The Sociology of Law in Corporate Capitalism: the Example of Software

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Methodology for Sociology of Law in the Economy

- Examine both Structures and Practices
  political economy + sociology of action
- Structures – the ‘code of capital’ (Pistor)
  Transnational financialised corporate capitalism
- Private Law building blocks - property, contract, tort
  Business organisations: corporations, partnerships, cooperatives
  Financial instruments: shares, debt, mortgages, derivatives
  Intellectual property rights: copyright, patents, brand names
- Public Law
  Tax & fiscal law
  Regulation: competition, utilities, finance, energy, ecology, food
    originated especially in US early 20C
    ‘regulatory state’ since 1980s (privatisation)
- ‘Market friendly’ - private rights take priority
Sociology of Action: Lawyering Practices

- Lawyers mediate between
  Spheres of power: public (politics) & private (economic action)
  Sites for the formulation, application & interpretation of law
  Levels of law: infranational, national, international, supranational
  Types of law: hard/soft, legislation/adjudication

- Lawyering Practices: exploiting indeterminacy of rules
  Linguistic: meaning is contextual
    technical language: ‘cognitive community’ habitus- Bourdieu
  Abstract/general rules application to specific situation
  Normative rules: teleological interpretation – desirable meaning

- Critique of formalist view of law
  Law does not provide certainty – it is fluid and contested
  Lawyers compete for ‘le droit de dire le droit’ (Bourdieu)

- The Power of Law
  capacity to amass & deploy legal resources dominates discourses
  accepted meanings shape material socio-economic practices
Software

- Key technology of post-industrial capitalism
  scientific rationality + creativity - new expertise
  solitary concentration + interchange of ideas – teamwork
  continuous process of development, testing, refinement, extension
  publicly funded research
  collective, social process – appropriated for private exploitation
  Central to cultural, social & economic practices
  Immense power of AI

- Contestations over Intellectual Property
  program = instructions for machine, not human communication
  fell between copyright & patent paradigms
  corporate lawyers achieved both copyright & patent protection
  continuing conflicts: emulation, decompilation
  law become weapon of competition
  programmers’ revolt: Stallman and ‘copyleft’
  Open Source: based on/transformation of copyright
  enables public-private collaboration
Property, Contract and Control

- **Control over Competition**
  Microsoft licenses Windows to OEMs to boost size & share of PC market
  Contracts can control permitted uses, *only between parties*
  Can restrict decompilation & reverse engineering
  Mass market for software products & applications based on property rights
  Software firms all agree, though battle over scope of protection

- **Control over Use and Users: the EULA (End User Licensing Agreement)**
  Transaction characterised as a licence, independent of sales contract
  Shrink-wrap/ click-through to indicate acceptance
  Aims to control permitted uses – but which uses need permission?
  Restricts resale of the copy – likely permitted by ‘first sale’ rule?
  Permits copying needed to operate the program -- implicit in sale?
  Regulates other (permitted?) uses – reverse engineering etc.
  Users also agree to grant rights – especially to collect data

- **Software Applications Monetise Global Social Networks**
  Applications supplied to users ‘free’ create ‘platform economy’
  Control of the Code enables appropriation of value from transactions
  Amplified by algorithms that channel social interactions

- **Rise of the Software-based Giant TNCs**
  Apple, Microsoft, Alphabet, Amazon, Nvidia, Meta in top Ten TNCs (market cap)
IPRs in Finance and Tax

- The Fetishisation of Intellectual Work as Private Property
  Private property = ‘right to exclude’, IPRs create scarcity in ideas
  Appropriation of publicly funded & social research
  Economic justification: encouraging investment & commercialisation
  Accumulation of software & patent portfolios for financialisation
  Financiers dominate direction of software development

- IPRs and Tax Avoidance
  Digitalisation exacerbates fundamental flaws in international tax rules
  Ownership of intangibles attributed to low-taxed intermediary entities
    TNCs reduce tax in host and defer tax in home countries
    less need for physical presence, no taxable presence where sales made

- Undermining the Source Tax Base
  Payments of fees for IP licensing & services deductible from business profits
  Channelled via conduits (e.g. in NL) to havens (e.g. Bermuda)
  Income from sales attributed to low-taxed affiliate (e.g. Ireland)
  e.g. Double-Irish Dutch Sandwich (Google)
Legal Trickery to Avoid Withholding Tax (WT) at Source

- **WT on Royalties**
  royalties include payments for the ‘right to use’ copyright
  OECD Commentary 1992: right to use software is not right to use copyright
  Text included as ‘relevant’ in UN Model Commentary 1997
  2011 addition: ‘some members are of the view that may constitute royalties’
  UN 2021: ‘large minority’ consider payments for software are royalties
  UN 2023: agree new version of model article – but needs inclusion in treaties

- **National Courts follow OECD Commentary**
  Arguments advanced on behalf of software TNCs
  India Supreme Court: *Engineering Analysis* (2021) resolution of many cases
    OECD authoritative, India’s reservation imprecise
  Kenya High Court: *Seven Seas* (2021): cites OECD Commentary & Indian SC

- **Payments for Digitalised Services**
  Can be attributed to non-resident affiliate
  Many treaties allow WT on ‘fees for technical & professional services’
    interpreted to require human intervention
  UN Model article 12A (2017), 12B ‘automated digital services’ 2021

- **Comprehensive Reform Needed**
  OECD/G20 project on ‘base erosion & profit shifting’ (BEPS)
    (that’s another story!)
Thank You