PYRAMIDS AND THE VALUE OF GENERALITY

Abstract

Responsive Regulation advocates a differentiated style of regulation and enforcement that is more responsive to the behavior of the regulated parties than a system of general or uniform rules. In this article it is investigated whether such a differentiated approach can be reconciled with the traditional ideal of general law. On the basis of a conceptual analysis of generality, it is argued that the notion is at best tautological and does not resist a differentiated approach. However, the value of generality is based on the assumption that rules function as reasons rather than as instructions. As reasons rules need not comprise large categories but they do need to last for a longer period of time. The conclusion is drawn that flexibility (rather than differentiation) is hard to reconcile with the notion of rules as reasons, although it may be demanded by a notion of rules as effective implementers of policies.

Key-words: Rules, reasons, generality, equality, flexibility

1. General rules

A conspicuous element in the proposals advanced in Responsive Regulation (RR) by Ayres and Braithwaite is the plea for a differentiated approach to regulation and enforcement, rather than the binary approach which is usually adopted in law. Whereas law is processed by yes/no answers to questions whether a certain rule is valid or invalid, whether the rules have been violated or not, or to whether a penalty should be attached or not, the authors propose a more nuanced approach, allowing for different degrees of intensity, depending, for a large part, on the behavior of the regulated parties. In the course of their book, several pyramids can be discerned, each one indicating a continuum of regulatory interventions. At page 35 an ‘enforcement pyramid’ is introduced, indicating different levels of sanctions that can be applied, ranging from persuasion to license revocation; at p. 39 we are given a similar continuum of enforcement strategies ranging from self-regulation at the base to the classical command and control strategy at the top, after which we are no longer surprised to be introduced at p. 154 to a pyramid of intensity of intervention, ranging from laissez-faire to industry-wide regulation.

These pyramids did not remain theoretical constructs but were applied in practice as well. Confining myself to the Netherlands, a differentiated and continuum-like approach in regulation, supervision, control and enforcement has not only been widely advocated but has also been put in practice. As self-regulation proved to be an ineffective method in enforcing non-smoking policies in Dutch bars and restaurants, regulators quickly climbed up the enforcement strategy pyramid: after having embarked upon enforced self-regulation for a while, they eventually ended up at the top (Weyers 2010). Dutch health care regulation is now at the stage of enforced self-regulation (Enequist 2010). And the Dutch inspection of education is well-known for its pyramid of varying intensity of supervision, differentiating between good schools and notoriously bad performers. It seems as if a pyramidal approach fits well with a need for tailor-made regulation that is adapted to the particular circumstances of the various regulated parties as well as the possibilities (and budgets!) of supervisors and regulators.
Yet, despite these advantages a differentiated approach seems to be excluded, if not
downright prohibited, by the traditional demand that law should be general. Rather than
stressing the need for tailor-made rules and sanctions, the traditional demand for generality
stresses the importance of the one-size-fits-all-strategy. According to Rousseau (1762), the law
neither springs from nor addresses particular groups and individuals. Law is for and by 'the
people': the general element citizens as citizens have in common. The law is the product of a
so-called general will, which abstracts from particular interests, and which is at the same time
constitutive for the collective entity.

The demand of generality is not confined to the history of political theory; it plays an
important role in the education of lawyers as well, and is usually explicitly defended by legal
theorists. According to Fuller (1964), generality is so important to law that without a certain
degree of generality law does not deserve the name 'law' at all. Speaking of the failures of
regulatory agencies to come up with general rules, Fuller remarks: “The complaint registered
against these agencies is not so much that their rules are unfair, but that they have failed to
develop any significant rules at all” (p.47). Austin (1832), well-known for his deliberately
descriptive and non-normative approach to law, attached much importance to generality.
According to Austin, only general commands, prescribing a general course of action, can be
called law. More recently, Schauer (2003) is among those to praise the virtues of general law.
He thinks as well that generality is essential to law and regards generalizing as the essence of
legal reasoning without which fairness cannot be hoped to be brought about (p.300).

It is of course possible to shrug one’s shoulders at these definitions. If differential treatment
cannot be called ‘law’, why bother? Then we should call these rules not ‘law’ but ‘regulation’!
The demand of generality may be important to law but those who are dealing with regulation
are clearly involved in a different enterprise, and don’t need to defend themselves against
these allegations.

