Law and Revolution

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BOOK REVIEWS


The James Barr Ames Professor of Law at Harvard's law school advises the reader that he began writing Law and Revolution in 1938 while a graduate student at the London School of Economics.¹ Some 558 pages of compactly printed text, to which 75 pages of footnote materials, primarily concerned with canon and secular legal systems in Latin Europe circa the years 1000 to 1200 are annexed, evidence that this was indeed the case. Harold J. Berman has dedicated this awesome work product to establishing two propositions, which can be arbitrarily encapsulated in reverse order. One proposition is that the law which developed in Western Europe, whether of the civil or common variety, is ultimately bottomed on the corpus of canon law that resulted from the Gregorian Reformation. The second proposition is that the reconstitution of the Roman Catholic Church associated with the reign of Gregory VII was in fact the primal revolution creating the jurisprudential main theme of Western Civilization; the seemingly discordant notes sounded by later revolutions have actually been counterpoint and variations upon the theme of this primal revolution.

Part II of the book, titled “The Formation of Secular Legal Systems,” describes the crystallization of the multiform rules of law existent in Western Europe into systematic bodies of feudal, manorial, mercantile, urban and royal law. Much of this material is descriptive. The author is the first to admit that the pieces of his story are “well known to specialists in various fields of history and law.”² It would be nice to think that at least the material on the Norman Conquest and Henry II³ was common knowledge in the law schools. “There was a time not long ago when a good lawyer was required . . . to know the story of the development of legal institutions.”⁴

This is not the place to rehearse Professor Berman’s extrapolation of the evolution of feudal law between 1000 and 1200 under six captions: objectivity, universality, reciprocity of rights of lords and vassals, participatory adjudications, integration, and growth.⁵ He is able to use the six categories to structure a discussion of the “transformation of ma-

² Id. at 538.
³ Id. at 434-59.
⁴ Id. at 7.
⁵ Id. at 303.
norial custom into a system of manorial law and to illuminate the evolution of mercantile law. Urban law is analyzed under a five-fold classification, however: its communitarian character, secular character, constitutional character, capacity for growth and its integrity as a system. Royal law, in its turn, emerged in the context of “a new type of political community, the secular territorial kingdom, which had nine significant characteristics.” Suffice to report, the author treats each detail with the loving, tender care one would lavish upon a delicate flower; it is with royal law and the new territorial kingdoms that we can begin to appreciate the design of the garden as a whole.

Under royal law in 1200, the king was purely a secular ruler and no longer the supreme spiritual head of his realm. Yet he was no longer simply the marginal leader of a set of territorial magnates who collectively held sway over a given area; he was ruler of all of the people within the realm. His job was to maintain the peace and settle disputes not only between magnates, but between lesser folk and even between vassals and magnates. He ruled through civil servants, including professional royal judges, so that a royal bureaucracy had replaced the local magnates in the structure of governance.

The king not only enforced the laws of the realm but made new laws if the need arose. Even so, much of this secular law emulated canon law. This was not altogether surprising given that canon law had an established system to be drawn upon and that the bulk of the king’s professional advisers were themselves clerics. The point is, however, that the king was busy doing all these things to create his own identity because there had emerged a rival authority who already had a body of law and a professional bureaucracy, the Bishop of Rome.

A murder in a cathedral may help us to understand this phenomenon. “The conflict between Becket and Henry was essentially a conflict over the scope of ecclesiastical jurisdiction; it was thus a paradigm of the Papal Revolution, which established throughout the West two types of competing political-legal authority, the spiritual and the secular.” But why a “revolution?” Professor Berman, like a good law professor, answers this question by building a somewhat complicated conceptual litmus. Let us attempt to discover whether the word is appropriate by adopting another tactic.

