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The proper place of the law in a digital society

Socio-Legal Studies Association Conference 2022
York University, and Online
Thursday 7 April 2022

Introduction

1. This talk is essentially about the proper place of law in a modern digital society.
2. There are many misapprehensions about what the law is for, how we should regard it, and what value we should accord to it.
3. First, many ordinary citizens regard the law as a coercive power which they would wish to avoid. They don't want to be arrested, fined or imprisoned, and think of law purely as the criminal law.
4. Secondly, many in politics, governments and elsewhere see the law as external, even as a necessary evil. They think it is over-complex, over-fussy and inaccessible. They try to avoid contact with it because it gets in the way, as they see it, of their ability to achieve what they want to achieve.
5. Thirdly, there are business, commercial and financial people, who see the law as an enabler. They need it to be able to trade, and they need it to be able to invest, buy and sell shares and properties and to contract with counterparties. When things go wrong, it enables them to sort out their dispute, albeit sometimes at too significant a cost.
6. There are many other views of the law, but very few in our society see the law as an entirely good thing – or as something that is more than a necessary but rather cumbersome part of a well-regulated society. It may

be noted, of course, that law plays different types of role in different types of society; in less democratic societies in particular. But even there, it is probably still regarded with a variety of views by those within those societies.

7. My thesis this afternoon is that law is actually rather more important, more essential, and even perhaps more 'lovable' than most people think. I use that word in the sense that it needs to be embraced by society to provide all the benefits of which it is capable. Our law after all actually reflects our society. It is the glue that holds us all together and makes us what we are, and it is a tool that offers even more to a digital society than to anything that has gone before. This is something that needs much more explanation at school and university, not to those studying law, but to those who are not studying, and will never study, law
8. Let me explain.

What is law?

9. First, what is law? Law is itself far from binary. There are probably well over 200 separate and different municipal legal systems in the world today, each with different conventional and legislative foundations. Many are code-based civil law systems, others are traditional common law systems, and yet more are a cross between the two.
10. The irony is that, despite the fact that we have so many municipal legal systems operating in different states around the world, it is not always those many municipal systems that are the most important ones. The relations between states are not governed by municipal laws at all, but by what we call international law, which is sometimes said not to be law at all. Large groupings of states like the EU and the USA have created very significant European Union and federal laws, which are probably far more significant to ordinary people's lives than the internal state laws. And much of people's lives is affected if not governed by large international corporations who operate across state boundaries, and generally choose what legal systems should govern their relations both with other businesses and with consumers. In practice, they generally choose from

very few of the many municipal laws and legal systems. That means that those laws and legal systems that are most attractive to and most popular with big business tend to have far more influence than those that are not. One might pick out PRC law, New York law, English law, Singapore law and in recent times Dubai law as examples.

11. Common law systems tend to be more attractive to business in general and international business in particular, because they provide a set of rules that are certain and consistent, but yet flexible enough to be adapted to novel situations thrown up by developments in society and in technology. It is their adaptability to new technological situations that is most important for the purposes of this talk. I shall return to that theme.

Law as a tool for regulation

12. The second aspect of law that is critically important to its success is its use as a tool for regulation. I use the term “regulation” in its broadest sense. Regulation in federal states tends to be imposed by federal as opposed to state law.
13. Regulation derives its authority from law, and is crucial to the stability of markets and society. Regulation of energy prices is something topical right now. Without it, economies would quickly destabilise.
14. Law also underlies the regulation of financial markets, banking, competition and trading in commodities. We can see what happens in such international borderless markets without regulation when we look at the vast unregulated trading in Bitcoin and other crypto coins and tokens and in decentralised finance. The size of these markets is now, according to President Biden, some 3 trillion dollars, and the markets are driven by the desire for disintermediation, something that sounds wonderful, but is far less easy to achieve and perhaps less beneficial than many, until recently, thought.
15. We are already seeing a transformation in the digital space. As more and more mainstream investors and businesses start to adopt digital technologies, specifically smart contracts, cryptoassets and the blockchain, there is a need for effective and agile national and

international regulation. The unregulated digital sector is gradually being brought within a regulatory environment. But the way in which that transformation is taking place is essential to my theme today. The point is that many of those who invest in cryptoassets and de-fi are in fact the same people who work and operate in mainstream society. They want to invest in regulated assets that provide security and the availability of legal redress for misconduct. They even, in most cases, want to pay taxes if they are due.

