

Second Draft

Towards a pragmatic compliance and enforcement regime for the environment using a rights-based approach

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“The state is the actuality of concrete freedom. But concrete freedom requires that personal individuality and its particular interests should reach their full development and gain recognition of their right for itself (within the family and civil society) and also they should, on the one hand, pass over of their own accord into the interest in the universal (collective), and on the other, knowingly and willingly acknowledge this universal interest even as their own substantial spirit, and actively pursue it as their ultimate end.” (Hegel, Constitutional Law)

Introduction

There is no intention of delving into the technicalities of compliance and enforcement issues, but rather to revisit some of the philosophical underpinnings that govern such a system. The approach being taken in this paper is to review compliance and enforcement issues within the backdrop of a desired governance system.

Such a system will be informed by how we address following questions: Why we do need a framework of compliance² and enforcement³? Why do we need to regulate? What are the responsibilities of public institutions, and those who use resources, produce and consume goods? What type of cultural framework is needed to sustain our choice of compliance and enforcement measures?

All of these it would seem revolve around the political and social institutions we would like to create and the location of individual citizens (and here I include organized formations of civil society as well) within this system, how they would like to live and what they hold as the basis for ethical life.

Compliance and enforcement measures enshrine not only a certain ethos, but should be seen as a tool or a means to *conditioning society in adopting certain modes of ethical conduct*. It should in the end always be a corrective measure where all else seems to fail. A measure that is only possible through the vehicle of a functioning and strong State. Compliance and enforcement measures are not an end in themselves, but merely tools to structure relations and build a suitable working milieu for these relations to evolve.

¹ I want to thank Peter Lukey for his valuable insights and opportunity to discuss my paper with him. Peter Lukey is Acting DDG for Environmental Management at the DEAT.

² Generally, in the literature described as ‘a state in which enforcement requirements are met and maintained. The solutions can vary from voluntary, regulatory, economic or liability schemes’.

³ In the general literature it is referred too as “ the use of legal tools to assist in and compel compliance with environmental requirements, and in some context to establish liability or responsibility for harm to the public or environment from polluting activities”.

I would like to suggest that a rights-based approach should underpin a compliance and enforcement system. By a rights-based approach we understand this to mean the ‘...describing of situations not in terms of human needs, or areas of development, but in terms of the obligation to respond to rights of individuals. This empowers people to demand justice as a right, not as a charity’.⁴

The Constitutional framework of South Africa espouses a rights based approach.⁵ A rights based approach is increasingly a favoured approach to dealing with developmental issues as it relies on human rights standards to guide action.⁶ A Human Rights⁷ framework provides a basis for establishing a public moral discourse that is rights focused rather than interest focused. The Human Rights framework guides and under-girds such a discourse.⁸

The World Commission on Dam’s (WCD) Report motivates for a rights and risk based approach to guide future dam building. The report notes:

“...the Commission proposes that an approach based on ‘recognition of rights’ and assessment of risks’ (particularly rights at risk) be developed as a tool for guiding future planning and decision making. This also provides a more effective framework for integrating the economic, social and environmental dimensions for options assessment and the planning and project cycles”. (WCD, 2000 p.206)

The WCD recognised that conventional approaches did not take into account the various rights and their accompanying interest could be in conflict with each other. A rights based approach allows for different rights to be assigned to the appropriate stakeholders as well as establishing their legitimate entitlements.

But, perhaps more profoundly a rights-based approach relies on developing a culture of negotiation in order to settle differing rights. Therefore by implication such a system will only work if there is investment in institutions that support the functioning of a rights-based system and culture. As Michael Ignatief in his seminal work on human rights notes:

⁴ Mary Robinson, 1999.

⁵ The three key features of a rights-based approach are:

- All rights are equal and universal.
- All people are the subject of their own right.
- The State has an obligation to work towards ensuring that all rights are met.

⁶ The three cornerstone documents that seek to promote a human rights political order are the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1954) and the International Covenant on Civil and Economic Rights (1966).

