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The East of the West.
Harold J. Berman and Eastern Europe

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Preliminary remarks. According to recent studies in law and economics, »legal origins«, and in particular the influence of Roman law or the absence thereof, explain the difference between the state-centered capitalism of continental Europe and the market-focused Anglo-Saxon system: [1] a thousand years of path dependency. However, it was Harold Joseph Berman who anticipated the origins theory in his book »Law and Revolution«, published in 1983. Indeed, he considered the origins of Western legal tradition as indicative of its present features. He referred frequently to its »organic growth« (5–7, 318, 400, 536) which evidently amplifies the role of its »sources« (144, 165, 279, 290), »roots« (39, 42, 166, 538) etc.

During the late Middle Ages, the subject of Berman's focus, the West, equalled a Europe whose overseas expansion had not yet begun. This recalls the »Europe of legal historians« as their attempt, efficiently caricatured by Dieter Simon, to determine the borders of the continent on the basis of a medieval state of affairs. [2] Such a historical justification of geopolitical concepts is risky, but nonetheless common. In the Middle East, the borders of Biblical regions legitimize present or future frontiers. Berman shared the usual ideas of legal history as regards the modern being nothing else than a protraction or renewal of the old, when he identified the papal revolution of 1075 as the factor having durably impregnated western legal culture.

The difficulty of the origins-problem may arise principally from the anachronistic nature of the concepts involved. Isn't it rather nonsensical to ask a question about the borders of Europe, when Europe as such did not exist at that time? Of course, the concept of Europe was known from the times of the ancient historian Herodotus, but during the Middle Ages, and even later until the end of the 17th century, at the continent – besides the Holy Roman Empire – rather the religious community called *Christianitas* or *republica Christiana* (*Christianorum*) had been invoked. [3] At that time, the concept of Europe did not yet play the pivotal role in political discourse which it acquired from the age of the Enlightenment. [4]

It was a moral revolution, unfortunately remained unknown to Berman, as the Polish lawyer and priest Paulus Vladimiri (1370–1435), rector of Cracow University, extended the legal community to the pagans of old Prussia, violently Christianized by the Teutonic Knights. [5] During the contest between the Knights and the Kingdom of Poland at the council of Konstanz (1414–1418) Vladimiri red his *Tractatus de potestate papae et imperatoris respectu infidelium* which granted the people of Prussia the natural right to live peacefully in their own state. [6] Over a century later, the Spanish neoscholastics, Bartolomé de Las Casas (1474–1566) and Francesco de Vittoria (1483–1546), adopted the same attitude towards the Indians of the New World.

Before and after Berman. Berman's principal achievement seems to be the substitution of Roman law with canon law as the main factor of western legal tradition (204–205) which was then simply the European one. So Berman gained support of scholars who accepted canon law as its primary source and the first common law of Europe. [7] However, this reduction in the significance of Roman law – which had already been referred to by Maitland as the »Imperial Mother« of her »Papal Daughter« [8] – was also questioned. [9] And Zimmermann recently objected that »the medieval Popes could not have been successful in their creation of the canon law and in their reorganization of the world …, had they not been able to resort to Roman law«. [10]

In any case, Berman falsified the old Romanist doctrine, due to Paul Koschaker (1879–1951) who, in his book »Europa und das römische Recht«,

1 La Porta, López-de-Silanes, Shleifer (2008) 327.
2 Simon (1995) 24.
3 Schneidmüller (1997) 5–24.
4 Wesel (2005) 602.
5 Chollet (2012).
6 Pennington (2010) 849–850; Giaro (2011) 6–7.
7 Helmholz (1996) 38; Caenegem (2002) 14.
8 Giesen (1980) 441.
9 Funk (1984) 693–694; Landau (1984) 939–940.
10 Zimmermann (2008) 1465.

first published in 1947, identified Europe with the reception area of Roman private law. Koschaker interpreted Europe as a historical synthesis of Romanic and Germanic elements, even if he recognized its ethnic substrate as Germanic and only the culture as Roman-Christian. The idea of the Latin-Germanic Europe, which descended from the Prussian court historiographer Leopold von Ranke (1795–1886), [11] embraced self-evidently only the Western Europe cleansed of Slaves, Jews and some minor nations, such as Hungarians or Latvians. [12]

As a matter of fact, Koschaker restricted the concept of Europe to its western part alone. Accordingly, he never acknowledged Eastern Europe, which remained for him rather a contradiction in terms than an autonomous historical region. Koschaker prized intensely the First (Old) German Reich as the bearer of the political and cultural idea of Europe, whereas he – an Austrian by origin – was not so highly appreciative of the Second Reich, built by Bismarck to the exclusion of Austria. However, Koschaker deplored the formation of several peripheral states (*Randstaaten*) which emerged in 1918 at the former boarders of the Second Reich and the Habsburg Monarchy.

