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"Spaces of Normativity"

The Changing Bell Jar

Pauline Westerman

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The Changing Bell Jar

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I. Introduction

In the harbour of Rotterdam, the Dutch government decided to install a special ship to detain illegal immigrants. My parents lived in a flat, overlooking that harbour; the boat was 500 meters from their window. We were often amazed about the silence on that boat. You hardly saw anybody there, although the newspapers had reported that the ship was overcrowded. Sometimes, when I stood on the balcony overlooking the harbour, a habit that I had formed since my childhood, I tried to picture how these people lived there. Did they see me? Could they see the pots of flowers on our balcony? Our balcony was so close, but so utterly beyond their reach. It is at these moments that one can literally feel the strength of a space, different from the physical one, and yet all the more real. When I think of the concept 'normative space', I cannot help thinking of the distance between my mother's pots of geraniums and the boat in that harbour.

That space has always existed. It is what Hernando the Soto called the legal bell jar.[1] Those who are in it have no difficulty legalising their financial transactions, properties and enterprises. Those who are out of it have to wait 14 - 20 years in order to take all the necessary steps to give their property a legal form which enables it to turn into capital, and to expand. The frontiers of this legal space divide those who are entitled to preserve their life, liberty and property from those who are denied that privilege. Rights are only natural and considered self-evident by those living within the bell jar, who have no idea that there are people outside that space. My parents' balcony testifies to the fact that no one can any longer assume such *naïveté*.

In this article I would like to argue that in the European Union the bell jar takes on a different form. Whereas it used to cover the relations between people, it now proceeds to prescribe desirable states of affairs. The legal bell jar expands in the sense that it covers

* Pauline C. Westerman is Professor of Legal Philosophy at the University of Groningen and the Vrije Universiteit Amsterdam, as well as a member of staff at the Academy of Legislation in The Hague.

terrains that had hitherto escaped legal formalisation. But at the same time it shrinks in the sense that it excludes people as subjects to whom one relates. The exclusion of people by establishing non-places such as immigrant ships is not the result of immigrant policies, or of increasing hostility towards Islam. It is the other way round: these fears and policies are the result of the changing bell jar.

In order to sustain that claim I would like to distinguish between two types of normative discourse: a discourse revolving around *relations* -rights, duties and the corresponding institutional arrangements- and a discourse that revolves around *goals* to be pursued. I will argue that what used to be seen as a 'relational' issue -a question of how we define our relations to things and persons- tends to be redefined and reconstructed as an issue that has to do with goals to be reached as more or less 'objective' states of affairs. Finally, I will sketch the way in which the legal systems of the European countries are affected by that redefinition.

II. Distribution *versus* win-win

In his frequent pleas in favour of independent non-majoritarian institutions as a panacea to the indecisiveness and inefficiency of the European Union, Giandomenico Majone draws a distinction between what he calls 'distributive' matters and 'positive sum games'.[2] Distributive issues are issues that have to do with the distribution of burdens and benefits. They are conflict ridden and should therefore be handled by majority rule in order to be solved in a legitimate way. 'Positive sum games', on the other hand, are not dependent on democratic decision-making. They are in the interest of all and should therefore be dealt with efficiently, swiftly and without the paralysis brought about by the bureaucratic inertia of formal democracy and the petty power games of member states.

The distinction also referred to as a distinction between 'value-claiming' and 'value-creating' can only be maintained if we do not want to allow for a discussion on the relative values of the various positive sum games. If we think of a 'clean environment', a 'competitive economy' or 'good education' as values in themselves, they are all worthwhile and noble aims

[1] **H. DE SOTO**, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York, Basic, 2000.

to pursue and no one would like to contest their value. But since life is short and resources are scarce, we have to choose between them. We have to discuss whether we should prioritise a clean environment or a competitive economy. These discussions are blocked from our view by Majone's distinction. He presents the whole issue as a matter of baking the cake and then dividing it. This is a misrepresentation, for all we have is a couple of ingredients in short supply, and we have to decide whether to bake a cake, an apple-pie or muffins. That choice, in Majone's view, should be entrusted to a couple of expert, independent committees and agencies.[3]

The boundaries between distributive matters and win-win situations are permeable. Issues of 'value-creation' are just as liable to discussions about distribution and value-claiming as, for instance, tax policies. Yet, although there are no firm lines to be drawn and although every win-win situation has a darker side which involves losses as well, we should not dismiss Majone's distinction too light-heartedly. The fact that he defines a large part of political discourse as revolving around issues that are in the interest of all is in itself revealing and deserves closer attention. It favours a self-definition of the EU as striving towards a number of valuable and honourable shared goals and purposes, none of which can reasonably be contested. The EU is not alone in this. A large part of present day political discourse has increasingly become goal-oriented. The UN formulates millennium goals, the individual institution formulates mission-statements, whereas an abundant amount of more concrete targets should be reached by private and public institutions alike, including the judiciary. The idea that we should start from goals to be reached, in whatever activity we engage in, from lecturing to researching, from curing patients to exhibiting pieces of art, is just a corollary of Majone's concept of issues that we should pursue simply because it is in the interest of all.

