SPECIAL WORKSHOP NO. 69.

REGULATING CONTINGENCY: RISK, LAW, AND THE THEORY OF REGULATION

GENERAL OVERVIEW

The workshop intends to analyse how sociology, philosophy of law, and theory of regulation may contribute to deeper understanding of different regulatory practices aimed at dealing with risks and uncertainties. It addresses various regulatory regimes, from the perspective of either regulators or regulatees, as well as interactions between these two groups. Within these frames, contributions to the workshop by principle tackle two major issues: the efficiency of regulation in the face of uncertainty and the reflexivity of regulation.

The relation between law and uncertainty/risk becomes increasingly problematic. Law is viewed as the most important social tool designed to control contingency. However, regulatory actions designed to tackle contingencies may in fact increase them. Moreover, there is a question of what regulatory agents see as risk requiring reaction, and what remains hidden in the blind spot. In short: in modern society, the process of controlling the uncertain becomes itself one of the key sources of uncertainty, due to backlashes, inactions, and overreactions. This leads to the question how to make regulation effective, as well as what does efficiency mean in the context of regulation.

While targeting risk and uncertainty, regulatory regimes often rely on and attempt to foster interactions between regulators and regulatees *via* strategies of meta-regulation, self-regulation or reflexive regulation. *Reflexivity* in this context may be defined as a self-referential coupling of cognition and action (Giddens 1990; Luhmann 1996). Thus, one may ask how both regulatory institutions and addressees of regulation learn about uncertainties they meet, how they define and address risks – as well as how their mutual interactions in these processes are structured.

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PROGRAMME

1st. panel: Uncertainty and regulatory efficiency (chair: Maciej Pichlak)

1. Gary Lynch Wood, David Williamson: *Making Regulation Work: A Theory of Performative Regulation*
2. Karol Muszyński: *Can policy drifts be effective?*
3. Mateusz Pękala: *Legislative policy in the light of qualitative content analysis of the expose of Polish Prime Ministers – research report*
4. Filipe Jones Mourão: *A Thousand Platforms: Regulatory Risk and Mediation*

Coffee break

2nd. panel: Reflexivity in regulation (chair: Karol Muszyński)

1. Maciej Pichlak: *Responsive and Reflexive Elements in Meta-Regulation*
2. Paweł Skuczyński: *Regulation of Professions and Professional Self-Regulation: Struggle for Reflexivity*
3. Olivier Wolf, *The global regulation of Systemic Risk: a response to a form of radical uncertainty emerging from World Society, its culture and institutional logics*
4. Klaudia Gaczoł: *General Data Protection Regulation as an example of meta-regulatory approach*

INDIVIDUAL ABSTRACTS

1. GARY LYNCH WOOD, *University of Manchester*
DAVID WILLIAMSON, *University of Manchester*

MAKING REGULATION WORK: A THEORY OF PERFORMATIVE REGULATION

In this paper we outline a theory of performative regulation in order to better explain regulatory successes and failures. Our theory addresses the trade-off between the conditions demanded by regulation and the capacities of regulatees to respond to those conditions. The trade-off is a dilemma because it involves the level of certainty we require on achieving the regulatory goal, where increased certainty increases the conditions demanded from firms, which increases the assurance that the regulatory goal is being achieved. The alternative is to lower the demands made by the conditions of regulation by reducing the magnitude of the regulatory goal, and have higher levels of compliance. The trade-off also affects the scope for innovation in regulatory responses, where an increase in conditions hinder, and a decrease in conditions foster, flexibility in compliance responses. It is shown that these trade-offs can be best accommodated by requiring that regulation has a minimum requirement for compliance, and an accompanying incentive for beyond compliance.

2. KAROL MUSZYŃSKI, *Faculty of Law and Administration, University of Warsaw*

CAN POLICY DRIFTS BE EFFECTIVE?

