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Applying Soft-Law Mechanisms and Responsive Regulation Theory to Labor Law: A Case Study of Poland

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Abstract: Focusing on selected international experiences, this article explores the role of soft regulation in the context of responsive enforcement of labor law. The analysis aims to answer the main research question of whether there is a method for the effective application of soft regulation in the responsive procedure of enforcing labor law in Polish legislation based on the experiences of Anglo-Saxon countries. Formal-dogmatic and comparative methods were used to address this question. The analysis includes experiences from the Canadian province of Ontario and Australian and British legislators. This article describes the mechanism of using soft regulation in the responsive procedure of enforcing labor law, which enabled the description of potential legal and governmental system consequences of its hypothetical application in Poland. The significant reliance of the responsive regulation model on soft regulation may, among other things, limit the ability of employers to challenge unresponsive treatment by public authorities. It also conflicts with certain constitutional principles, including the exclusivity of statutes and the principle of a democratic legal state. This, in turn, could prevent the implementation of responsive regulation in European legal systems. Finally, this article considers ways to minimise the risk of violating the Polish Constitution while maintaining the flexibility and potential effectiveness of responsive regulation.

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1. Introduction

The world of work is currently confronted with a number of challenges. The report, "Regulating Working Conditions – EU Employment Law Outlook and Challenges,"[1] outlines some of these, including the further expansion of precarious work (platform work, gig work). In turn, the development of teleworking and other forms of work using new technologies (ICT mobile work) is blurring traditional notions of place and time of work. Instead, the issue of an "always-on work culture" and the associated "anytime, anywhere" work has emerged.[2] These changes have occurred primarily due to the development of mobile devices and the expansion of flexible forms of work organization. In addition, the development of modern technologies, including artificial intelligence, may have a negative impact on the protection of workers' personal rights and privacy. The development of previously unknown forms of workplace organization, such as the "fissured workplace,"[3] is also worth mentioning. These developments could have a significant impact on the reduction of labor protection standards, including occupational health and safety.

New challenges are influencing the development of regulatory concepts in which hopes are placed for effective labor protection, especially in the context of the shortcomings of traditional regulatory strategies identified in doctrine.[4] The new approach emphasizes the need to create flexible and contextual regulations that will primarily engage employers in cooperation to improve compliance with labor law. Such a new approach is

1 Frank Hendrickx, "Regulating Working Conditions – EU Employment Law Outlook and Challenges," 2019, 8–10, accessed February 7, 2024, https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/638430/IPOL_BRI(2019)638430_EN.pdf.

2 "Working Anytime, Anywhere: The Effects on the World of Work," Eurofound and the International Labour Office, 2017, 3, accessed November 2, 2024, https://www.eurofound.europa.eu/en/publications/2017/working-anytime-anywhere-effects-world-work.

3 David Weil, *The Fissured Workplace* (Cambridge: Harvard University Press, 2014), 7 et seq.

4 See: Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation. Theory, Strategy, and Practice* (Oxford: Oxford University Press, 2011), 108–9; see also: Yoval Feldman, *The Law of Good People. Challenging States' Abilities to Regulate Human Behavior* (Cambridge: Cambridge University Press, 2008), 68–9; Keith O. Boyum, "Review: The Politics of 'Regulatory Unreasonableness': Bardach and Kagan's 'Going by the Book'," *American Bar Foundation Research Journal* 8, no. 3 (1983): 753 et seq.

the method of responsive regulation,[5] which appears to make extensive use of soft regulation, whose general utilization and effectiveness are also topics of academic debate.[6]

In the literature on responsive regulation, issues concerning the development of its theoretical aspects are particularly prevalent. These include the addition of more enforcement pyramids, creating three-dimensional pyramids, expanding tripartism, or methods of self-regulation,[7] as well as analyses of psychological mechanisms influencing compliance with the law and their use in responsive regulation.[8] However, in the academic discussion on this method, there is still an insufficient number of publications addressing legislative problems related to the potential implementation of the described theory, particularly in European legal systems. One such issue is the use of soft regulation in the responsive regulation model against the backdrop of the constitutional principles of democratic legal states belonging to the continental legal culture. This research problem will be the subject of this article. Hence, the importance of such studies is also derived. They serve as a tool to solve future practical implementation problems, thus enabling the transition from theoretical assumptions to their effective application by public authorities.

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5 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992), 24–7; Feldman, *The Law of Good People*, 65–8; John Braithwaite, *Crime, Shame and Reintegration* (New York: Cambridge University Press 1989), 54–65; numerous papers in the collective work: Peter Drahos, ed., *Regulatory Theory: Foundations and Applications* (Canberra: ANU Press, 2017).

6 For the most recent, see: Ian Cunningham et al., "Introducing Fair Work through 'Soft' Regulation in Outsourced Public Service Networks: Explaining Unintended Outcomes in the Implementation of the Scottish Living Wage Policy," *Industrial Law Journal* 52, no. 2 (2023): 314 et seq.

7 See: John Braithwaite, Valerie Braithwaite, and Mary Ivec, "Applications of Responsive Regulatory Theory in Australia and Overseas: Update," *RegNet Research Paper,* no. 72 (2015); Ayres and Braithwaite, *Responsive Regulation*; collective work in Drahos, *Regulatory Theory,* and Gale Burford, John Braithwaite, and Valerie Braithwaite, eds., *Restorative and Responsive Human Services* (New York, London: Routledge, 2019).

