Law in the twilight of environmental Armageddon

A response to Han Somsen*

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Han Somsen has written the kind of text that gives food for thought. It is rich in new and daring ideas. Since I am by no means an expert in environmental law, nor in applied ethics, in my response I would like to focus on some legal philosophical issues that are provoked by his paper. I will first address the problem of the relationship between effectiveness and legitimacy. Then, I will briefly look into the issue of regulation by code. Finally, I will make some remarks on geo-engineering and its underlying rationality.

Somsen maintains that an ecological catastrophe confronts law and lawyers with two major challenges. The first challenge concerns effectiveness: is there regulation that is fit for the purpose of dealing with the catastrophe? The second challenge regards legitimacy: is this regulation the right thing to do and is it the right way of doing it? The important theoretical issue here is how these two challenges are related. Somsen connects a catastrophe with the setting aside of constitutional values, in the sense that 'environmental regulatory priorities will be shifting towards effectiveness, directly at the expense of legitimacy'.[1]

While Somsen thus seems to suggest that legitimacy is simply sacrificed for the sake of effectiveness, I doubt whether this is actually the way in which the argument goes. It seems to me that here the concept of catastrophe invites the same type of reasoning as the notion of the sovereign decision on the exception. As Schmitt has famously made clear, the exception

> 'is truly a matter of extreme emergency and how it is to be eliminated. (...) He [i.e. the sovereign, LC] decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety'.[2]

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1 Somsen, in this issue, section 2.

2 Carl Schmitt, *Political Theology: Four Chapters On The Concept Of Sovereignty*, trans. and ed. George Schwab (Cambridge: MIT Press, 1985), 7.

The paradox here is that in the sovereign decision the constitution is suspended for the sake of that very constitution. Now, does not the same type of reasoning underpin Somsen's article, in particular his thoughts on the relationship between legitimacy and effectiveness? Indeed, legitimacy and effectiveness are bound to one another in a paradoxical way: it is legitimate to suspend the constitutional values of a legal order for the sake of the ultimate effectiveness of those very values. The emphasis on effectiveness is justified by the exceptionally bad state of the environment and immediately legitimized as necessary in order to uphold the existence of the legal order. Thus, the paradox may be formulated as follows: To secure legitimacy for the future, it is legitimate to make use of exceptional, non-legitimate and extremely effective measures. Somsen explicitly distances himself from what he labels 'cynical constructions' of 'fake-catastrophes' in the key of 'states of emergency' or 'states of exception'.[3] To him, the dangers of international terrorism provide one example of such a cynical construction. Yet, at the same time, his way of reasoning remains similar to these constructions. As a result, while Somsen himself refers to the way in which an environmental catastrophe will lead to an emphasis on effectiveness at the expense of legitimacy, he nevertheless seems to be unaware of the exact structure of his own argument. Given that his reasoning is basically the same as that used for states of emergency or exception, he should at least explain in which regard the case of an environmental catastrophe differs from these 'cynical constructions' if he wants to avoid the reproach of making use of a 'cynical construction' himself.

A second theoretically interesting issue is regulation by code. To explain this point, we should shift our attention to Somsen's use of Jonas' version of the categorical imperative. Famously, Hans Jonas pointed to the inability of old ethical theories to provide guidance in our present 'Technological Age'. Hence, his reformulation of Kant's categorical imperative: 'Act so that the effects of your action are compatible with the permanence of genuine human life.'[4] Somsen is keen to stress that 'human life' implies a life in which rights are respected.[5] With Jonas, Somsen trades law for ethics and uses undeniably powerful technologies as an enforcement mechanism. This move to ethics is needed to 'help clear the legitimacy hurdles that currently limit the options of environmental regulators'.[6] When it comes to environmental catastrophes,

> '[r]egulators that are not hindered by procedural or institutional legitimacy requirements, or in any event are not hindered by them to the same extent, will increasingly turn under such circumstances towards technologies as a regulatory instrument ("techno-regulation" or "code"), instead of or in conjunction with "law", self-regulation, or "market-mechanisms".'[7]

3 Somsen, in this issue, section 1.
4 Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age*, trans. Hans Jonas with David Herr (Chicago and London: The University of Chicago Press, 1984), 11.
5 Somsen, in this issue, section 2.
6 *Ibid*., section 2.
7 *Ibid*., section 3.