It is generally believed - and for the good reasons - that institutional change happens when governments implement new policies or adopt new laws that alter existing formal institutions. The possibilities different ways in which institutions might change have been explored in historical institutionalism, which lead to the emergence of the theory of gradual institutional change. The concept of policy drift describes a situation in which deep institutional change happens in a situation where no formal reform is being implemented (Hacker 2004). Policy drifts rely on uncertainty with regard to the institutional performance, manifested in weak surveillance or implementation mechanisms. Institutions seem not to be solving the problems they were intended to target anymore and they become bypassed, ignored, or violated by the actors. Actors utilize ambiguity of institutional performance to circumvent or violate formal rules and pursue actions different than formally prescribed by law.

The paper is going to explore the question of the effectiveness of policy drifts and attempt to describe the conditions allowing policy drifts to be effective. Very often, policy drift happens as a result of institutional stalemates, where one actor is too weak to impose its own solutions, but sufficiently strong to block the changes (act as a veto player). The effectiveness of policy drifts can only be interpreted from the standpoint of the actor that attempts to trigger the policy drift. Two type of actors can engage in promotion of policy drift: government or veto players. Government may try to initiate drift especially in order to bypass veto players, deal with path dependency mechanisms or engage in blame avoidance policies. Veto players, such as e.g. employer organizations or opposition parties may try to trigger policy drift to weaken the institutional solutions they would like to get rid of. This will lead to a typology of policy drifts. In the original Hacker's contribution, American conservatives were intentionally preventing the introduction of new solutions or the update of existing social policies to - in the long run - increase uncertainty around formal rules to fundamentally fragment and destabilize the institutional system. In this situation, the goal is institutional instability. However, many other options are possible, where actors attempt to e.g. increase economic effectiveness by adopting policy drift. In this case, the government behind policy drift attempts to utilize the uncertainty around institutional performance to e.g. boost economic transformation. This was the case of the rise of non-standard contracts in Germany, as well as the developments on labour markets in Central European countries, where governments were intentionally avoiding the reforms to allow the utilization of non-standard employment and violations and circumventions of employment standards that were boosting the countries comparative advantage.

3. MATEUSZ PĘKALA, *Jesuit University Ignatianum In Cracow*

LEGISLATIVE POLICY IN THE LIGHT OF QUALITATIVE CONTENT ANALYSIS OF THE EXPOSE OF POLISH PRIME MINISTERS – RESEARCH REPORT

The paper presents preliminary results of empirical research conducted by the author, consisting in qualitative content analysis of the expose of Polish prime ministers during political transformation from 90' until nowadays. Research is conducted from the perspective of selected problems of sociology of law and legal policy. The main aim of the research is to describe and reconstruct the rationality of polish legislative decision-making centre in the context of its self-awareness and beliefs about the state of public policy and legislative policy. The expose analysis is aimed at describing the assumptions of an institutionally understood legislator on: the social functions of the legal system, the role of legislative decisions as an instrument for achieving socially desirable values-goals and on the organisation of the decision-making process itself (how legislative policy sets its goals and ways of achieving them, what are the decision-making criteria taken into account in the course of the law-making process, what arguments and what knowledge is/should be used, which social actors take part in decision making). Describing the decision-making model adopted by public decision-makers and determining their level of "self-awareness" in the light of the beliefs concerning the so-called metadecisions (i.e. decision making, shaping the context of the decision-making situation, applying specific schemes of explanation - narration, as well as referring to specific sources of knowledge) is one of the most important research tasks of the Polish legal and political sciences. The above issues are closely related to the question of perception of risk and uncertainty in law-making processes, as well as to the search for ways of dealing with risk and uncertainty by using legal instruments. In a broader context, the empirical description and interpretation of the assumptions of rationality of the institutionally understood legislator is the first step to diagnose the characteristics of the Polish legal culture.

