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**Wim Decock**

## Capital Confidence

Updating Harold Berman's Views on Mercantile Law and Belief Systems

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Updating Harold Berman's Views on Mercantile Law and Belief Systems

»Every time a society finds itself in crisis it instinctively turns its eyes towards its origins and looks there for a sign.« With this citation from Octavio Paz, the 1990 Nobel Prize winner in literature, Berman concluded his *Law and Revolution: The Formation of the Western Legal Tradition* in 1983.<sup>1</sup> There is a sense in which, thirty years later, this quote remains utterly appropriate, certainly at the beginning of a re-assessment of Berman's thoughts on the particular topic of the religious origins of modern commercial and financial institutions. Five years on from the start of the financial crisis, triggered by the collapse of Lehman Brothers on 15 September 2008, it is worthwhile recalling, perhaps, that the sign perceived by Berman in the history of mercantile law was a sign that pointed towards the fundamental interconnectedness of belief systems and business. Berman was profoundly convinced of the vital, historical link between religion, trust, and economic prosperity.

Indeed, some have diagnosed the causes of the current debt crisis in terms of a profound alienation of the Western economic system from its religious and moral moorings. Regardless of how we want to evaluate this rupture, a recent episode from the credit crunch may illustrate that there is at least some truth in that diagnosis. Since June 2012 the City of London has been hit by the so-called Libor-scandal.<sup>2</sup> Regulatory authorities revealed that the »London interbank offered rate« (Libor), used for lending among banks and affecting the pricing of at least \$300 trillion in securities, had been manipulated during the financial crisis. Immediately, Barclays, the pride of English finance, found itself in the eye of the storm. Bob Diamond,

its charismatic CEO, had to resign and on 4 July 2012 was called before Members of Parliament for a hearing.<sup>3</sup> Mr Diamond had an answer for every question they threw at him, except one. When John Mann MP, member of the Treasury Select Committee, asked Mr Diamond to remind him of the founding principles of the Quakers who set up Barclays, Bob Diamond remained speechless, and Mr Mann had to give the answer himself: honesty, integrity and plain dealing.<sup>4</sup>

Confronted with this embarrassing example of historical amnesia, suffered by one of the brightest minds of the modern banking industry, a melancholic spirit might be tempted to find comfort in Alexis de Tocqueville's idea that »when the past no longer illuminates the future, the spirit walks in darkness« – a quote Berman chose to conclude the second volume of his *Law and Revolution* with. It might be fairer to just say that the early history of Barclays' banking business adds further weight to Berman's assumptions about the religious origins of modern commercial and financial institutions. Originally, the Quakers, also known as the Religious Society of Friends, committed themselves to banking and other trades on a decidedly Christian basis. John Freame, who was only 21 years old when he founded Barclays in London's Lombard Street in April 1690, is remembered for saying that the current generation has a duty to implant in young minds a sense of piety and virtue, since that would prove to be more advantageous to them than getting a great deal of riches.<sup>5</sup>

However, the aim of this contribution is not primarily to assess the prophetic nature of Berman's historical account nor to analyze the finan-

1 BERMAN (1983) 558.

2 For a chronology and detailed analysis of the Libor-scandal, see the expert coverage in the *Financial Times* <http://www.ft.com/intl/indepth/libor-scandal> (last accessed on June, 24, 2013). To get a sense of the dazzling litigation storm ensuing from the scandal, see *The Libor scandal. Year of the Lawyer: Banks Face Another Punishing Year of Fines and Lawsuits*,

*The Economist*, Jan 5<sup>th</sup> 2013 (<http://www.economist.com/news/finance-and-economics/21569053-banks-face-another-punishing-year-fines-and-lawsuits-year-lawyer>) (last accessed on 24 June 2013).

3 See <http://www.parliament.uk/documents/commons-committees/treasury/TSCFormalMinutes12-13.pdf> (last accessed on 24 June 2013).

4 PLENDER (2012) ponders the clash of cultures between the Quakers and the modern traders as witnessed in the Barclays affair.

5 ACKRILL/HANNAH (2001) 12 and SAVILLE (2002).

cial meltdown of Western economies over the last couple of years. Rather, acknowledging the merits of *Law and Revolution* as ›a great work of synthesizing scholarship‹,<sup>6</sup> it seeks to update some of the historical claims made in this seminal book by confronting them with the results of more recent research. Even if Berman's *Law and Revolution* has become the standard introduction to the history of Western law across the world, one should not infer from this that it has terminated the debate on many issues related to the historical origins of the Western legal tradition. In fact, Berman's *Law and Revolution* has contributed in no small measure to stimulating further investigation into the subject, particularly concerning the medieval origins of a universal law merchant and the religious roots of the capitalist spirit. The objective of the next paragraphs is to challenge some of Berman's assumptions regarding law, economics and religion precisely on the basis of research that has been undertaken subsequent to his great work.