Consequently, Koschaker mourned the establishment of the European peace system of the interwar period 1918–1939, known as the system of Versailles, deploring this »political shrinkage of Europe«. [13] Moreover, at another place in his memorable book Koschaker placed the Slavic legal systems at an older, primitive stage of evolution, localizing them »at the peripheries of Europe, if not wholly outside it«. [14] Even the introduction of the Romanist civil codes of Prussia (ALR), Austria (ABGB) and Germany (BGB) into Central-European countries, accomplished during the 19th century, was in the eyes of Koschaker incapable of Europeanizing the backward region.

A similar Westernism is still represented by many renowned scholars. To cite only few examples, Olivia Robinson, David Fergus and William Gordon (*European legal history*, 3 ed. 2000), Peter Stein (*Roman law in European history*, 2000), Hans Hattenhauer (*Europäische Rechtsgeschichte*, 4th ed. 2004), Paolo Grossi (*L'Europa del diritto*, 2007) and Randal Lesaffer (*European Legal History*, 2009), say nothing as regards Eastern Europe. In their recent book on the foundations of European private law Guido Alpa and Mads Andenas reconfirm the Roman-Germanic model of Koschaker, even though this distinguished expert of cuneiform laws died half a century ago. [15]

As a laudable exception *Western European legal history* of Andrew D. E. Lewis, published by the University of London in 2007, may be mentioned, which is at least modestly entitled as Western. Other exceptional works include *Geschichte des Rechts* and *Geschichte des Rechts in Europa*, published respectively in 1997 and 2010 by the German legal historian Uwe Wesel. Not by chance Wesel, who also takes Eastern Europe into consideration and pays equal attention to private and to public law, is an admirer of Berman. [16] Personally, I expressed similar ideas in 2001, proposing that the historical boundaries of Europe should rather be drawn on the basis of public law criteria. [17]

The borders of Europe. Whereas Koschaker simply identified Europe with the western part of the continent, in which Roman private law remained in force throughout the Middle Ages, and lamented the shrinkage of Europe following World War I, Berman rightly switched his focus to European public law, which he considered heavily influenced by medieval canonists. [18] As a matter of fact, Berman was right to harbour doubts regarding the importance of Roman private law's reception in Europe, particularly in Germany, at least in the sense of its direct application, because this law »was not the positive law of any specific polity in the West« (204). In this respect Berman criticized Koschaker very explicitly (603–604).

Conversely, Berman never went so far as to question the traditional concept of the *ius commune* of medieval Europe as being a synthesis of Roman law and canon law put on equal footing. On the other hand, it is true that he accepted the double name »Romano-canonical legal system« only in a qualified sense (204). In particular Berman insisted

11 Nurdin (2003) 61–64.
12 Giaro (2001a) 174; Giaro (2001b) 59.
13 Koschaker (1966) 350.
14 Koschaker (1966) 146; a critique in Giaro (2001b) 59–61.
15 Alpa, Andenas (2010) 12–15.
16 Wesel (1991).
17 Giaro (2001c) 551, 556–557.
18 Damaska (1985) 1816.

that »there was never a body of law called Roman-canon«, [19] even if the concept was effectively used in this sense by many legal historians of outstanding merit, among others by Helmut Coing, [20] and still continues to be used today. [21] Of course, the historical existence of Roman-canonical court procedure is not subject to doubts.

Berman's ideas on the borders of Europe have undergone some evolution. In his early book »Justice in Russia«, first published in 1950, he excluded Russian law from western tradition, because the short occidental influence from the 1860s onwards was insufficient to build a western legal system there. [22] By contrast, in »Law and Revolution« Berman included Russia, at least from the 19th century onwards, as well as the Soviet Union, into western tradition (539). Subsequently, the Romanist and European character of Soviet civil law became widely recognized. Some continuity between the czarist and the Soviet era was also present in public law, where the communists retained the old structure of the government and ministries.

In the same context, Berman included Poland and Hungary into the European community of law (539). This inclusion of countries, always clearly distinct from the Orthodox East, has already been advocated by Coing as early as the late 1970s. [23] However, having mentioned these typical representatives of East Central Europe, Berman completely forgot the South-eastern one. Of course he mentions Byzantium in the sense of the Eastern Roman Empire (168, 409, 579) and its law (122, 204, 352), but he neglects the fact that the *ius gentium* as public international law embraced since the 13th century the Byzantine world. In this respect Berman stopped at the anti-Byzantine positions of »Europe of legal historians«, inspired by Koschaker.

