



UNIVERSITY *of* NICOSIA

Session 3

Legal Systems

BLOC 513: Law and Regulation in Blockchain



Session objectives

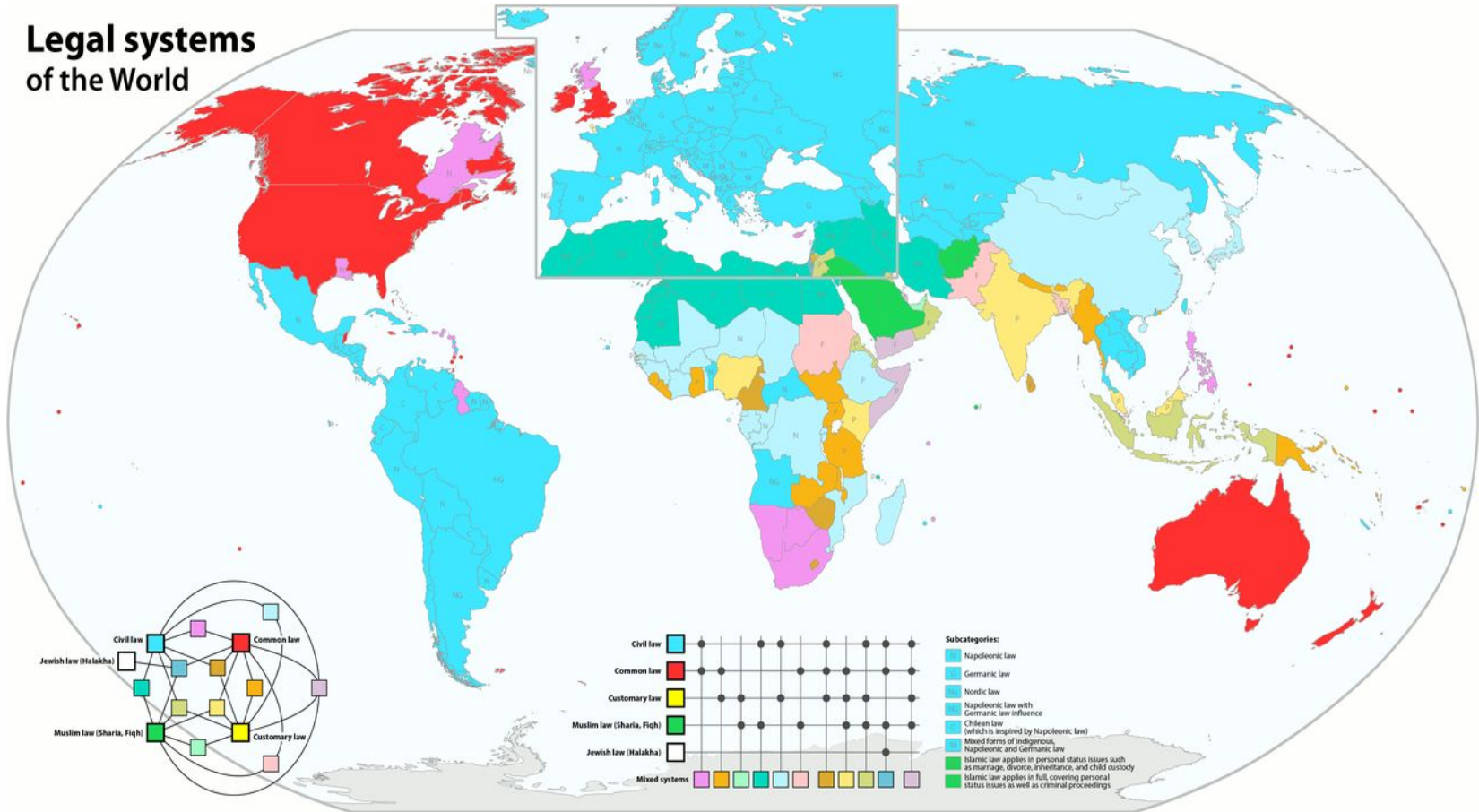
- To provide an overview of the main legal systems around the globe.
- To provide a deeper understanding of the legal systems and the key roles in each system.
- The focus will be on:
 - Common Law and Civil Law systems;
 - The societal, political, financial, and legal forces that drive and shape regulation;
 - How regulation can morph over time to reflect the prevailing conditions or attitudes in the given jurisdiction;
 - The challenges legislation needs to address, including the regulation of new technologies within the existing legislative and conceptual frameworks.

