Perspectives on the Evolution of Corporate Law and Corporate Governance

The workshop is organised around some current themes in corporate governance and corporate governance regulation. The main presenters will be Dr Andrew Johnston (the University of Qld), Associate Professor Rob McQueen (Monash University) and Mr Phillip Lipton (Monash University).

Presenters:

Dr Andrew Johnston: Between Market Integration and National Diversity: Some Reflections on the Difficult Evolution of European Corporate Governance Regulation

Associate Professor Rob McQueen: Do Origins Always Matter?: Corporations Law in Colonized States


RSVP:
Samantha Stewart at: samantha.stewart@monash.edu or: 9903 4198. Please rsvp by Monday the 17th October.

Date: Friday 21st October 2011
Time: 10.00 am – 3.00 pm
Venue: The Ramlar Room (S3.74), Building S (518), Level 3, Monash University, Caulfield Campus see: http://space.fsd.monash.edu.au/mapEnquiry/default.aspx?
The European Community became involved in the Member States’ corporate governance regulation because of a belief that differences in national rules would obstruct or distort market integration. It was originally proposed to harmonise corporate law across the Member States on the basis that companies and investors would be reluctant to operate across national borders if their activities were subject to different legal regimes, and perhaps because of fears of a ‘Delaware effect’. The ambitious harmonisation programme failed once it reached sensitive areas of corporate governance, such as employee participation and takeovers as Member States opposed the introduction of foreign norms which would be incompatible with the existing institutions of their economies.

After some delay, the European Court of Justice responded to this failure by requiring Member States to recognise companies incorporated under the laws of other Member States. This triggered some regulatory competition, as entrepreneurs incorporated in the UK in order to take advantage of its lack of minimum capital requirements, but carried on business throughout the EC through agencies or branches. Other Member States responded by lowering their minimum capital requirements. This does not pose a particular threat to creditors, who are widely considered to receive little protection from minimum capital requirements. However, the recent Cartesio decision appears to pose a threat to employees in Germany and elsewhere who have rights to participate in corporate governance, because it considerably expands the freedom of existing companies to change the legal system to which they are subject. This raises the tricky question of whether the ECJ will accept Member State justifications for restricting that freedom. If it does not, there is likely to be a slow drift towards a shareholder value model of corporate governance.

At the same time, the European legislative programme was able to resume by pragmatically adopting a more flexible approach to regulation, using a variety of techniques which have been grouped under the heading of ‘reflexive regulation’. By giving the Member States and individual companies a series of options as to the way in which the regulation applies, and through greater use of soft law, the EC has been able to reduce the differences between the Member States’ systems of corporate governance regulation. This has permitted more cross-border investments, mergers and takeovers, but without imposing regulatory uniformity on the Member States where this would undermine their competitive advantage. Whether the Member States will use this flexibility for protectionist purposes in light of the current economic downturn remains to be seen.

Several recent contributions to the study of the effects of the introduction of corporations legislation into a variety of colonial possessions of imperial powers during the nineteenth century provide an enlightening perspective on the manner in which ‘origins’ may (or may not) matter. In many (if not all) of these colonial possessions, there were extant forms of business organization and laws and rules governing commercial practice prior to colonization. It is therefore of interest to examine the resilience (or lack thereof) of these practices within the newly imposed colonial corporations law regimes in determining the circumstances where ‘origins’ matter, and in the case of colonized states with hybridic systems of corporations laws, which ‘origins’ we are indeed talking about.

One of the core assumptions of much of the ‘origins’ literature emerging from the law and economics debates is the assumption that originary systems in most colonized states were subsumed either totally, or at least in significant part, by the system imposed by the colonizers. As one recent such analysis states:

Legal systems also allow for the transmission of norms and practices across different regulatory spaces. Apart from a few “parent” systems (such as England, France, and Germany), most countries have had the basic features of their legal systems imposed upon them by colonization or conquest. When this kind of transplantation occurred at various points in the period from the late eighteenth
century, it was not just “specific laws and codes” that were transmitted, but “more general styles or ideologies of the legal system,” along with “individuals with mother country training, human capital, and legal outlook.” Over time, the national laws of particular countries might have “changed, evolved, and adapted to local conditions,” but “[e]nough of the basic transplanted elements have remained and persisted to allow the classification [of systems] into legal traditions.” This is the basis for the suggested division of the legal systems of the world into four principal groupings, namely English or common law, and the French, German, and Scandinavian variants of civil law.¹

These issues and the assumptions attached to them have also been the focus of a number of recent postcolonial legal analyses and critiques undertaken by legal historians, who often reach quite different conclusions from those of the ‘legal origins’ theorists. One such study is Sally Engle Merry’s work, Colonizing Hawai’i². Another, more recent, study examining these issues from an historical perspective is Ritu Birla’s analysis of the rise of the specifically ‘colonizing effects’ of the introduction of a corporate form modelled on the British legislation into in India, Stages of Capital³ (2009), which discusses the manner in which local entrepreneurs in India, particularly members of the Marwari trading class, adapted the core elements of the imported English company legislation to suit Indian conditions and to provide a more nuanced and specifically Indian framework for their trading activities. This capacity for adaptability to local practices and conditions in the legal regimes under which corporate actors operate has been championed by a number of comparative lawyers as a more crucial factor in the success of emerging economies, rather than this being a product of the legal origins of their corporate legal system.

