

REVIEW

Law and Revolution. HAROLD J. BERMAN. Harvard University Press, 1983. Pp. x, 657. \$32.50.

Peter Landau†

In *Law and Revolution*,¹ Harold Berman provides an account of the role of law in the historical development of western Europe during the middle ages. The title hints at Berman's central thesis: that the papal revolution in Europe in the eleventh and twelfth centuries set a pattern that recurred in later revolutionary epochs. The papal revolution worked a large change in social and legal conditions in Europe and created the canon law as the first European legal system. The revolutionary party, led by Pope Gregory VII, succeeded in displacing an old society that had different legal traditions with a new society. The new society was unified by the canon law, by the establishment of the rule of law as a firm principle, and by the organization of the Roman Catholic Church as a bureaucratic centralized government for all of Europe. Centuries before such developments in the national states, the Church was already organized as a kind of state that could serve as a model for secular government.

Professor Berman sees this revolution, which occurred around the year 1100, as the first in a series of six western revolutions—the later ones being the Reformation and the English, American, French, and Russian revolutions. Although Berman does not discuss the similarities of these seemingly very different movements in detail, he advances the view that messianic ideas of justice were driving forces in all. The book has both a theoretical and an historical perspective. On the purely historical level it gives a comparative summary of European legal history during the eleventh and

† Professor of Law, The University of Regensburg, West Germany.

¹ H. BERMAN, *LAW AND REVOLUTION* (1983) [hereinafter cited without cross-reference as BERMAN].

twelfth centuries, often in some detail. On the theoretical level it posits a social theory of justice in evaluating the historical development of western Europe between 1100 and 1500.²

As an historical study of medieval legal history from 1100 to 1500, Berman's work is wide ranging, attempting to summarize the developments in canon, roman, feudal, manorial, mercantile, urban, and royal law in nearly all countries of western Europe during that period. Because Berman is not a specialist in any of these fields, he has relied mainly on secondary sources. Selection in the use of such literature is unavoidable, but Berman's survey has many shortcomings beyond those usually found in this type of work. Berman emphasizes work done in English, and to a much lesser extent German or French, as a basis for his conclusions. No account is taken of modern Italian or Spanish scholarship. Virtually all of the *modern* work Berman draws upon is written in English. He takes almost no account of modern German legal history, although important contemporary German scholarship has greatly altered our view of the very questions Berman treats.³ Thus, there are serious distortions in the picture of European legal history Berman develops.⁴

A few examples of objectionable superficiality in Berman's book may be useful. Berman has a lengthy chapter on Germanic folk-law, which he sees as the main legal context in which the papal revolution occurred.⁵ In his description of tribal law of the earlier middle ages, we find him restating the ideas about Germanic traditions of law developed by Gierke⁶ in the nineteenth century and often repeated and enlarged in more recent times, especially by Fritz Kern.⁷ Berman sees Germanic tribal law as a static order with nearly no change.⁸ The Germanic tribes supposedly had a strong sense of community and trust, and retained their ancient institutions up to the eleventh century. Berman does not realize that nearly all of these notions have been undermined by impor-

² *Id.* at 40.

³ *See, e.g.,* K. KROESCHELL, *HAUS UND HERRSCHAFT IM FRÜHEN DEUTSCHEN RECHT* (1968); G. KÖBLER, *DAS RECHT IM FRÜHEN MITTELALTER; UNTERSUCHUNGEN ZU HERKUNFT UND INHALT FRÜHMITTELALTERLICHER RECHTSBEGRIFFE IM DEUTSCHEN SPRACHGEBIET* (1971).

⁴ Recent German work on the relations between law and liturgy, a theme stressed by Berman, is also generally overlooked. *See, e.g.,* H. DOMBOIS, *DAS RECHT DER GNADE* (3 vols., 1961-1983).

⁵ BERMAN at 49-84.

⁶ *See* O. VON GIERKE, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT* (1868-1913 & reprint 1954).

⁷ *See* F. KERN, *RECHT UND VERFASSUNG IM MITTELALTER* (1918 & reprint 1952).

⁸ *See, e.g.,* BERMAN at 50-51.

tant and well-regarded modern scholarship. We know much less about Germanic law than was thought 50 years ago. We do not know whether Germanic tribes developed specific ideas of faith or trust, nor do we know whether their social organization was dominated by strong traditional elements from pagan times or was mainly the product of foreign influence. It appears that vulgar Roman law had a decisive influence on the emerging Germanic kingdoms, as did the model of biblical law in the earlier middle ages. Even in antiquity Germanic society incorporated strong Christian and Roman elements, and had only a few remnants of old Germanic traditions. Berman's survey of early medieval law simply omits to take account of a breathtaking transformation in recent scholarship.

