

Hybrid Regulation as a Legal Design Challenge

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1. Introduction

This contribution is about *hybrid* regulation from a *legal design* perspective. Applying a legal design perspective is about ensuring and optimizing the legitimacy and effectiveness of legal regulatory instruments (in bringing about their sought outcomes) in a methodical way. Hybridity of regulation is a characteristic of forms of (combinations of) regulatory instruments based on a *mix of* origins. My core assumption is, that such origins, feature pure forms, characteristic of regulation being fully consistent with a particular ideal type institutional environment. These ideal types purport standard patterns of behaviour with *optimal* internal legitimacy and effectiveness.

Take the example of private law tendering and contracting on services of public interests (e.g. health care), involving both public and private parties. The above aspiration of legal design would call for applying a method (as a *well-considered* way of making a design), which takes into account that the mixed origins of such regulation will come with various particular demands and constraints as regards factors of legitimacy and effectiveness. In this example (i.e. contracting on matters of public interest) the origins of public and private law would require (among other issues) taking into account third-party interests while achieving mutual agreement between contracting parties.

Not all regulation presents itself in the form of legal acts or otherwise intended occurrence of legal effects, but when it does, legal design guidelines, relevant to choosing and moulding specific instances of regulatory instruments, need to build upon a proper understanding of their characteristics and conditions. These form the *considerations*, essential to a regulatory instrument's success. The legal design, for instance, of regulation by tradable emission allowances will build upon design considerations (such as of the property concept), which differ from

those relevant to, for example, regulating legal frames for public-private organizations (in which the concept of legal personality will feature).

It is the assumption of this contribution, that apart from characteristics of the *internal* norm structure of regulation (concerning norm *subject*, norm *object*, norm *operator* and norm *condition*), legal design of regulation must also reflect and provide guidelines on meeting conditions for *external* norm validity. Such external validity is about if, how and to what extent effectiveness and legitimacy of regulation is properly underpinned (and safeguarded) given the relevant institutional environment. Public law regulation regarding government interventions on safeguarding health and safety, and private law regulation concerning fairness of market transactions, will each call upon their own and distinct normative logic as regards their legitimacy and effectiveness. A ‘*normative alignment*’ is at stake here (e.g. government regulation under the rule of law; regulation by contracts under commutative justice), which has bearing both on the *power* to legally regulate and the norms of *conduct* regarding procedure and substance of regulation – which concern both effectiveness and legitimacy. On a systemic level, setting aside actors’ whims, normative alignment is (and so effectiveness and legitimacy are) ensured when a regulatory type’s core characteristics are consistent with the institutional environment (e.g. contracts in markets; administrative acts in government). When hybridity (of origins) is in play, such alignment is (at least) uncertain, and consequently the effectiveness and legitimacy of such regulatory acts may be at stake.

Consequently, understanding hybrid regulation is a logical step in answering legal design challenges of regulatory effectiveness and legitimacy. In this contribution the notion of ideal types of *institutional environments* and accompanying *institutional control systems* is used to provide a context for *mapping* regulatory hybridity. This mapping can be helpful in identifying types of hybrid regulation as a step towards formulating design guidelines relevant to achieving the necessary external validity, to secure their effectiveness and legitimacy through normative alignment.

To this end our narrative commences with defining regulation (see Para. 2). Not only is this about determining core characteristics, but also about understanding that in the last four decades (as we experienced the shift from government to governance)¹ regulation as a concept has outgrown its traditional pure form of unilateral, top-down, public law, government steering of citizens’ behaviour – thus giving cause to more closely look at other pure, but also at hybrid forms of regulation. The next step (in Para. 3) is to briefly explain the idea behind legal

¹ See, amongst others R.A.W. Rhodes, *Understanding Governance*, Buckingham, Open University Press, 1997.

design and its focus. With that notion in mind, the actual mapping of pure and hybrid forms of regulation will take place (in Para. 4). In conclusion (presented in Paragraph 5) some notes are made on how our insight into pure and especially hybrid forms may be taken aboard in our legal design efforts.

2. Regulation

2.1 *Control over or Attempted Alteration of Behaviour: Selznick & Black*

In this contribution the term regulation covers a broader area than defined by Philip Selznick,² when he spoke of “sustained and focused control exercised by a public agency over activities that are valued by a community.”

Especially the limitation to ‘public agencies’ – and consequently to a public interest approach (of community interests) – does not do justice to the present day fact that so many (possible) acts by private persons and organizations are ‘controlled’, or at least significantly influenced, by ‘private agents’, such as public service enterprises, multinational companies, and public interest NGO’s.

The definition provided by Julia Black³ seems more appropriate to capture such a broader scope, in keeping with the shift from government to governance, away from a primacy of government (or ‘public agencies’) over regulation:

the sustained and focused attempt to alter the behavior of others according to standards or goals with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behavior-modification.

The definition explicitly includes the element of *intent* (of ‘producing a broadly identified outcome or outcomes’), which in Selznick’s definition was implicit to the agenda of the public agency involved, as a consequence to its ‘task’, ‘mission’ or ‘objective’. Intent or wilfulness separates regulation from *accidental* influence exerted on the behaviour of others (e.g. when regulatees adjust their behaviour due to misunderstanding a politician’s remark about

² P. Selznick, Focusing Organizational Research on Regulation, in R. Noll (Ed.), Regulatory Policy and the Social Sciences, Berkeley, University of California Press, pp 363-364.

³ J. Black, ‘Critical reflections on regulation’, 27 Australian journal of legal philosophy (2002), pp. 1-35, and J. Black, What is Regulatory Innovation?, in J. Black, M. Lodge & M. Thatcher (Eds.), Regulatory Innovation, Cheltenham, Edward Elgar, 2005, p. 11.

changing a tax deduction system). Intent expresses a functional objective: a change of behaviour is sought (through adherence of others to certain standards or goals), as a means to particular outcomes (e.g. a subsidy to impact consumer behaviour towards favouring use of sustainable energy). Only as an intentional undertaking does it make sense to support regulation by a design approach.⁴

In all, to be labelled as regulation, the ‘attempt’ at altering behaviour may be understood to involve three separate elements: intent, focus and sustenance. Not only should we separate regulation, as *intentional* attempt, from accident, but also, as *focused* attempt, from (intentional and sustained, but) ‘dim’ attempts at altering behaviour. Take, for instance, a broadly phrased appeal calling for less violence in entertainment games. Likewise, as *sustained* attempt, regulation should not be confused with (intentional and focused, but) ‘incidental’ (*ad hoc* or discontinuous) attempts at altering behaviour. Take, for instance, a ban on smoking tobacco in public places being withdrawn on the day of its entry into force, without any enforcement action taken. In addition to intent, the elements of focus and sustenance underscore the benefits of applying a *design* approach to regulation.

Alternative to Selznick’s ‘control over activities’, Black refers to ‘mechanisms of standard-setting, information-gathering and behavior-modification’. Thus the scope of regulation seems, on the one hand, less limited (as ‘control’ suggests unilateralism), and on the other hand, more specified (as ‘control’ is a rather abstract term). In any case, this specification elucidates *how* regulation relates to behaviour: prescriptively, descriptively and assertively. It does so without suggesting exclusiveness (to other means or mechanisms), or that all of these mechanisms need always be used together. Still, it seems logical that *enforcement* (as an assertive form of behaviour modification) builds upon *monitoring* (as a descriptive form of information-gathering), which in turn builds upon *standard setting* (as a prescriptive form of projecting behaviour).⁵ Without setting standards, what is there to monitor or enforce with regulatory relevance?

⁴ Consider also the importance of ‘intent’ to bring about ‘legal effects’ as a necessary element of a ‘legal act’ – as opposed to legal effects following from the a mere legal fact (occurring without intent or regardless of its occurrence upon intent – lawful or unlawful).

⁵ At which the element of ‘prescription’ calls for a (basic) *norm operator* (‘shall’ or ‘may’) relating to a *mode of behaviour* (‘do’ or ‘not do’ X – X referring to an activity). I am assuming here that standard setting amounts to more (especially prescriptively) than merely expressing a possible standard for definition (types) and measuring of something (a (characteristic of a) thing, situation or activity), or applying a relevant method or mode of operation (as in service, production, management etc.).

At the same time it seems that to merely set standards, without monitoring or enforcement, hardly meets the criterion of a ‘sustained attempt to alter behaviour’ – even under regulation by providing information.⁶ In this contribution, the use of the term ‘regulation’ will refer to standard setting only, unless otherwise specified.

As the primacy of government no longer dominates the definition of regulation, the lack of reference to an element of *societal interest* (in Selznick’s definition: ‘activities valued by a community’) seems a logical consequence. Take the example of a supermarket chain, which introduces a new label to create a niche market and consequently requires of its subcontractors (and sub-subcontractors etc.) to apply certain standards of production. While, presumably, merely seeking to serve the private interest of this supermarket chain (at making a profit), this course of action may (also) be considered as a type of attempt at altering behaviour of (sub-)subcontractors, which fits all elements of Black’s definition of regulation (especially when the label is supported by a certification and auditing arrangement). Clearly, as we move away from the confinement to government regulation, we find that we enter a realm which not only introduces private regulators, but also private regulators merely regulating for their *own private interests*, and – perhaps ironically – also doing so by means that (almost) equate with traditional command and control by governments. Meanwhile, although Black’s definition does not presuppose “particular justifications or explanations for why regulation occurs”,⁷ it does hold at its core the notion that regulation is about ‘collective problem-solving’ with a scope that reaches beyond the confines of the state.⁸ The usefulness of a legal design perspective remains, as regulators outside government will also want their regulations to be (accepted as) legitimate and effective (as to their intended outcomes).

