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LEGISLATION ON ETHICAL ISSUES: TOWARDS AN INTERACTIVE PARADIGM*

ABSTRACT. In this article, we sketch a new approach to law and ethics. The traditional paradigm, exemplified in the debate on liberal moralism, becomes increasingly inadequate. Its basic assumptions are that there are clear moral norms of positive or critical morality, and that making statutory norms is an effective method to have citizens conform to those norms. However, for many ethical issues that are on the legislative agenda, e.g. with respect to bioethics and anti-discrimination law, the moral norms are controversial, vague or still evolving. Moreover, law proves not to be a very effective instrument. Therefore, we need a new paradigm, both for descriptive and for normative analysis. This interactive paradigm, as a normative position, can be summarised in two theses. The process of legislation on ethical issues should be structured as a process of interaction between the legislature and society or relevant sectors of society, so that the development of new moral norms and the development of new legal norms may reinforce each other. And legislation on ethical issues should be designed in such a way that it is an effective form of communication which, moreover, facilitates an ongoing moral debate and an ongoing reflection on such issues, because this is the best method to ensure that the practice remains oriented to the ideals and values the law tries to realise.

KEY WORDS: animal experiments committees, expressive and communicative functions of law, interactive paradigm, law and ethics, legal moralism, legislation

1. Introduction

Our political institutions are increasingly confronted with ethical issues for which legal regulation – or sometimes deregulation – is demanded. These issues are not restricted to the classic themes such as abortion, euthanasia, discrimination, varieties of sexual behaviour, and the use of alcohol and other drugs. Modern biotechnology and the Internet, health care and animal welfare – they all confront us and the legislative bodies with issues that undeniably have a moral dimension.

It is not only that new issues confront the law; the character of law itself is also changing. A new approach to law seems to be emerging especially

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in those fields where the moral dimensions of law are most visible. Ordinary citizens and practitioners, ethicists and other experts are increasingly involved in debates on legislation. Legal regulation often consists more of open standards and procedural norms than of detailed rules of conduct enforced by criminal sanctions. New legal instruments such as ethics codes and covenants between government agencies and certain sectors in society gain in popularity. It seems to us that this change is more than merely gradual and signals a shift towards a new paradigm of law.

These recent legal phenomena are frequently criticised as deficient forms of law. Legislation containing open norms is regarded as 'merely symbolic', ethics committees as ineffective, and so on. And indeed, if considered from within the traditional legal paradigm, these criticisms are not only understandable, but also justified. However, these new phenomena have not emerged without good grounds: modern societies need them. We need a different view of law, a new paradigm, to see how they are adequate responses to the problems of modern societies.

In this article, we will sketch and defend this newly emerging paradigm, which we call an 'interactive' one.[1] The traditional and the interactive paradigms differ in many respects, for example, in their views on legislation and implementation processes, their concepts of the citizen and of the relation between state and citizen, and in the way they structure the relation between law and morality. Their primary focus, moreover, is on different types of law and on different functions of law. We will not be able to elaborate all these differences, not only for lack of space, but also because many of these phenomena, let alone the paradigm as such, have not yet been analysed systematically.

To illustrate our theoretical analysis, we will refer to many examples for which we may defend controversial normative positions. We do not have the space here to elaborate our arguments for those positions;[2] we hope the reader will simply follow us, for the sake of the argument, to see how these examples can be clarified and structured fruitfully within an interactive paradigm.

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[1]The idea of this different approach to law has been inspired by the work of and discussions with various colleagues both in Tilburg and in Utrecht. We would like to mention Willem Witteveen in the first place, but others who have significantly contributed to the construction of this approach are Pieter Ippel, Bart van Klink, and Jan Vorstenbosch.

[2]Where possible, we have referred to other publications in which the arguments may be found.