Session outline

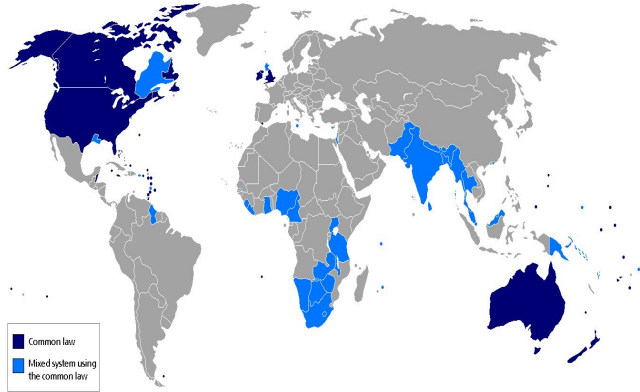
1. Legal Systems
2. Forms of Law
3. Types of Law
4. Compliance and Prohibition
5. Examples of Regulatory Variability
6. Why Regulation Matters
7. Required Reading
8. Further Reading

Legal Systems

Legal systems of the World



Common Law and Civil Law



Common Law: Similar penalties or sentences for the same offence was considered crucial to the administration of justice. Today, one-third of the world's population live in common law countries.

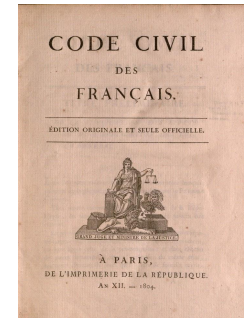
Court opinions and reasons for decisions in similar cases are precedents that bind future judges and litigants. Common law stands in contrast to and on equal footing with statutes which are adopted through the legislative process, and regulations which are promulgated by the executive branch.

Judges act as impartial referees on the case presented by lawyers.

Stare Decis: The principle that similar case facts should yield similar results, lies at the heart of all common law systems.

Civil Law: Legal opinions, rather than previous court decisions, are given emphasis. However, there is no statutory requirement that any case be reported or published in a law report, except for the councils of state and constitutional courts.

Publication of legal opinions are unofficial or commercial, except for the findings of the highest courts. Judges dominate trials and directly lead the enquiries and question the witnesses to seek the truth.



U.S. Legal System

The United States has 51 Legal systems: a federal system and 50 state systems
Each state has a certain degree of independence within its own legal system

Sources of United States Law		
Enacted Law (state & federal)	Caselaw (state & federal)	Secondary Authorities
<ul style="list-style-type: none">○ Constitutions○ Statutes○ Treaties○ Court Rules○ Administrative Agency Rules	<ul style="list-style-type: none">○ Judicial<ul style="list-style-type: none">• Common Law Caselaw• Caselaw Interpreting Enacted Law Policy goals:<ul style="list-style-type: none">▪ <i>Fairness: Equality before the law</i>▪ <i>Predictability</i>▪ <i>Judicial efficiency</i>○ Administrative Agency Decisions	<ul style="list-style-type: none">○ Treatises○ Law reviews○ Legal encyclopedias○ Digests○ American Law Reports○ Loose-leafs○ Restatements

Sources of Law

United States Sources



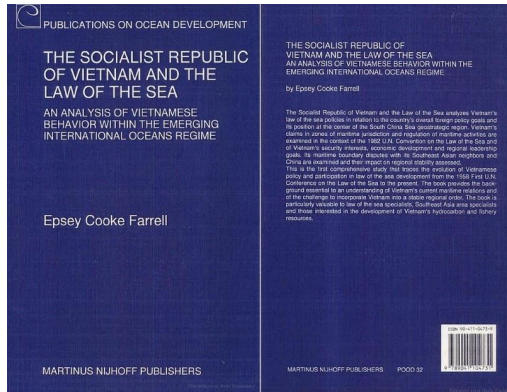
The hierarchy of the sources of US law are:

- Constitution.
- Federal statutes, treaties, and court rules.
- Federal administrative agency rules.
- Federal common law case law.
- State constitutions.
- State statutes and court rules.
- State agency rules.
- State common law case law.
- Secondary authorities.

* Each level of enacted law includes case law interpreting enacted law.