The rule of law as the foundation of society's values and access to justice

16. The third piece in the jigsaw is perhaps even more fundamental. Law is important because it is the foundation of democratic society and the rule of law itself. Lord Bingham identified the main features of the rule of law, several of which I have already mentioned in a different context: The need for the law to be clear, predictable and intelligible; rights being determined by law rather than discretion; laws applying equally to all; public officials acting *intra vires*; the protection of human rights; the state providing effective and fair dispute resolution; and the state adhering to international law.
17. The rule of law is one of the most misunderstood concepts. Not only do politicians often fail to understand its ramifications, but even some lawyers confuse rule by law with the rule of law. The rule of law is not about how many people are prosecuted or how law-abiding citizens may or may not be. It is about the power of the state being regulated by a legal system to which every citizen has access.
18. People generally do not see the rule of law as the cornerstone of a democratic society, which is what it actually is. They perhaps do not need to understand. But we certainly do.
19. The rule of law is important because, if you have it, ordinary people have confidence that they will be fairly treated. Ordinary people will have confidence that the government will treat them fairly; their employers will treat them fairly; and the police, the local authority, the courts, big business, Amazon, Google and everyone else will treat them fairly.

20. That public confidence is central to a successful society. Without it, people live either in fear or, at least, without the necessary motivation to be economically and socially productive.
21. In a digitised international society, the rule of law becomes even more significant. Again, I will return to the relevance that it has in that context.

Law in an international society

22. I have already touched on international law more than once. But here I am talking about how law affects the cross-border world in which we now operate. Multinational corporations like Facebook, Apple, Netflix, and Google/Alphabet – are highly significant because they provide a large proportion of the world's population with access to the internet, to consumer goods, to smart devices, entertainment and social media. In doing so, these corporations reach into the social fabric of all of our lives. It is axiomatic that they cannot operate unlawfully and in an unregulated environment. Yet, many think that, in some senses, they do. Their liability to tax is dictated by the efficacy of national revenue systems in an internationalised world. Their accountability to state governments may be thought, in some ways, to have been compromised. And yet their influence on a large percentage of the world's populations is huge.
23. But law in an international society is not only about multinational corporations. It is also about cross border technologies that do not easily lend themselves to governance by any specific municipal system of law. In a world of artificial intelligence, the blockchain and the internet of things, data about every citizen of every country is far more easily gathered and utilised. The regulation and legal foundation of this global environment is more problematic than many might have imagined a few years ago.

Law in a digital society

24. With that introduction, one might ask whether we can any longer ignore or fail to embrace the legal foundation of our societies.
25. The digital society of which I am talking is an environment in which the internet and the data that it creates continue to grow exponentially. It is

an environment in which we will see the ubiquitous use of smart machine-readable documentation in place of analogue programmes such as PDF and Word. It is a world of smart legal contracts recorded on-chain and central bank digital currencies and stable coins increasing both the number and the speed of transactions globally. It is a world in which everything that every consumer and every business does will be recorded immutably and eternally on the blockchain. And, of course, our lives will be increasingly dominated by the use of artificial intelligence. It will be a data driven international society.

