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Regulatory Impact Assessment (RIA) by Independent Bodies

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I. From Halcoms "The Real Story of Paradise Lost"

1. I am going to speak to you on institutions of RIA, namely independent bodies adjacent to Governments and Parliaments. Less quantity, more quality: these are the goals of RIA. The quantification of regulations may be easy: We just count. But what about assessment of quality? What is regulatory quality? How to measure quality at all? Let's have a look into the Bible, Book Genesis. "In the beginning God created the heaven and the earth …and God said, let there be light: And there was light. And God saw the light, that it was good. And God said, let the waters bring forth abundantly the moving creature that hath life… and God created great whales and every living creature that moveth… And God saw that it was good. And God said, let us make man in our image, after our likeness. So God created man in his own image, male and female created he then… and God saw man, he had made, and behold it was very good. And the evening and the morning were the sixth day and on the seventh day God rested from all his work."

2. And latest here our doubts start. How did God know that what he created was "very good"? If we look at history and present situation of mankind, and if we look at ourselves as individuals: Is the product really "very good"? And what were God's criteria? On what data and evidence did the Lord based his assessments? Just exactely what results was he expecting to attain? And hasn't God been a little close to the situation to make a fair and unbiased evaluation?

II. RIA as ex ante evidence based policy-making

3. Speaking in front of this knowledgeable audience I must not unfold the methodological details of RIA. I will talk about RIA as ex ante, prospective rating of norms, whereas I leave the term evaluation to the ex post retrospective appraisal. General discussion of RIA as a tool for reviewing law concentrate on the two questions: The first question is: What do we regulate and how do we do that. In other words: We discuss objects of RIA and criteria, methods of assessing and gaining better results. The second question deals with the institutional frame of RIA: Who assesses and how do we measure. In other words: We discuss organisation and procedures.

4. The starting point of RIA must be: What is good regulation in the given case? In which domain of governmental activity do we assess, which are the policy, goals, instruments of regulation? And which are the criteria, standards of rationality, technics of writing good law. Here we have to discuss the Standard Cost Model (SCM), the Net Administrative Cost Model (NET), the three E's (efficacy, effectiveness and efficiency). This, in the very end, is the search for principles of proper law making, which relate to the

universal idea of rationality. In RIA, I believe, we require access to political, legal, managerial and procedural rationality.

5. The latter is an element of the institutional context of RIA, namely organisation and procedure. The following observation and suggestions will focus on institutionalizing RIA, namely on establishing independent, non departmental expert-scrutiny-boards. They should be embedded within the policy development cycle, next to the head of government to underline the high priority and commitment of the center. The board should scrutinize the quality of RIA for all legislative proposals as well as assess amendments to proposals. Anywhere the contributions of all actors in regulation must be coordinated: Officials, public-sector-workers, elected politicians, citizens, consumers, businesses. And this should be the central scrutiny board.

6. I give this outstanding role of a RIA-Board preference before other frames of bringing in independent expertise, which are justifyable alternatives, like decentralized or split authority to assess, which is – of course – constitutionally requeired in federated systems. If stressing the importance of a central body one should keep in mind, that in every separation of powers systems the institution system reflects the functional diversification of state organs. Not only the head of government, the ministers – namely the departments of economy, justice, finance – and the cabinet have a lions share in preparing regulation. In addition parliament and its committees, the court of auditors and finally the (constitutional) courts participate in producing regulatory acts.

7. Procedure matters. The German Sociologist Niklas Luhmann wrote on "Legitimation by procedure", noting, that a fair procedure will bring fair and good results. This is procedural rationality. The formal provisions of the regulatory, namely legislative procedure are in almost all countries laid down in the constitution. This is the regulatory cycle: Initiative (policy setting), drafting and parliamentary decision, implementing, evaluation and (if needed) amendment. Material, substantive elements and regulation are "best practice" or – as in some countries – interpreted from basic principles of the constitutions: Rule of law, democracy. These principles are, among others, clarity, certainty, transparency, practicability, due process, participation, consultation, coordination, cooperation, communication (the latter are the 4 C's).