How should we understand this emphasis on win-win situations, on goals that are in the common interest of all to pursue? It is easy to downplay the firmness of the boundaries between 'value claiming' and 'value creating', but the fact that goals talk is dominant nowadays calls for an explanation. Whereas redistributive matters tend to be reconstructed as positive sum games, the reverse can only rarely be witnessed, if at all. Is this a matter of reformulation? Is goals talk only a way of preventing potential conflict from breaking out by

[2] **G. MAJONE**, "Independence v. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe", Florence, European University Institute, *Working Paper*, 1994, No 3.

simply claiming it to be non-existent? Or is there more to it than that and has the distinction a 'deeper' meaning?

III. Partners *versus* pirates

Although the choice between goals is just as liable to strife and conflict as distributive issues, there is certainly a difference between the two. That difference can intuitively be grasped in an example provided by Hugo Grotius. In his chapter on contract, Grotius relates how Dutch shipping companies -large and small ones- had united forces by establishing a naval association, the Admiralty. They did so in order to be better able to defend ships and cargo against pirates during their long voyages, although, Grotius adds, 'less worthy motives' also played a role. The partners, although not being equal in force, strength and wealth had consented to an arrangement in which gains and losses were allocated on the basis of the criterion of risk. According to Grotius, their internal arrangement thus combined inequality with fairness.

It seems as if we have a clear example here of Majone's distinction. Fighting the pirates is a goal shared and supported by all: it is even the *raison d'être* of the entire association. Without pirates there would be no association. Furthermore, the goal is a clear example of value-creation -or, more accurately, prevention of value-loss- so that, indeed, the distributive issues come in only after the cake has been baked. It seems as if the dividing line between value creation and value claiming, between distributive matters and positive sum games, presents itself on a silver tray here; innocent and self-evident.

It seems then that we have good reason to distinguish between what I would like to call *institutional arrangements* -*e.g.*, serving the allocation of resources- and *enterprises* or *goals* like fighting the pirates. Yet, the boundaries between enterprise or goal and institutional arrangement are to a large extent drawn on the basis of a prior decision about who should be the insider and who is to be regarded as an outsider. The pirates are not participating in the negotiations among partners. They merely form an external threat; the enemy to be fought. Institutional arrangements and relations are only established within the bell jar; the partnership of the shipping companies. That is why it is possible to combine inequality with

[3] See also: **P.C. WESTERMAN**, "From Democracy towards Accountability", in **E. KOFMEL**, *Anti-Democratic Thought*, Exeter, Imprint Academic, forthcoming.

fairness. The inequalities that exist within the in-group can be dealt with fairly because these are inequalities *between partners*, deserving equal respect.

IV. 'How' and 'what'

One might be tempted to think that insiders -those within the normative bell jar- are dealt with fairly, whereas outsiders are treated unfairly. This is a mistake. Insiders can be treated both fairly and unfairly; whereas, to outsiders, terms such as fairness and unfairness, reasonableness and unreasonableness, equality and inequality *do not even apply*. (Un-)fairness and (in-)equality are terms that can only be sensibly used in the discourse that is conducted within the in-group because they denote properties of relations. These terms do not apply to pirates, simply because we do not *have* any relations with pirates. And obviously, the same applies to relational terms such as 'duties' and 'obligations'.

This does not mean that once people are excluded they cannot be converted into insiders. Koskenniemi drew attention to the fact that one and the same problem can be construed as belonging to different (legal) regimes: what counts at one moment as anti-terrorist law is, at another, redefined as a human rights issue.[4] This change reflects a *rite de passage* from outsiders to insiders. I only want to stress that as soon as an issue is construed as an external enterprise, it is no longer seen as something with which we have a *relation*. Goals are states of affairs to be reached; an outside world that has to be changed. We are not *dealing* with goals. We only want to *realise* them. Once pirates, terrorists or immigrants are defined as a problem to be solved, a threat to be avoided, these people cease to be persons to whom one relates.

This not only applies to people, but also to activities. It sounds a bit artificial but I think one can say that there is a relation between me and the activity I am now engaged in; writing. Like all relations, it has a rhythm of its own which is partly but not entirely under my control. My writing may develop in an unexpected way, and often the unexpected views generated by writing are more important than the ideas I had in mind when I started writing. The connection between me and my writing is severed as soon as I start with a ready made

[4] **M. KOSKENNIEMI**, "The Fate of Public International Law: Between Technique and Politics", *Modern Law Review*, 2007, pp. 1-30.

end-product in mind. Then, writing turns into routine activity, a series of steps that should be taken in order to arrive at the end-product.

