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Chapter 12

The irony of a symbolic crusade: The debate on opening up civil marriage to same-sex couples

Wibren van der Burg

1 INTRODUCTION

The aim of this book is to confront two approaches to law, the social working approach and the symbolic working or communicative approach. This may suggest that there are two conflicting theories of law. However, as Griffiths rightly remarks,¹ the two approaches are not so much conflicting as focusing on different problems. Moreover, each of the approaches may fruitfully integrate insights from the other approach into its own, as both Griffiths (in this book) and Witteveen and Van Klink (1999) demonstrate.

The most important problem with the juxtaposition of these two approaches, however, is that there is not *one* communicative or symbolic working approach; there is, rather, a family of approaches that have some points in common but differ widely on other points. Many authors have done work on communicative dimensions of law. Valuable contributions have been made – to make an arbitrary choice from the Dutch and Belgian literature – by Antonie Peters (1986), Willem Witteveen

¹ ‘Do laws have symbolic effects?’, in this volume.

(1991; 1999), Willem Witteveen, Paul van Seters and Bert van Roermund (1991), Nick Huls and Helen Stout (1992), Margo Trappenburg (1993), Jan Vorstenbosch and Pieter Ippel (1994), Marc Hertogh (1997; 2002), Frans Brom (1997), Patricia Popelier (1997), Bart van Klink (1998), Hanneke van Schooten (1999), and Nicolle Zeegers (2003). What these authors have in common is an interest in communication processes in the development and the implementation of law. However, they vary widely in other respects. Some have a background in law, but most of them have backgrounds in other disciplines as varied as literature studies, political science, sociology, and ethics. Some of them restrict themselves to purely descriptive analyses, others combine these with a more normative interest. A common feature in about half of the case studies is that they deal with fields of law where the ethical dimension is quite prominent, such as anti-discrimination law, the regulation of the professions, and issues in biomedical law such as animal and embryo experiments, abortion, and euthanasia.

Historically, we can say that these communicative approaches grew out of two different lines of research with initially different research interests. One line of research (mainly developed by legal scholars and political scientists from Leyden and Tilburg universities such as Witteveen, Stout, Trappenburg, and Van Klink) focused on the regulatory crisis and argued that attention for the communicative dimensions of law might result in a better understanding of how law functions in contemporary society. The other line of research (mainly developed by moral and legal philosophers from the Utrecht Center for Bioethics and Health Law such as Ippel, Van der Burg, Vorstenbosch, and Brom) focused on how our society and our political and legal institutions deal with issues in biomedical ethics and how they should deal with them, and found that communicative or interactive approaches were strongly emerging in this field and that these approaches could also be normatively justified. The two lines came partly together when, in the years after 1994, four researchers from Utrecht, Twente, and Leyden started to work at Tilburg University.

My own version of a communicative approach to law (which differs on various points from the versions of Witteveen and Van Klink) has gradually evolved since the time I worked on my doctoral thesis (Van der Burg, 1991). It started with more

restricted and unsystematically connected ideas about the expressive and communicative functions of anti-discrimination law, about democratic processes, and about biomedical ethics and law. Since then, it has gradually widened into what may better be called an interactionist view of law. As these theoretical insights were largely developed in connection with specific case studies such as embryo legislation, same-sex marriage, and professional ethics, and as they were formulated sometimes with a more normative purpose and sometimes with a more descriptive purpose, they have so far not been presented in a very systematic way.² In the first part of this chapter, I will therefore try to bring the various lines together and formulate a general perspective in the form of a number of empirical and normative hypotheses.

The second part contains a case study about the process leading to the opening-up of civil marriage to same-sex couples in 2001. Whereas in most of my case studies so far I focused on a normative analysis and evaluation, this is primarily a descriptive case study of how the debate on the Equal Treatment Act, in the light of the equality norm of Article 1 of the Dutch Constitution, influenced the debate on opening up marriage to same-sex couples. Strictly legally speaking, the two statutes have an equal standing, and thus the Equal Treatment Act does not have direct implications for marriage law. However, the societal and parliamentary debates leading to the Act had strong implications for the debate on opening up civil marriage to same-sex couples. During the debate on the Act, both the general public and the political forum came to regard Article 1 of the Constitution as expressing the most fundamental value of our Constitution. Moreover, the basic rhetorical structure of the debate on the Equal Treatment Act became that of a conflict between the equality norm of Article 1 and various other constitutional rights protecting specific spheres from government intrusion. As this rhetorical structure had become so strong, because of the intense opposition, it was also dominant in the debate on the opening-up of civil marriage, which may be part of the explanation why the process towards opening up civil marriage could not be checked.

