LAW IN THE RISK SOCIETY

A Ucall Conference
9 and 10 April 2015
Achter St. Pieter 200, 3512 HT Utrecht
Raadzaal
Law in the Risk Society

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Law in the Risk Society

On 9 and 10 April 2015 the Utrecht Centre for Accountability and Liability Law will host its annual conference:

Law in the Risk Society

In 2016, it will be thirty years ago that Ulrich Beck published his Risikogesellschaft. Auf dem Weg in eine andere Moderne (Risk Society – Towards a New Modernity). The essence of the book is that contemporary modern society is confronted with the side effects of the successes of the processes of industrialisation and individualisation. This confrontation is visible in, amongst others, the (social) consequences of climate change, industrial activity and linear economic growth, the shift of focus from freedom to security, prevention and precaution, the disembeddedness of groups and individuals, and the deepening of inequality in terms of both wealth and risk exposure.

Beck suggests that to seek answers to the questions this confrontation gives rise to, we need to be reflexive upon the intellectual foundations of modernity. For lawyers and legal scholars, it means to explore and possibly reconsider the legal foundations of the “modern project”, their concepts and methodology, in order to deal effectively and justly with these side effects. This can have consequences for the foundations of accountability and liability law, but also changes the relations between public and private regulatory systems that concern modern risks. On January 1st Ulrich Beck passed away. This conference is dedicated to celebrate the work of Ulrich Beck and its impact.

The need for reflexivity is explored in the main theme and four subthemes that make up the conference:

Subtheme 1 Regulatory failures and new forms of risk regulation in modern risk society
Subtheme 2 From prevention of risks to imputation of consequences; duties of care, positive obligations and causation
Subtheme 3 Risk regulation of new technologies: challenges and opportunities
Subtheme 4 Risk commodification and the economic opportunities of the risk society
Subtheme 5 The risk society and the need for a new methodology for research and education

We hope to welcome you in Utrecht in April!

The conference team

Ubaldus de Vries - Lucas Roorda - Evelien de Kezel
Eelke Sikkema - Marjosse Hiel - Anne-Jetske Schaap
The programme in detail

A print version will be available upon registration on April 9th.

**Wednesday 8 April**

15.00-17.00  
Student seminar with Scott Veitch  
Toon Peterszaal, Achter St. Pieter 200, Utrecht

17.00 – 19.00  
Welcome reception for participation delegates  
Location: Iokaal negen, Trans 7, Utrecht

**Thursday 9 April**

9.00-9.30  
Registration, coffee and tea

9.30-9.45  
Welcome by Ivo Giessen and Francois Kristen (Directors of Ucall)

9.45-10.00  

10.15-12.00  
Keynote address, delivered by Professor Scott Veitch: “Law in the Risk Society: Challenging Legal Concepts”  
A reply by Professor Ferry de Jong, followed by Discussion, chaired by Professor Ivo Giesen

*Lunch, coffee, tea and fruit*

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**Coffee, tea and fruit**

**15.00-16.45 Parallel sessions II**

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19.00 Conference dinner – A walkin’ dinner at *De Rechtbank*
Korte Nieuwstraat 14, Utrecht
### Friday 10 April

**9.30-10.00**  
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| Aline Reichow  
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| Roeland de Bruin  
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**Lunch, coffee, tea and fruit**

**13.00-15.00**  
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*Proof of causation in toxic tort* |
| Rutger Fransen en Tim Bleeker  
*Transnational corporate responsibility revisited: liability beyond the national paradigm in a risk society* | Open discussion about methodology and education: what methodology fits the risk society? | Stanislaw Tosza  
*Criminal liability of managers for excessive risk-taking?* |
| Adriana Placani  
*Is a risk of harm a wrong and/or a harm?* | | Jessy Emaus  
*Facing Power: An Analysis of the Legal Responsibility of Financial Services Providers* |
| Maria Weimer  
*Re-thinking EU regulation of technological risks and its modernist foundations* | | |

6
Coffee, tea and fruit

15.30-17.00

Closing sessions – Round Table: “Law in the Risk Society – Ways Forward”
Raadzaal, Achter St. Pieter 200
About the plenary session


One of the provocations of Ulrich Beck’s sociology of risk society is to assess its meaning for law and legal institutions. This lecture provides an account of a double challenge: first, to understand how conventional legal concepts may be complicit in the production and maintenance of systems of “organized irresponsibility”; and second, to consider how legal concepts may themselves be adapted to challenge this situation. These issues are addressed in the context of Beck’s account of asymmetric practices of responsibility, reflexive modernization, and individualization. His final work introducing the notion of metamorphosis – reflecting changes to how we understand the meaning of change - in social theory and practice, and its potential implications for law, will also be addressed.

Professor Veitch is Paul K C Chung Professor in Jurisprudence of University of Hong Kong. Prior to that he was Professor of Jurisprudence in Glasgow. In his work he stands at the crossroads of jurisprudence, social and political theory. In 2007 he published Law and Irresponsibility – On the legitimation of Human Suffering (Routledge, 2007).

- Professor Ferry de Jong, “A reply to Scott Veitch”

Ferry de Jong studied law (LLM 2002) and Scandinavian studies (MA 2002, cum laude) at the University of Amsterdam and at Universitetet i Bergen, Norway. He obtained his PhD (cum laude) at the Willem Pompe Institute of Criminal Law and Criminology of Utrecht University in 2009. In the Spring Semester of 2011 he was Visiting Scholar at the Center for Law and Philosophy of Columbia Law School in New York City. He was appointed as Professor of criminal law and criminal procedure in June 2014.
About the themes, the sessions, speakers and their abstracts

General theme
Law in the Risk Society
Bald de Vries

In 2016, it will be thirty years ago that Ulrich Beck published Risikogesellschaft. Auf dem Weg in eine andere Moderne (Risk Society – Towards a New Modernity). The essence of the book is that contemporary modern society is confronted with the side effects of the successes of the modern project that have become eminent in the processes of industrialisation and democratisation. This confrontation is visible in, amongst others, the (social) consequences of climate change, industrial activity and linear economic growth, the shift of focus from freedom to security, prevention and precaution, the disembeddedness of groups and individuals, and the deepening of inequality in terms of both wealth distribution and risk exposure. The description of world society as a world risk society is the social-theoretical framework of Beck’s broader theory of reflexive modernisation in which the processes of industrialisation and democratisation are radicalised in the processes of globalisation and ‘forced’ individualisation. In brief, the theory suggests that this confrontation forces us, so to speak, to reconsider or re-evaluate the foundations of the modern project. For lawyers and legal scholars, it means to explore and possibly reconsider or re-evaluate the legal foundations of the “modern project”, their concepts and methodology, in order to deal effectively and justly with the side effects. This theoretical framework is one of the pillars for research into liability and accountability, as carried out in Ucall – the Utrecht Centre for Accountability and Liability Law. What does responsibility (in the broadest sense of the word) mean for law in the world risk society, when we consider that one function of law lies in the distribution of responsibility? What does liability as a means to distribute loss mean in the world risk society? Are the criteria we use applicable in respect of risks and their catastrophic consequences? These two fundamental questions are explored in the general theme and we do so from a legal philosophical and socio-theoretical angle, problematizing the core aspects of Becks theory reflexive modernisation.

Session 1: Risk, regulation and liability (a)

Speakers
• Henry Rothstein (King’s College London)
Risk and the limits of governance: exploring national styles of risk regulation across Europe

Abstract:

We are said to live in a Risk Society and one example of this is the wide promotion of risk-based approaches to regulation as universally applicable foundations for improving the quality, efficiency, and rationality of governance across policy domains. Premised on the idea that regulation cannot eliminate all adverse outcomes, these approaches provide a method for establishing priorities and allocating scarce resources, and, in so doing, rationalise the limits of what governance interventions can, and should, achieve. Yet recent comparative international research (Rothstein et al 2013) by the HowSAFE project suggests that risk-based approaches have spread unevenly across European countries.

Based on a comparison of the UK, France, Germany and the Netherlands, this paper explores how and why risk-based approaches have “colonised” regulatory regimes in the UK and to a degree the Netherlands, but have had much more limited application in France and Germany. The paper suggests that the institutionally
patterned adoption of risk-based governance across these four countries is related to how deeply entrenched governance norms and accountability structures within their national polities handle both the identification and acceptance of adverse governance outcomes. In so doing, the paper identifies hitherto relatively ignored factors that shape and constrain state intervention to manage perils, such as constitutional settings, legal traditions and political philosophies of the state.

- Lucas Bergkamp

*Is the concept of the risk society an acceptable model for risk regulation in a democratic society?*

Abstract:

Beck’s Risk Society has been a rich source of academic inquiry into a range of issues relating to the governance of risk. Law, both public and private law, have long been concerned with risk and damages resulting from the materialization of risk. Public law regulates risks and private law provides private remedies for unjustified risk taking and damage.

Although conceptually not restricted to public law, the concept of risk society is typically thought of as primarily relevant to risk regulation. As a purely descriptive concept, risk society can be viewed as an explanation of what, in fact, happens in risk regulation. But there is little empirical evidence demonstrating that risk society phenomena are representative for the real world or have been generalized. As a prescriptive theory, based on views of science and politics that reflect particular political positions, risk society proposes a reflexive process for social constructivist identification of risk, politically relevant science, and risk governance based on public participation, monitoring, and resistance.

In this presentation, the concept of risk society as a description of the scientific process and as a theory of risk governance is analyzed and criticized. The risk society model misunderstands and thus provides distorted pictures of both science and politics. Further, rejecting an objective, “neutral” or merely procedural approach to risk governance, risk society thinking imports into risk governance ideas that are potentially subversive to risk regulation in a democratic society. The conclusion is that the key ideas of the risk society model are unfit to serve as the basis for risk policy making.