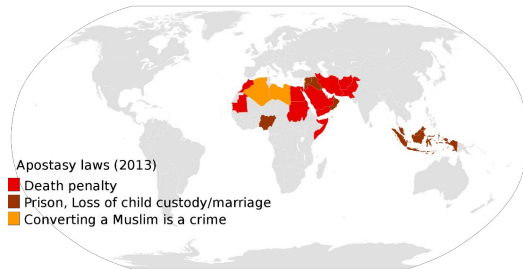
Constitutional Basis for the Hierarchy This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. --Art. VI, § 2

Other Legal Systems



Socialist Law

- This system of law based on statutes and legislation is followed in countries such as Russia, China, Vietnam, and Cuba.
- Party members sometimes act as judges. Judges play a secondary role.
- Courts are subordinate to the legislature.

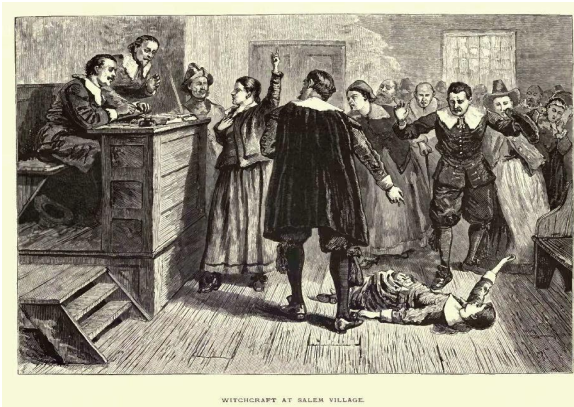


Islamic Law

- This body of law is based on religious tenets and religious documents have key importance.
- Judges have both religious and legal training and dominate trials and they play a secondary role in cases.
- Courts and other government branches are theoretically dominated by the Shari'a. However, in practice, the religious courts generally tend to be subordinate to the executive.

Forms of Law

Approaches to Law



APPROACHES TO STUDY LAW

Traditional or formalistic approach ('black letter')

- Law as a distinct object for study without reference to the social activity to which the legal rules are applied.

Law as a socio-political institution ('contextualism')

- Law as a phenomenon of the society and as 'something' that reflects the values of the society concerned

Critical Legal Theory

- Law in a context with nothing is taken for granted as the form and utility of law is considered and assessed.

THE NATURE OF THE LAW

The significance of the law in the creation and maintenance of social order

- There is a moving assessment on what is acceptable 'social order' and what acts are considered socially unacceptable or 'disordered'?

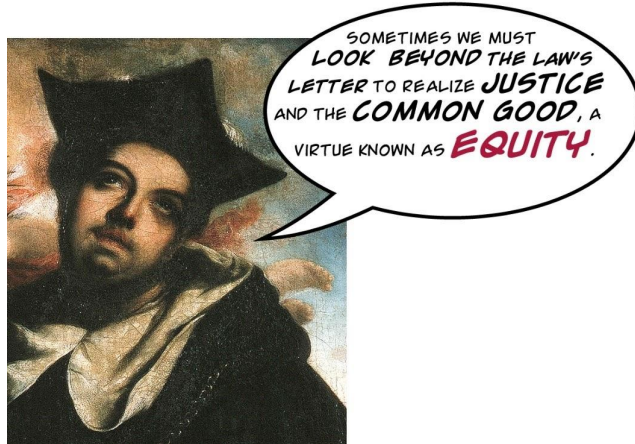
Forms of Law

Common Law

Came out of the need for a unitary system under the auspices and control of a centralised power – ‘the King’s peace’. The aim was to select the best local customs and a law ‘common to all’.

Statute

Law that has been created by the Parliament in the form of written legislation.



Equity

Because common law courts had become very formalistic and somehow inaccessible to most of the people, pleas passed for consideration and decision to the Lord Chancellor, who acted as the king’s conscience.

The intention is to have a specific court that delivering its judgments based on ‘fairness’ and ‘equity’.

Courts of Equity follow general established principles and tend to apply judicial discretion in the search for fairness.

He who comes to
equity must come with
clean hands

- ## Some Maxims
- Equity sees that as done what ought to be done
 - Equity will not suffer a wrong to be without a remedy
 - Equity aids the vigilant not the indolent
 - Equity acts *in personam* (i.e., on persons rather than on objects)
 - Equity abhors a forfeiture
 - He who comes into equity must come with clean hands
 - Where equities are equal, the law will prevail
 - Between equal equities the first in order of time shall prevail
 - Equity will not allow a statute to be used as a cloak for fraud

Compliance and Prohibition

Protection of Property

Inherent bias?

