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Kinga Pétervári

REGULATORY RISK MANAGEMENT VERSUS STATE INTERVENTION

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INTRODUCTION

> *"It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society."*
>
> Sir William Blackstone[1]

Risk is everywhere. The history of risk management may be matched to the history of law. Risk management, on the other hand, may trigger further risks somewhere else where risk was either endurable, or where there was no problem before. For example, ameliorating the fertility of the soil destroys the ecosystem of the surrounding environment which neccessitates further risks management, taking a pill against inflammation may cause kidney problems which again further necessitates risks management, building safer homes exhausts natural resources available only limitedly, etc. Risk management therefore is a *risk trade off*.[2]

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1 BLACKSTONE, W. *Commentaries on the Laws of England in Four Books*. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes. (Philadelphia: J.B. Lippincott Co., 1893). Vol. 1 - Books I & II. Chapter: Chapter I.: Of Property, In General.

2 See SUNSTEIN, C. Foreword. p.vii. In: GRAHAM, J. D. & WIENER, J. B. eds. *Risk versus Risk. Tradeoffs in Protecting Health and the Environment*. Harvard University Press. 1995.

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The following analysis of the laws tackles with this sort of trade-offs in certain areas of the law. Risk management has complex objectives nowadays, it does not aim at cancelling risk whatsoever, it strives to lower risks by either reducing the probability or the seriousness of a possible risk meanwhile calculating also the possible drawbacks of an invasive deed. Modern risk managament, or even the optimization of risk managament, however, presumes state intervention. But what kind of, or what degree of state intervention may be worthwile?[3]

The government in liberal democracy is accountable for its promises but is the state liable too?[4] What does accountability mean in a party-state system[5] who and how is responsible – or liable – for the promises?[6] These promises may be regarded as the bargaining of the political process no matter what these promises are about: housing for eveyone, universal health care, free education or the first generation basic rights – freedom of religion, free speech, free assembly and voting. But is there a ranking in these promises? If yes, on what grounds are these rankings justifiable: economic, moral or legal[7] or even ideological?[8] Illiberal democracies would value highly the paternalistic providences if at least formal elections are inevitable[9] as *opposed to* the first generation basic rights. Liberal democracies on the other hand *may* value

[3] Chapter 3.1.
[4] Chapter 3.2.
[5] Surely, two distinct notions may be used in the academic discourse to describe cc. the time period of cc. 1949–1989: *socialism* or *communism* – not only in Hungary but in Central-East-Europe (CEE). While both are contradictory in their applications, I choose to refer to this era as socialism rather than communism. For if I wrote communism, then those related ideas would be discarded which were already available in the 18.th century, such as the concept of communa, etc. If however I talk about socialism, then I would disregard the differences between the contemporary – European and Latin-American – socialism and the socialism back then in CEE. Yet, none of the level of development of communism was ever achieved – since there was not enough goods to make it possible – after World War II in CEE, so a description of that period as communism would be misleading. Plausibly, the notion of party-state (*pártállam*) would be the best suited word, so I use socialism and party-state interchangeably.
[6] Chapter 1.1. and 1.2.
[7] Chapter 2.1.
[8] Chapter 1.2.
[9] Chapter 2.1. and 3.1.

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welfare state *beside* freedom of conscience, free speech, freedom of assembly and voting rights. These discussions naturally involve the reasoning of fairness and equity. But how to negotiate, who can take part in it, who bears the risks of the ultimate decisions – beneficiaries or taxpayers.[10]

Modern constitutional democracies focus their regulatory power in optimizing these risks. Good laws are, which allocate liability on those who can defend from the occurrence of the risk the most efficiently. Efficient risk allocations may mean, among others, the lessening of the transaction costs for market participants, at the expense of taxpayers, or deterring participants from doing something, at the expense of the consumers.[11] But what kind of risks should be managed by regulations, what kind of infrastructure should be upheld by public monies?[12]