- Maciej Pichlak (University of Wroclaw)

*Regulating risk and different modes of law’s reflexivity*

Abstract:

The paper consists of two parts. Firstly, it begins with an examination of one of the most prominent features of contemporary legal orders, which is extensive attempts in enhancement of regulatory processes. Numerous programmes and policies (termed as ‘Regulatory Reform’, ‘Smart Regulation’, ‘Better Regulation’ etc.) have been adopted in that respect, both on national and supra-national level (EU, OECD). As the paper indicates, a key element of such programmes is risk-regulation and risk-management in various forms. Leaving aside technical issues of reliability and prudence of different methodologies in this area, the paper explores the wider sociological context of these tendencies. In this context it is claimed that both the entire regulatory reform programmes, as well as their particular elements related to risk-management, are symptoms and effects of a general reflexivity of contemporary social institutions, including legal systems.
In the second part, the paper compares different versions of a theory of law’s reflexivity – in particular focusing on its systemic and institutional interpretations. Systemic interpretation is illustrated by the Günther Teubner’s theory of reflexive law (being itself the best known elaboration of the problem of reflexivity within the scope of legal scholarship). The paper proves that such a theory, due to its focus on purely formal aspects of the legal system, is generally unable to grasp a crucial novelty brought by the aforementioned regulatory processes. Subsequently, the paper turns to institutional theory of reflexivity, which covers both formal and material aspects of social practices, thus offering a plausible ground for analysis of the aforementioned processes within current legal orders. In that respect, some differences between the treatment of the problem by Anthony Giddens and Ulrich Beck are scrutinized. As such a comparison demonstrates, these two authors differ mainly in understanding the role of structure and agency within institutions.

- **Roland Pierik (University of Amsterdam)**
  
  *Can law regulate risks that emerge from constitutionally protected choices?*

**Abstract:**

Diseases like polio, measles, mumps, whooping cough, and rubella have been dramatically reduced over the last decades as the result of the introduction of routine childhood vaccinations. A very large majority of parents voluntarily enrol their children. This paper focuses on parents who refuse to vaccinate their children, the new risks they generate for society at large, and ways in which law can mitigate these risks.

Until recently, non-vaccination was mainly confined to religious communities within the Bible Belt. However, in the last two decades, a broader anti-vaccination movement has emerged, generated for example by the (now fully debunked) vaccination-causes-autism claim that was trending a decade ago. This new wave of vaccine denialism generates a growing threat to herd immunity: the phenomenon that only when a critical portion of a community is immunized against a contagious disease, the virus can no longer circulate in the population with the effect that the disease cannot gain a foothold in that society. Medical experts argue that we are about to reach a tipping point in which herd immunity can no longer be guaranteed. And indeed, we can observe a growing number of outbreaks of infectious diseases in Western Europe and North America in the recent years. The most recent example is the measles outbreak that began in Disneyland (January 2015) and has spread all over the US.

New is that these outbreaks no longer merely affect children born within non-vaccinating groups. In August 2014, a consciously unvaccinated nine years’ old child infected three babies with the measles a Dutch day care centre. One six months’ old baby fell seriously ill: he spent a few days in intensive care and nearly died. Although he was enrolled in the vaccination scheme, he was not yet protected because the first vaccination against the measles is only given in the fourteenth month. Such cross-infections are possible within day care centres, because unprotected babies under 14 months share facilities with (unvaccinated) children up to 12 years old. Another example is Carl Krawitt, a 6 years old boy who fought leukaemia, and therefore cannot be vaccinated. His frail health makes him vulnerable to diseases like the measles. He is especially vulnerable because his school in Marin County California has an exceptional high number of unvaccinated children due to ‘personal belief exemptions.’

The growing number of parents that refuse to vaccinate their children poses an emerging threat to children who are too young to be vaccinated of who cannot be vaccinated for medical reasons, and whose protection against (highly) infectious diseases is highly dependent upon others around them. These new risks of non-vaccination are the result of choices of parents of other children than those affected, choices...
that might be protected by the fundamental right of religion and conscience. This paper analyses whether and how criminal and tort law can regulate these new risks.

Session 2: Law, Regulation and Transformations

Speakers
• Friederycke Haijer
  Differentiation in the national prosecution of foreign corruption: perspectives from the United States and the Netherlands

Abstract:

International anti-corruption instruments include far-reaching jurisdictional provisions; specifically, they allow for the passive and active nationality principle. The intention is to ensure jurisdiction for prosecutions of bribery that did not take place within the territory. Many countries have incorporated these provisions in their national legislation and legislation on the criminalizing of foreign corruption has reached a high level of harmonization internationally. Similar to other efforts at prosecuting international crime at the national level, the number of prosecutions varies immensely between different countries. For example, between 1999 and 2012, there were 236 prosecutions for foreign corruption in the United States of America, and just 1 in the Netherlands, despite strong similarities in both countries’ legislative regimes.

A US attorney was recently quoted saying “This is not the time for the United States to be condoning corruption. We are a world leader and we want to do everything to make sure that business is less corrupt, not more.” Meanwhile, the Dutch prosecutor responsible for combating foreign corruption in his speeches on the topic has placed emphasis on compliance and self-regulation.

Drawing on empirical data from the United States and the Netherlands, this paper will argue that the differences in numbers of prosecutions for foreign corruption can in part be explained by cultural factors: how prosecutors perceive their own role and the position of their country in the world, determines how active they are in initiating investigations and prosecutions.

• Wouter Ernst & Andrea Keessen (Utrecht University)
  The adaptiveness of law put to the test: dealing with water scarcity in a water-rich country

Abstract:

Arguably law should become adaptive in order to facilitate adaptation to climate change. However, adaptiveness is not the only feature of law. Too much flexibility runs counter to the need for stability, enforceability and legitimacy. Therefore a balance should be struck. Legal experiments could open up the discussion about the need for and the extent of legal adaptation to climate change. This need for experiments motivated our choice to analyze and compare two different adaptation measures which deal with water scarcity in a water-rich country like the Netherlands and to uncover to what extent dealing with the risk of water shortage requires a rule change. Our cases show that the legal system itself did not adapt to a situation of water scarcity for which it was not designed, but proved sufficiently flexible to accommodate this goal.

• Frans Koenraadt (UU/NIFP/FPK Assen)
  How personal is the risk in risk assessment in forensic mental health
Abstract:

Crucial in pre-trial forensic mental health reports is the individualization through observation and assessment in order to gain a clear description of the person involved. It is constantly a certain threat that the information provided in the report is too much at group level rather than on a personal level. The report however is meant to focus the information collected on the individual level of the person of the accused. Here we have a distinction that in psychological methodology has been a topic of discussion. It is considered to belong to the core now for forensic behavioral scientists who report for the court. The distinction that seems to divide forensic mental health experts is that between the nomothetic and the idiographic approaches. One category of nomothetic instruments is that of risk assessment and risk management instruments that as a result of the thinking in terms of risk society became very popular recently. In this presentation the risk of risk assessment will be examined and illustrated with examples by recent jurisprudence of criminal law procedure.

- Yu Yan (Maastricht University)
  The development of road traffic accidents Liability in China

Abstract:

The development of road traffic accidents liability (RTAL) in China can be divided into five phases. Started with the “non-legal based fault liability regime phase” (1978-1987). The “strict liability regime phase” (1986-1992) and “presumed liability regime phase” (1992-2004) were following afterwards. During 2004 to 2008, “triple-track liability regime” was applied. Within this regime, strict liability is applied when accidents happen between vehicle and non-vehicle party, and presumed liability is applied when accidents happen among vehicles or among non-vehicles. What’s more fault liability is adopted in case of property loss compensation. Since 2008, the “dual-track liability regime” comes into effect. Presumed liability is now valid for traffic accidents between vehicle and non-vehicle party. Fault liability is adopted for accidents among vehicles or non-vehicles as well as for compensating property loss. There is an interesting cycle in the course of China’s RTAL development, which provide nice case to enrich the study of global trends and norms in the RTAL arena.

This article first sketches the evolution of RTAL in China. The evolution is set against two backgrounds. First is increasing awareness of Chinese government who is ever more willing to protect victims in road traffic accidents against risks created by vehicles. Second are the intensive legal efforts in terms of reducing road traffic accident rate. This paper outlines problems that emerged in practice. Assisted with empirical data, this article also explores causes and impetus behind these changes, as well as the effectiveness of each phase’s liability regime Moreover, traffic regulations will also be discussed because the role of these administrative measures are so important in China that and cannot be neglected. Finally, the development of compulsory insurance system will be taken into account in order to comprehensively understand the reform of RTAL.

Session 3: Risk, regulation and liability (b)

Speakers
- John Fanning (University of Liverpool)
  “Risk society” and the decline of duty of care in the era of the United Kingdom Supreme Court

Abstract:
Donoghue v Stevenson, the landmark case which arose out of the discovery of a decomposing snail in a bottle of ginger beer, gave birth to the tort of negligence in English law. Its underlying principle continues to define and delineate the nature and scope of the duty of care in the law of tort. Yet how society interprets and responds to risk has moved on enormously in the 83 years since the House of Lords gave its famous judgment in Donoghue’s case. Situations of risk no longer necessarily coalesce around “vertical” relationships between proximate parties, e.g., employer-employee. Instead, they may comprise the complex hazards of modernity with a high catastrophic potential and a global reach. In contemporary society, everyone is therefore simultaneously responsible for managing hazards and perpetually “at-risk”. This has in turn created a society in which the attenuation of situations of risk has become a priority for public policy and law. This paper questions whether the classic construction of the duty of care still comports with the way society constructs risks of injury, loss or damage. Using the risk society theories of the late Ulrich Beck as an explanatory model, it argues that shifting contemporary social attitudes to risk may ultimately lead to the marginalisation of the duty concept as a structurally significant component of the tort of negligence. In its place, this paper contends that liability for negligence in English law may come to depend solely on the risks in the relevant circumstances. This will in effect impose a universal and residual obligation on everyone to take reasonable steps to attenuate foreseeable risks of injury and reduce the reach and scope of immunities from suit in English law.

- Rutger Fransen & Tim Bleeker (Utrecht University)
  Transnational corporate responsibility revisited: liability beyond the national paradigm in a risk society

Abstract:

Recent Dutch court decisions established that Royal Dutch Shell (RDS) could not be held responsible for the oil contamination which had severely impacted much of the environment in Ogoniland, a region in South Nigeria. As RDS received an annual profit of $1.8 billion from its extraction of petroleum in Ogoniland, we may question whether transnational corporations (TNCs), such as Shell, are held sufficiently responsible for the environmental damage they cause.

This article aims to reassess TNCs’ liability for the actions of their foreign subsidiaries from a socio-legal perspective, using the theories of Ulrich Beck and Thomas Pogge. Combining these theories allows us to explain the global risks inherent to the process of modernization, while problematizing our current indifference for the gravely unjust distribution of these risks. Whereas TNCs act globally, liability law remains restricted to the national level. The Dutch Shell Nigeria case exemplifies that claimants may encounter hurdles which flow from the applicable national liability regimes, in their search for redress against TNCs for the damage caused by their foreign subsidiaries. Using the Dutch Shell Nigeria case as a vehicle, we argue that the different national liability regimes result in a liability deficit for TNCs’ foreign subsidiaries. In order to tackle the unequal distribution of benefits and risks, we formulate the normative argument that TNCs’ liability should be reassessed from a global perspective.