26. In this environment, the law will play an even more fundamental part than it did before there were some 4.6 billion internet users in the world, as there are today (almost 60% of the world's population).
27. As I said, there is now a move from unregulated to regulated digital activity. Bitcoin has become larger and more popular than anyone expected, but in the longer term, its inevitable volatility and instability is going to put off many, if not the majority, of the world's investors and businesses. Regulated use of smart contracts and blockchain technologies will take off as soon as central bank digital currencies, stable coins, smart documentation, and electronic transferrable documentation themselves become ubiquitous as they inevitably will.
28. As examples, Bitcoin and investment may sound a long way from the real lives of ordinary people. But the shift to new technology, especially blockchain, will be apparent sooner than you may think in many, if not most, fields of human endeavour. It will affect how wages are received and taxes paid, how workers rights are protected, how food is supplied and how property is owned and transferred.
29. The question is how this regulation will function in the fragmented legal world about which I have spoken. I have worked hard through the UK Jurisdiction Taskforce to prepare English law, at least, for these developments. We published in November 2019 a Legal Statement on the status of Cryptoassets and Smart Contracts under English law, which has received judicial approval in various jurisdictions. It makes clear that cryptoassets are properly to be regarded as property in English law, and

that smart legal contracts are indeed legally binding contracts in English law. In April 2021, the UKJT published its Digital Dispute Resolution Rules intended for on-chain digital relationships and smart contracts. The rules provide for arbitral or expert dispute resolution under English law in very short periods for digital and blockchain disputes; they allow arbitrators or experts to implement decisions directly on-chain using a private key, and for the optional anonymity of the parties. In February 2022, the UKJT published its Smarter Contracts Report that explains how smarter contracts and blockchain technology are currently being used.

30. It is perhaps worth pausing for a moment to explain the reason why I have been so keen to lead the UKJT in the context of Lawtech UK. It is because, as I see it, a legal foundation to the rapidly accelerating digital world is not only desirable and inevitable, but provides an important opportunity for the UK economy.
31. All that I have said thus far may be important, but it does not explain exactly how the law can move in a digital environment from necessary evil to valued infrastructure.
32. It is necessary in the first instance to stand back. In my lifetime, the way people live their lives has changed beyond recognition. The internet, global corporations and social media do not provide services that are any longer luxuries or optional extras. Their value and the effect that losing these things has on world populations has become all too clear during the tragic events in Ukraine and Russia in the last few weeks. The 4.6 billion people I have already mentioned actually need access to a digital environment. It is not, as I say, an optional luxury. As consumer transactions for example for the supply of energy and telecoms are recorded on-chain, and as banking and financial services travel in the same direction, the people I have mentioned will also need stable and reliable access to blockchain technologies.
33. Stability in access to digital technologies, just like stability in the value of cryptoassets, can only be provided by legal infrastructure, allowing for the speedy resolution of digital disputes fairly at proportionate cost, access to justice and a level playing field. As I have said, law is undervalued because

there is a failure to understand what it is for. It is obviously valuable in the prevention and prosecution of crime, but it is less obvious that it is required to regulate the environment in which 4.6 billion consumers and millions of national and international business, SMEs and micro-businesses operate.

34. In my view, the digital revolution, if I can call it that without being accused of over-dramatisation, will focus debate on the legal foundation for the technologies on which all our lives already depend, and will come even more to depend. It is most likely that the range of municipal laws that are candidates for the role I am talking about will narrow. I have mentioned some already. One law will obviously not govern everything. But everything must actually be governed by law.
35. In the EU and the USA, different laws already govern private transactions and regulation as I have already mentioned. EU law and federal law governs competition and market regulation, whilst national laws and state laws govern private law transactions, whether by choices of law and jurisdiction being made or otherwise.
36. There are, therefore, good reasons for legal and regulatory infrastructure, such as financial stability, access to justice and service reliability. It is also necessary that the legal systems themselves are dependable and fit for purpose. That is why I always come back, in these discussions, to the value of English law. A recent report by the economic consultancy, Oxera, for Legal UK explained that English law governs trading in €600 trillion of OTC derivatives annually, in €11.6 trillion in metals trading, in £250 billion in M&A deals, and in £80 billion in insurance contracts every year – just giving a few examples. It is important that English lawyers and our government understands that English law can also provide the legal infrastructure for the new digital technologies that I have been talking about. It has the necessary stability, flexibility and certainty. And more important than any of that, English law enjoys international confidence.
37. There is a further point here about the rule of law. What one might regard as ‘compliance’ with the rule of law is obviously state specific. Consumers and businesses can only vindicate legal rights under their local municipal

