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**Heikki Pihlajamäki \***

## The History of Spanish Commercial Law in Context

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\* University of Helsinki, [heikki.pihlajamaki@helsinki.fi](mailto:heikki.pihlajamaki@helsinki.fi)

wärtig schon das traditionelle Gehäuse des souveränen Nationalstaats als des alleinigen Akteurs verlassen, aber auch das noch ältere naturrechtliche Fundament, das außereuropäische Kulturen nicht kennen und dessen Benutzung sie wegen seines

Missbrauchs im Kolonialismus nicht grundlos misstrauen. So wird die Geschichte des Völkerrechts zum Reflexionsort der Zukunft.



**Heikki Pihlajamäki**

## The History of Spanish Commercial Law in Context\*

Carlos Petit's new book on the history of commercial law is a formidable piece of scholarship. It is essentially a history of commercial law in Spain – but the treatment is far from national, as we shall see.

Petit treats the subject in different contexts. He starts by making an important distinction between law merchant (*ius mercatorum*) and mercantile law. Modern commercial (or mercantile) law is, like all modern law, a compound of legal norms and has, at least in theory, nothing to do with other normative systems such as religion. Law merchant, however, was different. According to the author, law merchant was a »normative complex, which not only, and not essentially, was in force as an order or legal ›system« (translations from Spanish here are all mine). Instead, this normative complex consisted of several ingredients. One of them was »police« (*»reglas de la política«*), which always aimed at the common good (*bonum commune*). The normative complex also included rules coming from the field of economics, which determined the ways in which economic activities were to be pursued and controlled, in the family and otherwise. Above all these normativities was, of course, religion, the super-norm (*»norma de normas«*), a sort of constitution that determined the use and place of all other norms. One might say that, in this way, medieval and early modern law merchant was typical of the time. A history of pre-modern crim-

inal law, for instance, would need to depart from a similar constellation, which Petit so elegantly lays down.

Because of the distinction between law merchant in the pre-modern sense and commercial law in its modern meaning, Petit needs to pay great attention to the non-legal context of the merchant world in the first chapters of his book. He dedicates a chapter to »mercantile culture and customs«, in which he explains, for instance, how tightly intertwined mercantile customs were with religion through the practice of almsgiving and how important friendship was. The importance of friendship had, of course, an important legal consequence as well, because it led merchants to avoid official legal proceedings and solve their differences instead through various means of amicable settlement. Petit explains carefully how merchant literature on *ars mercatoria* emerged in the 15<sup>th</sup> and 16<sup>th</sup> centuries and what kind of knowledge was considered essential for a merchant.

However, there was a lot of law in the life of a merchant as well. Usury receives a chapter of its own here, as does the corporation. Every merchant belonged to a corporation, one of the primary ordering elements of pre-liberal Western society. Consulates, with their autonomous jurisdictions over their members, were a prime example. Petit explains how, in the Castilian sphere of influence, the consulates (Burgos 1494, Bilbao 1511, Seville

\* CARLOS PETIT, *Historia del derecho mercantil*, Madrid: Marcial Pons 2016, 589 p., ISBN 978-84-9123-046-5

1543, Lisbon 1592, Mexico 1592, and Lima 1593–1614) were carefully built into the institutional architecture of the Crown.

The consulates also exercised jurisdiction over merchants. What law did they apply? The very question, so Petit, is wrongly formulated and reveals a misappropriated projection of modern experience. First, the Castilian norms of the 16<sup>th</sup> and 17<sup>th</sup> centuries covered a relatively narrow area of commercial activity. There were points on insurance and on the exchange of goods, but virtually nothing about the procedure. The author emphasises, however, how judges of the *ancien régime* period – or pre-modern period, as I prefer to call it – acted as interpreters of equity. They could base their conceptions on written law, but also on »customs, doctrinal topics, beliefs and religious values, which served the consulate in order to speak the law (*decir justicia*) according to proven facts«. In this way, commercial tribunals were no different from other courts of the early modern period, but they differed drastically from the modern Western courts that are supposed to »apply the law«, which mostly appears in the form of written norms.

Even though the written ordinances of the 16<sup>th</sup> and 17<sup>th</sup> centuries offered little in the way of substantive law, the situation began to change in the 18<sup>th</sup> century. To illuminate this, Petit devotes a chapter to the famous Ordinances of Bilbao (1737)

and several more chapters to the changes in the economic mood, banking in Madrid during the Enlightenment, and the increasing activity of the central government in regulating commerce. The treatment of all these matters is, again, thoroughly learned. It is also comparative in the wide sense of the term: although Petit concentrates on the Iberian Peninsula, he never loses sight of the overall European developments, to which the Spanish experience is related throughout.

The second part of the book – although there is no formal division into two parts – consists of the history of modern commercial law in the 19<sup>th</sup> century. Petit begins with the Constitution of Cádiz (1812) and continues towards codification, analysing the period in which »the Code submitted the ancient, solid autonomy of the merchant class to the rules of law«. Here, the treatment is already much more national, because so is the history that the author deals with, from the promulgation of the Commercial Code of 1829 to the new Commercial of 1885. The volume ends with a chapter on the consolidation of commercial law and its instruction as an academic discipline during the 18<sup>th</sup> and early 19<sup>th</sup> centuries.

Petit's book is a welcome addition to the fast-growing body of literature on the history of commercial law. It is also entertaining and a true pleasure to read. ■

**Ignacio Czeguhn**

## Schöpferische Quellen der Gesetze\*

Das vorliegende Buch ist das Ergebnis der *Journées régionales d'histoire de la Justice*, organisiert von der Französischen Vereinigung für Rechtsgeschichte und dem Zentrum für Rechtsgeschichte in Aquitanien und fand im November 2013 am Berufungsgericht von Agen statt. Eine wichtige

Aussage finden wir bereits in der ausführlichen Einführung von Laurence Soula. Sie weist darauf hin, dass hier nicht die Geschichte des französischen Berufungsgerichtshofes seit seiner Gründung im Jahre 1800 geschrieben steht. Vielmehr, so Soula, ging es um die Darstellung einer fort-

\* LAURENCE SOULA (Hg.), *Les cours d'appel. Origines, histoire et enjeux contemporains* (L'Univers des normes), Rennes: PU Rennes 2016, 228 S., ISBN 978-2-7535-4911-1

The topic of commercial law is discussed more fully than the rest, partly because of its intrinsic interest and partly because it (unlike family law) has apparently not yet been much absorbed into the consciousness of historians. For many constructive comments and suggestions I am most grateful to Peter Garnsey and Paul Cartledge, the editors of the series in which this book appears. The book would never have been finished had I not been able to enjoy the oasis of tranquillity that is the Robbins Collection at the Law School in Berkeley.Â Latin American Law: A History of Private Law and Institutions in Spanish America By M. C. Mirow University of Texas Press, 2004. Read preview Overview.