However convenient this definitional solution may be for regulators, it obviously runs counter
to the intuitions of those who are confronted with law and regulation: the norm-addressees
themselves. They will probably be indifferent to definitional matters. To them, all that matters
is that they are supposed to conform to a set of norms or rules and that, if they don’t,
sanctions can be expected to be imposed. If such norm-addressees would learn about legal
theory and about the importance of generality that is commonly attached to law, they might
want to know on which grounds they are denied such an important and widely cherished
virtue in their dealings with inspectors and regulators. In short: if there is a really good
argument in favor of the generality of law, that argument should also apply to regulation. If
such an argument can be found, it might count as an argument against the differentiated
pyramidal approach advocated by Ayres and Braithwaite, and, consequently, against the
practices that are en vogue in the regulatory state of today.

In order to advance such an argument it is not enough to simply refer to principles of
generality or equality and to assert that these legal requirements are flouted by regulatory
regimes. This is a strategy often adopted by lawyers who start from legal principles that are
constitutive for law and which serve as axioms for legal reasoning. In this article I would like to
go somewhat further by investigating these axioms themselves, which are not as self-evident
as their position in legal doctrine might suggest. In this paper I will first try to unravel the various meanings of generality and equality. After explicating the concept of generality, I will pay attention to the principle that like cases should be treated alike and to the principle of non-discrimination. We will see that neither of these varieties is at odds with a pyramidal approach. In fact, these principles seem to boil down to no more than just saying what we do when we follow rules. They do not tell us what kind of rules should be used nor how large the categories should be that are used in rules. Nor do these principles inform us about the reasons why we should proceed by rules.

The second part of this article deals with exactly this latter question. I propose that the value of rules can be understood somewhat better if we understand rules as reasons rather than as instructions. Reason-giving is important if we would like to justify our behavior, to criticize behavior of others, to limit discretionary powers, to make sure that people’s actions are coordinated and to arrive at a modus vivendi. If we take into account these functions of rules-as-reasons we will see why we should be careful in constructing pyramids. It is not their differentiated structure as such that endangers the value of rules as reasons. Rather we should be cautious that these pyramids are not too easily be climbed up and down; the flexibility to which a pyramidal approach lends itself may undermine the constancy of rules as sources for reasons and thereby endangering their important functions.

My analysis is a philosophical and not an empirical one. Empirical evidence can only be searched and found in the light of certain criteria. One may—and does—empirically investigate which strategy is more effective, or brings about more compliance or is less time consuming. But the preliminary question concerning the value of the criteria that are used does not lend itself to empirical investigation.

2. Generality: the logical conception

As for the first task: finding out what exactly is meant by this requirement of generality, at least three different conceptions of generality present themselves: a simple logical requirement, a principle of equal treatment and a non-discrimination principle. The first and simplest conception is not so much a requirement but rather a property thought to be intrinsic to rules. It can be read as the statement that rules can only be said to be genuine rules if particulars are ordered in general categories. General categories are, simply said, about the ‘all’ of something. ‘All inhabitants of London’ is a general category, as well as ‘all inhabitants of Main Street’. The former statement is not ‘more general’ than the latter. Both are general statements. The only difference between the two statements is that the category ‘inhabitants of Main Street’ is smaller than the category ‘inhabitants of London’. It is important to note then that if there would be such a thing as a demand for generality it can only requires us to make use of general categories; it cannot tell us anything about the appropriate or desirable size of categories.2

Furthermore, it is important to note that the dividing line between general and particular statements is a contested one. This is because general statements can refer to categories on four different dimensions: it can refer to a general category of norm-addressee, to a general
class of actions, and it may contain general descriptions of both place and time (Brouwer 1990, p.62). This applies to both descriptive and normative general statements; we are here obviously concerned only with normative statements. The statement that John should go to notary Smith in London tomorrow morning in order to bequeath his house on Derby Street 5 to his son John II, mentions particulars in all four dimensions. The statement that John should go every day generalizes time, whereas the statement that John should see just a notary generalizes the action.

It is clear that we are dealing with a ‘genuine rule’ if it succeeds to be general on all four dimensions (‘British nationals should sign wills before a notary in order to bequeath their possessions’). It is not clear, however, where exactly we can draw the dividing-line between such general rules and particular normative statements. Is it enough that a statement contains a category in just one dimension? Are some dimensions more important than other dimensions? Usually, generality of the category of norm-addresses is deemed the most important one. It is therefore said that rules should not refer to particular persons or mention proper names. But others stress the importance of generality of other dimensions. Austin, for instance, explicitly allows proper names. He maintains the view that in order to count as legal rules commands should prescribe a general class of actions. Only those rules that prescribe a course of behavior can be called law, to be discerned from ‘incidental commands’ (Austin 1832 p.19). So even if we take generality as the assertion that rules can only be rules if they are general (in which case the expression ‘general rule’ is nothing more than a tautology3) we do not know exactly what is meant by that assertion.

