SEMINAR SERIE
I ALLMÄN RÄTTSLÄRA

TOWARDS LEGAL DESIGN OF
SMART RULES & REGIMES

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LEGAL DESIGN OF SMART RULES & REGIMES

“Getting legislation right is essential if we are to deliver the ambitious objectives for smart, sustainable and inclusive growth, set out by the Europe 2020 Strategy.”

European Commission (2010)

“There are no easy routes to regulatory improvement.”

Robert Baldwin (2005)
Leading Questions

How so are smart rules & regimes relevant to policies fostering technological innovation?
How may such rules & regimes be the object of and inspire legal design methodology?
How does such a methodology relate to strategies under the heading of ‘Better Regulation’ and ‘Smart Regulation’?
LEGAL DESIGN OF SMART RULES & REGIMES

Roadmap

1. Regulating Technological Innovation
2. Smart Rules & Regimes
3. Legal Design Methodology – as such
4. Legal Design Methodology – regarding norms
5. Better & Smart Regulation
6. Some conclusions
1.0 THE DUTCH PARADOX (INNOVATION)

“An excellent record in knowledge creation, but a mediocre record in innovation activity”
1.1 WHAT IS INNOVATION?

Exploration
(inventions)

Process
(‘input’)  

Result
(‘output’)

Exploitation
(valorization)
1.2 MARKET OR ENTREPRENEURIAL FAILURE

- Positive externalities
  - societal interests
- Return on investment
  - spill-over or lack in demand
- Knowledge transfer
  - Complex and/or tacit
- Profit margins
  - Strong competition
- Cooperation
  - no chains/network
1.3 SYSTEMIC INNOVATION FAILURE

Exploration ➔ Exploitation

INSTITUTIONALIZATION

From ‘Open’ ➔ Through ‘Convergence’ ➔ To ‘Closure’

Market ➔ Technical Standards ➙ Government

“supply chain” ➔ “risk/distributive regulation”
1.4 GOVERNMENT INVOLVEMENT?

Innovation as a Public Interest?

Extrinsic
- generally make society flourish
  Mainly securing basic legal infrastructure

- Intrinsic
  - general purpose technologies
  - enhancing public service*
  - securing public values*
  gov’t as launching customer, initiator, partner & legislator  (* incl. egality & equity)
1.5 GOVERNMENT FAILURE

Regarding innovation
- Lack of knowledge: misjudgments/reg. capture
- Policy fragmentation: failing coordination; anti-commons
- Over-specification: too strict on innovation deliverables
- Overregulation: adm. burden, internal processes/mind set

Note:
1. Public interest (in Innovation) does not exclude private/privatized execution & regulation
2. Fail-risk + Liberal democracy – government: ‘additionality principle’ (regulatory & otherwise)
1.6 A SMART APPROACH?

Dumb ⇔ Smart
Technology dependent ⇔ Regulatory channeling

Regulatory policy (foll. Brownsword)
Red light – negative channeling – ‘Y shall not do X’ (prohibition)
Amber light – neutral channeling – ‘Y may (not) do X’ (permission)
Green light – positive channeling – ‘Y shall do X’ (command)

X being specific ‘innovative conduct’
Y being the norm addressee
1.6a A SMART APPROACH?

Red light – negative channeling – ‘Y shall not do X’ (prohibition)

‘Innovative Risk Regulation’
(un)certain (precautionary principle)

Innovation efficient
- Avoid overinclusiveness
- Proper proxy ....

Innovation effective
- Indirect incentives
  command/prohibit (mix carrot&stick?)

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1.6b A SMART APPROACH?

Amber light – neutral channeling – ‘Y may (not) do X’ (permission)

Innovation facilitating regulation

Basic legal infrastructure
- prop-rights; contract, competition, consumer law, ‘skills law’

Legal facilitation
- Intell.property / tradable public rights
- Reallocation / anti-commons
- Regulatory competition
- Competition Law: LPF and cooperation

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1.6c A SMART APPROACH?

Green light – positive channeling – ‘Y shall do X’ (command)

Innovation-compelling regulation

- direct (prohibitions &) commands
- indirect efficiency incentives
- intermediary (gov’t as initiator* or matchmaker**)

*launching customer?  
** procurement (PPP)?
2.0 SMART RULES & REGIMES

Rule – linguistic statement projecting a mode of conduct / power conferred, as norm which ought be adhered to.

