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Symbolic Legislation Theory and Developments in Biolaw

 Springer

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Chapter 4

How Law Matters: Sociological Reflections on the Symbolic Dimension of Legislation

Rob Schwitters

4.1 Introduction

There is no doubt that legal rules do have a symbolic dimension. The laws of a country may, for instance, fit into a narrative about its distinctive cultural traits. One may be proud of the Netherlands as being a liberal and tolerant country, referring to the legislation on prostitution, drugs and euthanasia. Citizens may also defend permissive or prohibitive laws to express themselves as being more or less tolerant. They may advocate more severe punishments and a stricter regulation of immigration to express themselves as hardliners on moral-political issues.

The real effects of law will be less relevant when legal rules are used as position-markers (Sunstein 1996a). In this case, one's preferences for more severe punishments will not be affected by empirical evidence indicating their ineffectiveness. And those demonstrating their approval of conservative positions on ethical issues by advocating a legal prohibition of euthanasia, will not easily shift their position if evidence shows that this prohibition leads to more (hidden) life-terminating practices in which standards of care are violated.

However, the symbolic dimension of law may affect the impact it has, and the symbolic effects may be deliberately used to enhance compliance. For instance, when citizens associate the law with the dignity of the queen, or of judicial authorities, this may induce them to obey the law. And if a repeated violation of the law is seen as characteristic of marginalized citizens, then this will be an extra motive for average citizens to follow the law. A factor which, according to Foucault, was actively incorporated in criminal-policy in the nineteenth century. By imprisoning criminals they were marginalized and excluded from their bonds with the lower classes, in days when social opposition led to violations of the law. It altered the

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meaning of violating the law and canalized revolutionary tendencies in directions less threatening to the legal order (Foucault 1995).

More idealistic overtones can be discerned in the program of communicative or symbolic legislation as developed by Bart van Klink and Willem Witteveen.¹ In their account the symbolic dimension prevails when the effectiveness of law relies on a persuasion-based compliance.² Law can be seen as reservoir of arguments which may be convincing for its addressees. What contributes to voluntary acceptance is that the legislator restricts itself to the drafting of general clauses which are further determined in communicative interaction with citizens, experts and stakeholders (Van Klink 1998; Witteveen and Van Klink 1999; Witteveen 2005).

Van Klink's and Witteveen's account of communicative legislation may be seen as a remedy for the regulation crisis which became manifest in the 90s (Witteveen 2005). The regulative ambitions of the government could no longer be achieved through the conventional parliamentary democratic procedure and instrumental regulation; a regulation which is based on *top-down* commands which are backed up by sanctions. Communicative legislation should be a more appropriate type of regulation, paralleling the introduction of less hierarchic styles of authority in management, education and in family life (Galanter 2005).

Van Klink and Witteveen contrast their account of legislation, which emphasizes the *positive* symbolic effects, with accounts which attribute the effectiveness of law to a calculative orientation on sanctions (*deterrence*). In this respect they subscribe to a distinction widely adhered to, in which the symbolic effects are supposed to cover a broad category of effects which are not dependent on coercive active enforcement by legal authorities. However, the symbolic effects distinguished by Van Klink and Witteveen, are a specific category of these symbolic effects: they address particularly those effects which are based on a persuasion-based compliance to the behavioral norms embedded in the law.³ They are especially interested in these symbolic effects, given their low expectations of the contribution of traditional democratic legal procedure to a voluntary compliance with the law.

¹ Other labels are used for related approaches such as 'responsive regulation' (Ayres and Braithwaite 1995), 'communicative legislation' or 'communicative approach' (Van Klink 1998, Chap. 2 in this volume) 'interactive legislative approach' (Van der Burg and Brom 2000; Poort 2013 and Chap. 5 in this volume; Van der Burg 2014 and Chap. 3 in this volume).

² The terms 'persuasion-based compliance' refer to a voluntary compliance which in Habermas' theoretical framework relies on communicative action: a mutual understanding that can be tested and evaluated in terms of good reasons (Habermas 1997, Ch. 1).

