

# Rechtsgeschichte Legal History

[www.rg.mpg.de](http://www.rg.mpg.de)

<http://www.rg-rechtsgeschichte.de/rg21>

Rg **21** 2013 224 – 227

**John Witte, Jr.**

## Harold J. Berman as Historian and Prophet

John Witte, Jr.

## Harold J. Berman as Historian and Prophet

In 1982, with an ailing Leonid Brezhnev still in power, Harold and Ruth Berman kindly invited me to dinner. As we toasted for dessert, Berman stood up and announced grandly: »I have a prophecy to make. I predict that, in a decade, the Soviet Union will be revolutionized, and the leader of the revolution will be a young man, I have been watching for a long time – Mikhail Gorbachev.« Within a decade, *glasnost*, *perestroika*, and *demokratizatsiia* had become the watchwords of a new Russian revolution led by Gorbachev.

This was vintage Harold Berman. It showed his brilliant command of Soviet law and legal revolutions. But even more, it revealed his remarkable ability to think above, beyond, and against convention. This typified his 60-year teaching career at Harvard and Emory. In the 1940s to 60s, the dominant Cold War logic taught that the Soviet Union was a lawless autocracy. Berman argued to the contrary that the Russians would always honor contracts and treaties that were fairly negotiated. His views prevailed and came to inform various nuclear treaties, trade agreements, and East-West accords. In the 1960s to 80s, the conventional belief persisted that the Middle Ages were the dark ages as the West waited impatiently for Enlightenment and modernization. Berman argued the contrary, that the medieval era was the first modern age of the West and the founding era of our Western legal tradition. This view is now standard lore. In the 1980s and 90s, jurists fought fiercely over whether legal positivism or natural law or some other perspective was the better legal philosophy. Berman called for an integrative jurisprudence that reconciled these views with each other and with historical and other perspectives on law. This view now prevails in a world dedicated to interdisciplinary legal study. And, in the 2000s, with the world hell-bent on waging »a clash of civilizations,« Berman called for a world law, grounded in global structures and processes, and universal customs and principles of peace and cooperation. This view holds so much more promise than the jingoism and jihadism of our day.

»First it was Russian law, then it was Western law, now it is world law. What's next, cosmic law?« This is how Berman's beloved wife Ruth once summarized (with a blend of exasperation and astonishment) the stages of Berman's legal thought. This is a keen insight. For Berman, every legal system – even the budding legal system of the world – must ultimately be founded upon cosmic commandments and contemplation, divine examples and exemplars. Berman has long prophesied that those legal systems that build on immanent and material foundations alone will fail. The spectacular fall of the Soviet legal system in the later twentieth century was ample vindication of his insight into the essential religious foundations of a just and enduring legal system.

Berman repeated this message in China, too, when in 2006, as a still energetic 88-year old, he gave a series of lectures on law to packed houses in a dozen universities. A Chinese respondent asked whether one needed to believe in God in order to have a just legal order. »It would certainly help!« Berman quipped immediately. »But no,« he went on diplomatically:

You don't necessarily have to believe in God, but you have to believe in *something*. You have to believe in law at least. If you can't accept God, then just focus on the law that God has written on all of our hearts. Even children intuitively sense this law within us. Every child in the world will say, »That's *my* toy.« That's property law. Every child will say, »But you *promised* me.« That's contract law. Every child will say, »It's not my fault. He hit me first.« That's tort law. Every child will say, too, »Daddy said I could.« That's constitutional law. Law ultimately comes from our human nature, and our human nature is ultimately an image of God.<sup>1</sup>

Such views reflect, in part, Berman's life-long effort to integrate his religious faith with his legal learning. Berman contrasted »the wisdom of the world« with »the wisdom of God.« The wisdom of

<sup>1</sup> *The Daily Report* 117 (Fulton County, Georgia) (June 1, 2006): 1.

the world, he declared, »assumes that God's existence is irrelevant to knowledge, and that truth is discoverable by the human mind unaided by the Spirit.« Both Jewish and Christian wisdom, wrote Berman (a Jewish convert to Christianity), »seeks God's guidance ... in order to discover the relationship between what we know and what God intends for us.« Knowledge and intellect are »intimately connected with faith, with hope, and with love.« »God does not call us to be merely observers of life; rather he calls all of us – even the scholars in all that we do – to participate with him in the process of spiritual death and rebirth which is fundamental religious experience.«<sup>2</sup>

