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FROM ETHICS TO LAW

by Wibren van der Burg

5.1 Is legislation an answer?

An analysis of the moral values and norms connected with sustainability and the construction of what I shall simply call a morality of sustainability are important first steps. The next step, however, is to get this morality implemented. How can we make sure that citizens adapt their behaviour? How can society at large become more sustainable? A quite natural answer to these questions is to say that the law should enforce the norms and values connected with sustainability. If there is a serious problem that outrages the public, we often hear people say: "There should be a law against it." So if the problem is that neither our present society nor our individual life-styles are sustainable, we should make laws that change this society and these life-styles. If pollution is morally wrong, we should prohibit it.

This appeal to the law may be a natural reaction, but this does not mean that a natural reaction is always the best one. Quite often, in fact, creating a law is not a good answer to a perceived problem. There are many steps to be taken before we can decide that we should transform a moral norm into a legal one. In modern pluralistic societies, many moral norms, especially those with regard to the environment, are controversial. Legislation in these cases often has major side-effects and may even be counter-productive.

Sometimes a law is difficult to enforce because the illegal conduct is generally accepted and common or because it takes place in a private home where it is hard for law enforcement agencies to detect it. Enforcement can

be difficult or almost impossible for practical or financial reasons. Sometimes a legal intervention is undesirable on grounds of normative principle, because some dimensions of our life should not be the state's business. For instance, according to most political theories, legal regulation of the number of children a woman is allowed to have would not be acceptable. Lastly, we should not forget that the law is a distinct institution with its own role in society and with specific characteristics and limitations. A host of issues like these should be taken into account before making the move from morality to law.

5.2 Why morality needs law

The ideal way to reach a sustainable society might seem to be to establish a situation in which all individual citizens are fully committed to a morality of sustainability and voluntarily act according to the norms based on those values. They minimize their use of energy and natural resources; they actively participate in the democratic processes; they voluntarily give a substantial amount of their income to the needy and to collective institutions, like the state, that provide public goods.

Of course, this ideal is quite unrealistic. It is unlikely that people will really make such major contributions voluntarily. If, for example, we think of the high tax rates in most countries, it is implausible that we shall be able to raise the same amount of money through gifts. The legal obligation to pay taxes is necessary to ensure enough funds for public purposes. Similar arguments hold with respect to other

aspects of sustainability, such as the prevention of pollution.

We should not dismiss the prospects of voluntary sustainable behaviour too easily, however. In many cases, people do indeed make substantial contributions to the solution of environmental problems, by insulating their houses, by separating glass, paper and other recyclable refuse and so on and we may expect that further improvements are possible, once people tend to take the problems of the environment more seriously.

Even so, it is clear that, although it may be a major contribution, the voluntary contribution by morally motivated citizens will not be enough to create a sustainable society. To understand why law can be of help, we need to determine the shortcomings that law is expected to remedy. Without claiming completeness, at least four (partly overlapping) clusters of factors can be mentioned. For each of these factors, law can provide a partial remedy for the shortcomings of morality, but not all that is needed.

It should be noted that this perspective on morality and law ignores a major cluster of factors responsible for blocking the transformation into a sustainable society, namely, structural factors such as the structure of the world economy or the characteristics of the international legal order. This is not because I do not consider them important, but because it is not possible to analyze them in a framework of transforming morality into law.

5.3 Four factors that restrict legislation

(i) Information factors

It is often very difficult for ordinary citizens to know which action is better from the point of view of sustainability. If I want to buy a new refrigerator, I need to know which type is most energy efficient. Also, on a more general level, how serious are the environmental problems really? It is clear that information campaigns and education are the primary means to address this problem. Law can play a supporting role here; for example, manufacturers could be legally obliged to give adequate information about the environmental aspects of their products.

(ii) Financial and practical factors

If a plane ticket from Amsterdam to Stockholm is cheaper than a train ticket, the choice will be obvious for most of us. If it takes much extra effort to take empty bottles to a glass container for recycling, many people will not do so. Financial and practical factors like these can be very important in influencing people's behaviour. Changing those factors is primarily a matter of public policy; for instance, through providing easy facilities for refuse collection and various types of tax on undesirable behaviour and subsidies for desirable behaviour. Legislation is often an instrument to realize such policies, if only because taxes and subsidies are usually introduced and changed by way of law.