- Subject – norm addressees (general – individual)
- Object – prescr. conduct (perform act / omit act)
- Operative mode – shall, may (not), can
- Norm condition – (hypothetical) abstract - concrete

Regime – a cluster of rules, which in conjunction holds at least the minimum of objective norms to underpin subjective rights

- Abstract regimes (property; permits; legal person)
- Concrete regimes (body of rules concerning a public interest)
2.1 SMART RULES & REGIMES

Two-fold wicked regulatory challenge:

High (social/technological) dynamics
Call for (self) adaptive (systems of) legal norms
   .. as in social following technological and vice versa

Strong conflicts of interests (clashing values)
Call for mediating/balancing legal norms
   .. as in public⇔private and innovation⇔risk
2.2 SMART RULES & REGIMES

General image of …

<table>
<thead>
<tr>
<th>Dynamics*</th>
<th>Societal</th>
<th>Technological</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value conflict**</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Private/ Innovat.</td>
<td>-</td>
<td>-/-</td>
</tr>
<tr>
<td>+</td>
<td>+/-</td>
<td>Smart rules &amp; regimes +/-</td>
</tr>
<tr>
<td>Public/ Risk</td>
<td>+</td>
<td>+/-</td>
</tr>
<tr>
<td>-</td>
<td>-/-</td>
<td>-/+</td>
</tr>
</tbody>
</table>

* prime focus: ensure efficiency and effectiveness

** prime focus: ensure legitimacy and legal validity/equity

Overall focus (hic et nunc): fostering technological innovation
2.3 SMART RULES & REGIMES

“The continuous safeguarding of the topicality of a regulatory regime, measured by the current state of technology, is the greatest and seemingly most hopeless challenge of technology regulation. (...) Effective regulation presupposes a procedural and institutional facility which facilitates a simple and fast adaptability of the regulatory regime to new technological factuality.” (Somsen, 2009: 21).

Here, smart rules & regimes are discussed as to their ability to provide such an ‘institutional facility’.
2.4 SMART RULES & REGIMES

4 dimensions of regulatory governance (4 legal maxims)

Legitimacy – *id quod*
- ‘What can legally be done by who?’

Legal validity – *modus quo*
- ‘How may/shall or can something legally be done?’

Effectiveness – *achieving regulatory objectives*
- ‘What can practically be done?’

Efficient – *most effective or least of means*
- ‘How can something be done?’
2.4a SMART RULES & REGIMES

Legitimacy – *id quod*

‘What can legally be done by who?’

State ⇔ Society (individuals/groups)

Different Institutional Environments

Hierarchy ⇔ Networks ⇔ Markets (+ 3 Hybrids)

Voice ⇔ Loyalty ⇔ Exit

Different Power-Conferring & Controlling Mechanisms

E.G. UMTS-Risks: consumer preference decides?
2.4b SMART RULES & REGIMES

Legal validity – *modus quo*
– ‘How may/shall or can something legally be done?’

Lawfulness
– decide within written and unwritten rules

Enforcement and legal protection
– mechanisms to uphold objectively/subjectively

‘Righteousness’
– meta-legal principles (e.g. distributive justice)
2.4c SMART RULES & REGIMES

Effectiveness – achieving regulatory objectives
– ‘What can practically be done?’

A (system of) norm(s) to bring the desired conduct?
– output ➔ outcome

Targeted: operator, object, conditionality, subject(s)
– not under-inclusive

Secure external coherence and enforcement
Secure dynamic appropriateness – robust & adaptable
– stay targeted: smart bomb hits moving target
Efficient – *most effective or least of means (cost-benefit)*
- ‘How can something be done?’

Regulatory management cost *(setting/enforcing)*
Regulatory burden *(responsiveness)*
  smoothness/ergonomics *(procedures/transactions)*
  align with behavior & gov’ce; shift burden
no over-inclusiveness *(object etc. – targetedness)*
  smart bomb avoids collateral damage
External coherence/enforcement *(transaction costs)*
No dynamic over-inclusiveness *(smart traffic light)*
2.5 SMART RULES & REGIMES

How to frame the smart regulatory game?

Rp = Regulatory policy-challenge
RR = Rule/Regime
Es = Effectiveness
Ly = Legitimacy
Lv = Legal Validity
Ey = Efficiency
A = Alternative reg.options

Satisficing: minimum requirements (no trade-off!)
Optimicing: maximizing (Pareto-optimality?)
3.0 LEGAL DESIGN
(OF SMART RULES & REGIMES)

O.K. (?)