³ This explains why my definition of 'symbolic' is broader than for instance Van Klink's definition. He considers a law to be symbolic (in the positive sense) 'if a law has acquired an extraordinary meaning within the legal and political community (...). The law is not merely a set of rules, but it is also a symbol for something higher, more valuable, for example human dignity equality or environmental protection' (See this volume). My definition of symbolic does not only refer to the relevance of more fundamental values, but also to other symbolic qualities such as the fact that the law may be seen as an indication of how the majority uses to behave in specific circumstances, or that the law may be seen as the outcome of a democratic procedure which gives the legislated norm a special authority.

How could one not sympathize with an approach to legislation that does not rely on imposing norms top-down and are enforced with sanctions but which relies on persuasion? This idealistic normative approach to legislation shares several insights with the empirical findings of sociologists of law. It builds for instance on the sociological observation that top-down regulation can hardly alter behavior, as long as the imposed behavioral norms are not supported by informal norms embedded in semi-autonomous social fields (Moore 1973). However, in this text I seek to indicate that from a sociological angle there is more to say on the positive symbolic effects.

In sociological empirical accounts of compliance it is an open question what motives and incentives induce people to obey the law. Max Weber, for instance, distinguished custom, tradition, instrumental rational motives, (procedural) legitimacy and value-rational conviction (Weber 1922/1980). Van Klink and Witteveen focus only on a few of the various motives and incentives, merely addressing persuasion and deterrence-based compliance.

I will particularly address the signal-effects, which is a special category of positive symbolic effects which are not acknowledged by the communicative theorists. Compliance with the law has a multifaceted character and cannot simply be explained in terms of persuasion or deterrence. Moreover seeing, as they do, persuasion and coercion as irreconcilable factors, blinds us to the fact that coercion in particular conditions may assist in creating a persuasion-based compliance.

Analyses of compliance may also gain from sociologists' attention to the significance of informal enforcement activities. The willingness of citizens to obey the law is not only dependent on the coercive power of the state but also on the enforcement-activities of citizens (*second order-enforcement*) (Scott 2000). When other citizens enforce a norm, this could cause a shift in the opportunity structure, implying that citizens reconsider their options in response to the negative reactions they anticipate from other citizens. On the other hand, these enforcement activities could also induce them to change their own preferences and motives. The fact that both underpinnings of compliance may have a combined impact implies that we cannot categorically identify compliance as being based either purely on calculation or purely on persuasion.

In this text I will first pay some more attention to Van Klink's and Witteveen's communicative account of law. Next, I will fall back on Habermas to maintain that in current complex societies the coercive power of the state and the formal procedural legitimacy of the law have to be seen as building blocks of communicatively structured compliance. Law-following behavior can hardly be exclusively based on persuasion. In the last part I will address some more concrete illustrations of effects of legislation which cannot be exclusively attributed to deterrence or to persuasion but which build on the combined effects of a calculative orientation and internalization. The first category of these effects concerns the signal-effects, effects which rely on precise and clear norms and are not dependent on an actively motivated adherence to the legislated norms. A lukewarm acceptance is sufficient. Second, I will address the significance of second-order enforcement for the willingness of the addressees to obey the law. Finally, I will indicate that especially in circumstances in which the law contributes to overcoming problems of collective action, its effect

will rely on the simultaneous impact of deterrent effects and persuasion-based effects. It is another illustration of the fact that the coercive power of the state and the formal procedural legitimacy of law may function as assistants to foster a persuasion-based acceptance of the law.