(iii) Coordination factors

One of the essential characteristics of environmental problems, but also of problems of social justice and democracy, is that they concern (partly) public goods and that collective action is needed to solve them. A clean environment and a flourishing democracy are public goods: no one can be excluded from enjoying them once they are provided. Even if I did not contribute anything to the achievement of these goods, I can still benefit from them. (In the

philosophical literature this problem is called 'the free-rider problem'.) Moreover, my individual action does not have a noticeable influence on the achievement of these goods. The individual actions of one person cannot turn a public transport system into a profitable system. We need the cooperation of a great number of persons, or collective action, to ensure this. A self-interested person has, therefore, little incentive to contribute to the provision of public goods. Especially if someone participates in the economic sphere, the reverse is rather the case: when your competitors contribute, while you avoid the costs of contribution, you have a competitive advantage. Therefore, no one will voluntarily contribute. The collective result will be far from optimal: the 'production' of these public goods is much lower than desirable.

A way out of the deadlock is to oblige individuals by law to act morally and to contribute to the realization of public goods. Arguments like these are standard in traditional fields of state activity such as defence, public security, the setting of minimum wages and social security. Similar arguments may be used with respect to the newer problems connected with the ideal of sustainability. If the state obliges us all to pay energy taxes or to obey rules protecting the environment, no one gets a competitive advantage and everyone can profit from the resulting public good.

A different way out of this deadlock is to change the economic parameters (or sometimes the way in which they are perceived) so that people understand that it is profitable, not only collectively but also individually, to act in a way that contributes to sustainability. In the field of environmental problems, this is indeed often a real possibility. Saving energy and raw materials also saves money. Developing new environmental technologies can be a profitable industrial business and a reduction in pollution is sometimes necessary to avoid liability suits from citizens.

(iv) Moral factors

This is a very broad category. Citizens' moral opinions with respect to sustainability vary; some will deny that they have a moral duty as regards nature or, more likely, they will tend to take their duty very lightly. Others will be convinced that they have this duty, but they simply do not act accordingly because they are not sufficiently motivated. There may be various ways to deal with this problem; providing a better moral education and stimulating lively public moral debate may be some of them.

Law can play two roles here. Legislation has a symbolic function: it can express certain fundamental values and present them as guidelines to citizens. More important is the direct role of law. Legal sanctions may provide citizens with an additional non-moral motivation to stick to certain norms, whether the citizens perceive them as moral obligations or not. Perhaps my moral motivation for not throwing litter out of my car window is in itself not strong enough, simply because it is such an easy way of getting rid of it. But if there is a severe penalty on this behaviour (as in the United States), this may well motivate me to abstain from it.

It should be noted here that sanctions need not always be penalties under criminal law. Administrative sanctions, like the withdrawal of official permits, or civil sanctions, like the payment of compensation for damage, may be even more effective. For a large company, the threat of a criminal penalty for polluting a river may be less serious than the risk of civil lawsuits for compensation by victims who have suffered health problems after swimming in that river.

These four clusters of factors are not comprehensive but they give a good overview of the various types of problem that law is supposed to solve. For some problems (like those concerned with lack of information) the role of law can only be marginal – solutions will have to be found elsewhere. For

other problems, especially those of a practical and financial nature, law can be seen as an instrument for public policy that indirectly influences behaviour. Finally, as an answer to coordination and moral factors, law can be used to enforce moral norms directly, especially by providing sanctions.

5.4 Law as an instrument of public policy

The morality of sustainability can be implemented through a variety of public policies. Only some of them use legal regulation as an instrument. The idea that law is an instrument for public policies is a standard one in modern welfare states. (Of course, law has other functions as well, like protecting citizens against one another and against the state.)

Law can be used in many ways; for instance, to regulate the economy with the purpose of achieving justice. Legally determined minimum wages and standards for working conditions, quotas for the participation of women, minorities and the disabled in the labour market are examples of this instrumental use of law. In a similar vein, law can be used to promote sustainability by setting limits to the amount of manure that is allowed to be spread on an acre of farmland, setting minimum standards for the insulation of houses and for the energy efficiency of household equipment, and so on. In recent years, many countries have seen a rapid growth in regulations concerning the environment, sometimes also the result of supra-national legislation from the European Union.

However, there are reasons for doubt about the effectiveness of this traditional form of instrumental regulation. Various studies have shown that sometimes the effect of instrumental regulation is minimal or even counter-productive. Some legal interventions have serious side-effects. Too strong an emphasis on law as an instrument for political purposes can also endanger the integrity of law as a relatively

autonomous institution that has an important function in the protection of citizens against the state. Fundamental doubts have been voiced about the ambition of governments to rule their societies and to change and restructure them. These criticisms have not only been heard in the Communist world, but also in the social democracies of the West. As a result, most western societies have gone through a period in which attempts were made (but often unsuccessfully) to have less regulation.