⁷ The early origins of a human rights doctrine can be traced to the Philosopher John Locke. Further impetus to Locke’s work was given by the 18th century German Philosopher Emmanuel Kant. Kant basically argued that moral principles are derived from autonomous rational individuals. These individuals can derive universal principles if they exercise what he termed a ‘categorical imperative’. Kant suggested that this can be derived when a rational agent acts ‘...on that maxim through which you can at the same time will that it should become a universal law’. Kant argued that only human reason can derive moral principles and that with reason universal categories of moral precepts that enshrine the notion of equality can be generated for an entire community to adhere too. Human Rights do though differ from natural rights in a number of respects: there is more of a focus on equality, than individual interest, there is more of a focus on family and community, and they are more internationalist in nature than natural rights.

⁸ The Internet Encyclopaedia of Philosophy notes: “Human rights rest upon moral universalism and the belief in the existence of a truly universal moral community comprising all human beings. Moral universalism posits the existence of rationally identifiable trans-cultural and trans-historical moral truths”. (<http://www.utm.edu/research/iep>)

“Indeed, rights conflicts and their adjudication involves intensely difficult trade-offs and compromises. This is precisely why rights are not sacred, nor are those who hold them. To be a right’s bearer is not to hold some sacred inviolability but to commit oneself to live in a community where rights conflicts are adjudicated through persuasion, rather than violence. With the idea of rights goes a commitment to respect reasoned commitments of others and to submit disputes to adjudication. The fundamental moral commitment entailed by rights is to not to disrespect, and certainly not to worship. It is deliberation. The minimum condition for deliberation with another human being is not necessarily respect, merely negative toleration, but a willingness to remain in the same room, listening to claims one doesn’t like to hear for the purpose of finding compromises that will keep conflicting claims from ending in irreparable harm for either side. This is what a shared commitment to human rights entails”. (p.84)

Holders of rights, require that their rights are enforceable a function that is viewed to be the responsibility of the State. However, in as much as there are rights, these privileges do not come without certain duties and obligations that the holders of rights must fulfil for such an entitlement. Or if the holder of such a right does not fulfil a duty, a third person may hold it against him/her for not fulfilling his/her duty, provided there is a law granting him/her such a recourse.⁹

If the system cultivates congenial conflict-which is predetermined- how then are we best to arbitrate over these conflicts? The mediation over the conflicts of rights is best achieved by recourse to practical reason. A framework of decision making that is more suited for secular government, not-withstanding, that perceptions of what is moral and right can be informed by science, religion, atheism, any form of discourse that seeks to give meaning to human experience, beliefs and ways of acting. Practical reason as a tool for deriving moral reasoning by its nature must personify prudence and pragmatism when mediating.

It is worthwhile to note that practical reasoning is neither a perfect system. All new ideas and notions of what is right and wrong can be changed if they are proven to be onerous, unjust, and not leading to the desired outcome. A decision at one time may have been shown to be correct, and at another time incorrect, such a decision should be changed, not arbitrarily, but within reason and sufficient consensus.

Rights, as endowments, in the end should lead to individuals being in a position to achieve self-realization which is embodied in the idea of *‘freedom’*; one of the cornerstone ideas in the tradition of philosophical liberalism. As John Rawls¹⁰ notes, when he provides commentary on Hegel’s view of freedom, he writes:

“...freedom is understood as a system of political and social institutions that guarantee and make possible citizen’s basic freedoms”. (Rawls, 2000)

Rawl continues to explore this trajectory of thought by showing how the notion of freedom in Hegel’s thesis is tied to Hegel’s particular conception of the role of the State, as the vision of the State is tied to the vision Hegel has of the idea of freedom. Rawl notes:

⁹ In the last 60 years or so, there has been distinct shift from the premise that a right is only a right through law, to one where rights can be claimed through the appeal to a universal convention like the Human Rights Charter. In the end a human rights culture is aimed at supporting the respect for others, the showing of empathy, and the protection of dignity. All things that make it possible for humans to function as a community.

¹⁰ John Rawl is a liberal philosopher and is well known for his magnum opus “The Theory of Justice”.