How to design smart rules & regimes?

Does legal design methodology make sense
- Common sense or tacit wisdom?
- any promise & feasibility?

Positioning?
D.W.P. Ruiter
3.1 LEGAL DESIGN
(OF SMART RULES & REGIMES)

What is a design?
outline something non-existent but realizable on the basis of the outline (something as object with a function)

What is a design method?
well-considered, systematic, reproducible manner of making designs

What is a design methodology?
a well-considered, systematic, reproducible manner of making well-considered, systematic, reproducible manners of making designs
Design designates the projection of types of artefacts with a function determining their form

As in drawing of dress and the dress made

By analogy legal artefacts?

Candidates (civil law): rights, obligations, powers, property, legal persons

Practice: no clear method or methodology of legal design offering general guidelines towards methods of design in different area’s
3.3 LEGAL DESIGN
(OF SMART RULES & REGIMES)

Legal theory may provide building blocks

Proper level of abstraction within LD-methodology through ‘legal institutions’

“(1) Systems of rules (2) projecting a state of affairs (3) that ought to be realized (4) by a social practice regulated by those rules and (5) expressive of the common belief that the state of affairs is (6) actually the case.”

Not empirical facts, but institutional (legal) facts
3.4 LEGAL DESIGN
(OF SMART RULES & REGIMES)

Projections of states of affairs (2)

- legal quality – characteristic of person (e.g. minor)
- legal status – characteristic of object (e.g. res nullius)
- personal legal relation – relates persons (e.g. marriage)
- objective legal relation – relates person&object (e.g. ownership)
- legal configuration – relates objects (e.g. servitude)
- legal entity – personification (e.g. foundations)
- legal object – reification (e.g. tradable rights)

With legal institutes: general guidelines (all) and specific guidelines (class) (9 elementary design guidelines)
3.5 LEGAL DESIGN
(OF SMART RULES & REGIMES)

When design with institutional focus…
legal concept ⇔ form conceptualization (within legal order)

Beware of nature of consequential rules
legal effects follow from (mere) factual acts (e.g. caretaking)
- general/objective design (‘the legal system’)
legal effects follow (also) from legal acts (e.g. contract).
- specific/subjective design (‘a micro legal system’)

LD-Methodology primary focus:
the projection (the drawing),
not the legal artefacts (the dress-made)
4.0 LEGAL DESIGN
(OF INTERNAL STRUCTURE: NORMS)

Design of Norms Constitutive of Rules/Regimes
1. Norms of conduct

Take account of basic components of every norm
* subject-object-operator-conditions

Check relevance of logical oppositions
* command-prohibition-permission-dispensation

Establish legal relations
* claim-duty, privilege-no claim; unital/multital
4.1 LEGAL DESIGN
(OF INTERNAL STRUCTURE: NORMS)

Norm components

1. Subject
   General (open group/class) ⇔ Individual (person/closed group)

2. Object
   To do (perform act) ⇔ To not do (omitting act)

3. Operator
   Shall (duty) ⇔ May (allowance)

4. Condition (hypothetical)
   Concrete (unique circumstance) ⇔ Abstract (repeatable)

How to combine components ➔ design guidelines? (e.g. 2 + 3)
4.1a LEGAL DESIGN
(OF INTERNAL STRUCTURE: NORMS)

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

<table>
<thead>
<tr>
<th>Square of 4 types of norms</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Operator</strong> ( \downarrow )</td>
</tr>
<tr>
<td>( \Rightarrow )</td>
</tr>
<tr>
<td><strong>Shall</strong> ( \text{‘Ordered’} )</td>
</tr>
<tr>
<td><strong>May</strong> ( \text{‘Permitted’} )</td>
</tr>
</tbody>
</table>

Contradictory \( \Rightarrow \Leftrightarrow \); Contrary \( \Leftrightarrow \); Subaltern \( \Leftrightarrow \); Subcontrary \( \Leftrightarrow \)
Similarly frame horizontal legal relations according to Hohfeld - norms of conduct

<table>
<thead>
<tr>
<th>Group 1</th>
<th>Rights in given relations (shall/may)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Claim</td>
</tr>
<tr>
<td>X</td>
<td>Of X against Y</td>
</tr>
<tr>
<td>Y</td>
<td>Duty</td>
</tr>
<tr>
<td></td>
<td>Of Y against X</td>
</tr>
</tbody>
</table>