8 Feldman, *The Law of Good People*; see also: Christine Parker, "The 'Compliance' Trap: The Moral Message in Responsive Regulatory Enforcement," *Law & Society Review* 40, no. 3 (2006): 591–622; Christine Jolls and Cass R. Sustain, "Debiasing through Law," *The Journal of Legal Studies* 35, no. 1 (2006): 199–242.

Soft regulation has been employed by public bodies in the field of labor law for a considerable period of time, both in common law systems[9] and in EU law. Even before the Lisbon Treaty, there were numerous debates on its use in regulating and harmonizing social policy and labor law,[10] including the European Employment Strategy.[11] However, the article focuses on applying soft regulation as a "legal" basis for labor inspectors' actions in the responsive enforcement of labor law regulations. This article specifically aims to theoretically capture how soft regulation is used in Anglo-Saxon practices of responsive enforcement of labor law and then to determine whether, and if so, to what extent, the experiences of these countries can be valuable for the European legislator, who does not utilize either soft or responsive regulation in labor protection. The example of Poland will be used to illustrate this issue.

This article poses three research questions. The first concerns the application extent of soft regulation in implementing responsive regulation. The second deals with identifying potential problems in grounding responsive regulation on soft regulation in countries with a continental legal culture, such as Poland. After conceptualizing these issues, the article raises the question of whether there is a method for the effective application of soft regulation in the responsive procedure of enforcing labor law in Polish legislation based on the experiences of Anglo-Saxon countries. To analyze individual national responsive labor protection systems, legal-theoretical, formal-dogmatic, and comparative methods were used to answer the first question. In the context of the second and third questions, the formal-dogmatic method was employed.

The structure of the article includes an introduction, a detailed description of the assumptions of the responsive regulation concept, an analysis of the material and procedural aspects of the law enforcement pyramid,

9 See the examples of Canada, Australia, and the UK described in the article and the cases described in the English-language literature regarding the use of soft regulation as a labor law technique, e.g. Cunningham et al., "Introducing Fair Work," 314.

10 Anna Di Robilant, "Genealogies of Soft Law," *The American Journal of Comparative Law* 54, no. 3 (2006): 504–6; Cunningham et al., "Introducing Fair Work," 329–36.

11 "Ten Years of the European Employment Strategy (EES)," European Commission, 2007, 5 et seq., accessed February 15, 2024, https://eur-lex.europa.eu/resource.html?uri=cellar:9fea25eb-5f5b-4cb6–986d-fa084bf99953.0007.03/DOC_2&format=PDF.

a review of international experiences with a focus on the case of Ontario, a discussion of the characteristics of soft regulation, a critical consideration of the possibilities of grounding responsive regulation on soft mechanism, and a discussion of the ways of incorporating soft-law mechanisms into hard regulation framework, summed up with synthetic conclusions.

2. The Concept and the Material and Procedural Preconditions of Responsive Regulation

Until the late 20th century, the two main regulation methods were the command-and-control method and the deregulatory method. The former relies on ensuring law compliance through deterrence, thus applying sanctions that are painful and strictly associated with specific behaviors. In contrast, the latter avoids sanctions, and the mechanism of law compliance is based on building cooperation and trust. In the 1980s and 1990s, the method of responsive regulation emerged, combining the advantages of these two methods. It is based on flexibility and contextuality, considering various aspects of an employer's operation.[12] The responsive method rejects the approach based solely on punishment or persuasion. Its creators argue that an effective regulatory system requires a balanced combination of compliance and deterrence.[13] This is based on the observation that relying solely on deterrence results in a focus on the letter of the law and the search for loopholes, which in turn leads to the creation of new, stricter regulations. At the same time, treating sanctions as a last resort, as in the case of deregulatory legislation, can encourage employers to break the law.[14]

The most important principles of responsive regulation include the enforcement pyramid, tripartism, and coercive self-regulation.[15] All are essential for creating a responsive model of labor protection. However, due to the focus of this article, tripartism and self-regulation will not be analyzed. Emphasis will instead be placed on the enforcement pyramid and procedures for navigating it.

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12 Ayres and Braithwaite, *Responsive Regulation*, 5.

13 John Braithwaite, *To Punish or to Persuade: Enforcement of Coal Mine Safety* (New York: State University of New York Press Albany, 1985), 84–118.

14 Baldwin, Cave, and Lodge, *Understanding Regulation*, 107.

15 Ayres and Braithwaite, *Responsive Regulation*, 6–10.

In technical terms, the law enforcement pyramid involves a hierarchical arrangement of many potential legal measures that the controlling authority can apply in response to an employer's behavior.[16] At the bottom of the pyramid should be measures based on compliance, whose main addressees, according to the theory of the law of good people, are morally good employers (those who unknowingly violate the law) and employers who situationally violate the law (those whose unethical behavior is primarily justified by their rationalizations for wrongdoing under certain circumstances). Establishing separate measures for them is crucial because, according to research on behavioral ethics, applying painful and costly sanctions is counterproductive in many situations.[17] This section of the pyramid advocates for measures based on educating and informing violators, including notifying the regulated entity about detecting a violation, ordering the implementation of remedial measures, or reaching a settlement.[18] If the employer's attitude does not demonstrate a willingness to change, regulation should be moved to a higher level of escalation while continuing the dialogue and remaining open to continued cooperation.[19]

The second level of the pyramid comprises a set of legal measures that combine elements of compliance and deterrence.[20] These include a warning letter, an order or prohibition of specific behavior, compensation, restitution of benefits, restoration to the previous condition, and an administrative monetary penalty.[21] Limiting access to public procurement can be similar.[22]

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16 Todd Lochner, Dorie Apollonio, and Rhett Tatum, "Wheat from Chaff: Third-Party Monitoring and FEC Enforcement Actions," *Regulation & Governance* 2, no. 2 (2008): 219–20.