• Adriana Placani (University of Budapest)

**Is a risk of harm a wrong and/or a harm?**

**Abstract:**

This essay answers two questions that continue to drive debate in legal philosophy; namely, "Is a risk of harm a wrong?" and "Is a risk of harm a harm?" My central claim is that to risk harm can be both to wrong and to harm. This stands in contrast to the respective positions of Heidi Hurd and Stephen Perry, whose views represent prominent extremes in the debate about risks. This essay shows that there is at least one category of risks—intentional impositions of risk on unconsenting agents—which can be both wrongful and harmful. The wrongfulness of these risks can be established when, on the balance of reasons, one ought not to impose them. In cases where agents act for the wrong reason of harm production, this wrongfulness requirement is defeasibly met. The harmfulness of these risks can be established when they can be shown to set back legitimate interests. In cases where risks constitute a denial of the moral status of agents onto whom they are imposed, they set back agents’ interest in dignity. Having shown that risks can both wrong and harm, I return to Hurd and Perry and confront some of their objections. By showing that my account can answer their challenges, the preferability of my position is further strengthened.

• Maria Weimer (Universiteit van Amsterdam)

**Re-thinking EU regulation of technological risks and its modernist foundations**

**Abstract:**

In contemporary risk societies, regulating technological risks confronts deep uncertainty, limited knowledge, and societal contestation. This in turn forces a transformation of the traditional model of regulating risks. The need for an alternative precautionary and socially inclusive approach is widely recognized, yet translating this approach into viable legal concepts and approaches remains a challenge. This contribution focuses on how this challenge is being addressed at EU level. Despite reform attempts and the official recognition of the precautionary principle, EU regulatory practice often still follows an outdated technocratic approach treating complex technological risks as simple ones, and neglecting uncertainty. The technocratic (or deterministic) approach is in turn deeply rooted in the modernist paradigm, which understands science as culture-neutral, universalistic and objective, and presupposes a linear separation between risk assessment and risk management, and between facts and values. This paper intends to show that at EU level the attractiveness of the technocratic paradigm is reinforced by the self-legitimation needs and practices of the EU as a nascent supranational polity, and its market building project. In other words, the growing powers of the EU regulatory state have long been justified with the promise of scientifically sound, apolitical, expert-based regulation to tackle transboundary problems. This in turn has also influenced the shaping of EU legal frameworks for regulation. On the basis of two case studies (i.e. GMOs and chemicals), this paper will show the need to re-think current regulatory and legal practices, and identify emergent alternative pathways of conceiving both of the EU and of its risk regulation.
Subtheme 1
Regulatory failures and new forms of risk regulation in modern risk society
Elbert de Jong

In the development of technologies, safeguarding societal interest such as the natural environment and physical safety, is a primary responsibility of national and supranational governments. However, by their nature modern technologies create several difficulties for governments in developing adequate regulatory schemes for dealing with (emerging) technologies and the global (risks that come along with these technologies).

These difficulties may in the end lead to (the threat of) regulatory failure. In situations of a regulatory failure (a certain form of) regulation of risks is desired, but governments do not (or cannot) provide the regulations needed. A regulatory failure includes a situation in which it is likely that regulators will fail to regulate a risk in the future. Regulatory failures have at least two consequences. First, in case of a regulatory failure it is unclear which actor has what responsibility. Second, regulatory failures create the threat of an unwanted materialization of risks or can even lead to the materialization of risks. An important question, then, is who decides whether there is a regulatory failure. Is it national governments that signal the threat of a regulatory failure at national level, NGO’s, corporation’s or a judge?

In order to prevent or correct regulatory failures, various actors explore several (new) legal mechanisms. One could think of preventing regulatory failures by making private actors (more) responsible for the regulation of a new technology (self-regulation). But one could also think of civil law injunctive relief procedures as a crowbar to remove regulatory failures. These mechanisms are explored by governmental actors and non-governmental. For example, injunctive relief procedures are frequently used as a mechanism to force national governments to reduce greenhouse gas emission. And in the context of nanotechnology, governments acknowledge the shortcomings of traditional risk regulation and therefore pursue new risk regulation schemes, such as soft law mechanism (e.g. voluntary codes of conducts or self-regulation).

The central problem of this theme lies in exploring new mechanisms of risk regulation, which is based on four assumptions. 1: there is a (threat of a) regulatory failure. 2: the traditional way of regulation is insufficient for dealing with the technology and (uncertain) risks in question. 3: the new mechanism is necessary and desirable to overcome or prevent a regulatory failure. 4: the mechanism is suited for this purpose and provides, to a certain extent, a ‘better’ instrument of risk regulation. The question is whether and under which conditions these assumptions are sound. We are seeking for papers that explore topics referring to, amongst others, the definition, characterization and identification of regulatory failures; who decides upon the existence of a regulatory failure (who are the primary actors?); causes of regulatory failures; legal mechanisms to redress failures; the ‘pros and cons’ of the identified new mechanisms in terms of legitimacy, quality and effectiveness.

Session 1 – Risk regulation a
Speakers

• Ludo Veuchelen (The Belgian Nuclear Research Centre)
  The (in)effectiveness of the normative principle ALARA in nuclear safety law

Abstract:
Establishing a risk management policy for high technology industrial sectors is a complex and arduous process. In view of the societal developments over the last decades, and partly also because of risk-
aversion, one is faced with the challenges of gaining societal trust, stronger stakeholder involvement and long-tail goals for sustainable development.

Safety policy and regulation have to address both the generic risks over the long term (Risk Assessment and Policy) as the day-to-day operational risks (Risk Management). Such Risk Policy and Management must be regulated in a transparent, democratic and effective way, taking into account security of law, predictability, reflexivity, giving incentives for safer behaviour, monitoring and sanctions, access to justice, enforceability, liability and compensation.

The ALARA Principle is acclaimed in the nuclear sector as being a forerunner of the Precautionary Approach and of Reflexive Regulation. In reality, ALARA is a “catch-all formula” conceived by International Scientific Committees, such as ICRP, without any legal background and without a clear mandate from the EU regulatory bodies, i.e. EURATOM and the EC Commission, which are responsible for preparing and publishing the Nuclear Safety Directives, in which ALARA is simply mentioned among the Basic Nuclear Safety Principles.

A comparison with BAT/BATNEEC, which is technology based instead of performance based, will shed more light on the effectiveness of "Principles Based Regulation", a regulatory technique which is the more and more explored as a way of bridging the gap with purely technical and command-and-control regulation, which clearly failed in the past.

As a conclusion will be argued that upstream as a Policy Principle, ALARA should be process-oriented with more Official Guidance; downstream, as a Legal Principle (a legal standard of due care), it should be performance based, using minimal safety standards, monitored by an independent Safety Agency. A better combination of hard and soft law is thereto needed.

- Thomas de Weers & Tessa de Zeeuw (Utrecht University)

The Performative Potential of Private Law in the Risk Society: Participation and Responsibility in the Urgenda Case

Abstract:

On November 20th, 2013, the Dutch organization Urgenda summoned the state of the Netherlands to court on grounds of neglect with regard to the damage caused by climate change. The trial is still underway, but it is already clear that, from a legal perspective, it is not going to be a success. However, Urgenda used an inventive approach, called ‘crowdpleading’, whereby they invited the public at large to participate, both financially and in writing, in the summons.

This approach makes the case interesting in the context of the problems that have arisen with the onset of the Risk Society. In their article ‘Lege magen, holle ogen’, De Vries and Francot argue that our current social situation of interdependence calls for a new way of distributing responsibility. The scale of damages in our globalized world, they argue, requires us to reconsider our tort liability system. Damage caused by climate change is exemplary: assessment of tort liability is practically impossible. In addition, and perhaps as a consequence of this, a feeling of collective responsibility in light of the global environmental crisis is lacking also. We will analyze the Urgenda case in light of this latter issue. Starting from the angle that trials have a distinctly theatrical structure, that they are performances in front of an audience, and that they therefore have the potential to change social reality (Horsman, 2010; Felman, 2001), the approach taken by Urgenda is striking. We will argue that in the Urgenda case, the courtroom functions as a podium from which a claim is made that effectively, performatively, reaches beyond the mere distribution of damages.
We will read the ‘crowdplea’ as a ‘gesture’ (Benjamin, 1968) that may, through its participatory nature, potentially contribute to a sense of collective responsibility vis-à-vis the damages caused by climate change.

- **Anoeska Buize & Herman Kasper Gilissen (Utrecht University)**

  Causes of regulatory failure – the epistemological weakness of climate models as a legal argument

  Abstract:

  The vast majority of knowledge we have about climate change is derived from climate models. Although in the past decades modelers have made a lot of progress in improving the reliability of their models, they still have some inherent weaknesses. Policy makers have no alternative to these models when determining their policy on climate change, though. This makes any decision to adapt to climate change vulnerable to attacks based on the alleged failures of climate modelling. Although this is to some extent a political issue, it is also a legal issue. It is eventually up to the courts to assess whether public authorities have made proper use of climate models in their decision-making processes, and whether their final decision can be justified based on the information provided by the model.

  This contribution explores three issues. First, it discusses how courts deal with climate models when they are presented as evidence, and whether such models are considered a proper motivation for public decisions. Second, it looks at the rules regarding the use of scientific knowledge from a more general perspective. Rules on how to deal with scientific uncertainty are tailored to prevent actions that carry risks.

  The precautionary approach is based on the idea that it is better to be safe than sorry. However, when it comes to proactive approaches, this idea is thrown out of the window. There is no obligation to take action even if the available models indicate there is a real risk. The problems with this ‘proactive precautionary approach’ will be illustrated with an example from Dutch water law. Although the lack of a proactive precautionary norm is understandable, because it would require an indefinite number of proactive measures, it is still a fundamental problem. Therefore, the third issue we will discuss is the need for so-called ‘robust solutions,’ and the extent these robust solutions can be integrated in the legal system.

- **Leonie Reins (KU Leuven)**

  “New” technologies and the law: how does the wrapping matter for its regulation?

  Abstract:

  Within the last two decades, several “new” technologies have been emerging in the European Union’s energy and environmental area. Amongst these were the Carbon Capture and Storage technology, which aims at, as its name suggests, capturing CO₂ from large point sources (power plants) and transport it to a storage site to depose or store the latter in underground geological formations, the nanotechnology which manipulates or fine-tunes materials at atomic, molecular and macromolecular scales and most recently the shale gas hydraulic fracturing technology to extract gas from deep ground shale formations.