4. FILIPE JONES MOURÃO, *Law Faculty, Universidade Católica Portuguesa (FDUCP) / Centro de Estudos Sobre Direito e Sociedade (CEDIS), Universidade Nova de Lisboa*

A THOUSAND PLATFORMS: REGULATORY RISK AND MEDIATION

The slow but sure implementation of the post-modern state (moving from social state to regulatory state) has occurred in tandem with the evolution of technological tools that allow finer and deeper elaboration of state action and decision-making. The increasingly decentralized and networked nature of rule-and decision-making by the State mirrors the increased diversity and complexity of our societies and populations. Requirements for legitimacy are evolving to include ever more instruments of direct democracy and an enlarged public space. Participatory approaches to regulation are an increasingly theoretical evidence, yet illusory in practical adaptation. Enter the digital platform.

The platform as socio-technical phenomenon constitutes a new tool for the efficiency of social (regulatory) systems, insofar as they can be a privileged fora for enhanced communication, with substantial potential in terms of informational exchange, institutional transparency and accountability and also data treatment and analysis/presentation, and this between regulator, regulatees and

remaining civil society. As the State moves towards a supervisory rather than directly regulatory role, platforms will become a requirement since they afford a "space" wherein supervision can efficiently occur.

With traditional hierarchies of law becoming enmeshed with newer regulatory frameworks (meta-regulation, self-regulation, reflexive regulation, ...), a pressing need arises to define spaces of competence and avoid regulatory overlaps. However, from a functional point of view, the resolution of regulatory tensions between fragmented normative sources is not a new task for society's ruling classes, harking back to the "variable geometry" of power structures in medieval societies, even if later displaced by the codified trinity of the Separation of Powers. It is suggested, instead, that the novelty lies in the State's new-found functions as space-holder, mediating between the diverse and conflicting but increasingly empowered and transparent interests that play themselves out in the sectoral platform "fora", just as they once did, much less efficiently or transparently, in the social arena of pre-digital times. Announcing the balance-to-come we may say that decentralised rule-making would thus find itself centralised in platformed decision-making.

In such a pervasively platformed scenario, the State's role is still multifaceted. Although likely to have an executory say, e.g., in the definition of procedure and other relevant rules, the State is nonetheless particularly held by law to act in a manner respectful of the guiding principles of its legal order. Thus, the main takeaway is the possibility of auditing (in almost real time?) the state's action in defining the rules of the (platform) game - a high-stakes affair considering the end result is the collaborative creation of new regulation. The follow-on question ought perhaps to be: what are the constitutional, international and remaining legal mandates relevant to the State's regulatory activity? In answering this question, we hope to lay ground for the development of a set of Standards for Regulatory Platforms, to aid States in mediating regulatory activity and interested parties in holding the mediator accountable for its mediating actions.

5. MACIEJ PICHLAK, *University of Wrocław*

RESPONSIVE AND REFLEXIVE ELEMENTS IN META-REGULATION

The title of the paper refers to the well-known Gunther Teubner's article *Substantive and Reflexive Elements in Modern Law* (Teubner 1983), which provides an influential critique of the concept of responsive law. In a nutshell, the core of Teubner's critique is that responsive law is an inconsistent 'amalgam of two different types of legal rationality': substantive and reflexive one. Since the first type does not fit to the contemporary social logic, we should focus on a reflexive programme for law. This was the starting point for the theory of reflexive law developed subsequently by Teubner.

For the next thirty years since then, the opposition between responsive and reflexive law has been present in a jurisprudential debate. During this time, it has been also reflected in a meta-regulation movement – both in an academic writing and in practical applications. Reflexive and responsive regulation have formed two dominant accounts on meta-regulation, as a 'regulation of self-regulation'. Both perspectives have been repeatedly promoted (often under apparently new guise, like management-based regulation, principles-based regulation etc.), each against alleged shortages of the

alternative approach. Thus, reflexive regulation is usually advocated against excessively communitarian and paternalistic responsive strategy, whereas responsive regulation is said to overcome the 'light touch', neoliberal mood of reflexive account.