8. It has to be gladly acknowledged, that OECD is functioning as a midwife of RIA, having introduced and improving frame works and methods thereof RIA in member states and the EU. The OECD undertakes institutional comparison of countries, develops blueprints for development of institutional and political contexts, electorally, ideologically a.s.o. and plays a mediative role in implementing models. Better Regulation / Legislation is a permanent programme of the OECD, from "Principles of Regulatory Reform" (1997), "Guiding Principles for Regulatory Quality and Performance" (2005), "Regulatory Policy and

Governance" (2011) – on the basis of a 15-countries survey- ,furthermore the "Recommendation of the Council of Regulatory Policy and Governance" (2012), the "Regulatory Indicators Survey" (2014) and finally the "Regulatory Policy Outlook" (2015).

III. RIA-Boards in European Countries and the EU

9. The OECD has been an active agent of diffusion of RIA-Institutions among European Countries and the EU. The objectives and motivation for introduction of RIA are usually similar across states: Improving the quality of regulation, reducing administrative burdens, making policy more transparent and consultations thereof. However, national administrative tradition and country-to-country interaction have a large role in the institutionalisation process of RIA.

10. This paper concentrates on four countries: The Netherlands, Great Britain, Germany and Sweden. Not included are for practical reasons Switzerland, France and the USA. Although the first, Switzerland, introduced the responsibility of the Federal Government to undertake RIA–measures into the Revised Constitution of 1990 (Art 170). The oversight over legality, regularity and efficacy, effectiveness and efficiency of regulation is a responsibility of the Federal Assembly, (Art 26 para 3 Parliamentary Law). In France the drafts are prepared by each ministerial department (études d'impact) and reviewed by the Conseil d'Etat as the governmental counsel. Since 2009 the Conseil d'Etat also reviews RIAs, before proposed new regulatory legislation is sent to the National Assembly. As in the US no primary laws are initiated by the executive, RIA and stakeholder engagement cover only processes that are carried out in the executive. According to the Paperwork Reduction Act of 1980 all these RIA-activities take place in the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB in the office of the Vice-President). There is no mandatory requirement in the US for consultation with the stakeholders and general public and for conducting RIA to assess drafts of primary laws initiated by Congress. "Pocket Bills", deriving de facto from the executive, are of course assessed beforehand.

11. The Netherlands is the role model for RIA bodies in Europe and beyond. It has been so successful that the question arised, whether we all are "going Dutch". This appreciation is mostly one to the effectiveness of the "Advis College Toetsing Administrative Lasten" (ACTAL) which was established in 2011. It is an independent and external advisory body that advises government and parliament to minimize regulatory burdens for firms, citizens and professional workers in health care, education, safety and welfare works in organisations within and outside the Netherlands. ACTAL is also examining strategic issues relating to regulatory pressure. Ex ante evaluation moreover becomes so internalized in departmental policies ,that additional oversight by the Council of State will no longer be necessary. The methods of measuring laws, like Standard Cost Model (SMC) and National Administrative Cost Model (NET) have spread all over

Europe and other countries (like Canada, Australia a.s.o.). Nevertheless in strategic perspective ACTAL detected some weaknesses in regulatory policy making. Consequently the ACTAL-watching has urged the Cabinet to replace the "Integrated Framework for Policy Analysis and Legislation" (IFPL) by a better RIA-based system. This framework is a tool of the "Interdepartmental Commission for Constitutional Affairs and Legislation". ACTAL'S mandate terminated on 1st June 2017. The Rütte III government works on future organisation of a RIA-Board similar to the Netherlands.

12. Great Britain was very early and deeply involved in RIA. In 1997 a Better Regulation Taskforce was established, which – on the basis of the Legislative and Better Regulation Act of 2006 - was replaced by the Better Regulation Commission (BRC), which since 2012 is the Regulatory Policy Committee (RPC). This is a special public body of government, independent of any government department in the jurisdiction of the Department for Business, enterprises and Regulatory Reform.