Around the year 1000, neither church nor state in the modern sense

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6 Id. at 321.
7 Id. at 341.
8 Id. at 392.
9 Id. at 408.
10 Id. at 409.
11 Id. at 274.
12 Id. at 260.
13 Id. at 18-23, 99-107.
of those terms existed. The emperor or king was a peripatetic figure constantly traveling about in order to impose some semblance of order on his chief tenants and, perforce, his realm. Whatever the king's physical power, he gained an added psychological dimension because his authority was sacred as well as secular. He was the vicar of Christ responsible for the spiritual well-being of his subjects. Bishops were often appointed by the king and, because of the lands of the monarch they held, they were at least quasi-secular figures in the realm. Marriage or concubinage was common among the village clergy; their local roots limited their outlook. "[T]here was as yet no separate, corporate, organized Roman Catholic Church in the West, no unified legal entity, but rather an invisible spiritual community of individual bishoprics, local churches, and monasteries subordinate to tribal and territorial and feudal units as well as to kings and emperor."

By 1200, the Church of Rome had come to be "an independent, corporate, political and legal entity, under the papacy." It "exercised the legislative, administrative, and judicial powers of a modern state." "The clergy became the first translocal, transtribal, transfeudal, transnational class in Europe to achieve political and legal unity." The events which surrounded this metamorphosis seem entitled at least to the appellation "revolutionary." These were the events that occurred between the year 1075, in which Pope Gregory VII issued the Dictates of the Pope, and 1122, which saw a semblance of papal-imperial accommodation reached with the Concordat of Worms. Between these two dates an emperor stood barefoot in the snow at Canossa and a pope was captured by imperial forces at Rome.

How could this new transkingdom quasi-state have come to be? First, there was throughout the West a *populus christianus,* sick and tired of the secular preoccupations of prince-bishops. Second, in 910, there was a Cluniac reform which created "the first monastic order in which all the monasteries, scattered throughout Europe, were subordinate to a single head." Indeed, here was "the first translocal corporation," which in some respects served "as a model for the Roman Catholic Church as a whole." Third, and now the plot thickens, a person emerged who could mold people and model a new institution. 

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14 *Id.* at 51.
15 *Id.* at ii.
16 *Id.*
17 *Id.* at 69.
18 *Id.* at 520.
19 *Id.* at 113.
20 *Id.* at 108.
21 *Id.* at 94-99.
22 *Id.* at 91.
23 *Id.* at 89.
24 *Id.*
pher Dawson told us that leadership of the reform movement within the Church "passed to younger men" who were prepared to act "at whatever cost. Foremost among them was the archdeacon of the Roman Church, the Tuscan Hildebrand, who . . . was elected Pope in 1073 as Gregory VII."25 Professor Berman confines himself to the description articulated by another scholar who painted the image of a person possessed of "an overpowering sense of mission" and "the temper of a revolutionary."26

Thus it was the Roman Catholic church which first built a centralized system of governance and, perforce, created "a centralized and systematized law."27 Even so, the Church left secular governance to the emperor, kings, and dukes, who coexisted with the Church on the same territory. In their turn, these dominations and powers created the basis of the modern state. Yet nothing of the sort would have happened unless the Papal Revolution had occurred, and this convulsion would not have occurred had not there already come into being "a grass-roots community of the faithful, a populus christianus, extending throughout Western Christendom."28 The circumstances of this revolution illustrate that, "Law spreads upward from the bottom and not only downward from the top."29

The canon law propounded by the Church Revolutionary reflected then emerging theological beliefs at the heart of the movement. Echoes of these beliefs can still be discerned in the mirror image secular law, of which some still survives. For example, a convicted murderer who becomes insane after sentencing will not be executed until he regains sanity. "Why? The historical answer, in the West, is that if a man is executed while he is insane he will not have had the opportunity freely to confess his sins and to take the sacrament of holy communion."30