The conception of generality is in itself not a very informative one. It does not tell us which dimensions of generality are important, it does not tell us whether categories should be small or large. It only requires us to subsume particulars under general categories, of whatever size, in whatever dimension. Therefore, the notion of generality in itself cannot be used against the differentiated approach that is advocated by Ayres and Braithwaite. Their proposals only advise us to make smaller categories, and to differentiate between for instance, well-performing hospitals and notorious bad performers. Even if there is only one hospital that is singled out as a good performer, the principle of generality may not be flouted. That hospital may belong to a category. Generality is not determined by the actual scope of application of a certain category, but by its potential scope of application (Brouwer, 1990, p. 166). A category is general as soon as other hospitals are conceivable that might equally fall within the category ‘good performers’.

Moreover, regulators who differentiate between good and bad performers may say that although they do not address norm-addresses in general terms, they do generalize as to the type of action that is required. Whether the action is described in abstract terms (provide good care) or more concretely (make sure that waiting times do not exceed two hours), such a rule still refers to a general class of actions and cannot be seen as an incidental command.

If the notion of generality is in itself unhelpful, the question arises why it is so often invoked. What is the point of stressing generality?

3. Treat like cases alike and unalike cases unalike
A common answer to that question is that generality is important in so far as it enables us to fulfill the requirement of equal treatment, usually expressed in the dictum ‘like cases should be treated alike and unalike cases unalike’. According to this argument, the requirement of equal treatment only makes sense if we know in which respects cases can be said to be ‘alike’. It is here that (general) rules are thought to play their part. They form the major premises which enable us to compare cases with their precedents. These major premises may be merely assumed, as in common law when the judge tries to find the proper precedent (Llewellyn 1960, p.73-74), or they may explicitly be formulated as rules. In other words, cases can only be compared if we can order them in general categories. The case of a birch that is planted at a distance of 60 cm from the fence with the neighbors can only be compared to the precedent of a willow that was ordered to be cut if we refer to the rule that [all] trees should not be planted [at all times] within 2 meters from [all] fences.

Not only likenesses but also differences can only be traced by means of such general major premises. Here again, it is obvious that we should know in which respect cases are different. Again, this information is thought to be provided by the rule. The rule directs our attention to similarities and differences that are relevant in the light of the rule. As Schauer (2003, p. 206) convincingly points out, rules thereby not merely help us to discover similarities and differences, but there are simply no likenesses and differences without rules. Rules make cases different or similar.

It should be noted that the requirement of equal treatment is directed to those who apply the rules. The principle does not tell lawmakers which categories they should choose; it only tells the administrative agent or the judge that if two cases belong to one and the same category, they should be dealt with in the same way and if they belong to different categories, they should be treated differently. The principle of equal treatment in itself does not inform us about which kind of categories should be constructed. The imposition of absurd or unfair categories is not prohibited. The legislator is free to choose the categories that it sees fit. The principle of equal treatment is only directed to those who apply or administer the law and tells them that rules should be applied consistently. This led Kelsen (1953) and after him also Westen (1983) to conclude that this principle is an empty shell that can be filled with whatever content legislators may wish to come up with. In this sense the principle of equal treatment is no more than the requirement of consistent rule-application.

It seems that here again we are caught in tautologies. In the previous section we saw that it is tautological to speak of general rules because rules simply aren’t rules if they are not general. Here we see that the requirement of equal treatment is tantamount to the requirement to apply the rules. You simply cannot be said to apply any rules if you violate the requirement of equal treatment. Like the term ‘general’, ‘equal treatment’ does not give any additional meaning to the notion of rules. Generality and equal treatment are just different ways of describing what it is to proceed by rules.

As in the case of generality, the principle of equal treatment does not give us much ammunition against the differentiated approach proposed by Ayres and Braithwaite. The principle only tells us that the inspector who imposes a fine on Hospital A for defects that also have been detected at Hospital C which was however not sanctioned in this way, is not
following a rule. If the inspector justifies this omission by saying: ‘C is a small hospital and we do not impose sanctions on such small hospitals’, there is nothing wrong with this strategy. It is clear then that this particular decision was nevertheless the result of the application of a rule, namely: sanctions should be applied to [all] large hospitals. Again: the fact that the category of large hospitals is smaller than the category of hospitals does not make the rules less general.

