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STUDIES ON REGULATION

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Abstracts

Yuval Roitman, Yael Kariv-Teitelbaum, *The Regulatory Principles Law: Cornerstone for Better Regulation Policy in Israel*

Enacted in 2021, the Regulatory Principles Law is a landmark framework law that enshrines the Better Regulation approach in Israeli law. For the first time in Israeli legislation, the guiding principles upon which Better Regulation is based are anchored in the law. To meet these principles, the law establishes mandatory processes for managing the "flow" of new regulation and the "stock" of existing regulation; and orders the establishment of an Israel Regulatory Authority as a central body responsible for advising, guiding, and monitoring regulatory policy matters.

This article aims to outline the main aspects of the law, based on three central pillars: First, the article describes the background of its enactment, focusing on the rise of the Better Regulation approach in Israel and around the world. Second, the article presents the main provisions of the law and their underlying rationales, including amendments that have been made during the legislative process. Finally, the article discusses the main legal dilemmas that accompanied the formulation of the law and influenced the design of the provisions enshrined in it, including the challenge of creating an inter-governmental overseeing body that is subject to judicial review; the challenge of establishing a professional and independent Regulatory Authority while minimizing the concern of its falling into "regulatory capture"; and the challenge of applying the Better Regulation approach on independent regulatory agencies (e.g., financial regulators) without compromising their independence.

Guy Mor, *From Vision to reality: the Practical Implications of The Principles of Regulation Law, 2021 on Regulators*

How will regulators interpret The Principles of Regulation Law and how will it practically apply to them?

This article examines the law's impact through a thought exercise: Reading the law from the perspective of a hypothetical regulator. Such a reading helps identifying the challenges, questions, and insights of a regulator who reads the law and intends to implement it. Additionally, reading the law through the eyes of a regulator helps us see the messages that regulators are expected to take in when they read the law as an instruction for them.

The article reveals messages and insights that regulators are expected to pick up from reading the law: the optimal regulation in the eyes of the legislator; the emphasis on lowering regulatory costs and publishing decisions; that the relationship between the Regulation Authority and the regulators is a dual system consisting of both monitoring and assistance; the law sets rules and principles but leaves the regulators with broad discretion in a variety of issues; diverse qualifications and skills are required to produce optimal regulation, but some of these are currently not found among regulators; and - the collaboration of various government units is required to create optimal regulation. To understand the practical effects of the law, the article focuses on analyzing four key questions that arise from reading the law through the eyes of the regulator. 1. What additional skills regulators need? 2. What is the meaning of additional players' involvement when optimizing regulation? 3. How may the Regulation Authority work with regulators to promote optimal regulation? 4. For which regulator was the law written?

Lilach Litor and Orr Karassin, *Ex-Post Regulatory Evaluation: The Missing Stage in the Regulatory Cycle*

The regulatory lifecycle presents numerous challenges, the most significant of which seems to occur after a new regulation has been introduced, when its outputs, outcomes, and effects need to be assessed. To address this challenge, ex-post regulatory-evaluation procedures were developed. Ex-post regulatory evaluation requires that the application of a regulation be examined after its initial introduction. This is to ascertain that it has achieved its stated goals, examine the extent of its effectiveness, and review ways it has been implemented and enforced. Although ex-post evaluation is a critical stage in the regulatory lifecycle, it has not received sufficient attention in the literature and has been sidelined by Israeli regulatory administrative bodies, and elsewhere.

The enactment of the Principles of Regulation Law-2021 offers an opportunity to adopt procedures and consistently apply ex-post regulatory-valuation processes in Israel. To develop an outline for an ex-post regulatory evaluation process that supports regulatory learning and adaptive improvement of the regulatory system, we conducted a comparative analysis of the design and implementation of evaluation processes in four countries: the United States, Italy, the United Kingdom, and Australia.

