2022

The Death of Law

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https://doi.org/10.1515/gj-2022-0064
Published online November 16, 2022

Abstract: This is a talk about the decline and fall of constitutional law, an overarching characteristic of the new millennium. I focus on the period from the end of the Cold War—once described as the end of history—to what I call the "Second Cold War" beginning in the second decade of this century and having escalated in the proxy war in Ukraine. The Second Cold War is also characterized by an aborted cooptation of China through the World Trade Organization (to tame China's seemingly unstoppable ascension to global supremacy) as well as a state of permanent emergency.

Keywords: constitutional law, western legal tradition, corporate takeover, surveillance, conditionality

TERMINOLOGY. The English language, for lack of nuanced terminology, does not accommodate a more precise title for this talk. Most other languages of the Western legal tradition include the fundamental opposition developed by Roman law between *ius* and *lex*. In Spanish, this is *derecho* and *ley*. In French, *droit* and *loi*. In Italian, *Diritto* and *Legge*. In German, *Recht* and *Gesetz*. In Russian, *parvo* and *zako*. … Well, you get the idea. The first concept—*ius*—is law as principle of justice, and shelters morality: something straight, something righteous. The opposing concept—*lex*—emerges from the idea of being bound, by rope or chain, "obliged" as in the legal notion of obligation; there is no value judgment: *lex* is such because it is binding (*dura lex sed lex*). *Ius* is the domain of jurists, where principled and rational discussion occurs; *lex* is the domain of coercive power, that of cop handcuffs and incarceration. My title for this talk, 'The Death of Law', alludes to the former concept.

RATIONALITY CHECKS: CIVIL LAW *v* COMMON LAW. In the Western legal tradition, after a long historical evolution, professional jurists have been capable of asserting themselves not only as necessary aides to the establishment of sovereign power (in need of ordered bureaucracy) but also as professional checks on

Inaugural lecture given on 7 October 2021 at the UC College of the Law, San Francisco to celebrate the appointment of the author as Ray L. Sullivan emeritus Professor of Law.

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arbitrary power. This was the topic of my induction speech to the Fromm Chair that I delivered almost 28 years ago in front of two colleagues whom I miss more with each passing day: Professor Rudolf Schlesinger and the then new Dean Mary Kay Kane. The gulf between civil law and common law tradition has centered around the institutional postures of such guardians of the rationality of power (and progressively of legality and of rights other than property). In civil law, the oracles were professors; in common law, they were judges. In both capacities, jurists served the crucial role as check on arbitrary power. Both circuits have now abdicated this role.

BOTH CHECKS IN US CONSTITUTIONAL LAW. The first explicit theorists of this constitutional role were the Huguenot jurists who were grounded since the sixteenth century in the tyrannicide of constitutional law tradition: when the ruler brings people to ruin there is a right to resist that includes killing. In England, the Glorious Revolution, with its grant of tenure to judges, evidences the importance of the judiciary in maintaining a stable balance between sovereignty and the people (at that time, of course, the property owners). Thanks to the invention of modern law schools in 1870 by Dean Langdell at Harvard (only eight years before UC Hastings), the United States became the first country in which were established both a powerful judicial and academic control on the rationality of power. This might be the most important reason for the hegemony of US law beginning last century.

WHAT I MEAN BY *THE DEATH OF LAW*. The collapse of this historical equilibrium, which grounds both ideology and praxis of the rule of law, is what I call *the death of law*. Today, in the face of massive violations and transformations of the standards of legal and constitutional decency within the Western legal tradition, both academic and judicial circuits have failed. By relinquishing critical and rational control of the arguments, taking sides on partisan lines within a narrative of constant emergency (from climate crisis to COVID-19 to war in Europe), jurists transform themselves into the problem rather than the solution. The result is a collapse of the reputation of Western legal tradition, and the likely global hegemony of systems of social control unimpaired by what is reduced to a hypocritical rhetoric of rights (I have penned a couple of articles on the Chinese advantage in this state of affairs, the second recently accepted by *The American Journal of Comparative Law*).

CORPORATE TAKEOVER. The first lethal force accelerating the death of law was the corporate takeover of Western institutions, a silent takeover morphing over two decades between Noreena Hertz's The Silent Takeover (2001) and Camila Vergara's Systemic Corruption (2020), two books I recommend highly to you. I refer not only to legislative capture but also to seizure of every apparatus or power with a political impact. In the book I wrote with Laura Nader, Plunder: When the Rule of

Law is Illegal (2008), we denounce the corporate anti-law movement that two years later, with *Citizens United v Fed. Election Commn.* (2010), was incorporated into US constitutional law.

PARTISANSHIP. Partisanship in the US Supreme Court took its gloves off with *Bush v Gore* (2000), and has since confirmed itself with strictly partisan confirmation votes. There are no principles stronger than this: if I can take it, I'll go for it!, a motto of the Reagan years. What has followed this decline in institutional culture is the denial of any principled idea of privacy that has emerged, on bipartisan lines, with the overruling of *Roe v Wade* (1973) (by conservatives) and the aggressive and discriminatory mandatory vaccination policies of the COVID era (by liberals). In both instances, the person and their body do not function as a limit to corporate political power. Throughout the footprint of American influence (US, Canada, Australia, Western Europe) abortion and vaccination—other than when explored through principled legal discussion on the scope and limits of individual choice—became paradoxical terrain for arbitrary partisan confrontation and stadium cheering. The radicalized conservatives: against privacy in abortion but for privacy in the vaccine mandate. The radicalized liberals, rallying for *Roe v Wade* but showing contempt for privacy in vaccination issues in reverence of corporate science. Conservatives, in fervent denial of women's rights over their own bodies; liberals, in naiveté about corporate interests in science. Both right and left in denial of privacy and of logic in legal and policy arguments. *Dobbs v Jackson Women's Health Org.* (2022) ruins lives; the absence of Novak Djokovic from the US Open hurts tennis.

