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Harold Berman's »Law and Revolution«: A Necessary Challenge for Legal History Research

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I. A Monumental Historical Perspective and its Problems

Harold Berman's two voluminous books on »Law and Revolution«¹ comprise all attributes of a truly inspiring contribution to historical and legal science. Both volumes do impress their readers with their concise style, their distinctive arguments and with Berman's courage to draw long lines through more than thousand years of European history. At the same time, Berman maintains a masterly combination of legal historical, legal philosophical and legal sociological perspectives,² which has become rare in a frequently highly specialized discourse tending sometimes towards a segmentation into different, unrelated subdiscourses. This approach finds its counterpart in the breadth of perspective in Berman's main arguments,³ in his idea of the existence of a more or less uniform Western legal tradition, not based (as it might be assumed⁴), Roman law as permanent constant of changing legal cultures, but emanating from a »Papal revolution« starting with Gregory VII and having been shaped by a series of successive revolutions up to the 20th century. The foundation of these revolutions in changing religious beliefs with strong apocalyptic notions – be it biblical visions of a new Christian reign, be it »Deist versions of the same« as in the revolutions of the

18th century, or be it the belief »in the messianic mission of the Communist party to prepare the way to a classless society«⁵ – links them among each other. They are also connected by the underlying evolution of a specific Western legal tradition, which »was renewed by such revolutions«.⁶

It is easy to understand that this monumental historiographical concept and its impressive literary realization has received much praise and attention.⁷ That does not change the fact, however, that Berman's handling of historical detail is sometimes problematic and even frustrating for those of his readers who are used to work with the sources and on the topics Berman has covered in his books. Berman's argument, for instance, that Gregory VII »made known« the contents of the *Dictatus Papae* thus proclaiming his revolutionary program to the world⁸ is questionable, to say the least: As far as we know today, this document had no addressee and, moreover, there were only very few (if any) contemporary reactions to it.⁹ There are numerous other instances of superficial and thus highly imprecise dealing with sources and facts (not to mention the limited use of scholarly literature) in Berman's first book,¹⁰ which has even been called »a keen disappointment«.¹¹ Similar objections have been raised towards Berman's second book criticizing that the religious dimensions of the English revolution »are in certain important re-

1 BERMAN (1983); BERMAN (2003). For a list of translations see CHAPPELL (2011) 3 with numbers 21, 24.

2 See, e.g., BERMAN (1983) 4–5, 43–45, 538–558, and BERMAN (2003) 27–28, 379–382.

3 For a thorough survey of Berman's arguments, which can not be elaborated here in detail, see ARONEY (2005) 355–362. For a short comprehensive outline see HELMHOLZ (1993) 476–477.

4 For this kind of perspective see for example KOSCHAKER (1947), STEIN (1996/1999), ZIMMERMANN (1990).

5 BERMAN (2003) 4.

6 BERMAN (1983) 10.

7 For the widespread reception of Berman's first book see the survey in HELMHOLZ (1993) 478–488.

8 BERMAN (1983) 96.

9 SCHIEFFER (1986) 56–62; as an overview THIER (2008) with further reference.

10 LANDAU (1984) 938–941; PENNINGTON (1985) 548; PETERS (1984–85) 692–695; SCHIEFFER (1998) 20–23, 28–30.

11 PENNINGTON (1985) 548.

spects neglected and obscured». ¹² Nevertheless, even Berman's fiercest critics do concede that his overall picture of the facts and figures is correct. ¹³ In the case of pope Gregory VII, for example, a new quality in the relationship between law and theological concepts with a rising importance of legal normativity is characteristic for the papal rule making since Gregory's pontificate, which would in fact set new standards of juridification for a more and more papally dominated church. ¹⁴ So, Berman provides his readers with a big impressive picture, whose details are not always correct and need further elaboration by those, who, as Berman presumably would put it, are »concentrating on bits and pieces of history«. ¹⁵ Nevertheless, not only for this type of researcher books like Berman's are indispensable as challenging and sometimes also provoking reference point.