4.2 Communicative Legislation: The Superior Status of Legislator's Arguments

What is new in the communicative approach of legislation, as formulated by Witteveen and Van Klink, is not so much the discovery of symbolic effects as the articulation of how particular symbolic effects of law may be used as a remedy for problems of legislation in contemporary society. These communicative theorists attribute these problems to the deficiencies of a classical instrumentalist model of legislation.⁴ When it concerns objects of regulation prevailing in current societies, which are characterized by complexity, dependency on expert knowledge and conflicting ideological commitments, the instrumentalist device to rely on clear and distinct legal directives, backed up by sanctions, is inadequate (Witteveen and Van Klink 1999). According to the communicative theorists, effective regulation of those domains requires the active engagement of citizens in the process of legislation. The legislator has to restrict itself to the creation of a legal framework which embodies general clauses. The interpretation and specification of these clauses has to be left to the cooperative activities of the legislator, addressees of law and to legal and other experts. In this cooperative endeavor, dialogue and persuasion play a central role (Witteveen and Van Klink 1999).

The prominent place of dialogue and persuasion in the communicative account of legislation reflects an increasing democratization and spreading of education and the more urgent task of integrating diverging life styles and opinions. Moreover in complex and technologically advanced societies the legislator often simply lacks the expertise to create detailed legislation. It has to fall back on the knowledge of experts.

The question can be raised whether the capacities of the legislator in this bottom-up approach of legislation are not reduced to the articulation of norms which are already prevailing in semi-autonomous social fields? Do legislated norms have a distinct quality which differentiates them from informal norms? Is the legislator able to alter informal norms?

The representatives of the communicative approach do not seem to have many doubts about the transformative-potentials of the legislator. According to them "symbolic law offers a vocabulary that affects the way in which legal and political actors perceive reality". It offers "a source of arguments". Moreover "these arguments or *topoi* can be used as trumps" (Chap. 2 in this volume). However, it is not

⁴For a more elaborate exploration of instrumentalist and communicative legislation, see Chap. 3 in this volume.

easy to conceive what they regard as the basis of this persuasive weight of legislator's arguments. What constitutes their 'trump status'? Why are they authorized to do more than just advise (Cotterrell 2005)?

A possible explanation might be found in the *constitutional* function which Van Klink and Witteveen ascribe to communicative law. A communicative law constitutes an interpretive community, that is a group of legal and political actors and citizens who are participating in the interpretation and application of the law. The legislator has to restrict itself to the introduction of general clauses.⁵ These clauses express certain principal values and aims to which the addressees of law are already committed or to which they will become gradually committed, while they are engaged in the interpretative process. Two qualities which can be derived from this constitutional function can be distinguished: first, the participation of experts and stakeholders will improve the quality of the law. Second, participation of addressees in the process of legislation will have a positive effect on their obedience. It commits them to the legislator's cause.

It seems quite plausible that the legislator's arguments will be more convincing when these may rely on the input of engaged citizens, experts and stakeholders. However, the extra weight of these arguments cannot be exclusively explained in terms of this responsive quality. Only the fact that the legislator is able to constitute interpretative communities and win the engagement of citizens and stakeholders implies that the legislator is imputed a special authority.⁶ This has to be attributed to the formal rules constituting its authority and the coercive power it can fall back on to enforce the legislated norms. It is impossible to deny the relevance of factors that the communicative theorists have disqualified as belonging to a top-down perspective.

4.3 Coercion and Positivity as Building-Blocks of Dialogue (Habermas)

As stated, Van Klink and Witteveen tend to contrast their legislative ideal with top-down instrumental legislation.⁷ This may explain why they emphasize that the effectiveness of communicative legislation relies on debate and persuasion and not on procedural legitimacy and enforcement backed up by sanctions.

Especially in a sociological empirical account the multi-faceted bases of compliance have to be acknowledged. In this respect a one-dimensional focus on persuasion-based acceptance ignores the multitude of motivations and incentives

⁵The legislation on embryo research, Van der Burg refers to (Chap. 3 in this volume), is a good illustration of experts and stakeholders being engaged with the process of norm development.

⁶In later publications Van Klink acknowledges that the coercive dimension of legislation cannot be ignored, see e.g. Van Klink (2005).