For many jurists, including legal historians, Harold Berman has become associated with the popular idea that there really existed a universal *lex mercatoria*, a kind of self-regulated, customary and transnational mercantile law, which can boast a history of almost a millenium. Indeed, Berman is often quoted as one of the main authorities legitimizing that proposition,<sup>7</sup> since he argued that continental and overseas trade from the eleventh to the fifteenth centuries was governed by ›a general body of European law, the law merchant‹.<sup>8</sup> Apart from the *universal* character of the medieval law merchant, Berman stressed that it was the self-generated product of mercantile *custom*.<sup>9</sup> In addition, merchants settled their disputes in their *own courts* which were characterized by participatory adjudication.<sup>10</sup> Consequently, Berman has also become one of the favorite culprits for critique by those scholars who seek to deconstruct the myth of a universal and eternal law merchant.<sup>11</sup> It is

worthwhile giving a short outline of that critical revision, which has become widespread among legal historians across Western countries over the last decade or so.<sup>12</sup>

The universal character of the *lex mercatoria* is probably one of its supposed features which has been attacked most fiercely by contemporary scholars, for instance in the work of Albrecht Cordes.<sup>13</sup> Already back in 2001, Cordes demonstrated that merchants from different European regions did not share the same substantive law in the Middle Ages. There is also no evidence for a universal mercantile procedural law.<sup>14</sup> On the continent, a body of mercantile privileges referred to as *ius mercatorum* can be found as early as the beginning of the twelfth century, but it is not meant to represent a universal body of mercantile law.<sup>15</sup> In late thirteenth century England, *lex mercatoria* is merely a concept that indicates a number of procedural privileges for merchants, for instance less strict rules of evidence.<sup>16</sup> One wonders if it is possible to conceive of universal systems of law in the 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> centuries anyway. Even canon law, which Berman called the ›first modern Western legal system‹, remained much more local and particularist in nature in the wake of the Papal Revolution than Berman thought it was.<sup>17</sup> As Christopher Wickham concluded in his investigation on the church courts in twelfth-century Tuscan region, ›local differentiation in ecclesiastical practice did not by any means end with Gregory VII and Urban II, or even with Alexander III and Innocent III‹.<sup>18</sup>

*Law and Revolution's* claims about the transboundary character of medieval mercantile law are in need of revision, then, since the *lex mercatoria* was much more particularist in nature than is often supposed. The decidedly local character of mercantile law persisted in the early modern period.<sup>19</sup> By the same token, assumptions about the fundamentally customary and self-regulatory nature of mer-

6 EWALD (2005) 161.

7 For two random examples from the overwhelming flood of publications on the law merchant, see MEYER (1994) 49 nt. 35, and MICHAELS (2007) 448.

8 BERMAN (1983) 334 and 342. Compare BERMAN (1988) and BERMAN/DASSER (1998).

9 BERMAN (1983) 340.

10 BERMAN (1983) 346.

11 E.g. CORDES (2001) 172; KADENS (2004) 39–41; SCHERNER (2001) 153–155.

12 E.g. BART (2000), DONAHUE (2004a), GIALDRONI (2008), DE RUYSSCHER (2012), KADENS (2012), MICHAELS (2012), and SACHS (2013).

13 CORDES (2001), CORDES (2003), CORDES (2013).

14 CORDES (2013) 49.

15 CORDES (2001) 178.

16 CORDES (2001) 173–174. For a discussion of the late medieval English Treatise *Lex mercatoria* which was included in the late 13th century Little Red Book of Bristol, see COUILLETTE (1997) 143–205.

17 BERMAN (1983) 199–254.

18 WICKHAM (2003) 269.

19 E.g. WIJFFELS (2005) 264–266 and VAN HOFSTRAETEN (forthc.).

mercantile law need to be qualified. In this regard, Charles Donahue Jr. once pointed out the absence of a general collection of customs of merchants in the medieval and early modern sources.<sup>20</sup> Both Emily Kadens and Stephen Sachs emphasize that merchant adjudication in the late Middle Ages was not necessarily separated from the ordinary court system and that private customs were certainly not the only source of normativity for merchants. Even when merchants did have their own customs and dispute settlement mechanisms, they used the courts of the local secular and ecclesiastical authorities as well.<sup>21</sup> For example, at the fair of St. Ives, one of the major trade happenings in 13<sup>th</sup> century England, merchants settled their disputes in the local court, which was run by the Abbot of Ramsey and sat in his hall.<sup>22</sup> Self-regulation and private ordering, then, were limited. Commercial norms themselves were shaped not only by mercantile customs, but also by statutory law – often at the explicit request of the merchants.<sup>23</sup> In fact, Berman was not unaware of this. He acknowledged that mercantile law had ›especially close connections with urban and ecclesiastical law‹.<sup>24</sup>