Various alternatives for state regulation have also been proposed. Some authors have argued for a more reflexive type of law where societal subsystems or sectors organize and regulate their activities autonomously. A recent development in environmental law is the idea of covenants, in which the government and certain organized segments of society, like the chemical industry or the agricultural sector, agree on certain policy goals, but which leave the industry or the sector concerned a substantial amount of discretion to decide on the way in which these goals should be reached.

The effectiveness of alternatives like these is still a subject of debate and study. Anyhow, it should be clear now that the desire to make laws purely for instrumental purposes should not be met uncritically. An evaluation of the probable effects and of possible alternatives should be made before one can conclude that "there should be a law". Moreover, recent theoretical debates have shown the importance of morality. Both instrumental legislation and the suggested alternatives usually work best in situations where almost everyone agrees on certain fundamental values and goals, and is morally committed to them. In other words, legislation can remedy some of the shortcomings of morality but, conversely, it needs to be supported by morality as well.

5.5 Law as the enforcement of moral norms

Law can also influence behaviour directly by simply making certain types of action illegal. Some moral norms are legally enforced; transgressions can lead to criminal punishments, administrative sanctions or civil liability suits. The core of traditional criminal law consists of the legal enforcement of moral norms against theft, violence and so on. Private law embodies moral norms regarding the protection of property and liability for harm caused to other persons. In a similar way, the implementation of a morality of sustainability could lead to statutes prohibiting the irresponsible disposal of wastes or creating civil liability for polluting the air with toxic substances.

Even with respect to the traditional norms of law, this is a much too simple picture, however. For one thing, the interaction between law and morality is usually more of a two-way process than a one-way translation. Moreover, the step from moral ideas to legal norms is not a simple translation. There is always a transformation process in which moral ideas are merged with typically legal concepts and modes of thinking. Even if identical words are used, they often mean something different in the legal context. Law is a distinct institution with specific characteristics, limitations and dynamics that influence the role and interpretation of legal norms.

For instance, in criminal law we need general and yet precise norms, otherwise legal practice would be confronted with many problems of application. We can quite vaguely say that we have a moral obligation to refrain from driving a car at a dangerous speed. In the law, however, it is more practical to have (also) a more specific norm like it is forbidden to drive at a speed of more than 100 km/h on roads of type A.

Another example is that the principles of civil liability usually have many similarities with the

From morality to law: some issues to be considered

1. THE NEED FOR LEGAL INTERVENTION

What is the problem we perceive and is law a solution to the problem? Other policies may give better results or we must simply be content with the fact that neither legislation nor other policies can solve the problem. When it is considered desirable to separate household refuse so that paper, glass, etc. can be recycled, we must first try other alternatives like creating a better system of wastepaper collection.

Most societies are in the process of growing public awareness and willingness to cooperate voluntarily to achieve environmental goals. Sometimes premature and strict legislation will even frustrate this process, because it provokes opposition from those citizens for whom the changes go too fast. On the other hand, legislation may also foster this process by symbolizing the change in our common values and providing democratic legitimacy.

2. THE AVAILABILITY OF ALTERNATIVES

As many studies on the effects of legislation have shown, law is sometimes very ineffective or even counter-productive. Therefore, we should always carefully consider whether there are alternatives.

Providing information, creating subsidies and other facilities for desirable behaviour or imposing higher taxes on undesirable behaviour may be more effective and politically more acceptable than direct prohibition of undesirable behaviour or rationing of resources. Higher petrol or electricity prices may help more than legal measures to reduce our energy consumption. Recently, various other alternatives have been discussed. Promoting self-regulation in a cooperative process of all parties involved. Certification of products by independent boards (supported by all parties involved) in which environmental factors are taken into account may be a better way than setting inflexible legal standards.

3. THE FIELDS OF LAW

Law is a plural phenomenon. There are various (sub)fields of law, each with its own characteristics. Criminal law is different from administrative or civil law. There is a tendency among the public, when speaking of law, to focus on criminal law. In modern law, however, other fields of law are often much more important.