Berman gives a broad outline of the development of Western legal science and of the emergence of Roman law and canon law after 1100.⁹ His description of canon law as the first modern western legal system is generally accurate. It may be an important contribution to make specialized research in that field known to a wider public. Berman's book, however, provides little information about the earlier canon law tradition; the canon law of the 1100's is seen as an almost completely fresh and revolutionary body of legal texts fulfilling the program of Gregory VII's "Dictatus Papae."¹⁰ This perspective is too one-sided. Berman does not discuss the important older canonical collections that laid the basis for the twelfth-century development. The main link between old and new canon law, Gratian's *Decretum*,¹¹ is treated as a revolutionary work of legal theory,¹² whereas in fact Gratian relied on elementary distinctions that had been made by Isidore of Seville in late antiquity. Gratian cites Isidore in the beginning of his *Decretum*;¹³ his own remarks on the Isidorian texts reveal a rather limited understanding of Roman legal concepts and a partial confusion of natural law and biblical law, but no consistent modern legal theory.

Berman's account of the influence of Roman law in the middle ages also has serious distortions. He surveys university instruction in Roman law from the twelfth century onwards,¹⁴ but he neglects the importance of Roman law in the daily practice of the courts.

⁹ *Id.* at 199-254.

¹⁰ *See id.* at 201-02, 206-07.

¹¹ GRATIAN, A CONCORDANCE OF DISCORDANT CANONS, published as *DECRETUM* in 1 *CORPUS IURIS CANONICI* (E. Friedberg ed. 1879 & reprint 1959).

¹² *See* BERMAN at 145, 202.

¹³ In *Distinctio* I-IV.

¹⁴ BERMAN at 120-64.

Roman law and canon law are treated as more or less separate systems. Berman overlooks the important ways in which secular law had been fused with canonical practice from an early date. The whole process of the revival and reception of Roman law will be misunderstood if one conceives of Roman law in the twelfth and thirteenth centuries as an "ideal law" that had little practical importance.

Extensive chapters deal with the emergence of legal studies and the methods of legal science in the middle ages. Modern science, even natural science, is said by Berman to have its roots in medieval legal science shaped by scholastic methods.¹⁵ Berman claims that the jurists of the twelfth century made "experiments" comparable to those in modern science in their case-oriented expositions of legal questions.¹⁶ This is an anachronistic position. There were enormous methodological differences between scholastic science and modern historical and natural science. Using the word "science" to refer to both the activities of medieval lawyers and those of modern physicists retards rather than promotes understanding of the medieval form of rationality.

The second part of the book, which describes the formation of secular legal systems, sketches the broad outlines of the historical development of feudal, manorial, mercantile, urban, and royal law. Berman is certainly correct to stress the central importance of canon law in the western legal tradition after 1100. Papal decretal law served as a model for the law-making activity of medieval kings. Roman and canon law influenced the systematic elaboration of feudal law and might have stimulated the development of urban law. There is much valuable information here, but it is marred by the same shortcomings evident in the discussions of the role of Roman law and canon law. The chapter on manorial law, for example, builds on English scholarship, ignoring recent continental developments. Urban law was, according to Berman, largely a result of revolts by emerging merchant communities.¹⁷ This generalization is false for many parts of Europe, where the development was continuous and evolutionary. Berman correctly takes note of the importance of royal legislation, but he misleads in speaking of *systems* of royal law.¹⁸ Berman supposes that because the Gregorian revolution developed the concept of the Church, it unavoidably had the

¹⁵ *Id.* at 120-21.

¹⁶ *Id.*

¹⁷ *See id.* at 357-403.

¹⁸ *See, e.g., id.* at 406, 516.

consequence of developing the concept of the State.¹⁹ This was true in the long run, but not for the twelfth and thirteenth centuries, an epoch still dominated by a concept of unity within the "Christianitas." The first treatise on the Church as a separate entity was written at the beginning of the fourteenth century by James of Viterbo;²⁰ the first treatise on the State was probably Dante's *De Monarchia*.²¹ The great event in the articulation of the concept of the State and the origins of political science was the translation of Aristotle's writings around 1260.

Berman uses the historical material to support his legal theory. Although it is difficult to give a summary of Berman's theoretical point of view because the historical narrative often obscures the theoretical argument, as a general matter Berman sees his principal contribution to a social theory of law in his partial opposition to the theories of Karl Marx and Max Weber. Berman's fundamental difference with Marx's theory lies in his view of law as an independent factor in historical change, even a cause of revolutionary developments.²² Berman rejects the view that economic conditions should be taken as the decisive reason for the different role of law in European and non-European societies,²³ and denies the analytical value of the Marxist dichotomy between basis and superstructure²⁴ as well as the Marxist periodization of history that distinguishes between a feudal and a capitalist epoch.²⁵ He argues that the middle ages and the early modern period were neither predominantly feudal nor without strong commercial development, referring to modern research on the commercial revolution in the middle ages²⁶ which he ventures to call an "industrial revolution."²⁷ Marxist categories fail to explain the particular European legal developments after 1100 because they are tied to an inadequate, unidimensional theory of economic causation. In his attack on traditional Marxist arguments, however, Berman does not take account of the more sophisticated ideas Marx himself sometimes

¹⁹ See, e.g., *id.* at 520-21, 527.