  While all these technologies were - and to some extent still are - perceived to be new, the regulatory approaches to these technologies differ. The regulatory design debate regarding nanotechnology was, at least in the beginning, characterised by a cooperative approach between industry, non-governmental organizations and the general public. Action on a European level includes a European strategy for nanotechnology, a European action plan, a common definition established though a Recommendation and a code of conducts. However there is no specific legislation on this matter. The general health, safety and environmental legislation, such as the REACH Regulation, the Plant Protection Directive, and the so-called “new approach on technical harmonisation and standardisation” legislation (especially regarding
machinery, personal protective equipment, low-voltage, medical devices, etc.) and more sector specific regulation on for example cars, medical products, food or cosmetics applies.

The discussion surrounding the CCS technology on the other side resulted in the adoption of binding legislation. The CCS Directive 2009/31/EC amendments the Water Framework Directive, the Waste Directive and several other Directives. The European Commission itself promotes that “although the components of CCS are all known and deployed at commercial scale, integrated systems are new, and a clear regulatory framework is required. The EU’s CCS Directive provides this.”

The most recent “new” technology is the shale gas hydraulic fracturing technology. The shale gas debate in the European Union is characterised by the classical opposition of industry, NGOs, etc. A non-binding Recommendation outlining minimum principles is the only specific regulatory approach so far. As such shale gas is considered to be a “new” technology. However, one can question if the technology (and its impacts) is really new and uncertainties are associated with the activity or whether it is rather the likeliness of the impacts which are at question.

The presentation will analyze these trends in EU regulation on new technologies, more specifically the regulatory approach taken on shale gas (the recent recommendation on shale gas and the fact that it is a recommendation and not a Directive) and compare it with the nanotechnology/CCS discussion and the regulatory approaches taken for these activities. It will focus on questions such as “where is the “soft” in soft law?” and “where is the “new” in new technologies?” and how this matters for the regulation.

Session 2 – Risk regulation b

Speakers

• Paul Verbruggen (Radboud University)

Addressing Private Regulatory Failure: What Role for Civil Liability Law

Abstract:

Private regulation constitutes an important part of contemporary discussions about risk regulation. It concerns the sustained and intentional activities that private, non-state actors (firms, trade associations and non-governmental organisations) pursue to steer and guide corporate behaviour along the lines of predefined norms that signify collective goals. State actors are keen to integrate, delegate to, or otherwise engage with private regulators to enhance policy outcomes, thus creating hybrid models of regulation (Levi-Faur 2011: 7-11).

This paper addresses a theme that has so far received remarkably little attention in the literature on regulation and governance, namely the civil liability of private regulators for regulatory failure. Private actors, just like their public counterparts, may not live up to their regulatory tasks. We frequently learn about private actors that fulfil a crucial regulatory role in specific policy areas, but perform poorly. For example, soon after the 2008 financial crisis it emerged that rating agencies had failed to adequately monitor the creditworthiness of firms active on financial markets. As public regulators had hard-wired credit ratings offered by these private bodies in legal frameworks regulating financial markets, the failure of rating agencies had far-reaching consequences for investors worldwide (Moloney 2014: 639-641).

Numerous questions emerge around civil liability of rating agencies and other private regulators. What norms govern the liability of these actors? Are private regulators liable even though their failure may only be secondary to that of others? When do they ‘fail’ in the first place? This paper starts addressing these questions through an empirically-informed discussion of the PIP scandal, which relates to silicone breast implants of sub-standard quality, yet were produced and marketed according to a quality management system that was approved and certified by a private regulator. As will emerge from the analysis of this case, and the civil law disputes that have been brought in relation to it in Europe, the answer to the identified questions will strongly depend on the interpretation of the public-private divide in market regulation.

• Judy van der Graaf (London School of Economics and Political Science)

Co-Regulating Transnational Risks: The State and International Credit Rating Agencies

Abstract:

This paper considers how non-state actors may be engaged in risk regulation under the auspices of the state. Some of the most significant risks in modern society are transnational in character and in this context the state and traditional legal mechanisms of regulation may not always form an adequate response. The regulatory literature suggests a mix of actors and tools may be best for addressing transnational risks. In this paper a case study is presented of a non-state actor that has come to play an important role in the regulation of risks that are involved when investing in bonds, this is a case study of the international credit rating industry. As commercial firms international rating agencies came to be important standard setters addressing the uncertainty that is involved when investing in the debt capital markets. The capacity of rating agencies to gather and provide vast amounts of information about a wide range of market participants, has led many actors including the state, to turn to the ratings that the agencies develop and to use these as indicators of risk. The incorporation of credit ratings into laws and regulations promulgated by states and international bodies, has further enabled the regulatory role of rating agencies. This paper will look more closely at the co-regulatory regime shared by the state and the international credit rating as it has developed in the debt capital markets. The paper will furthermore address how the use of and reliance on credit ratings by the state has come under increasing pressure in recent years especially as a consequence of the global financial crisis of 2007-08. This crisis brought to the fore doubts around the ability of rating agencies to successfully transform uncertainties into risk and shortcomings in the accountability of the rating agencies for their actions and the (unintended) consequences of their actions.

• Piotr Bystranowsky (Jagiellonian University)

The AML Lessons for Effective Risk Regulation

Abstract:

The risk of money laundering, i.e. the risk of using legal financial structures to channel and disguise the origin of illegally obtained funds, is one of these serious hazards that are not manageable by state institutions acting alone and in principle can be mitigated only by a close cooperation between the government and private industry (in this case: financial market institutions). That is the main reason why the anti-money laundering (AML) regulation, since its inception in 1980s, have always been a plethora of different legal instruments: from quite specific rules, prescribing how an institution should react to some kinds of transactions, to general standards compelling financial institutions to implement their own AML procedures, making use of their own risk assessment tools. Therefore, AML regulation is quite interesting from the perspective of both legal theory (because AML makes use of many types of legal commands,
differing with respect to the degree of specificity or precision) and regulation theory (because, although AML in some part relies on traditional command and control regulatory tools, it quite often just gives financial institutions incentives nudging them to create suitable regulations on their own).

Since AML is still a relatively young branch of legal regulation, there are not decisive studies proving that the current AML model is effective enough and many claim it is at least to some extent an example of regulatory failure. However, it is quite evident that the existing regulation have led to the emergence of the whole corporate culture of prevention of money laundering, tending to balance the AML goals with the legitimate interests of the financial industry’s clients. Therefore, AML seems to be a good case for considering where to look for best regulatory response when the industry involvement is necessary in establishing rules regulating the risk in question.

- **Tobias Held (SCKCEN – Study Centre for Nuclear Energy)**

  *Nuclear law and environmental law*

  **Abstract:**

  Over the past decades, nuclear law has not developed along the lines of environmental law. Fundamental principles which are applicable to other risk sectors were mainly ignored in the nuclear sector. Being based on a promotional Treaty, such as the Euratom Treaty, regulation in the nuclear sector is arguably not in accordance with the current paradigm of transparent and inclusive risk regulation as it is apparent in other high risk sectors such as for example the chemical or the oil sector.

  When in June 2013 a new Directive of Nuclear Safety was proposed, the draft proposal by the Commission seemed to have the potential to serve as an impetus for a revitalizing and strengthening of risk regulation also in the nuclear sector, allowing a true rethinking and amending of the status quo of nuclear safety within the European Union. The final version of the Directive that was eventually adopted in July 2014, however, had been watered down in the negotiation processes and not all suggested amendments as they were apparent in the original draft were still part of the final version.

  This contribution has two main goals: One the one hand, it will assess in how far the new directive as it was eventually adopted still incorporates the core paradigms of better regulation. Prime attention will be paid to the question of how transparent nuclear regulation is and whether the public has meaningful tools at their disposal to get involved in the decision making process. On the other hand, a public choice analysis will serve to illustrate the power structure at the European level. It will be analysed whether public choice theory can explain some regulatory failures in the nuclear sector and whether an improper balance of powers in Brussels is source of flawed regulation in the nuclear sector with regard to its robustness and effectiveness.
Subtheme 2
From prevention of risks to imputation of consequences; duties of care, positive obligations and causation
Eelke Sikkema

In order to minimise the risk of being held liable for unlawful behaviour by their employees, companies, particularly those with frequent foreign contacts, invest more and more money and time in setting up compliance schemes. To do so, they often call in the services of internal compliance officers and external consultants, such as lawyers. This subtheme addresses the question to what extent companies (legal entities) and executive officers can be held liable for criminal offences and other unlawful behaviour perpetrated by their employees. More specifically, we focus on the questions as to what extent companies have a duty of care to prevent unlawful behaviour by employees and to what extent the breach of such duty of care can cause (criminal) liability to ensue. This also raises the question whether a compliance scheme is of any benefit to a company if a violation occurs in spite of it. Phrased differently: if things go wrong nonetheless, how does having a compliance scheme protect a company against liability?

In a risk society, citizens demand as much safety as possible. This safety is to be guaranteed by the government. If a risk does however materialize, someone should be held liable for the costs. If it’s the government that has not successfully secured its citizen’s safety, it should be held accountable for that failure. From the European Convention on Human Rights and Fundamental Freedoms (ECHR) the European Court of Human Rights (ECtHR) has deduced several positive obligations for the state to protect its citizens. This obligation is backed up by a legal responsibility: if the government does not fulfill its obligation, it should be possible for a citizen to hold it liable and demand compensation for the losses he has suffered. Within this subtheme, we aim to focus on the question what can exactly be expected from the government to comply with the demand for security of its citizens.

The imputation of legal liability involves a retrospective judgment. This implies that the contravention of an ex post postulated duty of care could result in legal liability if a causal connection obtains between that contravention and a certain result or damage. The legal concept of causality is governed by the criterion of ‘reasonable attribution’. However open-ended this criterion may be, establishing causality can sometimes involve rather difficult interpretative problems. These problems obtain, for example, in cases where, during the time span between act and result, a number of intervening factors have occurred that may also have contributed causally to the result. The concept of causality is considered as one of the ‘objective’ conditions for legal liability. Nonetheless, in the more difficult cases, it appears to be partly filled in with normative factors, such as duties of care and related views on the socio-ethical responsibility of the defendant for the damage. The open-endedness of the criterion of reasonable attribution opens up a helpful room for maneuver, but it simultaneously raises questions with regard to legal certainty: what possible remote consequences does one have a legal duty to calculate in, and to what measure can normative factors be allowed to contribute to the establishment of causality?