The only kind of reasons that are prohibited by the principle of equal treatment are reasons like: “all things considered, we find that this particular hospital A should be fined, because of the particular make up and organization of hospital A”. I doubt whether such a statement can be called a reason. If the scope of a reason is not wider than the decision itself, it can hardly be called a reason at all. The principle of equal treatment is therefore tantamount to saying that for a decision a reason should be adduced. (Cohen 2010). Since the principle of equal treatment does not inform us about the kinds of categories that should be chosen, that reason can be trivial or downright absurd: if we tell the hospital that it was fined because we impose a fine on all hospitals with red bricks, the principle of equal treatment is met. It tells us that a reason should be adduced but not what counts as a good reason.

We are now in a position to analyze the meanings of 1) the notion of generality and 2) equal treatment. The first tells us that rules are necessarily general; the second tells us that rules only work like rules if they are applied. That means that both meanings help us to define the properties of rules. Neither of these two notions can, however, be used as an argument in favor of rules. Although it is possible to argue that rules help us to decide efficiently, or help us to avoid errors of judgment, or enhance fairness, those arguments are absent in the principles of generality and equal treatment. They say what it is to proceed by rules. Not why we should proceed by rules.

4. The principle of non-discrimination

Another possible answer to the question why generality is important can be found in a different principle of equality, often confused with but logically distinct from the principle of equal treatment (Lucas 1965). That is the principle that says that people should count as equals before the law and should not be subject to unjustifiable forms of discrimination, such as sex, color, gender and the like. The principle finds many expressions in national and international jurisdictions.

The principle of non-discrimination differs from the principle of equal treatment in two important respects. First, it is not about cases but about people as citizens. It is based on the assumption of a fundamental equality between people that serves as its moral foundation. Second, it is not confined to those who apply or administer the law, but it is equally addressed to legislators. It does not leave it to legislators to come up with whatever categories they see fit. The principle imposes clear constraints on the kinds of categories that are allowed. Categories may not be construed in order to differentiate between people on grounds that are considered to be morally irrelevant criteria such as sex, color, gender etc.
It is this principle that Radbruch (1957) had in mind when he asserted that it was clear from the very beginning that Nazi-law did not deserve to be called ‘law’. A system that differentiates between murderers of Nazi’s and murderers of Jews, could not, according to Radbruch, be called a genuine legal system since it flouted its very foundation: equality before an impartial and general law. The principle of non-discrimination is therefore much more than a mere tautological definition of what it is to proceed by rules. This may account for the fact that the principle of non-discrimination is often seen as a strong moral argument in favor of general rules. And there is indeed some intuitive appeal in the notion that a society that is guided by general and impartial rules is less vulnerable to practices of discrimination than societies where decisions are made in an arbitrary fashion.

But although the principle may serve to criticize extreme particularism, or may serve to criticize morally wrong distinctions, it cannot be used as an argument against a differentiated approach as such. The principle of non-discrimination itself gave rise to a host of detailed rules that may have obliterated conventional unjustified distinctions but which draw new boundaries in order to do justice to real differences between e.g. men and women, or between part-time workers and full-time workers and to make sure that they will enjoy equal opportunities. In other words: the kind of rules that are brought about by the principle of non-discrimination can aptly be described as examples of a differentiated approach, used in order to bring about a policy-goal: a society which does not discriminate on unjust grounds.

But there is another reason as well why the principle does not serve to criticize the recent regulatory practices. The principle prescribes how individual citizens should be treated. It owes its moral appeal to the notion of fundamental equality between members of the human race. Regulators, however, seldom address citizens as individual citizens. They deal with institutions, schools, hospitals, and industries. As such they may want to invoke the principle of non-discrimination. They may want to enforce for instance non-discriminatory policies, such as application procedures, separate toilets, rooms for prayer, equal career opportunities. And doing all that, they are not prevented from using a differentiated approach. On the contrary, they may feel the need to differentiate between schools with good non-discrimination conditions and schools with bad records. As regulators deal with institutions which have their own internal policies and rules, regulators address a kind of mini-legislators, not citizens as free-and-equal-individuals.

Is this to say that regulators in their dealings with institutions are exempt from the requirement of non-discrimination? Not completely. The principle may be extended to the way institutions as schools, hospitals and industries are treated, demanding the same degree of justification if differences are made on unjustified grounds (e.g. where religious schools are treated differently from non-religious ones) but the force of this requirement is still -however indirectly- derived from the assumption concerning the equality of human beings as members of humanity. And this requirement may conflict with policies regulators may want to enforce. Equal opportunities policies may be hampered by religious schools, and religious schools may for that reason be subject to more intense forms of regulation and enforcement.

5. Reasons
It seems to be difficult to find any arguments against the differentiated approach proposed in *Responsive Regulation* if we confine ourselves to the notions of generality and equality. These pyramids are compatible with generality, with the principle that like cases should be treated alike, and they even seem to be demanded by the principle of non-discrimination if that is a policy to be implemented by regulated institutions. It seems therefore truly amazing that these notions are so often invoked against a differentiated approach.

