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DISCUSSION

Regulatory decision-making in the context of uncertain standards – the concept of courage

OREN PEREZ — 7 November, 2014



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A response to the post by Machiko Kanetake

Machiko Kanetake's post highlights the difficulties faced by transnational scientific bodies such as ICNIRP and IPCC, which have to *manoeuvre* between political, legal and scientific expectations and norms.

I want to highlight another facet of this dilemma – that of the decision-makers that are standing at the receiving end of the advice produced by such bodies. In many cases

decision makers have to make decisions against the background of extreme moral and epistemic controversy. The lack of clear standards seems to call for regulatory judgment that would transcend the bounds of instrumental rationality. But what should be the basis of such decision? In another paper, I argued that a possible basis for such decision could be found in the **Socratic concept of courage** and the idea of **forward-looking responsibility**. The idea of courage requires agents to be able to provide an articulated moral justification for their choices and to take responsibility for them. The capacity to “take a stand” reflects a willingness to “grapple with uncertainty, [and] to dare to venture beyond the known.” But this willingness should also involve the recognition by the agent of its own state of epistemic and normative perplexity. Courage is, therefore, neither the ignorant persistence of animals nor the super-calculating persistence of homo economicus, but the intelligent, reflexive persistence of a cognitively bounded human being.

There are obvious prices for this approach in that it requires us to forego the assuredness of strict decision-making criteria. Ultimately, the assuredness associated with regulatory techniques such as cost-benefit analysis is I argue merely elusive. It promises more than it can actually deliver. Courage is not, however, a panacea to the problems of modern regulation. By highlighting the blind-spots of analytical techniques the idea of regulatory courage denounces the illusory hope to base our regulatory decision-making on fully rational grounds. But in that very denouncement this idea also opens the way for a morally inspired regulation, which would both recognize and embrace the singularity of regulatory decision-making. In the article I discuss some of the legal and institutional

mechanisms that could both facilitate and put to scrutiny the realization of this ideal. Machiko Kanetake's post nicely illustrates these dilemmas.

Oren Perez is Professor at Bar-Ilan University Faculty of Law. Among his recent publications are "How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement" in the *Journal of Law & Society and Whose Administrative Law is it Anyway? How Global Norms Reshape the Administrative State* 46 CORNELL INT'L L.J. 455 (2013) (with Daphne Barak-Erez).

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