When considering legislative approaches, we must carefully choose which fields of law are best suited to do the job. For some problems, an administrative law approach will be adequate; for example, if technological possibilities change very rapidly and general guidelines are difficult to draw, a system of permits may be most effective and flexible.

As a second example, if the administrative and judicial agencies are understaffed and overburdened, it may be wise to try to mobilize the citizens. A method for doing so is that of making private lawsuits easier, for example, by recognizing so-called 'class actions' which enable individual citizens to sue in court on behalf of a whole group when public or collective interests are at stake.

4. THE INTEGRITY, ROLE AND CHARACTERISTICS OF LAW

Law is a distinct social institution with a specific role and concomitant limitations. Law cannot make people morally perfect; it is better suited for enforcing minimum standards. Setting the standards of achievement too high in legal regulation can therefore result in ineffective laws.

Law has special problems of enforcement and proof. Criteria of due process and the Rechtsstaat sometimes lead to practical and normative problems in trying to get people convicted. These considerations are very important, especially in environmental law, where many crimes are victimless.

5. THE EFFECTS OF THE LAW

Both the intended effects and the unwanted side-effects of legislation should be calculated. Legislation is not always effective in influencing people's behaviour. Legal prohibition of certain polluting activities here may lead to the transfer of an industrial company to a Third World country where environmental control is less or even minimal. A new prohibition might not be effective because the police force is already overburdened and will not give priority to the prosecution of offenders.

6. THE NORMATIVE LIMITS OF THE LAW

According to most normative political theories, some forms of behaviour that are considered morally wrong should nevertheless not be the subject of legal prohibition. Just when and why this is so is, however, an issue of controversy. The crucial problem here is that many environmental problems have to do with life-style issues – a category of issues that is traditionally considered to belong to the private sphere in which the

concepts used in discussions of moral responsibility. The specific characteristics of law and legal dynamics have, however, also resulted in major differences, such as the introduction of the legal concept of strict liability. Quite often, the transformation process of implementing a moral norm and the subsequent legal dynamics change the original moral ideas beyond recognition.

Issues like these are complicating factors but they do not make the transformation of moral norms into law completely impossible. We can therefore try to transform a morality of sustainability into legal norms, provided we are prepared to tackle those issues. In some cases the transformation is quite simple. We can create a legal rule that prohibits dumping litter. If the fine is substantial and the chance that transgressors are caught and punished is high enough, this may deter citizens from such undesirable behaviour.

In other cases, legal regulation is less simple. One of the causes of eutrophication is that too much manure is spread on farmland. The surplus which the land cannot absorb then pollutes the ground water. Morally, this problem may seem easy to solve: we could construct a moral principle that no farmer should spread more manure than the biological absorption capacity of his land allows. But how do you translate this into a legal norm? Such a general norm would be too vague to be of practical use. Many factors are relevant here, like the characteristics of the land and the crop. It is technically quite difficult (though not impossible) to elaborate this basic principle and turn it into a feasible legal norm or system of norms.

There are not only technical problems here. Most modern societies are morally pluralistic. Everyone agrees on minimum rules against murder and theft. On moral principles regarding topics like the environment and social justice, however, there is often substantial disagreement. This raises, firstly, the normative question as to whether the law

should impose moral norms on a minority that does not agree with these norms. This question touches on a number of issues in political philosophy regarding democracy, the protection of minorities, state neutrality with respect to religious and moral convictions – complicated issues that cannot be elaborated here. It raises, secondly, the practical question as to whether it is feasible to enforce such laws. People who do not see the point of legal norms are more likely to disobey them as soon as they get the chance.

This practical problem is especially important when we are dealing with so-called victimless crimes – crimes in which there is no identifiable victim who can complain. Traditional examples of these are the use and sale of illegal substances like alcohol and drugs, euthanasia, abortion and various types of sexual conduct between consenting adults (such as homosexual acts or adultery). In many countries, acts like these are considered immoral by a majority and they have been made criminal offences. (I leave aside here the normative issue as to whether these acts should really be considered immoral or should be made illegal.) It is always very difficult to enforce such norms because the acts are so difficult to detect and prosecute. In ordinary criminal cases, there is a victim of the theft or the assault, who reports it to the police and who can help to establish the evidence by providing relevant material and testimony. When someone consumes drugs in private, it is much more difficult to detect this act and prove it. This is even more so when the person lives in a subculture that does not consider the use of drugs immoral – there will be little cooperation then.