17 Feldman, *The Law of Good People*, 68–80.

18 Lochner, Apollonio, and Tatum, "Wheat from Chaff," 218–20.

19 John Braithwaite, "The Essence of Responsive Regulation," *UBC Law Review* 44, no. 3 (2011): 493–7.

20 John Braithwaite, "Types of Responsiveness," in *Regulatory Theory*, 121.

21 Ayres and Braithwaite, *Responsive Regulation*, 35–7.

22 Generally subject to a specific panel agreement with the regulator. An example is the Australian Victorian Government Schools Contract Cleaning Program. See: John Howe and Ingrid Landau, "Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design," *Journal of Industrial Relations* 51, no. 4 (2009), 575–83.

Measures that rely exclusively on deterrence, including criminal sanctions or deprivation or suspension of the rights to conduct business, should be applied only as a last resort. Research indicates that the more severe the sanction at the top of the pyramid is, the less frequently it is applied. Sanctions in this part of the pyramid serve two functions. On the one hand, they impact the psyche of typical violators. On the other hand, they target irrational employers who, for the good of society, should be deprived of the ability to conduct business.[23]

An equally crucial aspect of the law enforcement pyramid is the procedure by which the regulator executes its mandate. In legal theory, two strategies for navigating the pyramid are mentioned: the tit-for-tat strategy and the restorative justice strategy.[24]

The tit-for-tat strategy is employed in game theory and was presented based on the so-called prisoner's dilemma by Anatol Rapoport. Its purpose is to escalate to de-escalate and return to cooperation through forgiveness.[25] Applying it as the ground of responsive regulation in labor protection, the strategy essentially involves two actors. The first is the employer, who wants to minimize the costs associated with regulation. Meanwhile, the second (the regulator) aims to achieve the highest possible compliance with the regulations. Consequently, the two actors begin the regulatory game from a position of cooperation, but then the employer, motivated by a desire to minimize their losses, exploits the regulator's submissive stance and deviates from complying with the law. This, in turn, causes the regulator to impose sanctions to discourage avoidance of the law. Ultimately, when the entrepreneur is willing to cooperate, the regulator de-escalates the situation, returning to cooperation.[26] In the above scheme, the regulator is an intelligent guide who freely chooses the most appropriate legal measure.[27]

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23 Braithwaite, "The Essence of Responsive Regulation," 486.

24 Vibeke Lehmann Nielsen and Christine Parker, "Testing Responsive Regulation in Regulatory Enforcement," *Regulation & Governance* 3, no. 4 (2009): 377–81; Braithwaite, "Types of Responsiveness," 118–20.

25 Shirli Kopelman, "Tit for Tat and Beyond: The Legendary Work of Anatol Rapoport," *Negotiation and Conflict Management Research* 13, no. 1 (2019): 8–10.

26 Ayres and Braithwaite, *Responsive Regulation*, 20–2.

27 Nielsen and Parker, "Testing Responsive Regulation," 379–81.

Within responsive regulation, restorative justice is employed at the lowest level of the enforcement pyramid. This involves collaboration, dialogue, negotiations, mediation, and other forms of engagement in cooperation to achieve compliance with the law. Therefore, it requires moving away from a strictly described procedure that mandates specific behaviors from the regulator.[28] Its essence is the direct accountability of the offender to the victim. This accountability entails compensation or reparation for the damages incurred, with the involvement of all parties: employers, employees or their representatives, and the regulator. Restorative justice is implemented as an alternative to or voluntarily after the process. Meanwhile, the procedure of responsive regulation should generally always pass through it and is expected to end there.[29]

In summary, both procedures for navigating the enforcement pyramid contradict procedural formalism. J. Braithwaite pointed out responsiveness is about reconciling conflicting interests and preventing further escalation. It is not about "similar treatment for similar cases"; achieving the desired outcome in each case is of greater importance.[30] Responsive regulation is flexible, contextual, and sometimes iterative. It is impossible to reduce it to a strict procedure that will always proceed the same way.[31] Nevertheless, the objective should be to reach the lowest possible level on the enforcement pyramid.[32]

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28 Gale Burford, John Braithwaite, and Valerie Braithwaite, "Introduction," in *Restorative and Responsive Human Services*, eds. Gale Burford, John Braithwaite, and Valerie Braithwaite (New York, London: Routledge, 2019), 1–5.

29 Brenda Morrison and Tania Arvanitidis, "Burning Cars, Burning Hearts and the Essence of Responsiveness," in *Restorative and Responsive Human Services*, 56–7.

30 Kathy Daly, "Restorative Justice and Responsive Regulation," *The Australian and New Zealand Journal of Criminology* 36, no. 1 (2003): 110.

31 Sometimes, the freedom of the regulator is very limited, even reduced to a non-responsive and therefore pre-regulated response; see: Neil Gunningham and Darren Sinclair, "Smart Regulation," in *Regulatory Theory*, 138–9.