The difference between the two kinds of writing, a relational one and a result-oriented kind of writing is discernible in nearly all activities. We are ready to distinguish between 'genuine' painters and those painters who assemble at the *Place du Tertre* in order to copy Monet's water lilies for tourists. The moral philosopher Scanlon made some very wise remarks on the difference between objective states of affairs to be promoted and things with which we entertain a relation, and mentions music as an example. Beethoven's late quartets played in the elevator of an office building illustrates, he says, that "understanding the value of something often involves not merely knowing that it is valuable or how valuable it is, but also *how* it is to be valued" [my emphasis].[5] Goal talk systematically ignores the importance of the question of what our *attitude* should be towards the valuable goods that are presented to us as such goals.

These are deep insights, maybe a little too deep for our present purpose, but they may alert us to the possibility that to talk of one's activities, relations, and attitudes in terms of preliminary steps to achieve well-defined results leads to a reification of these activities, attitudes and relations. There is no longer room for the question how we would like to relate to these persons/things/activities. Instead, attention should be given to *what* we would like to produce or to bring about, rather than *how* we should deal with it.

The difference between 'how' and 'what' -between relations and goals- should not be exaggerated. As we have seen, a relational discourse can be (and is often) converted into a goal-oriented discourse and vice versa. The two discourses reflect two perspectives and gestalt-switches often occur, by means of which women are converted from lust objects into political voters, or immigrants into a terrorist threat. But the ease with which the two discourses alternate should not mislead us. They are really different ways of seeing and conceptualising the world.

[5] **T.M. SCANLON**, *What We Owe to Each Other*, Cambridge (Mass.), Belknap, 1998, p. 100.

V. The states of affairs that ought-to-be

One might be tempted to think that the moment a relation is conceptualised as a problem to be solved or a goal to be reached, legal discourse stops and a different discipline like criminology, economy or psychology enters the stage. Legal discourse is usually seen as revolving entirely around human relations. Where relations come to an end, there seems to be no room anymore for entitlements, wrongful acts, duties, obligations, rights or liabilities. Those outside the bell jar are denied not only citizenship but also legal personality.

I think that this is changing. To be sure, law still revolves around relations; but it is at the same time expanding. Nowadays it tries to encompass the world of goals as well. Law no longer confines itself to guiding and regulating relations, but tries to regulate the achievement of goals as well.[6] It no longer formalises relations, but tries to formalise what the desired state of affairs should look like.

This may call for further clarification, and I can think of no better example than the trivial but all pervasive detailed rules that reach us either directly from Brussels or through national implementation, and which specify the sizes of the meshes in fishing nets, the appropriate sizes of tiles at municipal playgrounds, or the required temperature in the cool-boxes of groceries. These rules do not specify relations. They specify the state of affairs to be reached. They do not prescribe how people should relate to each other, but what the world should look like. They are *ought-to-be* norms rather than *ought-to-do* norms.[7] For want of better terms I will differentiate between OTB-norms and OTD-norms. My claim is that many OTD-norms are converted into OTB-norms.

There are concrete OTB-norms such as those on meshes and tiles, but there are also more abstract ones. These more abstract norms can be found in the many framework directives that are issued at the European level. Framework directives require member states to further or to promote a certain state of affairs and to issue appropriate legislation in order to reach/further/promote that state of affairs. These goals may be highly abstract like the protection of the Antarctic or reasonably concrete like the specification of a maximum amount

[6] See also: **P. WESTERMAN**, "Governing by Goals: Governance as a Legal Style", *Legisprudence*, 2007, pp. 51-72; **P. WESTERMAN**, "The Emergence of New Types of Norms", in **L.J. WINTGENS**, *Legislation in Context: Essays in Legisprudence*, Ashgate, Aldershot, 2007, pp. 117-133.

of emission allowed. But all OTB-norms, whether abstract or concrete, have in common that they prescribe states of affairs to be reached.

The amount of freedom allowed to devise the means may vary. In the more abstract OTB-norms that figure in framework directives it is often left to the member states to determine how the prescribed goals should be reached. The more concrete ones specify the goals to be reached to such an extent that room for choice is limited, and at the most concrete level, the desirable state of affairs is prescribed in such great detail that there is no room left for deciding between alternative means. But this is all a matter of degree. The abstract prescription to 'further the protection of the environment' allows more room for choice than the prescription to reduce emission of toxics by two percents and this latter prescription leaves more room for choice than the requirement to install adequate filters, but what all these prescriptions have in common, abstract as well as concrete, is that they prescribe a certain *state of affairs* to be reached.