Session 1 – Duties of care a
Speakers

- Marjan Groenouwe (Utrecht University)

Corporate criminal liability in the Netherlands: further clarification of a duty of care

Abstract:

In the Netherlands we have witnessed a landmark decision on corporate criminal liability in the Drifmest case in 2003. With this decision the Dutch Supreme Court affirmed that if a legal entity has ‘accepted’ the occurrence of the offence it can be held criminally liable. The Hoge Raad added that this acceptance can
also be established if the legal entity has not taken enough care to prevent the occurrence of the behavior. This duty of care implies that if the corporation did all in its power to prevent the act, it can successfully escape criminal liability.

Unfortunately case law has since then not provided any clarification on how corporations can fulfill this duty of care. Literature seems to suggest that the assessment can be made by taking into account statutory provisions as well contractual obligations, but the specific circumstances of the case also seem to play a decisive role. An important question that arises is how this duty care can be evaluated considering the requirement of foreseeability that has been expressed by the European Court of Human Rights. Currently it is virtually impossible for companies to predict which supervision or control measures they are required to take, and what the consequences of taking adequate care will be.

A multidimensional approach could provide inspiration for a more detailed interpretation of this duty of care. Outside of criminal law, Dutch tort law also holds interesting clues that deserve further exploration. One could also turn to company law, more specifically case regarding articles 2:138 and 2:248 of the Dutch Civil Code, which deal with the external responsibility of company directors. Finally, an analysis of existing best practices and compliance codes could help us to further clarify this corporate duty of care.

- **Mark Hornman (Utrecht University)**
  Zorgplichten van leidinggevenden. Een nadere concretisering aan de hand van de archetypen van Henry Mintzberg

**Abstract:**

Vragen naar de zorgplicht van de onderneming is ook vragen naar de zorgplicht van haar leidinggevenden. Dat die zorgplicht er is, is algemeen erkend. In het strafrecht komt deze specifieke vorm van hiërarchische aansprakelijkheid tot uiting in de aansprakelijkheidsfiguren functioneel daderschap en feitelijk leidinggeven. Van oudsher is het strafrecht nogal huiverig met het hanteren van zorgplichten nu deze doorgaans redelijk ongedefinieerd blijven. Dat is om meerdere redenen bezwaarlijk: het belet effectieve rechtshandhaving, reduceert de voorzienbaarheid van aansprakelijkheid en kan ertoe leiden dat het schuldbeginsel in het gedrang komt. Nadere concretisering van die zorgplicht is dus wenselijk.

Hoe de zorgplicht verder gestalte krijgt verschilt naar gelang de aard van de voorliggende strafbare feiten, de aard van de onderneming en de positie die de leidinggevende daarbinnen inneemt. Om dit verschil in zorgplicht inzichtelijk te maken zullen een aantal aan Mintzberg ontleende archetypen worden gepresenteerd. Binnen ieder van die archetypen kunnen vervolgens verschillende leidinggevende posities worden geïdentificeerd. Daaruit zal blijken dat de zorgplicht voor ieder van die leidinggevende basisposities uiteenloopt. Ook de zorgplicht van vergelijkbare leidinggevende posities binnen de verschillende archetypen hoeft niet overeen te komen. Zo verschillen de reikwijdte en de invulling van de verantwoordelijkheid van zowel de direct leidinggevende als van de strategisch leidinggevende sterk per archetype.

Die nadere concretisering zou de drie bovengenoemde bezwaren tegen een meer zorgplicht georiënteerde benadering weg moeten kunnen nemen en bij kunnen dragen aan het terugdringen van de paradox van gedeelde aansprakelijkheid. Door duidelijker te kunnen maken wat ieders verantwoordelijkheid is, zou effectieve rechtshandhaving moeten kunnen worden bevorderd en wordt het mogelijk om tot een passender aansprakelijkheidsoordeel te komen.
• Louise Vytopil (Utrecht University)
  Corporate social responsibility

Abstract:

I have investigated which legal measures Dutch, English and Californian MNCs take in order to govern their supply chains in terms of CSR: do they use contracts, general terms and conditions or codes of conduct (“COCs”) to effectuate certain corporate social responsibility (“CSR”) behavior with their suppliers? And what are the consequences of these measures in terms of both contract law and liability law?

In this research, it is argued that most companies now take measures to regulate their supply chains in terms of corporate social responsibility, and many of these measures can be qualified as contractually binding in the relationship between MNC and supplier. However, these measures offer little in terms of recourse for the victims of CSR violations in supply chains, as they tend to serve to negate the legal liability for MNCs in respect of CSR violations in supply chains rather than provide a legal basis for holding the MNC liable.

If this insight is combined with the knowledge that most Western governments currently do not believe that more legal measures (in the form of acts of legislation, legally binding covenants with businesses, et cetera) are not desirable and will not be initiated, the question of the role and value of the law for addressing CSR violations in supply chains arises.

• Emanuel van Dongen (Utrecht University)
  Private Safety: a Comparative and Historical Study on the Liability for Inadequate Security provided by Private Parties

Abstract:

Nowadays, services that used to be provided by public entities are increasingly being carried out by private parties. One issue arising from this is whether the private party is liable for damage caused by a third party when the former had not provided sufficient safety supervision. In 2011 in Alphen aan den Rijn six people were killed by a lone shooter in a Dutch shopping centre. The question was raised whether the police officers were liable for the granting a gun license to the individual in question. Could the shopping centre also be held liable for providing inadequate security? In this case, although damage had been caused by a third person, the person that had provided security is sued. Claiming damages from these so-called peripheral parties is problematic from a moral point of view because they only had a small contribution in the occurrence of the harm, in contrast to that of the primary tortfeasor. Furthermore, with the increasing privatisation and the retreating governmental role, and the – alleged – claim culture, these claims become extremely problematic: they can lead to an enormous rise of insurance premiums, furthermore, costs for security get very high. The presentation will give an outline of the recently commenced research project on the nature of these claims in a historic and contemporary context.
Session 2 – Duties of care b
Speakers

• Ellen Gijselaar (Utrecht University)
  Positieve verplichtingen in geval van (milieu)vervuiling en overlast

Abstract:

In de risicomaatschappij wordt de samenleving geconfronteerd met neveneffecten van industrialisering. De confrontatie met deze neveneffecten is duidelijk zichtbaar in milieuproblematiek. Op (dreigende) milieuproblemen dienen overheden met behulp van het recht te anticiperen en te reageren. Daarbij dienen zij zich rekenschap te geven van de positieve verplichtingen die voortvloeien uit het Europees Verdrag voor de Rechten van de Mens (hierna: EVRM) en de rechtspraak van het Europees Hof voor de Rechten van de Mens (hierna: EHRM). Het EVRM is van belang als het gaat om milieubescherming, omdat het veroorzaken van (milieu)vervuiling en overlast door bijvoorbeeld lawaai, stank, (radioactieve) straling en verontreiniging van bodem, water of lucht kan de in artikel 8 lid 1 EVRM genoemde rechten beperken. Artikel 8 EVRM biedt op die grond verschillende waarborgen tegen situaties waarin activiteiten plaatsvinden die belastend/hinderlijk zijn voor de omgeving en/of het milieu. Inmiddels zijn op grond van deze bepaling verschillende positieve verplichtingen aangenomen om burgers te beschermen tegen dergelijke activiteiten. Allereerst is een verplichting aangenomen om in een wettelijk en bestuurlijk kader te voorzien om activiteiten die schade aan het milieu en de gezondheid toebrengen te reguleren. Daarnaast dienen onder omstandigheden preventieve maatregelen te worden genomen. Recent is duidelijk geworden dat ook het voorzorgsbeginsel een rol speelt in het kader van artikel 8 EVRM. Tijdens de workshop zal inzichtelijk worden gemaakt welke positieve verplichtingen in geval van (milieu)vervuiling en overlast van belang zijn voor het materiële aansprakelijkheidsrecht. Wat is de reikwijdte van deze verplichtingen en welke tendensen zijn zichtbaar? Hoe actief dient de overheid zich op grond van het leerstuk van de positieve verplichtingen op te stellen wanneer het gaat om allerhande milieurisico’s die gepaard gaan met industrialisering?

• Renée Kool (Utrecht University)
  Positieve verplichtingen in geval van (seksueel) geweld tegen kwetsbare slachtoffers

Abstract:

De problematiek van seksueel geweld en misbruik van kwetsbare slachtoffers, in het bijzonder vrouwen en kinderen, staat sinds het midden van de zeventiger karen volop in de politieke belangstelling. De afgelopen jaren zijn binnen de Europese rechtsruimte diverse incentives geproduceerd (Raad van Europa: Recommendations, Verdragen; Europese Unie: Kaderbesluiten, Richtlijnen) die toezien op het bewerkstelligen van preventie en bestraffing van dergelijk geweld. Daarnaast volgt uit de rechtspraak van het EHRM vanaf het begin van de tachtiger jaren (Airy vs Ireland, 1979; X & Y vs The Netherlands 1985) dat de staten gehouden zijn adequate en effectieve bescherming te bieden tegen seksueel geweld/misbruik, in het bijzonder aan minderjarigen en anderszins kwetsbare slachtoffers. Het EHRM heeft daartoe een uitgebreid lichaam van jurisprudentie ontwikkeld (positieve verplichtingen). De afgelopen jaren is, niet in het minst onder invloed van technologische ontwikkelingen (digitalisering), de nadruk komen te liggen op de preventie van (seksueel) geweld. Daarin speelt naast artikel 3, het recht op privacy ex artikel 8 EVRM een belangrijke rol. Tegelijkertijd is binnen het strafrecht een ontwikkeling gaande richting voorzorgsstrafrecht. Deze orïëntatie past in een tijdgewricht waarin de conceptualisering van risico’s en de afwending daarvan in toenemende mate wordt geduid in recht op redress en remediëring, in het bijzonder richting de overheid.
Anders dan waar het gaar over milieuproblematiek ligt in deze problematiek geen ‘directe’ relatie besloten met het werk van Beck. Diens concept van de risicosamenleving richt zich immers op de aansprakelijkheidsvraag gerelateerd aan de neveneffecten en risico’s die liggen besloten in de voortgaande industrialisering. Hooguit zou hier een direct verband liggen tussen risicosamenleving en digitalisering, met als onvoorziene neveneffect de totale poreushheid van de persoonlijke levenssfeer en de daaruit voortvloeiende risico’s en aansprakelijkheden jegens – in het bijzonder - kinderen.