In this paper, I adopt a perspective of the theory of reflexivity in order to look at the meta-regulation. From this vantage point, I put forth and argue for two main theses: Firstly, that one of the key differences between the reflexive and responsive regulatory strategies lies in their perception of a relation between regulators and regulatees within a meta-regulatory regime. Such a regulatory relation is a complex bond between social agents, with an ontological, epistemological, and ethical dimension. Hence, the difference between alternative meta-regulatory accounts is far from being merely technical. In fact, it is grounded on diverse social ontologies, social epistemologies and social ethics.

The second thesis claims that the old opposition between responsive and reflexive approach has been apparently depleted. As the paper demonstrates, both of them are grounded on not fully adequate social-theoretical tenets, what results in theoretical and practical problems with their application.

Therefore, we need to move beyond the opposition and search for such a model of meta-regulation which offers a more satisfactory view on a relation between regulators and regulatees. In particular, the searched model should stress the often dialectical character of regulatory relation. Apparently, this could be to some extent reconciled with (particularly) the perspective of responsive regulation, still only after a significant modification and enrichment of the latter. The searched model is thus, once again, 'an amalgam' – a junction of responsive and dialectical elements in meta-regulation. Some possible practical consequences of such a model are considered.

6. PAWEŁ SKUCZYŃSKI, *University of Warsaw*

REGULATIONS OF PROFESSIONS AND PROFESSIONAL SELF-REGULATION: STRUGGLE FOR REFLEXIVITY

The paper concerns professional self-governments understood as a traditional form of institutionalization of social practices based on advanced expert knowledge. This form is characteristic most of all for civil law countries. Self-governments are conceived as public law corporations. Their key element is that they are independent from any central political power, whilst exercising broadly understood public power themselves. This is why self-governments have competences of self-regulations, as well as control over practising of certain professions.

Self-government as a form of institutionalization has to provide the most adequate and direct use of expert knowledge in determining rules and their implementation in the sphere of expert knowledge-based practice. Apart from being very traditional form, in scope of modern social theories, including governance theories, it can be interpreted as a guarantee of high level of reflexivity in certain social practices.

However, the analysis of reality and empirical evidences are demonstrating two weak points in fulfilling this function by self-governments and, eventually, providing the reflexivity in certain social practices.

First of all, the dual-placing of self-governments in frames of public power generates the permanent conflict concerning the scope of competences both self-governments and the government. It regards mainly to the problem of balance between central and self-regulations. This conflict increases the contingency of practising certain profession and decreases its reflexivity. Instead of grounding regulations and the control in expert knowledge, the strategic reasons aimed at maintaining the control over the practice are taken into account.

Secondly, the deeper cause for increasing the contingency of practising certain profession and decreasing its reflexivity is the following paradox, which explains also the reason of permanent conflict in the institution of professional self-governments. On one hand, self-regulations and the control of given practise by self-government rise questions whether it really impartially applies the expert knowledge. It is entangled in the conflict of interests of self-government, for the latter is representing a certain profession. It directs the application of knowledge towards a particular group interest.

On the other hand, if the regulatory and control competences are taken over by the central institutions, then it seems to become easier to define and secure the public interest in context of given practice, however – the application of expert knowledge looses its directness. Sometimes it even leads to distancing the regulation from its reliable sources. The regulation and the control are becoming less reflexive, which increases the uncertainty.

This occurrence can be defined as a self-regulation paradox. In frames of this presentation, I will attempt to demonstrate the ways of overcoming this paradox.

7. OLIVIER WOLF, *Hebrew University of Jerusalem, Faculty of Law*

THE GLOBAL REGULATION OF SYSTEMIC RISK: A RESPONSE TO A FORM OF RADICAL UNCERTAINTY EMERGING FROM WORLD SOCIETY, ITS CULTURE AND INSTITUTIONAL LOGICS

In 2007-2009, the world has been struck by a financial crisis of an unprecedented violence and extent. Since then, financial regulation has been reformed throughout the world, and this process is ongoing. In particular, the need to tackle systemic risk is considered as a central lesson of the crisis. Interestingly, although systemic risk is not a new concept, it is only following first decisions taken at G20 meetings that many countries around the world adopted and implemented policy and legislation in order to regulate systemic risk. This has been done by adopting laws and regulations and by creating new supervisors, resulting in a global legislative and regulatory cascade in order to address systemic risk.