“In truth, laws are always useful to those with possessions and harmful to those who have nothing; from which it follows that the social state is advantageous to men only when all possess something and none has too much.”

— Jean-Jacques Rousseau, *The Social Contract*

- Legal systems tend to have a bias towards the protection of property. Regulation is an imperfect science biased towards the interests of the elite of a particular society.
- English law was built on the protection of property. It remains easier to be charged for shoplifting than to be imprisoned for corporate fraud.

Even the same government can vary its rules in different locations.

"In administrative terms, then, the British presided over a ramshackle empire, full of contradictions and quirks, and with a control apparatus that was spasmodic at best. It had grown Topsy-like with much improvisation. But by the mid nineteenth century, three different patterns of rule (a term defined broadly) were at work in three different empires: the settler empire, the Indian empire, and the vast residual category to which most were consigned, the Crown colony empire."

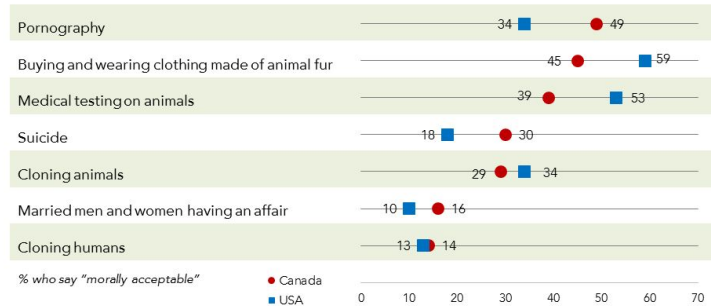
- John Darwin "Unfinished Empire: The Global Expansion of Britain"

Moral Spectrum

Where do you fit?

MORALLY RIGHT OR WRONG?

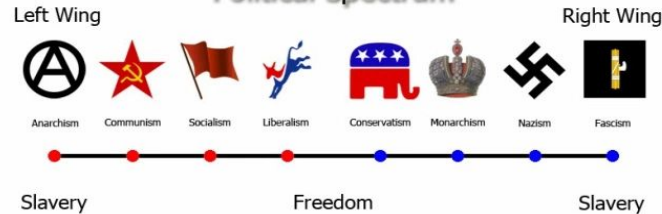
*Gallup survey conducted in May 2016



Regardless of whether you think it should be legal, for each one, please tell me whether you personally believe that it is morally acceptable or morally wrong.

ABACUS DATA

The Left vs. Right Political Spectrum



Moral Behaviour can depend on...

- **The Consequences** – what will happen if they do it/don't do it.
- **Their Emotions** – how will they feel about their decision afterwards.
- **The Situation** – the background, what led up to it.
- **Laws and Rules** – if it is against the law or a rule.
- **Authority** – if someone orders them, or forces them to do it.
- **Common Practice** – whether or not everyone is doing it.
- **Their Conscience** – something that tells them its right or wrong.

Alcohol's Effect

Key facts



- Worldwide, 3 million deaths every year result from harmful use of alcohol, this represent 5.3 % of all deaths.
- The harmful use of alcohol is a causal factor in more than 200 disease and injury conditions.
- Overall 5.1 % of the global burden of disease and injury is attributable to alcohol, as measured in disability-adjusted life years (DALYs).
- Alcohol consumption causes death and disability relatively early in life. In the age group 20–39 years approximately 13.5 % of the total deaths are alcohol-attributable.
- There is a causal relationship between harmful use of alcohol and a range of mental and behavioural disorders, other noncommunicable conditions as well as injuries.
- The latest causal relationships have been established between harmful drinking and incidence of infectious diseases such as tuberculosis as well as the course of HIV/AIDS.
- Beyond health consequences, the harmful use of alcohol brings significant social and economic losses to individuals and society at large.