2.2 A Designed Instrument – Brownsword & Somsen

In as much as Black’s definition is leading in this contribution, the specific (and concise) wording of Brownsword & Somsen’s⁹ definition of regulation requires consideration:

⁶ Without assuming that monitoring or enforcement necessarily involves unilateral interventions; some persistence to the effect of calling for or organizing compliance (if only by informing) seems, however, logically included.

⁷ Black, *supra*, 2005, p. 11.

⁸ Id. and *supra*, 2002.

⁹ R. Brownsword & H. Somsen, ‘Law, innovation and technology: before we fast forward – a forum for debate’, *Law, Innovation and Technology*, Vol. 1, No. 1, 2009, p. 8.

Any instrument (legal or non-legal in its character, governmental or non-governmental in its source, direct or indirect in its operation, and so on) that is designed to channel behavior.

First of all, this definition moves away from regulation as an activity ('to regulate'), and focuses on its characteristics *per se*. In Black's definition these characteristics amount to: standard setting, monitoring and enforcement; altering behaviour to accord with standards or goals, to produce certain outcomes. Brownsword & Somsen summarize the notion of regulatory mechanisms (such as standard setting etc.) by reference to the use of an(y) 'instrument'. They do not provide a particular definition of the term '*instrument*', but their use of the term in the context of '*coding*' provides a connotation especially relevant to design considerations.¹⁰ Coding for action is about the 'regulatory environment' (as a context) of this action, providing *signals* on whether particular acts are viewed positively, neutrally or negatively, praised or criticized, incentivized or disincentivized, whether they are permitted, required, prohibited, or even possible or impossible.¹¹ Various signals may apply in any given situation of an actor (the 'regulatee' – the 'other' in Black's definition) considering an action (including to not act).

Brownsword & Somsen regard the regulatory environment as a product of intentional *design*, building upon self-conscious decisions of regulators to provide (a range of) coding signals,¹² with the aim of channelling behaviour – i.e. with a purpose. From this a regulator's strategic choice should be to engage with regulatees' '*practical reason*' (i.e. their moral and non-moral reasons for action) to shape their conduct. Thus regulatory coding becomes a '*social fact*', which "variously constrains or supports what they otherwise wish to do." These codes either have *normative* elements (i.e. ought or ought not – expressed as (absence of) a right to (not) act, or as an act being prudential as regards their self-interest in it) or *non-normative* elements (i.e. can or cannot – expressed as the possibility or impossibility to perform an act).¹³

Coding through signals which hold such elements is geared to 'channelling of conduct', broadly speaking either by constraining or enabling (such as, in normative-legal coding, tort(s) law being a constraint, and property law (mostly)

¹⁰ Other than that we should use standard dictionaries, such as Merriam-Webster (online): "*Instrument* – a means whereby something is achieved, performed, or furthered." (available at <<http://www.merriam-webster.com/dictionary/instrument>>).

¹¹ *Supra*, note 9, p. 4.

¹² *Supra*, note 9, p. 5.

¹³ *Supra*, note 9, p. 6.

enabling. The basic modes of channelling follow a particular ‘ethical stance’ as regards a particular course of action (on the occasion of its first identification as object of regulation).¹⁴

Basic modes of channelling will vary with the choice of regulatory *modes*, each involving their own particular instruments and range. At this, Brownsword and Somsen refer to Lessig’s distinction between four ‘modalities of regulation’,¹⁵ labelled according to their characteristic kind of constraints, as: *law* (underpinned by legal force and accompanying threat of punishment), *social norms* (underpinned by decentralized punishments, by a community), *markets* (underpinned by price constraints), and *architecture* (underpinned by physical constraints as sanctions). In the words of Brownsword & Somsen, instruments as instances of such modes are relevant so long as they shape conduct (of regulatees) “[...] by *engaging* some dimension of their practical reason”.¹⁶

As we will see in the below, Murray and Scott¹⁷ have taken up on Lessig’s approach and provided systemic amendments which are especially relevant to the ‘purity’ of concepts and thus to the analysis and understanding of hybrids.

Brownsword & Somsen emphasize that in their definition of regulation, *the* regulatory environment probably does not exist. Instead, at any given time or place, there will be different classes of regulators, simultaneously contributing to the regulatory environment, sometimes rivalling in their attempts at channelling particular types of conduct. As they put it: “[...] individuals produce private decentralized norms, institutions produce centralized private norms, and states produce public-centralized laws and regulations.”¹⁸ Not only does this make for a *multi-actor* regulatory environment, but often (as in the EU, but generally also in states) also for a *multi-level* regulatory environment – which reflects the terminology of multi-actor and multi-level governance. In determining design-

¹⁴ Brownsword & Somsen, *supra*, pp. 13-15. R. Brownsword, *Rights, Regulation, and the Technological Revolution*, Oxford, Oxford University Press, 2008, p. 19. To elaborate is tempting, but reaches beyond the scope of this contribution. Cf. also, C. Harlow & R. Rawlings, *Law and Administration*, 2nd edn, Cambridge, Cambridge University Press, 1997 (reprint 2006) and editions 2009 and 2012.

¹⁵ *Supra*, note 9, p. 9, n. 14; L. Lessig, *Code and other Laws of Cyberspace*, New York, Basic Books, 1999, Chapter 7, and L. Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’, *Harvard Law Review*, Vol. 113, No. 2, 1999, pp. 501-546, especially pp. 506-14.

¹⁶ *Id.*, p. 6.

¹⁷ A. Murray & C. Scott, ‘Controlling the New Media: Hybrid responses to new Forms of Power’, *The Modern Law Review*, Vol. 65, No. 4, 2002, pp. 491-516, esp. p. 502.

¹⁸ *Id.*, p. 8. We will leave aside why Brownsword & Somsen choose to speak of private *norms* and of public *laws and regulations*.

guidelines, this complexity of modern day regulatory governance needs to be well-considered.

2.3 *Plurality of Definitions: Levi-Faur*

The complex state of regulatory governance is also reflected in David Levi-Faur's statement that "[...] we are all immersed in the regulatory game."¹⁹ Levi-Faur emphasizes that, apart from scholarly differences, the variation in definitions of regulation can be understood as a result of conceptualizing regulation either from a state-centred or a society-centred perspective.²⁰ Clearly, in the vein of Selznick's definition, a state-centred approach will lead to a definition, which stipulates the important relation between regulation and the existence of an administrative agency (especially a public agency). Quite opposite, we find a society-centred conceptualization, which includes "all mechanisms of social control"²¹ (i.e. 'hard' and 'soft') and considers as regulatory, "anything producing effects on behavior", that is, including unintentional norm development. In this approach, regulation also encompasses civil-to-civil, civil-to-government, civil-to-business, business-to-government and business-to-business regulatory relations, which not only *de-centre* from the state, but (in part) also from institutionalized forms of self-regulation. Levi-Faur cites Scott's (2001) definition of regulation as expressive of this very open approach:

any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within acceptable limits of the regime.²²

Generally, an iteration of standard setting, monitoring and enforcement will reflect some intent with some regulator. In any case, given this contribution's prime objective ('mapping hybridity as guidance for design'), I do not propose to drop 'intentionality' as an attribute of regulation – and so regulation will be understood as such hereafter). Intentionality is an indispensable element of regulation if we are to regard it as an object of *design*, geared to channel behaviour. Given the above definitions of Selznick (especially "control exercised by an agency"), Black (esp. "attempt [...] with the intention of producing [...] outcomes') and Brownsword & Somsen ("not the product of

¹⁹ D. Levi-Faur (Ed.) *Handbook on the Politics of Regulation*, Cheltenham UK, Edward Elgar, 2011, p. 7.

²⁰ Id., p. 3.

²¹ Id., p. 6.

²² Id.

unintentional design”) I believe a definition or categorization, which builds on the notion of intent of design (as I consider ‘intentional design’ a pleonasm), stands in good company.

Finally, Levi-Faur himself, while emphasizing the plurality of definitions (given scholarly and other backgrounds or analytical motives), prefers a rather strict definition:

[the ex-ante] bureaucratic legalization of prescriptive rules and the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors. (As long as these rules are not formulated directly by the legislature (primary law) or the courts.).²³

An important motive behind his choice of definition is that it focuses attention to the role of (sets of) *actors* in the regulatory process and thus emphasizes the importance of ‘hybridity’ in regulation (and, for that matter, governance) of human or societal affairs. Clearly, this is an approach and motive most relevant to the aim of this contribution.²⁴ Meanwhile, what we need to take from the definition is that, although it is not meant to suggest any *substantive* function of regulation, clearly it is based on a categorization, which builds on regulators acting with intent.