VI. No compliance but performance

One may question to what extent these OTB norms differ from ordinary rules. For, obviously, goals should be *furthered*, results should be *obtained* and the required state of affairs should be *brought about*. In this sense, all OTB-norms are equally OTD-norms. They necessarily refer to acts that should be done or refrained from in order to achieve the goals prescribed.[8]

However, there are certain characteristics that justify a distinction between OTB- and OTD- norms. The first is that OTB-norms emphasise the results that should be obtained rather than the means to be adopted. The verbs used -'further', 'take measures', 'promote', 'bring about'- are unspecific and wholly subservient to the state of affairs that should be promoted and realised. That is why most OTB-norms leave room for a choice of means. Legislatures of the member states are free whether to opt for express legislation, a system of licenses or for private certification as long as they succeed in bringing about the desired situation. As I noted above, more concrete OTB-norms leave less freedom of choice, but here there is also a

[7] **G.H. VON WRIGHT**, *Norm and Action: A Logical Enquiry*, London, Routledge & Kegan, 1963.

discernible tendency to leave the means unspecified by formulating them in a purposive way. Norm addressees are not required to install filters of a specific prescribed type and size but to install filters that effectively reduce the emission of toxics. Even these detailed rules reveal their OTB character; only results count, no matter how they are brought about.

Since OTB norms do not require acts to be carried out but *results* to be obtained, one can only be said to have complied with an OTB-norm if one has successfully realised the prescribed state of affairs. The requirement to take measures in order to further good labour conditions, for instance, should not be read as a requirement to take measures. It is a requirement to do whatever is appropriate and useful in order to bring about a world with good labour conditions. There is no obligation here to *conform* but to *perform*. Even to *perform successfully*. It is not enough that member states make an effort; they should succeed in bringing closer the prescribed goal. On the other hand, if some (advanced) member states have already realised the prescribed world, they are to be considered as having brought about a state of affairs that is in conformity with the goals prescribed, even if that member state cannot be said to have acted in conformity to the norm. Compliance therefore collapses into performance.

This entails a third difference. OTB-norms hold people liable for an (undesired) situation, instead of for non-compliance. If this difference may sound enigmatic, one should think of the difference between the OTD-norm 'do not smoke' and the OTB-norm 'provide for a smoke-free room'. The OTD-norm can only be violated by actually smoking. The OTB-norm, on the other hand, extends liability: the norm addressee is liable for a situation, even where that situation is adversely affected by factors beyond one's control. That means that the OTB-norm is violated if other people smoke heavily or if there is a chimney nearby. That is why the formulation of OTB-norms often entails a development towards risk liability. The question of whom the situation should be brought about by is only relevant in so far as it is necessary to determine who can be held liable in case of non-performance.

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[8] See: **J. HAGE**, "Contrary to Duty Obligations: A Study in Legal Ontology", in **B. VERHEIJ *et al.***, *Legal Knowledge and Information Systems*, Jurix Fourteenth Annual Conference, Amsterdam, IOS Press, 2001, pp. 89-102.

VII. Formalisation of end-states

OTB-norms play a crucial role in formalising goals. They *fix* the states of affairs to be reached, and they attach a norm to that fixed states of affairs by requiring that measures should be taken and, more importantly, that *reports should be delivered* about the steps that were taken. But in order to fulfil this duty to report it is necessary to know the relevant parameters and criteria by means of which one can actually *show* that some progress has been made. Consequently, the institutions themselves, or else the numerous committees and supervisory agencies working in the regulated field are all heavily involved in formulating performance indicators by means of which progress to the desirable goals can be gauged and assessed.

These performance indicators can be regarded as more concrete OTB-norms; often highly detailed prescriptions of the component parts of the desired states of affairs. The 'good and reliable care' that is required of health care institutions is for instance defined as consisting of a patient-oriented atmosphere, high professional standards, and transparent procedures. These three items are then in turn specified to ever finer requirements. In addition, levels and standards are developed in order to determine *to which degree* the procedure should be transparent or *to what extent* the patient should be informed about his illness. These standards are developed by means of benchmarking and may be raised to higher levels of performance the moment other and comparable institutions perform better. The goals are thus in the process of being constantly analysed, formalised, standardised and adjusted to ever higher levels of performance.