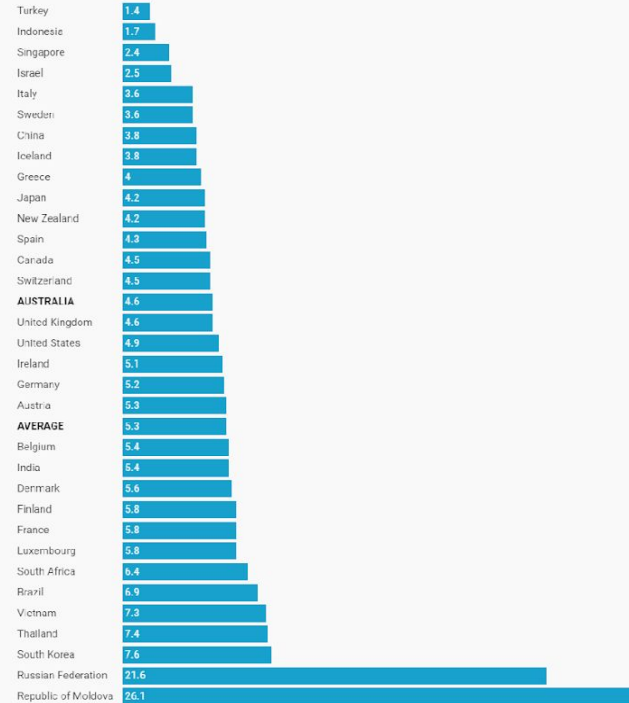
Despite its social impact, alcohol remains legal in most jurisdictions around the world. At the same time, serious penalties – even death – can be handed down to those who trade or even use other substances.

In the Republic of Moldova, alcohol suffers from the world's highest proportion of [alcohol-related deaths, according to the World Health Organisation](#).

In 2016, more than a quarter — 26.1 percent — of all deaths in Moldova were attributable to booze.

Alcohol-related deaths

Percentage of all deaths by country in 2016 where alcohol was an attributable factor.

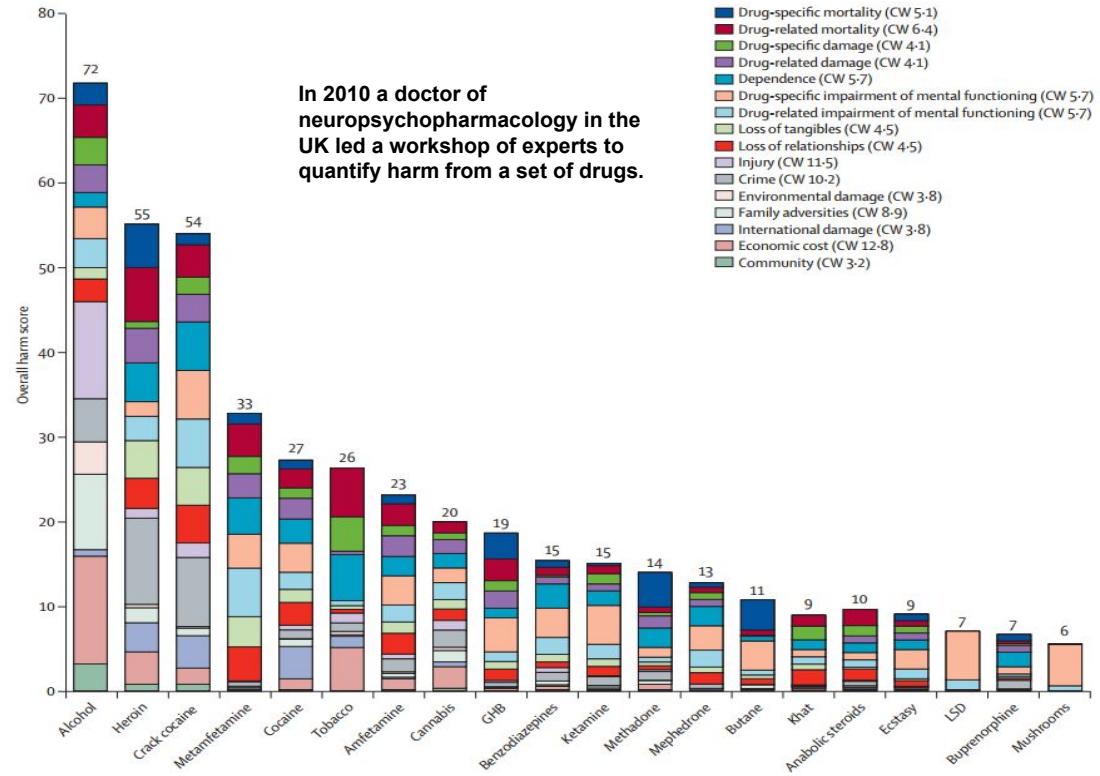
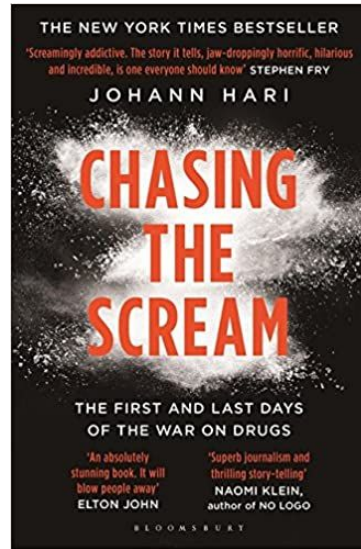


Source: World Health Organization - Get the data

Morality of Drug Laws

Should regulation consider and reflect the level of harm that a drug actually does?