32 John Braithwaite, Valerie Braithwaite, and Gale Burford, "Broadening the Application of Responsive Regulation," in *Restorative and Responsive Human Services*, 29–31.

3. International Practice of Implementing Responsive Regulation in Labor Protection: A Case Study of Ontario, Canada

In 2015, the RegNet association published a report titled "Applications of Responsive Regulatory Theory in Australia and Overseas."[33] It identified legislators recognized in the academic community as responsive. In the context of the research question, analyzing a legislator who introduces responsive regulation according to the aforementioned principles was crucial. This included flexibility in law enforcement and using soft regulation for this purpose. One such legislator is the regulator of Ontario. Similarly, this also applies to British and Australian legislators.

In Ontario, occupational health and safety are regulated by several statutory acts. From the perspective of law enforcement, the most important of these is the Occupational Health and Safety Act (OHSA),[34] which applies to the majority of employers.[35]

This Act does not explicitly refer to responsiveness. Although it is based on the normative approach, some responsiveness elements are noticeable. However, it must be highlighted that a full implementation of the theory into normative content has not been accomplished. This is partly due to the lack of a statutory obligation to start regulation by applying cooperation and restorative justice, although the regulator can implement them.[36] The potential pyramid itself is quite narrow and particularly covers two levels, i.e. an order for specific behavior combined with a possible compliance plan and cessation of work, among other things, if there is a threat to the safety and health of workers. Additionally, according to section 66, violation of the OSHA regulations and non-compliance with the inspector's orders is a criminal offence, and the possibility of initiating proceedings has been entrusted to

33 Braithwaite, Braithwaite, and Ivec, "Applications of Responsive Regulatory Theory."

34 Occupational Health and Safety Act, RSO 1990, c O.1, accessed February 7, 2024, https://www.ontario.ca/laws/statute/90o01.

35 Leah F. Vosko et al., "New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada," *Comparative Research in Law & Political Economy. Research Paper*, no. 31 (2011): 41.

36 See: Sections 54, 57(4), and 59(1), which provide space for cooperation and education. However, the Act does not explicitly impose an obligation to cooperate with the inspector other than to share sources of information during inspections.

employees of the Ministry of Labour.[37] The penalty, however, is imposed by the court.[38] In a general sense, the use of tit-for-tat is therefore limited. The regulator is also essentially deprived of the ability to start regulation from any place other than the order of specific behavior, especially when it knows it is dealing with an unreformable, recidivist employer. There is also no regulated moment, which the literature describes as "forgiveness" and a return to cooperation. In summary, it can be said that while the Ontario legislator grants sufficiently broad discretionary power, the inspector has a chance to be responsive, and this is not derived from the Act itself.

In 2021, The Ontario Gazette, a legal publisher, published a document that, in a European context, can be considered an example of soft regulation, namely "Regulators' Code of Practice: Working together to protect the public interest in Ontario".[39] Its aim is to build transparent cooperation and the practice of enforcing labor law. The word "responsive" is not mentioned, yet its message is clear. The Code of Practice develops traditional regulations, emphasising cooperation with regulated entities. The document indicates that non-compliance frequently arises from misunderstandings or errors rather than deliberate action. It promotes a proactive approach to compliance based on cooperation, communication, and education. Inspectors are encouraged to clarify irregularities and define expected actions. Punishment should be proportional, based on the principle of gradation. Escalation should proceed from education and encouragement to warnings and penalties, depending on the situation. Inspector decisions should be contextually appropriate. These postulates thus align with the theory of responsive regulation.

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37 The ministry may initiate a prosecution against any person for contravening the act or the regulations or failing to comply with an order or requirement of an inspector or a director or an order from the minister (OHSA, Section 66). These prosecutions are conducted by the Ministry of the Attorney General lawyers or paralegals on behalf of the Ministry of Labour, Immigration, Training and Skills Development.

38 Ministry of Labour, Immigration, Training and Skills Development's Guide to the Occupational Health and Safety Act, Ontario Gazette 2017, accessed February 7, 2024, https://www.ontario.ca/document/guide-occupational-health-and-safety-act.

39 Ministry of Labour, Immigration, Training and Skills Development's Regulators' Code of Practice: Working together to protect the public interest in Ontario, Ontario Gazette 2017, accessed February 7, 2024, https://www.ontario.ca/page/regulators-code-practice-working-together-protect-public-interest-ontario.

As previously emphasized, such a regulatory scheme is not an exception and is not only applicable to Canadian legislation. For example, the Australian government agency Safe Work Australia issued "The National Compliance and Enforcement Policy."[40] This document is a basic guideline for occupational health and safety inspectors operating under the Work Health and Safety Act.[41] Similarly, the British regulator bases its work on the Health and Safety at Work Act of 1974 (HSWA)[42] and the "Enforcement Policy Statement."[43]

In summary, the regulatory technique, whether of the legislator of Ontario or the aforementioned Australian and British legislators, occurs on two levels. The first level is the statute. It regulates issues of legal measures, as well as the principles of employee participation in external and internal control. It also fulfils the postulate to informalize responsive regulation. For this purpose, a second level of regulation can be distinguished, which is characterized by soft regulation. At this level, definitions of strategies such as tit-for-tat, the discretionary power of labor inspectors, and an emphasis on a cooperative approach are formulated.