“It means that in one’s capacity of being citizen, as opposed to a Burger, one understands that society is held together not simply by the satisfaction of particular interests but by a sense of reasonable order, and that is regulated by, let’s say, a common good conception of justice, which recognizes the merits of the claims of all sectors of society. What raises human life above the workaday burgerliche world is the recognition of the universal interest of all citizens in participating in and maintaining the whole system of political and social institutions of the modern state that makes freedom possible. Citizens knowingly and willingly acknowledge this universal (collective) interest as their own, and they give it the highest priority. They are ready to act for it as their ultimate end. This is the goal of the project of re-concialition”. (Rawls, 2000)

In Hegel’s work, and the supplementary interpretation offered by Rawls, suggest that the primary role of the State is to build the social infrastructure necessary for self-realization. In other-words creating within various agencies of the state the capability to deal with difference. In modern heterogeneous societies the art of ruling well is not derived from absolute power, but the ability to deal with difference and conflict. The creation of this architecture of practical reason is in itself the public good that nourishes democratic order and offers within it a dynamic but respectful exchange between holders of different competing rights and views.

In the end the sanctity, the freedom of every citizen, and the strength of the State and society are dependent on what Hegel calls, the ability of citizens to serve and act for the ‘universal spirit’ that binds all of us together. Compliance and enforcement regimes should work towards building and reinforcing the achievement of a ‘universal spirit’ in whatever texture and shape we choose it to be.

The risk in the age of globalisation

The project we have before us is to establish a system of enlightened regulation and enforcement the aim of which is to balance differences of power between unequal actors in society. The reasons for this must be found in the divisions, fractures and inequity that continue to exist in society. Therefore, compliance systems must consciously ask: what is it that needs to be corrected and balanced?

Ulrick Beck¹¹ calls our society ‘*the world risk society*’. His work contains the most developed analysis of the notion of risk for industrial and post-industrial society. Beck firstly points out that the phenomena of risk is multiple, diverse, and increasingly uncertain and within a limited range of predictability as technology develops faster than societies ability to cope with the changes that technology brings about.

Secondly, -and perhaps Beck’s most important idea-is the notion that risk is perceived, and felt by different segments of our society not only on the basis of their views and faith in authority, but also their educational and economic dispositions. Beck builds his theory of risk on the notion of unequal economic classes and citizens.

Beck’s shift or emphasis on how we value and quantify risk is sociological. He does not rely on the classical scientific approach, where risk is merely a statistical estimate and focused on physical aspects of risk.

¹¹ ‘Risk Society’ principally deals with the problems of capitalism acting on a capitalist society (rather than capitalism acting on a pre-industrialist society). Beck calls this process Reflexive Modernisation. In consequence, the problems of present societies are not just concerned with wealth production but also with risk production.

Hitherto, the language of risk is too founded on what is empirical or evidenced based-what can be quantified and made material-but little is it about subjective processes that formulates and formalises our relationship to risk. Beck writes:

“..in an age in which faith in God, class, nation and the government is disappearing, the recognized and acknowledged global nature of danger becomes a fusion of relations in which the apparent and irrevocable constants of the political world suddenly melt and become malleable. At the same time, however, new conflict and political alternatives present themselves, which once again question the unity of the world risk society: How could these dangers be overcome within the limits of historical non-simultaneities of single nations and cultures?” (Beck, 2002)

The effects of risk are often trivialised by the obsessive pursuit of statistics. In fact, statistics can be used as a form of deception. Statistics can falsely distract us away from the individual’s experience of death, injury and harm which are deeply emotive and personal. No amount of statistics can remove the existential crises that is experienced by individuals when they are harmed. A hundred thousand people dead in Bam, Iran, is a hundred thousand dead and too many.

Beck’s theory extends to the nature of citizenship, where the quality of citizenship is reflected in the free citizen’s ability to influence or inform the political process under whose sovereign they fall. The more politically marginal one is from the center of decision-making the more one’s legitimate rights and concerns are likely to be ignored. The vulnerability from harm or offers of protection of groups or members of society in the end is largely dependent on the extent to which they have voice and influence within that society.

The uninformed, the illiterate, the poor and those without means are generally, the most vulnerable because of the lack of voice and hearing. It is if you want, dependent on the degree to which one is regarded as half or full citizen. Being full citizen is not about being told today that one is free, and one can vote freely for the political party of one’s choice, but also being given the means to use one’s freedom in productive pursuit where one’s labour and mind can be applied towards achieving that which is the best for one’s social welfare and happiness.