TECHNOLOGICAL ASSAULT. The most lethal blow to law—already weakened by the anti-law movement that has capped punitive damages, made class certification difficult, and reined in rights by a variety of alternative dispute resolution strategies—came from technological habits learned by domesticated consumers objectified online as "big data". The corporate takeover and the surveillance State, rapidly developed in the aftermath of 9–11, have married in their contempt for privacy and individual autonomy, thereby paving the way to the daunting panopticon in which we are living, denounced by victimized heroes like Aaron Swartz, Julian Assange, Edward Snowden, Chelsea Manning, and others less famous.

TAKE-IT-OR-LEAVE-IT! Five billion human beings are tethered via cell phone, half of whom are on social media. Average daily time spent online is more than 8 h, more than sleeping. With these numbers, and these numbers are increasing, the Internet has become the frontier for capitalist accumulation. Like the Americas of early modernity, everyone reaching this modern Far West of corporate accumulation learns its logic the hard way: the owner of the platform makes the rules. And the user must accept the rules: *take-it-or-leave-it*! You do not consent to the rules? Then you must stay out. Try to use Facebook, Twitter,

WhatsApp, or Zoom without accepting their rules because, for example, you are concerned for your privacy: no way can you get in, no matter how important your transaction is. No consent? No Zoom! No Zoom? No education during lockdown. Even a US President must accept Twitter's rules or be banned … at least for a little while.

ACCUMULATION WITH NO NEED OF LAW. Take-it-or-leave-it is a *de facto* logic. The opposite of law. It is also known, in the hypocritical jargon of the North-South relationship between the powerful and the powerless, as "conditionality". A euphemistic term for *blackmail*. On the Internet frontier (and this is the main difference from colonial expansion) there is really no need for law in order to accumulate capital. Algorithms, smart contracts, and firewalls are more than sufficient. For the first time in the history of capitalism, accumulation lawyers are unnecessary. They may assist and maintain a few jobs for a little while, but the foundations of capital order do not require them. Intellectual property is easily defeated by technological innovation. And privacy over the Internet, in spite of European attempts like General Data Protection Regulation, is a caricature that has long made law lose prestige. Who reads forms in a world in which many are eager to share with the Net their private—or even *intimate*—secrets?

YEARS ON THE FRONTIER AND BACK HOME. All capitalist institutions of accumulation have been tried on the frontier before returning to the motherland. Absolute private property and universal freedom of contracts (the sole and despotic dominion) needed a genocidal empty land as a laboratory and, because they were proven there to be *very efficient*, they returned to Europe eventually to prevail. The medieval institutions were too thick with feudal obligations, commons, and collective duties to be prime terrain for experimentation of new property rights and structures. It is no accident that early Dutch corporations were developed to transact business on the *mare liberum* to reach new lands and plunder them. Only after successful trials at the frontiers of capitalism were the new institutions permitted to return and revolutionize the Old World.

CONDITIONALITY BACK AT HOME. With the COVID-19 emergency (and other risks creating a permanent state of emergency), conditions are ripe for a return to the take-it-or-leave-it logic at home in the offline world, which is more and more difficult to keep separate from the online world in the panopticon metaverse. Not yet at the very core, the US, where the culture of privacy and individual rights might still retaliate. The transfer of conditionality-driven panopticon, from the Internet to the real world, needs experimentation in countries like Israel or Italy, where Chinese-like devices of control have been declared mandatory for the population. Personally-sensitive health information is contained in a QR Code that has to be presented and scanned by restaurant attendants, bus drivers, owners of exercise facilities, and even in the exercise of fundamental rights such as going to

schools or post-offices or travelling by train. Once a right is conditioned it ceases to be a right. Controls have been outsourced to tech companies and their apps.

QR CODES OR LEGAL CODES? It is so much cheaper to use QR Codes rather than law as controlling processes that there is scant hope that, in the wake of neoliberal values, law will survive much longer. Courts of law, law schools, attorneys, notaries, casebooks, legal codes and texts, dissenting opinions, and doctrinal discussions are increasingly perceived as wastes of time and money, useless transaction costs for capital accumulation. The same functions of social control and capital infrastructure can be guaranteed *de facto* by an app, a smart contract, or a block chain at a fraction of the cost. Why go through a cumbersome legal process if your client defaults on the monthly lease payment on her car when you can simply render the car impossible to start via a cheap smart program built into the car? Much more can be done to control dissent through apps, as already witnessed in China and Canada (the latter at the time of truck driver strikes by blocking bank accounts of those protesters caught on smart camera).

VICTIMS OR ACCOMPLICES? Without doubt, lawyers are professionally vulnerable to smart logic since they can be replaced cheaply by automatization, as already occurs in airline, banking, and large distributing businesses. Our profession, however, can also be considered passive, or even complicit, to its own demise. Professional opposition by the legal profession to its grim and deteriorating state of affairs has been ineffective at best and nonexistent at worst. For motives of pragmatism or cynicism, professional values have not been defended. Perhaps because our professional project is no longer necessary for capital accumulation, it is more difficult to defend legal values in the citadels of power. Lawyers have only limited bargaining power to uphold the values of integrity, privacy, respect, and equality in their services to capital. Indeed, capitulation has been hasty: the fascination for paradigms of neoliberal economics, communications technology, and cognitive and medical science has made law lose its soul. For the law, eschewing politics is to commit suicide.