4. Concerns about Basing the Responsive Regulation Procedure on Soft Regulation

To broaden the context of the gains and risks associated with soft regulation in the procedure of enforcing labor law, it is necessary to answer the question regarding the definition of soft regulation and then determine the differences between it and hard regulation. In the doctrine of community law, soft regulation is defined as rules of conduct that, in principle, do not have legally binding power but can still have practical effects, including legal ones.[44] The CJEU revealed the sense of this doctrinal definition in

40 "The National Compliance and Enforcement Policy," Safe Work Australia, March 19, 2020, accessed February 10, 2024, https://www.safeworkaustralia.gov.au/resources-and-publications/legislation/national-compliance-and-enforcement-policy.

41 Work Health and Safety Act 2011, 29 September 2012, ACT Legislation Register no. A 2011–35.

42 Health and Safety at Work etc. Act 1974, 31 July 1974, UK Public General Acts 1974, ch. 37.

43 "Enforcement Policy Statement," Health and Safety Executive, October 2015, accessed February 10, 2024, https://www.hse.gov.uk/pubns/hse41.pdf.

44 Oana Stefan, "European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects," *The Modern Law Review Limited* 75, no. 5 (2012): 879–80 and the literature cited therein.

the Grimaldi v. Fonds case.[45] This ruling concerned the question of whether recommendations could be binding for national courts when they are sufficiently clear, unconditional, certain, and unambiguous. The Court indicated that although recommendations are not binding, which means they cannot be invoked in court – as they are not the basis for rights and obligations – they cannot be said to be irrelevant or legally ineffective. They set the direction of interpretation and explain the purpose of regulation. Moreover, they supplement community law, for instance, where it leaves certain gaps and interpretative spaces.[46] Similarly, the literature emphasizes that the fundamental difference between soft and hard regulation lies in enforceability. In the case of hard regulation's enforceability, it is guaranteed by the state and formalized sanctions. The concept of soft regulation, however, presupposes the existence of many quasi-legal orders.[47] Producers of this regulation can be both private entities[48] and public bodies.[49] Given its amorphous nature, soft regulations take various forms and names, including listing agreements on stock exchanges, advisory resolutions, codes of good practice, declarations, or corporate control mechanisms.[50] Regardless of the form and nomenclature in national or community law, their essence, which needs to be emphasized again, lies in the lack of binding force.[51]

From a linguistic standpoint, the concept of soft regulation reveals a certain paradox. On the one hand, the softness of norms implies their

45 CJEU Judgment of 13 December 1989, Case Salvatore Grimaldi v. Fonds des maladies professionnelles, C-322/88, paras. 15–19.

46 "(...) where they are designed to supplement binding Community provisions."

47 The phrase quasi-legal orders refers to the concept of legal pluralism. A concept that critically approaches the paradigm of the state as a monopolist in regulating human behavior. These occur in almost every organization intermediate between the state and the individual. In all organizations, therefore, a quasi-legal order is produced, which is a hybrid of formal (hard regulation) and informal (soft regulation) norms – living law. See, for instance, Di Robilant, "Genealogies of Soft Law," 534–8. See also: Miranda Forsyth, "Legal Pluralism: The Regulation of Traditional Medicine in the Cook Islands," in *Regulatory Theory*, 235.

48 Di Robilant, "Genealogies of Soft Law," 499–500.

49 Dimity K. Smith, "Governing the Corporation: The Role of 'Soft Regulation'," *UNSW Law Journal* 35, no. 1 (2012): 396–7.

50 Ibid., 380–2.

51 Stefan, "European Union Soft Law," 879–80. See also: Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421–2.

unenforceability. On the other hand, any regulation is a deliberate action[52] aimed at setting requirements for human behavior and influencing it. To achieve such influence, some form of enforceability is necessary. Otherwise, soft regulation would be a collection of wishes hoping for their voluntary execution. This would consequently result in the concept of soft regulation being marginalized, which is in contradiction to the practice of law application.[53]

In doctrine, it is posited that soft regulation can be an effective tool to complement universally established law. An example of this is the concept of legal pluralism, understood as nodal regulation.[54] In a similar vein, J. Braithwaite emphasized that responsive regulation is about coherence and achieving the desired outcome in each case, but this cannot be accomplished through a rigidly predefined procedure.[55]

In adapting Anglo-Saxon practices of soft regulation to Continental legal systems, including the Polish one, two main problems may arise. The first is the uncertainty that an employer subject to regulation would face. It concerns the ambiguity as to whether the "soft" responsive approach will be applied in their case at all. If it is not applied, there arises a doubt whether the employer will have the opportunity to appeal against the decision taken, contrary to the soft procedure but still within the framework of the law. This is the well-known problem in the literature of weakening hard regulations that guarantee a clear level of protection by soft regulations that dilute them.[56] Secondly, in some countries with a Continental legal culture based on the principle of constitutionalism, it appears that there is no room for creating a second soft legal system operating without direct statutory authorization. These doubts arise from the principle

52 Smith, "Governing the Corporation," 393–4.

53 On soft regulation having its own alternative enforcement regime, see: Benedict Sheehy et al., "Shifting from Soft to Hard Law: Motivating Compliance When Enacting Mandatory Corporate Social Responsibility," *European Business Organization Law Review* 24, (2023): 696, 700. See also: Smith, "Governing the Corporation," 391.

54 Cameron Holley and Clifford Shearing, "A Nodal Perspective of Governance: Advances in Nodal Governance Thinking," in *Regulatory Theory*, 164–5.