While answers to these risk management questions concern politicians and academics alike, the Internet sweeps in stealthily and create global incompetence.[13] The Internet creates two parallel but intertwined worlds: the on-line and the off-line world. And by enabling ones to connect and use others' databases and softwares, the internet generates global incompetence. Yet, the emphasis here is on the data or information of others. For how to trace back the bad signals, the misinformation or misunderstanding or even hacking, in the interconnections of the various databases and softwares used throughout the internet causing defect in the services. Certainly, these softwares and databases have in-build protecting protocols but so far, we live with the recognition that there is no bug free software. Can disclaimer be applied in case a map becomes unduly un-updated, or a traffic code sign becomes obsolete? And could this be the case in the internet and especially in the case of driverless cars, for example? These sort of incompetence

[10] Chapter 2.1., 2.2., 3.1. and 3.2.
[11] Chapter 4.1.
[12] Chapter 3.2.
[13] Chapter 4.2.

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requires special liabilities. Thus by blurring the boarderlines between businesses and private actions, thanks to the internet, the legal formula of the objective (strict) liability presumably extends to more areas of transactions too.[14] The data provider or perhaps a database owner need not be an expert as the US case of the mushroom picking laymen shows (Winter v. G.P. Putnam's Sons, 1991). In this court case the plaintiffs wanted to pick and eat wild mushrooms, so they had bought a mushroom encyclopedia. But after having the meal they got so sick that they needed a liver transplantation. The reasoning included the problem of liability of publishing houses for reprinting others' books. The argument of the court may be rational and acceptable, even if it is hard to digest that an encyclopedia need not be correct. But what sort of data become obsolete? And when? And finally, what is more important: to have more information or to have checked information? Checked by whom?[15]

This book deals with this regulatory risk management from both a sociological and a law and economics analytical point of view in certain areas of laws. Risks are discerned in an abstract way, such as negotiations within the legislations, drafting laws by certain elite groups, dealing with non-efficient laws, applying different categories of liability due to the technological challenges, or even the withering away of the copyright law as should be now in academic circles. The book is structured around the following topics and problems:

PART 1. *discusses risks management from a historical point of view. With the benefit of hindsight, it reveals the problems of the unmanaged risks regarding property questions in the time of party-state system (or socialism) in Hungary.*

[14] Chapter 4.3.
[15] Chapter 4.2.

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Chapter 1.1. explores whether without actual property titles there can be no, or only limited market relations, as stated in the neo-libertarian theory. The model of the New Economic Mechanism of '68 in the socialist Hungary is a case study for a law and economics analysis as to whether and how the guidance of the price due to the lack of the free market, may be simulated without clear ownership rights. According to the findings it is important to emphasise, that even without these prerequisites certain very limited room for maneouvers and risks could be allocated rationally but they definitely remain inefficient, wasteful and highly bureaucratic. However, the investigations were definitely a taboo. If there was no property right, but there was a market, even a quasi-market, then capital and its yield were not conceivable, or interpretable concepts. The corporate assets value was necessarily fictitious without the classic property right. If, however, the value of the property right was not real, then it was not possible to calculate how much the return on capital was, that is, the market only existed as a commodity market and not as a capital market or a market for means of production. As a result, the indefinability of property rights in direct steering economies (or command economics) makes it impossible to examine efficiency. How could the performance and value of a factory be measured if there was no market for its products. How to check whether production was efficient for a given company if there were no real data about the company.

Under such a regime risks are not calculable, not rationally manageable, so as interests cannot be defined, the costs may not be limited and must be born by those who cannot avoid it.

Chapter 1.2. analyses the arguments that were used in the parliamentary plenary session debates in Hungary in 1987 when introducing the personal income tax. The point of this analysis is that even in a non-pluralist parliament there can be rational debates, provided that there exists a well devel-

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oped intellectual environment surrounding it. As an example this chapter interprets the reasoning in the national assembly towards the end of the socialist regime in Hungary. The analysis of this special parliamentary debate back then is legitimate, because the less influential a national assembly is, the more informative its debate may be. So, owe to its fairly irrelevant, non-influential, therefore, more informative dispute, the reasonings may be studied. As a consequence of that, it could be drawn both that i) a multiparty system in itself does not guarantee a meaningful debate on public issues if a dominant party squeezes out the chances of such a structured discussions, so that no rational comments may be added, and ii) vice versa, even in a one-party regime a parliament could have deliberation — also because it is weightless. Under these circumstances limited risk management may be possible, however, it cannot be calculated rationally or foreseeably. The costs and the burden of risk is allocated again on those who cannot avoid it and not at all on the beneficiaries.