OTB-norms enhance the formalisation of goals, turning them into *legal* objects. But by whom are they issued and enforced? It may be tempting to approach this matter in traditional hierarchical terms. In such an account, the EU issues framework directives, which are then fulfilled by national legislatures, and these legislatures in turn issue national equivalents of framework-directives to institutions, and so on all the way down to shop floor level. That is how I initially thought of the process as well. But this is only partly true. (Local) experts are often at the cradle of EU framework directives,[9] whereas many transnational standards are set

[9] See: **S. SMISMANS**, *Law, Legitimacy, and European Governance: Functional Participation and Social Regulation*, Oxford, Oxford University Press, 2004.

by international (professional) institutions without the intervention of formal bodies at all. The hierarchical picture of norm creation and enforcement no longer matches reality.[10]

Neither is it possible to think in terms of 'rule makers' and 'rule followers'. As we have seen, abstract OTB-norms often require those who are addressed by the norm to *make* rules, not just to follow them. Those who issue OTB-norms *outsource* the activity of rulemaking by requiring others to draft rules in order to achieve a certain goal. Moreover, those who receive an OTB-norm usually do not actually proceed to produce the required state of affairs, but mirror the strategy: they just prescribe (a more concrete version of) the state of affairs in an OTB-norm and outsource further rule making to others. The process of outsourcing of legislation and enforcement *does not stop* at a certain point, but is spreading (as it were) by analogy, to all kinds of institutions. All these institutions formulate states of affairs to be reached, either in terms of abstract goals or in terms of concrete targets. At a certain point, of course, there are no others left to whom one can delegate the actual realisation of the prescribed goals. Down at the level of professionals the work should finally be done. But even here, this actual fulfilment of tasks is constantly accompanied by explicit formulations of the required end-products.

VIII. Legislating one's own doings

If this sounds improbable, the reader is advised to think of his own profession. University lecturers are not only urged to deliver a certain output of articles, but are also constantly urged to devise standards and criteria for what counts as output. I spent many hours, together with my colleagues, trying to determine the wisdom of requiring only quantitative or also qualitative output and, since the latter course is embarked upon, many more hours debating whether Journal X is better than Journal Y and on which criteria. Teaching activities are regulated in the same way. It is no longer enough to teach in an inspiring way. One should formulate end-terms. Many additional hours were spent by me and the same colleagues trying to determine whether a certain course merely aimed at 'familiarising' students with a certain topic, or was meant to 'provoke independent thinking'.

[10] **M. ZAMBONI**, "Globalisation and Law-Making: Time to Shift a Legal Theory's Paradigm", *Legisprudence*, 2007, pp. 125-153.

There is much to be said about this phenomenon, but I would like to confine myself here to two observations. The first is that there is no end to this kind of activity. One can go on indefinitely because there are always many more criteria to be developed. Once determined that it should be a journal of 'outstanding quality', the question immediately arises what the terms 'outstanding' and 'quality' are supposed to mean. This is not because there is any defect in the *law*. The burdens of overregulation are not brought about by the fact that legal regulation is always cumbersome and inefficient. The problems are brought about by the *subject-matter* of regulation. It is because here, attempts are made to formalise *goals or desirable states of affairs*. And there is literally *no end* in describing and prescribing desirable states of affairs.

The second observation is that since *all* those who engage in an activity are drawn into the regulation of their own activity, which under a system of OTB-norms involves the description of desirable end-states and end-products, people tend to be cut loose from their own activities and to see them as merely instrumental in getting the required outcomes and end-products. All of us, and not just the managers whom we appointed in order to carry out these tasks, are in the process of becoming the kind of painters I alluded to earlier. Painters who paint for the sake of arriving at a picture that conforms to pre-established descriptions and blueprints, devised beforehand by others or by ourselves. The activities we engage in are no longer valuable as activities or in virtue of the *way* we carry them out, but are only regarded as necessary steps in order to arrive at an objective and approved state of affairs. That means that all activity is converted into production.

IX. Absolute claims

A certain amount of artificiality or, more accurately, of sub-optimality is intrinsic to all forms of legalisation and formalisation. Explicit contracts are needed if tacit understanding is lacking. Legal arrangements are only a (poor) substitute for a flourishing social life. As Hume wrote, if men were angels, they would not need law at all. And were all judges Hercules, they could have done without explicit formalised rules. In the same vein, one could argue that the formalisation of goals is a necessary evil. Just as the contract comes in where tacit understanding has been lost, the explicit goal-prescription is needed in a world where people fail to realise these goals by their own accord.

But I wonder whether this comparison holds true. We should keep in mind that it is not ways of doing that are formalised, but end-states. And the formalisation of end-states seems to generate less advantage than the formalisation of ways of doing. The difference between the two may be clarified by a trivial example. Let us think of someone who would like to improve her physical condition. She knows only too well her weak character and undisciplined disposition, so she imposes on herself the OTD-rule that from now on she will be at the rowing machine every morning for half an hour. Although some mornings -when she is ill, tired, and generally ill disposed- the rule is not doing her any good at all, the rule works out very well *in general*. Not only does the regular exercise improve her physical condition, but she is relieved of the heavy burden of deciding each and every morning whether she will do her exercises or not. She simply no longer needs to think and deliberate. In the words of Joseph Raz,[11] the rule is an exclusionary reason for her not to act on the balance of reasons in favour of, or against, rowing. This exclusionary reason does not exclude all deliberation: if some urgent situation arises, like a sick child, she may decide incidentally to break the rule, but generally the rule does not allow for regular deliberation. These are the well-known advantages of rules.