laws. If the court system is not fair or not available, the value of that legal system is significantly reduced, however excellent that system of law might objectively be. The reason English law is so valuable is precisely because the system is accessible, is applied fairly and does, therefore, attract the confidence of national and international consumers and business.

38. In a ground-breaking keynote speech last Monday 4 April 2022, John Glen MP, Economic Secretary to the Treasury, said some very important things in this connection to the Innovate Finance Global Summit during Fintech Week 2022. He said that “[i]f crypto-technologies are going to be a big part of the future, then ... the UK [wants] to be in, and in on the ground floor”. He said that “if we commit now... if we act now... we can lead the way”, and he said that the Treasury’s response to its consultation on stablecoin confirmed that legislation will “bring certain stablecoins into our payments framework ... creating the conditions for stablecoin issuers and service providers to operate and grow in the UK”. The Government will also be looking, said Mr Glen, at “regulating a broader set of crypto activities including trading of tokens like Bitcoin ... and we will consult on a world-leading regime for the rest of the crypto-market too ... a regime that will facilitate safe and sustainable, and ... rapid, innovation”.
39. More importantly than any of that, Mr Glen referred to the legal landscape explaining that it will be crucial. He said that: “English law and our world-leading legal services and courts are already a huge asset, and can play a big part in making the UK an attractive hub for all things digital and for new technologies more generally”. He referred specifically to the work of the UKJT and the Law Commission, concluding that he was “asking [the Law Commission] to undertake a new project ... to consider the legal status of Decentralised Autonomous Organisations” and that “English law can and should provide the legal foundation for the use of these borderless technologies”.
40. To return then to my thesis, anyone looking at the trajectory of change in consumer and business technologies will be able to see how vital the legal infrastructure will be. It is, as I started off by suggesting, the glue that will

hold the international consumer and business world together in our new environment. Lawyers need to explain to the world how critical that glue will be to protecting real people when they are increasingly dependent upon digital systems and data recorded on-chain.

41. The reality is that such digital systems will be governed by law in one form or another, whether English law or other laws, or no law at all. The risks of the latter solution are huge. As the size of the existing unregulated defi market already shows, that possibility does not sufficiently alarm large numbers of individuals around the world. It should do, and lawyers and others need to make the case more strongly than they have so far.

Conclusions

42. I will conclude by trying to draw some of the threads together.
43. The things that are important to people have changed dramatically in less than two generations. Moreover, the connections between life in different states and different countries are much closer than they were even 20 years ago. The legal community has not been as good an advocate for itself as it could have been. It failed to explain, or perhaps to convince a large enough proportion of the population, why law was important in an analogue world.
44. For the reasons I have been trying to explain, it will be even more important in the developing digital age for the legal community to explain why law is so critical to the success of societies of the future. The massive increase in data and connectivity will make it imperative that the law underpins the technological edifice on which everyone will depend. I have not mentioned either hacking or cyber-crime, but both obviously pose huge risks to our digital futures. I always argue that we should not halt digital development because of our fear of cyber-crime. Instead, we should make sure that we make cyber-security our highest development priority.
45. Nonetheless, cyber-security, alongside the need for financial and platform stability provide excellent reasons why the law will be far more important in the digital world.

46. Law and regulations will bear a huge responsibility for the success of the digital developments I have mentioned. English law can play a major part if its advocates are sufficiently persuasive as to its virtues. Neither English law in particular, however, nor law in general, will succeed if it does not persuade the consumers and businesses of the globe that law is an essential support, not just something that they can take or leave at will.