In short, when they should read Berman, future jurists will not ignore the presence of powerful ›foundation myths‹ in the debate on the *lex mercatoria*.<sup>25</sup> It would be unfair, however, to blame Harold Berman for not trying to deconstruct the conventional *lex mercatoria*-narrative. When Berman wrote his synthesis of the evolution of the Western legal tradition, the romantic tale about the medieval origins of the law merchant was predominant. Incidentally, 1983 saw not only the birth of *Law and Revolution* but also witnessed the publication of Trakman's influential study on the

evolution of mercantile law, which has been called ›a somewhat rhapsodic celebration of the medieval Law Merchant‹.<sup>26</sup> Moreover, the myth about the medieval origins of a transnational law merchant prevailed in the two decades preceding his writing through the work of Clive M. Schmitthoff and Berthold Goldman,<sup>27</sup> even if, occasionally, critical voices were raised already at that time.<sup>28</sup> In fact, the revival of the discourse on *lex mercatoria* in the 60s and 70s turns out to have been just another episode in the cyclic recurrence of the myth since the early seventeenth century.<sup>29</sup> The tendentious use of the law merchant goes a long way back.<sup>30</sup>

Admittedly, the resistance against Berman's somewhat naïve picture of the law merchant is justified, but it does not detract from the brilliance of his overall message. *Law and revolution* is essentially a reminder that commercial law and economic institutions cannot be considered as merely depending on developments in the material or political sphere. It shows that the theoretical models for the explanation of legal and societal change offered by Karl Marx and Max Weber were too heavily indebted to cheap economic or political determinism, respectively.<sup>31</sup> Instead, Berman highlighted the connection between changing belief systems and socio-legal developments. He warned against ›the danger of viewing the law always as a consequence of social and economic change and never as a constituent part of such change‹.<sup>32</sup> Moreover, in Berman's view, the law embodied a typically Christian morality. Perhaps what Berman would have agreed with more than with conventional ideas about the *lex mercatoria*, is that a universal customary law among merchants did exist since the papal revolution, if we understand

20 DONAHUE (2004a) 28.

21 KADENS (2004) 64.

22 SACHS (2006) 720–728 and SACHS (2013) 22–23.

23 KADENS (2012) 1199. The combined forces of both customary and statutory law have also been singled out as the driving factor behind the development of medieval and early modern company law in MEHR (2009) 25–28. Accordingly, Mehr abandons the notion, adhered to by BERMAN (1983) 215 that the modern law of corporations is mainly the legacy of Roman and canon law.

24 BERMAN (1983) 341.

25 MICHAELS (2013) 268.

26 EPSTEIN (2004) 5–6 and TRAKMAN (1983).

27 SCHERNER (2001) 148, DE RUYSSCHER (2012) 500.

28 For example, BAKER (1979), also cited in BASILE et al. (1998) 179.

29 The intellectual history of the myth of *lex mercatoria* has been accurately described in BASILE et al. (1998) 123–188. The authors argue that in early seventeenth century England the concept of the law merchant was advanced strategically to protect the interests of the merchants against royal interference and the pervasiveness of the common-law courts (p. 124). It were actually those seven-

teenth-century advocates of merchants' privileges who first used medieval sources in an anachronistic manner to bolster their claims; compare CORDES (2001) 175–177. For further analysis of Gerald Malynes' role in this process, see SCHERNER (2001) 160–161 and GIALDRONI (2009).

30 DONAHUE (2004a) 26.

31 BERMAN (1983) 247 and 538–558, BERMAN (1987, repr. 2000) 239–250, BERMAN (2003) 380.

32 BERMAN (1983) 336.

by this that merchants shared a common moral culture imbued with Christian values.<sup>33</sup> It is important that critics pay more attention to this aspect of Berman's exposition on the evolution of Western commercial law.