Yet, it is hard to believe that the intuitive appeal of impartial and general laws rests on simple tautological assertions. Isn’t there anything more to it? Isaiah Berlin (1978) thought that this appeal had to do with a kind of natural predilection for regularity and similarity: “The assumption is that equality needs no reasons, only inequality does so; that uniformity, regularity, similarity, symmetry [...] need not be specially accounted for, whereas differences, unsystematic behavior, change in conduct, need explanation and, as a rule, justification.” (p. 84). I don’t think he is right. If in the gym I am treated in the same way as a 21 year old girl, I may be justified in demanding a differentiated approach and the same applies to small firms that have less to spend on environmental measures than larger firms. Differential *as well as* equal treatment call for justification. In this sense there is no ‘presumption of equality’. There is no ground for the belief that larger categories need less justification than smaller categories. Whatever the size of categories, the boundaries that separate them are always contestable.

But Berlin’s emphasis on giving *reasons* in the context of equality is helpful. In fact, the notions of generality and equality are about just that. They all emphasize and elaborate upon the notion that reasons should be given for decisions. Overlooking the three principles discerned above: generality, equal treatment and non-discrimination, we may compare them in the way they advocate that reasons should be given for a decision. The first, the notion of generality itself, tells us that a reason should be given that generalizes from the particular case. In fact, as we have seen, the notion of ‘a reason’ *entails* the notion of generality. If I tell my student that I decided to give him a bad mark because he did not add a literature list, he may be justified in believing that all essays without literature lists are marked in the same way. If he finds out that they are not, he is justified in requiring additional reasons, explaining why his case is different from the other essays without literature lists.

The second, the principle of equal treatment, is very similar to the first, but requires a little bit more. It demands that next year I also give bad marks to essays without literature lists. The principle of equal treatment requires me to adhere to the given reasons in a consistent manner. In fact, the principle of equal treatment is not only about the desirability that people are guided by rules in their actions, but about the desirability that officials and decision-makers who are administering the rules are themselves subject to rules as well. The principle of equal treatment is therefore a general rule itself, addressed to me as decision-maker, generalizing my decisions, as well as the time and place of my acting so.

Finally, the third, the principle of non-discrimination, demands that the reasons are good reasons. In order to decide what ‘good’ is, moral assumptions concerning the natural equality of mankind are invoked.

It seems then that the appeal of the three notions is closely connected to the requirements that *any* reasons, *consistent* reasons, or *good* reasons ought to be given for a particular action.
or decision. If that is correct, and if indeed all talk about generality and equality can be reduced to these basic requirements of rationality, the differentiated approach of Ayres and Braithwaite does not fail to fulfill them. Inspectors, supervisors, enforcers of all sorts, visiting, auditing and imposing fines, climbing up and down the ladders of increasing or decreasing control, can all give reasons for their decisions\textsuperscript{10}.

The question however arises whether this reason-giving quality of rules is deemed important by both theorists and practitioners of regulation. Whereas judges, and for that matter legal philosophers\textsuperscript{11} consider rules mainly as sources for reasons, and evaluate rules for their capacity to furnish those reasons, I do not have the impression that regulators regard rules in the same way. Regulation is primarily meant to effectively fulfill collective goals. If regulators – and, for that matter- students of regulation- talk about ‘better regulation’ they do not talk about regulation that is better able to provide reasons, but about regulation that is more effective and efficient in enforcing policies. It is true that transparency and ongoing dialogue (Black 1997) are also mentioned as virtues of alternative models of regulation, but mostly on the assumption that they will help securing effective compliance. There are, however, other important reasons for reasons.

6. Reasons for reasons

So the question arises: what is the point of giving reasons? In other words: are there good reasons for demanding reasons, other than securing compliance?

If we confine ourselves to the reasons given by officials regulating the conduct of both individual citizens and institutions, we can at least distinguish five functions of reasons. The first is already amply explored: reasons serve as justification for decisions. As I pointed out above, it is necessary for a justification that it refers to a general category, though the general category may be a small one.

The second function mirrors the justificatory function: reasons can give rise to criticism. The very simple assertion that the bad mark is due to the lack of a literature list can give rise to the criticism that literature lists are not a relevant criterion. The requirement of consistency as is indicated by the principle of equal treatment opens up the further possibility of criticizing inconsistent rule-application, whereas of course, the third principle of non-discrimination widens the scope for criticism even further by demanding that the criteria are morally relevant and correct.