55 Daly, "Restorative Justice," 110.

56 Isabelle Duplessis, International Labour Organization, Bureau for Workers' Activities, and International Labour Organization, Bureau for Workers' Activities, 2006, *Soft Law and International Labour Law*. *Labour Education*, 42–4.

of legalism and are stronger the more important the position of the parliament in the legislation.

The principle of legalism is one of the most important constitutional principles, probably due to its substantive capacity. In its broadest sense, it is equivalent to the sum of the constitutional features of a modern democratic state.[57] The role of the Constitutional Tribunal is to interpret its content in the Polish legal order.[58] This principle can be understood both formally and materially.[59]

In interpreting its formal content, certain discrepancies exist regarding its national and EU understanding.[60] For example, in the jurisprudence of the CJEU, this principle has been present since 1986[61] when the Court expanded its interpretation, indicating that fundamentally its core is the ability to verify the legality of an action by a public authority, and not the form in which the action was taken. Similarly, some representatives of EU doctrine emphasize that an evolutionary approach to the actions of public authorities should be accepted. J. Figueiredo pointed out the necessity of moving from the principle of legalism to the principle of efficiency, which governs administration in the private market. Thus, the essence is the realization of the goal – meeting the needs of the community – whereas the form in which this occurs, even using new governance instruments like soft regulation, is secondary.[62]

The traditional approach to the formal principle of legalism, which dominates, among others, in Polish law, means that public authorities act on the basis and within the limits of the law. Only legal provisions define the material, organizational, and procedural aspects of the authorities'

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57 Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* (Warsaw: Wolters Kluwer Poland, 2016), 76.

58 Polish Constitutional Tribunal, Judgment of 4 June 2013, Ref. No. P 43/11, Journal of Laws 2013, item 692.

59 Monika Florczak-Wątor, "Art. 7," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Piotr Tuleja, 2nd ed. (Warsaw: Wolters Kluwer Poland, 2023).

60 Jan Siudecki, "Zasada legalizmu a sankcjonowana samoregulacja: analiza na przykładzie porozumienia Prezesa UKE z Telekomunikacją Polską," *Kwartalnik Prawa Publicznego* 11, no. 3/4 (2011): 65.

61 CJEU Judgment of 23 April 1986, Case Parti écologiste "Les Verts" v. European Parliament, Case 294/83, EUR-Lex 61983 CJ 0294.

62 Siudecki, "Zasada legalizmu a sankcjonowana samoregulacja," 49–51.

activities.[63] When it is violated, a compensation claim arises on the part of the citizen. This claim constitutes, on the one hand, a subjective right and, on the other, a guarantee of the implementation of the principle of legalism. Where the influence of the state's "imperium" is significant, the implementation of the discussed principle and claims should be best.[64]

In the substantive interpretation, the principle of legalism includes the concept of citizens' trust in the state, which originates from German judicial practice. It imposes on state authorities the duty to clearly inform citizens about the bases and legal effects of their actions.[65] An individual should be able to determine the consequences of specific behaviors and events based on the existing law and reasonably expect that the legislator will not change this law arbitrarily.[66]

From the substantive interpretation of the principle of legalism in countries with a strong parliamentary democracy, the principle of statutory exclusivity also follows. According to Article 2 of the Constitution of the Republic of Poland,[67] there is no place for sub-statutory norms that are not directly based on laws and do not serve their execution.[68] Moreover, the more important the issue for the citizen, the more detailed the statutory regulation should be, limiting the scope for references to executive acts. This criterion applies especially in criminal and constitutional law, but more broadly concerns any matter of a repressive nature.[69] Undoubtedly, the procedure for implementing a given strategy for enforcing labor law has a repressive character. Therefore, the legislator cannot "create normative structures that constitute an illusion of law and, consequently, provide only

63 Florczak-Wątor, "Art. 7."

64 Polish Constitutional Tribunal, Judgment of 1 September 2006, Ref. No. SK 14/05, Journal of Laws, No. 164, item 1166.

65 Garlicki, *Polskie prawo konstytucyjne*, 76–82.

66 Polish Constitutional Tribunal, Judgment of 14 June 2000, Ref. No. P 3/00, Journal of Laws 2000, No. 50, item 600.

67 The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

68 Polish Constitutional Tribunal, Judgment of 26 June 2001, Ref. No. U 6/00, Journal of Laws 2001, No. 69, item 722.

69 Garlicki, *Polskie prawo konstytucyjne*, 156–8.

an appearance of protecting individual interests."[70] These views are even more applicable to all forms of soft regulation, which seem to mimic hard laws, thereby creating an illusion of enforceable law.

Within the aforementioned comments, the "subthreshold" implementation of responsive regulation in the form of soft regulation, as is the case with the legislature of the province of Ontario, may raise doubts in a continental legal culture. Soft regulation is fundamentally non-binding and does not provide adequate certainty to citizens that the public authority will behave exactly as declared. By "committing" to more favorable treatment under soft regulation, the authority makes an unfunded promise. The legal consequences are also unclear when, despite the "duty" of the labor inspector, he does not behave responsively towards the employer in a specific case. Such a situation undoubtedly violates the principle of the definiteness of the law and citizens' trust in the state.