An intricate connection exists between the medieval law merchant, on the one hand, and the salvation of souls, on the other. Along with Last Judgment, purgatory and sin, the salvation of souls is a theological concept which Berman saw as the key to understand the history of the Western legal tradition. Concerning the origins of mercantile law, Berman claimed that ›law was a bridge between mercantile activity and the salvation of the soul.‹<sup>34</sup> According to him, ›the law developed by the merchants to regulate their own interrelationships, the *lex mercatoria*, was supposed to reflect, not contradict, the canon law.‹<sup>35</sup> At the same time, Berman recognized that the relationship between canon law and mercantile law was not always a smooth one. He also realized that the religious sources of the Western legal tradition had come to dry up in recent times. He found that the Christian foundations of Western law had almost totally been rejected in the twentieth century.<sup>36</sup> The result for our understanding of law and legal history was obvious to Berman: ›Western legal science is a secular theology, which often makes no sense because its theological presuppositions are no longer accepted.‹<sup>37</sup>

Recent scholarship affirms Berman's general intuition about the relationship between the origins of Western commercial law and developments in medieval canon law. In his outline of the history of Western commercial law, Laurent Waelkens explains why there is a direct relationship between the rise of ecclesiastical jurisdiction in the wake of the Concordate of Worms (1122) and the subsequent commercial revolution of the twelfth century.<sup>38</sup> Moreover, by considering merchants as a special category of *personae miserabiles*, the Church

was able to claim jurisdiction over them.<sup>39</sup> Indeed, because of their frequent travelling through foreign regions, merchants were thought to deserve special protection, just as pilgrims.<sup>40</sup> Ecclesiastical courts have also been credited with playing a leading role in debt enforcement between merchants.<sup>41</sup> In addition, the prominent role accorded to principles of equity in both the canon law tradition and the merchant courts is no coincidence. By the sixteenth century the content of ›equity‹ may have derived from a secular morality of fair dealing rather than a specific Christian notion of equity.<sup>42</sup> But the late medieval emphasis on equity in commercial transactions is clearly associated with religious representations of good faith and equity.<sup>43</sup> Last but not least, several authors have confirmed Berman's criticism of the Weber thesis about the Protestant origins of the capitalistic spirit.<sup>44</sup> As Berman argued against historians such as Henri Pirenne, there is evidence going back to the 12<sup>th</sup> century which is incompatible with the widespread conviction that the Catholic Church opposed the profit motive.<sup>45</sup> In fact, the Church contributed to the emancipation of merchants.<sup>46</sup> The first systematic treatises on commercial law and contracts were written by canonists and theologians.<sup>47</sup>

*Law and Revolution* has been said to be a book as much about the present as about the past.<sup>48</sup> One could even maintain that it is about the future. There have always been signs of prophecy in Harold Berman's writings. Ten years ago, when the second volume *Law and Revolution* appeared, he concluded that ›it became necessary to explore not only the dependence of economic growth on law but also the dependence of law on the underlying belief system of the society whose law it is.‹<sup>49</sup> Berman sensed that in the early twenty-first century the historical nature of the Western legal tradition became visible precisely because it was in decline.<sup>50</sup> In that sense, the financial crisis,

33 PETT (1997) and PETT (2008).

34 BERMAN (1983) 339.

35 BERMAN (1983) 339.

36 BERMAN (1983) 197.

37 BERMAN (1983) 165.

38 WAELKENS (2011) 9–10.

39 C. 24 q. 3 c. 23; DUVE (2008) 63 and 138–139.

40 PIERGIOVANNI (1992) 630.

41 NEHLSSEN-VON STRYK (2012) 90. See also the research project on excom-

munication for debt in late medieval France conducted by Tyler Lange, the results of which were presented at the LOEWE-Dialogue for Young Scholars (Frankfurt/M., March 2<sup>nd</sup> 2013).

42 DONAHUE (2004b) 33.

43 PIERGIOVANNI (2005) 177–178,

PIERGIOVANNI (2006) 103–104.

44 There is an abundant literature on this subject. Please allow us to refer to DECOCK (2009) and (2012).

45 BERMAN (1983) 102, 248, 336–338, BERMAN (2003) 377–378.

46 PIERGIOVANNI (1992) 617.

47 SAVELLI (1987), CLAVERO (1991), PRODI (2009).

48 IBBETSON (1986) 137.

49 BERMAN (2003) 380.

50 BERMAN (2003) 382.

which he could no longer witness, produced the perfect proof of his diagnosis. The vital interconnection between faith and finance, capital and confidence, has been crudely laid bare during the recent economic turmoil. Even if Berman's historical account of the medieval law merchant needs to be updated, his insight into the fundamental interplay between commerce, law and belief systems remains accurate today. One wonders, then, how Berman would have reacted to Bob Diamond's

amnesia about the religious values on which the foundation of Barclays' banking depended. Undoubtedly, he would have rehearsed the magic mantra that runs as a red thread through his intellectual legacy: »It is the thesis of this book that the evolution of the Western legal tradition is founded on an evolving Western belief system.«<sup>51</sup>



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51 BERMAN (2003) 373.

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