Until the late eleventh century priests had not had the authority to forgive sins: they could pray to God to do so.31 Christians expected to meet their God only at the Last Judgment, and Christ was important as a symbol of this hoped for resurrection.32 At this time in the West, the notion developed that the sinner had to suffer punishment for unexpiated sins in purgatory before the Last Judgment. There was then an intermediate judgment, and this was a decision that the ecclesiastical authorities could directly influence. Priests acquired the authority to

26 H. Berman, supra note 1, at 94-95.
27 Id. at 553.
28 Id. at 555.
29 Id. at 556.
30 Id. at 166.
31 Id. at 71.
32 Id. at 177-78.
absolve sins.\textsuperscript{33} The Pope as vicar of Christ could grant indulgences which would cancel the punishments due in purgatory; he had "jurisdiction over purgatory."\textsuperscript{34} Because sin meant punishment in purgatory, the significance of Christ was recast: he came to be seen "primarily as the conqueror of sin."\textsuperscript{35} "Thus the church came to be seen less as the communion of saints in heaven and more as the community of sinners on earth."\textsuperscript{36} Gregory's amendment of the Nicene Creed conformed it to this new outlook and signaled the schism between the Eastern and Western churches.\textsuperscript{37}

Professor Berman discerns that these events were to have unforeseen consequences of considerable concern to us. First, a prudent person, who kept track of his sins and was careful to acquire forgiveness or store up credits to shorten the period of punishment in purgatory, might hope to show up at the Last Judgment in a fail-safe mode. Odd as it might seem, a kind of careful accounting practice within the system might make him free. "Man was beginning to take the center of the stage."\textsuperscript{38}

Second, this odd celestial accounting system, involving as it did a balancing of sins and indulgences, tends now to distract us from some crucial points. All sin merited punishment; ergo, all crime did. Crime, like sin, was an offense against the order of things; tribute or retribution had to be paid. These are notions central to the criminal law today. However, of crucial importance was the belief that, punishment being deserved, God would not go around willy-nilly forgiving sins. Sin, or crime, merited punishment, so much so that forgiveness without some form of penance (punishment) "would constitute a deficiency in justice."\textsuperscript{39} Even "God is bound by his own justice."\textsuperscript{40} Thus we reach the core idea underlying both canon and secular law: "justice-based-on-law and law-based-on-justice, with mercy playing an exceptional role."\textsuperscript{41} However, if God was bound by his own justice, kings had to be bound by theirs. Thus implicated in the Papal Revolution was the idea of "a state ruled by law, a 'law state' (Rechtsstaat)."\textsuperscript{42}

Critical to the law states that evolved after the Papal Revolution was the fact that a number of disparate tribunals came to exercise jurisdiction and that tension resulted. Secular courts came to rival canon tribunals, while within the secular world criminal, civil, and mercantile
courts coexisted uneasily. "The same person might be subject to the ecclesiastical courts in one type of case, the king’s court in another, his lord’s court in a third, the manorial court in a fourth, a town court in a fifth, a merchants’ court in a sixth." Thus it is that “the Western legal tradition” was bottomed upon “belief in the existence of a body of law beyond the law of the highest political authority” and has always involved “autonomous legal systems . . . within the nation.”

Yet to be appreciated is how much of his own self Harold Berman reveals on these pages. First, there is the persona of a classic law school professor. Obviously his work posits “a time when what is known today as a legal system—a distinct, integrated body of law, consciously systematized—did not exist among the peoples of Western Europe.” “In 1000 there was no professional legal scholarship.” In the wake of the Papal Revolution came not only a new canon law, and its mirror images in various bodies of secular law, but “a class of professional lawyers and judges” together with “law schools.” Professor Berman describes the first law school at Bologna, the scholastic method, and, ultimately, the notion that “law” was actually a prototype of western science. Langdell fairly haunts these portions of the book.