Based on our comparative analysis, we identify and define several principled approaches to ex-post evaluation: A procedural (post-legislative) approach focuses on the formal examination of regulation, the completion of the legislative processes, and the development of implementation and enforcement mechanisms. An effectiveness

(cost-benefit) approach focuses on analyzing the costs and benefits of regulatory implementation designed to improve economic efficiency and reduce the regulatory burden. An effectiveness approach examines whether the regulation attained its goals and whether implementation produced the desired results. Finally, a participatory (democratic) approach uses insights from regulated and interested parties, or the public, to evaluate regulatory implementation.

Based on these principled approaches, we delineate a stepwise model for conducting ex-post evaluation in Israel, suggesting it is conducted in a layered manner. We include components from the various, identified approaches, integrating different actors in a gradual and coordinated process that is efficient and effective.

Nilli Even-Chen, Amir Zalait and Reut Ushpizai, *Overseeing the RIA: A Practical Model for the Israeli Regulatory Oversight Body*

The Israeli Regulatory Oversight Body (ROB) was established in 2021 by the enactment of the Principles of Regulation Act, according to which, one of the ROB's five key roles is to oversee Regulatory Impact Assessment (RIA) processes. This article means to enrich the academic and public discussion of this issue by proposing a practical model with which the ROB could exercise its authority to oversee the way governmental regulators determine new regulations.

We developed our proposed model based on a critical analysis of local and international oversight models. In Israel, we examined the oversight model operated by the Revach Naki NGO (Net Profit; a nonprofit organization), and discussed the various stands of regulatory policy makers. Internationally, we examined oversight models from Australia, the United Kingdom, the Netherlands, and Sweden. Finally, to adapt our proposed model to the Israeli legal system, we discuss the current state of the judicial review of regulation, and assess its implications on the desired oversight model.

We conclude that the Israeli ROB should adopt a detailed and transparent methodology to oversee the RIA process based on four qualitative categories. The depth of oversight should be correlated with the economic impact of regulation. We suggest a process of preliminary consultations with the ROB. Furthermore, we stress the importance of investing the resources necessary for training regulators prior to oversight. We hope this article will help to expand the ROB potential to shape the way regulation is determined in Israel.

Sigal Golan-Atir, *Chronicle of an Outcome Foretold*
– *A Symbolic RIA*

The process of Regulatory Impact Assessment (RIA) includes several steps designed to identify the optimal alternative - regulatory or non-regulatory. This tool was adopted, developed, and distributed mainly by the Organization for Economic Co-operation and Development (OECD) near the end of the 20th century as a principal regulation-improving tool. Despite the widespread use of RIA, the findings pertaining to whether these processes achieve their purpose - which is, raising social welfare through improved regulation - are ambiguous and indecisive. This article focuses on the case of writing a RIA report practically after the preferred alternative was prechosen without a proper evaluation process leading to an optimal alternative (hereinafter: "symbolic RIA"). This is in complete contrast with the rationale underlying the implementation of RIA - as a process whose purpose is to objectively identify the optimal alternative.

The first three chapters of the article review the development of RIA aspects related to the definition and assessment of the process quality and present empirical findings on the topic. Chapter 1 reviews the theoretical basis for the RIA process, the development of the process and its spread - from the United States of the 1960s, through the contribution of the OECD, to its widespread around the world, and finally to current trends. Chapter 2 focuses on assessing the quality of the process, first considering what problem the RIA is trying to solve; discussing what is a good and effective RIA; and reviewing methods used to assess the quality of RIA. In Chapter 3, we present and review empirical findings on the quality of RIA, its actual impact on regulation, and the connection between it and economic parameters.

The three following chapters focus on symbolic RIA. Chapter 4 clarifies the concept and presents updated findings on its scope. In chapter 5, indicators for identifying a symbolic RIA report are proposed. Chapter 6 offers two explanations for the phenomenon of symbolic RIA: the weakness of a rational theory as an explanation for policy processes, and the fact that RIA is a special case of policy transfer. The last chapter is a summary of the practical implications of the insights as presented earlier, which are then examined.

