

KEY POINTS

- Economists appear to have no clear understanding of how a legal system delivers value or why one legal system may yield a greater economic return than another.
- It should not be possible for fiduciaries and regulators to operate with low levels of understanding in this field.
- There is a strong case for finding ways for professionalising the way in which development of the legal platform is planned.
- If one accepts that English law is a valuable economic asset, it is strange that there is little investment in its development.

Spotlight

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Legal platforms as economic tools

In this Spotlight article Guy Beringer considers the importance of legal platforms as valuable economic assets; he argues that this requires: (i) an understanding of the value that can accrue to an economy as a result of the efficiency of a legal platform; (ii) planning of the legal platform so that it keeps pace with development; and (iii) investment in the legal platform.

■ We live in a world where platforms are ubiquitous. We rely on transport platforms, infrastructure platforms, communications platforms, trading platforms and social media platforms on a daily basis. Physical and virtual platforms abound.

Economists generally understand and recognise the value of platforms even though valuation can be challenging when benefits are dispersed, shared or hidden. Some platforms, like road systems, are provided because of the benefits they provide for society and the economy generally. Others, like social media platforms, are exploited by their owners with less regard to public benefit.

All of these platforms have an owner (which may be either private or public) and therefore have an entity which is interested in their development from either a public or self-interested perspective.

When businesses or individuals transact with each other, they require a legal platform to give meaning to what they are doing. Legal platforms are therefore probably the most widely used platforms in history. Strangely, they are rarely viewed as economic tools or economic assets by economists. There is no clear understanding of how a legal system delivers value or why one legal system may yield a greater economic return than another.

Over the past 250 years, English law has provided a remarkable case study of how a legal operating platform can both support and encourage domestic prosperity and also how it can attract international capital and commerce on a significant scale. It is therefore

a strong example of a platform which provides both domestic benefit and international comparative advantage. Given this history, how does one explain the apparent existence of an economic blind spot in relation to English Law?

One simple explanation may be that English law is an asset but it lacks an owner. It may be the most important single economic asset of the UK but it is an orphan in economic terms. It is freely available to all and is supported and curated by the judiciary and the justice system. But nobody derives rents from it and nobody controls its development.

The legal professions themselves have a clear interest in the success of English law but that is rather like the relationship between Google and its developers, designers and software engineers. The greatest beneficiaries of the platform offered by English law are probably the Treasury and the financial services industry but neither recognises this fact openly.

The paradox of an economy based on an orphan asset grows when one considers that English law is highly valued for its certainty and predictability but its USP is that it is constantly evolving and changing. We therefore have an economic crown jewel which benefits us all but which no-one owns; which is prized for its certainty but can only thrive if it keeps changing; and which does not seem to be noticed by economists. Unsurprisingly, this throws up some interesting challenges for the future.

If an organisation possesses a crown jewel asset, it will normally seek to preserve its value and its primacy through investment.

That investment will normally come either from its owner or its beneficiaries or both. An orphan asset which is not recognised by its principal beneficiaries will struggle to achieve such investment. An analysis of the challenge which this poses and of the accompanying investment need might helpfully be summarised under three headings: understanding, planning and investment.

UNDERSTANDING

Legal economy does not exist as a significant academic discipline in the UK. As a result, we do not understand how a legal platform operates or what makes it successful. We do not understand how it affects economic performance. We do not understand how value can accrue to an economy as a result of the efficiency of a legal platform. We do not understand how features such as network effects (which are well understood in relation to other platform technologies) play out in relation to legal platforms.

This lack of understanding is significant not merely because of the implications for economic growth. It also affects regulation and valuation. It ought to be part of the toolkit of regulators and credit rating agencies who do not appear to be mindful of the differences between different available legal platforms in international businesses. They would not take the same view in relation to different technology platforms in a fintech business. We see, for example, political decisions in the European context in relation to choice of legal platform with no accompanying consideration of the economic implications. It should not be possible for fiduciaries and regulators to operate with low levels of understanding in this field. Legal economy deserves a better following as a discipline and should no longer be a blind spot for those who direct markets.

Spotlight

Biog box

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Lest anyone think this is simply a matter for business, the same thinking should be applied to law as a tool for social welfare. If an economist had been involved in the design of the legal aid system, we would not have a system overburdened with red tape, insensitive to the need for the thousands of participating organisations to thrive and blind to the economic outcomes it creates. Legal economy is a matter for society as well as business.

PLANNING

English law has, for at least 250 years, provided a legal platform which has arguably performed more effectively for business, commerce and prosperity than any other international competitor platform. This has not been an accidental development as judges have consciously sought to provide a system which fairly served a society in which trade and commerce were of vital importance. It should, however, be noted that this sustained development has often been slow, piecemeal or unsatisfactory. There is a strong case for finding ways of professionalising the way in which development of the platform is planned and for adopting a more strategic case. Some may argue that a system which has worked for 250 years needs little change. Leaving aside the fact that business history is littered with examples of complacent market leaders who woke up too late, there are two important reasons why the old system of involuntary evolution will no longer pass muster.

The first is that the competition is waking up to the value of legal platforms. Competitor jurisdictions are thinking about these issues and the way in which legal platforms operate.

The second reason is the pace of change in the digital world. The last fifty years in financial markets have seen the advent of eurobonds, asset finance, securitisations, structured finance, swaps and derivatives and a host of instruments which were not thought of fifty years ago. It is likely that similar developments will occur in the coming period but at a greatly accelerated pace. A legal platform which cannot accommodate these developments will rapidly lose its attraction to markets.

Conversely, a platform which can anticipate and host these developments will be enormously powerful. Anyone who is complacent about a strong market position in the face of digital development should look at what happened to the Eastman Kodak company.

INVESTMENT

The third issue is investment, and this will determine the outcome on understanding and strategic planning. If one accepts that English law is a valuable economic asset, it is strange that there is little investment in its development.

There are numerous problems to overcome in relation to investment. The first is simply: who should invest? Government should not be seen to influence the development of English law as a platform for business precisely because its main brand characteristics are independence, objectivity and certainty. Any tainting of the brand through governmental self-interest will devalue it. But that does not mean that government is not the logical investor. HM Treasury is the principal beneficiary of the success of English law as a business platform. But the investment case rests not merely on preserving what the UK economy already has. It also offers opportunities for growth which will be hard to match elsewhere. Developments in financial and capital markets over the coming decades will offer enormous opportunities for an operating platform that can anticipate them.

A second fundamental problem with investment is: how should it be done? The blind spot in relation to the economic significance of legal systems and the challenges of orphan assets have previously been overcome in a number of other areas. Science, medicine, art, fashion, film and technology have all found solutions in which government has enthusiastically participated. With the exception of science, none of these areas of endeavour has provided 250 years of recurring value to the UK economy. Surely it is time for this anomaly to be addressed and for legal platforms to be understood and developed to the benefit of all? ■

Further Reading:

- Why English law as the governing law of contracts? (2019) 7 JIBFL 427.
- Post-Brexit: the factors increasing the pressure to refer matters to EU law (2018) 3 JIBFL 135.
- LexisPSL: Dispute Resolution: Q&A: What factors impact the choice of English law as the governing law for a new agreement which will directly impact upon the operation of existing agreements subject to other governing law choices?