2. The Inadequacy of the Traditional Paradigm

Traditional normative approaches to the theme of legislation on ethical issues[3] usually have a simple pattern. There are two main types. One approach, usually discussed under the title 'legal moralism' starts with positive or social morality, the moral norms actually accepted by a society.[4] The normative question is whether and on what conditions these moral norms should be transformed into law; usually, the focus is very specifically on criminal law.[5] The other approach starts with some idea of critical or ideal morality, for example, a liberal ethical theory, a Christian morality or some form of natural law. Here, the normative question is analogous: How can such a critical morality be the basis for legislation?

Despite their differences, both approaches have two assumptions in common:

1. the assumption that there are clear moral norms, belonging either to positive morality or to critical morality;
2. the assumption that the law has such authority or force that giving moral norms a legal status (and enforcing them with criminal sanctions) is an effective method to have citizens conform to those moral norms.

These two assumptions are connected with various other characteristics which are typical of the traditional paradigm.[6] The relation between citizen and state is modelled vertically, as one between sovereign and subject. The focus is on legal and moral rules as direct action guides rather than on

[3]We will use this phrase, 'legislation on ethical issues', or phrases such as 'legislation and ethics' to refer to all those themes where legislation is discussed with regard to issues where the ethical dimension is, if not predominant, at least central to the debate.

[4]The distinction between social and critical morality was introduced by Hart (1963, p. 20). For a detailed discussion of both types and the dialectical relationship between them, see Brom (1997, p. 62 ff. and p. 252 ff.).

[5]Cf. the famous Hart–Devlin debate, partly reprinted in Dworkin (1977). The most elaborate discussion of the theme may be found in the four-volume series of Feinberg (1984, 1985, 1986, 1994).

[6]Of course, a general sketch of a paradigm can never do justice to many authors who have defended more sophisticated positions on some of the characteristics suggested. Moreover, many authors have already tried to incorporate into their theories some of the insights derived from the newer paradigm. Nevertheless, we think that the distinction of these two basic paradigms, however simplifying this may perhaps be, can illuminate many issues.

more general standards such as values and principles;[7] these moral and legal norms can be analytically distinguished from each other (though not necessarily separated). And the basic functions of the law are the protective and instrumental functions: legal rules protect citizens' rights and are instruments for public policies, respectively.

This paradigm can, however, no longer be taken for granted. In modern societies, both assumptions are highly questionable, and various other characteristics are not so adequate either.

1. We no longer have the idea that there are indisputable moral norms that give us guidance on every issue. Moral pluralism is one cause for this, but not the only one. Another cause is that our moral norms are often inadequate for dealing with new problems. Rapid changes in technology or in society confront us with problems for which neither our positive morality nor ethical theories offer adequate answers. In response to these social and technological changes, our positive morality and our ethical theories have to develop as well.
2. The second assumption, namely that introducing a statutory norm is sufficient to make citizens act in accordance with moral norms, is also questionable. The authority of the law can no longer be taken for granted and threats with sanctions are often quite ineffective. The idea that we simply have to state legal norms and that citizens will follow them is obviously naive, though this naive idea still seems to have a strong hold on many members of the public, on politicians, and on bureaucrats.

   Modern societies are so complex that legal norms are often difficult to enforce without some form of voluntary co-operation of citizens. If legal norms do not correspond with the moral norms of the people or with the moral norms of the practice we want to regulate, their effectiveness is doubtful, especially if effective control or sanctions are lacking. This was already common knowledge in criminology with regard to so-called victimless crimes, such as the use of alcohol or other drugs or 'deviant' sexual practices. Such behaviour is very difficult to control, and attempts to enforce criminal norms often have serious negative effects and side-effects, such as the growth of organised crime and the corruption of law enforcement agencies.[8] But it may be even more

[7]Cf. Dworkin's famous critique of the 'rule model of law' (Dworkin, 1978, ch. 2 and ch. 3).

[8]Cf. Skolnick (1968).

important to acknowledge this truth in connection with relatively autonomous practices such as those of medicine. If legal norms do not correspond with the moral beliefs of medical practitioners, they remain a dead letter.[9]

So the two basic assumptions of traditional approaches to legislation on ethical issues no longer hold, at least not generally. Therefore, we need a different approach, which is also embedded in a broader paradigm.