PART 2. *studies risks of* ***quasi legal*** *bargaining. These bargainings are carried out with the legislation therefore its real nature is also political.*

Chapter 2.1. is about a unique, out-drawn, henceforth unsolved legal bargaining between small churches and the parliament in Hungary. Is the majority principle based on firm enough grounds, so that to differentiate among religions? Why should the ruling majority be required to take into consideration religious groups that are marginal, or that they dislike, on an equality basis while distributing public funds? This analysis suggests that the conceptual critique of the new deliberately differentiating, illiberal Church law of 2011 is, that it allows unhinged exclusive and arbitrary decision-making for the legislation. Although majority principle should be the essence of democracy, its unconstrained version creates such anomalies in

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the democratic institutions which could well be survived but would alter the system into a non-democratic regime. First generation fundamental rights are therefore to be protected, not by the democratic institutions, even in a democracy, but by the rule of law (liberalism). This chapter tackles with the arguments justified by ideological reasonings as opposed to legal ones, yet the burden of costs of the risks are difficult to assess. At first glance it seems the prevailing of the majority principle is merituous and the costs are born by those who were not valued by the majority. Nonetheless, the denial of protection of freedom of conscience based on ideological arguments may represent an oppression rather than question of conscientiousness from a historical point of view.

Chapter 2.2. addresses the question of legislation. Even though legal experts do not create legislation, it is appropriate to question the role that the different legal professionals—attorneys (advocate lawyers), judges, prosecutors, law professors, law clerks in the government administration, etc.—play in drafting law. Assuming that creating the law requires real power, one should be able to discern which group of professionals has the most influence on this process. Depending on the cultural values of a community, the expectation that people play by the rules is more or less strong, with the effect, that an individual who has intentionally violated the rules may or may not feel compelled to justify, or apologize for their behavior. It is also well established that playing by the rules is best accomplished if one has the power to create and modify these rules, perhaps even retroactively. Laws and regulations are no different from this, with one exception: their binding nature—which, of course, implies enforcement—means that creating laws requires genuine power. It is more likely than not, that academics are the best equipped legal professional group, because they have the opportunity to disguise their own group interests by pretending that

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their sociological identity is a representative of objectivity, using scientific methodology, and legal rationality. Here the risks lie in the not easily calculable, non-transparent influence of the interests of the legal elite.

***PART 3**. examines the risks of law in conscientiousness. First, the laymen concepts of failed long-term loan agreements are scrutinized, whether laymen perceive foreseeability as the laws do and whether they calculate risks accordingly. Whether the laymen concept of the careing society reflects the reality of the "welfare state" as it exists in the 21st century in Hungary. Secondly, the promise of the state is under scrutiny, i.e. how risky it is to rely on a promise made by the state.*

Chapter 3.1. is a follow up of a survey among students analysing their attitude toward non-performance of longterm loan agreements. The new survey, using the same old questionnaire to be answered by the same statistically homogeneous student group at the university, provides a possible interpretation of the changes of the financial-legal culture — if any — in Hungary. The first study was conducted between 2013–2016 while its follow-up in 2024. Interestingly enough, the overall changes in the attitude in 2024 show a deeper general solidarity towards those in need. Yet, at a closer look, when it comes to the actual point of helping, this solidarity seems to be more or less at the same level as it was 8 years ago. However, one thing that really seems to be different, is an even stronger distrust in the state (the laws, the system) and more possible reliance on family and friends.

As for a conclusion of the surveys, one could say that the respondents act very logically and calculate very rationally. They do so, even if they mostly have no basic knowledge of the issues above but a hunch. The problem is that acting irresponsibly is rational because it often pays off better than

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acting by the rules. To be able to embrace the disadvantages of the market economy and the distrust in the state one needs to be able to understand the institutions. This survey, as it stands now also in 2024, still demonstrates exactly the lack of such an insight. What is left nowadays is the capitalistic objectives (an avidity to be wealthy) without the capitalistic virtues (the autonomous, financially independent, deliberating citizen).