But these advantages are only attached to the OTD-norms that tell you how to act. Let us now suppose that one morning the rowing woman decides to abandon this OTD-norm and to substitute an OTB-norm. She will then probably enter into some complex calculations concerning the kind of physical person she would like to become and will spend much time determining blood pressure, heartbeats per minute, required waist sizes and required weight. The ideal figure will haunt her from now on. She will see it before her eyes all day. Every minute which is not spent on the rowing machine is a lost minute, since it slows down progress towards the ideal she has in mind. If she has to divide her attention between different goals like good health, children and work, the ideal figure at the back of her mind will tear her into pieces. All three goods, measured and formalised to the highest degree, will fight continuously for her undivided attention. This kind of rule does not guide her actions and does not relieve her from continuous deliberation but instead urges her to deliberate at all times and causes her to chase her goals in a frenzy, alternating between them.

[11] **J. RAZ**, *The Authority of Law: Essays on Law and Morality*, Oxford, Oxford University Press, 1979.

What can she do? One morning she will sit down, and will try to strike a balance. If all three goals should be satisfied to some degree, she will try to devise a way in which all three can reasonably be pursued without sacrificing one to the other. But at the moment she strikes such a balance, she will probably do so by means of an OTD-norm that tells her *how to act* in order to satisfy all three goals to a reasonable degree. The OTB-norms telling her *what* to pursue will then be abandoned.

X. Fragmentation

For an individual person OTD-norms are valuable as time- and energy saving devices that enable one to pursue in a consistent manner a variety of equally valuable goals. At the collective level, OTD norms bring about consistency and predictability in social life and thereby facilitate cooperation and coordination between people's actions.[12] These tasks cannot be performed by OTB norms. They sketch and specify the end-states to be reached, leaving it to the various institutions how to combine the different regulations that are derived from several, often conflicting, more abstract OTB-norms. Hospitals have to pursue 'efficient management', to 'improve labour conditions', and to provide for 'reliable care' while guaranteeing a 'sustainable environment'. All goals are specified to a high degree and demand full and undivided attention. The more these goals are split up and divided, the more committees will be established in order to define them even further. There is no level at which actions can be coordinated. Such rules are the very opposite of time-saving devices.

The loss of coordination is enhanced by the fact that OTB-norms tend to particularise, to specify and to differentiate. This is in stark contrast to the generalising capacity of OTD-norms. The kinds of ideals we have in mind, and the kinds of efforts required in order to get at that ideal state of affairs, differ from person to person, from institution to institution. We cannot expect a part-time university teacher who has been pregnant to deliver the same scientific output as her male, unmarried and fulltime working colleague. We cannot expect a small factory to put the same effort into reducing toxic emission as Shell. This means that although OTB-norms are in themselves basically indifferent as to by whom they should be fulfilled, their *practical application* requires constant differentiation of classes of norm-addressees. If we want to get criteria on what can reasonably be expected from X, we should

[12] **B. ZHAO**, *Principles and the Rule of Law in China*, Dissertation, Groningen, University of Groningen, forthcoming.

compare X with others who share the same relevant characteristics. In fact, OTB-norms invite further refinement of benchmarking categories.

Refinement of benchmarking, in turn, leads to the formulation of an extended set of OTB-norms differentiating desirable states of affairs as well as classes of norm addressees. This problem is intrinsic to OTB-norms. Whereas acts and efforts can be generalised -*e.g.*, no smoking-, desirable states of affairs cannot. If a 'discrimination-free space' has to make sense at all, we should differentiate between such space in municipalities, schools or factories. In each of these institutions the desired state of affairs means something else, and has different ingredients. That means that the principle of equality only surfaces as a principle of differentiation, in the form of the second part of Aristotle's maxim; that unalike cases should be treated unalike.

As I noted above, law is always a necessary evil. It is suboptimal in various ways and for various reasons. Traditionally, these vices were compensated for by some important virtues of rules. Not only are rules time- and energy-saving devices, they also embody fairness to the degree that everyone is subjected to the same rules and no exceptions are made without sufficient reason. Rule-based decision making is more reliable than ad hoc decisions because they do not presuppose a wise decision maker.[13] By subjecting human behaviour to rules, arbitrariness is limited.