X and/or Y can be ‘unital’ (in personam) or ‘multital’ (in rem)

Thus leading to 8 types of legal relations......
4.2 LEGAL DESIGN
(OF INTERNAL STRUCTURE: NORMS)

Design of Norms Constitutive of Rules/Regimes

2. Norms of competence (Power-conferring)

‘can’ (not expressible as ‘may/shall’ relation)

Bring about legal effects by legal acts
Not change empirical facts but institutional facts
Power-conferring norms

Norm of conduct must express power to bring about legal effect through legal act (empowerment within legal order):

If <legal act> then <legal effect>

Norm-condition (Z):

Only <if and when Z>, then If <legal act> then <legal effect>
Similarly frame vertical legal relations according to Hohfeld - - - - norms of competence

<table>
<thead>
<tr>
<th>Group 1</th>
<th>Rights in creating/abolishing relations (can)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Power</td>
</tr>
<tr>
<td>X</td>
<td>Of X concerning relations of Y</td>
</tr>
<tr>
<td></td>
<td>No-Power</td>
</tr>
<tr>
<td></td>
<td>Of X to change relations concerning Y</td>
</tr>
<tr>
<td>Y</td>
<td>Liability</td>
</tr>
<tr>
<td></td>
<td>Of Y to X’s power</td>
</tr>
<tr>
<td></td>
<td>Immunity</td>
</tr>
<tr>
<td></td>
<td>Of Y as X cannot change relations concerning Y</td>
</tr>
</tbody>
</table>

X and/or Y can be ‘unital’ (in personam) of ‘multital’ (in rem)

Thus leading to 8 types of legal relations
### 4.3 Legal Design (of Internal Structure: Norms)

A (further) methodology of legal acts

<table>
<thead>
<tr>
<th>Declaratory acts:</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Sec</td>
<td>state legal facts</td>
<td>e.g. celebrate marriage</td>
</tr>
<tr>
<td>- Purposive</td>
<td>suggest oneself</td>
<td>e.g. letters of intent</td>
</tr>
<tr>
<td>- Commissive</td>
<td>oblige oneself</td>
<td>e.g. contracting</td>
</tr>
<tr>
<td>- Hortatory</td>
<td>suggest another</td>
<td>e.g. submit appointment</td>
</tr>
<tr>
<td>- Obligatory</td>
<td>oblige another</td>
<td>e.g. legal ban</td>
</tr>
<tr>
<td>- Expressive</td>
<td>express oneself</td>
<td>e.g. offer apology</td>
</tr>
<tr>
<td>- Assertive</td>
<td>represent fact</td>
<td>e.g. formal confession</td>
</tr>
</tbody>
</table>
4.4 LEGAL DESIGN  TOWARDS  SMART RULES & REGIMES

Usefulness of LD-Methodology notes?
1. Scientific positioning
2. Possible guidelines internal structure of norms

Specific issues
1. Channeling conduct
2. Effectiveness & Efficiency dimensions

Next steps
1. Broaden internal perspective rules to regimes
2. External perspective …. Better&Smarter Regulation
5.0 BETTER & SMART REGULATION

From the 90’s (of the 20\textsuperscript{th}) 2 movements

‘Regulation matters’: OECD: growth, innovation, societal risks
Shift from Deregulation (focus adm.burden)
to Better Regulation!

\textit{Deregulation implies regulation is not needed. In fact good regulation can benefit us all – it is only bad regulation that is a burden.” Dr. David Clark}

Modes of Regulatory Governance: broad array of regulatory instruments And what about Regulatory Design?
5.1 BETTER & SMART REGULATION

OECD 1995 – Principles on Good Regulatory Decisions

1. correct problem definition
2. government action justified
3. regulation preferable (consider alternatives)
4. legal basis
5. appropriate level (of government)
6. do benefits justify costs
7. distributive justice & transparency
8. clear, consistent, comprehensible, accessible
9. stake-holder participation
10. compliance ensured
5.2 BETTER & SMART REGULATION

EU 2002 Better Regulation

7 principles: necessity, proportionality, subsidiarity, transparency, accountability, accessibility, simplicity

Action plan - Key measures:
- stakeholder consultation, regulatory impact assessment (ria)*
- legislative review clauses, international network, simplification program

* RIA: especially facilitate choosing between alternatives or combinations of regulatory instruments
5.3 BETTER & SMART REGULATION