The third function of giving reasons can be described as limiting discretionary powers. The reasons that regulators give for their decisions limit the scope of variation available to them in future cases. Once having stressed the importance of literature lists, I cannot ignore that argument in the years to come. I should take that element into account, or else will have to give explicit reasons for omitting to do so.

The fourth function of giving reasons is that it makes it possible to coordinate actions.\textsuperscript{12} Those who are regulated, as well as bystanders, will count on my acting on those reasons in future cases. As they will anticipate consistent behavior, they will act accordingly. The students of the next year will certainly include literature lists, not only because they want to write good
essays, but also (and maybe even mainly) to get a good mark. It is important to note that the anticipation of my decisions may also serve as a mechanism of coordinating the actions of the students among themselves.

The fifth function of giving reasons is to come to a *modus vivendi* that is acceptable to all involved. If I tell my students that my reason for the bad mark is simply that it enhances my own status and reputation as an ambitious and demanding teacher, I provide them with a bad reason because it does not deal in any significant way with the interests of the student. Reasons need to take into account the interests of those involved. The more inclusive reasons are, the more they are convincing.

It seems to me that the traditional legal view that general rules are important ultimately rests on the belief that they facilitate these functions. The implicit argument runs:

a. Rules are important in so far as they serve as sources for reasons;

b. The more they are capable of providing such reasons, the more they serve to fulfill the above-mentioned five functions of giving reasons;

c. The more they help realizing these functions, the better the rules are.

The functions of rules that are made, applied and enforced in regulatory regimes are understood differently. As I understand the statements in RR, and also in the various proposals for better regulation that are still flooding legislative circles in European member-states, rules are mainly supposed to tell people and institutions what to do or not to do and which aims and targets should be reached: a clean environment, a level playing field or good labor conditions. (Westerman 2007) The main objective of RR and many other studies on regulation is to ensure that regulation is drafted, applied and enforced in such a manner as to reach these ends in an effective and efficient manner. The implicit argument runs:

a. Rules are important in so far as they serve as instructions;

b. The better they give such instructions, the more they serve to bring about some desired social aims or policies;

c. The better (the more effective and efficient) they are in bringing about the desired social aims, the better the rules are.

7. Flexibility

To be sure: there is nothing wrong with rules that effectively and efficiently realize aims and policies. It is also possible that these effective and efficient rules at the same time succeed as justifying, criticizing, coordinating and power limiting devices. *But not necessarily so.* There are also tensions between these functions.

I think that these tensions surface in the focus on flexibility that is so characteristic for RR. The pyramids of lawmaking and enforcement, that are drawn up in RR not only point to the need for a differentiated approach as such. It is advocated that these pyramids enable regulators and enforcers to adopt a more flexible approach. The pyramids themselves are not the main
issue. It is by climbing up and down these pyramids that effective and efficient regulation is ensured. Pyramids facilitate a swift change of strategies, in response to the behavior of the regulated parties. These swift changes are not only advocated in view of game-theoretical findings concerning the value of tit-for-tat strategies. It is also maintained that economic developments call for rules that are more flexible. It is argued that the legal predilection for stability and predictability fails to keep pace with the dazzling speed of economic and technological developments (p. 110) and that therefore formal legal rules are inadequate or at best suboptimal in implementing policies in an effective and efficient way.

However, the reverse may equally be true. The flexible rules advocated in RR may be optimal policy-implementers but may be suboptimal or even defective reason-suppliers (see also Mascini, this issue). Let me once more return to the various functions of reasons that I sketched above and reflect on how flexible rules would carry out these functions. Further empirical research has to be carried out, but a little reflection can give us some indication of the problems that can be expected.

1) Justification. In the previous sections I argued that rules that apply to smaller categories of norm addressees or to smaller categories of actions, times and places can serve just as well as justifying reasons. The inspector may point out to the director of hospital A that he deserves closer inspection in view of his lousy performance over the last year, a performance which made hospital A significantly different from efficient hospital B. There is nothing wrong with that. However, this justification fails dramatically if in the following year, hospital A managed to catch up with the level of performance of hospital B but nevertheless remains subjected to closer inspection because of the fact that it still lags behind hospital B, which, by its efficient behavior, has set a higher and unexpected standard. The same applies to rules that prescribe different performances. If museums are told this year that they should preserve national cultural heritage and the next that they should aim at attracting immigrants, such rules are failures as sources for reasons. Although it is of course unavoidable that rules are interpreted differently, or that they allow for exceptions, there is a limit to the degree in which rules can be modified if we would like to use them as justificatory reasons. Rules that change (keeping pace with `economic and technological developments’) risk to fail as convincing reasons.