2.4 This Contribution’s Take

In this contribution I will use the term regulation as defined by Brownsword & Somsen ([a]ny instrument designed to channel behavior’), while assuming that this definition particularly regards intentional, focused and sustained standard setting (apart from monitoring and enforcing – as in Black’s definition), and that it involves social, business and political actors both as regulators and regulatees (as in Levi-Faur’s definition). I see no need to exclude legislation, but will exclude court decisions *per se*. Further, as my interest lies with the legal appraisal of the notion of hybridity, from a design standpoint, I only include

²³ Id.

²⁴ Yet another aspect of Levi Faur’s definition coincides with Brownsword’s & Somsen’s remark of there not being just one/the regulatory environment, but various environments at the same time. Levi-Faur’s approach to this (alongside others) is that of Regulatory Capitalism, which refers to how state deregulation to liberalize markets is accompanied by more non-state regulation: a shift from the *Regulatory State* to *Regulatory Capitalism*, which in turn may also be taken to refer to a state of competition between regulation from different (multi-)actor and (multi-) level origins. See D. Levi-Faur, ‘David, The Global Diffusion of Regulatory Capitalism, *Annals*’, *AAAPSS*, 598, March 2005, pp. 12-32.

those types of regulation, with which design involves a choice of a *per se* legal form related to their regulatory function, which is to (somehow) channel behaviour.

Without going into detail on this exclusion, one can image that to regulate in terms of a publicity campaign – whether by a public or a private regulator – is of interest only if the choice of form of campaigning calls for a choice of legal form. This would leave out publicity generated by merely making information known to the public or target group by existing channels (such as TV & radio, internet sites, leaflets, newspapers and billboards). The following remarks on the concept of design – preceding an analysis of hybridity of regulation – will hopefully provide further clarification.

3. Design

3.1 *Object of Design?*

In the phrase “Any instrument *designed* to channel behavior”, I take the verb ‘designed’ to refer to a designed type of *instrument* to channel behaviour, rather than the instrument as a (prescribed) design of *behaviour* (which is channelled according to the design). The latter interpretation would call for a focus on the actual use of a particular instrument, in its capacity of providing a guideline, model or pattern for subsequent norm-conform behaviour by regulatees. In this contribution, however, we are looking at instruments, especially of a hybrid nature, as ‘ground work’ towards the formulation of related design guidelines.

This approach of the design of *types* of regulatory instruments is in keeping with the common-sense notion of a design as an abstract model, *not the real thing* (a piece of regulation in practice), but, as Ruiter has put it, “[...] an outline of something that does not yet exist, but is considered to be realizable on the basis of the outline”.²⁵

²⁵ This definition does not rule out the possibility that the outline is used only once – to accordingly create only one ‘something’ (as in the design of a unique house), although, dependent on specifications (and dependent on property rights in the design), a repeatable creation will often be either foreseen or possible. Unless stated otherwise, references in this contribution to D.W.P. Ruiter, relate to work in progress at Twente University, concerning Legal Design Methodology.

The 'outline' itself is an *idea*, which projects a yet inexistent object or artefact, designed to fulfil its ascribed *function* and to be as such created or produced in actual fact – e.g. a car to drive, a dress to wear, a chair to sit on, a rule to be adhered to.²⁶

Take the example of somebody saying: "This car is designed by Pininfarina!" This is not to suggest Pininfarina's active involvement in the production of this particular instance of a car (the 'actual car'), but it refers to his *idea* behind it. This idea is projected by an 'outline', often a depiction or representation, perhaps by pattern, image or model, possibly accompanied by an *instruction*, as a 'user manual'.²⁷ This outline is geared to contribute to making forms, which may lead to some functional end-result and in that sense, with Ruiters, we may view design as "the projection of a type of artefacts with a function determining their form." Pininfarina's idea as a projection of an artefact in the form of a type of car, is about producing actual, physical instances of this type of artefact (i.e. many such cars). Here, by analogy, we take *regulatory* artefacts as *intangible* objects produced through design; types of regulatory instruments with a *form* suitable to perform the intended regulatory *function*, such as the form of a legal prohibition, which channels behaviour in that regulatees 'shall not do x' (i.e. refrain from performing act x). In this example, 'channelling' is indicative of how the '*form follows function*' relationship fits the terminology used by Brownsword & Somsen. In their view, regulatory instruments are designed to channel behaviour through (forms of) coding (as providing signals, normative or non-normative, which relate to regulatees' practical reason). Proper design of regulatory forms of coding should ensure that these forms will (effectively and legitimately), once produced according to the design, perform their function of channelling behaviour. The design provides the outline for repeatedly producing regulatory instruments of a certain type, suitable to functional specifics, which accommodate application in various regulatory environments. For example, with legal significance, one can think of the design de- and prescriptively of how to set up the instrument of tradable (property) rights or of service contracts; designs to be used as outlines according to which instances of such instruments can in practice be introduced (or changed or withdrawn).

²⁶ With all kinds of functional specifications: a car for open driving, for transport of persons or goods; a dress for a wedding, for work, for dancing; a chair for by a table, to relax in, to work from, to watch a movie in, to use while driving a car; a rule to empower (arrive at a contract, grant a permit) or to channel behaviour prohibitively, permissively, and/or facilitatively.

²⁷ One can imagine that with some artefacts the design as image, provides sufficient information for subsequent production – certainly to the trained eye. One could say that in such cases the design is indeed intended for a 'copy-paste' practice; a practice that the art of designing is actually meant to take distance from.

3.2 *Design versus Making of Instruments*

So, first there is design of regulatory instruments and then the actual making of instruments, leading to instances of instruments made. Compare the design of tradable public rights versus the *de facto* introduction of such rights in a particular jurisdiction – as of parking licences in a major city. As was explained in the above, we focus on the design of the instrument, not on the design of behaviour in particular circumstances – so, we need to be clear on this distinction.

We saw in the above (opening sentences of Para. 3.1), that instances of actual regulatory instruments deployed, may provide a, let us say, *de facto* design for norm-conform behaviour. That is, if and when it holds an abstract norm condition, making the norm applicable to an abstract category of cases or situations, as ‘repeatable legal facts’ (e.g. “an establishment which is likely to cause environmental harm, must have a permit”) – as opposed to a concrete case or situation, as a ‘unique legal fact’ (e.g. on King Willem Alexander’s royal inauguration, it is prohibited to demonstrate in Amsterdam’s city centre). In deployment in practice (and in its design outline), abstract and concrete conditionality will be matched with either general or individual norm subjectivity. General norm subjectivity refers to an open class of regulatees, as in “all car-drivers are not allowed to drive their car in Amsterdam city centre”, at any day or only on the day of the royal inauguration (i.e. either with abstract or concrete conditionality). Individual norm subjectivity refers to an individual or a closed group of regulatees, as in “the prince royal of Oranje or all present members of the House of Oranje shall sit front row”, always or only at the royal inauguration (i.e. either with concrete or abstract conditionality).²⁸

Abstract deployment of norms in practice (both generally or individually) may be regarded as *de facto* design as normative guidance towards repeated factual behaviour.

Again let us look at the analogy with physical objects of design, such as the design of a dress, as an idea (captured in a pattern), making the actual dress (according to the design) and the actual dress as a result thereof. One may argue that the actual dress made, is in fact (also) a design for behaviour of the person(s) wearing the dress. This is relevant in as much as a dress is suitable only for specific behaviour (e.g. for dancing, wedding, sports, gardening,

²⁸ See, amongst others D.W.P. Ruiter, *Institutional Legal Facts, Legal Powers and their Effects*, Dordrecht, 1993, Kluwer Academic Publishers, pp. 161-. The example of the royal inauguration is based upon (not taken from) the events in the Netherlands on April 30, 2013.

swimming et cetera), and whether this is merely accidental or indeed intended use by enabling or constraining design of behaviour. If so, we are faced with an example of the concept of the regulatory mode of *architecture* (named in the above – see Paragraph 2.2). In regulation by architecture, behaviour is intentionally channelled by physical conditions of a particular functionality, such as – perhaps more illustrative, a road, which is not just accidentally bumpy or curved, but intentionally furnished with a speed ramp or traffic corridor), as a matter of channelling behaviour.²⁹ A particular ramp or corridor in a road will, at its particular place, design the behaviour of drivers in how they move their car over and/or through (as to speed, direction etc.).

Given our choice of focus, we consider such regulation, as we do other types of regulation, only in terms of its design as a particular instrument type (as in what is the make-up of a ramp, so that its form will fulfil its function of speed reduction) – to be brought about, in factual instances, by following applicable design instructions.³⁰³¹ This exclusion of *de facto* design, should not be taken to also preclude types of regulatory instruments (other than architecture and especially found in statutory legislation) which, as objects of legal design, within themselves hold a legal design, often with accompanying design-guidelines (often related to one or more power conferring norms) for performing legal acts – such as contracts or administrative acts.