First, the lack of moral consensus requires a different perspective on the process of legislation. And second, the fact that the law's authority can no longer be taken for granted requires a different perspective on the process of implementation and enforcement. We will argue that, for both problems, an interactive approach will be fruitful. This interactive approach, as a normative position, can be summarised in two theses:

1. The process of legislation on ethical issues should be structured as a process of interaction between the legislature and society or relevant sectors of society, so that the development of new moral norms and the development of new legal norms may reinforce each other (see section 3).
2. Legislation on ethical issues should be designed in such a way that it is an effective form of communication and that, moreover, it facilitates an ongoing moral debate and an ongoing reflection on those issues, because this is the best method to ensure that the practice remains oriented to the ideals and values the law tries to realise (see section 4).

3. The Legislative Process in an Interactive Paradigm

3.1 Description

In a study of the legislative process concerning two Dutch statutes, the Medical Experiments Act and the Experiments on Animals Act, it was suggested that the long legislative process had had important effects, because the groups directly involved had participated in it.[10] An analysis of the latter statute, however, shows, that the interactive process is not always without contention.[11] The legal discussion on

[9]Cf. Griffiths et al. (1998).

[10]Vorstenbosch and Ippel (1994).

[11]Brom (1999).

the protection of laboratory animals used in animal experimentation started already in 1888 with a juridical thesis.[12] In this thesis, a licence system for animal experimentation was proposed. In 1907 and in 1933, State Committees also recommended a licensing system. Only those institutions that could guarantee the use of animals solely in properly designed experiments should be allowed to perform animal experiments. The scientific community protested vigorously against legislation. It was argued that scientists are not cruel and that the experiments they perform are scientifically sound, which makes these experiments by definition properly designed. The Second World War interrupted the legislative process. In the 1950s, the process was restarted. Animal experiments were dealt with in the 1955 Bill on Animal Protection. However, during the parliamentary debate they were removed from the Bill. Again, the protests from the scientific community were effective. As a compromise, however, a special government committee was installed to prepare special legislation. This committee concluded that it was not realistic to outlaw animal experiments, but it saw enough reasons to regulate animal experiments in order to protect the animals involved. In 1970, a new Bill was sent to Parliament. In 1977, the parliamentary debate led to the Experiments on Animals Act (EAA). This legislation provided for a licensing system.

Already before 1977, the basic ideas behind the EAA had been introduced into the animal experimentation practice. In 1985, an Advisory Board on Animal Experiments – installed under the EAA – wrote an advice for the Minister of Public Health. In this advice, the Advisory Board proposed to institutionalise the discussion on the acceptability of experiments in animal ethics committees. The decision on whether a certain experiment was acceptable should not be left to only those directly involved. Most institutions voluntarily set up Animal Experiment Committees (AECs). These committees stimulated the debate among researchers and contributed to changes in the research practice. Therefore, it was with little scientific protest that, in 1996, when the Animal Experimentation Act was changed, the Animal Experiment Committees became obligatory. Since then, animal experiments are allowed only if an Animal Experiment Committee has assessed and approved the experiments. The current legislation is largely a codification of the moral norms that those involved in the practice had in the meantime accepted and implemented. The quality of the Act also had profited from the long process and from the involvement of the researchers. Because the drafters had become aware of the concrete problems,

[12]Witsen (1888).

perceptions, and experience of the research practice, the Act became better adjusted to that practice and thus much more effective.

This case study is a good example of an interactive legislative process on ethical issues. The development of moral norms and the development of legal norms can reinforce each other.[13] As a result, implementation becomes less problematic because the researchers have already oriented themselves to the new legal norms and, moreover, support these norms.

3.2 Criticisms

Objections to an interactive structuring of legislative processes usually appeal to standards such as efficiency, the rule of law, and democracy. Interactive processes will usually take longer because more actors are involved, and when bills are finally passed, they seem almost superfluous as they merely codify existing practice. Moreover, a democratically elected parliament becomes almost redundant if its task is merely to approve certain norms that are the result of some uncontrollable process influenced by groups that have direct interests in that particular legislation.