Second, Professor Berman reveals the persona of a humanist who has witnessed the disappearance of the plurality of legal jurisdictions and the erosion of belief in a coherent body of law above and beyond politics. Belief in the law’s “structural integrity . . . its religious roots, its transcendent qualities” is being dissolved by cynicism. Words have come to disguise meaning: witness how “‘public policy’ has come dangerously close to meaning the will of those who are currently in control.” “These are harbingers,” Berman suggests, “not only of a ‘post-liberal’ age but also of a ‘post-Western’ age.” In his introduction Professor Berman seems ready to adopt T.S. Eliot’s pose and patiently

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43 Id. at 10.
44 Id. at 45.
45 Id. at 49.
46 Id. at 76.
47 Id. at 116.
48 Id. at 123-27.
49 Id. at 131-32.
50 Id. at 151-64.
51 Id. at 39.
52 Id. at 52.
53 Id. at 41.
54 Id.
55 See Spender, In Eliot’s Cave, N. Y. REV. OF BOOKS, Sept. 19, 1974, at 22: [W]hen one reads Notes Towards a Definition of Culture, one goes away with the feeling that he does not really believe there is the basis for any real culture in contemporary society, and that he is only discussing all this out of a sense of Christian duty or humility.
wait the coming of a new dark age. As London before it, the Hub has had to suffer the continued westward migration of economic, and, perforce, political and intellectual dominance. Given a preference for the values once associated with the concept of gentleman, the quality of life even in academic communities in the East has become something of a dog’s breakfast. Professor Berman may have especial cause to grow wistful as the *haute bourgeoisie* periodically romp through Langdell’s corridors pretending to be Bolsheviki seizing control of the decisionmaking process in the Winter Palace. What are we to make of all this? Here is a superb intellectual history which tells a plausible story about an upheaval in Western society and, at the same time, tells us a great deal about the technical law then coming into vogue. Each of us lives in a world we half create so that, in the last analysis, the temporal “truth” of Professor Berman’s construct depends upon how closely it matches the parameters of our own. I find the construct plausible, but I have also read Christopher Dawson with pleasure. It is doubtful whether the professional historians will be so easily pleased by legal history rehearsed, as it were, in the grand manner.

Professor Berman balances his melancholic views of the future with a frolicking conclusion. While the Introduction rehearses a contemporary jurisprudential “crisis,” the concluding pages include a “refutation” of Karl Marx and a critique of Max Weber. What has law-trained Marx to do with a history of medieval ideas, the one weakness of which may be its refusal to limn the bathos of the material conditions in which the ideas arose? Everything, when one considers that Marx and Berman are at loggerheads over the question whether Hegel should stand on his feet or on his head. The law professor’s whole effort is, after all, bottomed on the notion ably put by John Lukacs, that “[w]hat

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56 H. Berman, supra note 1, at 33-41.
58 Sir C. Dawson, supra note 25, at ch. 5.
59 Relevant here is an aside in a book review:

As Sir Lewis Namier once remarked to me, after a rather tense game of snooker: Historical judgments mark the point at which the historian has ceased to do his research. Their content is of little value in itself. If there had been more than fifteen reds on the table, it is conceivable that you might not have lost.

60 H. Berman, supra note 1, at 33.
61 Id. at 544.
62 Id. at 539-45.
63 Id. at 545-52.
64 Id. at 547.
people think and believe is the real substance of their lives and of their histories—and the material institutions of society are the superstructure of that." 67 Yet, in the short run, it is the law-trained 68 Weber who presents the real problem.

Professor Berman seems actually to be experiencing a variety of religious experience when he describes the legal process which emerged from the Papal Revolution. He believes that "scholastic jurists created a legal 'science,' in the modern Western sense." 69 A five-fold criteria enables him to define science in its modern sense and to conclude that "the scholarly researches and writings of the Italian, French, English, German, and other jurists of the late eleventh, the twelfth, and the thirteenth centuries, both canonists and Romanists, constituted a science of law." 70 A science presupposes that its practitioners adhere to certain intellectual standards of objectivity. 71 Where the spirit is willing, however, the flesh may be weak. Although judges and lawyers were not always able to live up to this ideal, the law teacher or legal scholar had to set the example by adhering to this "scientific code of values." 72

One paragraph encapsulates the spirit pervading the whole enterprise, and it is a truly magnificent one.

