

HIST 416

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By submitting this essay, I attest that it is my own work, completed in accordance with University regulations.—Michael Gousgounis

The Samuel and Mary Attempted Piracy
Outside the Port of Cephalonia:
A Case Study of Piracy Law as a Transitional Factor
Away from Lex Mercatoria

by Michael Gousgounis

Introduction

On 14th of April 1693 the ship, Samuel and Mary, with John Taylor as its master, was sailing out of the port of Cephalonia on its way back to England loaded with Ionian currants.¹ A ship, first under Dutch Flag and then under “the pretence of a French Commission”, approached Samuel and Mary and started pursuing it. After two hours of close engagement, Samuel and Mary escaped the danger with damages “to the value of one Thousand three Hundred and Twenty Ducats.” It was a typical case of attempted piracy, but for the fact that the perpetrators’ identity had been made known to the victims. “The Enemy, that so engaged her [Samuel and Mary], proved to be Venetian, owned and manned by Venetians, called the Loyal Subject, commanded by Captain John Girau, with a French Commission...” the English ambassador states to Venice’s government.

The incident’s details survived the centuries in a memorandum submitted to the Venetian Senate by Charles Earl of Manchester (E of M). E of M had visited Venice in 1697 as Ambassador Extraordinary to the Republic of Venice with a five-issue agenda on behalf of the Crown of England.² One of the five pressing issues was the attempted piracy against Samuel and

¹ *Manchester Papers*, Series I Album, Box 1, Folder 69, Beinecke Rare Book Collection

² The contextual information about his trip comes from other letters contained in *Manchester Papers*, i.e. Series I Album, Box 1, Folders 2-14.

Mary which led the Crown of England via the E of M to ask for “[r]eparations to be made, but likewise to inflict an exemplary Punishment on such of the Subjects of this State.”

E of M’s demands are not arbitrary, diplomatic maneuvers. They are based on English statutory and common law provisions on piracy. What complicates the case is the jurisdictional tension involved, since the piracy attempt took place in Venetian territory, by Venetian sailors. E of M, alluding to the jurisdictional complication, prefaces the incident in his speech as a “Case of State rather than of Commerce.” As he explains in the memorandum while asking for remedy, “English ships are obliged to pay One Hundred and Twenty Ducats each, for the protection, as it is call’d, of the Republick, and at the same time one of them is attack’d by its Subjects.” E of M thinks that the Venetian government had an obligation to protect the English ship from pirates. The investigation of this paper supports that these obligations are not humanitarian, but legal in nature.

The legal rules implicitly invoked in the Samuel and Mary incident, are suggestive of a historical hypothesis - that piracy was a significant factor behind the shift from the Law Merchant of the early medieval period to the nation-based legal paradigm of the early modern times. Piracy’s effects on economic activity and economic institutions, such as insurance instruments, are more straightforward and have been extensively analyzed. Piracy’s effects on legal institutions remain more obscure. Interestingly, piracy accelerated the consolidation of legal rules under national umbrellas. The Samuel and Mary incident exemplifies the subtle and highly complicated legal context that addressed piracy. Piracy law, as it is manifested through this case, indicates the comparative advantage of central, legal systems compared to law merchant. Its occurrence in 1693 stands in the middle of this gradual transition from the law merchant of the early medieval period to the centralized legal systems of our modern age.

Section I offers an overview of the debated transition from law merchant to national, centralized systems. Section II reveals the legal principles that are implicitly invoked by E of M in the Samuel and Mary case. Section III shows how these legal principles support the argument that piracy presented with issues that law merchant was inherently inadequate to address. Section IV confirms this hypothesis based on evidence from the Court of Admiralty.