However, once it is acknowledged that the ultimate aim of a legislative process is not a change in the statute book but a change in reality, the first objection disappears, because the interactive process stimulates a change in the practice long before legislation is passed. And if we focus on a substantive rather than a procedural conception of democracy, an agreement among the groups that are directly involved is at least as important as a political majority in the elected legislative body; moreover, the latter is still required as well.[14]

3.3 Advantages

Most important, however, are the advantages of an interactive approach. It forms part of the answer to both problems of the traditional paradigm mentioned earlier.

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[13] The idea of an integration of moral norm development and legal norm development has been elaborated in Brom (1998).

[14] In a procedural conception of democracy, a decision is democratically legitimate if it has been taken by the democratic organs according to the procedure prescribed. In a substantive conception, a broader support by the population at large and especially by those who are directly involved in the issue, e.g., because they have to implement it, is required as well. For a defence of a substantive conception of democracy, cf. Van der Burg (1991).

1. Moral consensus is not presupposed as a starting point; rather, it is regarded as one of the purposes of the discussion. In a continuing discussion with the practice or the field, the structure of moral issues is clarified and the values and norms that may apply are developed. Moral development and legal development go hand in hand, and hopefully lead to a consensus or at least to clarification of the differences in opinion, which may be the starting point for a compromise.
2. The problem of norm conformity is tackled in three ways. First, the new law is oriented to the reality of the practice as it is perceived by those working in that practice themselves and, hence, the law may be expected to be useful and effective in practice, and more than a mere theoretical construct. Second, the interactive process ensures that the legal norms are supported by those involved in the field or practice. Third, during the process, the practice has already changed in anticipation of the new legal norms.

4. The Implementation Process in an Interactive Paradigm

4.1 Description

An interactive approach is not only important during the legislative process. It is perhaps even more important, and controversial, in the implementation stage. In the traditional paradigm, implementation is primarily seen as the subjects' obedience to rules of conduct as formulated authoritatively by the law, and especially by the legislature. As subjects usually will not follow these rules completely voluntarily, there must be an effective threat of sanctions and the state must support these rules with a coercive apparatus of enforcement agencies such as the police. In an interactive view of law, however, a different attitude towards law is required, and this brings with it a different type of law.

The basic idea is that autonomous citizens take their own responsibility seriously in trying to realise the basic ideals, goals, and principles as formulated by the legislature. Citizens should see their role not as obedient subjects but as participants in a co-operative effort to interpret and realise those general standards. And the legislature, in its turn, should treat them as autonomous persons, who are often in a better position than the legislature to decide what is required in order to realise the common project in the concrete circumstances of the case. Therefore, the legislature should be cautious in setting too detailed rules.

In an interactive paradigm, implementation thus becomes a co-operative effort of legislature and citizens. Obviously, it will be

impossible to have a genuinely interactive process in which the national legislature and citizens continuously discuss how to implement the basic ideals, goals, and principles the legislature has formulated. In a more limited way, however, it is possible to have an ongoing communication process in which citizens and official or semi-official institutions co-operate. In this process, more general standards are interpreted and elaborated, specific norms are constructed and refined, and concrete decisions are made. In this way, a continuing norm development can take place, at various levels of abstraction. Moreover, not only are norms developed, but the practices are oriented to these norms and concrete actions are guided by them, or criticised in their light.

Before our sketch becomes too abstract, let us illustrate it. As said above, the Experiments on Animals Act provides for Animal Experiment Committees that are to assess the acceptability of animal experiments. From the traditional paradigm of law, one may see these committees as a kind of law enforcement agencies: the law sets standards which must be upheld and enforced by the committees. These committees assess the acceptability of specified animal experiments on a case-by-case basis. By creating a committee, the legislator safeguards that in these decisions the 'animal point of view' is not neglected. In this way, the Act can be seen as the end of a moral development in society. It codifies the 'dominant' morality of the society. We think, however, that, in an interactive paradigm of law, a more communicative approach is required. From this point of view, committees should try to stimulate moral sensitivity among researchers through open discussion. It seems more fruitful to gradually develop a more responsible research practice. This communicative approach can be developed in three steps.