Somsen himself points to the risks of this approach:

> 'constitutional values are set aside, or at the very least are substantially eroded to do justice to new ecological realities, in the same way that the 9/11 attacks have paved the way for national security measures that would have been unimaginable prior to that event. Put differently, environmental regulatory priorities will be shifting towards effectiveness, directly at the expense of legitimacy.'[8]

Also here, Somsen's argument is more subtle than he himself seems to think: his appeal to Jonas is not simply a choice for effectiveness and against legitimacy. Ethics is called upon to legitimize the use of technology, because technology is more effective than law in dealing with an environmental catastrophe. In other words, in his attempt to think radically, Somsen abandons law for a discourse based on ethics and technology. While he notices the risks, he still thinks that the dawning catastrophe justifies the use of techno-regulation.

I would like to call attention to one of the claims techno-regulation makes. Call to mind the end of the quote of Lawrence Lessig, as it appears in Somsen's paper:

> 'Code is an efficient means of regulation. But its perfection makes it something different. (...) In the well implemented system, there is no civil disobedience. Law as code is a start to the perfect technology of justice.'[9]

While Somsen admits that we have moved away from the legal domain, with Lessig he seems to claim that justice may still be done. Yet, is code really able to bring us justice? The binary logic in which law works implies that giving up civil disobedience means that there can be no civil obedience either. What remains is behaviour in accordance with code, but since the subjects have not deliberately made the decision to behave in accordance with a law it is impossible to speak of civil obedience. What this ultimately entails, I think, is that we may no longer speak of citizens as legal subjects in the sense of bearers of legal rights and duties. What else is civil obedience than a legal subject's decision to follow the rule? Now, this rule-following presupposes a fundamental sort of agency involved in law. Without this agency there can be no law and no civil obedience.[10] Thus, without this agency there are also no citizens. This has direct consequences for justice. Justice (in the classical sense of 'giving each his due') involves a necessary moment of in- and exclusion to determine who is entitled to get something and who is not, a necessary moment of drawing the boundaries between citizens and non-citizens. Indeed, justice cannot be done without determining who are citi-

8 *Ibid.*, section 2.

9 *Ibid.*, section 3.

10 Cf. Lon L. Fuller, *The Morality of Law: Revised Edition* (New Haven: Yale University Press, 1969), 162: 'To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.'

zens.[11] In other words, without civil disobedience there can be no civil obedience and thus no citizens but then ultimately no justice either. Technology may bring us order, but only the kind of order that encompasses everything and cannot distribute anything. Replacing law by code means giving up justice completely.[12]

One last issue remains to be addressed. In the third part of the paper, geo-engineering is introduced together with the precautionary principle. Geo-engineering is treated as an 'apocalyptic' type of technology. Notwithstanding its high risks (most importantly because of a lack of scientific knowledge regarding the exact consequences), Somsen argues in favour of this type of technology because it also promises huge benefits. In this regard, the value of the precautionary principle

> 'resides in its *enabling* nature: it allows regulators to take preventive action to avoid threats of serious or irreversible damage in cases where they otherwise could not do so.'[13]

The cost-benefit analysis thus seems to point in favour of the use of new technologies. Yet there is still something in the background of this argument that does not entirely convince me.

My first problem concerns the lack of argumentation in this crucial part of Somsen's article. In his thought experiment he stipulates that there is a consensus on the view that we are on the brink of environmental catastrophe, and from this factual assumption he pleads for extremely far-ranging normative measures. His argument seems to be built completely on the precautionary principle. Is this not too shallow a ground? While I can see why Somsen relies on this principle, I am not convinced that it is enough. The enabling character of the principle might say that measures *may* be taken, it remains silent on the question why measures *should* be taken, *which* measures, *when* and *how*. Telling in this regard is the negative formulation of the precautionary principle in the Rio Declaration.[14] While scientific uncertainty may not be used as a reason to postpone action, I do not see why it would unequivocally legitimize the use of geo-engineering technologies. In any case, the *fact* of impending environmental Armageddon does not immediately bring us to the conclusion that

> '[r]egulators will then *rightfully* argue that the fact that uncertainties remain about the potential risks of intervening in the climate is not a reason to delay action.'[15]

11 In this sense, see also: Bert van Roermund, *Law, Narrative and Reality: An Essay in Intercepting Politics* (Dordrecht: Kluwer, 1997), 151 and (more specifically on the theme of legal space) Hans Lindahl, 'Give and Take: Arendt and the Nomos of Political Community,' *Philosophy and Social Criticism* 32 (2006): 881.

12 For a similar argument, see: Mireille Hildebrandt, 'Juridische bescherming "by design"?' *Nederlands Tijdschrift voor Rechtsfilosofie & Rechtstheorie* 39 (2010): 101.

13 Somsen, in this issue, section 4.

14 Quoted by Somsen, in this issue, section 4.

15 Somsen, in this issue, section 4. My italics, LC.

The historical evidence that regulators actually do argue in this way (including the dangerous example of the Hiroshima bomb) does not suffice.

