FOSTERING INNOVATION BY REGULATORY REGIME DESIGN: BEYOND INDIFFERENCE

- WORK IN PROGRESS -

Prof.dr. Michiel A. Heldeweg  
Em.Prof. dr. Dick W.P. Ruiter
Pace of technological innovation presents a historically unique challenge of many new/novel act-types, i.e. …

- acts, which such were never before performed or foreseen as performable (e.g. cloning; nano-farmaceuticals)

- Acts, which (may well) require normative channelling…
‘A CASE OF NORMATIVE OPENNESS’

Compare The Garden of Eden
- how to perform the first sin?

Lack of prior….
- description: no factual analogies with existing act-types
- prescription: no predetermined obligations or permissions

Need for a method of legal design!
- Provide ‘from scratch’ description of new act-type
- Normative balance: foster opportunities/curb risk
‘First norm-to-act encounter’
3 basic types of regulatory channelling

Say: new act type ‘X’ (‘Y’ = norm addressee)

Red light negative channelling: ‘X is prohibited to Y’
Amber light neutral channelling: ‘(Not) X is permitted for Y’
Green light positive channelling: ‘X is commanded of Y’
NOTE 1st ENCOUNTER: CHANNELLING ACT-TYPES BY NORMS OF CONDUCT

- **Subject**: norm addressees
  - general public – individual person

- **Object**: mode of conduct
  - perform act / refrain from acting

- **Operative mode**: ‘direction of ought’
  - obligatory (shall) or permissive (may)

- **Norm condition**: hypothetical bindingness
  - abstract case(s) – concrete/unique case
TYPES OF NORMS AS A REGULATORY SPECTRUM

<table>
<thead>
<tr>
<th>Negative</th>
<th>Neutral</th>
<th>Positive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shall not do X</td>
<td>May do/not do X</td>
<td>Shall do X</td>
</tr>
<tr>
<td>Prohibition</td>
<td>Permission</td>
<td>Command</td>
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</table>

Greater complexity – intermediary positions…

**Regulatory variables:**

- **sanctions**  penal, tort, revoke permit
- **reservations & facilities**  conditions & extra’s
- **strategic mixtures**  public/private law instruments
- **tilt**  interpret ‘gaps’ pro-prohibition/pro-permission
DESIGN FROM CHANNELLING

Proposition
- first elaborate on channelling (Browndword)
- focus on (norm operator) x (norm object)

Elements
Operator – Obligation (O)
  – Permission (P)
Object – act (a)
  – not act (~a)

Combinations
Oa or O~a, and Pa or P~a
NOTE CONSIDER CONTEXT: SQUARE OF NORMATIVE OPPOSITES

Combine **Operator** (shall/may) and **Object** (do/not do)

<table>
<thead>
<tr>
<th>Operat or (\downarrow) object (\rightarrow)</th>
<th>Do ‘Perform act’</th>
<th>⇋</th>
<th>Not do ‘Omit act’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shall ‘Ordered’</td>
<td>1. Command Oa</td>
<td>⇋</td>
<td>2. Prohibition O~a</td>
</tr>
<tr>
<td>⇋</td>
<td>&lt;+&gt;</td>
<td>&gt;=&lt;</td>
<td>&lt;+&gt;</td>
</tr>
<tr>
<td>May ‘Permitted’</td>
<td>3. Permission Pa</td>
<td>&lt;&gt;</td>
<td>4. Dispensation P~a</td>
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</table>

Contradictory (>-<); Contrary (<->); Subaltern ( <+>); Subcontrary (</>)
Consider the possibility of a (future) drug (‘Z’) to remedy, if used early in pregnancy, occurrence of a handicap.

The Sq^re positions depict four types of (from scratch) normative channelling:

1. **Command**: pregnant women shall take Z.
2. **Prohibition**: pregnant women shall *not* take Z.
3. **Permission**: pregnant women may take Z.
4. **Dispensation**: pregnant women may *refrain from* taking Z.
ELABORATION AND POSITIONING OF NORMATIVE OPPOSITES

Positions with (negated) equivalents

Apply the Square to Brownsword’s modes of channelling...

Positive channelling: 1. Command - $Oa = \neg Pa$

Negative channelling: 2. Prohibition - $O\neg a = \neg Pa$

Neutral channelling: 3. Permission and 4. Dispensation together - $(Pa \land P\neg a) = (\neg O\neg a \land \neg Oa)$
TO CHANNEL OR NOT TO CHANNEL…

Every new act-type appears as unchannelled….
Take ‘cloning’:
No obligation to clone ($\sim Oa = P\sim a$)
No obligation not to clone ($\sim O\sim a = Pa$)

Together this makes: $P\sim a \land Pa$
Also known as “INDIFFERENCE”
 Positioned outside of the sq$re$ (opposite $Oa \land O\sim a$)

… but neutral channelling also reads as: $P\sim a \land Pa$
WEAK & STRONG PERMISSIONS