Dialogue was the key, in Berman's view, to teaching and reaching reconciliation, and for building community both locally and globally. Both Jewish and Christian theology, he argued, teach that persons must reconcile themselves to God, neighbor, and self. For Berman, building on St. Paul, this meant that there can be »no real division between Jew and Gentile, slave and free, male and female« – or, for that matter, black and white, straight and gay, old and young, rich and poor, citizen and sojourner. For every sin that destroys our relationships, there must be grace that reconciles them. For every Tower of Babel that divides our voices, there must be a Pentecost that unites them and makes them understandable to all.

Such spiritual sentiments could shackle the narrow-minded. They liberated Berman from conventional habits of mind and traditional divisions of knowledge. He challenged Max Weber, Karl Marx, and Jeremy Bentham for their separation of fact and value, is and ought. He criticized Alexander Solzhenitsyn for his contradistinction of law and morals, law and love. He fought against the divisions of the very world itself into East and West, old and new, developed and undeveloped. His favorite jurists were Gratian, Matthew Hale, and Joseph Story, who wrote concordances of discordant canons. His favorite philosophers were Peter Abelard, Philip Melancthon, and Michael Polanyi, who developed integrative holistic philosophies. »The era of dualism is waning,« Berman wrote. »We are entering into a new age of integration and reconciliation. Everywhere synthesis,« the overcoming of false opposites, is »the key to this

new kind of thinking and living.« Either-or must give way to both-and. Not subject versus object, not fact versus value, not is versus ought, not soul versus body, not faith versus reason, not church versus state, not one versus many, »but the whole person and whole community thinking and feeling, learning and living together« – that is the common calling of humankind.<sup>3</sup>

Berman's talk of the death of dualism and the birth of an age of synthesis points to his further belief in a teleological, if not, providential view of history. Both Jewish and Christian theology, he stressed, teaches that time is continuous, not cyclical, that time moves forward from a sin-trampled garden to a golden city, from a fallen world to a perfect end time. Berman was convinced that slowly but surely all the peoples of the world would come into contact with each other, and ultimately, after revolutionary struggle and even apocalyptic explosion, would seek finally to be reconciled with each other forever.

Berman's grand account of evolution and revolution in Western history, set out in his *Law and Revolution* series, is rooted in this basic belief about the nature and pattern of time. There is a distinctive Western legal tradition, he argued, a continuity of legal ideas and institutions, which grow by accretion and adaptation. The exact shape of these ideas and institutions is determined, in part, by the underlying religious belief systems of the people ruling and being ruled. Six great revolutions, however, have punctuated this organic gradual development: the Papal Revolution of 1075, the German Lutheran Revolution of 1517, the English Puritan Revolution of 1640, the American Revolution of 1776, the French Revolution of 1789, and the Russian Revolution of 1917. These revolutions were, in part, rebellions against a legal and political order that had become outmoded and ossified, arbitrary and abusive. But, more fundamentally, these revolutions were the products of radical shifts in the religious belief-systems of the people – shifts from Catholicism to Protestantism to Deism to Marxist-Leninism. Each of these new belief-systems offered a new eschatology, a new apocalyptic vision of the perfect end-time, whether that be the second coming of Christ, the arrival of the heavenly city of the Enlightenment philosophers, or the withering

2 BERMAN (1996) 319–322.

3 BERMAN (1974) 110–114.

away of the state. Each of these revolutions, in its first radical phase, sought the death of an old legal order to bring forth a new order that would survive its understanding of the Last Judgment. Eventually, each of these revolutions settled down and introduced fundamental legal changes that were ultimately subsumed in and accommodated to the Western legal tradition.<sup>4</sup>

In this new millennium, Berman believed, the Western legal tradition is undergoing a profound integrity crisis, graver and greater than any faced in the past millennium. The old legal order of the West is under attack both from within and from without. From within, Western law is suffering from the critical and cynical attacks relentlessly issued by jurists and judges – a »form of lawyerly self-loathing,« he once called it. These legal skeptics have dismissed legal doctrine as malleable, self-contradictory rhetoric. They have depicted the law as an instrument of oppression and exploitation of women, of minorities, of the poor, of the different. They have derided the legal system for its promotion of the political purposes of the powerful and the propertied. This assault from within the law, from within the legal academies and within the courts – devoid as it is of a positive agenda of reconstruction – reflects a cynical contempt for law and government, a deep loss of confidence in its integrity and efficacy. The »secular priests of the law,« its officials and its educators, no longer seem to believe in what they are doing.