The nature of the supposed contribution of particular frameworks of corporations law, in formerly colonized states to later development, and the differences in trajectories imputed to a particular system’s origin in either a common law or civil law tradition has been the subject of considerable debate. Comparative lawyers and legal historians have often been critical of what they regard as an overly simplified notion of imputed difference based on the ‘origins’ of a particular State’s corporations laws. The law and economics literature on the importance of origins has consequently often been the subject of significant critique by both comparative lawyers and legal historians. One such critique by a leading comparative lawyer has opined in respect of the ‘origins’ debate in the law and economics literature the following:

“It is easy to understand why so many economists and World Bank reformers have been attracted to a simple view of law’s relationship to a liberal market economy. It is clean and straightforward. Its analytical fulcrum rests on the long established comparative law dichotomy between the common law and the civil law. It depicts law as a kind of technology that can be inserted in the proper places and imported from abroad when necessary to accomplish an important task. And the prevailing view is consistent with the hoariest of conventional wisdoms—that a rule of law is an essential prerequisite to economic growth and political liberalization. As one scholar puts it, the “fullest achievement [of the rule of law ideal] is associated with the maturation of capitalism into laissez-faire competition under conditions of political stability.”

This view of the relationship between law and capitalism, however, rests on a number of assumptions that do not hold up under careful scrutiny. Nor does it explain some of the most important economic success stories of the twentieth century, such as Japan, Korea, and most recently, China. Unfortunately, “good” or “high quality” law (whatever that means, exactly) and “good” enforcement (ditto) do not lead inexorably to good economic outcomes. On the other hand, many countries have achieved remarkable economic growth with legal systems that don’t live up to the canonical rule of law ideal.⁴

This paper also considers aspects of the ‘origins’ thesis in those contexts where the colonized states being examined had not one, but rather a succession of laws imposed upon them by different colonizers and at different historical periods (e.g., The Philippines, Hawai’i, South West Africa). The question in such instances is which of these ‘origins’ has endured, and why this may have been the case. In such instances it is also important to examine the factors at work where a state has adopted a hybridic form of corporations law, combining elements of different colonizer’s systems, or alternatively has combined a particular colonizer’s system with elements of customary practice in commercial organization. These examples provide a context in which to deepen our understanding of how and in what way origins may matter, and in those cases where ‘origins’ are abandoned, what forces might be at work in precipitating such an abandonment (trade relations, dominant global systems of corporations law being easier to work with, and so on.).

² Merry, Sally Engle (2000), Colonizing Hawai’i: the cultural power of law, Princeton University Press
⁴ Milhaupt, Curtis J., Beyond Legal Origin: Rethinking Law’s Relationship to the Economy - Implications for Policy, 57 Am. J. Comp. L. 831 2009, @ 834-835

Phillip Lipton, Department of Business Law and Taxation, Monash University

This paper explores the nature of the relationship between law and economic development in the context of the early history of the joint stock company and stock exchanges in England. The development of these financial institutions during the seventeenth century took place at a time when there was very little legal or regulatory framework apart from the constitutional provisions contained in incorporating charters. During the eighteenth century, the Bubble Act sought to prohibit the formation of unincorporated joint stock companies and can therefore be seen as detrimental to economic development yet this period witnessed the profound economic developments of the Industrial Revolution.

Despite the almost complete absence of formal law and regulation, early joint stock companies developed sophisticated governance and accountability structures that formed the basis of modern corporations and they were highly successful in raising capital and achieving their commercial and political objectives. The widespread use of joint stock companies was closely related to the development of stock exchanges in the years after 1688. Share trading turnover greatly increased and many features of modern stock exchange trading became established from this time.

The early history of the joint stock company and stock exchanges raises interesting questions about the nature of the relationship of law and economic development. It calls into question a central argument put by La Porta and colleagues that law and legal institutions that protect investor rights are crucial to a country's financial development. The early history of the English joint stock company shows that financial markets and institutions may still flourish despite the absence of formal investor rights, legal protections and effective enforcement. The English historical experience indicates that social norms and trust compensated for the lack of formal legal investor protection and may be more important than legal rules and regulation in the early development of financial and capitalist institutions. Protective 'law in the books' does not appear to be a precondition for the development of financial markets because it is only one form of institutional constraint that influences economic behaviour and it is not necessarily the most important.

The first major statutory development in company law was the Bubble Act which remained in operation for over a century. During this time major economic change took place even though England had the most restrictive company law in Europe. The history of this period therefore casts doubt upon the importance of law to economic development and the functionalist perspectives, including that of Weber, who saw a ‘rational legal system’ as a necessary precondition for capitalism and industrialisation.
# Program

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