2005 OECD update 1997 principles with respect to:

- greater attention to policy coherence
- multi-level coordination
- ex ante impact assessments
- competition policy (network industries)
- market openness
- risk awareness
- implementation
5.4 BETTER & SMART REGULATION

Smart Regulation Gunningham et al. (1997-1998)

Focus .. (Environmental Policy)
- choose proper policy instrument
- seek proper instrument mixtures

Concerns&considerations
- existing approaches seriously suboptimal
- general scope: design of regulation in any given situation
- design criteria/principles towards preferred policy outcomes
5.5 BETTER & SMART REGULATION

Smart design

- 4 regulatory design processes
- 5 regulatory design principles
- 4-5 frames for designing instrument combinations

Approach:

- pragmatic problem based: avoid public choice critique
- focus on effectiveness & efficiency: pol.acceptance & equity
- underpinned by lessons from experience: ‘Industr.World’
5.5a BETTER & SMART REGULATION

4 design processes

identify major issues as input to apply design principles

- desired policy goal(s) (trade-offs)
- characteristics of the (environmental) policy problem
- range of regulatory participants & policy instruments
- opportunities for consultation and public participation
5.5b BETTER & SMART REGULATION

5 design principles

- preference of complementary instrument mixes
  no smorgasbordism
- choose least interventionist instruments
  parsimonious
- regulatory responsiveness & escalating response
  sequencing
- empower third parties
  regulatory resources
- maximise win-win opportunities
  to move beyond compliance
5.5c BETTER & SMART REGULATION

4-5 frames for designing instrument combinations

Consider ‘bipartite’ combinations

- inherently complementary
- inherently counterproductive
- sequencing
- context specific
- note multi-instrument mixes
5.6 BETTER & SMART REGULATION

From Better to Smart Regulation

Baldwin (2005)

Intrinsic: proponents of Smart Regulation have a case

Extrinsic: especially regulatory impact assessment is not geared to multiple and dynamic instrument evaluation (+ bureaucratic policies)

Getting smarter earlier?
‘From design to review’
5.7 BETTER & SMART REGULATION

EU(2010) Better Regulation must become Smart Regulation

Financial crisis
Getting legislation right
Smart, sustainable and inclusive growth

Step up a gear’ from already ‘significant positive changes’ BR

Smart: whole policy cycle – various elements....
5.7a BETTER & SMART REGULATION

EU(2010) Smart – various elements….

* improving existing stock of legislation
  esp. simplifying, reducing administrative burden, ex post
cost-benefit evaluations, better implementation, interactive
information to business

* shared responsibility
  EU-MS

* strengthening the voice of citizens & stakeholders
  Consultations

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6.0 TOWARDS LEGAL DESIGN OF SMART RULES & REGIMES

Better & Smart Regulation as external viewpoint

- general policy objectives rather than legal design
- pragmatic lessons to preference of mixing instruments

Institutional Legal Theory contributes to

- positioning and primary focus LD-methodology
- guidelines on internal structure of norms

How to move from mere tools/toolbox to a true methodology?
Leading Questions

How so are *smart rules & regimes* relevant to policies fostering *technological innovation*?

How may such rules & regimes be the object of and inspire *legal design methodology*?

How does such a methodology relate to strategies under the heading of ‘*Better Regulation*’ and ‘*Smart Regulation*’?
Next steps:
- look for an overall model*
- consider multidisciplinary scope**
- focus on technological innovation***

* providing a synthesis of positioning, internal and external perspectives
** combine normative and empirical approaches?
*** rule/regime adaptability and ergonomics and channeling

Not only effectiveness and efficiency but....
‘LLEE’ as good legal/regulatory governance
6.4 LEGAL DESIGN OF SMART RULES & REGIMES

“There are no easy routes to regulatory improvement.” (Baldwin)

Q’s & A’s

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7.0 ADDITIONALS CONCERNING SMART RULES & REGIMES

Steps/stages in Social Science/Legal Design
(Herder et al.; Knops)

1. set design goals
2. determine legal constraints
   goal related + legal design environment
3. Determine design objectives
   consider techno-functional specificities
4. establish design space
5. model a test method
   use case studies
So much for Scandinavian Legal Realism?

1. law is indeterminate (what the judge had for breakfast)
2. law requires interdisciplinary approach (socio and antropo)
3. law must focus on providing instruments (tools for social purposes)

Legal facts are representations or projections
A legal proposition is not true nor untrue, but a command which is valid or invalid.