Let me, secondly, take a closer look at some of the consequences Somsen's ideas might have. At the very end of his paper he states:

> 'that such systematic recourse to environmental techno-regulation invites a range of fundamental legal and ethical questions. When such questions arise in the context of an impending catastrophe, as the example of the war on terrorism clearly suggests, fundamental principles that discipline environmental regulators and bestow legitimacy on their actions will prove "fundamental"'only up to a point.'[16]

The problem with these lines is that it remains rather vague what Somsen means by 'fundamental principles'. However, since he links them with the task of disciplining regulators, I assume he is speaking of constitutional values aimed at limiting the power of those who may set binding rules. In that case, this argument puts at risk far more than it may solve. With this kind of reasoning a future may definitely be saved, but *what kind* of future? The price to be paid for the survival of the legal order for future generations seems to be *no legal order* for future generations. A society where fundamental principles are *beforehand* '"fundamental" only up to a point' may certainly not count as a *legal* order. Order might be the first of law's tasks, but it is certainly not the only one. Order under the rule of law entails a society where order is always subordinate to freedom. Now, fundamental principles are exactly what ensures these freedoms.[17] Of course, there may always be a situation in which even fundamental values may be infringed. Yet, as is now the case, every infringement should meet some hard conditions that may be tested in court. Somsen seems to give *carte blanche* to infringements of fundamental values in the name of future generations. Surprisingly, here he even approvingly refers to the war on terrorism which he seems to have discarded earlier as a 'fake-catastrophe' construed by 'cynical regulators'. To me, a future where fundamental values are in constant jeopardy of being sacrificed for the sake of future generations sounds like a future that ought never to become a present.

I come now to my third problem with geo-engineering. This problem precedes the questions taken up by a cost-benefit analysis. It concerns the way of thinking that seems to hide in the very concept of geo-engineering. Indeed, the very notion involves an amount of hubris that invokes the images of Daedalus (also an engineer!) and his poor son Icarus. Mythology aside, geo-engineering seems to regard the Earth as a globe, as an object or artefact that may be adjusted to meet the wishes of mankind. At least, that is how direct human intervention changing the conditions of oceans, atmosphere and stratosphere with the sole purpose of redu-

16 Somsen, in this issue, section 5.

17 I base this argument on the well-known legal philosophy of Gustav Radbruch, see Gustav Radbruch, 'Legal Philosophy,' in *The Legal Philosophies of Lask, Radbruch, and Dabin*, trans. and ed. Kurt Wilk (Cambridge: Harvard University Press, 1950), 43.

cing the effects of climate change strikes me. Is this type of instrumental rationality not exactly the one that has led us to the present apocalyptic state? If we are to take seriously the plea for an ethics for times of environmental Armageddon, it should certainly take leave from the type of anthropocentric and technological rationality that lies at the very root of the problem.

Instead of taking refuge in a 'techno-logos', a mode of thinking still indebted to a Cartesian ontology of dichotomies such as subject and object, mind and body, human and environment, what is needed is what I would like to call an 'eco-logos'. This entails a mode of rationality that puts nature at the centre and takes our incarnated being as rooted in the earth seriously. A phenomenological understanding of the relationship between man and world may form the starting point for developing such a rationality.[18] What is at stake in an environmental catastrophe is not the world as an artefact (a globe) that we might adjust as if we were its masters, but rather the world as a 'lived world'. The world is not simply what opposes us, or what surrounds us (the literal meaning of 'environment'), but as human beings we are 'in the world' in the sense that we are directed towards the world, are part of it, and have a relationship with the world. Eco-logos thus encompasses a kind of thinking that understands our Earth as the place of our dwelling, the horizon that makes all our activity possible. This rationality should be the starting point from which new norms could be established.[19] I admit that my approach is much closer to the status quo than the one advocated by Somsen. However, I would rather be cautious with putting all our hopes on technology. What might save us at the end of the day is a durable change in behaviour that finds its origin not first and foremost in the impossibility of doing the wrong thing but in the acknowledgement that there lies a fundamental non-mastery at the root of our mastery. From this perspective, the interests of the environment may appear as our *own* interests.

18 For more on this theme, especially in the field of legal philosophy, see: Luigi Corrias, *The Passivity of Law* (PhD diss., Tilburg University, 2010), chapters III and IV. A revised edition of this book will be forthcoming at Springer in 2011.

19 I am by no means claiming that such a notion of rationality would immediately and unequivocally point to new legal norms. A lot of legal and philosophical work needs to be done in order to get to the concrete level of norms. This is not the place to elaborate on this, yet I do believe that another way of dealing with the ecological problems ahead of us should start with rethinking rationality.