Niettemin is het inmiddels ‘goed gebruikt’ om het door Beck ontwikkelde gedachtengoed breder toe te passen, namelijk ook op non-industriële risico’s.\footnote{Mocht het zo zijn dat ik het mis heb dan kan ik nog de bocht maken naar digitaal seksueel misbruik, ofwel: de ‘handel’ en daaraan verbonden vervaardiging van kinderpornografie vanuit commerciële motieven als gevolg van digitalisering. Zie 
\[\text{Zie Laurens Lavryssen, Sigimifant Flaws 2014; K. Lindenbergh, Zedendelicten en positieve verplichtingen 201. Ook: EHRM Soderman vs Sweden 2013, ECHR 2014, m.nt Lindenbergh.}\]


Tegengeworpen kan worden dat het EHRM in het geval van seksueel misbruik strafrechtelijke interventie geïncludeerd acht, met uitzondering van wanneer het gaat om lichtere inbreuken.

Een tweede – verwante - vraag die zich opdringt is die naar de conceptualisering van aansprakelijkheid: als seksueel misbruik wordt beschouwd als inbreuk op een zwaarwegend mensenrecht (art. 3 jo 8 EVRM) dan behoeft het tekort in geboden bescherming een effectieve remedie (ook in samenhang met artikel 13 EVRM). Die is in het geval van seksueel geweld (irreversibel) uit haar aard niet anders te bieden dan in geld. In samenhang met de verschuiving in het denken over de legitimiteit van te dragen schade (schade moet weg) lijkt dit aanleiding te geven tot een verruiming van de aansprakelijkheid van de staat voor onrechtmatig/strafbaar handelen van non-state agents. De staat biedt immers de meeste kans op redress en had uit hoofde van haar zorgverplichting het gedrag van de non-state actor behoren te voorkomen. Hoewel daarbij als beperkingsgrond het criterium van de ‘unduely burden’ geldt – en als nieuwe loot aan de boom, de ‘significant flaw’ – lijkt recente rechtspraak van het EHRM te wijzen op een te vergaande voorzienbaarheid van achteraf toe te rekenen risico’s (vgl. O’Keeffe vs Ireland, dissenting opinion. Die opreking van staatsaansprakelijkheid lijkt echter onvoldoende te worden geproblematiseerd.\footnote{\[\text{Zie (mn) EHRM (K.U. vs Finland (2011; Leach; Laurens Lavryssen, ‘ Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights’, pp. 69-130/hoofdstuk 4), in: Yves Haeck & Eva Brems, \textit{Human Rights and Civil Liberties in the 21st Century}, Springer 2014.}\]}

In de bijdrage aan de workshop en de paper zal deze tendens tot ‘going public’ van het aansprakelijkheidsrecht worden geanalyseerd in het licht van de in het kader van de positieve verplichtingen door de staat in acht te nemen voorzorgsmaatregelen wegens mogelijk onrechtmatig/strafbaar handelen van non state actors.

- Wouter de Zanger (Utrecht University)

Positieve verplichtingen

Abstract:

In de risicosamenleving zoals die in 1986 door Ulrich Beck is beschreven, eisen burgers zoveel mogelijk veiligheid, die door de overheid moet worden verzeker. Indien een risico zich verwezenlijkt, moet daarvoor een verantwoordelijke worden aangewezen. Slaagt de overheid niet in het verzekeren van de veiligheid van burgers, dan moet zij daarvoor kunnen worden aangesproken.

Deze verwachting ten aanzien van de overheid om risico’s zoveel mogelijk uit te bannen en de veiligheid van burgers te garanderen, heeft zich vertaald in de juridische verplichting voor de overheid om een adequaat (wettelijk) handhavingskader op te zetten en dit actief te handhaven in gevallen waarin deze risico’s zich kunnen voordoen. Het Europees Hof voor de Rechten van de Mens (EHRM) is een groot katalysator geweest in de ontwikkeling van dergelijke verplichtingen voor de overheid. Dat hof heeft uit meerdere artikelen van het Europees Verdrag voor de Rechten van de Mens en de Fundamentele vrijheden (EVRM) verplichtingen voor de staat afgeleid om beschermend op te treden.*** Aan deze verplichting wordt een (juridische) aansprakelijkheid gekoppeld: treedt de overheid niet of onvoldoende op, dan moet een getroffen burger de overheid voor de rechter kunnen dagen om deze aansprakelijk te stellen en compensatie te verwerven voor de geleden schade. Het Hof schrijft in beginsel niet voor via welk rechtsgebied uitwerking moet worden gegeven aan deze beschermingsverplichting. Niettemin geldt voor de meest zwaarwegende rechten dat bedreiging met strafvervolging wordt voorgeschreven als effectieve remedie (artikel 13 EVRM).††† In die gevallen geldt, zoals steeds, dat het voorkomen van (ernstige) risico’s geen onevenredige belasting mag leggen op de lidstaten. Dit laatste impliceert niet alleen een bewustzijn van maatschappelijke risico’s op abstract niveau, maar ook informatie over zo’n dreigend risico jegens een geïndividualiseerde burger en daadkrachtig optreden tegen verwezenlijking van dat risico.

De workshop op het UCALL-congres richt zich op de juridische gevolgen van deze ontwikkeling van positieve verplichtingen. Centraal kan staan de vraag wat wordt verwacht van de overheid om tegemoet te komen aan de hang naar veiligheid en preventie zoals die leeft bij burgers. Is er daarbij nog enige ruimte voor het maken van beleidskeuzen, of gaan we richting een juridisch speelveld waarin de overheid alle risico’s moet uitsluiten? Hoe actief moet een overheid zijn? Anders gezegd: welk niveau van bewustzijn, geïnformeerdheid heeft te gelden en hoe wordt kan worden vastgesteld dat die kennis daadwerkelijk aanwezig is geweest bij de overheid? In spiegelbeeld: indien bepaalde kennis niet voldoende of langs de juiste kanalen gedeeld is, komt dit dan voor rekening van de overheid? Het vaststellen van een schending en daaraan verbonden vraag naar redressering van schade vindt immers retrospectief plaats en impliceert toerekening. ‘De overheid’ is immers een sociale constructie, een in rechte geconstrueerde entiteit die voor haar informatie afhankelijk is van individuen, binnen en buiten de kringen van de overheid. Hoe actief dient de overheid zich op te stellen wanneer het gaat om allerhande risico’s die besloten liggen in het menselijk samenleven, en hoe omvangrijk zijn de daaraan verbonden inspanningen om realisatie daarvan te


voorkomen. Indien zij daar niet in slaagt, is zij dan altijd aansprakelijk voor de geleden schade van de slachtoffers? En wie moet er dan precies aansprakelijk worden gehouden: ambtenaren (uitvoerders), beleidsmakers, leidinggevenden of de (decentrale of centrale) overheid als zodanig? Een belangrijke vraag hierbij is welke gevolgen deze paradigmaverandering van mensenrechten als ‘afweerrecht tegen de overheid’ naar ‘afdwingbaar recht ten aanzien van de overheid’ zal hebben voor het aansprakelijkheids- en strafrecht.

- **Eduardo Mazzantie (PISA, Maastricht University)**

  *From the State to the State (via citizens)*

  **Abstract:**

  The emergence of serious, obscure and diffusive risks has shaped criminal legal systems: once substantially focused on retrospective punishment of (manifest) past harms, criminal law is nowadays more concerned with the prevention of (possible) future dangers. This shift redefines the role of the State in providing safety.

  On the one hand, the State is asked to take a step back from regulating and involve citizens (individuals and legal entities) in co-defining the rules they are subjected to. This change, apparently paradoxical as it might undermine some of the traditional features of criminal law, is a consequence of the shift from legal systems conceived as pyramids to legal systems conceived as networks; in that sense, criminal law makes no exception and, in order to tackle uncertainty and better define the scope of duties of care, relies on a public-private regulatory interaction.

  On the other hand, the State is asked to take a step forward and ensure people’s rights to life and safety. In contexts of risk, criminal law has moved the focus from the ‘ultimate’ offender to those who create or control the chance of harm; in that sense, and in the light of the recent evolution of ECHR case-law, the State is now to be considered the first safety guarantor, especially in case of dangerous activities or events resulting from combined failures of many people, whose individual liability may not per se trigger criminal conviction.

  The aim of this work is analysing the theoretical and practical implications of this State’s back-step – forward-step approach in providing safety, with focus, respectively, on pros and cons of self-regulation in criminal law and on the extent of State’s liability for safety issues, with particular attention to how ECHR and EU law may interact to better implement life and public health protection.

  

  **Session 3 – Duties of care**

  **Speakers**

  - **Marianne Hoppenbrouwer (Hasselt University)**

    *Proof of causation in toxic tort: a lack of knowledge or a misunderstanding*

    **Abstract:**

    Today’s risks are, as Beck says, a side effect of modernisation. The increased knowledge and awareness of risks make safety a priority. Major worries are, rightly or wrongly, related to chemicals. Chemical substances are omnipresent in daily life and in the environment. People are continuously exposed to them.

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**References:**


Some of these chemicals are toxic. Concern and/or damage after an exposure lead people to file liability claims for personal injury allegedly caused by chemicals. Toxic tort is a rapidly growing area of law. Cases involving chemical substances are generally complex. Scientific input is necessary and still then proving a causal link between exposure and damage is challenging. How can it be proved that a specific chemical caused harm to a specific individual in such a way that recovery for the plaintiff becomes possible?

The presentation will provide an evaluative overview of existing solutions and new suggestions. The analysis is essentially comparative and involves the US, the UK, the Netherlands and France.

At least following concepts are analysed on their impact of proof of causation in toxic tort:

- The usefulness of the sine qua non principle;
- Factual and legal cause;
- The NESS test****;
- The concept of reasonable contribution;
- ‘Le contrat sociale’;
- Thinking like the ‘ordinary man’ and fairness.

However these ‘solutions’ do not eliminate the need for scientific input. Scientific evidence remains necessary. Confronted with such evidence, courts struggle. Scientific reasoning differs considerably from legal reasoning. Judges seek certainty and aim at lasting decisions, whilst scientists think in terms of uncertainty and probability. Each legal system has adopted its own approach in countering the difficulties. The different methods are discussed on their strengths and weaknesses. The analysis is supported by concrete examples of court cases. Finally changes that support courts in toxic tort are shared.

- Stanislaw Tosza (University of Luxembourg, Utrecht University)

Criminal liability of managers for excessive risk-taking?