Many actions that harm the environment are 'victimless' crimes. The 'victims' are the environment, animals, perhaps future generations – but only seldom are actual living persons. Neither the offenders nor the people in their direct environment often see any harm in the acts involved – there may even be sympathy for farmers or fishermen who

dodge environmental regulations. This makes detection and proof difficult and the effectiveness of regulation is often doubtful.

5.6 From morality to law

The conclusion above is that legislation works best when there is a broad moral agreement on the norms embodied in the law. Law cannot supplant morality, only supplement it, while at the same time, vice versa, it has to be supported by morality.

Legal implementation of moral values and norms is in many ways problematic. Law is sometimes ineffective or it may not be the best instrument to realize moral values; it may also be undesirable from a normative point of view to enforce moral norms through the law. Without claiming completeness, I shall list a number of topics that will have to be addressed before we can make the step from a morality of sustainability to legal regulation. (See box p. 30)

The problem here is to find the right balance. Inactivity by the state may lead to further deterioration of the environment, whereas too much state intervention may erode our civil liberties and civil society. The latter are essential conditions for keeping public awareness of environmental problems alive – only free, well-informed citizens may be expected to take their moral responsibilities seriously. Here, as elsewhere in this chapter, the message is that moral awareness alone is not sufficient, but nor is the law; we need both. Law is not an alternative for morality, but its supplement, just as morality is a supplement to law.

Legal regulations and sustainability

Sustainability may be introduced into law in different ways. There are many regulations concerning environmental protection already in effect even before sustainability has been adopted as a political goal. More recently, laws have been implemented that are directly based on the concepts of sustainability. They include regulations on resource use (for example, taxation on the use of fossil fuels) and waste management (for example, regulations on recycling). Several laws are the consequences of international conventions such as protection of the atmosphere and biodiversity. There is only very little that is directly related to, for example, the rights of

future generations.

Physical planning has a special role here since it forms the basis for the use of natural resources and preservation of biotopes, biodiversity and in general long-term planning that will shape the world for future generations.

Below follows a short enumeration of some of the major categories of legal regulations relevant to sustainability. For further reading see 'The Baltic Sea Environment Session 7 (I.-M. Andréasson-Gren, G. Michanek and J. Ebbesson, 1992).

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1. LEGAL REQUIREMENTS AND ENVIRONMENTAL QUALITY STANDARDS (LIMITS)

Legal requirements are precise restrictions or prohibitions, banning the use of hazardous substances such as DDT and PCB, as well as controlling certain practices such as discharges from vessels, certain forms of transportation of hazardous chemicals, etc. Quality standards define allowed amounts of polluting substances in water and air and thereby emissions to water and air. Such regulations enforce improved purification of discharges and stimulate the introduction on non-waste technologies.

2. LEGAL ECONOMIC INSTRUMENTS

Legal economic instruments, which include taxes, fees and subsidies, are determined by legislation. These instruments do not enforce, but promote, environmental protection and sustainability. Important examples are taxation on fossil fuels, oil and petrol and fees on emissions of carbon dioxide.

3. MATERIALS FLOWS AND RECYCLING

More recently, legal requirements relating to waste handling have been expanded by requirements on recycling. Thus, a company selling a product may be forced to take care of the used product. Products might be forced to contain only recyclable materials. Some materials might be outlawed, as mercury is in Sweden.

4. TOWN AND COUNTRY PLANNING; PERMITS (CONCESSIONS)

Land and water is continuously being developed. New factories, power plants, roads, harbours,

etc. are built. Concessions for such developments are part of town and country planning. The planning authority, often a municipality, must balance all conflicting interests, such as those of production, leisure, etc., in connection with the proposal and evaluate at least the environmental impact of a new installation. Legally binding regulated planning also exists in the energy, waste management and water sectors.

The legally binding protection of nature has to be considered. Thus, protected areas, nature reserves, the protection of endangered species and the protection of biotopes must be considered in physical planning.

Factories, sewage treatment plants, etc. are examples of point sources with potentially great environmental impact. A permit (concession) is required before such an installation can be built or expanded. Permits are granted for certain emissions for a certain period of time. By reducing the periods for which the permits are issued, authorities can stimulate the development of better technologies.

5. LEGAL RESTRICTIONS ON DISCRETIONARY POWERS

Legislation also distributes the power of decision-making to authorities, whose competence is thus usually restricted by legislation. Such regulations define sustainable development as the basic goal to be promoted in all physical planning but leave open the question of how the responsible authorities should do it. Some guidelines as to how physical plans should be drawn have, however, been defined.