To clarify the difference, we need to carefully separate the following elements, as sequential steps (each indicated with a number), which will be presented along a particular example: given a concern for a particular interest (say, safety within bars and restaurants), some agent (say, the association of municipalities), introduces a legal design in the form of a non-binding model bylaw for municipalities (1. such as in the form of a bylaw but with explanations; sent to its members), which may then be used by municipalities to introduce instances

²⁹ Brownsword & Somsen, *supra*, p. 5, on the place of a door in a room and possible regulatory intent – *e.g.* is it merely because construction-wise this is the only suitable place, or does it involve a choice regarding how future users of the room are to (preferably) move about in the building.

³⁰ Consider how Murray and Scott, *supra*, p. 501, emphasize that, “[...] the standard setting element of architecture is not self-executing, but is by definition, designed by human hands.” They go on to point out that as to monitoring and enforcing architecture can, but not necessarily is, self-executing.

³¹ I will not go into the debate on whether ‘de facto design’ (of behaviour), brought about by an actual (*de facto*) instance of a designed type of regulatory instrument, can only really be considered design if its intent to channel behaviour manifests by in situ behavioural choices reaching beyond merely prescribing the regulatory blue-print to the given ‘situation’ – in other words only if it creates behavioural consequences which are not implicit or inherent to the type alone. This also relates to the before last footnote – if a dress is ready-made or tailor-made, taking a particular person’s preferences into account (within or outside the given design guidelines [...]).

of such a bylaw (2. as a matter of exercising a hitherto legal competence), and within these bylaws there may be a design in the form of a prescribed model permit (3. regarding safety in bars and restaurants), which can legally be applied by municipal authorities to issue permits (4. for individual bars and restaurants), prescribing norms with abstract conditionality (5. such as safety standards applicable when preparing hot foodstuff), whereupon permit holders perform norm conform behaviour (6. ideally, by applying the prescribed behaviour).

From this contribution's perspective I draw a line between element 4 and 5, thus including the 'prescribed' design within a legal act, but excluding the 'de facto' design of mere factual behaviour. Thus, both the regulatory instruments (of no. 2) providing such prescribed designs (no. 3, of legal acts of no. 4) and the non-binding/proto designs (of no. 1) of such instruments (of no. 2) and instruments (as of no. 4), which do not hold prescribed designs, are part of our analysis. Considering our scope, looking at hybrid regulation, we should be aware that a piece of *public law* regulation (such as a bylaw – such as the above no. 2), may hold a (no. 3) prescribed legal design, as a binding guideline for performing *private law* legal acts (no. 4). As we will see later, hybridity can involve far more complicated mixes of origins than the public-private dichotomy and consequently, even greater care is required. For now, a graphic representation may help to keep track of the above distinctions.

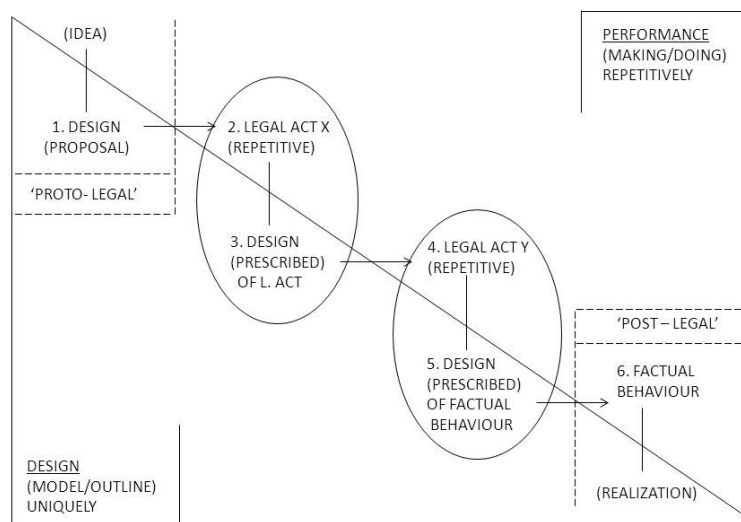


Figure 1 Sequential Elements of Legal Design

3.3 Evolution or Design?

In design we try to distance ourselves from ‘mean and lean’, ‘copy-paste’ strategies of producing regulations – applying *mimesis*: using other regulatory instruments, on mere *prima facie* ‘form-function’ reflection, while making only minor amendments, concerning some specificities. Legal practise is undoubtedly full of instances where existing contracts, permits, ordinances, presumed similar to the one desired in a novel situation, are used to make that new instance.³² Making proper designs, however, calls for a proper ‘method of design’. For it is assumed here, that (proper) design holds a better promise of facing future regulatory challenges than mere regulatory *evolution*. Such evolution is understood as a chronology of incremental regulatory changes or developments, through successive instances of regulation.³³ These evolutionary changes and developments are *accidental* in that they do only in retrospect reveal a novel *idea* of a function served by a particular *type* of regulation, which may subsequently be intentionally enjoyed and deployed to that end. Much as in human existence, evolution can create beautiful accidents, or rather incidents (of instances of) regulation. It is, for instance, possible to arrive at systems of tradable public law allowances, other than by legislative scheme, merely on the conjunction of various incidents of regulation (including court decisions adding rules or providing novel interpretations). The thing is, we have little to no *ex ante* knowledge on the likelihood that regulatory evolution will always provide the needed instruments, timely and with (desired and ‘proven’) functionality, securing effectiveness and legitimacy.³⁴ Although practice provides ample examples of adequate evolutionary regulation, such as in the introduction of legal personality, even on a copy-paste basis (as with the many cases where existing bylaws and statutes are used as examples for new legal acts regulating new issues) we should be aware that this is particularly true for ‘tame policy problems’ (new rather than novel),³⁵ where regulatory effectiveness and

³² The term ‘*de facto* design’ comes to mind, but, apart from confusing terminology, using the term design here, would wrongfully suggest intent behind the instance/examples being copied. To use the term ‘novel’ instead of ‘new’, marks a distinction – with ‘novel’ understood as “new and not resembling something formerly known or used” (Merriam-Webster online, <<http://www.merriam-webster.com/dictionary/novel>>) – which of course increases doubts about copy-paste practises.

³³ To speak of a *sequence* of changes/developments or *sequential* instances would too strongly suggest (functional and causally pursued) intent towards a specific outcome (involving a *per se* legal form relating to a regulatory function – see Para. 2.4).

³⁴ Admittedly, ‘proof’ is a tough concept. Proof through testing of actual models of design is not unusual in the course of a design process. Building upon general knowledge of regulation channelling behaviour and thus producing desired outcomes will be relevant, but ‘evidence based’ design is desirable. These are especially issues of ‘regulatory impact assessment’.

³⁵ See note 32.

legitimacy can (both) be achieved largely by applying existing instruments. Especially in this day and age of rapid (and increasingly entangled) societal and technological innovation, regulatory challenges concern ‘wicked policy problems’, where both effectiveness and legitimacy of regulation are challenged. Especially in such cases regulatory design is called for.³⁶

3.4 Methodology of Regulatory Design?

When the term design is used here, it refers – departing from Ruiter’s wording – to well-considered, methodical attention to the specificity of the artefacts aimed to be created, building on an instrumental form and function relationship, and on the legal norms and factual circumstances which mark the particular scope for functional effectiveness and legitimacy.

This methodical attention, rooted in a proper methodology of (regulatory) design, will entail regulatory design methods, which will (largely) consist of *guidelines* for making designs (which designs will hold guidelines for producing ad hoc instances of the design *et cetera*). Given the focus of this contribution, our attention is drawn especially to guidelines regarding the external validity of hybrid regulatory instruments. This follows from the assumption that in ‘pure’ (i.e. non-hybrid) regulation, the proper method of design is built into the ideal type characteristics of the instrument (‘design by origin’, if you will), yielding legal optimality in effectiveness and legitimacy, whereas it is not with hybrid regulation.³⁷ Consequently, before actually formulating design-guidelines for hybrid regulation, we need be clear on what hybridity is about, so that we have a proper basis for research into their guidelines. Hence we must now return to regulation, with a focus on hybridity.

³⁶ For the original typology of tame and wicked policy problems see: H. Rittel, & M. Webber, ‘Dilemmas in a General Theory of Planning’, *Policy Sciences*, Vol. 4, 1973, pp. 155-169. Personally, wickedness in the face of technological innovation, has triggered my research into ‘smart rules and regimes’: M.A. Heldeweg, Legal Design of Smart Rules and Regimes: Regulating Innovation, in M.A. Heldeweg & Kica, E. (Eds.), *Regulating Technological Innovation. A Multidisciplinary Approach*, Hershey, Palgrave MacMillan, 2011, pp. 37-52.

³⁷ This assumption rests upon the premise that institutional environments present patterns of behaviour not only as an empirical fact, but also as normative (institutional) fact, which often relates to legal norms, rules and regimes. See: D.W.P. Ruiter, ‘Types of institutions as patterns of regulated behaviour’, *Res Publica*, Vol. 10, No. 3, 2004, pp. 207-231.

4. Hybrid Regulation

4.1 *Hybridity in Law*

From a legal perspective (especially under civil law),³⁸ hybridity will generally be explained in terms of core legal phenomena (such as norms, (regulatory) acts and organizations/legal persons) across the *public* law – *private* law divide. Public and private law then function as ‘ideal type’ legal areas or particular configurations of basic legal aspects, such as *interests* (e.g. private, societal, public), *values & norms* (e.g. autonomy, solidarity, non-discrimination, fair competition), legal *institutions* (e.g. property, statehood), legal *persons* (e.g. private persons, public offices, courts) and legal *relations* (and related activities; e.g. rule-making, contracting, management).