First, the community of scientists participates in the debate. The establishment of these committees as 'external' decision makers on the basis of the law has implications beyond those directly involved. Of course, the discussions start within these committees, as they assess and approve (or disapprove) specific animal experiments. But the discussions expand beyond the committees into the community of scientists. Scientists try to determine in advance whether a certain experiment has a chance of being accepted. Their thinking about the acceptability of their experiments is structured by the conceptual scheme that is provided by the law. In this way, the community of animal scientists is recreated into an audience with a common language.

Second, the framework can expand beyond the community of scientists. Animal experiments will remain controversial. Scientists who perform animal experiments are often confronted with critical questions. In answering these questions, they will need to defend themselves. In this

defence, they tend to use the normative language in which these experiments are discussed and assessed in the Animal Experimentation Committees. The way a certain experiment is justified within a committee creates a basis for defending these experiments outside such a committee. In this way, the language provided by the law expands beyond its legal scope and becomes part of the language in which the society publicly discusses animal experiments as moral questions.

It could be argued that this only solves the problem of the scientists and that society is left out of the discussion. A third step is necessary. It is important that, in order to make the interactive process function, the questions from society provide an input for the discussion within the committees. This is done in two ways. Members of committees participate in continuing education programmes. In these programmes, recent developments in societal and ethical debates are discussed between members of different committees. Besides this, in every committee, there are members who are not directly involved in animal experimentation, who need to bring in the external points of view. In this way, the moral criteria can develop on a case-by-case basis, in the light of the specific facts of the cases.

We hope this illustration has demonstrated what an interactive approach in the implementation stage may look like and, moreover, that such an approach is quite common in modern societies. It also suggests what a legislature can do and should do in order to stimulate such a process.

First, at the level of substantive norms, the legislature should refrain from formulating detailed rules. It should rather set open norms or general values as a common frame of reference. On the one hand, even if these open standards must still be interpreted and elaborated, they are not merely vague norms but formulate the most basic ideals, goals, and principles. On the other hand, they leave the possibility of being sensitive to the context and to the personal circumstances and convictions of individual citizens and organisations. In other words, their openness invites citizens and professionals to accept their own responsibility in a further process of norm construction.

Second, the legislature should create procedures and institutions which stimulate further discussion of the substance of the standards and, at the same time, may help in formulating authoritative interpretations, whenever necessary.[15] Institutions such as the

[15]Of course, formulating authoritative interpretations is traditionally the role of the judiciary. However, we should be cautious about giving the judiciary a role here. There is a tension between the role of formulating authoritative interpretations and that of fostering discussion, and the judicial practice has a strong tendency towards the former role. So,

ombudsman may play such a stimulating role for public agencies to help them orient to those standards.[16] Institutions such as ethics committees, Equal Rights Commissions, and animal experiment committees may foster similar discussions with regard to individual citizens, professionals, and private organisations.

Whatever the organisational structure, it is important to note that the primary tasks of institutions such as committees and ombudsmen are twofold: They are to foster discussion on the implications of common ideals, goals, and principles as formulated by the legislature, and they are to promote moral sensitivity to those implications, so that citizens will accept these autonomously and integrate them into their daily work rather than follow them under the threat of external sanctions. A repressive attitude of such institutions will seldom work because it is likely to frustrate open discussion; they should rather choose a communicative style. This still leaves room for different emphases. Sometimes the emphasis should be on the role of the institution as interpreting and constructing (legal) norms, sometimes on solving conflicts and sometimes on stimulating moral reflection and influencing the moral attitude of the citizens. The role of such institutions may thus tend towards a semi-judicial one (e.g. the Dutch Equal Opportunities Commission[17], towards a more mediating one (e.g. the ombudsman in many countries), or perhaps even towards an educative one (which we think is the best role for animal experiments committees in their early stages).