Von Wright: ‘Norm and Action’(1963):

Weak permission = absence of obligation to perform or refrain from performing an act

Strong permission = a permission following an authoritatively considered normative status of an act…

<table>
<thead>
<tr>
<th></th>
<th>Unchannelled</th>
<th>Weak Perm.</th>
<th>Pre- nor proscibed</th>
<th>Absence of obligation</th>
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<tr>
<td>Channelled</td>
<td>Strong Perm.</td>
<td></td>
<td>Considered norm. status</td>
<td>Expression of tolerance</td>
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Society can take 3 approaches (Brownsword)

<table>
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<tr>
<td>Prohibitive</td>
<td>Permissive</td>
<td>Command</td>
</tr>
<tr>
<td>(O~a)</td>
<td>(Pa ∧ P~a)</td>
<td>(Oa)</td>
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If option 2 is preferred; regulators must choose:
2. as channelled/strong permission
2. as unchannelled/weak permission

And the differences (relevant to design) are......
THE DIFFERENCE... 1
STRONG PERMISSION

(Weak permission = absence of obligation)

A strong permission
- implies an opposite: legal promise - non interference
  .... a toleration (‘by authority’)

but (generally) also comes with:
  - a right: relative to others being Prohibited to hinder or prevent the holder of permission (e.g. keep protesters out);
  - a claim: ........
THE DIFFERENCE… 2
STRONG PERMISSION

A strong permission … (generally) comes with:

- **A right**: ..........(Prohibition).
- **a claim**: relative to others being under Command to (also) enable the holder of permission (e.g. provide assistance)

Rights&claims: no tolerance regarding ‘others’

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<th>S. Permission as a right</th>
<th>S. Permission as a claim</th>
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Strong Permissions possibly implicate Prohibition and Command….

In turn Prohibition and Command always implicate Dispensation and Permission respectively.

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Unilateral Permissions (P~a ∨ Pa) as opposed to Bilateral permissions (P~a ∧ Pa)… as in:
- strong permission (neutral channelling) or
- weak permission (absence of a norm)
Absence of obligations: \( \sim O \sim a \land \sim O a \)
Reads as: \( P a \land P \sim a \) .... as a matter of ‘logic’

In ‘practice’ legal systems often have ‘norms of closure’: response to absence/legal gaps/new act-types

E.g. the ‘principle of prohibition’:
“Any act which is not prohibited is permitted”

E.g. the ‘legality principle’:
“Government may act only upon explicit legislative power.”
BEYOND CHANNELLING: ISSUE
REGULATORY DEFAULT – ‘TILT’

3 Ideal type (?) societal responses to drug Z

Society 1 – Prohibitive …..
  ▪ Prohibitive, but with exceptions of Permission or Command
  ▪ Negative tilt in similar but not excepted cases (O~a)

Society 2 – Commanding …..
  ▪ Commanding but with exceptions by Dispensation or Prohibition
  ▪ Positive tilt in similar but not excepted cases (Oa)
REGULATORY TILT

Society 3 – Permissive …..

- Permissive, but with exceptions upon Command or Prohibition
- Neutral Tilt in similar but not excepted cases
  \((Pa \land P\sim a; \text{‘the pregnant woman decides’})\)

Note: basic rule/type of channelling does not determine the tilt!

E.g. Licencing
- Basic rule reads \(O\sim a\)
- Tilt may read: neutral only with reservations!
3 STEP DESIGN PROCESS

legal/regulatory design sequence, upon an emerging new act-type:

1. Recognition and legal specification
   - act type (who. what, how, where, when…)

2. Choice of from of basic rule (type of channelling)
   - when permissive consider weak vs strong

3. Determination of regulatory tilt
   - consider objective behind basic rules
DESIGN BY REGULATORY
CHANSELLING OF NEW ACT-TYPES

Discussion

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Prohibition \((O\sim a)\) implicates (and requires) Dispensation \((P\sim a)\), but is silent on \((Pb)\)

- proscribing action (‘a’) in favor of (weakly) permitted action (‘b’)

When ‘b’ is more innovative than ‘a’: e.g. fuel a v. b
Command (Oa) implicates (and requires) Permission (Pa), and is opposite to (D~a)

- prescribing action ‘a’, while proscribing action ‘b’ in favor of innovative action (‘b’)

When ‘b’ is more innovative than ‘a’: e.g. fuel a vs b
Permission \((Pa \land P\sim a)\) presents freedom in (not) pursuing action \(a\) or action \(b\)

- as strong permission as a right or claim – facilitating and fostering action ‘\(a\)’
- as weak permission, action ‘\(a\)’ dependent on other than normative incentives (unless norm of closure)

When ‘\(b\)’ is more innovative than ‘\(a\)’: e.g. fuel \(a\) v. \(b\)
NOTE IMPLICATED NORMATIVE POSITIONS [POST S15]

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