I. Law Merchant to National Laws: A Controversial Transition

Lex Mercatoria or Law Merchant refers to the set of customary rules that regulated commercial activity in the early medieval ages across the European continent and the Mediterranean. This set of rules filled the institutional vacuum that followed the collapse of the Roman Empire. Law Merchant is praised for its voluntary, informal, speedy, and efficient adjudication that gave rise to the “commercial revolution of the eleventh through the fifteenth century that ultimately led to Renaissance and the Industrial Revolution.”³ The spontaneous character of its formation has been paralleled to a natural selection of rules⁴ and its power has been attributed to efficiencies stemming from “economics of standardization.”⁵

Piracy naturally falls under maritime commercial law, which is a subset of Law Merchant. Maritime law followed closely the development of law merchant since “by far the largest element in the body of the maritime law was either created or modified by custom.”⁶ The customary, maritime interaction gave rise to regulating and adjudicating mechanisms in the same way as it did on land transactions. Towards the end of the middle ages, Merchant Law was

³ Benson, Bruce L., 1997, *The Spontaneous Evolution of Commercial Law*, in: *Reputation: Studies in the Voluntary Elicitation of Good Conduct*, edited by Daniel B. Klein, Ann Arbor: The University of Michigan Press, pp. 165-190.

⁴ Ibid.

⁵ Landes, William M and Richard A. Posner, *Adjudication as a Private Good*, *Journal of Legal Studies*, 1979, 235-84.

⁶ Sanborn, Frederic Rockwell. *Origins of the Early English Maritime and Commercial Law*, Oxford, 1930.

gradually incorporated into civil codes and common law rulings and was finally replaced by firm, national legislative and adjudicating bodies.

Some scholars have questioned the prevalence of the Merchant Law in European middle ages.⁷ Cordes questions the existence of a universal merchant law by tracing the historic use of the term. The first usage of “Lex Mercatoria” is found in a treatise written around 1280, which seems to suggest that common law “is depicted as the mother of Lex mercatoria, who endowed her with certain privileges.” In a seventeenth century book entitled “Lex mercatoria or the Ancient Law Merchant,” Malynes comments on his contemporary judicial debate of whether mercantile affairs fell under the jurisdiction of the English Common law courts. Until then the Admiralty- the office of naval military affairs under the English king - adjudicated on mercantile affairs, not the common law courts. Cordes argues, that “the Parliament grew suspicious of the Admiralty being too close to the King” and tried to give more power to the common law courts. The proponents of the Admiralty tried to portray the Merchant Law as a distinctive body of law in order to sustain the power of the Admiralty.

According to Cordes, this view - once a political argument - is falsely reiterated in Lord Mansfield’s argumentation “as a fact” when he ruled on a case and effectively established that common law courts have the last say in merchant affairs. Cordes believes that the term does not reflect a customary body of law but only political debates behind it. Sachs has questioned the much influential Goldschmidt thesis as well.⁸ Goldschmidt’s thesis of a universal law merchant is still the theoretical cornerstone of modern views on English commercial medieval law. Sachs challenges the idea of merchant’s law based on his studies of a fair court of St. Ives.⁹

⁷ Cordes Albrecht, *The Search for a Medieval Lex Mercatoria*, Oxford, 2003.

⁸ Goldschmidt was a German lawyer and historian who first made the historical claim about Law Merchant.

⁹ Sachs Stephen, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 Am. U. Int'l L. Rev. - working paper.

It is not in the scope of this paper to resolve the controversy behind Goldschmidt's thesis, but it is important to take into account the challenges before we set out to prove that piracy was an influential factor in the transition from law merchant to national legal systems. Nevertheless, even if Goldschmidt's thesis were not fully accurate, there would be no question that commercial maritime law moved from a more customary and informal status to a more nationally integrated and formal one.

II. Samuel and Mary's Legal Context

The precepts on English piracy law are manifested in E of M's arguments regarding the questions of piracy, liability, and jurisdiction.

