Legal Evolution and Hybridisation

The Law of Shares Transfer in England

Matteo Solinas

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FOREWORD

The growth of financial intermediation in today's world presents challenges for sound regulation and has the potential, ultimately, to undermine the stability of markets. One of the challenges which has been prominent among those considered by supranational and national authorities alike is the increased legal uncertainty caused by a mismatch between the practice of holding interests in securities through intermediaries and the jurisprudence of ownership, which itself reflects concepts long since settled in every legal jurisdiction round the globe.

If we are to negotiate this minefield of legal uncertainty successfully, we will need to think broadly and deeply in order to gain a rich understanding of this relatively new practice of holding and circulating interests in securities through intermediaries. And if we are to do that, then we can do no better than to start with this hugely valuable and clever book.

Dr Matteo Solinas does not stop, however, at proposing a new cross-cultural understanding of the law on securities intermediation. He has a much higher purpose. He would like to give the world a new intellectual framework within which to understand legal change and its complexities. In this respect, as in others, we should regard his book as an exercise in thought leadership for the modern world. If the defining legal philosophical task of the twentieth century was to account for the legitimacy of law in a world of conflicting political and moral rights, that of the twenty-first century will undoubtedly be to explain and justify the law in a world of rapid social and industrial change.

I first met Matteo through the work of the Financial Markets Law Committee, which is greatly indebted to him for the painstaking research he undertook, informing several of its most important papers. Matteo's highly perceptive analyses revealed his intellectual tenacity, his incisive focus and his ability to draw on a broad array of themes from diverse legal cultures. It is these qualities which ensure that this study is not only important and relevant but also one which makes that most valuable of intellectual contributions: a whole new schema within which to reappraise our collective received wisdom.

This book is particularly welcome as dealing with a topic, namely the dematerialisation and intermediation of securities, which has been thrown into sharp relief by the post-2008 financial crisis. The audience to whom the book will be of interest is undoubtedly a large one. It will appeal to students, teachers and practitioners of both

financial markets law and comparative law. It will also be a useful reference work for all those who would like to obtain a multijurisdictional overview of the law relating to the transfer of interests in intermediated securities. My hope is that the ideas which it presents will come to the attention of policy-makers who must devise the laws and regulations for the new financial world order. If they do, we can trust that the intellectual underpinnings of the new order will be all the more convincing than those of the old.

Joanna Perkins
Chief Executive, Financial Markets Law Committee

PREFACE

This is a book on comparative law and legal change. With a focus on corporate law and the law of personal property, it reviews the current state of the comparative debate on the evolution of law.

It takes as a starting point the similarities and differences between legal systems as a means to understand the factors that shape legal growth and tests the well-established thesis according to which law tends to develop as a consequence of the movement of legal rules from one country to another. The analysis carried out in the first part of the book finds this thesis perplexing, as, above all, it does not put forward a persuasive account of the mechanisms of legal reception. In attempting to fill that gap, this study contends that recent contributions on culture contact and culture change offer an interesting explanation for the circulation of juridical models across national boundaries.

In brief, this book suggests that the notion of 'hybridity', as originated in postcolonial theory, provides a valid conceptual means to examine the intricacies of legal evolution, to refine and to give content to the observation of the reception of law. The notion of hybridity overcomes the rigid dualist perception of culture in the colonial contexts that neatly distinguished between colonisers and colonised and promotes the view that cultural norms in colonial contexts are more than the result of the fusion of features of colonial and indigenous background. They are neither colonial, nor indigenous 'in disguise', but they occupy a 'third space' between colonial and indigenous cultures. In this light, hybridity is a powerful tool in explaining the pattern of cultural change in social sciences in general and in law in particular. Borrowing reflects a general trend of social life, a mechanism of culture diffusion. It applies to law too because law is itself a form of culture. As with colonial norms and standards, borrowed legal paradigms outside their original meanings become unsettled. They interact at different levels with local traditions, with certain indigenous perceptions, and do not survive in their original identities. A new legal tradition, a hybrid space that is peculiar to the specific contact situation is therefore created. Borrowed legal paradigms become almost the same as the original ones, but not quite.

The analysis of comparative jurisprudence put forward in this book does not rest exclusively on theoretical grounds, but it is explored and tested with reference to a specific case study. This is the legal mechanism by which shares in companies are transferred in England. The case is appealing for a number of reasons. First of all,

England is an interesting jurisdiction for investigating the theory of legal transplants against the controversial historical argument that the development of English law has consisted in an autochthonous national achievement, independent from continental law. Second, it deals with a distinguishing structural characteristic of modern company law, which apparently involves peculiar national legal implications, as the method of transfer of registered shares and share warrants to bearer is rooted in the history of the law of personal property. Finally, the chosen test case addresses the issues of legal uncertainty that have arisen from the evolution in financial practice and, in particular, the debate on post-trading law reform connected to the advent of the indirect system of holding securities. This scheme of legal evolution is particularly challenging for the purpose of this study, as, contrary to the pattern in the growth of state legislation either by independent creation or by mere borrowing, this one consists of a regulated mechanism of harmonisation set out by the contributions of delegates and national experts at international *fora* to be later implemented in the domestic legal framework.

The book endeavours to describe the state of the law at August 2013. Some later development and some further references were incorporated after the final submission of the manuscript.

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This book is the revised and updated version of my doctoral dissertation. In writing it, I have incurred many debts and have many people to thank for comments and encouragement. In particular, at LSE I was fortunate enough to have as supervisors Eva Micheler, Joanna Benjamin and David Kershaw. They have helped me at various stages by providing valuable comments and sharing many penetrating insights into the project and advanced drafts of the manuscript. In mid-2011, Dan Prentice and Sir Ross Cranston examined the thesis and made the day of my viva a memorable experience for all the right reasons.

Outside LSE, my thanks go to Anthony Beaves, Marcus Smith, Mark Evans, David Nelken, Ross Anderson, Matteo Bascelli, Antonio Serra, Joshua Getzler and to my greatest friend Pedro Fernandes who have been unfailingly generous with their time and ideas. I am also very grateful to Joanna Perkins for having found time to write the Foreword. Notwithstanding the contributions, the usual disclaimer applies: I bear sole responsibility for the views presented and all remaining errors are my own.

I would also like to express my gratitude to Ann-Christin Maak and Rebecca Pound at Intersentia for their patience with a first-time author and assistance in bringing the book to publication.

Finally, and closer to home, I would like to apologise to Annamaria, Giacomo and Agata for spending so much time in writing this book when I should have been playing with the family. Their support and good humour have kept me in one piece during four eventful years in London and have maintained the relative importance of my work firmly in perspective. This book is dedicated in gratitude to them.

La Maddalena, 8 August 2013

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