Hybrids in law, as in legal regulations or in organizations with legal personality, will either combine such aspects in a way where the one aspect has a public law connotation (e.g. public interest) and the other has a private law connotation (e.g. bilateral/reciprocal legal relations), or where within one aspect, connotations of both areas are combined (e.g. a rule which calls upon regulatees, such as public service organisations, to compete amongst each other but also act in solidarity).

The appropriateness of such hybrids (as a ‘best of both worlds’ instead of a ‘toxic mix’)³⁹ may be assessed in terms of their ability to successfully combine elements of public and private configurations to a *form*, which can, legally speaking, *function* both effectively (with desired legal consequences) and legitimately (with acceptance of its bindingness). Thus, upon proper design, a public enterprise, for example, is presumed to properly serve public interests, while operating as a private law type of legal person, guided by a (particular) mix of different or shared public and private law values.

To apply this legal type of categorization makes sense when indeed a ‘mere’ *legal assessment* is called for, more particularly on legal validity and lawfulness of instances of regulation. It does, however, fall short of our analytical needs, when our aim is to provide a regulatory *design* perspective which more broadly addresses effectiveness as well as legitimacy, as a matter of *regime choice*, that

³⁸ Increasingly also under common law. See: F.J. van Ommeren & G.T.J.M. Jurgens, *De opmars van het onderscheid tussen publiekrecht en privaatrecht in het Engelse recht. Vanuit rechtsvergelijkend perspectief*, Den Haag, Boom Juridische uitgevers, 2009; with a summary in English: The Rise of the Public-Private divide in English Law.

³⁹ See J. Jacobs, *Systems of Survival: A Dialogue on the Moral Foundations of Commerce and Politics*, New York, Vintage Books, 1994.

is: beyond the realm of existing, ‘positive law’ demands of legality and lawfulness.⁴⁰

Consequently, we should first further investigate how hybridity may be conceptualized from the broader perspective of regulatory governance, to subsequently consider possible approaches of regulatory (and, given legal relevance), legal design. Two approaches present themselves as interesting ‘candidates’ for an understanding of hybridity as a departure from pure forms of regulation.

4.2 Hybridity Following Regulatory Modalities

The first candidate is presented by Murray and Scott and based upon their suggestions to improve on Lessig’s types of regulatory modalities – abovementioned, in Paragraph 2.2. As to their amendments regarding modalities,⁴¹ they argue that as a separate form of regulation, *law as command* is too suggestive of only including law as state law. In proposing the term ‘*hierarchical control*’, they hope to redirect the scope to the form of control, rather than its source, and thus private control forms may also be included. With regard to *social norms*, Murray & Scott suggest the term *community-based control*, as this term reaches beyond the scope of standard setting (only), to the institutional regulatory environment, which also holds mechanisms of monitoring and enforcement (with social sanctions in the form of public criticism and ostracism).⁴² Both *market* and *architecture* are labels deemed under-inclusive, as Murray & Scott consider the alternatives of ‘*competition-based control*’ (also including non-market governance and regulatory competition), and (perhaps somewhat confusing here) ‘*design(-based control)*’, also including the design of social and administrative systems in as much as capable of control in a way beyond regulatees’ influence – such as in-built administrative oversight.⁴³

⁴⁰ Compare how Beetham defines legitimacy (of public authority) not only as a matter of legality, but also of fit with shared values and of consent. D. Beetham, *The Legitimation of Power*, Basingstoke, Basingstoke/Palgrave, 1991.

⁴¹ *Supra*, pp. 502-504.

⁴² These could relate to public and professional moral convictions, so one may wonder if personal moral convictions (as a strictly personal motivation), would be relevant – I lean to a negative position, unless these personal convictions lead to an expressed commitment to others, giving rise to (shared) expectations concerning behaviour.

⁴³ As discussed, the case here is that all regulation benefits by a design-based approach, but that statement refers to the (methodologically proper) way of establishing outlines before making actual instances – rather than to (outlines and) instances that do not allow for regulatees’ influence on their normative substance.

On the basis of these ‘amendments’ to Lessig’s distinction of regulatory modes, Murray & Scott continue on Lessig’s argument, “[...]. that there is scope for the use of hybrid forms of regulation which link two or more of the ‘pure’ modalities of regulation [...]”.⁴⁴ This approach fits perfectly with my earlier remark on purity and hybridity as regards the public law – private law divide. In their description and analysis, Murray & Scott accentuate the kinds of hybrids that are of particular relevance to controlling cyberspace. Here we apply a more abstract approach, so that a simple, overall list of pure and hybrid forms suffices.⁴⁵

As pure forms Murray & Scott distinguished four modes:

Singles

1. Hierarchy-based regulation (‘Shall (not)’)⁴⁶
e.g. prohibition of criminal acts.
2. Community-based regulation (‘Ought (not)’)
e.g. NGO child-labour or eco-friendliness standards
3. Competition-based regulation (‘Want (not)’)
e.g. corporate social responsibility standards (labels) to create a niche market, e.g regulatory competition between states in attracting companies (see no. 6).
4. Design-based regulation (‘Can (not)’)
e.g. speed ramp, crush barriers, IP-addresses, regional dvd-codes.

From this 6 pairs of hybrid modes, 4 threesomes of hybrid modes and 1 foursome hybrid mode can be distinguished:

⁴⁴ Murray & Scott, *supra*, p. 504.

⁴⁵ With each some examples are named, mostly taken from Murray & Scott, but some added on my own accord.

⁴⁶ My, perhaps somewhat feeble, attempt is to typify distinctions by succinct descriptions as (varieties of) incentive-modes: shall – ought – want – can (not).

Hybrid pairs

1. Hierarchy- & community-based regulation ('Shall (not) & Ought(not)')⁴⁷
e.g. public 'co-regulation' and 'enforced self-regulation', being community-based and, if and when involving mechanisms of government mandates or approval, hierarchically based (but check no. 8).
2. Hierarchy- & competition-based regulation ('Shall (not) & Want (not)')
e.g. 'partial industrial regulation' – such as in auctioning of public rights/allowances – e.g. UMTS), being hierarchy-based, but leaning on a competition between regulatees.
3. Hierarchy- & design-based regulation ('Shall & Can (not)')
e.g. hard 'enforced design' (for products or services, including websites), when hierarchy-based following mandatory government regulation, such as a standard on in-built content scrambling or encryption against violation of copyrights (but also check no. 9).
4. Community- & competition-based regulation ('Ought (not) & Want (not)')
e.g. private 'co-regulation' and 'enforced self-regulation' (see no. 5; especially know as), being community-based and, if and when involving mechanisms of negotiations between competitors, competition-based – at a risk of infringing competition law.
5. Community- & design-based regulation ('Ought (not) & Can (not)')
e.g. soft 'enforced design' (see no. 7), being community-based, following from private (e.g. industrial) self-regulation.
6. Competition- & design-based regulation ('Want (not) & Can (not)')
e.g. 'standardized design', being competition-based as first-mover designs of products (or infrastructure or semi-manufacture) become dominant if and when they are favoured by consumers, and next, second-mover competitors follow design to successfully and competitively enter the market.

Hybrid threesomes

1. Hierarchy- & community- & competition-based regulation ('Shall (not) & Ought (not) & Want (not)')
e.g. government requirement of management or process certification by NGO, for industry (concerning tradable allowances').
2. Hierarchy- & community- & design-based regulation ('Shall (not) & Ought (not) & Can (not)')

⁴⁷ In this labelling the assumption is that each of the involved modes expresses the ultimately intended behavioural norm and that, if applicable, the '(not)' expresses this norm. With more nuance, each of these hybrids combines two: hierarchy-community and community-hierarchy, in which case the second mode is primary object of the first (and not the behavioural norm itself): i.e. shall – ought (not) and ought – shall (not). The actual existence of each of these forms is not obvious and I have consequently refrained from analysing all their possibilities.

e.g. government requirement of service certification or benchmarking by NGO for NGO.

3. Hierarchy- & competition- & design-based regulation ('Shall (not) & Want (not) & Can (not)')

e.g. government requirement of product, infrastructure or physical production process certification by companies

e.g. 'architected private property rights', being community-based allocation and regulation of new property rights in a design context (as in new internet domains - e.g. '.aero' and '.info', but not '.xxx') names) available in competition (to the highest/fastest bidder) The hierarchical aspect would be of a private nature, carried by ICANN. Alternatively, similar systems could exist on the basis of governmental hierarchy, as in public parking space.

4. Community- & competition- & design-based regulation ('Ought (not) & Want (not) & Can (not)')

e.g. self-regulatory service certification or benchmarking by NGO for NGO.

Hybrid foursome

1. Hierarchy- & community- & competition- & design-based regulation ('Shall (not) & Ought (not) & Want (not) & Can (not)')

e.g. product certification or benchmarking by NGO for NGO.

