

HAROLD BERMAN: SOME PERSONAL REFLECTIONS

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When I was teaching Roman and Comparative Law at the University of Cape Town in the 1980s, five of my colleagues and I created an informal reading group. We got together about four times a year in one of our houses to discuss a potentially important new book that one of us had recommended and that we had then all read. If I remember correctly, we started that group in 1985. The third or fourth book that we read and discussed was Harold Berman's *Law and Revolution*. On my desk today in Hamburg I have the copy that I then bought for 41.40 South African rand, and it contains two pages of notes that I then made. That book immediately fascinated me, and it has made a lasting impression. I would count it among the ten most important books that I read as a student and in the early part of my teaching career.

Analyzing Harold Berman's accomplishment as a legal historian, Richard Helmholz has identified four principal themes that can be found in *Law and Revolution*.¹ First, between 1050 and 1200, there occurred in Europe a fundamental social, economic, and intellectual transformation that was sparked by the Papal Revolution. That, I would say, is very widely, if not generally, accepted today. Second, the Papal Revolution also gave birth to the Western legal tradition by creating the new, scientific system of Canon law contained in what came to be known as the *Corpus Iuris Canonici*. Here, it will probably have to be taken into account that Berman intended to provoke reaction. My own reaction would be that the medieval Popes could not have been successful in their creation of the Canon law and in their reorganization of the world in general, had they not been able to resort to Roman law. And the creation of what can truly be called the first and fundamental legal science in Europe would hardly have been imaginable without the reception of Greek philosophy, and quest for truth, in Republican Rome. Thus, I would prefer (with authors such as Philippe Nemo) to see three elements of antiquity as being essential for the "cultural morphogenesis" of Europe (and European law): (1) the

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¹ See Richard Helmholz, *Harold Berman's Accomplishment as a Legal Historian*, 42 EMORY L. J. 475 (1993).

emergence of critical rationality in Greece; (2) the development of a highly differentiated jurisprudence, focusing on private law, in Rome; and (3) the awareness of the historicity of man inherent in the Jewish-Christian heritage. But it was indeed the Papal Revolution that established the basis for the practical assimilation of the cultural achievements of antiquity and that, in this sense, created the modern (occidental) world. The crucial role of Canon law in the shaping of the *ius commune*, at any rate, is widely recognized today; and in order to emphasize the very close association between the two essential bases of European law, one may, as Helmut Coing has done, refer to a Roman-Canon *ius commune*.²

Third, up to the age of codification, law in Europe was marked by a fundamental intellectual unity. That assertion involves a pointed refutation of the traditional endeavors to describe and analyze the Western legal world in terms of a civil law-common law dichotomy. Recent research has vindicated Harold Berman's version again and again and has contributed both to a growing awareness of the existing connections between civil law and common law and to a process of increasing convergence. Wherever one chooses to look, one will find "legal institutions, procedures, values, concepts, and rules that English law shares with other Western legal systems."³ Hardly anything is sacred. Even Magna Charta, "this most basic statement of English customary law and constitutional principle," was partly shaped by influences from the Continental *ius commune*.⁴

Fourth, today the Western legal tradition, like Western civilization as a whole, is undergoing a crisis greater than it has ever known before. Berman associates this with the loss of faith in law which is a vital cement of society. And indeed, essential elements of the idea of law—ritual, tradition, authority, universality—are jeopardized today. A pervasive instrumentalism contributes to loss of confidence in the law's integrity and to feelings of cynicism.

To these four themes I would like to add another two that have particularly impressed me when reading and re-reading *Law and Revolution*. One of them has just been touched upon. European law, as it originated in the Middle Ages, has never been static. It possesses an inherently dynamic character, and it thus constitutes a tradition that is always developing. But it has been developing

² HELMUT COING, *EUROPAISCHES PRIVATRECHT* 7 (1985).

³ HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 18 (1983).