If, we are truly committed to the idea of universal citizenship, then we must understand not freedom as something abstract. Freedom, as a notion, is only materialised if opportunity is given to achieve self-fulfilment. Beck’s risk society emanates from this fundamental premise: the degree to which the negative exposure to risk limits our freedom, choice, and the right to a fulfilling life. In Beck’s thesis, citizenship and the rights that are associated with it are denied if citizens live in constant fear of harm.

Those who have no voice are further marginalized as result of having no access to information or knowledge of the law. They are not hooked onto the internet they do not attend conferences like this, they do not hobnob with decision makers, they rarely read the newspapers. If they were informed they would certainly be in a disposition to make certain choices about what is good or bad for them, and what sought of things will enhance the quality of their life.

Here, this silent group, needs to be taken into account. A bridge needs to be built for them too. For they too are affected by the choices, words and deeds of others with means and power. In this scheme of things, and that which is natural for society of such diversity as our own, we must be aware, and super-conscious of inherent inequality, class divisions, power divisions, and *the information divide*.

What is this information divide? It is about the practices, measures and consequences of the activities of those actors that have a substantial footprint on the environment, society and the economy.

The footprint can be the result of the activities individuals, firms, corporations, State enterprises, and institutions. The information divide arises from having access to not only information that points out the impact of activities on the environment, but also how decisions are made as to economic choices, forms of rules and interventions that are aimed at rectifying or correcting what are imperfections, and unsatisfactory state of affairs.

Often the State is the only vehicle by which this information divide can be narrowed. As we have noticed that good tax collection is not reliant just on voluntary submission of tax returns but also the Revenue Services having at its disposal an armoury of legislation, recourse to a suit of penalties, but also whole army of surveillance infrastructure, young accountant sleuths, access to bank accounts, and compliance measures applied by both contractors and contractees alike who are involved in commercial transactions. The tax regime if it is to make a success must have information in order to know who it must reward and who it must punish.

In circumstances of unequal power, the information divide can only be bridged by regulation, or empowering citizens to have legal recourse. Information must be forced out of their holders, like we have seen with the anti-tobacco campaigns and those who have fought the drug companies over the exorbitant pricing of anti-retrovirals. The market mechanism and voluntarism failed us in these cases because the holders had a monopoly, as well as used their power to influence the political system which in the end resulted in the non-disclosure of information leading to the loss of life.

You can naturally avail yourself to the challenge we have in creating a system of social contract, standards and rules that work for all. The State, and its various formations, in a democratic order is viewed as bearing the responsibility of managing and intervening in this playing field. The State in the end embodies the will of its citizenry, or at least should strive to uphold the interest of the general public.

The State's task in a globalised world is all the more pertinent. Its role without choice has to extend beyond its own borders if it is to protect its citizens adequately from the uncertainty of globalisation. The State must also act transnationally, it has to tamper with processes beyond its own borders if it is to ensure that its own sovereignty is not encumbered by the will of non-citizens, states or powers within an interconnected global political-economy. Doing nothing is likely to increase vulnerability, threats and harm it faces.

For States to secure, ironically, national interest, they must in certain respects denationalise the origins of risk and the nature of their interventions. They must act globally, especially in areas of the environment where the resource is a global good that is shared unencumbered by many nations and impacted upon unrestrictedly by those who share in this common pool resource. Beck writes:

“The paradoxical principle is valid here: states need to denationalise and transnationalize themselves. This means that they need to sacrifice certain aspects of their autonomy in order to overcome their national problems in a globalized world. The acquisition of a new space of action and leeway, that is the expansion of political sovereignty and control has to be paid with “self-denationalization”.

Increasingly, the State's internationalist role will co-determine its ability to exercise autonomy or bring within the realm of its control the influence of 'transnational citizens'. Here, a plethora of nationals respond transnationally to global concerns, to act, as it were, as global citizens seeking to assert a common transnational course, and aver opinions and policies on a range of issues.

Clearly, we have witnessed the power of such activist on issues such Genetically Modified Organisms (GMOs), the use of indentured child-labour, or the way we produce wine and fruit. This global community of citizens that connect virtually have largely come to have their opinions and worldview bear on our own policies, and the different configurations of citizenry we may adopt as a result of these common challenges. Public voice as were, is not bound by political boundaries, today the voice is global in magnitude.