Murray & Scott only discuss full hybrids. In their analyses, three- and foursomes do not appear as partial hybrids that combine two or more instances of one mode with one or more instances of another, as in: hierarchy- & community- & hierarchy-based regulation and community- & competition- & community- & design-based regulation. I am under the impression that the authors' main intent was to redefine control modes and to show accompanying examples in regulating cyber space.

It would be a next step to determine the variety of hybrids in which there are particular sequences of control modes (related on a causal or a normative basis), in which case, for example, the above no. 6 theoretically involves two hybrid types: hierarchy-competition and competition-hierarchy, and in which case it makes sense to, generally speaking, also distinguish full and partial hybrids.

Furthermore, hybridity may deepen as we break-up the three (or more) aspects of regulation – standard setting, monitoring and/or enforcement. In pure modes of control all of these aspects share the same 'origin' – of hierarchy, community, competition or design. Perhaps though, it is – for instance – possible to envisage a hierarchically established standard, which is enforced by community mechanisms (of criticism and ostracism). Not all of these may make practical sense (here and now), but theoretically we may expound our inventory and

analyses way beyond the 11 full hybrids, or 60 full hybrids with differentiated/non-random sequences – and beyond inclusion of 30 partial hybrids, or 264 partial hybrids if we include differentiated/non-random sequences. Together these make 340 combinations, and if we allow one or two aspects per option to break-up (or not), then we yield many, many more combinations.⁴⁸

So, starting with four pure modes of control-incentives, we yield many hybrid types, primarily by mixing modes, sequencing modes and meanwhile differentiating between three basic aspects of regulation.

As we move from control incentives to regulatory sequences, from a design standpoint of external regulatory validity – both in being effective (capable) or legitimate (accepted),⁴⁹ it becomes interesting to better understand sequences as: (a) types of relations between regulatory actors, including regulatees, holding certain positions and (b) considering the nature of these positions, if only as this nature, as standard practical reason, may reflect sensitivity particularly to certain modes of control incentives. In including these aspects (a and b) we can make good use of the analysis provided by Levi-Faur.

4.3 Hybridity Following Regulatory Relations

Levi-Faur's angle in defining regulation was also motivated by the possibility to emphasize the importance of 'diverse sets of actors' in the regulatory process, especially to underscore the importance of hybridity in regulation.⁵⁰

These sets relate to the various 'institutional environments', notably that of *government* (featuring unilateral command in service of public interests), of *civil society* (as voluntary cooperation in service of shared interests) and of *markets* (as business transactions under competition in service of private interests), with

⁴⁸ To be exact, a staggering 238.343.500. On my website I have included a note, which I have produced together with T.T.R. Heldeweg, showing all possible varieties (in abstract terms – a, b, c, d for modes of control) for pure, full hybrid and partial hybrid combinations, and the math for determining all combinations including hybridity within modes. See: <<http://www.utwente.nl/mb/pa/staff/heldeweg/>>

⁴⁹ The issue of internal design, as regards the choice and configuration of norm components, is likely to also become a challenge as in pair, three and foursomes, regulation will generally come as a conjunction of norms, which should be consistent across the various incentive modes upon which they are built. Of course this is not necessarily the case if standard setting is based in only one of two, three or four modes, involved in the particular piece of hybrid regulation.

⁵⁰ Levi-Faur 2011, *supra*, p. 6.

types of regulation ‘purely’ within such environments, or ‘hybridly’, across these environments.⁵¹

Institutional environments have their own characteristic set of (institutive)⁵² normative arrangements, such as that of property, contract, company and competition law concerning *markets*, democracy and the rule of law (e.g. legality) concerning *government*, and the freedom of association, legal personality and voluntary codes concerning *civil society*. Regulation is relevant to the introduction, change and termination of rules related to such arrangements. As such, they present themselves as matching regulatory environment(s), as described by Brownsword & Somsen. We should, however, not identify institutional and regulatory environments ‘one on one’. Firstly, because regulation is merely one of many institutional factors determining governance patterns of behaviour. Secondly, as regulatory environments are, consequential to the shift from ‘government regulation’ to ‘regulatory governance’, to a large extent contingent upon the occurrence and objectives of many different regulators applying various instruments to achieve different outcomes in various contexts – not necessarily bound by ideal type institutional prescripts.

To make regulatory sense of actor operations within these entangled action contexts (or arena’s),⁵³ we need to keep track of regulatory relations. To this, Levi-Faur provides a useful approach when linking the ‘who’, with the ‘how’ of regulation.⁵⁴ This is captured in what he names major relational concepts of regulation, of which *first*, *second* and *third party* regulation are the major types.⁵⁵ I understand these concepts as regulatory relations, between core

⁵¹ Thinking of four modalities of regulation, it is tempting to also consider the concept of the institutional environment of the *physical world*, with patterns of behaviour which relate to the realm of physical functionalities, technologies and artefacts and which shape patterns of human activity – in as much as ‘architecture’ constitutes these patterns, rather than follows norms, so that ‘architecture’ can be said to, as an institutional environment, carry with it both an empirical and a normative dimension. I will not elaborate on this view. For some ‘roots’ for such a perspective see: L. Winner, *Of Autonomous Technology: Technics-out-of-Control as a Theme in Political Thought*, Cambridge, Mass., MIT Press, 1977.

⁵² Institutive is used loosely here, as generally institutional environments are momentary states of affairs in an evolutionary process of societal dynamics. Generally one cannot refer to a particular institutive act, which brings about such an environment.

⁵³ E. Ostrom, ‘Background on the Institutional Analysis and Development Framework’, *The Policy Studies Journal*, Vol. 39, No. 1, 2011, pp. 7-28.

⁵⁴ To focus on the ‘how’ (or act/strategy) of regulation, instead of the ‘who’ (actor), seems a logical consequence to the shift from government regulation to regulatory governance. ‘We are all immersed in the regulatory game’, as Levi-Faur puts it (*supra* (2011), p. 7) and so, to merely look at the ‘who’ can only tell part of the story (and no longer the whole story as when looking at the ‘who’ of government sufficed).

⁵⁵ Levi-Faur 2011, *supra*, p. 8. It is not clear to me which other strategies he would

functional actors in the regulation game, with each position in the relation carrying a specific function: (professional) regulators, regulatees and intermediary or supporting actors, such as standard setting, monitoring, auditing, and/or certification organizations. As to these latter actors Levi-Faur emphasizes their character as NGO's established especially to develop and provide additional regulatory capacity: *MaNGO*'s, controlled by companies from within the market, *GoNGO*'s, controlled by governments, or *CiNGO*'s, controlled by societal organisations. The main argument behind using the NGO-label seems to be that it separates these specialized bodies from their controlling organisation(s). I find the NGO concept somewhat confusing here and rather refer to these actors by adding the 'i' of *intermediary* to the capital letter of their nature (G, C and M, for Government, Civil society, and Market): iG, iC, iM.⁵⁶ Their role will become clearer as we now look at the three basic types of regulatory relationships.

In *first party* regulation there is no real specialization of concerned actors in terms of the role of regulator and that of regulatee, as both positions are occupied by one and the same actor, who is thus regulating itself: first party regulation is *self-regulation*.⁵⁷ Given the three underlying institutional environments, we can distinguish between three (pure) subtypes, on the basis of related ideal type regulatory actors:

1. a government (organization) regulating itself (G-G);
2. a civil (society) organisation regulating itself (C-C);
3. a market enterprise regulating itself (M-M).

Across all of these, we may find service, product, and/or process quality standards, policy guidelines, ethical/integrity standards and governance codes. In all cases plurality of actors is possible, but only if consensus is the basis, as otherwise we enter into second party regulation.

distinguish. Are there 'fourth party' strategies?

⁵⁶ I understand the need to underscore the specialized character of these organizations, but remain somewhat sceptical as to separating them too much from their government, market or civil society roots – take credit rating agencies: they may be intermediaries but they are also companies wanting to make a profit...

⁵⁷ The regulatee being the same as the regulator is to say that that the norm subject is equal to the regulator. Where a Constitution allocates power to municipalities to autonomously introduce bylaws on matters concerning the 'household' of the municipality, we have to look at the norm subjects of this bylaw to decide if this involves first or second (and perhaps third) party norm subjects. If the norm subject is the municipality itself, we label the bylaw as first party regulation, if it concerns citizens, then we label it second party (or perhaps third – on which more later in the main text).

In *second party* regulation we do find the crucial ‘specialisation’ separating actors as regulators from actors as regulatees; the first being the one to introduce, change or terminate regulations, the second being the one actor (group) whose behaviour is channelled by these regulations (or channelled differently or no longer channelled). Given three underlying institutional environments, we can distinguish between nine subtypes, which I list, for the sake of brevity, as three groups of three relationships, again on the basis of related ideal type regulatory actors:⁵⁸

1. (1-3) A government can regulate another government or a civil organization or a market enterprise (G-G; G-C; G-M).
2. (4-6) A civil society organization can regulate a government, or another civil organization or a market enterprise (C-G; C-C; C-M).
3. (7-9) A company can regulate a government or a civil society organization or a market enterprise (M-G; M-C; M-M).