2) Criticism. Also here, a differentiated approach in itself does not necessarily cause problems. The introduction of smaller and more refined categories may even enhance the possibilities for criticism. The problem arises –again- if these finer categories are not applied constantly over time. Criticizing the decisions of regulators will be like chasing moving targets. This is not only the case if rules embody swift policy changes. It is also the case with rising standards resulting from benchmarking.

3) As for the function of reasons to limit discretionary power, it is clear that it cannot be exercised by changing rules. To put it even more strongly: it is an exercise of discretion to change and adapt the rules to tailor the needs of the moment. The requirement of light and flexible rules therefore enhances rather than limits discretionary power. The repetition is tedious: the problem is not brought about by a lack of generality but by lack of constancy. Rules that are not made to last (p. 110) are not made to limit discretion.
4) **Coordination.** Unlike the former functions 1-3 this function is not only impeded by lack of constancy, but also by differentiation such as is advertised in the pleas for rules that are locally drafted and applied, as in a regime of enforced self-regulation. In such a regime I might know what to expect from the new rulebooks issued by my own management. But I don’t know whether these rules will succeed in persuading the inspection and will give rise to less intense forms of scrutiny. Furthermore, I don’t know how competitors will react (and in which aspects their rulebooks are different), or what the results of benchmarking will be. I don’t know in which regime of enforcement my institution will figure. I am completely in the dark about how judges will react (to what extent they will see these rules as reasons for their decision-making) and in view of all those variables, I will not know how to plan my actions in advance for more than 1 year from now. Nor, therefore, do the others with whom I interact.

5) **Modus vivendi.** As for this last function, this one may be exercised in a regulatory regime if a genuine debate is going on between regulator and the regulated parties on the implementation of aims. The use of the term ‘responsive’ is reason for some hope in this respect. There are good reasons to suppose that in a regime of truly responsive regulation there is room for deliberation on how the demands of regulators can be met with an eye to the specific needs of the norm-addressee.

A true debate is, however, only possible on the basis of equality of information and equality of arms. Both conditions are lacking in the regulatory regime proposed by Ayres and Braithwaite. Equality of information is seen as ineffective. Regulation is deemed to be more effective if regulated parties do not exactly know what to expect from the regulator. This is expressed in the clearest possible terms in the chapter on the enforcement pyramids (The Benign Big Gun), where it is advocated that regulators bluff greater powers than they actually possess (“skating on thin legal ice”, p.46). It is not equality but asymmetry of information that is seen as a valuable asset: regulators should have access to internal information whereas the regulated party is kept in the dark about the severity of the sanctions that might be imposed.

Neither is there any equality of arms. The regulator may always choose to climb up the pyramid to more intense forms of inspection, or more command and control if softer means prove ineffective. It is important to be aware of the fact that the norm-addressee does not have such pyramids to his disposal. In this respect it is significant how often war metaphors are invoked and analogies are drawn with international warfare (p. 37, 38, 39). Responsiveness may boil down to friendly fumbling with a -not too well-hidden- gun.

There may be good reasons for these guns, especially if the regulatee is a strong party, equipped with ample financial means and power. Coercion is a necessary element of any kind of regulation and law. But coercion should not, I believe, be dressed up as benevolence, as is often the case in regulatory practice (Timmer 2011). In such cases one would wish responsiveness to be substituted for a precise and clear definition of rights and duties by law. Precise and stable rules are meant to channel the exercise of power, rather than hide it from view.

In short: it may be true that formal and stable rules are bad instruments for realizing policies. The flexible rules, proposed in RR, promise to be more effective and efficient. But they are suboptimal as sources for reasons and therefore in carrying out the tasks that are performed
by reasons. It should be noted, however, that for a large part they fail to do so, not because of their differentiated nature, but because of their lack of continuity, which is intrinsically connected to their primary aim: realizing collective goals. The problem of these rules is not their lack of generality but their flexibility over time.

8. Conclusion

The differentiated approach to regulation as is advocated by Ayres and Braithwaite in RR seems at first sight to conflict with the traditional legal principle of generality, according to which rules should be general in scope. In this article I have shown that this accusation is ill-founded. Distinguishing three possible versions of this legal principle (generality, equal treatment and non-discrimination) we may safely conclude that RR does not fail to fulfill any of these three versions.