II. A Grand Narrative in the Period of Post-Narratives

Berman's narrative of the revolutions as decisive factors of historical change sets forth a tradition of the early 20th century, when several scholars like Berman's mentor Eugen Rosenstock-Huussy turned their attention to the historical importance of revolutions. ¹⁶ Moreover, Berman himself put his concept in the tradition of former historical meta-narratives as they were conceptualized in the works of Karl Marx and Max Weber. ¹⁷ In that regard, Berman's books represent a long standing tradition of historiography, which might be traced back to the early efforts of universal history. By now, however, it appears as if those »grand narratives« have gone, as Lyotard has stated it in his famous reflections on the conditions of knowledge in the

postmodern period. ¹⁸ This applies also to legal history (at least in its German speaking branch), where a certain kind of reluctance has occurred towards the great stories of the evolution of modernity. ¹⁹ Given these developments, which might be getting additional traction with the deconstruction of pre-modern legal normativity by the cultural sciences, ²⁰ Berman's concept with its strong focus on the idea of law and legal systems may appear outdated. From a culture-historical point of view it might even be considered as a subject of necessary deconstruction, as an effort to provide the participants of the Western legal discourse with a collective identity founded in history. In fact, some of Berman's notions of »law« as, for instance, »an integrated system« ²¹ may be objectionable at least for the middle ages given the fact that the idea of a system came only to existence in the early modern period. ²²

But despite such problems in perspective and, as mentioned before, also in detail Berman's contribution is of lasting importance for legal history research: It presents a reference model, which is perfectly suited to stimulate further research – be it as confirmation, ²³ be it as refutation of Berman's ideas. Moreover, in highlighting and elaborating the importance of revolutionary change for legal evolution, Berman points to a phenomenon which may be called »temporal structure of law and legal change«: His description of Western law »as moving forward in time« ²⁴ with a »time dimension« as defining mark, ²⁵ and his attraction to the dialectics and mechanisms of revolutionary change as opposed to evolutionary legal change points to an essential topic of history in general and legal history in particular: It is the notion that legal evolution does not happen as steady process with always the same speed. Instead, there are different

12 ARONEY (2005) 371, who calls Berman's attribution in the abstract of his paper an »ultimately attenuated ... account of law and religion in seventeenth-century England« (ibid. 355).

13 LANDAU (1984) 943; PENNINGTON (1985) 548; PETERS (1984–85) 695–696; SCHIEFFER (1998) 25–30.

14 THIER (2011) 279–334 (on the period until the concordat of Worms 1122 and the rules on episcopal elections).

15 BERMAN (2003) 21 with regard to conventional periodizations.

16 For a short overview see KOSELLECK (1984/2004) 786–787. For Rosenstock-Huussy's concept and its influence on Berman see the outline in SCHIEFFER (1998) 21–24 with reference also to other similar concepts.

17 BERMAN (1983) 538–558; see also BERMAN (2003) 192–195, 379–380.

18 LYOTARD (1979/1986) 112 and *passim*.

19 Summarizing DUVE (2012) 26–29, and, for the history of private law, RÜCKERT (2010) 105–117.

20 For this kind of approach STOLLBERG-RILINGER (2010) 4–32.

21 BERMAN (1983) 9.

22 THIER (2011) 274 with further reference.

23 As example for this kind of use of Berman's work see the examples in HELMHOLZ (1993) 488–495.

24 BERMAN (1983) 203.

25 BERMAN (1983) 205.

evolutionary layers and, presumably, patterns with different speeds of historical time. Berman might be mistaken in his belief that only revolutions represent this kind of accelerated legal change, because there might be – depending from the changing cultural, social and economic contexts of legal normativity – other phenomena of such

acceleration. But his argument for a deeper research on the evolutionary mechanisms of the Western legal orders in comparison to other legal traditions is certainly right. ■

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