and “this Nation’s evolving understanding of human

⁹ See ALBÉRIC ROLIN, 1 PRINCIPLES DE DROIT INTERNATIONAL PRIVÉ Nos. 360, 364, at 566, 570 (1897); LEO RAAPE, INTERNATIONALES PRIVATRECHT 535 (4th ed. 1955); GERHARD HOHLOCH, DAS DELIKTSSTATUT 44 (1984); MATHIAS ROHE, ZU DEN GELTUNGSGRÜNDEN DES DELIKTSSTATUTS, 179, *passim* (1994) (referencing case law and literature); see also Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels art. 12 no. 2, Sept. 23, 1910, (“Brussels Convention of 1910”), 1913 REICHSGESETZBLATT 49 (Ger.) (stating that *lex fori* applies when “all persons interested” belong to the forum state). For an early comprehensive comparative review of the law applicable to the *statut personnel* (primarily in status and other personal matters), see M. [JEAN JACQUES GASPARD] FÉLIX, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ nos. 30–31, at 43–54 (1st ed. 1843).

¹⁰ Harold Berman, *Is Conflict-of-Laws Becoming Passe?*, in BALANCING INTERESTS: PETER HAY 43, 47 n.15 (Hans-Eric Rasmussen-Bonne et al. eds., 2005).

¹¹ *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

¹² *Id.* at 628. For criticism by Judge Posner of *Roper*, see *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (articulating an “international concept of due process”); see also Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159 (2007).

¹³ *Roper*, 543 U.S. at 604 (O’Connor, J., dissenting) (agreeing on this point with the Justice Kennedy’s majority opinion). Justice O’Connor could have gone back further: “International law is part of our law, and must be ascertained and administered by our courts” *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also William S. Dodge, *The Paquete Habana: Customary International Law as Part of Our Law*, in INTERNATIONAL LAW STORIES 175 (John E. Noyes, Laura A. Dickson & Mark W. Janis eds., 2007). Interestingly enough, Justice Scalia, in dissent, developed the notion of “prescriptive comity” in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 818–21 (1993) (Scalia, J., dissenting), which was subsequently adopted by the Court in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168–73 (2004). For views favoring comity-oriented application of judgment-recognition requirements, see the decision in

dignity is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.”¹⁴

Justice O’Connor’s statement reflects Berman’s view of “integrative jurisprudence”: it “defines law as a process of balancing order and justice in the light of experience. It returns to an earlier meaning of the Latin words *integrare*, ‘to heal,’ and *integration*, ‘renewal’.”¹⁵ In integrative jurisprudence, “history plays an equal role with politics and morality, helping to resolve tensions between them.”¹⁶

Berman viewed “Western Legal Tradition” from the perspective of the accomplished and erudite comparativist, the legal and political historian, and the moral and religious philosopher. His search for solutions for common problems on the basis of common values informed his answers to contemporary questions. When he asked, “Is Conflict-of-Laws Passe?,” the answer was obvious to him: comparative law often seeks to show, indeed exactly to delineate differences among legal systems. Conflicts law, with the aid of comparative law and a historic perspective, should emphasize “concepts and doctrines for integrating—not eliminating—. . . differences. [Historically, conflicts law] presupposed that among the diverse polities that constituted Western Christendom there was a community of law.”¹⁷ The task is to “harmonize differing legal systems”¹⁸ and, in doing so, to be mindful, as were glossators drawing upon canon law, that “in all cases justice should prevail over formal rules of choice of law when the application of a formal rule would have an unjust effect.”¹⁹

Resort to the *lex domicilii communis* as the parties’ common bond, in the context described above, would have been natural for Harold Berman. His

Ashenden, 233 F.3d 473; Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1232 (2007); see also Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004).

¹⁴ *Roper*, 543 U.S. 604.

¹⁵ *Preface to HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION*, at xii (2003).

¹⁶ *Id.* at 382

¹⁷ Berman, *supra* note 10, at 48; see *supra* note 13.

¹⁸ Berman, *supra* note 10, at 48.

¹⁹ *Id.* at 47. In contemporary American conflicts law, Weintraub’s “consequences-based” approach to choice of law also reflects this thinking. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.2 et seq. (5th ed. 2006 Supp. 2007); Russell J. Weintraub, *Rome II and the Tension Between Predictability and Flexibility*, in BALANCING INTERESTS: PETER HAY, *supra* note 10, 451, at 452, 458–60. European conflicts thinking, in contrast, continues to be more rule-focused, albeit sensitive to the need for flexibility to accommodate particular unusual cases. See Hay, *supra* note 4, at 1-144 nn.79–80.

global view would have helped the courts when they first struggled to rediscover this rule (or thought that they had discovered something new), as it would often do now.