Attempted Piracy

"A pirate is a Sea Thief, or Hoftis humani generis who for to enrich himself, either by surprise or open force, sets upon Merchants and others trading by Sea..."¹⁰ The alleged incident satisfies the seventeenth century, English definition of piracy which is punishable under English law. In fact Charles Molloy in his detail account of maritime law has codified that "...if the Subject of any other Nation or Kingdom, being in amity with the King of England, commit Piracy on the Ships of Goods of the English, the same is Felony and punishable by virtue of the Stat. [of 28 H. 8]."¹¹ There are no provisions on attempted piracy regarding damages in the treatise. But since there are other provisions on attempted piracy that has resulted in murder, or captured sailors, we can infer that the law would still require reparations.

¹⁰ Molloy, Charles, *De jure maritimo et navali : or, A treatise of affaires maritime, and of commerce : in three books*, London, London 1701 p. 51., printed for R. Vincent and John Walthoe; and sold by Ralph Smith. Found in Rare Book Collection, Lilian Goldman Law Library, in Microfilm form.

¹¹ Ibid, IX, p. 57.

Molloy's treatise was initially published in 1682 and reprinted numerous times afterwards. Its publication - contemporary to the Samuel and Mary events - is of great historiographic value in this case. The treatise contains extensive citation of common and statutory law and has been referenced by many subsequent legal treatises, including *Lex Mercatoria Rediviva*. The extensive references reduce the likelihood that Molloy included his personal views instead of the principles of maritime law. Nevertheless, the mere nature of common law tradition, which is based on previous jurisprudence, is readily inviting for legal interpretation to which to some undetermined extent Molloy has resorted. In the treatise, Molloy devotes a separate chapter to English, piracy law with all its different provisions depending on the citizenship of the perpetrators, the dominion of the waters, the injury inflicted, and the diplomatic relations of the country's perpetrators with England.

Liability

The interesting question is who is actually liable for the damages, which were inflicted in Venetian waters, by Venetians who acted under French commission. E of M remarks that it is a question of "States not Commerce," alluding to the responsibilities of Venice. Molloy seems to agree. According to Molloy's treatise: "By the Laws of Nature Princes and States are responsible for their neglect, if they do not provide Ships of War, and other remedies for the restraining of these sort of Robbers;" This principle resonates in E of M's arguments, as he mentions how the English ships are even required to pay for the Venetian protection, and they are not protected. Interestingly, this principle does not invoke the English law but the "Law of Nature." Molloy explains that these rules "flow from Nature, whose rule (according to God's making it by that which is in himself) is right reason and honesty." He juxtaposes these natural rules from human

rules of nations - circumstantial laws intended to manifest the laws of Nature. This language implies a set of rules that transcend national systems. E of M's implicit invocation of them to the Venetian Senate is consistent with this naturalistic legal approach.

Nevertheless, even under the laws of nature, the liability question is not so straightforward for two reasons. First, Molloy acknowledges that the liability is not immediate; secondly the pirates were acting under a "French Commission," hence complicating the issue:

...how far they [Princes and States] are bound, either by the Civil Law or Common Law of this Kingdom, may be some question: for it is agreed they are not the cause of the unjust spoil that is committed by them, nor do they partake in any part of the plunder; but if a Prince or State should send forth Ships of War, or Commissions for reprise, and those instead of taking prizes from the Enemy, turn Pirates and spoil the Subjects of other Friends there has been some doubt, whether they ought not to make satisfaction to the Parties injured.¹²

Commissions were often granted to merchants by states for reprisals, in order to make reparations for the damages that their subjects had incurred from pirates. The practice started probably as a deterrence and restitution mechanism, or as a way to institutionalize and thus control violent acts. It was a standard practice in the medieval and late medieval period. These commissions were also known as "Letters of Marque." This practice was even incorporated in peace treaties, as Beawes explains in his *Lex Mercatoria Rediviva*:

¹² Ibid, I, p.51

This Custom of Reprisals is now become a Law by the Consent of the Nations, and had been generally confirmed by an Article in almost every Treaty of Peace that has for some Years past been made in Europe.¹³

It is unclear why the commissions were granted by the French government to “Captain John Girau,” and whether these commissions in fact constituted Letters of Marque or some other kind of agreement between the French government and Girau. But Molloy’s provision referring to cases where the commissions had been abused, still seems to apply since it does not limit the scope of the article to Letters of Marque.