4.2 Criticisms

There are strong objections to an interactive approach in the implementation stage; in a sense, it goes against the most deeply rooted attitudes of lawyers. While we argue that open standards are necessary, many critics hold that they endanger legal certainty (*Rechtssicherheit*), that they provide insufficient guidance and that, therefore, they are merely symbolic and ineffective.[18] And while we argue that ethics committees and ombudsmen should choose a communicative style and, therefore, sanctions should

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court proceedings and judgments should develop a more communicative style than is now common (at least in the Netherlands), a style that adequately balances the need for openness and flexibility and the need for legal certainty.

[16]Cf. Hertogh (1997).

[17]Cf. Van Klink (1998).

[18]For a critical discussion of a number of these criticisms, see Van Klink (1998).

be weak, the lack of real sanctions and an effective enforcement agency is often regarded as a sign of ineffectiveness. And while we argue that the legislature should refrain from detailed rules, many critics may hold that unacceptable situations continue to exist because they are only superficially regulated. For instance, there is still animal suffering in animal experimentation. Within a traditional paradigm, all these criticisms are undeniably correct, and it is difficult to regard these types of law as other than ineffective, democratically deficient, and so on. However, someone who looks carefully at reality will understand that they are not so much ineffective as effective in a different way.[19] They are effective in using discussion and persuasion as a means rather than external sanctions and in appealing to morally responsible behaviour of citizens rather than to merely strategic action of subjects.

However, it must be admitted that this interactive strategy is only effective in specific circumstances. It is what may be called a 'high-risk' approach:[20] it does not guarantee success and it may go terribly wrong, but if it works, the results may be much better than through traditional approaches.

4.3 Advantages

Therefore, it is difficult to compare the advantages and the disadvantages of an interactive approach. Nevertheless, the possible advantages of a successful interactive approach may be clear by now: it does more justice to the autonomy of citizens; it is more flexible and responsive to variation and change; it fosters ethical reflection and discussion, and may hence create greater legitimacy of the emerging law. But these can only be tentative suggestions; we need much more empirical analysis before we can say when such advantages are likely to be realised.

5. The Role of Legislation in an Interactive Paradigm

One may wonder whether, in such an interactive approach, there is any role left for legislation as a product, for statutes. If everything is a continuous process, why would we need statutes at all?

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[19]This point has been forcefully argued by Bart van Klink in his dissertation on communicative legislation and illustrated with the way the Dutch Equal Opportunities Commission functions. Cf. Van Klink (1998).

[20]Cf. Nonet and Selznick (1978).

We think that, in an interactive paradigm, the role of legislation is, indeed, more modest but it is certainly not superfluous. It is more modest in the sense that the law leaves much more discretion (but no licence!) to those involved in the practice, to citizens, than in traditional views of law. In another sense, the role of legislation may be even more ambitious as the law does not deal with relatively minor details and concrete regulations but focuses on the most fundamental ideals, goals and principles.

1. On many issues, consensus will still be broad enough (or consensus will emerge during the discussion process) on concrete norms that should be codified in legislation. For example, over the past decades, patients' rights have been developed in medical practice and medical ethics; to make them legally binding, codification in statutes was a good strategy. These rights correspond with what is usually called the *protective function* of law: the law protects the rights of individual citizens. A consensus may also grow regarding rules with a more *instrumental function*, e.g., on the minimum technical standards which a research institute must meet to conduct animal experiments. In such a case, legislation may be useful as well. An interactive paradigm thus still recognises the importance of these traditional functions of the law.

   However, in many cases there will be no rules or other concrete standards on which consensus exists. Other functions of the law then come to the fore, namely the *expressive* and *communicative functions*.[21]
2. Often there is no consensus at the level of concrete norms, but there is consensus at the level of more fundamental values and principles. For example, in the Netherlands, we are still discussing which concrete rules would best protect animals, but there is a consensus on the idea that animal suffering should be minimised and that animals have an 'intrinsic value' (even if it is unclear what the latter may mean).