⁷They have also described the differences in terms of 'soft law' versus 'hard law', see Witteveen and Van Klink (1999) and Witteveen (2005).

underpinning the obedience to law that prevail in social reality, and underestimates the significance of the formal procedural qualities of law and the coercive power of the state. Both factors are appreciated in Habermas' account of law, which nevertheless, as Van Klinks and Witteveens account, articulates the communicative dimension. He considers the formal procedural qualities of law and the coercive power of the state to be necessary building blocks of a persuasion-based obedience. The communicative dimension of law is optimally realized when there exists an appropriate balance between communicative legitimacy, positivity and coercive power (Habermas 1997).

Habermas sees law as a product of modern complex societies, and as a necessary device to realize a norm and value-based coordination of behavior and social integration.

According to him, the integration of societies is dependent on communicative intersubjective orientations. He distinguishes communicative action, as a necessary basis of social integration, from strategic action. In strategic action, actors do not strive for mutual understanding but try to realize individual aims. Communicative action is more demanding because it is successful merely insofar as cooperation is based on a consensus between the actors regarding the reasonableness of their aims (Habermas 1997).

Although social integration can to some extent be based on strategic forms of action (e.g. success on the market, efficiency), societies are stable over the long run only if the social order is perceived as legitimate and in accordance with what is true, right and good. It requires the grounding in consensual norms, which assumes actors to be orientated towards reaching understanding (Habermas 1997).

In modern societies this grounding in communicative action is a special accomplishment. In pre-modern societies the social order was based on shared norms and values being taken for granted. But current societies cannot fall back on the integrating force of perceived norms because these are too differentiated and pluralistic. Understandings which used to be shared and taken for granted are doubted and contested. With modernization, social interaction comes to depend more on communicatively actively accomplished consensus as opposed to consensus prescribed in advance by tradition. Only those norms that can meet with the approval of those potentially affected are considered to be valid. Integration has to rely on the active exchange of arguments through communicative action that relies on the compelling force of the better argument. Habermas sees it as the task of social institutions and the law to facilitate these rational discourses (Habermas 1997).

Modern societies need more advanced modes of normative orientation to cope with complex interdependencies. This complexity is mainly the consequence of the differentiation of domains that are based on systemic rationales such as the economic and political-administrative domain. While in pre-modern societies conduct is predominantly normative and symbolically structured, modern complex societies have domains that are governed by non-linguistic media such as money (economic domain) and power (state/administration). These media disentangle economic and administrative activities from religion, family-relations and traditional bonds and values (Habermas 1997).

Money and power enable the coordination of complex systemic interdependencies. What counts in the 'systems' is effectiveness and success. Coordination is not based on shared understandings or agreement but it takes place behind the actor's back (e.g. the rationality of the market) (Habermas 1997). It is the prevalence of these complex system that facilitates the productivity and wealth in our societies.

As mentioned earlier, according to Habermas, a robust coordination and integration cannot rely on the systemic rationale of the market and political administration but requires communicative underpinning. The institutionalization of communicative processes is urgent since the systemic rationalities embedded in the market and bureaucracies have a tendency to crowd out these consensual forms of integration ('colonization of the life world') (Habermas 1987, 1997). All norms become vulnerable to being assimilated into the strategic rationality of social subsystems of finance and administrative power.

To counter the erosion of communicative action, this process of a growing systemic complexity requires a post-conventional mode of normative integration. A mode of social integration which relies on discursive processes in which only the best argument counts. In Habermas's perspective this amounts to the proper place for instrumental and strategic orientations and the right balance between these orientations and communicative orientations.

In pre-modern societies actors were able to derive their mutual expectations of behavior from a framework of perceived norms. Once a discursive orientation on norms becomes predominant this steady framework is no longer available. Law is able to integrate complex societies because it has some mechanisms that make the integration less dependent of actual consensus. It grants citizens a private domain where they are allowed to follow their own preferences and motivations (*private autonomy*) (Habermas 1997). And in contrast to morality, law leaves the motives for compliance open while demanding law-following behavior. It does not require citizens to comply with the law for the right reasons. It may rely on voluntary rational adherence but it may also rely on identification with others, the fear of punishment or the negative reactions of fellow citizens (Habermas 1997). This does not mean that it should not be an endeavor of the legislator to win the assent of the addressees of law. But it is a functional sociological observation that thanks to the formal procedural qualities of law (rules imposed by recognized authority) and its coercive character, law is able to deal with the contingency of norms in complex societies. Law is the medium which in modern societies helps to ease the burden of social integration that falls on moral discourse and communication. Norms and values incorporated in a legal framework can be doubted and discussed because the law entails a mechanism to define which norms should be followed (positivity) until further notice and which norms can be enforced (Habermas 1997).