Highlighting the scope of the issue, it must be noted that the current theoretical form of responsive regulation raises more constitutional doubts. Among the greatest are the principle of equality before the law and the principle of proportionality. According to the first of these principles, employers should be treated equally in identical situations. This means that all entities characterized by a given relevant feature to the same degree should be treated equally.[71] This principle is not absolute, and under certain conditions, deviations from its application are possible. In this light, the question arises whether soft regulation, defining a procedure that, by definition, should be contextual and flexible, provides adequate guarantees in this respect. From the principle of proportionality, it follows, among other things, that the legislator, or more broadly, the public authority,[72] to achieve a given goal may only use the least burdensome means for the regulated entity.[73] In responsive regulation, the regulator (and not abstractly the legislator or court) within the framework of soft law, under conditions

70 Polish Constitutional Tribunal, Judgment of 10 January 2012, Ref. No. P 19/10, Journal of Laws 2012, item 76.

71 Polish Constitutional Tribunal, Decision of 9 March 1988, Ref. No. U 7/87, Official Gazette of the Republic of Poland (OTK) 1988/1/1.

72 Provincial Administrative Court in Kraków, Judgment of 17 May 2017, Ref. No. III SA/Kr 345/17, LEX No. 2298882.

73 Garlicki, *Polskie prawo konstytucyjne*, 123.

of extremely broad discretionary power, will choose one of several or more legal measures, including the suspension of economic activity.[74] The conditions and form of the responsive regulator's action take on a scale unknown to many legal systems and rightfully raise concerns and uncertainty among citizens regarding the protection against excessive interference by the public authority.

It is not entirely clear why, in legislative practice, soft regulation is used to complement hard regulation in defining the procedure for responsive regulation. Considering the current state of knowledge on soft regulation, three likely answers can be proposed.

On the one hand, it can be assumed that this is a necessary action resulting from the nature of soft and responsive regulation. They are complementary. Soft regulation provides a regulatory environment that catalyzes cooperation between the regulator and the employer.[75] Flexibility, organic nature, greater motivation to adhere to one's own solutions, and the non-adversarial nature of meetings provide the contextuality and flexibility of responsive regulation.[76] These elements promote innovation in compliance and learning through discourse,[77] which is also a premise of responsiveness. The fact that soft regulation initially developed within international law suggests its resilience to the variability and complexity of the regulatory subject.[78] These arguments are also known in EU doctrine. Soft regulation as an element of new governance is intended to increase the effectiveness and democratic nature of EU law and to be an effective deregulatory tool.[79] These remarks justify J. Braithwaite's thesis that attempts to rigidly regulate proceedings often have the opposite effect to what is intended, causing compliance with the law to worsen.[80]

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74 See comments in: Zofia Duniewska, "Zasada proporcjonalności a prawo administracyjne – zagadnienia wybrane," *Studia Prawno-Ekonomiczne* 123, (2022): 15 et seq.

75 Di Robilant, "Genealogies of Soft Law," 505–7.

76 Smith, "Governing the Corporation," 415–6.

77 Kenneth and Snidal, "Hard and Soft Law," 422–4.

78 Pavlina Hubkova, "Soft Rulemaking through Multi-level Administrative Practice: Replicating the Aesthetics of Law," *Transnational Legal Theory* 14, no. 4 (2023): 499–502.

79 Siudecki, "Zasada legalizmu a sankcjonowana samoregulacja," 42.

80 John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002), 29–31.

On the other hand, it is likely that legislators did not conduct detailed analyses of the properties of hard and soft regulation. Soft regulation is undoubtedly more beneficial for understanding the effectiveness of an experimental regulatory strategy. It is non-binding and easily reformable. Thanks to this, it is possible to ascertain the outcome in a cheaper and faster way, and it is easier to withdraw.[81]

Of course, a possible scenario is also the simultaneous occurrence of both described motivations. Using soft regulation to implement responsive regulation to the cause of the problem will influence how it is solved. In the second case, the response to the threats resulting from using soft regulation is incorporating responsive regulation into universally binding law. In the first and third cases, it is necessary to consider how to legally use soft regulation to introduce responsive regulation.

Assuming such an approach would be possible, it must be emphasized that some co-occurrence of both types of regulation is inevitable. Limitations on rights and freedoms, including the freedom of economic activity, both in international agreements and, for example, in Article 22 of the Polish Constitution, are permissible only by statute and only due to an important public interest. This means that soft regulation can only regulate the procedure of responsive regulation. Thus, issues such as the catalogue of legal measures, the right to appeal, the scope of authority to conduct inspections, etc., must be governed by hard regulation.

5. The Incorporation of Soft Regulation through Hard Regulation

In the context of responsive regulation in labor protection, there is a lack of a bridging solution that would combine the necessity of using soft regulation with the principles of legality, especially in legal systems with a strong position of the parliament. Soft regulation appears to be a convenient tool for implementing contextual and flexible regulation. Considering the EU's legal experience, it appears possible to combine both regulations in countries like Poland. A bridging solution could be incorporating soft regulation through hard regulation, whose mechanism has been described by P. Hubková.