   In such cases, legislation may formulate at least those fundamental standards. The legislature thus expresses which values are important and should be seen as points of orientation and guidance by the citizens. This still leaves citizens discretion (and responsibility) to

[21]These two functions have been elaborated in Van der Burg (1996). Together these functions may be called the 'positive symbolic function'. Cf. Witteveen et al. (1991) and Van Klink (1998).

determine how to interpret those values precisely and how to implement them. This is the *expressive function* of the law: the law may express what we, as a political community, hold to be essential, what the basic values are that we want to cherish. In other words: it expresses who we are and want to be. This expressive function is at stake in many legal rules that, at first sight, may seem meaningless or even illogical.

An example may be found in Dutch euthanasia law. Under Article 293 of the Criminal Code, euthanasia is a crime, notwithstanding the fact that a doctor is not prosecuted if certain conditions are met, such as consultations with a second doctor, a consistent request for euthanasia by a competent patient, and so on. By keeping euthanasia in the Criminal Code, the legislature gives an important symbolic message: euthanasia should never be taken lightly or become a routine, because one of our most fundamental values, respect for human life, is at stake. Many more examples may be given in which attention for the expressive function of the law can give us guidance in understanding statutes or in suggesting legal reform.[22]

It should be noted that the expressive function of legislation is usually combined with and often overshadowed by other functions. Only rarely is the expressive function the most important one in analyses of legislation, and usually it is then the ground for criticism.Examples are moralistic laws which have not been enforced for decades (such as the Georgia anti-sodomy law central to *Bowers v. Hardwick*,[23] or the Prohibition Clause in the US.

3. A second function is what may be called the *communicative function* of the law.[24] Legislation may create a common normative framework and a vocabulary to structure normative discussion on certain issues. The communicative function has a substantive dimension: the law may present concepts, values, principles and other standards. This substantive dimension is obviously connected with the expressive function. It also has a procedural dimension: the law may create and support institutions and procedures that promote further

[22]It is also important for understanding the role and substance of international treaties and conventions. They express the most basic values and ideals of a civilised society, while leaving the states discretion to implement them in ways which are responsive to specific historic and cultural circumstances.

[23]Cf. Van der Burg (1992).

[24]On this function, see Witteveen (1992) and Van Klink (1998).

discussion on how to interpret, elaborate and implement this substantive framework.

An example may make this clear. The Animal Health and Welfare Act, which, in 1992, replaced the above-mentioned Animal Protection Act, functions as a general legal framework. This Act has (partly)a 'no, unless' structure: certain acts regarding animals (like surgery without veterinary necessity) are forbidden, unless explicitly allowed in special regulations. There is, for instance, a special regulation on surgery without veterinary necessity on animals in certain cases. Only those surgical practices that are explicitly mentioned in this regulation, such as removing horns from cattle with designated techniques, are allowed. In order to implement its regulatory framework, the Act requires specified regulations. The Council on Animal Matters advises the government on these regulations. Therefore, detailed technical and moral discussions are held within this Council. The various groups that are represented in this Council have different interests and different moral points of view, but the necessity for specified regulations forces them to co-operate.

The discussions in the Council are structured by the Act's conceptual scheme. In having these discussions, the members of the Council are recreated into an audience of the law with a common language.[25] The members of the Council, however, are not *just* individuals. They represent societal groups and have to defend their agreements (compromises) with the other members of the Council. The people they represent want to understand why they accept certain Council statements. In the discussions with the people they represent, they tend to use the same language as is used within the Council. In this way, the framework expands beyond the people directly involved.[26]

Thus, animal protection legislation creates a conceptual framework with a certain content. This framework is not only a point of departure for societal discussions but also its point of reference. This framework functions as a source for normativity and it fosters moral discussions on the acceptability of concrete human actions with animals.

Animal protection legislation is based on the societal 'consensus' *that* animals *themselves* deserve our moral concern. It is based on

[25]Witteveen (1991).