Habermas observes that in complex societies, such as ours, features of the legislation-process also imply that you cannot expect all legislation to rely on the voluntary assent of all citizens. This would be too ambitious given the range of relevant arguments and expert-knowledge which plays a role in processes of legislation and the pluralism prevailing in current societies. The bulk of political decision-making includes, for instance, pragmatic issues in which empirical knowledge is

relevant. Moreover, the principle of certainty reduces the options for the selections of norms. Further, time pressure sets limits on open discussion in which only the better argument counts. Within the actual process of legislation, compromises, bargaining and the majority rule play an important role. Therefore Habermas reformulates the idea that normative decisions have to be able to win the assent of all citizens, when it applies to matters of legislation. Legislated rules only have to be indirectly legitimized by the universal assent of those affected, which means that the assent merely has to apply to the democratic character of the procedure (Habermas 1997).

A law is legitimate when, besides protecting private autonomy, it can win the assent of members of the legal community because it is the product of a formal decision-making body which is based on deliberation and discourse. Apparently this concept of democratic legitimation brings Habermas very close to accepting the prevailing institutions as sufficient guarantees of his discursive rationale and seeing the formal procedural qualities of law as a sufficient guarantee of the communicative underpinning of law. However, if this should be an appropriate description of his position, it would seriously diverge with the ambitions of Van Klink's and Witteveen's project of communicative legislation.

Although it has to be admitted that there is a lot of institutional realism in Habermas' perspective, a formal democratic procedure does not suffice to accomplish his discursive ideals. The discursive underpinning is only realized when citizens are able to regard themselves as the authors of law (*public autonomy*) (Habermas 1997). Democratic procedure is only one requirement. The other is that there has to exist a fruitful interplay between the deliberation and decision-making in governmental institutions and informal discussions among ordinary citizens. He sees it as the role of citizens and mass media to create well-considered public opinions. It is the role of legislative bodies to be receptive to the information, arguments and suggestions which are developed in the discursively structured public domain. These considerations bring him close to the ambitions of the communicative theorists.

To summarize, what Habermas shares with the defenders of communicative legislation is the appreciation of the discursive underpinning of legislation. But where in the design of communicative legislation the significance of procedural legitimacy and coercion is downplayed (as if legislation is just a matter of a horizontal dialogue between legislators and addressees) Habermas regards these factors as building blocks for a persuasion-based compliance. In a complex and pluralistic society social integration and coordination of behavior are not only dependent on the persuasion-based adherence with legislated norms but also on these factual dimensions of law; a dimension which is based on formal legal qualities, coercive power and which allows a calculative orientation of actors. This factual dimension releases the integration of the necessity of an actually prevailing consensus and facilitates debate and argumentation.

4.4 Alternative Bases of Compliance

The compliance with the law is mediated through various social phenomena which cannot be identified in terms of the persuasion versus coercion contrast. Seen through a sociological lens, in particular the impact of citizens' mutual expectations of law-following behavior has to be taken into account. Illustrative are the signal-effects. These effects rely especially on the information the law gives the addressees of other citizen's preferences and how they will react when the rule is violated. A refined sociological account has to acknowledge that coercion is not only the outcome of state-imposed punishment but also of the negative reactions of fellow citizens (*second-order enforcement*) (McAdams 1997; Scott 2000; Griffiths 2003). The contribution of law to solving problems of collective action offers a good illustration of this.