Political sovereignty does not imply that one is protected from the criticism of others who you do not regard as your fellow citizens. Slowly, if not already, the boundaries of citizenship are being blurred, as political opinion-making refuses to be limited by conventional notions of where one does one's politics.

Public opinion is no longer confined to the neat political boundaries of the national state. In fact, in the environmental field it has always been transnational in nature. The calculus of risk is no longer a national purview, but as we can show with numerous examples the views of others do count-those that we refer to as the 'other'. Those we regard as outsiders when it is convenient to do so. The transnationalisation of human rights issues essentially has brought with it the parallel concept of a global citizenship and system of rights.

Beck's work provides precisely an insight into the globalisation of risk, and that the practices and methods of production that are well suited for one group of people can easily be ill-suited and unjust to those that are not socially ready for these universal ways of producing. Beck suggests that the globalisation of risk makes the new modernity-this reflexive modernity he speaks of- uncertain and chaotic. (Beck, undated) Beck notes:

“Globality means that everyday life is permeated by the perception of global problems. In their daily lives, people can see they are affected by questions that do not only relate to one location, but affect civilization s a whole. We do not yet have the solutions to these questions, but the awareness that we live in an endangered world is present in more and more life situations.” (Beck, 2003)

As there have been failures in the ability of experts to predict risk, or to seem to be taking effectives measures against harm, citizens will grow increasingly impatient. As they feel a greater sense of insecurity, so will the desire grow in proportion to want to have greater control over science, technology and processes of risk assessment. A parallel debate may emerge as we have seen with the military, of greater civilian say and control over science. The perception of risk is magnified when technological progress is accelerated, more expert dependent and viewed to be left to the vagaries of self-regulated commercialisation.

We also live in an era where the expert is not our neighbourhood doctor whom we invite to our home to have supper, or bump into the street to have an occasional chat. Experts are distant figures. People we do not see, neither do we know their identities or names. They will occasionally be seen in periods when crises or calamities hit us. They will be found giving opinion in the media, or sitting on government commissions trying to take stock and give recommendations for the future.

This distance develops a social '*anomie*'-an alienation of ordinary people from the world and the intellectual setting of the expert community. As technology becomes more sophisticated and the audience will have to rely on some rudimentary knowledge of the science, or

translators so as to fill the gap between what is intelligible and not, will define the extent of the *'social anomie'*.

The biggest threat to any effective compliance and enforcement system is fear and mistrust of the entire system itself. The rootedness for all of this is the growing information divide between those who hold information and those who possess little. Such insecurity in the end breeds the fear that certain freedoms stand to be threatened or subject to limitations because of the fear of harm.

The natural reaction is to resist the very system designed to protect the interest of potential losers for nothing is discernable, trustworthy or has credence. Everything seems to be 'polluted' with the interest of the dominant player-the citizen who has more rights under the law than one.

What is then to be done? Some conclusions:

A possible answer is to be found where we first started, and that is, Hegel himself¹². In Hegel's theory of the modern state, the relationship of humans to nature is examined. Hegel unravels the dialectic between nature and humans. The desire to satisfy a need-which is met by nature-can at first lead to a distancing between humans and its object (nature). (Avineri, 1972)

However, as humans are endowed with consciousness, there is an awareness, as Hegel points out, between both being consciously part and separate from nature. A growing distance creates an impulse to be total, to be part of the totality, and hence the desire to narrow the distance between subject (humans) and object (nature). Hegel sees for instance in the possession of property¹³ the dual impulse to take from nature, and give back to it what he has taken. In taking, as Hegel surmises, one is also fully aware that possession must be such that it does not lead to the injury of a third party.

We are then left with this rather profound insight: how to possess without injury, and how to realise one's own self-fulfilment by not obscuring or losing sight of the fact that one's very self-fulfilment is dependent on the integrity of the totality. In Hegel's constellation property is a social attribute, and hence social function. It is if you want, both dependent and accountable to social attribution, as this is the mechanism by which the right to possession is brought into force.