Abstract:

This research analyses criminal liability of managers for exposing their companies to excessive risk of negative consequences (e.g. loss, criminal sanctions etc.).

It is fairly common for legal orders to criminalise wilful causing of loss to the company by its manager, though different models of criminalisation exist. To the contrary, criminalisation of mismanagement of company’s financial interests by taking excessive risk is not common. The offence of abuse of trust in German law (Untreue, § 266 StGB) punishes improper conduct in relation to entrusted property, if the conduct results in damage. The theory of schadensgleiche Vermögensgefährdung associates mere endangerment with damage and incriminates it. The French offence of abuse of company’s assets – Abus de biens sociaux (Article L241-3 Code de Commerce and other similar provisions) – also comprises a possibility, under certain conditions, to commit the abuse by mere exposure of the company to excessive

risk of loss. The English law on fraud contains the modality of abuse of position, which could also be committed through exposure to risk.

This research examines the regulation of these selected legal orders, in which excessive risk-taking by managers is criminalised (United Kingdom, Germany and France). It is followed by a more in-depth reflection on the role of criminal law in punishing acts of mismanagement, which consist in exposure to excessive risk, while at the same time acknowledging that taking risk is inherent in the pursuit of business. This reflection takes a perspective of basic theories of criminalisation and ethical problems inherent to the topic, as well as the interference with other branches of law regulating corporate environment. The outcome of this reflection shall allow for proposing a model regulation for excessive risk-taking.

The proposed presentation would focus mainly on the role of the requirement of result and causality within the structure of the analysed offences. The three legal systems vary to great extend as regards this limb of the offence, which has important impact on the scope of criminalisation foreseen in each of the systems and the applicable standards to assess the excessiveness of risk. The presentation would also use model cases in order to demonstrate how criminalisation provided in these systems translates into potential liability of managers for excessively risky decisions and what practical problems it encounters.

• Jessy Emaus (Utrecht University)
  Facing Power: An Analysis of the Legal Responsibility of Financial Services Providers

Abstract:

Social structures have changed a great deal over the last century due to social, economic and political development. One consequence is that non-state actors have gained more and more power over individuals. Examples of these powerful non-state actors include financial services providers who run the financial markets (such as Dexia).†††† Power imbalances hold the risk that its excrescences in some way affect an individual’s core interests and thereby also affect today’s society. However, in academia, the problem of power imbalances is always addressed from the perspective of the protection of the weaker party (e.g. the consumer).‡‡‡‡ Less attention has been paid so far to analyzing and problematizing the role of the powerful non-state actor. That is problematic since it is the powerful non-state actor who finds himself confronted with particular legal responsibilities.

In this paper the legal responsibility of the financial services provider will be explored and thereby given a face on the basis of three questions: (1) who is this powerful non-state actor? (2) why is a heavier burden of responsibility placed on the financial services provider? (legitimization) (3) how is this responsibility implemented in private law? (methods).

The first question involves a search for indications in judgments of the Hoge Raad concerning the character of the financial services provider (aard van de partij). Sociological power theory, more particular Bierstedt’s “An analysis of social power”, will be used to further substantiate the idea that financial services providers can be considered powerful in relation to their clients.§§§§ Sociological theory is considered to be most suitable for this purpose, since it is exactly relationships between people in society that are the centre of study in sociological research.

The second and third question entail a case law analysis and an analysis of preparatory documents to find arguments on why particular responsibilities are given to the financial services provider and to find out

how these responsibilities are implemented in law. In addition, attention will be paid to relevant case comments and academic literature.

In the end, Emaus will draw conclusions on the legal responsibility of financial services providers, on the value of sociological theory for the further development of the legal responsibility of powerful non-state actors, and indicate some lessons learned by studying power imbalances from a different perspective.

Although the focus in this research is on Dutch law, the problem addressed and the conclusions are most relevant for many legal systems.

NB. This paper is the result of an explorative case study on the legal responsibility of one particular powerful non-state actor. The results will be published in Dutch in December 2014.
Subtheme 3
Risk regulation of new technologies: challenges and opportunities
Luisa Marin & Evisa Kica

Innovation is a central concept that leads the evolution of our societies. In these days, we are witnessing the emergence of a number of new technologies, ranging from nanotechnology to 3-d printing, from synthetic biology to disruptive technologies, such as drone technology, to robotics. Next to the emergence of new technologies, the deployment of ‘known’ technologies to domains other than the ones they have been produced for or simply the transformation and/or evolution of known technologies (e.g., the Internet and the Internet of Things), triggers questions as to their implications and connected risks. Even though there is scientific controversy on the specific hazards that some technologies can pose to the human body, air or environment (e.g. nanotechnologies) or on their impact upon core constitutional rights (e.g. drones), this debate serves as early warning about the hazardous and risk potential associated with the use of new technologies.

These issues have suggested the necessity of various government funded research programs, and promoted commentators, industry and activist groups to engage in many debates about the potential and/or effectiveness of current regulatory frameworks to regulate newly and emerging technologies and manage their potential risks. As a result, next to the proliferation of risks, we are witnessing the professionalization of risk management, with actors from both private and public sectors taking various actions to respond to risk implications posed by new technologies. Such actions range from hard law to a wide range of soft governance arrangements developed by governmental and non-governmental (e.g. NGOs, industry) actors to assist regulators with developing appropriate risk management and risk assessment frameworks for many newly emerging technologies. The approach to risks has therefore become rationalized. As Beck has argued earlier in his book Risk Society: Towards a New Modernity, resort to risk regulation is seen to represent “a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself” (1992: 21). Yet, however, the main issue remains on what regulatory approaches or mechanisms are more appropriate to respond to the risks posed by new technologies?

The panel aims to explore how risk regulation can cope with the regulatory challenges represented by the emergence of new technologies, and at the same time, it will explore the venues, the opportunities that various forms of regulation offer to the solution of those challenges. The panel aims at tackling theoretical and empirical questions in the realm of risk regulation of new technologies, also by discussing the emergence of regulatory answers and models from specific cases. It therefore welcomes papers that tackle, amongst others, (one of) the following questions:

- What are the key implications that accompany the (risk) regulation of new technologies (focusing on specific sectors)?

- What are the regulatory responses taken by various (public and/or private) actors to respond to the risks that accompany new technologies?

- To what extent hard and soft regulatory responses contribute to the (risk) regulation of new technologies?

- What are the challenges that might accompany different regulatory responses?
- How can various regulatory mechanisms/approaches be revised to respond to the risks of new (emerging) technologies?

**Session 1 – New technologies**

**Speakers**

- **Martha Morvillo (University of Bologna)**
  
  *Between politics and expertise. A constitutionalist’s perspective on risk and law-making processes*
  
  **Abstract:**

  The shift in the balance between private and public sphere, as outlined in post-war liberal-democratic constitutional states, is surely one of the most discussed consequences of the emergence of “new risks”. But several other interferences, which do not seem to be less relevant, emerge when observing the phenomenon from the point of view of constitutional law. Technical and scientific progress has deeply affected also the decision-making processes taking place within each of the three classical branches of the public sphere itself: neither the judiciary, nor public administration, nor, most remarkably, the legislative power have been immune to the implications brought by such trend.

  One of the most powerful channels through which risk has entered the constitutional discourse has taken the shape of decision-making in face of scientific uncertainty, and thus of the ever-evolving dialectic between the technically (or scientifically) possible and the legally or, in the last instance, constitutionally possible (i.e. legitimate): the field of biotechnologies provides plenty of examples of such tension (as happens with the issues related to medically assisted procreation and stem cells research), but it is far from being the only one (e.g. environmental law, ICT law). The emergence of a new factor of legitimacy – which could be envisaged as a form of “scientific legitimacy” – besides the traditionally conceived ones (political and constitutional) needs therefore to be integrated within the constitutional discourse.

  Through an overview of the case-law of the Italian Constitutional court, the paper aims at highlighting the possible approaches to the need of a deeper integration of technical and scientific knowledge within the public decision-making processes, in an attempt to strike a balance capable of avoiding the two extremes of scientifically weak decisions on one hand, and of “technical deference” to experts on the other, on the assumption of the alleged neutrality of “technique”.

- **Patricia Stapleton (Worcester Polytechnic Institute)**
  
  *From Mad Cows to GMOs: EU Food Safety and the Precautionary Principle*
  
  **Abstract:**

  In the 1990s, a series of public health and food safety scandals reverberated across the European Union (EU). An HIV-tainted blood scandal unfolded in France early in the decade, followed by the discovery in the UK that bovine spongiform encephalopathy (BSE) – commonly known as “mad cow” disease – was responsible for variant Creutzfeldt-Jakob disease (vCJD), a rare and fatal human neurodegenerative condition. In the midst of the media furor over mad cow disease, another food safety scandal emerged in Belgium: dioxin-contaminated chickens and eggs. Efforts to assign liability for these incidents revealed that economic interests had trumped public health concerns in decisionmaking processes. Repercussions included criminal cases against public officials in France in the blood case, as well as plummeting levels of public trust in governments’ ability to effectively regulate public health and food safety issues. In reaction to shifting public perceptions of risk, the EU began to codify the precautionary principle into its risk regulation in these issue areas. For food safety, the EU also acknowledged the need to shift competence from member states to the EU in order to coordinate regulation across the Common Market.
approach to risk regulation coincided with the arrival of American genetically modified (GM) soy in Europe, leading to protracted policy debates regarding the safety of genetically modified organisms (GMOs). This paper will review the triggering events of the 1990s that led to the creation of the European Food Safety Authority and the transformation of the risk regulation environment into which GMOs were introduced. In doing so, it will analyze how regulatory failures in public health and food safety prompted a more precautionary approach to risk management for new technologies in food production, namely for GMOs. The paper will also address how the incorporation of the precautionary principle as the foundation for food safety regulation was in part motivated by declining levels of public trust. More specifically, it will look at how these regulatory failures were viewed as consequences of the liberalization and integration of markets.

- Aline Reichow (University of Twente)

Risk and uncertainty in nanomaterials regulation. Opportunities for effective co-regulation among business associations and policy-makers

Abstract:

Under existing occupational health and safety (OHS) legislation employers in the EU and US are obliged to protect the health of employees, who handle nanomaterials in workplaces, through having risk assessment and management in place. But since scientific data for nanomaterials is scarce, it is uncertain whether the traditional risk assessment approach is evidently effective in protecting employee health. Industry has been asked to share scientific data and knowledge with regulators, which would allow making traditional risk assessment applicable to nanomaterials. Specifically business associations appear to collaborate with public policy-makers to push forward nanomaterial characterization and risk specification. However, the actual contribution of business associations to effective regulation of nanomaterials occupational health and safety is unclear.