4.4.1 Signal-Effects

There is a symbolic dimension of legal rules which is not explored by the advocates of communicative legislation. It concerns the *signal-effects*, effects which require clear and precise legal rules. These effects are extensively discussed in the dissertation by the Norwegian sociologist of law, Vilhelm Aubert (1954). This exploration has never received the attention his study of regulation of the position of Norwegian housemaids has received, which is regarded as the illustration of *negative* communicative legislation. Negative, because the law just creates the illusion of social reform, in fact lacking the enforcement apparatus to have any social impact (Aubert 1961). This negative concept has long been the standard interpretation of symbolic legislation.

Instead, the assumption underpinning Van Klink's and Witteveen's concept of communicative legislation is that symbolic effects may contribute to law's effectiveness. The same applies to the signal-effects which can be addressed in the footsteps of Aubert. However, contrary to the effects of communicative legislation, signal-effects do not rely on actively motivated conviction but on a lukewarm passive compliance with the law. This compliance is based on the law's significance for addressees' mutual expectations of behavior. People do not merely see the law as a set of prescriptive norms but also as a description of the rules the majority adheres to (Aubert 1954). These rules give people an indication of the expectations they may anticipate in various situations, in which informal norms are diffuse. People often adapt their behavior to these laws without much passion or conviction but just because it makes life easier.

It is not difficult to understand that signal-effects are relevant in situations in which the content of the norms is not morally precarious or not contested. Whether you have to drive on the right side or the left right of the road is for instance morally irrelevant. A legal prescription informs car drivers what they may expect from each

other and this signal-effect in combination with the drive of actors not to risk life and limb, may be seen as the major source of compliance.

This does not imply that signal-effects merely prevail when it concerns morally neutral regulations. For instance doctors may see legal rules prohibiting euthanasia as a reflection of standard practices within the medical profession. This may explain why in many countries with laws prohibiting euthanasia, the legal authorities are reluctant to actively enforce these rules. Bringing doctors to trial would reveal that euthanasia is a common practice. That might undermine the repressive policy, since doctors practicing euthanasia on severely suffering terminal patients, may count on the sympathy of many citizens. They may be seen as heroes instead of as criminals. For legal authorities which are reluctant to allow euthanasia it may be wise policy to ignore the violations of the prohibitive rules.⁸ To summarize, a slack enforcement may contribute to law's effectiveness when this contributes to the illusion that prohibited behavior is not practiced (Aubert 1954).

McAdams explains the signal-effect as the consequence of the significance of informal (non-legal) sanctions for the effectiveness of law (McAdams 1997). People's compliance with the law is often more dependent on rule enforcing reactions of fellow citizens and colleagues than on formal enforcement activities. People are likely to act in accordance with their perceptions of what other people expect and appreciate. This impact of others' opinions is especially relevant when it concerns the willingness of people to enforce norms. Since the costs of these informal reactions are not very high the inclination to react is related to what there is to win or lose in esteem. People will be reluctant to react when they anticipate that others will not adhere to the norm that informal reactions are required in the prevailing situation (McAdams 1997; Scott 2000).

A legislated norm may empower those who adhere to the content of the law to use informal sanctions against those violating the law. This applies especially for those with weak preferences for the norm. They are less likely than those with intense preferences to address those violating a norm when they are not certain about the support they may receive from others (scared to be seen as busy-bodies or dummies). They will be more willing to sanction violators of the norm, the more they assume that others are also willing to sanction (Scott 2000). An increase in the number of potential norm-enforcers reduces the expected costs of conflict of any single enforcer and enforcement-activities may then even contribute to one's reputation. A legislated norm teaches the community about the majority's opinion on the prevailing norms and the rights or duties to enforce these norms (Scott 2000). It also reduces the inclination of those violating the norm to react aggressively to an attempt to shame them.

The success of the anti-smoke legislation in the USA can be seen as an illustration of the signal-effects. The prohibitive law was considered to be very effective, while lacking an active enforcement policy. The explanation being that the law changed the perception of what the majority's sensitivities were towards smoking.

⁸Following this line of thought I explained the in Norway prevailing enforcement-policy, see Schwitters (2005).