But the entire rationale of a rule of *law* instead of men is undermined in a system in which OTB-rules prevail. In such an OTB-based legal system, arbitrary decisions are not prevented but required. Frequently, rule makers -and keep in mind that under a regime of OTB-norms most of us are rule makers- have to ask themselves at what point and for what reason a different rule should be made for a different norm addressee.

XI. Citizenship as a goal

It is time now to return to the immigrants in the Rotterdam harbour. I asserted right in the beginning that we do not expel immigrants and create non-legal spaces because we adopt

[13] **F. SCHAUER**, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford, Clarendon, 1991.

certain policies towards immigrants or Islam, but that it is the other way round: we adopt these policies because the legal space has acquired a different character and form.

I argued that legal discourse, although still to a large extent revolving around human relations, increasingly tends to regulate the achievement of goals; desirable states of affairs. But I also remarked that the demarcation line between 'relations' and 'states of affairs' is permeable. Something which is initially merely conducive to an external goal, like earning money, can turn into a valuable activity which gives meaning to one's life. And conversely, activities to which one relates in a meaningful sense (teaching) can turn into a production process, mere steps towards a desired end-state like the graduation of a fixed amount of students. This does not only apply to activities, but to people as well. The history of suffrage shows how people tended to become included in the political process and how various classes and races were converted into partners. Nowadays most people seem to cross that border in the opposite direction: the first Turkish girl who entered my primary school in the sixties was an interesting foreigner whom we taught our language. She and her children are now a *problem* to be solved and their integration a *goal* to be reached.

Whether or not to exclude people from the legal bell jar is not only a political choice. The choice *between* goals like expulsion or integration may be political. But both expulsion and integration are goals to be reached, states of affairs which dictate the policies to be pursued. And the more the internal frontiers between national states in the European Union break down, the more need there is to put immigrants outside the bell jar, where they are turned into objects of policy rather than subjects with whom one relates.

One may object to this that integration is a different kind of goal, since it aims at turning these people into partners, who are within the legal bell jar. Integration is a temporary goal, not an end-state; the end-state being full inclusion in the legal bell jar. But we should be careful here. The aim to turn people into citizens all too clearly reveals the assumption that citizenship should be *deserved* by these people. The obligation to follow a course that qualifies one for citizenship is in this sense just as disheartening as downright expulsion. In order to be fully included in the legal bell jar, legal personality should be considered self-evident, not something one may deserve by following a course. Citizenship is not something that should be taught but presupposed.

The tendency to view issues as problems to be solved in order to arrive at certain desirable states of affairs seems to spread by analogy. I am not sure about its beginnings, but we may suppose that in the kind of welfare-states that were established in the seventies, several 'problems' -*e.g.*, environment, unemployment- were identified and goals were formulated, which then proved to be fruitful starting points for joint enterprises and sustained international collaboration. At that time, not everything was yet considered as an external problem to be solved. The Moluccans who hijacked Dutch trains in the seventies were not considered terrorists at all, but citizens who had been cheated into collaboration by the Colonial administration. They were considered partners rather than pirates. But gradually, the habit of identifying threats and opportunities, of engaging in problem solving and goal achievement, then spreads to new areas as well.

Goal talk has become so dominant that it is now applied to fellow citizens as well. In the Netherlands many reports are issued concerning the political education of one's own citizens. We read in those reports that democracy should be 'learned' and democratic attitudes and virtues instilled.[14] The same citizen should be taught the values and merits of a democratic constitutional state.[15] This is the ultimate form of goal thinking. For, of course, the constitutional and democratic state is nothing more or less than the embodiment and institutionalised form in which citizens *relate* to each other. To see that arrangement as a topic of education and to view one's fellow citizens as students of that topic, dramatically reveals how dominant goal talk has become. It is no longer self-evident that citizens live under the rule of law; they can only 'deserve' that treatment by proving to be a good student.

XII. Border posts of the bell jar

If we want to realise fully what it means if citizenship is considered a goal, a state of affairs rather than the arrangement of human relations, it is instructive to think once more of Grotius' example of the naval association that had formed itself in order to defend itself against the pirates. We might imagine two kinds of discussion to take place in the 17th century version of the association that Grotius had in mind. The first probably revolved around the proper distribution of gains and losses. The criterion of risk that had been adopted

[14] **Raad voor Maatschappelijke Ontwikkeling**, *Vormen van democratie: Een advies over democratische gezindheid*, Amsterdam, SWP, 2007.

was one amongst many. Other criteria like labour and swiftness of the fleet could have been chosen as well. So a discussion concerning the proper criteria for distribution is conceivable. The second kind of discussion refers to the enterprise for which they had come together. We can imagine that the shipping companies, after having dealt with the pirates in a successful way, discussed the possibility of focussing more on the slave trade. Discussions concerning the choice between various potential enterprises are therefore conceivable as well.