This paper adopts a process-oriented perspective to effectiveness in which the aspect of collaboration is attributed a central role: when processes of collaboration among business associations and public policy-makers are successful, activities aimed at supporting nanomaterials OHS are effective. Collaboration is successful when business associations and policy-maker learn how to apply traditional risk assessment to nanomaterials. Learning requires relations of trust among collaborators. Trust relationships are both a precondition and amplifier for information exchange and they stimulate sustainable problem-solving and potential for innovation. The assumption is, when business association and policy-makers have a common basis of trust, opportunities for knowledge exchange and deliberation are enhanced, allowing for increased capacity in making risk assessment applicable to nanomaterials.

This paper evaluates collaborative business association activities directed at nanomaterials OHS in terms of trust among actors. Trust will be investigated by six analytical categories. To this end collaborative
activities of one particular business association are analyzed, based on data from publicly available documents, interviews with association staff/member companies and policy makers.

- **Roeland de Bruin (Utrecht University)**
  Autonomous Intelligent Cars on the European intersections of liability and privacy

Abstract:

This paper will discuss the possible impact of the current regulatory framework on the development of autonomous intelligent cars AIC and deployment thereof in society by looking at the intersection of civil liability law and data protection law in the European Union based on a – very simple – case study. The question will be addressed in which ways the current EU regulatory framework on liability for damages caused by AIC (insofar that is present to date) may interfere with the right to data protection of consumers of AIC-technology. An analysis will be made of the harmonized rules on product liability law, followed by a case study of (non-harmonized) liability for car owners/possessors in the Netherlands. This will show that AIC-technology in itself will contribute to answering the question as to how to establish liability. For instance AIC equipped with black boxes, or vehicle tracing technology recording (and communicating) sensory information, decisions of the systems and input from the driver will be used to establish the cause of an action leading to damage. The fact that AIC technology can also assist in allocating liability may form an incentive for instance to insurance companies to insure certain risks involved in AIC, which may in turn contribute to development and deployment of the technology. However, the same fact that AIC will be able to process and store massive amounts of (personal) data, possibly being connected to other AIC’s, or (interconnected) networks, forms a potential threat to the privacy of its drivers, which may hinder acceptance of the technology. Finally, this paper will conclude with some remarks on potential challenges for the EU regulatory framework given the core values of the allocation of risks, consumer protection and the EU Horizon 2020 ambitions on innovation and economic welfare, in view of the pending introduction of Autonomous Intelligent Cars.
Subtheme 4
Risk commodification and the economic opportunities of the risk society

Lucas Roorda

The risks of the modern age may have introduced a much more complex and unforeseeable world than those of the pre-industrial societies, they have also provided opportunities. Where the State as a single actor has become increasingly incapable of managing risks and their consequences, other parties have stepped in. This has led to the so-called “commodification” of risks – singling out particular aspects of risks, defining the prevention of their consequences as tradeable commodities and selling them on the “risk market”.

Exemplary for this commodification trend is the ever-growing market for private security services. Where the monopoly on the use of force was traditionally thought to reside exclusively with the State, in the last decades private parties have started to provide security services that encroach upon that monopoly – either directly contracted by States, or under State license to be contracted by other private parties. Private security of public office holders and privately run prisons are but a few examples of direct outsourcing, but this movement is not just a matter of “classic” outsourcing for cost-efficiency reasons; it is actively being stimulated by business sectors that engage in high-risk activities and cannot rely on State control because of the nature of their activities. Examples of these sectors include international shipping business dealing with the risk of piracy, natural resource companies operating in weak governance States and even NGOs delivering aid in conflict areas. In each of these areas, private companies offer their services in risk prevention and mitigation of consequences. Of course, by introducing armed private security companies in these situations, whole new risks and corresponding accountability problems are created.

The risk commodification trend is not merely one of direct, physical protection against the risks of conflict; it is also noticeable in the growing role of insurance companies in determining their clients’ security strategies, and the growing market for hedging insurance policies covering different types of risk against each other. Similar to the private security industry, the interwoven insurance industry may not necessarily reduce the risks to a system as whole; it may actually amplify them. The consequences of certain strategies may resonate throughout the system if the risk actually materializes. Secondly, where insurance policies force the policy holder to pursue a specific security strategy to mitigate the possibility of an insurance payout, who is responsible for the negative consequences of this strategy? Moreover, does the State still play a role in this system as a risk-bearer, or responsible party for mitigation of the risk’s consequences?

As this trend touches upon both private and public law, this stream invites papers from all fields of law with a focus on the fragmentation of responsibilities and the creation of new or compounded risk through risk commodification. Specific issues that might be tackled are the definition of “core” State tasks, the limits of the guiding role of the insurance industry, and creation of new risks by private parties.

Session 1 – Risk commodification

Speakers

- Wan Zuhafiz Wan Zahiri (University of Aberdeen)
Subtheme 5
The risk society and the need for a new methodology for research and education
Bald de Vries & Francois Kristen

Lawyers do become increasingly aware of the necessity of and need for multidimensional, and multidisciplinary research. The problems of the risk society cannot be understood solely from a mono-disciplinary perspective. At Ucall there is a strong emphasis on multidimensional research.

The themes that ground the research within Ucall are not merely legal but encompass a variety of academic disciplines and, by implications, a variety of knowledge domains. It implies that research is by definition not mono-disciplinary. In addition to legal knowledge, other knowledge is needed and used in order to carry out the research projects. Research within the programme unites different domains of knowledge. The question is how to use this ‘other’ knowledge? Is this done through cooperation, consultation, self-study? Does this mean that research is interdisciplinary, multidisciplinary, cross-disciplinary? Ucall aims at employing a multidimensional approach. This approach starts with using the traditional methodology for conducting legal research and supplements and enriches the research results by using insights that have been gained elsewhere (internal comparative law method, external comparative law method, other disciplines, like criminology, economics, psychology, sociology, and so on). These insights provide external perspectives which will be used to look at the relevant research questions and the research field from different angles. It creates a multidimensional image which is derived from and consists of multiple dimensions. What do we actually mean when we employ this terminology and approach? This theme invites papers that seek to establish clarity as to the meaning of these terms and thus the type of research and its organisation, including the methodologies of research.

In addition, the shifting focus of research and research methodologies has consequences for legal education. Many faculties are revising their curriculum in order to explore the possibilities of integrating research methodologies within courses and provide an intellectual context for positive law in such courses. To what extent can we introduce the aforementioned perspectives into legal education? Is there a developing need for more theory in legal education? To what extent should students be familiar with empirical perspectives on law and facts?

In an open discussion, without formal papers and presentations we want to discuss the need and scope of a new methodology and what the implications of this is for research and legal education.
Practical information

Registration

There is a conference fee of €50.00. (For PhD students (aio’s) the conference fee is €25.00.) Please send an email to UCALL.Congres2015@uu.nl to register for the conference. The registration deadline for registration for the conference is 1 April 2015.

Publication

There is the possibility to have the paper published. There will be a special issue of The Utrecht Law Review dedicated to the theme of the conference and there will be a book of essays, to be published by Eleven International Publishers. Both will apply a peer review procedure. The editors will apply strict deadlines to ensure publication with the ear. When submitting an abstract, please indicate if you wish to partake in one of the publications.

Practical information – travel and accommodation

Overview airports

1. Schiphol

Schiphol is the most commonly used airport for international flights and the most convenient airport for your continuing travels to Utrecht. As you leave the Terminal for Arrivals, you automatically walk into the train station of Schiphol. Trains to ‘Utrecht Centraal’ leave every 15 minutes from platform 1-2 and take about 30 minutes. Tickets can be bought at one of the many yellow vending machines.

The total costs of traveling from Schiphol to Utrecht Central Station are: € 8,50

2. Eindhoven

Eindhoven is the other international airport of the Netherlands, though it mainly processes flights from within Europe. After exiting the airport Terminal, busses leave for the train station of Eindhoven at the bus station, situated a 50 meters south of the Terminal. The bus takes approximately 20 minutes to arrive at ‘Eindhoven Centraal’ (the last stop). Tickets can be bought from the bus driver. Trains to ‘Utrecht Centraal’ leave every 15 minutes, and take about 50 minutes. Tickets for the train can be bought at one of the many yellow vending machines.

The total costs of traveling from Eindhoven Airport to Utrecht central station are: € 16,17

Utrecht

A few rooms have been reserved for the conference in ‘De Rechtbank’ (Korte Nieuwstraat 14, 3512 NM Utrecht). If you would like to use one of the reserved rooms, please let us know as soon as possible. ‘De
Rechtbank’ is within walking distance of Utrecht Central Station:

Registration will take place at 9.00 on the 9th of April in the ‘Raadzaal’ (Achter St. Pieter 200, 3512 HT Utrecht),

also within walking distance of Utrecht Central Station:

Other accommodation

- http://www.parkplaza.com/utrecht.nl (Near train station; 10 m. walk to city centre)
- http://www.nh-hotels.com/nh/en/hotels/the-netherlands/utrecht/nh-utrecht.html (Near train station; 10 m. walk to city centre)
- http://www.sandtonmaliehotel.nl/ (City centre)
- For a youth hostel, check: http://www.hostelutrecht.nl/roomsandprices.html and http://www.strowis.nl/
- For other hotel reservations and budget accommodation, please check:
  - http://www.booking.com/city/nl/utrecht.nl.html?aid=303947;label=utrechtttMAUSF1vaoGnMmOjizUorQ5863136727;ws=&gclid=CODpoYeU254CFUE3god0nSWLg

The university and Utrecht

Utrecht University has locations in the city centre as well as in “De Uithof” campus. The Faculty of Law is wholly located in various buildings in the City Centre. The Conference will be held, primarily, in the location Pietershof, (Achter St. Pieter 200/Kromme Nieuwegracht) which houses the Institute of Legal Theory as well as the Institute of International, Social and Economic Public Law and the Institute of Constitutional and Administrative law. The Conference dinner will be held in the Court Hotel restaurant, also located in the city centre (Hamburgerstraat/Lange Nieuwstraat). For more details on Utrecht University: http://www.uu.nl and for Utrecht itself: http://www.utrecht.nl.
List of delegates

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Ulrich Beck

Risk Society
Towards a New Modernity

Ulrich Beck (1944-2015)