Before the introduction of the law there were already many citizens who opposed smoking. But as long as they were uncertain about the opinions of others they were reluctant to complain directly to smokers in public places. The ordinance that was introduced, which imposed clear rules about where smoking is permitted, gave them an indication of the norm upheld by the majority and stimulated them to enforce the rule against violators (McAdams 1997; Kagan and Skolnick 1993).

The signal-effects may be seen as a distinct category of symbolic effects. These do not have to rely on the motivated acceptance of the content of the law and these effects do not directly depend on the sanctioning power of the state. However, the fact that legislated rules are seen as indications of majority's beliefs and practices presupposes that legislated rules are given extra authority. This distinctive authority cannot be explained without acknowledging the (indirect) effect of coercive power and the formal procedural basis of law.

4.4.2 Law as an Assistant to Change Behavioral Norms

In analyses that emphasize the relevance of informal reactions on violations of norms, the effectiveness of law may be seen as the outcome of a shift in the opportunity structure. Those considering disobeying the law will respect the law because they fear the negative reactions of others. Coercive power is not merely embodied in state sanctions but also in informal sanctions. This implies that Holmes' 'Bad Man' figures not only in the judicial domain but in the non-legal domain as well.

Behavior that is determined by the opportunity structures might in the long run be governed by the feeling of duty, which reflects an internalization of a norm (McAdams 1997; Scott 2000). There will be a more fluent transition when the opportunity structure relies on informal norms than on norms embedded in the law. Within informal social relations a rich variety of sanctions prevails, including subtle reactions such as frowning your brows, while the repertoire of legal sanctions is quite limited. In addition, informal sanctions can be flexibly adjusted to the context and the features of the norm-violating individual.

Within the domain of non-legal relations there are more supplementary mechanisms which stimulate addressees to adhere to the norms of desirable behavior. Processes of identification for instance, may urge them to internalize norms and values. People are likely to copy the behavior of those they are dependent on or respect. Legislation may be more or less effective to the extent it is adequately intervening in the structures of status and identification. If for instance, repeated violation of the laws is a propensity of marginalized groups in society and more respected people tend to obey the law, the adoption of norms in law may have a positive effect on following these norms.⁹

⁹This rationale makes it understandable that competing groups in society are often eager to have norms they cherish, articulated in legislation, see e.g. Gusfield (1967).

A refined sociological account of compliance has to acknowledge the combined effect of shifts in the opportunity structure and internalization. For instance an ordinance prohibiting littering on the streets may inform individual citizens about the sensitivities of the community. The immediate effect may be a change of their behavior because they anticipate informal sanctions. In the long run the external norm which prohibits littering may be internalized and in that case a new normative framework prevails which influences individual citizens. The relation between effects which have to be attributed to changes in the opportunity structure and internalization, is rather complex. Both underpinnings of compliance are interrelated and overlapping.

Legal economists are inclined to exclusively focus on opportunity structures and ignore the fact that the law may alter and modify preferences. In their perspective effective enforcement is based on cost/benefit calculations. According to this rationale civil liability for instance enhances safety because it confronts actors with the financial costs of violations of standards of care. But when this device, appealing to the calculative orientations of the addressees of law, is adopted in legal practice it may crowd out the informal enforcement mechanisms which may be invoked by imposing a duty to obey legally imposed standards of care. If the reaction to socially undesirable behavior is limited to confronting the violators with the financial costs of their behavior, the sanction becomes a license that permits behavior as long as one is willing to pay for it.¹⁰ A price tag on behavior will create a completely different appreciation of regulated behavior than an imposed duty, which may promote informal enforcement and (as a consequence) internalization.

