Session 1

Theoretical Conceptualizations of Law

BLOC 513: Law and Regulation in Blockchain

Session objectives

- To provide students with a rounded conception of what Law is.

- To provide a more thorough appreciation of the theories that underpin the drafting, development and enforcement of Law.

  - In particular, to understand:

    - The concept of "Natural Law";
    - The concept of "Legal Positivism";
    - Government-imposed regulation and self-regulated organizations;
    - Centralized and Decentralized Legal Governance;
    - The legal challenges brought forward by Blockchain technology.

Session outline

1. Natural Law vs. Legal Positivism

2. Self-regulated organizations

3. Centralized vs Decentralized Legal Governance

4. Blockchain & Legal Challenges

5. Required reading

6. Further reading

Natural Law vs. Legal Positivism

Natural Law vs. Legal Positivism

Plato **Aristotle**
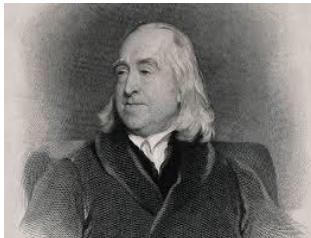
Natural law: Humans have certain rights, moral values, and responsibilities that are inherent in human nature. There are universal moral standards, governing our reasoning and behaviour throughout all time, hence sustaining a just society (a highly subjective theory / notion of 'equity')

Jeremy Bentham (1748-1832)

John Austin (1790-1859)

Legal Positivism: True knowledge can only derive from the perception of our senses – notably observation. Only that which can be observed and empirically evaluated can be regarded as proven. Hence law is synonymous with positive norms, that is norms made by the legislator or considered as common law or case law (judgements based on values, morals or perceptions of good and evil are irrelevant, because they cannot be measured scientifically).

Natural Law vs. Legal Positivism

Connecting the two (?)

- Rule of Law

- Legal Certainty

- Principle of Proportionality

- Statutory Interpretation

- Law, Technology and the 'problem of speed'

High Court of Ireland: Mc Keogh -v- John Doe 1 & Ors

High Court of Northern Ireland: XY -v- Facebook Ireland Ltd

[13] These proceedings serve as a timely reminder that we live in a society governed by the rule of law. This is the supreme principle. All members of society submit and subscribe to a system wherein the law is dominant. This system protects every member of the population. The efficacy of this system requires, and is guaranteed by, an independent judiciary.

Defamation Law in the Internet Age [Law Commission of Ontario – March 2020]

Centralized & Decentralized Legal Governance

Centralized & Decentralized Legal Governance

In a **centralized governance model**, primary decisions are made by the person or persons at the top of the organization. The authority and decision-making power are vested solely within a central body. There is a solid, strict, top-down, clear chain of command.

Centralization is often boosted by overregulation.

This is particularly evident in the Financial Services and the broad financial/investment sectors.

(Stricter rules on AML/CTF have led to significant increase of reporting obligations to Regulators)

OECD (common reporting standards)

Foreign Account Tax Compliance Act (FATCA)

In a **decentralized governance model**, decision-making authority is delegated throughout the organization and, more specifically, from the top management layer to middle and lower-level layers. This is the case, not just among big corporations, but to a certain degree and by law to local and regional public authorities. Quicker, more efficient, and more democratic decision-making process, are the driving factors for such governance model.

Self-Regulated Organizations

Self-Regulated Organizations

Self-Regulatory Organizations are private organizations that have the power to set regulations and apply enforcement procedures through their members. They are usually non-governmental organizations, formed to exercise a certain degree of regulatory authority to certain professions or industries. They exist in the absence of government regulation or to support or operate alongside such regulation. Their establishment is often driven by industry specialized knowledge, industry motivation, closer and better regulatory/compliance oversight.

Characteristics:

- Legislative authority

- Strong governance

- Oversight

- Enforcement procedures

- Disciplinary rules

- Resolution of disputes

Examples: Bar Associations, Stock Exchanges, Institutes of Certified Public Accountants, and many more.

In its most complete form, self-regulation encompasses the authority to create, amend, implement and enforce rules of conduct with respect to the entities subject to the relevant self-regulatory organization's jurisdiction and to resolve disputes through arbitration or other means.

Blockchain & Legal Challenges

Blockchain & Legal Challenges

A whole new (high tech) aspect of decentralization. In Blockchain, decentralization refers to the transfer of control and decision-making from a centralized entity (individual, organization, or group thereof) to a distributed network. <u>Distributed architecture and trust-by-computation: Code is the law!</u>

Bitcoin as the first decentralized payment system. An online payment system, a peer-to-peer network system, allowing direct transactions between parties, without needing trusted third parties for processing and clearing the transactions. A wholly decentralized system, facilitating every party on the network to keep track of all the transactions that are taking place on the network. An operating system for money without banks and bank managers. No central entity controlling Bitcoin, while the underlying blockchain protocol enables an incentive network, powered by the cryptographic governance 'rules' embedded on its token. These 'rules' allow for automated and transparent coordination of a disparate group of people who do not know or trust each other.

Decentralized Autonomous Organizations. Border-less, digitally formed and established, self-regulated organizations, with non-hierarchical structure but managed by rules encoded on a smart contract. Individual participants (members) collectively contribute to a common goal without being bound together by a legal entity, nor have they entered into any formal legal contracts. Instead, they are steered by incentives and transparent 'rules' tied to the network tokens. Only one governing 'law' – the protocol or smart contract – regulating the behaviour of all network participants.

Should the technology be regulated?

Required Reading

Required Reading

Liis Vihul, **International Legal Regulation of Autonomous Technologies** (2020)

Marcella Atzori, **Blockchain Technology and Decentralized Governance: Is the State Still Necessary?** (2015)

Joshua Ellul et. al., **Regulating Blockchain, DLT and Smart Contracts: a technology regulator's perspective** (2020)

Legal Theory Lexicon 016: **Positive and Normative Legal Theory**

Further reading

Further reading

Amitai Etzioni, Oren Etzioni, **Should Artificial Intelligence be Regulated** (2017)

Richa Kaushal, Bitcoin: **First Decentralized Payment System** (2016)

Pierluigi Chiassoni, **Kelsen on Natural Law Theory** (2014)

Stephen Mumford, **Normative and Natural Laws** (2000)

Natalie Gold et. al, **Normative theory in decision making and moral reasoning** (2011)

Adrian Vermeule, **Connecting Positive and Normative Legal Theory** (2007)

Michael Sevel, **Legal Positism and the Rule of Law** (2009)

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Questions?

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