But how would they have fared under a regime of OTB-norms? Much, if not most, discussion would probably have revolved around the best and most efficient way to beat the pirates. The pirate-less state of affairs for which they had joined forces would have been the guiding ideal that tends to concretise itself in more modest aims, such as a reduction of 10 percent of pirates for the coming year. They would have felt the need to call upon experts telling them how this target could be reached. That would have resulted in the formulation of many complex rules, concerning the proper rigging of the ships, the equipment that should be on board, the amount of men to be employed, the kind of steers and sails to be used, and so on. Sooner or later, the complexity of the rules and the trouble to meet the requirements would have resulted in a discussion as to whether it is advisable to lower standards for smaller and poorer shipping companies. If experts had advised against such a policy, saying that this type of rigging and guns was *absolutely* necessary to effectively reduce piracy, the elaborate set of concrete and detailed OTB-norms would have led to the exclusion of the small companies who could no longer meet the requirements without going bankrupt. Some of them would from then on have been expelled from the partnership and would probably have become pirates themselves in order to earn a living. Others would merge and form bigger companies that could live up to the required standards.

One thing is certain: discussions about the proper (technical) standards would have prevailed, including within the individual shipping companies. This is not only because meeting these standards effectively reduces piracy, but because by meeting these standards *one deserves to be included* in the legal bell jar as an insider. The OTB-norms not only prescribe a desirable state of affairs, but also draw firm lines between insiders and outsiders. Seemingly innocent, technical and neutral, they are the frontiers of the legal bell jar. Only

[15] See: **Commissie Uitdragen kernwaarden van de rechtsstaat**, *Onverschilligheid is geen optie: De rechtsstaat maken we samen*, The Hague, Justice Ministry, 2008; on fundamental principles of the rule of law.

when these border posts are passed can discussions about proper shares or even about the proper goals to be pursued come within reach.

XIII. Conclusion: Goals as guides

The emphasis on goals to be reached leads to the formulation of rules which prescribe the attainment of an objectified and reified state of affairs. This relatively new kind of rule should not be seen as just an extra. The discourse revolving around goals is not only *added* to the discourse in which human relations and activities are central. The way people relate to each other is permeated by considerations concerning the degree to which these desirable states of affairs are realised. I think that it is not exaggerated to say that the goal-oriented discourse is *parasitic* on the relation-oriented one.

This is already visible at the individual level. We are all like the judge who avoids notoriously 'hard cases' because they prevent him from reaching his target of verdicts to be reached,[16] and the scientist who refrains from investigating an uncertain path for fear of losing subsidies. It is also apparent at the collective level, where the proliferation of specific OTB-rules undermines the generality of law and where people and institutions struggle to conform to standards for fear of losing recognition and a position as an insider.

The expansion of law into the realm of problems to be solved and goals to be reached should not only be seen as an extension of law. The increase of the legal bell jar in terms of goals is accompanied by a decrease of the same bell jar where it deals with persons and activities to which one relates. Where differentiation is called for in the pursuit of goals, there is less scope for a rule of general and non-arbitrary law. Where compliance is rated as less important than performance, or where results are deemed more important than acts, something valuable is lost as well.

Does this mean that we should abstain from all goal-thinking? Of course not. If we pause for just one moment to think of Grotius' Admiralty, it is immediately clear that shared, or at least common, goals and enterprises are vital to any form of society. The shipping companies would not even have dreamt of coming together without the danger of piracy. To

[16] **Commissie evaluatie modernisering rechterlijke organisatie**, *Rechtspraak is kwaliteit*, The Hague, Justice Ministry, 2006; on the reorganisation of the judiciary.

think of society as merely a set of relations, governed by distributive arrangements, as Rawls did to a certain extent,[17] is in all probability fallacious.

But we should conceive of goals in a different way. We should not think of them as states of affairs to be promoted and to be reached but as something that we should keep at the back of our mind in forming and establishing relations. The society we strive after should not be seen as a state of affairs to be reached at the final bus-stop of our journey, but as something which may inspire that journey and may turn the journey itself into a worthwhile experience. We should not be misled to think of goals as the entire *raison d'être* of living together. The relation should be the reverse. No one phrased the proper relation between means and ends more accurately than John Dewey who remarked that "men do not shoot because targets exist, but they set up targets in order that throwing and shooting may be more effective and significant".[18]

[17] **J. RAWLS**, *A Theory of Justice*, Cambridge (Mass.), Harvard University Press, 1971.
[18] **J. DEWEY**, "The Nature of Aims", in **J.A. BOYDSTON**, *The Middle Works of John Dewey*, 1899-1924, Vol. 14, Carbondale and Edwardsville, Southern Illinois University Press, 1983, pp. 154-163, at p. 156; originally published in 1922.