²⁰ See H.X. ARQUILLIERE, *LE PLUS ANCIEN TRAITÉ DE L'ÉGLISE: JACQUES DE VITERBE, DE REGIMINE CHRISTIANO (1301-1302); ÉTUDE DES SOURCES ET ÉDITION CRITIQUE (1926)*.

²¹ There is no agreement on the precise date of Dante's *De Monarchia*, but it was certainly written between 1308 and 1317. See 3 *ENCICLOPEDIA DANTESCA* 1001 (1971).

²² *Id.* at 538-558.

²³ *Id.* at 545.

²⁴ *Id.* at 295-96, 539-58.

²⁵ *Id.* at 42-43, 542, 544.

²⁶ See, e.g., *id.* at 351, 359; see generally R.S. LOPEZ, *THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES 950-1350 (1976)*.

²⁷ BERMAN at 359.

developed.²⁸ Marx in fact saw interrelations between law and economics in both directions.

Berman adopts some categories from Max Weber's famous analysis in the *Rechtssoziologie*, for example, those regarding the importance of legal specialists ("Rechtshonoratioren") in European legal development and the role of rational concepts open for systematic interpretation (formal rationality).²⁹ But Berman thinks that Weber's categories of charismatic, traditional, and rational law cannot be used to describe the phases of Europe's legal history,³⁰ and hence, that Weber cannot explain the causes for the major legal transformations in the twelfth century. It is certainly true that Weber's categories are inadequate for distinguishing different epochs in European legal history. On the other hand, Weber's concepts are more helpful as analytical tools for legal historians than any other existing concepts in legal sociology. Berman's criticism does not fully recognize Weber's idea of the sociological concept as an "ideal type". Weber's theory was not meant to be an abstraction based upon specific European developments but rather was to be a common denominator for similarities in legal cultures as diverse as China and the Islamic countries.

Berman criticizes Marx and Weber and rejects a purely ideological or idealistic understanding of the historical development of law. Yet, in the end, it is hard to understand Berman's own theoretical approach. Although he disdains idealistic, economic, and socio-political theories, he stresses incessantly the importance of interrelations between law and other forces—religious, economic, social, and political. He seems to combine elements of Marx's and Weber's theories with ideas taken from the nineteenth-century German historical school that emphasized the decisive role of custom in legal history. Berman knows that law can be and sometimes has been a relatively independent social system with a certain history of its own,³¹ of which Marx and Engels revealed their misunderstanding in their famous saying, "We do not know any history

²⁸ See Landau, *Karl Marx und die Rechtsgeschichte*, 41 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 361-71 (1973). In this article I show that Marx distinguished different legal structures in early agrarian societies in spite of the fact that they shared the same economic base. The different rules of legal organization in these early societies were mainly the result of political events like war, as Marx suggests in the text of his first draft of *Das Kapital*. Marx did not argue that all capitalist societies developed the same legal system, but rather that all capitalist societies had legal systems that lagged behind the stage of development of each society's economic substructure.

²⁹ See generally MAX WEBER, *RECHTSSOZIOLOGIE* (2d ed. 1967).

³⁰ See BERMAN at 547-51.

³¹ See *id.* at 542-45.

of law." He observes that legal innovation can transform traditional societies by introducing foreign institutions, and that the history of western law since the twelfth century was unique in many respects.³² But this is hardly a general social theory of law—if that were in any event a reasonable goal for the study of legal history. I think that legal historians can make contributions to such theories only by working on a higher comparative level than Berman does in this work, by testing western law against the results of legal historical research on the ancient Orient, the Islamic countries, China, and the different primitive societies. Max Weber tried to do that within the limits of historical knowledge at the turn of the century. Berman's book has the shortcomings of exclusive concentration on the western middle ages. It does not give a comprehensive social theory of law.

Stressing the objections to Berman's view of legal history and legal theory should not denigrate the major contributions of this work. Berman seems justified in his periodization of legal history. The eleventh and twelfth centuries do mark a watershed in the history of western law and of western society, probably a more important watershed than the Reformation. In this period, our legal tradition was born: there is an essential legal continuity from the Catholic middle ages through the Reformation, and beyond. Berman's attempt to overcome a nationalistic approach in legal history³³ also seems correct. It will be necessary for legal historians to do much more work on the common roots of civil, common, and canon law systems in the future. Moreover, the author's idea that canon law limited the influence of feudalism in the middle ages and had a revolutionary impact in many sectors of medieval society is supported by much evidence and may even justify the title "Law and Revolution" for a book on the European influence of canon law. Although his attempt to use varied methods and approaches is stimulating, one should read the book critically, aware that it reflects no first-hand study of the historical facts upon which it depends.

³² See *id.* at 546.

³³ See, e.g., *id.* at 1-4, 538-39.