Why is it that certain less harmful drugs prohibited and criminalised? The decriminalisation of cannabis in Canada and the changes in the U.S. show how changes can occur.



Prohibitive Regulations



- Laws are created to address a perceived problem.
- Perceptions will vary widely over time depending on which political party is in power, the prevailing economic circumstances or something as ephemeral as the 'mood of the times'.
- Society tends to periodically waver between permissive and punitive eras.
- Punishments can be harsh for those on the wrong side of current popular beliefs.
- A glance at society's attitude to alcohol is just one example. Prohibition failed miserably and unleashed its own evils.
- Many would argue the 'war on drugs' has also failed and led to similar social ills.

Changing Perceptions



Not that long ago, the laws on obscenity were rigidly enforced and the public's rejection of censorship was a very heated social issue.

The OZ obscenity trials of the 60s electrified London.

Banned Books

A glance at the history of banned literature will show how perceptions can change .

- The 1960 trial over Penguin's publication of E.M. Forster's *Lady Chatterley's Lover* is claimed by some to have heralded the sexual revolution of the 1960s.
- James Joyce's *Ulysses* was also banned for its sexual content.

Banned Books



Not all bans resulted from sex. Some banned books exposed views of religion that were rejected in various jurisdictions.

- Aldous Huxley's *Brave New World* was banned in Ireland for its comments against religion. Banned in India where Huxley was decried as a “pornographer” for his view that recreational sex should be encouraged from a young age.
- Henry Miller's *Tropic of Cancer* was described by a judge in Pennsylvania as “an open sewer, a pit of putrefaction, a slimy gathering of all that is rotten in the debris of human depravity”.

Salman Rushdie similarly provoked religious ire when he wrote *The Satanic Verses*.

Book Burning

Politically Unacceptable

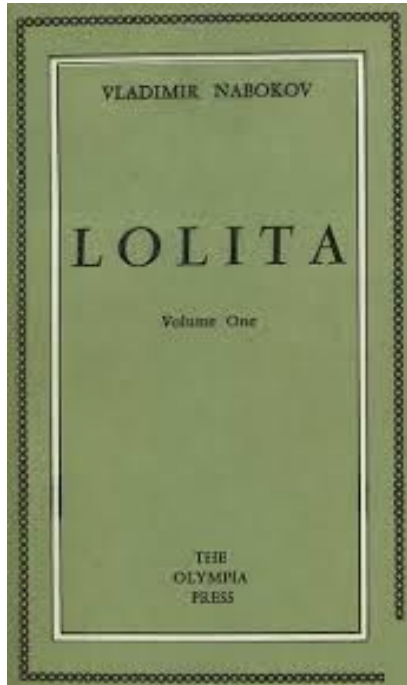
- *Animal Farm* was banned in the USSR for its anti-communist views and remains banned in Cuba and North Korea. Somewhat surprisingly, it was also banned in Kenya for its views against corruption.
- *All Quiet of the Western Front* was burnt by the Nazis for its 'unpatriotic' depiction of the plight of Germans soldiers in the WWI trenches.



Book burning also occurred in the US. Local officials in Kern County persuaded workers to burn *The Grapes of Wrath* due to its depiction of harsh working conditions for migrant workers in California during the Depression. Defenders cited the views of historians that Steinbeck had delivered a true-to-life portrayal. 80 years later, migrant worker issues are still hotly debated in American politics.

Morality and social issues are not always one-way traffic.

Lolita



Is Lolita Even More Unacceptable Today?

Vladimir Nabokov's *Lolita* increasingly seems out of step with society's current views on the damaging effects of a sexual relationship between an adult and a younger person.

Examples of Regulatory Variability

Regulatory Discrepancies - Murder



The problem with laws is that they don't have a single author.

Laws can even vary on issues we tend to think of as having a rock solid definition. Even the definition of murder can have subtle, but obviously very important, differences.