I have already pointed out that the notion of a rights based approach must not be understood as something abstract, but embedded –or sourced from the larger purview, i.e. the totality of things that are necessary for human self-realization and self-fulfilment. A right cannot be fulfilled without the means to do so. The task of the state is to both create and protect the environment in which these goals of self-actualisation are possible.

We can only understand then the role of enforcement and compliance as a relational tool. A relationship that is fostered between those who possess property (in the very generic sense), and hence apply such property to production, their degree of accountability to the protector of property (the state), and those who are beneficiaries (including nature) from the products of property.

¹² Hegel's work while predominantly focused on philosophical speculations of all sorts, placed also considerable weight on political and social issues.

¹³ In Hegel's view property is largely secured by way of recognition of such right to property from others. And, since we are dependent on this recognition, property can only exist because it derives its source from social origins, and not something that is intrinsic to itself.

However, all three: property possessor, state and beneficiary (except for nature) are in their own right conscious citizens who make up the totality and must ensure its optimum functioning. They are all holders of rights. There is a division of rights and labour that empower each to pursue different roles and responsibilities within this totality. As a result the functioning of the totality is largely dependent on the reciprocity between different holders of rights that serve as glue.

Holding of rights by their nature force upon its holders the need to engage reciprocity as a way of negotiating between the different demands that are made between the different holders of rights. In the end the efficient running of the polity and economy is not dependent entirely on its material aspects, but the degree of reciprocity that exists between the different parties that are most likely to come into conflict with each other as result of holding and being empowered by their respective rights. Beck alludes to the need for reciprocity when he ominously charts out what the future holds if nothing is to be done. He writes:

“Let there be no illusion: a capitalism focused only on ownership and profits, which turns its back on the unemployed, on the social welfare state, and on democracy, will undermine itself. So what is now at risk is not ‘merely’ the millions without work. Not ‘merely’ the social welfare state. Political freedom and democracy are at risk! We have to ask: What are the contributions of global economy and transnational corporations to support national or cosmopolitan democracy? We have to make the economy responsible for the future of democracy...by strengthening transnational consumer movements and a global civil society”. (Beck, in Zolo, undated)

In many respects social objectives are designed intuitively—while couched in ethical and legal language—as ways of facilitating reciprocity. We build goodwill amongst ourselves by the degree to which we are seen to do good to others. In doing good one assists the other in his/her self-actualisation and self-fulfilment. But, in doing good too, we expect others to be good and generous to ourselves.

Compliance and enforcement measures instituted by the state should evolve out of an understanding of the relations that are fostered between these three interlocked holders of rights in the instance of what we are discussing. The balance of rights and interest will engender what the nature of the normative rules and measures of compliance and enforcement are.

It is useful to point out at this juncture that in general the international trend within compliance and enforcement systems is to use an integrated approach: a combination of public and private instruments that include education, changing technology, negotiation and compulsion. It is therefore possible to envisage within this integrated approach voluntary measures, co-operative agreements, or simply strict enforcement and compulsion.¹⁴ The context and relations of power between actors will determine which tool is the most appropriate for the circumstance: the degree of command and rule vs voluntarism.

The relevance of all of this to our situation is that given the social and economic context of South Africa a sound and strong command and rule system is the essential pre-requisite by which to evolve an integrated approach. International practice demonstrates that command and rule—where compliance has to be enforced—co-exists with other voluntary and co-operative measures. These measures in the end are only possible once the offending

¹⁴ It is important to note that while there is talk of economic instruments, they can only be seen as complements to conventional command and rule systems of management, but cannot be construed as substitutes to such a system.

industries mature, and there are broad perimeters set within the entire enforcement system that creates a suitable framework by which the interest of different parties are accounted for.

Presently, the framework of what is acceptable norms and practice is evolving. It is far too premature to talk of voluntary agreements, self-certification or even economic/market mechanism when the setting has not been stabilised, and there is still a lack of confidence and trust in the state and industry's ability to meet the desired compliance standards and norms. First, there must be the stick than the carrot. There are countless examples of this rule being applied across our society, and the best example of this is the tax law itself. It is worth us learning from the application of tax and its moral underpinnings the instruments we need to apply in other parts of human behaviour where we have the a mental tussle of the extent and proportion to which we should apply the stick vs the carrot.

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