Chapter 3.2. enquires the legal nature of the budget law, wether the state can be held liable for its promises, if it does that through the state budget. As to the legal conception of the state promise, as argued below, there are two types of public promise: i) the public law promise and ii) the private law promise. Again, there are two types of private promise: ii/a) the public promise based on a contract and ii/b) the public promise based on a specific budgetary law. Budgetary law *strictu sensu* provides for an accountibility of the government mainly politically. So the government shall be answerable for its public law promises (elections, programs) only politically. The answer is, therefore, that a state promise can only be chargeable via the liability provisions of the Civil Code if it is made by the state as a civil law entity.

These provisions cannot be applied to other state promises, even if they are clearly promises and commitments, and even if there is coverage for it in the budget, which in the given case is not a condition for a civil law obligation, according to the Hungarian Civil Code, for example. So, oddly enough, if the state committed itself in a private law contract, it has to perform even if there is not budget allocated for that. Political processes are, *preater iuram*, least restricted by law.

This shows the risk in the legislative process and the importance of bargaining power. And not only the bargaining power but the power to allocate the costs of managing these risks.

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PART 4. *deals with the changes in risk management or risk allocations due to the new "disruptive" technologies.*

Chapter 4.1. is a provocative essay against copyright in scientific investigations and for freedom of research, and free access made possible by the Internet. The Internet — at least web2.0 — has created an opportunity for freedom of expression that essentially questions the current version of copyright. Anyone can publish anything, orally, such as via Youtube, or in writing, in a blog, except for researchers who, being condemned to mandatory publication, can only officially access the public through academic journals, or book (publishers). Academic publishers in this regard play the role of gatekeepers in that they bring some kind of control, an extra professional aspect to the discourse in exchange for remuneration. The following analysis discusses the role of copyright holders, publishers and authors, focusing exclusively on the world of scientific works, in an era in which research is almost entirely financed by public funds, and in which freedom of research means not only the researcher's subjective right to publish his work creating thereby monopoly over his work, but also that the researcher has access to the work of others. The final conclusion of this investigation is that, the emphasis is once again shifting from the author to the work in the scientific world, just like in the old pre-Guttenbergian days. That means that only the moral rights pertinent to the copyright would remain in contrast to the monopolistic property rights of the author. So a researcher, as a private individual, can continue to be as an important player in the free market and a disseminator of 'popular' science.

Chapter 4.2. discusses the expansion of incompetence owe to the Internet. Internet has a special new feature. Internet connects. Internet creates two parallel but intertwined worlds: the on-line and the off-line world. And by

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enabling ones to connect and use others' databases and softwares, the internet generates global incompetence. If softwares are defect on the internet, it has physical consequences in the real world. With its connecting nature, internet inserts a third assisting party into all on-line transactions. The role of the traditional actors is undistinguishable and extra risks triggered by the internet are to be dealt with. The question of competence and liability faces challenges. One uses others' softwares or databases via the internet not necessarily knowing its defects, so defects may grow into others' softwares, like bugs via deep learning.

Chapter 4.3. looks into the regulatory and applicatory challenges related to new technologies. Inspite of the radical changes brought about by the new disruptive technologies, the law, as it is today, still operates with analogies and fictions. And as long as there are analogies, and precedents, or fictions available, the regulatory and applicatory challenges can be overcome. Since there are no homologous lawsuits, legislators and judges need to interpret previous cases. Beside interpretation courts and legislators employ analogies too.

In the following various legal tools are to be investigated which may be relevant in the time of AI, robotics, self-driving cars and machine-learning. These possible legal institutions are: i) legal personality, ii) vicarious liability and iii) culpability as opposed to strict – objective – liability. As all these legal techniques were familiar in the course of the legal history, none of these are new. Yet, the conceptions or the construction of these legal tools may change. But even the most radical recommendation of awarding a computer a legal personality, or constitutional fundamental rights, can found its roots in the past, like legal personality, and criminal liability to organs created by the law, such as the companies, or the standing for the trees, which provides now legal protection to the environment.

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