With all of these nine relations, each actor type can refer to single or plural instances, and it is possible that regulators regulate more than one regulatee-type at the same time, as in a government regulation on fraud being applicable to governments, civil organisations and market enterprises at the same time (G-GACAM).

It is characteristic of modern regulatory governance that this list of second party regulation, especially looking at group 2 and 3 (no’s 4-9), includes relations where government is regulated by either market enterprises or civil organisations, and where market enterprises and civil organisations are regulating each other or others of their own kin. These latter relations (‘private to private’) may involve forms of *voluntary* regulation, such as market enterprises (as regulatees) adopting technical or social norms formulated by civil society regulators – which borders first party/self-regulation. They may, however, be of a (more) *coercive* nature, when based in private ownership or in (especially B2B) contracts under market conditions which leave the other contracting party (e.g. suppliers) little choice in accepting (retailer) conditions – something that has more elaborate third party forms – shown in the below.

Note, finally, that of second party regulation, *three* types are about relations between the same type of organization (no’s 1, 5 and 9), and *six* types are about relations between different kinds of organisations. It is tempting to translate this in terms of pure versus hybrid, but we should look at third party regulation before we decide by what criterion we make this kind of judgement.

⁵⁸ And again, each actor type could refer to single or plural instances of such actors.

In *third party* regulation we find that, in between regulator and regulatees, a third party appears and fulfils a function indispensable to the proper working of the regulatory relationship. These are the intermediary or supportive regulatory agents, especially active in the field of auditing and certification.⁵⁹

Following Levi-Faur’s approach, there are twenty-seven subtypes of third party regulation, summarized in a table, linking each of three possible regulators to three possible intermediaries, and for each of these combinations to three possible regulatees.

THIRD PARTY REGULATION (27 relations: 3x3x3)				
Regulator	Intermediary	Regulatee (choose between G, C and M)*/**		
G (Government)	iG	G (1)	C (2)	M (3)
	iC	G (4)	C (5)	M (6)
	iM	G (7)	C (8)	M (9)
C (Civil Society)	iG	G (10)	C (11)	M (12)
	iC	G (13)	C (14)	M (15)
	iM	G (16)	C (17)	M (18)
M (Market party)	iG	G (19)	C (20)	M (21)
	iC	G (22)	C (23)	M (24)
	iM	G (25)	C (26)	M (27)
* G=Government; C=Civil Society; M=Market enterprise; iG, iC, iM as intermediaries controlled by G, C or M				
** (between brackets) the number of the specific relation: regulator-intermediary-regulatee				

Following Levi-Faur’s distinction between purity and hybridity by the nature of regulatory actors, there are *three* relations (No’s 1, 14 and 27) where all actors are of the same origin (in simple abbreviations: GiGG, CiCC, MiMM). Consequently, we are left with *twenty-four* relations as hybrids:

- Six of these are *full* hybrids, in which every actor has another origin (i.e. GiCM; GiMC, CiGM, CiMG, MiCG, MiGC). These are interesting as their regulatory relation involves actors of different institutional denominations, causing legitimacy and effectiveness of regulation to hinge upon distinct actor characteristics – of regulators, intermediaries and regulatees – originating in their ideal type ‘practical reasons’ for acting, by regulating or under regulatory influence. Presumably, regulators opting for full hybridity do so on the assumption that the effectiveness and/or legitimacy of their regulatory intervention is best served by involving an intermediary from a different origin – either as this will ‘cloak’ their own involvement or add

⁵⁹ I lean to the position that we consider as third parties only those agents that have determining influence on the actual coding of signals, defining the scope of action available to regulatees, proving elements that the regulator has left to yet be decided – not merely enforcers or those who may support a change of behaviour but are not indispensable.

additional legitimacy and/or effectiveness through the intermediary's involvement.

- Next, there are *three* groups of six *partial* hybrids (so in all eighteen – no rocket science here), with the interesting feature of there always being ‘an odd one out’.
 - In one group, the *regulator* is the ‘odd one out’ (i.e. *GiCC*, *GiMM*, *CiGG*, *CiMM*, *MiGG*, *MiCC*), suggesting, as in the above group, that the regulator seeks regulatory support in an intermediary from the same origin as the regulatee – suggestive, perhaps, of facilitating some measure of self-regulation.
 - In another group, the *intermediary* is the ‘odd one out’ (i.e. *GiCG*, *GiMG*, *CiGC*, *CiMC*, *MiGM*, *MiCM*), perhaps suggesting impartiality to regulatees of the same origin as the regulator, or some other type of external legitimacy (presenting the different nature of the intermediary as a sign of external support of the regulation in case), or merely acquiring the regulatory capacity that is otherwise lacking.
 - In the last group, the regulatee is the ‘odd one out’ (i.e. *GiGC*, *GiGM*, *CiCG*, *CiCM*, *MiMG*, *MiMC*), presenting a strong case of suggesting that the regulator ‘means business’, by retaining the primacy over, what we could call, the ‘active side’ of regulation (i.e. of the regulator and the intermediary; as against the ‘passive side’, where the regulatees are placed), but possibly also to hold primacy, but meanwhile creating distance (and impartiality) from characteristic influences upon the regulator (e.g. political, market, stakeholder).

From all of this it seems that Levi-Faur applies a ‘simple’ distinction between purity and hybridity: when all actors share the same origin, there is purity, if not, there is hybridity.

Thus *first* party regulation is always pure, unless there is (*de facto* or *de iure*) involvement by other parties – as with coerced/enforced self-regulation or with co-regulation. I am assuming that Levi-Faur considers these hybrid only if they involve intrusion by a regulator of another nature, rather than there being a hybrid mix between first and second, or even third party regulation, regardless of the nature of actors involved.

Following Levi-Faur's approach, under *second* party regulation six out of a total of nine relations are hybrid, as their actor denominations do not match. Doing so certainly creates awareness of the fact that, often, regulatees do not share regulator origins and accompanying characteristics, such as organisational form and purpose, so that through regulation their ‘practical reason’ may be incentivized in different ways than peculiar to the regulator himself. At the same time, certain second party relations are well established as typical of particular

institutional environments, such as those of government regulation of citizens. Levi-Faur, however, does not in so many words single out these six hybrids. As we saw in the above, within third party regulation, twenty-four of the twenty-seven third party relations are considered hybrid, again by virtue of the difference in nature of one or two or all of the actors involved.

Apart from these twenty-four hybrids within third party regulation, Levi-Faur makes a general point about hybridity, by discussing four major types,⁶⁰ applicable to first and second party regulation – and perhaps also to third party regulation.⁶¹ These are:

- *Co-regulation*, much alike self-regulation, the regulator/regulated joins another regulator in bringing about regulation agreed between them. This agreement separates co-regulation from self-regulation as it is likely to involve compromise.⁶²
- *Coerced regulation*, although self-regulating, the regulator/regulated is doing so under influence of another party with regulatory capacity (pushing *ex ante* substantive specifications and/or demanding *ex post* approval).
- *Meta-regulation*, is about ‘any form of regulation [...] that regulates any other form of regulation’⁶³ It comes in various forms, such as (legal) regulation of self-regulation (e.g. oversight or voluntary accreditation of self-regulation or regulatory governance codes) and in transnational regulation (e.g. EU primary or secondary rules on member states’ regulation). When meta-regulation is understood as a regulator (as in second and third party regulation) facilitating and motivating regulated to self-regulate – setting aside whether the regulator is a public or a private actor – it presents a hybrid between different types of regulatory relations. Again this begs the question whether we should distinguish between hybridity as a mix of types of regulatory relations and hybridity as a relationship involving actors of different natures – maybe it is both.
- *Multi-level regulation*, is about the possibility of regulators being situated at ‘different levels of territorial tiers’⁶⁴ – either on the basis of allocation driven by functional, hierarchical or incremental considerations. The core issue of multi-level regulation seems to be the transfer of regulatory authority between tiers,⁶⁵ and in that sense it stands separate from meta-

⁶⁰ Of course ‘major’ suggests that there are indeed more hybrids than Levi-Faur discusses.

⁶¹ Levi-Faur 2011, *supra*, p. 13.

⁶² Not necessarily only between ‘pure’ regulators; Levi-Faur points out that there may also be a sharing of regulatory work between MaNGO’s and CiNGO’s, or between MaNGO’s and Government. Levi-Faur 2011, *supra*, p. 10.

⁶³ C. Parker, as quoted by Levi-Faur 2011, *supra*, p. 11.

⁶⁴ Levi-Faur 2011, *supra*, p. 11.

⁶⁵ Which separates it from meta-regulation.

regulation. Nevertheless, one can envisage multi-level regulation involving a shift in regulatory discretion from an actor within the dominant tier to one or more actors, self-regulating within a subordinate tier – so perhaps there is a (possible and partial) overlap of concepts. In any case, again one may wonder about the criterion for purity or hybridity: is multi-level regulation by definition (always) hybrid or only if it concerns regulators of different persuasions?

As in some of the above four types of hybrids one can recognize some of the hybrid regulatory forms presented by Murray and Scott. However, the question remains whether this can be explained by reference to corresponding criteria for classification; either as pure or as hybrid types of regulation. Such classification may be vital to establishing guidelines for external validity of their design.