It is erroneous to assume that soft regulation is entirely unenforceable. Indeed, it has developed its own alternative system for enforcing

[81] Duplessis, *Soft Law and International Labour Law*, 41.

compliance with its provisions.[82] However, it is recognized that the most effective means of enforcing behavior that is compliant with non-binding regulations is achieved by incorporating soft regulation through hard law. A perfect example here is the EU law. In this context, soft regulation is issued by an authoritative supervisory body as a means of filling in the details of a legal loophole created by the vagueness of terms in hard regulation. In this way, soft regulation is valorized and legitimized as a tool helping interpret and apply hard regulations. Moreover, the body's authority guarantees that adherence to its guidelines will minimize the risk of violating binding regulations. In such a case, although soft regulations would not be legally binding at the level of lawmaking, they become legally binding – indirectly – in law application.[83] In addition, EU hard law even forces the creation and application of soft regulation. For example, Directive 2003/51/EC requires companies to report on their implementation of corporate social responsibility – expressed through soft regulation – in relation to employees and the environment.[84]

Similarly, if responsive regulation cannot be detailed in the provisions of hard regulation, as this would distort its essence, soft regulation may be used instead if it is incorporated into the legal order through an authoritative body. This condition can be met by including declarations of responsive action by authorities in the legislation and using vague terms to define its general guidelines. Then, the regulatory body could issue soft regulations that would fill the vague expressions of the law with detailed content. In addition, hard regulation could further strengthen the application of responsive regulation, for example, by introducing reporting on responsive actions in the post-inspection report.

In that case, a mechanism known from corporate governance case law would arise. For example, when the principles of good market practices codified in soft regulation gain approval, they become a measure of careful action that influences court rulings on the fault of a company's body. This happens especially when the prevailing laws leave a certain degree of

82 Hubkova, "Soft Rulemaking," 500–4, 509 et seq.

83 Ibid., 509–14.

84 Mario Vinković, "The Role of Soft Law Methods (CSR) in Labour Law," in *Recent Developments in Labour Law* (Budimpešta: Akadémiai Kiadó, 2013), 102–7.

discretionary power to the company's management. In this way, like general clauses, they influence the application of law by judicial or administrative bodies.[85] Similarly, if soft regulation that frames responsive actions were established by an authoritative supervisory body and gained doctrinal acceptance, it could serve as a criterion for courts in determining the appropriateness of regulatory bodies' behavior. This, in turn, would provide a certain range of guarantees and legal security for employers. Over time, some soft regulatory guidelines of responsive regulation could be incorporated into statutory regulation. However, such actions would require caution to maintain flexibility in applying the law.[86]

It should be emphasized that it is essential for the legislator to use vague terms to define general principles of responsiveness at the level of hard regulation. This is important because the greatest enemy of soft regulation is the strict use of literal interpretation in applying the law. For soft regulation to retain its effectiveness, it requires the use of teleological interpretation, which takes into account the broader context of the functioning of the regulated entity. In countries where the legal culture requires the literal application of provisions, the use of vague terms by the legislator forces the authority applying the law to take a flexible and contextual approach to its interpretation, necessarily following soft guidelines issued, for example, by the central labor regulator.[87]

6. Conclusions

In doctrine, two distinct strategies for navigating the enforcement pyramid have been identified. At the base, the regulatory body should typically begin with the strategy of restorative justice, while at higher levels, it should transition to the tit-for-tat tactic. In both approaches, the broad discretionary power of the regulator is a fundamental element. The regulator should have the freedom to understand the regulatory context and the characteristics of the regulated employer, ultimately deciding where to start the regulation. This implies that regulation may proceed differently for each employer due to changing circumstances. The objective is to achieve the desired outcome

85 Smith, "Governing the Corporation," 402–4.
86 Vinković, "The Role of Soft Law Methods (CSR) in Labour Law," 106–9.
87 Ibid., 105–9.

by employing escalation for de-escalation. Consequently, responsive regulation may prove incompatible with the traditional procedural code, which is inherently rigid, not flexible, abstract, and not contextual.

Soft regulation effectively supplements the shortcomings of hard regulation. Firstly, its informal nature, non-adversarial approach, organicity, and openness to innovation fit perfectly with the tactics of restorative justice and tit-for-tat. These factors have likely contributed to the widespread use of soft regulation by responsive regulators (including Canadian, Australian, and British ones). In response to the first research question, these observations may indicate the necessity of using soft regulation in the procedure of responsive regulation.

Moving on to the second research issue, using soft regulation in responsive regulation for labor protection raises several doubts. First, it should be emphasized that soft regulation is not inherently secured by state coercion. Although there is an alternative system for enforcing its provisions, it is noticeably weaker, mainly due to low pressure and lack of accountability. For this reason, there is a trend in law to move away from its use in matters related to labor law. Thus, soft regulation leads to a blurring of regulatory accountability in case of non-compliance. The regulated employer will not have guarantees whether appropriate claims will be available to them. The lack of proper guarantees in hard regulation breeds distrust among citizens, which, in turn, is inconsistent with the material aspects of the principle of legality. Additionally, there are doubts about using soft regulation instead of statutory regulation to norm the procedure of enforcing labor law. Such a regulatory technique is inconsistent, among other things, with the Polish Constitution.

Given the attractiveness of responsive regulation and its potential to solve the problems facing labor law, instead of abandoning the idea of soft regulation and thus weakening the effectiveness of responsive regulation, it is necessary to seek bridging solutions. Without them, implementing responsive regulation into some legal systems will be impossible. One of the solutions, which is important to emphasize, only resolves some doubts, is the incorporation of soft regulation through hard regulation. This solution could lead to the legitimization of soft regulation.

In conclusion, further research on the problems and their solutions is necessary to translate the responsive regulation theory into different legal

systems. There are many doubts, some of which have already been indicated in the article. They mainly concern issues related to constitutional principles of proportionality, equality before the law, and the exclusivity of statutes. These issues must be considered when creating theoretically implementable solutions.

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