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‘Codification à l’anglaise: The making of modern negotiability for the statistically minded’

In his lectures on the sociology of law, Max Weber posited the existence of a link between the law and the Modern economy by means of the former’s increasing rationalisation. In his view, the codification exercises of the many European civil law countries in the 19th century were a testament of how the law encouraged Capitalistic development. The exception to this rule, however, was the English common law which although heavily anchored in less systemised case law was still home to a thriving Capitalistic economy. Taking an issue with the Capitalism and codification nexus in the context of Weber’s English problem, in this paper I examine the first case of codification in the United Kingdom: The Bills of Exchange Act of 1882. My main contention is that the traditional juxtaposition of case law and codification obscures the 19th century rationalisation of English law by means of partial codification. In my view, scholars have too easily dismissed the importance of the choice of codifying Modern negotiability for Capitalistic development. In section I, I examine the inner logic of English codification and identify three major lacunae in the literature: 1) an overemphasis on assignability; 2) a disregard of negotiability; and 3) an ahistorical appraisal of the common law. In section II, I demonstrate that the choice of codifying the legal principles of negotiability through the Bills of Exchange Act of 1882 was intimately linked to both socioeconomic developments and the inner logic of English codification as it met both domestic and foreign challenges. In section III, I introduce a new dataset of over 1100 cases cited by Mackenzie Chalmers throughout his 1878 Digest of the Law of Bills of Exchange, Promissory Notes, and Cheques to better understand the construction of the principles laid out in the 1882 Act. After discussing the methodology used in the coding of the database, I present the results to emphasise the socio-historicity of the major principles comprising Modern negotiability. In doing so, I show how English codification sanctioned the use of some debt instruments by creating a particular status, that of a negotiable instrument, as a partial solution that rendered English case law amenable to the Capitalistic calculus embedded in liquid financial markets. As it turns out, for Weber’s relief, the English legal system was as rational as its civil law counterparts; however, by opting for a partial codification it sought to preserve the evolutionary flexibility of judge-made precedents to reformulate legal rules on an ad hoc basis rather than relying on all-encompassing Parliamentary enactments and revisions. This choice predates the contemporary practice of regulatory sandboxes.