⁴ See R.H. Helmholz, *Magna Carta and the ius commune*, U. CHI. L. REV. 297, 371 (1999).

within an established framework of sources and methods, of concepts, rules and arguments. Closely related to this is the other point. Berman refers to it as “[p]erhaps the most distinctive characteristic”⁵ of Western law: the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems. Thus, we have the picture of considerable difference within a fundamental intellectual unity that explains the characteristic dynamicism and capacity for growth and development of European law. The same, of course, holds true for European culture in general. It was shaped by the coexistence, confrontation, and reconciliation of diverging perceptions, powers, and perspectives: *fides* and *ratio*, Pope and Emperor, Empire and the individual territories constituting the Empire, Rome and Byzantium, classical antiquity in their Greek and Roman varieties, the Judaeo-Christian tradition, the role of revolutions in the re-shaping, but also preservation, of that identity, the sense of being free and yet being bound, the ideals of *vita activa* and *vita contemplativa*, the one God as Trinitarian God, Christ as being true man and true God, the Christian who renounces the world and yet, at the same time, embraces it.

I only, once or twice, met Harold Berman very briefly. But there are three other issues which have confirmed the very close affinity that I have always felt for him. (i) Some time ago, he asked me for permission to get my essay on American law reviews translated and published, somewhat ironically, in an American law review. That essay had been written during my first extended stay at one of the leading American law schools. It had compared the type of scholarship that I found in the law reviews with what I was used to from Europe. With a little exaggeration, one may perhaps characterize the “law and –” scholarship so typical of law review writing as legal scholarship without law. I sensed a pervasive loss of faith in law, and legal doctrine, as I know it; and that must have struck a responsive chord in Harold Berman. (ii) Over the past few years, I have become very interested in German lawyers (usually Jewish, or of Jewish origin) who had to leave Germany during the Nazi period, and their contribution to law and legal training in England. Many other German legal scholars, of course, went to the United States. It is difficult to assess their impact, but my personal impression is, at least for legal history and comparative law, that it did not last. There is one exception: Eugen Rosenstock-Huessy. Rosenstock-Huessy (1888–1973) was very unusual in many ways: an outsider within the German academic establishment of the 1920s and early 1930s, a “Querdenker,” i.e., someone whose thinking

⁵ BERMAN, *supra* note 3, at 10.

disregarded established patterns and conventions, and, at the same time, transcended the entrenched disciplinary boundaries, a visionary as much as a scholar, protagonist of the idea of work camps for workers, farmers and students, and spiritual father of one of the principal cells of resistance against the Hitler government, the circle of Kreisau. In Germany, his work has met with little response. Thus, it was through his teaching at Dartmouth College in Hanover, New Hampshire, where he had moved in 1935, that the ideas enunciated in his extraordinary work *Out of Revolution: Autobiography of Western Man* (the original German version is entitled *Die Europäischen Revolutionen: Volkscharaktere und Staatenbildung*) have lived on. For it was at Dartmouth College that he became the academic teacher, mentor and guide to Harold Berman who was thus inspired to write a history of Western law based on the pattern of revolutions mapped out in Rosenstock-Huessy's book. I am sure that Berman would have wanted that to be remembered on this occasion.

(iii) Harold Berman kindly contributed a chapter on Comparative Law and Religion to the *Oxford Handbook of Comparative Law* that was edited by Mathias Reimann and me.⁶ It may have been one of his last essays published before his death, and it may be read, at least to some extent, as his intellectual testament. In it, he emphasizes the religious dimensions of law; and he calls upon comparative lawyers to demonstrate that “a common faith in law among the various cultures of the emerging world society constitutes an essential element of a world civil religion.”⁷ That will involve an awareness of the specifically Christian imprint of European culture and European law. But it will also force us to explore the relationship between law and religion in other cultures, to establish common patterns of development, and to trace intellectual connections. Patrick Glenn's *Legal Traditions of the World* is a step in that direction.⁸ A young scholar from Hamburg has just written a book arguing that the creation of classical Islamic law was based on a reception of Roman law. And he intimates that Islamic law, as developed in the tenth century, may have inspired the new scholasticism that was (and he refers to Berman in this context) the motor of scientific development in Europe.⁹ The Max Planck Society, for which I am now working, has just established an Institute for the Study of Multireligious and Multiethnic Societies, within which we hope to

⁶ THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006)

⁷ *Id.* at 750.

⁸ H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (3d ed. 2007).

⁹ BENJAMIN JOKISCH, ISLAMIC IMPERIAL LAW: HARUN AL RASHID'S CODIFICATION PROJECT (2007).

focus, inter alia, on the normative systems shaping a society, and on their relationship with each other. And we are embarking on a project exploring *convivencia* between 500 and 1500, particularly in Spain. I hope that these are ventures of which Harold Berman would have approved. At the same time, very sadly, we will now no longer be able to draw upon his counsel.