Before that, in 1997, some principles were identified as the basic tests of whether any regulation is fit for purpose and may be initiated in the House of Commons or – as secondary legislation – may be released by government. These 5 principles are proportionality, accountability, consistency, transparency and targeting. Information and proposals should be submitted to the department responsible for developing the policy during their consultation when considering in the RIA-process that a draft is fit for purpose. It is not to judge whether or not the policy is fit for purpose. In the House of Commons the Regulatory Reform Committee (RRC) as a select committee examines subordinate provisions to amend primary legislation as created under the Deregulation and Contracting Out Act of 1994 as amended in 2001. The Regulatory Reform Committee (RRC)expects all proposals to receive a fit for purpose designation from the Regulatory Policy Committee (RPC) before they are considered to inclusion in the governments legislative programme. Drafts are judged as "fit for purpose", when they are fulfilling the 5 critera,as mentioned before. The possibilities of 1 in / 1 out and "fast tracking" imprint RIA-procedures. In 2002 the Public Accounts Committee of the House recommended, that the National Audit Office should submit a sample of RIAs each year.

13.Germany learnt quite a bit from RIA institutions in NL, GB, Canada and Australia. RIA is primarily a matter of government, both on the Federal Level for Federal Legislation and in the centre of each of 16 States for State Responsibilities. First assessment information have to be provided by the department in charge. The explanatory memorandum of the draft should respond to some 27 questions on regulatory impact thereof. In 2006, as amended in 2011, a National Regulatory Control Council at the Federal Chancellery was established by Act of Parliament . It is bound only by the mandate conferred by the Act and independent in its work. This mandate is to support the Government in implementing its measures within the fields of bureaucracy reduction and better regulation. "Cutting Red Tape" is no longer the primary goal of RIA. The Council examines bills as initiated by Government, the Federal Diet or the Federal Council – the

two houses of parliament. In addition the NRCC is available in an advisory capacity to the leading and coadvisory standing committees of the parliament. In the Federal Diet and Federal Council themselves there are – in addition – three institutions, where RIA is located: the Scientific Service of Staff , the Office of Technology and the Council on Sustainable Development. In assessing bills the Federal Audit Court is involved usually. The President of the Audit Court holds an independent Office of Federal Performance Commissioner, who looks at efficiency of drafts.

14. The German Federal Constitutional Court (FCC) over the decades developed an impressive and estonishing set of criteria for assessing regulations, namely parliamentary laws. Nor are there only constitutional procedural norms for legislation, but material prerequisits for "good legislation" as well. There is not only legal rationality, transparency of procedure and results,but in addition the principle of that legislation must be based on present reality, the requirement that methods and stages of calculation must be disclosed and clear, that results must be subjected to constitutional review and revised as necessary. The latter in other words: That the legislator must keep the body of law under control. In fact the Constitutional Court is the epicentre of Germany's democracy. It has a breath-taking mandate both within scope and depth. The Constitution is now virtually identical with the Court's interpretation.The Court is a "quasi legislative institution".

15. By an ordinance of 2007 the Swedish Better Regulation Council (Regelradet) was established under the auspices of the Swedish Agency for Economic and Regional Growth and the National Financial Management Authority. Its mandate is to assess the impact of legislation on business. It covers national as well as EU-Law . The members of the Council are appointed by government and the Council is responsible for its own decisions. The Norwegian Regulatiory Council (Regelradet) and the Finnish RIA-Council (FCRIA) as well as the Czech RIA-Board (RIAB) work in a similar legal and institutional frame.

16."Regulatory Watch Europe" is the banner under which Europe's seven independent national advisory boards coordinate to assess and maximise the benefits of Europe's smart regulation agenda and reduce regulatory burdens. Regulatory Watch Europe's Joint Statements to vital points and upcoming problems of legislation to the European Institutions as well as Joint Reactions to European consultations belong to the best offerings on the "Legislation and Legisprudence market": Short, topical and always up to date.

17. The papers of Regulatory Watch Europe are of tremendous value for regulations of the European Union. At the conference on 20th of March this year the first annual report of the Regulatory Scrutiny Board (RSB) was released.The Board which was established in 2015 by the Euopean Commission as an independent body. It continues actions of the Union to reduce quantity and improve quality of EU regulation which are the Commission´s "Inter Institutional Agreement on Better Lawmaking", a common approach to RIA (2005),

the establishment of thefirst Impact assessment Board (2006) as well as SMART- (2007) and REFIT- (2012) – Programmes. The High Level Group of Independent Stakeholders on Administrative Burdens (2008) set the target to reduce quantity of regulation by 25% per year, which some member states reached, some however partly. Today Vice President Timmermans is responsible for the package. The European Parliament decided to create an RIA Directorate, which started to review the Commissions Road Map and RIA Documents. The European Court of Auditors has a strong impact on RIA,done by the EU organs. Primary EU law contains explicit criteria for good regulation, like subsidiarity and proportionality (Art 5 para 1 TEU). The jurisdiction of the European Court of Justice is more and more looked at as frame for regulation, at least by its "obiter dicta".