RR certainly fulfills the requirement of generality. The rules that are drafted, applied, and enforced by regulators may introduce finer distinctions and may refer to categories which are smaller than traditional legal categories, but this does not mean that they are not general. If we understand the requirement of generality as the principle that like cases should be treated alike, and unalike cases unalike, there is no cause for criticism either. This principle expresses what it is to apply rules. The fact that the rules draw finer distinctions enables regulators to fulfill the requirement that different cases should be treated differently. If we understand the requirement of generality as the principle of non-discrimination, we noted that this latter principle refers to the way we should treat members of the human race, whereas the rules in a regulatory regime are directed mainly to collective entities. Furthermore, non-discrimination can also be seen as a policy goal that gives rise to exactly the kind of differentiated approach as is proposed in RR, and is practiced in a lot of regulations pertaining to non-discrimination.

Neither of the three possible notions of generality can be used as ammunition against the approach of Ayres and Braithwaite. What then is the rationale behind the appeal to generality? I argued that the point of generality is nothing more -nor less- than the desirability of giving reasons for a particular decision. The notion of generality points to the desirability of giving a reason, the principle of equal treatment expresses the desirability of giving consistent reasons, whereas the non-discrimination principle stresses the desirability of good reasons. Rules are traditionally considered as sources for such reasons. The quality of rules is therefore usually seen as being dependent on their capacity to provide reasons.

This led me to inquire into why (any, good, consistent) reasons are thought to be so desirable. I discerned five possible functions of reasons: giving justifications, giving rise to criticism, enabling coordination, limiting discretionary power, and establishing a modus vivendi between conflicting interests and opinions. However, these functions can only be fulfilled by rules that are stable and which are made to last. As for the function of coordination we may add the further desideratum that rules are not made and applied locally.

We may conclude that the way we evaluate the quality of rules, depends on how we see their function. If we see them as instruments for the implementation of policies, they should be flexible and easy to change, they should be produced locally and be tailor-made to the exigencies of particular times, places and contexts. But if we see rules as (sources for) reasons,
that are important in guiding debate, deliberation, coordination and the creation of reciprocal relations, they should be stable and made to last.

I do not want to conclude prematurely that these functions are more important than the successful realization of social aims. But we should not confine ourselves to effectiveness and efficiency as the only criteria and realization of policies as the only function of rules. Designing good rules requires instead a balance of various, possibly conflicting criteria, which are derived from a careful weighing of the different functions of rules. 16

References


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1 Ashworth (2000) and Yeung (2004) are among those who appeal to ‘constitutional values’ in order to criticize regulatory arrangements.

2 Schauer’s plea for general law (2003) cannot therefore advocate ‘more general’ rules, as he himself believes (p.287). It is in fact a plea for using larger categories. The question is: larger than what?

3 The expression ‘particularistic rulemaking’ (RR p.115, 120) is therefore a contradiction in terms

4 Or: principle of formal equality

5 Commonly attributed to Aristotle (350 BC), *Nicomachean Ethics*, V.3. 1131a10-b15. However, Aristotle is speaking here more specifically about the distribution of shares.

6 Note that the requirement of equal treatment taken by itself does not contain the requirement of advance notice. Rules can also be invoked post hoc and are not 'less general' for that matter.
As Strauss (2002) correctly remarked, the principle of equal treatment cannot justify a system in which this principle plays an important role. A discussion on the wisdom of following the principle of equal treatment cannot be decided by reference to this very principle. Therefore, it is more fitting to say that the principle of proportionality requires differential treatment rather than equal treatment, since differential treatment is better suited to balance ends and means. If Yeung (2004) suggests the opposite, it is because she thinks that measures should be proportionate to past actions rather than to future behavior (p. 169-170).

Hence the double-layered structure of law: it does not only contain rules for conduct of the citizen, but also rules for officials regulating the way law is made, changed or administered. Kelsen (1945) pp 19-20; Hart (1961) pp. 92-97.

It should be noted that it is not enough to have reasons. They should be given and stated explicitly in order to justify, criticize, coordinate actions, establish a *modus vivendi* and limit discretion.

The dominant perspective of legal philosophy is (still) a judge-centered one. Waldron (1999)

The importance of the classical legal virtues for law’s coordinative function is stressed by Hadfield and Weingast (2011).

This is already clear in Driver (1983) who unambiguously measures the success of a rule ‘in effecting its purpose’ (p. 67). In economic studies about the desirable features of rules, efficiency is seen as an indisputable if not axiomatic virtue (e.g. Kaplow, 1995).

Although Congleton (2002) views generality as a valuable tool for efficient rulemaking.

The reasons why these reasons are considered good can be diverse; they can be religious, political, or moral.

The two functions I distinguished (giving reasons and fulfilling policies) are formulated in a more abstract way than the functions of rules discerned by Raz (2009), p. 176); settling unregulated disputes, providing facilities for private arrangements, providing services and redistributing goods, preventing and encouraging behavior. Each of these more concretely formulated functions may give rise to more refined criteria for the quality of rules.