

## LAW471 Weekly Readings

### Topic 1

Berman, H, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge Mass, 1983, pp 333 – 356

- As with feudal and manorial law, so with mercantile law the crucial period of change was the late eleventh and twelfth centuries.
- It was then that the basic concepts and institutions of modern Western mercantile law- *lex mercatoria* (the law merchant")- were formed, and, even more important, it was then that mercantile law in the West first came to be viewed as an integrated, developing system, a body of law.
- The changes in mercantile law were even more striking than the changes in feudal and manorial law: informal, customary feudal and manorial relations had been widespread in the ninth and tenth centuries, although they had not then been given systematic legal expression, whereas, since the decline of the western Roman Empire, commercial relations had existed only on a very limited scale.
- Fairs and markets also existed, though they were not widespread, and some towns, especially seaports, survived from Roman times.
- Then in the eleventh and twelfth centuries there occurred a rapid expansion of agricultural production and a dramatic increase in the size and number of cities.
- At the same time there emerged a new class of professional merchants, who carried on large-scale commercial transactions both in the countryside and in the cities.
- It was primarily to meet the needs of the new merchant class that a new body of mercantile law was developed.
- Although the nourishing of commerce and the development of mercantile law were closely connected with the rise of cities and the development of urban law, they also had an important nonurban aspect.
- Even apart from these theoretical and historiographical implications, the development of Western commercial law in the eleventh and twelfth centuries should be seen in the context of trade in the countryside, and not only in the context of trade in the cities.
- The rise of a merchant class was a necessary precondition for the development of the new mercantile law.

- The transformation of agriculture in the eleventh and twelfth centuries created both the opportunity and the need for the rapid expansion of the merchant class.
- It is difficult to determine the exact scale of the migration from the countryside to the cities of Europe.
- Although many historians have shown that Western commercial; capitalism originated not in the sixteenth and seventeenth centuries, as is commonly supposed, but in the eleventh and twelfth centuries - in the heyday of the manorial mode of production and of feudal class relations-nevertheless many of the same historians have continued to perpetuate the view that Christian teaching prior to the Reformation remained fundamentally opposed to the profit motive.
- One is thus presented with a striking paradox: the *spiritus capitalisticus* (as Pirenne called it) is said to have originated at a time when the prevailing system of beliefs placed primary emphasis on the mystical and ascetic sides of life and on rewards and punishments in the hereafter.
- Moreover, the prevailing system of beliefs was backed up by the entire moral and legal authority of an all-powerful ecclesiastical hierarchy - and yet in fact commerce flourished.
- These questions, however, arise from a view of the relation of Christian doctrine to the development of commercial capitalism which is based on a distortion not only of Roman Catholic thought in the period from the late eleventh to the fifteenth centuries but also of Protestant thought in the sixteenth and seventeenth centuries.
- From the point of view of the Christian social theory which prevailed in the formative period of Western commercial institutions, the economic activities of merchants, like other secular activities, were no longer to be considered as necessarily a danger to salvation"; on the contrary, they were considered to be a path to salvation, if carried on according to the principles laid down by the church. These principles were spelled out in the canon law.
- To say that the basic concepts and institutions of modern Western commercial law were formed in the period of the late eleventh and twelfth centuries does not ignore the debt which the creators of those concepts and institutions owed to the Roman law as it was reflected in the newly discovered texts of Justinian .
- The old Roman jurists had also recognized that many contracts were governed not by the civil law but by customary law, including the *Jus gentium*.

- Included in the customary law of commerce of the Roman Empire was the Sea Law of Rhodes, usually thought to date from about 300 B.C., as well as the customs of maritime trade that had been developed subsequently by eastern Mediterranean traders.
- Nevertheless, neither the newly rediscovered Roman civil law nor the barely surviving Roman customary law, including the jus gentium, was adequate to meet the kinds of domestic and international commercial problems that arose in western Europe in the late eleventh and twelfth centuries.
- Occasionally, rules of mercantile law developed by merchants were collected and circulated.
- At the same time a large body of law was created that governed overland trade.
- The law merchant, then, governed a special class of people (merchants) in special places (fairs, markets, and seaports); and it also governed mercantile relations in cities and towns.
- As in the case of feudal law and manorial law, so in the case of mercantile law, during the period from 1000 to 1200, and chiefly between 1050 and 1150, rights and obligations became substantially more objective and less arbitrary, more precise and less loose.
- In twelfth-century Europe the transnational character of the law merchant was an important protection against the disabilities of aliens under local law as well as against other vagaries of local laws and customs.
- However, not all other countries eliminated distraint of foreigners for the debts of a fellow citizen; in northern Italy a long series of treaties among the cities was slowly and fitfully securing for the Italians this same protection
- The movement toward uniformity in this and other respects was a gradual process.
- The customs even of the international fairs were not always the same.

Heydon JD *Some developments in commercial law in the lifetime of the Australian Law Journal* (2007) 81 ALJ 577

- The third main development in commercial law relates to what Chief Justice Gleeson has called the search for "individualised justice".<sup>2</sup> It has several sources.<sup>3</sup>
- First, statutory changes were introduced which tended to weaken security of transactions and to increase the breadth, complexity and detail of factual inquiries in litigation.