Jurisdiction

The mere fact that E of M is asking from the Venetian Senate for reparations and exemplary punishment of the perpetrators implies a jurisdictional recognition on behalf of England that the case falls within Venice’s judicial confines. This claim is corroborated by the fact that Molloy includes provisions of English law regarding piracy claims that have taken place explicitly within British territorial waters, but there are no provisions about British jurisdiction in other territories. In fact, in a different section it is specified that “Princes may have an exclusive property in the Sovereignty of the several parts of the Sea... as no man that is desperately impudent can deny it.”¹⁴ At the end of Book III, Molloy devotes a whole section on “the Laws of Nature and of Nations,” touching on the jurisdictional issues. In fact, he cites common law precedents of foreign subjects, who despite residing in other countries, have been convicted by English courts and the judgment was imposed through the judicial system of the other state.¹⁵ A reason which in this case the same process was not

¹³ Beawes, W. 1761, *Lex Mercatoria Rediviva: or the Merchant’s Directory*, London 1751, p. 203.

¹⁴ Molloy, Charles, *De jure maritimo et navali : or, A treatise of affaires maritime, and of commerce : in three books*, London, London 1701 p. 67.

¹⁵ Ibid, p 430-1.

followed might be that as E of M frames the incident, it was a matter of “State not of Commerce,” alluding to Venice’s obligations under Laws of Nature, but also under the contractual payments to offer protection to English subjects.

III. Piracy and a Need for Legal Consolidation

The highly detailed provisions in Molloy’s treatise and in *Lex Mercatoria Rediviva* fifty years later, as reflected in E of M’s arguments, are indicative of piracy’s tremendous impact on commercial maritime activity. As commerce increased in the late medieval period, so did piracy. Pirates did not act independently but constituted communities of great size and power. Molloy refers to “Pirates that have reduced themselves into a Government or State, as those of Algier, Sally, Tripoli, Tunis. They spoiled merchandize, killed sailors, and took seamen as slaves either for ransom or forced labor.”¹⁶ Fodor presents Malta’s organized community of pirates during the “golden ages of piracy:”¹⁷ 1580-1680 and their ransom seeking endeavors. The widespread existence of ransom slavery is verified by English law provisions, that explicitly say that the captive seamen’s lost salary should be given by the master of the ship for the collection of the demanded ransom, and that if the seamen feel endangered, the captain of the ship cannot take a certain route without their agreement.¹⁸

Consistent with the hypothesis of this paper, a universal law merchant - which produces and voluntarily enforces the custom rules - would be inherently inadequate to confront piracy - especially independent powerful centers such as Malta, Tripoli or Tunis. This is because piracy is an extraneous, criminal activity and its perpetrators are not bound by the reputation or boycott mechanisms on which the law merchant depends. The merchant activity could go only so far as

¹⁶ Fodor Pál, *Piracy, Ransom Slavery and Trade*. Tursica, 22, 2001, p. 119-134.

¹⁷ Ibid.

¹⁸ Molloy, Charles, *De jure maritimo et navali : or, A treatise of affaires maritime, and of commerce : in three books*, London, London 1701.

to offer collegial protection or insurance schemes, such as contracts to sail together in “convoys” or agreements to cover part of spoiled goods.¹⁹

Nevertheless, convoys were not always successful against determined pirates, insurance mechanism had no deterrent qualities, and alleged protection from states such as in Samuel and Mary case often proved inefficient or misleading.