Amir Wasserman and Liron Cohen Danieli, *Judicial Review of Regulatory Impact Assessments: Navigating the Costs and Benefits*

Enacted in Israel in 2021, the Principles of Regulation Law instituted a regulatory reform that has been promoted in Israel and abroad over the past decades. The Law outlines numerous procedures aimed at improving regulation, the most prominent of which is the regulators' duty to conduct a process of Regulatory Impact Assessment. The underlying premise is that a structured process of this kind will lead regulators to improve the regulation under their responsibility.

All duties imposed on the State are subject to judicial review. Therefore, the extent and nature of judicial review of duties set by the Principles of Regulation Law - particularly the duty to perform regulatory impact assessment - are crucial. Will the Law result in frequent legal challenges to regulation? Will courts intervene in processes of regulatory impact assessments? What might be the results of not performing, fully or partially, different stages of the process? And what is the desirable judicial review on this matter? Judicial review of regulatory impact assessments entails certain benefits as well as significant drawbacks. On the one hand, judicial review may encourage compliance by regulators and reduce sub-optimal or even harmful regulation. On the other hand, increased judicial review might lead to excessive litigation that will result in various negative consequences such as a 'chilling effect' on regulators when making regulation, thwarting needed regulation by interest groups, and the entrance of courts to areas where legal decisions should not set the tone. Apparently, the intention of lawmakers was to avoid such consequences.

This article analyses the implications of judicial review of regulatory impact assessments through the provisions of the Law; the pros and cons of such reviews; and how the courts have performed judicial review on regulation to date. Following the analysis, we suggest that the extent of judicial review of regulatory impact assessments be comprised of two tiers: the continuity of prevalent judicial review concepts; and an acknowledgment of wide regulatory discretion when conducting regulatory impact assessments. Next, we explain how limited judicial review comes into play in various aspects. For example: Avoiding judicial review before a regulation is finalized; allowing regulators to flexibly interpret exemptions provided by the Law; and, in most cases, avoiding judicial review of the quantification of regulation costs and benefits when such quantification was attempted.

Sharon Yadin, *The Benefits and Perils of the New Israeli Regulation Database*

The Israeli regulation database is an online public register of procedures, circulars, instructions, regulations, and laws with a regulatory aspect. The database is currently being established in accordance with the Principles of Regulation Law, 2021. While the basic concepts of this novel Law were extensively discussed in public and legal discourse surrounding its legislation, the database received little attention. This article analyzes the benefits of such a database and points out its expected drawbacks. The main argument is that contrary to convention, increasing transparency in the regulatory system is not necessarily advantageous, and in some cases, the weaknesses might outweigh the benefits. This article recommends policy directions that should be taken to realize the advantages inherent in the database, such as promoting transparency and legislative accessibility at all legislation levels, strengthening regulatory certainty, and implementing principles of optimal regulation set in the Law.

Yair Hakak, *Regulatory Archeology: Between Regulation, Regulators, and the Regulatory Authority*

The enactment of the Regulatory Principles Law marks a watershed event in the creation of the Israeli regulatory state, bringing regulatory activity from the periphery to the center of the governmental apparatus. The law, however, focuses on actual regulation, whereas contemporary regulation in Israel is the result of different layers of regulatory administration, dating back to the British Mandate in Palestine, which have since changed significantly.

Using the tools of historical and sociological institutionalism, the roots of the current system can be identified by viewing the various layers: The colonial/imperial layer; the Israeli etatist-developmental layer; the transition layer of the 1985 Emergency Stabilization Plan; and the subsequent development of the neo-liberal market state. The transitions between layers, while marked by dramatic and even violent shifts in the government's ideological approaches, are also marked by an administrative and bureaucratic continuum. The new Regulatory Authority would do well to understand this continuum, which has left many regulatory entities with an eclectic worldview, if it wants the law to make a significant and long-lasting regulatory change and reform.