[26]For instance, the common language will be used in articles in the periodicals of the organisations involved.

the recognition that animals are proper objects of moral concern. It provides a legal framework to implement the implications of that judgement, by creating legal norms for judgements about the acceptability of human actions regarding animals. It guarantees that, in these judgements, animal welfare is not neglected. In this way, these statutes can be seen as the (provisional) end of a moral development in society. They codify the 'dominant' morality of the society. Through this codification, society expresses that animal protection is an essential value. Through these laws, it communicates the value of animal protection to its members, expecting that they will implement it in their actions. The interactive paradigm shows that the codification of society's dominant morality is not the only thing the Acts do. The communicative function goes beyond the codification of the dominant moral position; it creates a public framework on the basis of this dominant position. It recreates the abstract consensus that animals are proper objects of moral concern into a morality in which the acceptability of human actions regarding animals can be discussed.[27]

6. When Is the Interactive Paradigm Preferable?

The shift towards an interactive paradigm has wide dimensions. It opens up new perspectives on many recent phenomena in law. We will not go into these topics now, but we think it is important to note that the approach we have sketched for legislation and ethics fits into a much broader orientation towards interactive law.

For example, the use of covenants between societal sectors or fields, on the one hand, and government agencies, on the other, fits in with a broader trend towards what in Dutch is called *onderhandelend bestuur* ('negotiated public policy making'). Other phenomena that may be mentioned are the abundance of open standards and even references to ethics in modern law, the growing importance of ethics codes, the rise of institutions such as ethics committees, equal rights commissions, and ombudsmen. In legal theory, it fits in with concepts such as autopoiesis or 'legally controlled self-regulation'. In the traditional paradigm, most of these phenomena can only be deplored as deficient in effectiveness or in *Rechtsstaatlichkeit*. Consequently, they are often criticised and treated with suspicion, characterised as merely 'symbolic' legislation, and so on. But these new

[27]Postema (1992, p. 164) argues that a morality " . . . not only provides the environment within which members act, but it directly shapes their sense of the meaning and value of the actions about which they deliberate. It provides content, not just context."

phenomena have not emerged without reason: they are forms of law or semi-law that are responsive to the problems of our complex modern, democratic societies. Only if we shift towards an interactive paradigm can we understand why they are as they are and value them more positively.

An interactive approach need not always be the best approach in legislation, and it need not always work. For example, a process of open discussion as we sketched above will only be possible in societies with a specific public culture which allows open discussion on merits. We think that countries such as the Netherlands and Switzerland, with a multi-party tradition, where minorities have long been forced to co-operate with each other, may be a better context than strongly polarised two-party countries.[28]

7. Concluding Remarks

In this article, we have sketched a new approach to law and ethics, which has at least some of the characteristics of a paradigm shift. It is only a tentative sketch because as yet it is unclear how general these phenomena are, for which issues this new paradigm is most relevant, and how it is related to traditional approaches.

This leaves us with the question of how ethicists should respond to this change in paradigm. We think many ethicists have already adequately responded to this change. In the traditional paradigm, the role of moral philosophers and theologians is to construct foundations for moral norms and values, e.g., in natural-law theory, and thus present authoritative arguments for or against legal norms and, if necessary, to criticise positive law. We do not believe in foundationalism, and hence we do not believe in such a role for ethicists. But it is also a role which is no longer feasible in an interactive paradigm.

Ethicists should take on a new, both more ambitious and more modest role. As we have argued before, moral norms are often still fragmentary and inadequate, just like legal norms. The challenge of moral philosophy is to articulate the implicit morality emerging in practices, and to analyse possible solutions and the arguments for and against. Moral philosophers and theologians are not the final authority in moral affairs; they are merely a group of discussion partners with a specific analytic skill and

[28]It also fits in well with the so-called Dutch *polder model* for socio-economic relations, where trade unions and employers' organisations co-operate with the state to determine economic policies.

ethical expertise, in a common co-operative process of norm development. This is nothing new, of course. It reminds us of a recent debate on the role of ethicists in public debate. Robert Heeger argued that ethicists should neither be moral gurus, nor moral crusaders for truth; they should simply facilitate decision making in moral questions.[29] Such a role is precisely the one which fits best within an interactive paradigm.

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[29] Heeger (1993).

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