Therefore, national legal systems assumed judicial power over piracy affairs. These judicial systems grew in parallel of merchant law mechanisms and gradually assumed more responsibilities. The Court of Admiralty in England, which the Samuel and Mary case would fall under if it had taken place in English waters, is an example of this parallel concentration.

IV. Piracy and the Court of Admiralty

The Admiralty Court’s history and adjudication record confirm the hypothesis that piracy was one of the primary driving factors of legal consolidation. The Admiral was the Lord in charge of Naval Military affairs under the English King. During the reign of Edward III, in the late fourteenth century, the Court of Admiralty under the Admiral was established to adjudicate on maritime issues “according to Civil, and the Maritime Laws of Rhodes and Oleron yet by Stat. 28 Hen.”²⁰ The Rhodian Sea Law was a collection of maritime rules and customs that go back to classic Greece and the island of Rhodes and were mostly formulated during the Roman Empire. Laws of Oleron were French maritime rules established in northern France in the early medieval ages, and proved influential in English common law tradition.

The Court of Admiralty’s jurisdiction changed over time, but across the centuries this tribunal adjudicated on all kinds of issues pertaining to maritime activity, such as: murders, robberies, wages, building and mending of ships, debts, damages, free passages, insurances and

¹⁹ Beawes, W. 1761, *Lex Mercatoria Rediviva: or the Merchant’s Directory*, London 1751, p. 278.

²⁰ Ibid, p. 248.

piracy. The Court's cases and respective decisions have survived in the Black Book of the Admiralty Court. As with all medieval books, the book was named after the color of its cover, and it contained the basic ordinances and legal principles. The original Black Book has been lost but different alleged copies have survived which contain the Laws of Oleron.²¹ Based on pleas found in the Black Book on cases from the early fourteenth century it is established that the Court of Admiralty's adjudication was dominated by piracy cases during the first century of its inception:²²

spoil at sea by Flemish pirates (1322), spoil of a ship of Piacenza by one from Bristol (1323), complaints by the king of Aragon of delayed justice in piracy cases (1323-4), robbery at sea by men of Yarmouth (1325), an English ship seized and the crew murdered by Frenchmen; reprisals granted to the owners on failure to obtain justice abroad (1327), piracy and murder (1327), etc.

Based on this extensive record it is plausible to argue that the Court of Admiralty was actually established in order to fight piracy. Sanborn concurs with this view and identifies piracy as the primary reason for its establishment. The powers of the Court of Admiralty were gradually diminished after the middle ages, and the common law courts became in charge of the same issues. In the eighteenth century, Lord Mansfield's judicial opinion determined for the first time that common law courts have the final saying in merchant disputes, effectively consolidating the three legal structures: the Law Merchant, the Court of Admiralty, and the common law courts. His decision also eliminated the regulatory arbitrage that allowed merchants till then to either refer to common law courts or merchant informal adjudication. Piracy had given rise to the Court

²¹ *The black book of admiralty : with an appendix*, edited by Sir Travers Twiss, (Introduction) Reprinted 1998.

²² Sanborn, Frederic Rockwell, *Origins of the Early English Maritime and Commercial Law*, Oxford.

of Admiralty, which having the legitimacy of the Crown, facilitated the legal centralization away from Law Merchant.

Moreover, this record confirms the institutional role of reprisals within the legal order. In the 1327 case cited above, reprisals are offered as a means to make up for the lack of judicial efficiency. This practice, analyzed under the question of liability, stands in the crux of the centuries long piracy problem. Reprisals in effect perpetuate the cycle of violence and legitimize, under certain instances, the act of piracy. An act that is legitimate, even only under special permission, is more difficult to be outlawed or stigmatized as immoral or wrong. The more reprisals occurred, more cases the courts had to resolve and more inefficient the Courts probably ended up being, hence, leading to more reprisals from the other side, and continuing thus the vicious cycle.