IV. Some Conclusions

18.To draw some comparative lines and come to a conclusion, it seems to be obvious, that there is no clear best practice for all countries, due to their different constitutional and legal frames, their culture, their institutional wisdom. RIA may be done on departmental level, in the center, with a strongpoint in government or parliament, in ministerial agencies, at arms length, by independent advisory bodies. I argue that an independent, central and interdepartmental body, available for government and parliament, is the preferable institution. But even if you follow this priority-setting there is no format which does fit all. The choice is a political decision. However, building a national frame work, one should obey some basic suggestions: Include the stakeholders and give the body a firm legal mandate! Integrate RIA timely into the legislative process: "Ask the right things, at the right time, in the right sequence" (Mandelkern Report, 2001)! Build a team and network of experts. Connect ex ante assessment and ex-port-evaluation: They are the two sides of one coin! Give RIA a strong support from the top! Keep in mind, that RIA never has to judge, whether the policy is fit for purpose!

19. The situation of RIA in the EU is particular.At the moment there is no real strong independent body to fulfil the task. The increased amount of RIAs being produced by Commission Directorates General might threaten the sustainability of the Regulatory Scrutiny Board (RSB). In addition the principle of proportionate analysis and subsidiarity seem to be followed very imperfectly. All three players of the EU legislative process – Parliament, Council, Commission - are likewise committed to a common and coordinated approach including common methodology. Communications and networking is required.

V: and finally: Five Trends of Legislation and Legisprudence

From a comparative law perspective five trends of Legislation in modern states may be noted.

20. First, legislation and its problems as analysed and descibed by legisprudence are similar but not the same in constitutional states. Astonishment over differences and similarities is the engine of comparative law. Progress of harmonization and unification of legal procedures, content and form of laws will proceed. Europeanization and globalisation of legislation provide a common basis by opening up constitutions to the work. Namely the constitutions of the European Union and National Member States are complementary law,establish a "constitutional compound". European constitutions, legislative procedures and chosen forms of RIA shape a family of law, in which all systems enrich each other.

21. Second, legislation is a matter for parliament, which is the centre of power in a democractic state. However, its role may change. Parliament is under permanent political pressure to guarantee the stability and flexibility of law at the same time. Effectiveness of law is the primary goal. An increasing quantity of law production in all states is the consequence of globalisation,the welfare and social state and technology,which needs to be regulated.We are facing a "motorised legislator" .This conflicts with attempts to deregulate. Lack of quality and insufficient transparency of law are consequences of hasty procedures of the legislator. We want and have more participation and Impact Assessment.This takes time. And we observe governmentalisation of leadership on the one hand as well as demands for federal,regional and local autonomies on the other.Bottom –up and top-down at the same time!

22. Thirdly: As far as quantity and quality of law production is concerned, EU legislation contributes to the deluge of suboptimal regulation. Perhaps half or more member country rules now come from EU sources. It is partly the result of the "Brussels-Effect" .The Union intervention has expanded on issues, that do not fall within the narrow scope of aquis and may even be considered to lay outside its core competences when dealing with the Member States.Some interventions don't obey the subsidiary principle.

23. Fourthly, the juridification of legislation is proceeding. The judge is part of the legislative cycle and requires to be taken into account by RIA and the further legislation procedure. The judge ultimately measures procedures, targets, instruments and form of legislation against constitution and law. National Courts, the European Court of Justice and the European Court of Human Rights are gaining directive influence on national as well as European legislation: "Gulliver in chains".

24. And finally RIA and legislation at all should be aware of their limitations. The law should be as good, precise, efficient and rational as possible, but it will never be mathematics. This year's Nobel Prize for Economy is awarded to Prof. Richard Thale for his research on "bounded rationality" in market choice. It was 130 years before , on 13 August 1787 in the Constitutional Assembly of the United Stated of America in Philadelphia, that John Dickinson said: "The life of the law has not been logic: It has been experience".