Internalization is especially likely when law solves problems which have their origin in a conflict between narrow individual preferences and deliberate political choices (well-considered interests). Cass Sunstein observes that people are often kept from following their deeper convictions and commitments because they obey reputational norms that stimulate them to ignore these convictions and commitments. A majority may oppose dog owners not cleaning up after their dogs but refrain from enforcing this norm for fear of the reactions of others (to be seen as a busy body). People's private convictions may diverge greatly from public appearances. Hockey players may for instance prefer not to wear mouth guards as long as it is seen as cowardice but would use this protection if the reactions were not so negative. Following the rationale of Sunstein, the introduction of an ordinance prescribing mouth guards may then be a proper device to overcome the adverse effects of the unreflected reputational norms (Sunstein 1996b). The introduction of a legal rule may in the end foster a persuasion-based adherence to the prescribed norm (Sunstein 1996b; McAdams 1997; Scott 2000).

This rationale that the law may be contributing to overrule unreflected private preferences with deeper concerns can also be recognized in problems of collective action (Sunstein 1996a). While individual preferences may cause *free-rider behavior* among actors, legal intervention may create a situation that corresponds better

¹⁰ Along this lines I have criticized economical accounts of non-pecuniary damages, see Schwitters (2012).

with their real (well-considered) preferences. Free-riding, which in first instance may be reduced by the coercive power of the state to impose a norm, may soon be reduced because actors will voluntarily adhere to the imposed norm. Moreover, legislation may alter mutual expectations and reactions and bring about a decisive shift in informal enforcement activity (Sunstein 1996a; Scott 2000).

Even when the difference between narrow interests and well-considered interests is not as clear as within the framework of the problem of collective action, legislation may be persuasion-based when it reflects well-considered interests. Sunstein refers to legal bans on the sale of sexual and reproductive capacities. Law may fortify norms regarding the permissible use of money (restrict commodification) (Sunstein 1996a). One may also consider practices of sex-selection (enabled by IVF and sperm-sorting). What might be a desirable policy on the basis of the direct interests of parents, might not be wise policy when wider social implications are taken into account. To submit the gender of children to human intervention might lead to a contested gender policy: to provoke the government to correct or influence the decisions of individual parents when their aggregate decisions result in an unbalanced population. A legal ban on sex-selection might be a device to avoid this politization of sex-selection and be more in line with well-considered interests.

It is the essence of political deliberation and democratic processes to substitute narrow short-term preferences for deliberated preferences. People's political judgments are not a product of their narrow self-interest. People may in their role of political actors favor altruistic or other aims which are not reflected in their actual daily behavior. Narrow self-interests or reputational norms may keep them from acting in accordance with these aims. In their political judgments they may opt for legal rules and institutions which alter their immediate preferences. They may seek the assistance of law to create a social order that they appreciate more than the prevailing order. Political judgments may reflect second-order preferences (wishes about wishes) (Hirschman 1984; Sunstein 1996b; Habermas 1997). A legislated rule, which brings behavior more in tune with reflected interests, may produce an important change in behavior and while first being dependent on coercive force, soon relies on communicative underpinning.

4.5 Final Remarks

In this text I have delved deeper into the question: how law matters. More particularly, I have addressed the symbolic effects of law. In the program of communicative legislation the effectiveness of law is explained in terms of the participation of citizens, stakeholders and experts. Their participation should improve the quality of legislated norms and contribute to their acceptance of these norms. This program has developed in response to the deficiencies of traditional, democratic *top down* legislation. It assumes more horizontal relations between the legislator and the citizen. Compliance is seen as based not on commands backed up by sanctions, but on the positive symbolic effects of persuasion.

Taking a sociological stance, I questioned some presumptions of the communicative program. I followed Habermas, who shares the normative ambitions of the communicative theorists, but acknowledges the functional significance of the coercive power of the state and the formal procedural legitimacy of the law, for a persuasion based compliance in complex societies. I also suggested that compliance may be based on symbolic effects other than persuasion. The *signal*-effects are an illustration of this. Finally, I showed that especially in circumstances in which the law contributes to overcoming problems of collective action, its effect will rely on the simultaneous impact of deterrent effects and persuasion-based effects. This is another illustration of the fact that the coercive power of the state and the formal procedural legitimacy of law can help to foster a persuasion-based acceptance of the law.

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