Besides the seas and the Admiral Court's early days, piracy also dominated the diplomatic correspondence, which was "distinguished by a constant stream of complaints made sometimes by the king of England against the kings of France or Spain or the Counts of Flanders, and sometimes by those and other foreign sovereigns against England,"²³ as Sanborn argues. E of M's agenda to Venice should be viewed in this context, of centuries long preoccupation with piracy in diplomatic communication. This intense diplomatic involvement - once again confirmed in the Samuel and Mary case indicates an expectation of national involvement and action on dealing with piracy. These diplomatic pressures increased the involvement of the states in fighting piracy, and thus they fueled the political will for more legal consolidation.

As legal structures became more effective and diplomatic relations strengthened, granted reprisals were replaced by Ambassadorial demands, such as the ones of E of M, breaking in this

²³ Sanborn quoting from *Select Cases before the King's Council* (Selden Society), p. 23-28.

way the cycle of piracy. The fragmentary legal and political landscape after the collapse of the Roman Empire had indeed ignited piracy. As commercial activity in the Mediterranean increased, there was more opportunity for illegal profits by pirates. At the same time increased piracy acted as a catalyst of legal consolidation by giving a concrete economic reason for involvement at the national level, such as the establishment of courts such as the Court of Admiralty. This need was not just a subconscious metamorphosis of the legal setting. Molloy's treatise suggests that it was a highly conscious and organized progression.

English statutory and common law tradition cited by Molloy is the outcome of four hundred years of adjudicating on piracy issues. In Molloy's words the pragmatic dangers of piracy and the increased commerce between the European countries necessitated a "Supreme Authority" to deter the "Arbitrary and promiscuous Use" of the Sea:

The considerations of the general practice in all Maritime Countries, the necessity of Order in mutual commerce and the Safety of mens persons, goods and lives hath taught even the most Barbarous Nations to know by the Light of humane reason, that Laws are as equally necessary for the Government and Preservation of the Sea, as those that negotiate and trade on the firm Land and that to make Laws and to give them the Life of Execution, must of necessity require a Supream²⁴ Authority; for to leave every part of the Sea and Shores to Arbitrary and promiscuous Use, without a correcting and securing Power in case of wrong or danger, is to make Men in the like Condition with the Fishes, where the greater devour and shallow the less.

²⁴ The word was misspelled in the original text.

This excerpt is suggestive of the conscious effort to create supreme political, military and legal authorities in order eliminate arbitrary, violent and economically harmful.

Conclusion

E of M's arguments and the legal principles invoked regarding attempted piracy, liability and jurisdiction support the assessment that national legal structure had slowly emerged as a means of fighting piracy. The Samuel and Mary incident, and the legal questions it raises, is only a snapshot, a cross-section, of centuries long commercial legal transitioning to nation based legal control. These national legal structures ended up incorporating all commercial activity, which had been developed through the voluntary merchant interactions.

The hypothesis of this paper does not claim exclusive explanatory power over the much debated legal transition from law merchant to national legal systems. Other concurring reasons, not mutually exclusive, can be advanced as well, such as the increase of economic and political power of nation states compared to feudal medieval Europe.

Piracy can be seen as a partial explanation along many others. Apart from its explanatory aspect, the hypothesis is highly pertinent to recent developments in international commercial law. In particular, the 20th-century emergence of regulating and adjudicating mechanisms, independent of national structures has been deemed a revival of the medieval Law Merchant.²⁵ Often enough, the Law Merchant has been used as a legitimizing precedent against qualms for these developments. But if the piracy hypothesis proves to be of some ground, then it suggests that commercial transactions are in need of territorial legal enforcement that usually comes with

²⁵ Benson, Bruce L. 1997 "The Spontaneous Evolution of Commercial Law", in: Reputation: Studies in the Voluntary Elicitation of Good Conduct, edited by Daniel B. Klein, Ann Arbor: The University of Michigan Press, pp. 165-190.

national structures in order to deal with potential criminal activity. Modern piracy of intellectual property exemplifies this claim.