My research deals with the notion of systemic risk itself, as well as its global regulatory regime, i.e. the rules adopted globally / internationally aiming at addressing systemic risk. As an example of sources of systemic risk, it shows how – before the global financial crisis – the Basel Committee on Banking Supervision issued a global standard on minimum capital requirements, which turned out to create procyclical effects, and therefore created a negative feedback loop, leading to further financial problems during the crisis. Even though it was aimed at supporting financial stability, this global standard ended up creating unforeseen problems, thereby reinforcing the global financial crisis.

About the notion of financial systemic risk, it argues that it is rather a type of uncertainty (even a radical form) than a kind of risk. My research draws on notions of Risk Society (for the notion of risk), and of Systems Theories (for the notion of systemic behavior), and finds that the possible harms emerging from system behavior are not predictable, and therefore qualify as uncertainty, as opposed to risk. And yet, systemic risk is being see as requiring regulatory action – and therefore somehow anticipatable, i.e. a form of risk.

My research proposes an explanation to this phenomenon of increasing pressures to regulate systemic risk although it is not possible to anticipate it. The explanation is based on World Society Theory, and its (sociological) neo-institutional principles: it is argued that financial systemic risk is called to be globally regulated, not necessarily (or not only) because it is the most efficient and rational thing to do, but rather (or also) because it is culturally globally admitted that this is what is out to be done. And more specifically, systemic risk and its regulation – by now globally institutionalized – emerge from the world-cultural principles of justice and responsibility, and following World Society logics of actorhood and rationalization.

8. KLAUDIA GACZOŁ, *University of Wrocław*

REGULATING RISK. GDPR AS AN EXAMPLE OF META-REGULATION APPROACH

The new personal data protection regime was first and foremost designed to harmonize the protection of fundamental rights and freedoms of natural persons in respect of processing activities and to ensure the free flow of personal data between Member States (see: Recital 3). Not without significance is the fact that rapid technological developments and globalization have brought new challenges for the protection of personal data. What is more, in the last two decades, the scale of the collection and sharing of personal data has greatly increased. Also technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities (see: Recital 6).

What is currently presenting the highest risk in the field of personal data is the fact, that unauthorized, redundant or simply incorrectly optimized processing activities can cause discrimination, identity theft, identity fraud, financial loss, breach of reputation, significant economic or social damage, political use of data mining and many, many more. Considering the above we can safely conclude, that data protection become a social problem and that is why Regulator needs to find an appropriate means to ensure the efficiency of designed solutions. According to the fact, that personal data is a kind of risky and living substance that escapes static evaluations and other standardized forms, Controllers would not be able to adequately manage the risk by regulation imposed in advance. Due to the meta-regulation approach, they are allowed to develop and implement solutions to mitigate the risk specifically to their context.

As Oren Perez notes, regulatory strategies referring to the principle of reflexivity are those that currently have the greatest impact on practice, especially in the context of risk regulation (Perez, 2011). It seems that the application of meta-regulation approach in the field of personal data protection should significantly improves the quality of regulation. Delegating regulation down to the corporations allows individual Controllers and Processors to set maximally individualized rules to the sector in which

they are operating. That makes settled standards inevitably tailored to their specific background. Thereby, the solutions adopted through the self-regulation conditions (not based on unilateral and authoritative decisions) may be presumed as a better protection of fundamental rights and freedoms of natural persons according to data processing activities.

The aim of the paper is to tackle the issue why EU legislator decided to choose such form of regulation and also – in what way the risk to the rights and freedoms of natural persons is perceived under the GDPR.

Implementation of meta-regulation in the field of personal data protection can cause many practical difficulties and challenges. Noteworthy, much depends on conditions such as specificity of the regulatory area, as well as those concerning the regulatory capacities of interaction partners – both Regulators and Regulatees (Pichlak, 2019). These problems will be also addressed.