Nonetheless, on the whole Berman is far more advanced than Koschaker. His larger criterion of area, wherein canon law was in force (205–215), better fits the reality of the late Middle Ages than Koschaker's Latin-Germanic Europe, defined by the reception of Roman private law. The universal Roman Church, which heavily influenced European legal culture, [24] was the only organized factor of political and legal unity in Europe following the fall of the House of *Hohenstaufen*. Moreover, at the beginning of the 15th century the new *ius gentium* expanded even beyond the borders of Christian community, as Paulus Vladimiri claimed to respect the rights of the pagan Prussians, Christianized by sword and fire through the Teutonic Knights. [25]

The final Europeanization. However, Berman's thesis cannot be integrally upheld. It would have signified a resurrection not only of the medieval dispute between the Pope and the Emperor, but also of the »Europe of legal historians«, this time governed by the canonists. A serious study of the Europeanization process should not trace back to the first infiltrations of either Roman or canon law, or both, into regions transcending the Roman-Germanic core of medieval Europe. It should, rather, simply ask when the continental legal systems became structurally homogeneous. As the English example shows, this is not achieved solely by academic education in Roman law or by recognition of certain principles of canon, public or international law.

In conclusion, Berman's thesis of the unity of western legal tradition, based upon the continuity of the medieval common law of Christians, descending from canon law of the universal Church, is – unfortunately – unacceptable. [26] Already during the transition to early modern times in the 16th century, this legal unity vanished because of the Reformation and Counter-reformation. Europe divided sharply into a Protestant North and a Catholic South. [27] The northern economy of commerce, centred in London and Amsterdam, suppressed the religious orders and aristocratic hierarchies. In the South, by contrast, the ecclesiastical, noble and landowning world remained primarily intact.

The decline of both universal powers of the Middle Ages, the First German Reich and the Roman Papacy, caused a disintegration of the medieval *ius commune*. [28] In consequence, more national

19 Berman, Reid jr. (1994) 989, 1008; Berman (2003) 126.
20 Coing (1985) 7.
21 Heirbaut, Storme (2010) 24.
22 Berman (1963) 188, 191, 220.
23 Coing (1978) 33; further citations in Giaro (1993) 331.
24 Landau (1991) 39–57; Landau (1996) 23–47.
25 Belch (1965) 257 ff.; Wyrwa (1978) 106 ff.; Woś (1979) 50 ff.
26 Monateri, Giaro, Somma (2005) 133–134.
27 Osler (1997) 407–410; Osler (2007) 184–192; Osler (2009) IX–XV.
28 Caenegem (1987) 90–91.

legislation and more written collections of customary law – hence more diversity – emerged. However, at the end of the 18th century in Eastern Europe, including East Central Europe, local customary law reigned, administered by lay judges and differentiated according to social strata and provinces. And if the reception of Roman law in the West consisted in an intellectualization (*Verwissenschaftlichung*) of local law, [29] it reached Eastern Europe with considerable delay.

Until the end of the 18th century, the diffusion of Roman law in East Central Europe was indeed greater than in South-eastern Europe and in Russia, but ultimately equally as narrow as in England. Despite the medieval origins of the somewhat spectral universities of Prague, Cracow and Pécs, it was only during the 19th century that modern law schools and legal professions emerged in East Central Europe, together with law journals and associations as well as a professional administration of justice. [30] To this century, unjustly accused of being a time of decay of unitary legal tradition, [31] belongs the crucial significance for the actual legal map of Europe.

Berman's emphasis on canon law undermined the belief in the originality and importance of English common law which, following Berman, appears simply a part of western legal tradition. [32] This tradition, previously interpreted mainly in terms of the contrast between civil and common law, regains its plausible unity under the aegis of public law, which was significantly shaped by canon law. Contrary to Koschaker's opinion, Berman saw clearly that western legal tradition meant not only Roman and civil law, but also common law. Both systems were influenced by values of Christian morality, individualism and liberalism as well as by legal institutions of parliamentarism, self-government and personal rights.

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29 Wieacker (1995) 96–97, 106, 176; Avenarius (2010) 119–180.
30 Giaro (2003) 126–128.
31 Zimmermann (1992) 10, 18–19.
32 Brundage (1995) 242.

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