The scholastic dialectic and consequently modern science, including legal science, were produced by the contradictions in the historical situation of western European society in the late eleventh and twelfth centuries, and by the overwhelming effort to resolve those contradictions and to forge a new synthesis. They were produced, above all, by the revolutionary upheaval which separated the ecclesiastical and secular jurisdictions and thus made the reconciliation of opposites an acute necessity at virtually all levels of social life. A learned profession of jurists emerged in western Europe—first mainly in the church and eventually, in varying degrees, in the cities and kingdoms—in response to the need to reconcile the conflicts that raged within the church, between the church and the secular authorities, and among and within the various secular polities. Formed primarily in the universities, the legal profession produced a science of laws; that is, the jurists constituted a community in which legal science was the expression of the community's reason for being. Through its science, the legal profession helped to solve the contradictions in the social and historical situation of western Europe by solving the contradictions between that situation and the preexisting legal authorities. Legal science was, in the first instance, an institutionalization of the process of

68 H. Berman, supra note 1, at 547.
69 Id. at 151.
70 Id. at 152.
71 Id. at 155-56.
72 Id. at 157.
resolving conflicts in authoritative legal texts.73

During this formative era, this effort was seen as part of the larger effort to reconcile God and man. "More than anything else, it was the new vision of his own ultimate destiny that first led Western man to have faith in legal science."74

Max Weber's world was built upon the rock of politics instead of Marxist economics; its fundamental tenet is the necessity for any society either to be dominated or coerced.75 This view ignores Professor Berman's picture of a body of quasi-sacrosanct law distilling the society's moral beliefs and a legal process dedicated to crystallizing customs into law as these notions work their way up through the social fabric.76 Law does not remain forever fixed in Berman's world; it gradually must be adjusted to continue to reflect the community's own evolving beliefs. A proper respect for tradition is crucial to the workings of this judicial process.77 Instead of Weber, one cannot help but think of Michael Oakeshott's admonition that the "modification of the rules should always reflect, and never impose, a change in the activities and beliefs of those who are subject to them, and should never on any occasion be so great as to destroy the ensemble."78

Professor Berman has written a superb memorial to the ideals which exhilarated the Western world for a considerable time as the result of the Gregorian Revolution. Those ideals were based on "a fear of purgatory and the hope of the Last Judgment."79 The reader has now to strum his or her own blue guitar and to reflect upon our own epoch.80 Ours is an age in which, if God is not dead, hell and purgatory have been disestablished. There are few shared beliefs on this planet Earth. "Three degrees of latitude reverse all jurisprudence; a meridian decides the truth."81 We live in a nation which has become the leader of the Western world, but ours is a multilingual as well as a culturally tribal society. Government has become "a set of institutional arrangements for imposing a bureaucratised unity on a society which lacks genuine moral consensus."82 We are ruled by a mild despotism imposed by courts, agencies, and collective elites, in what has become an administrative state. And so, this reader has to conclude that this truly magnificent

73 Id. at 160 (emphasis in original).
74 Id. at 164.
75 Id. at 51-52.
76 Id. at 556.
77 Id. at 558.
78 M. OAKESHOTT, RATIONALISM IN POLITICS 190 (1967).
79 H. BERMAN, supra note 1, at 558.
81 B. PASCAL, PENSEES 83 (Everyman's Library 1948) (This book is a collection of "thoughts." The cited quote appears in thought number 294).
82 A. MACINTYRE, supra note 57, at 236.
book is a last hurrah, if not a memorial in the genteel tradition, for a world which exists today only in one’s memory and which, in gentle persons, may cause a moment of regret, as one would recall with nostalgia the grand decadence of the perished swans.83

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