In one jurisdiction it may be held to be a murder if a person's actions result in the death of an unborn child.

"The Unborn Victims of Violence Act of 2004 (Public Law 108-212) is a United States law which recognizes a child in utero as a legal victim, if they are injured or killed during the commission of any of over 60 listed federal crimes of violence."

https://en.wikipedia.org/wiki/Unborn_Victims_of_Violence_Act

However, other jurisdictions may not consider a human being to come into existence 'until the moment of their first breath'. Thus, an act that causes the death of a foetus (even a foetus near full term) may not be treated as murder.

Regulatory Discrepancies - Rape



Definitions of rape can also vary. We all understand the principle of “no means no”. If a woman says “no” and a man persists then that is clearly rape.

What about in jurisdictions where a positive element of consent is required. (Willingness must be demonstrated either verbally or through physical actions).

The question then moves from “did she say no”? to “did she say yes”?

The various rape law models show how different legal systems can view a particular crime.

Rape Concept - Consent



Historically sexual assault and rape were property offences. The woman was considered the property of her husband or father. Her consent or willingness was not considered. It was an offence because the woman had been made “less valuable”.

It was not until the 1980s that the woman was the property of her husband was removed from Australian law and marital immunity to rape was abolished.

Sexual assault was then seen as an offence committed forcibly and against the will of the person.

Consent became relevant for these offences ‘against the will’ of the woman. There was a belief that a woman would show active resistance. Physical injury provided evidence of the use of force.

See <http://www3.aifs.gov.au/acssa/pubs/sheets/rs1/>

Rape Concept - Positive Consent



A further concept:

- Sexual assault is an offence against a person's agency.
- 'Positive' consent is required.
- Willingness must be demonstrated either verbally or through physical actions.
- It is not merely enough to assume consent.

Another Rape Concept



Swedish Law and Julian Assange

For: “Apparently having consensual sex in Sweden without a condom is punishable by a term of imprisonment of a minimum of two years for rape. That is the basis for a reinstitution of rape charges against WikiLeaks figurehead Julian Assange.”

See article written by Assange’s barrister.

<http://www.crikey.com.au/2010/12/02/when-it-comes-to-assange-r-pe-case-the-swedes-are-making-it-up-as-they-go-along/>

Against: “If consent is predicated on condom use and one partner surreptitiously avoids using a condom, morally, that’s a form of sexual assault.”

<http://bigthink.com/focal-point/a-feminist-lawyer-on-the-case-against-wikileaks-julian-assange>

Rape Law Complexity



Recent Events:

- Condom Removal: 12 months sentence for removing a condom without partner's knowledge during intercourse (that had been consensual up to that point): Switzerland 2017.
- No Means No: Germany in 2016 accepted the word "no" as the refusal of consent: previously, a victim had to prove that they had fought back.
- Conditional Consent: a teenage girl was imprisoned for consensual sex with her girlfriend while posing as a boy : England 2013 McNulty case.

Other Issues:

- Sex Workers: If a sex worker consents to sex on condition of being paid, and isn't paid: Is that rape or a breach of contract?
- Types of Rape?: Political debate in the UK recently pondered whether rape can be stratified into: classic, serious, violent, marital, sort-of, or technical rape.

Why Regulation Matters

Howey Test

While Bitcoin may not necessarily neatly fit a strict definition of money, Bitcoins are deemed to fall within the broader definition of money in the U.S.

The Howey Test looks at whether an investment of money has been made.

In 1946, in [S.E.C. v W.J. Howey](#) it was held that an investment contract (which was covered by regulations) would be held to exist if the transaction involved people investing money in a common enterprise with the expectation of profits to come solely from the efforts of others.

Subsequent case law further developed the Howey Test.

Kaye Scholar's - a law firm's - view

The Howey Test is that the asset, interest, enterprise, instrument or arrangement must involve:

- ✓ an investment of money;
- ✗ in a common enterprise; and
- ✗ the expectation of profits coming solely for the efforts of others.

While an acquisition of Bitcoins may involve an investment of money, it appears in the view of law firm Kaye Scholar, to fail both the 2nd and 3rd factors of the Howey test.

Family Resemblance



In the United States, the “family resemblance” test in *Reves v. Ernst & Young* is used to determine if a note is a security.