5. Way forward: in Conclusion

5.1 *Pure & Hybrid*

In the above (Paragraph 4.1) I wrote that the distinction between purity and hybridity can be made in various ways, dependent on a particular focus, which presents a particular setting and/or particular characteristics as ideal type(s), such as that of public versus private law. This is the kind of approach that we find with Murray & Scott and with Levi-Faur, both with a different perspective on purity.

Murray & Scott present purity and hybridity in the nature of *modes of control*, especially sanctions, but more broadly incentives. The nature of actors is relevant only in as much as this is indicative of their responsiveness to particular types of incentives. By combining four pure modes of regulation they presented eleven hybrid modes – across a variety of combinations across the aspects of standard setting, monitoring and enforcement. As we saw, this approach can easily be expanded upon with further refinement, as to specific sequences of modes and aspects, yielding up to 340 (or indeed 238.343.500) theoretical combinations (within the limit of only combining four modes).

Levi-Faur focuses on actor types, with similarity of nature (based in market, civil society or government) being indicative of purity of regulatory form, and differences in nature leading to hybridity. Thus he demonstrates how modern day regulation involves actors from all kinds of persuasions, social, business and political actors, operating and interacting on the basis of different rationales and responding to different incentives. Hybridity of actor types across a regulatory relation requires, especially of (meta-) regulators and intermediary regulators,

that they are well aware of the diversity of interests, values, objectives, faculties, and expectations, influencing legitimacy and effectiveness of regulation. At the same time, Levi-Faur's ordering of pure and hybrid regulation shows that purity and hybridity may also be regarded through the lens of the relationship itself, with hybrids being the consequence of mixtures between first and second party, second and third party and third and first party regulation.

Against the backdrop of these approaches, the emphasis of the design challenge concerning hybrid regulation, would be on a given (or a to be established) specialisation in regulatory *functions* which need to show a *fit* across the regulatory relationship, facilitating standard setting, monitoring and enforcement and specialisation within these aspects – as instruments and incentives need to be consistently deployed. At the same time these functions need to properly align regulatory discretion of the regulator (and/or intermediary party) and behavioural susceptibility to regulation on the regulatees' end of the relationship. As a matter of design this challenge resonates with the awareness that, following Brownsword & Somsen's remarks, there is no such thing as *the* regulatory environment, as a single monochrome (or pure) normative template for behaviour. Hybridity in regulatory relations clearly points at the interrelations between regulatory forms. Proper design is no easy feat!

5.2 The Design of Hybrids

Given their differences in approach by Murray & Scott and Levi-Faur, there are clearly similarities between them, if only because of the types of regulation which are labelled hybrid in both appraisals, such as co-regulation and enforced regulation, and various kinds of third party regulation.

What is clear is that although there may be ideal type combinations between institutional environments and organisations immersed in regulation, especially as regards incentive mechanisms that regulators call upon (hierarchy and unilateralism by *governments*; cooperation and consensus by *civil organisations*; competition and exchange by *market enterprises*), these combinations are by no means ironclad – in keeping with the shift from government to governance. Governments may apply hierarchy, but may also be involved in regulation by cooperation, contracts/exchange and competition. Similarly, civil organisations and market enterprises may use strategies or incentives other than typical to their ideal type origins of civil society (networks) and markets; such as command through ownership by civil society organisations and cooperation (legal or otherwise) by market enterprises in sharing resources. And in doing so, all actor types may also be involved in regulating by design. This means that as

regulators may ‘position’ themselves in ‘alien’ environments or, to phrase it somewhat less exotic, apply other than their own natural or ideal type incentive modes (i.e. other than unilateral commands by government, cooperation by social organisations and competitive contracts by market enterprises), so that regulatory strategies are mixed (and perhaps mixed up). Similarly intermediaries or regulatees may find themselves placed in other than their ideal type environment and accompanying ideal type relation to other regulatory actors.

A similar perspective is possible as regards the deployment of different types of regulatory relations. Whereas second party regulation may be suggestive of hierarchical control, it is not necessarily government that is on the regulator end of the relationship. Similarly, first party regulation is not limited to civil society organisations and indeed in third party regulation we may find mixed combinations of actors, control modes and institutional environments involved. Given ideal type institutional environments, with characteristic configurations of control modes, actors and relations – manifesting as patterns of behaviour –, what we find is that all three components can be reconfigured in ways which give a profoundly different meaning to their functionality – taking on characteristics which by nature are orthogonal to them, typical of application in other ideal type environments, such as a public allowance becoming a property right which can be traded.

When we focus on the position of regulators, this being ‘out of place’ as a regulatory actor, focuses attention to possible, what I name, ‘*normative transaction costs*’.⁶⁶ My assumption, for which this contribution does only allow a brief description, is that ideal type alignment between a regulator and its institutional environment rests on the premise that this presents – by definition – the optimal match in its (balance of) effectiveness and legitimacy in performing regulatory activities. Moving away from this general optimum makes sense only if this provides regulators with *ad hoc* opportunities that could not be realized within their ideal typical scope and which are expected to outweigh negative impacts from normative transaction costs. These are costs in being less effective or legitimate than on ideal type balance. Such loss of effectiveness (e.g. a government not being able to unilaterally decide and/or having to compromise) or of legitimacy (e.g. a company using its market power to enforce its quality

⁶⁶ This is a label of my own device, but of course leaning on the concept of transaction costs as used by O.E. Williamson (and others). The adjective ‘normative’ does not exclude the possibility of real costs, i.e. with monetary consequence – *see also* the next footnote.

standards over suppliers), is then traded off against expected reciprocal *ad hoc* gains in legitimacy and effectiveness respectively.⁶⁷

Of course, the ideal type institutional environments are not merely recommended optimum normative types of states of affairs, but they will also come with normative demands and constraints, which present boundary rules for certain regulatory ‘transpositions’ – as in competitors freely regulating markets cooperatively (i.e. cartels) or in governments regulating for the mere benefit of private business persons or volunteers (i.e. favouritism, nepotism etc.), apart from restricting aspects of legal personality and of allocation of legal powers.⁶⁸ Thus to merely consider hybrid regulatory transpositions as clever, yet neutral remediable responses⁶⁹ (i.e. without normative consequence) to institutional failure of markets, civil society, or government, in meeting certain regulatory ends, would not do justice to the normative standing enshrined in the typical normative balance they strike between effective and legitimate (regulatory) interactions.

5.3 *Finally*

This contribution’s objective is to set a first step in understanding and mapping hybridity of regulation and understanding that it impacts external validity as a parameter of proper legal design of the rules and/or regimes that establish such regulation.

We have found firstly that the shift from government to governance has broadened the scope of regulation and increased the number and measure of entanglement of regulatory environments, actors and activities. With this, regulatory environments have developed not only within, but also across the institutional environments of markets, civil networks and government.

Secondly, the case was made that modern day *wicked policy challenges* call for a proper methodology of legal design regarding regulatory instruments to secure and foster their effectiveness and legitimacy. Such a methodology builds upon an understanding of legal design as well-considered relationships between legal form and legal functionality, expressed by procedural and substantive guidelines

⁶⁷ Think also of costs of organising oversight for market enterprises involved in taking decisions with public authority.

⁶⁸ In a manner of speaking, making systemic transaction costs absolutely unaffordable, as their prohibitive causes are beyond compensation.

⁶⁹ Compare the concept of ‘remediableness’ as suggested by O.E. Williamson, *The Mechanisms of Governance*, Oxford University Press, Oxford, 1996, p. 210 (“The relevant test is whether (1) an alternative can be described that (2) can be implemented with (3) expected net gains. This is the remediableness criterion.”)

for design. Such form-function relationships are relevant, firstly, to the internal norm structure of regulation (concerning the configuration of norm subject, object, operator and condition),⁷⁰ but also the external validity of regulatory instruments. This is regarded a challenge especially to hybrid regulation as their method of design does not follow from some ideal type concept of regulatory instruments, given institutionalized patterns of behaviour.

Thirdly, an attempt was made to understand and *map* some likely candidates for conceptualisation of such pure and, especially, hybrid forms of regulation, based on different perspectives: of ‘modes of control’, of ‘types of actors’ and of ‘regulatory relations’. Even with the modest exploration performed in this contribution, the number and variety of hybrids is, well, ‘staggering’. Furthermore, it has become clear that from a design standpoint we need to clearly determine the functionality of regulatory types in context. If we accept the premise of ideal type institutional environments with, as to their external legal validity (in being effective and legitimate), intrinsic design methodologies, then the search for design guidelines could be undertaken by comparing normative transaction costs. Thus designed, hybridity may be understood as a well-considered choice of regulation away from general optimality, towards *ad hoc* optimality, enhancing regulatory effectiveness and legitimacy while minimising normative transaction costs.⁷¹

⁷⁰ Which we may understand as a general notion of setting standards for behaviour, but includes the issues of standards for standard setting, for monitoring and for sanctioning, and the powers to set standards, to monitor and to sanction.

⁷¹ I wish to thank my colleagues Aurelia Colombi Ciacchi (Groningen University, Faculty of Law) and Richard Neerhof (VU University of Amsterdam, Faculty of Law) for their very useful comments to an earlier version of this text.