

Historical Sketch of Freedom of Association in the West

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Abstract

This article discusses government allowances and restrictions on freedom of association from the Roman Empire to the Middle Ages. At various points, freedom of association expanded for religious organizations, universities, and stock-holding corporations.

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Most empires have not permitted freedom of association. The Roman Empire and then the Eastern Roman Empire (Byzantine Empire) generally forbade freedom of association. In 1219, Frederick II, King of the Two Sicilies and Holy Roman Empire, sought to outlaw guilds in his possessions in Germany and Italy, seeking unsuccessfully to create an imperial regime.

Ancient Rome did allow associations for religious purposes. As Roman law recognized private property because family burial made the property sacred to each family, it allowed families to associate for funeral purposes. Romans would visit graves on anniversaries to have meals as a contact with the ancestor. There might be associations to build and maintain religious shrines. This aspect of Byzantine Roman law may have influenced Islamic jurists to introduce trusts or foundations (wafts), which were dedicated to religious (mosque), pious (school), or good works (a fountain or a bridge). Such protection did not develop in Islam for commercial property.

Among examples of Roman official aversion to freedom of association are the letters exchanged between the Emperor Trajan (98–117 AD) and Pliny the Younger (62–113 AD), his friend and literary figure, whom Trajan appointed as governor in Asia Minor. Pliny wrote to Trajan requesting permission to allow a volunteer fire brigade. Cities were vulnerable to fires, and in lieu of fire brigades,

the army could be sent for to come from some distance—too late to control the fire, but able to keep order. Trajan responded that not on his life should Pliny authorize an association to control fires. The associations could be used to organize opposition to the state and must not be allowed despite the losses due to conflagrations.

The fall of the Roman Empire in the West (476 AD) and the settlement of the German tribes in the former Roman provinces permitted the emergence of associations. German customs provided for bands of companions of war leaders. There was a tradition among the German tribes of social clubs (*gilda*). The advisers of the new Germanic rulers were generally Christian churchmen with some background in Roman laws that encouraged religious associations. The cathedrals (and bishops) had received donations of property, so an association of the urban clergy emerged.

Monasticism was introduced in the rural areas of the West from Egypt and was organized as an association of the monks who professed the rule. Religious clergy means following a rule while secular clergy in the dioceses do not follow a set of rules. The rule of St. Benedict was predominate in the West for five hundred years.

The end of the Roman Empire in the West was characterized by the decline of cities and the focus on rural society, which involved autarchy on manors, the tying of labor to the manorial land, and the rise of feudalism. Other than religious institutions of Benedictine monasteries in rural areas, the need for associations did not arise until the revival of cities in the 11th century. This revival is associated with the agricultural revolution, which provided surpluses for the commercial revolution.

The renewed urban centers not only became focuses of trade but of demand for education. Bishops or local magistrates began to grant charters for associations of clergy to conduct education. Similarly, members of a particular craft in a town would organize into guilds under the patronage of a saint with the purpose to pray for the souls of sick or deceased members (a good occasion to discuss business) or to fund aid to widows and orphans.

The organization of universities was based on the model of producers or consumers. As in England today at Cambridge and Oxford, higher education was based on residential colleges. On the Continent young students from the same language area generally were housed in colleges, which were donated by some local benefactor. In the medieval universities these would be called

nations. The common educational language was Latin. Outside of Germany, there would be a German nation. In France, there were north French, south French, Lombard, Iberian, etc. nations.

At Bologna, the first university, law was the principal subject. The students were older, and they organized the university under the control of the consumers (themselves), who set terms for professors' salaries, etc. In France, England, etc., where students were younger, the universities were the guilds of the masters (starting with the arts, such as grammar, then philosophy, and then theology), who set the standards of admissions and of completion. Normally a university would be chartered by the bishop and be self-governed.

After 1200 AD urbanization led to newer religious expression. Alongside the monasteries in the countryside, new urban religious movements emerged, particularly the friars. The most significant were the Franciscan friars and the Order of Preachers (Dominican friars). They undertook preaching in the streets as well as in churches. Importantly, they created associations of laypersons for prayer and pious works, including conducting schools for the poor.

There were very many medieval associations, which were often connected to religious endowments. Although the Romans built aqueducts, they did not build many bridges because they were centered around the semi-arid Mediterranean and directed their roads to shallow streams. The more northerly climes of the Middle Ages meant more water and watercourses. Bridge building was important in the Middle Ages, and many bridges were built by associations or guilds of pious people. A bridge might be built by a subscription to an association associated with a particular saint, and a chapel might be placed next to the bridge. Similarly, a road between two towns might be built and maintained from donations to an association. Income from the association owning urban property might be used for maintenance of the roads.

The widespread use of associations in the Middle Ages may have been the foundation for the development of the stock-holding corporation. Heretofore, around the world, partnerships had been the basis of commercial activity. Often the partnerships were formed among relatives or people from a small religious group. How did the medieval Italians transcend those natural limitations to develop the stock-holding corporation? These pious associations for bridges and roads are one explanation. Another is that the heavy earth of the Po River valley required heavy plows drawn by four teams of two oxen.

Each household lacked eight oxen and therefore needed to share the animals for production. One way or another, Italians became accustomed to investing in enterprises alongside persons who were not relatives.

The development of private commercial law can be found in the private Law Merchant. Most law until recently concerned the most significant form of property, land. For example, in England the common law courts met quarterly because the land was not going to move on. The medieval merchants who moved from town to town might be in a different place each night. They could not wait two or three months for a regular court meeting. The travelling merchants settled disputes among themselves by the customs they developed. Because in England these merchants were French or Italian, the merchant courts were called *pied poudre* or *Pie Powder courts* (dusty feet courts).

The merchants sometimes travelled in caravans with armed guards. Due to the favorable approach of the Counts of Champagne, the Fairs of Champagne (1100–1300 AD) became a series of months-long fairs among the cities of Champagne. Their location between Paris, Flanders, and the Rhineland made them attractive for Italian merchants and bankers. The merchants organized the fair administration and the adjudication of disputes. After the kings of France inherited Champagne and imposed taxes, the Italian merchants preferred the new ship routes in the Atlantic Ocean to reach Flanders and England. Improved navigation instruments were important. Freedom of association became a part of the legal framework of Western Europe.

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