The starting presumption is that the note is a security, unless the note bears a strong resemblance:

1. the motivations of a reasonable seller and buyer to enter into the contract,
2. the instrument’s “plan of distribution,” and “whether it is an instrument in which there is ‘common trading for speculation or investment,’”
3. public expectations and whether the investing public would consider the instrument to be a security, and
4. whether some mitigating factor that might reduce the risk of the instrument renders the application of the Securities Acts unnecessary.

Regulatory Impact

A report a few years ago gave insights into the potential for ICO-related prosecutions.

“Yahoo Finance and Decrypt claims that “Hundreds of startups that did token sales are finding out they’re in violation of securities law— including many that were sure they did it the right way.”

As expected, the SEC is now closing in on many ICOs. A number of our competitors who went for the 'easy money' may now be facing some difficult months/years ahead as they try to disentangle themselves.

<https://news.bitcoin.com/hundreds-of-icos-being-secretly-investigated-by-sec-claims-report/>

Bitcoin.com

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Mining

PSA

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REGULATION

Yesterday | C. Edward Kelso | 3356

Hundreds of ICOs Being Secretly Investigated by SEC, Claims Report

Join our Telegram @TMTGForum Now and Receive 10 Free TMTG!
The airdrop will be limited to 30,000 participants only

Hundreds of startups are reportedly being “secretly” targeted by the U.S. Securities and Exchange Commission for their involvement with initial coin offerings. Companies that participated in ICOs are now scrambling to clarify whether their token constituted a security, and, if so, whether it was properly registered with or exempted by the SEC.

Also read: [Europe, Japan and the ‘Drug’ of Quantitative Easing](#)

SEC ‘Tightens the Noose’ on Startups That Used an ICO

IN CASE YOU MISSED IT

Bitcoin Core Developer Advocates Credit Card Payments Over BTC. Bitcoin Core developer Jimmy Song has caused controversy by suggesting that bitcoin enthusiasts would be better off using credit cards as a means of payment... [read more](#).

Bitcoin.com Wallet

Now Available For

ANDROID

IOS

WINDOWS

OSX

LINUX

Required Reading

Required Reading

International Law

[International Legal Systems – U.S. Department of Justice](#)

Other Perspectives

These early writing and observations still capture some core issues related to cryptocurrency and blockchain regulation.

Fleming, Rick A., The Importance of Smart Regulation NASAA Public Policy Conference 14 April 2015.

<https://www.sec.gov/news/speech/importance-of-smart-regulation.html>

Quotes: *“The key is that regulation must be smart. Dumb regulation manifests itself in a variety of ways: it puts pointless burdens on business, fails to reflect changing technology, is overly protective of turf, or, even worse, leaves investors as sheep to be sheared. Smart regulation, in contrast, provides a sufficient level of protection to bolster confidence without needlessly burdening the regulated entities.”*

“J.N. Dolley, the author of the first blue sky law, was a banker who had seen customers withdraw money from banks to chase higher yields by investing in copper mines, Central American plantations, irrigation projects, or other wildcat stocks. Dolley believed that “at least ninety-five percent of all the money put in those stocks was irretrievably lost,” so he proposed a set of statutes to require governmental review of securities offerings. We still need those laws today.”

Fred Ersham, Blockchain Governance: Programming Our Future, Medium Nov 28, 2017.

<https://medium.com/@FEhsam/blockchain-governance-programming-our-future-c3bfe30f2d74>

Quote: *“We are birthing into existence systems which transcend us. In the same way democracy and capitalism as systems determine so much of the emergent behavior around us, blockchains will do the same with even greater reach. These systems are organisms which take on lives of their own and are more concerned with perpetuating themselves than the individuals which comprise them. As technology stretches these systems to their limits, the implications become more pronounced. So we’d be wise to carefully consider the structure of these systems while we can. Like any new powerful technology, blockchains are a tool that can go in many different directions. Used well, we can create a world with greater prosperity and freedom. Used poorly, we can create systems which lead us to places we didn’t intend to go.”*

Further Reading

Further Reading

Please Note: You will not be examined on these articles. They are included in case they are relevant to your areas of interest or areas of business.

1. [The Challenge of the Rule of Law – William Burnett Harvey – Indiana University Law School](#)
2. [Courts and the Rule of Law – Murray Gleeson](#)
3. [Challenges to the Survival of the Common Law](#)
4. [Tomaskova, Eva and Sehnalek, David: The Hierarchy of Legal Sources](#)



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Course Support: digitalcurrency@unic.ac.cy

IT & Live Session Support: dl.it@unic.ac.cy