From without, the radical transformation of economic life and the rapid acceptance of new social forms and customs, many born of Eastern, Southern, and new-age thinking, have stretched traditional Western legal doctrines to the breaking point. Each of the major branches of Western law – contracts, property, tort, family, criminal, commercial, and constitutional law – have been transformed several times over in the past two generations. Many of these changes may well be necessary to modernize the law, to conform it to contemporary social needs and ideals, to purge it of its obsolete ideas and institutions. But as a consequence, Western law – always something of a patchwork quilt – has become more of a collection of disjointed pieces, with no single thread, no single spirit holding it in place and giving it integrity and direction. This also has led to pro-

found disillusionment with and distrust of the law.

For Berman, these are signs of end times. We are reaching the end of an age and the end of the Western legal tradition, as we have known it. Western law is dying, he wrote, a new common law of all humanity is struggling to be born out of the counter-forces of violent balkanization, radical fundamentalism, and belligerent nationalism that now beset us all. Western law, rooted in the soils and souls of Christianity, Judaism, and their secular successors, will have a place in this new common law of humanity. But so will the laws of the East and the South, of the tribe and the jungle, of the country and the city, each with its own belief system. What needs to be forged in this new millennium, Berman challenged his readers, is a comprehensive new religious belief system, a new pattern of language and ritual, a new *eschaton*, that will give this common law of humanity its cohesion and direction. We need a new common law and a new common faith, a new *ius gentium* and *fides populorum* for the whole world. We need global structures and symbols, global processes and principles. These cannot be found only in world-wide science and commerce, or in global literature and language. They must also be sought in a new »world law« and a new »world religion.« For law and religion are the only two universal solvents of human living that can ultimately bring true peace, order, and justice to the world.

A bold streak of mystical millenarianism colors Berman's historical method – much of it already conceived while he was a young man witnessing the carnage of World War II and still brimming with the heady instruction of his Dartmouth mentor, Eugen Rosenstock-Huessy. Description and prescription run rather closely together in his account, occasionally stumbling over each other. Historical periods and patterns are rather readily equated with providential plans and purposes. But here we have one of the deepest sources of many of Berman's insights and ambitions as a legal scholar. He was, as he put in an April 17, 1966 letter to Rosenstock, on a scholarly »pilgrimage.«

It is a very long, slow, hard journey. It goes through law and language, history, comparison of legal systems and cultures, the Great Revolu-

4 BERMAN (1983); (2003).

tions, the communication of the nations, trade between planned and market economies, the hard struggle for peace, the reconciliation of man to his destiny and to God ... I have hope that I can make meaningful and important what you have taught me – and can possibly rescue a good deal of scholarship and make a contribution to peace – by showing, first, that American law is a human, creative response to the con-

tinued danger of disintegration and alienation, and that law altogether is a great hope for uniting mankind. But law, to fulfill this hope, must be felt to be Speech, and a response to God's Word.<sup>5</sup>



### Bibliography

- BERMAN, HAROLD J. (1974), *The Interaction of Law and Religion*, Nashville: Abingdon Press
- BERMAN, HAROLD J. (1983), *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge (Mass.), London: Harvard University Press
- BERMAN, HAROLD J. (1996), *Faith and Order: The Reconciliation of Law and Religion*, Grand Rapids, MI: Wm. B. Eerdmans
- BERMAN, HAROLD J. (2003), *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*, Cambridge (Mass.), London: Harvard University Press
- BERMAN, HAROLD J. (2013), *Law and Language: Effective Symbols of Community*, ed. JOHN WITTE, JR., Cambridge: Cambridge University Press

5 Quoted in BERMAN (2013) 12.