2 See, esp., Van der Burg (1996; 1997; 1999; 2001) and Van der Burg and Brom (2000).

2 AN INTERACTIONIST APPROACH TO CHANGE

The recent communicative turn in legal theory has a parallel in various other disciplines such as policy studies and ethics. It can only be understood against the background of particular changes in society. In a full analysis, many of these changes should be discussed, like globalisation, fragmentisation, informatisation, et cetera. I just want to mention three themes that are most relevant here.

The first major change is one of horizontalisation. In the Netherlands and other Western societies, the model of vertical power relations with a top-down command structure is becoming less dominant, in the family, in schools and universities, in organisations, and in society at large. This is also reflected in law, as legal relationships between the state, the legislature, or the police on the one hand and citizens, companies, or organisations on the other have become more horizontal (although they have not become fully horizontal in all instances!). The legitimacy of the state or the law is no longer almost automatically taken for granted but must be earned; as Nonet and Selznick call it, we need 'legitimacy in depth' (Nonet and Selznick, 1978, p. 56).

The second change (which is connected with the first) is that of individualisation, and especially the individualisation of morality. Individuals increasingly tend to determine their moral views of what they ought to do themselves rather than being guided by moral authorities such as the church, the state, their parents, or school (Ester, Halman and De Moor, 1994). Both horizontalisation and individualisation are important factors in what is now generally known as the regulatory crisis.

The third change is an increased dynamics. Society and technology are changing very rapidly. Morality and law have to respond to new problems, to new issues such as biotechnology, but also to changing social views with regard to, for example, euthanasia or abortion. As a consequence, law and ethics also have to change rapidly, but they have serious problems keeping up with the rapid pace of societal and technological change.

It is especially this latter phenomenon which is the focus of my own research interests. How do law and ethics respond to the phenomenon of change? Are there ways to improve the ways in which they respond, to result in better, more adequate

law or ethics? And in what ways do these processes in law and in ethics influence each other, or are they connected?

Thus, the most general research questions in my research can be formulated as follows:

- 1 How can we describe processes of change in law and in ethics in connection with changes in society and modern technology? How are these processes in law and in ethics connected with each other?
- 2 How can we promote more adequate processes of change in law and in ethics in connection with changes in society and modern technology?

Although in a pragmatist view such as my own the descriptive and normative issues cannot be separated, it makes sense to distinguish them as different questions. The analysis of the normative questions certainly builds on the analysis of the descriptive questions, but should also build on normative political philosophy and include normative reflections on issues such as democracy, the rule of law or legal moralism.

Obviously, these questions are extremely broad, and no one should claim to provide a full-fledged theory for them. Nevertheless, in order to provide a clearer focus for future research, it may be helpful to formulate at least a number of hypotheses. Below I will formulate ten hypotheses, both descriptive and normative, that may illustrate the way in which an interactionist perspective might work.³

2.1 *Descriptive claims*

I will start with three descriptive hypotheses which contain the basic tenets of an interactionist approach to law.

Hypothesis 1: In certain fields, especially those with a strong ethical dimension, the development of legal norms is shifting from a vertical model in which the legislator authoritatively sets standards for society to a more interactive process in which

3 My discussion of the hypotheses is meant to be concise here. For further elaborations – and for references to the literature I am indebted to – see esp. Van der Burg (1999; 2001) and Van der Burg and Brom (2000).

various societal actors participate, among which the legislator has an important, though not necessarily central role.

Hypothesis 2: In certain fields, especially those with a strong ethical dimension, the implementation, enforcement, and control of legal norms is shifting from a vertical model in which government bodies are the main enforcing actors to a more interactive process in which various societal actors participate, among which government bodies have an important, though not necessarily central role.

Hypothesis 3: In connection with the changes suggested in hypotheses 1 and 2, the separate processes of norm development and norm implementation are merging into one continuous process of norm development and implementation.

Three remarks should be made. First, the claim is not about law in general, but about *certain fields* of law. It does not mean that the interactive model is emerging equally strong in all fields of law or society. I suspect that the interactive processes are most visible where strong ethical convictions play a role. Examples of these can be found in biomedical ethics, in anti-discrimination law, and in the professions. Case studies in these fields show, at least in the Netherlands, that interactive models are indeed emerging.⁴ Whether these models have become as important in other fields seems a matter of discussion. Authors such as Lon L. Fuller (1969) have argued that it is a dimension of law in general. However, I believe that in fields such as criminal law or traffic law, the interactionist model is at least less dominant than it is in fields with a strong ethical dimension – we need an eye for variation here.

Second, the hypotheses are about processes of legal norm development and legal norm implementation in general. Legislation is an important type of process in which legal norms are developed, though certainly not the only one. The three hypotheses imply that legislative processes themselves have become more interactive and horizontal and that the same holds for the implementation of legislation. They imply, moreover, that the centre of gravity of legal norm development and implementation may have partly shifted from processes in which the legislature and other government bodies play a central role to processes in which they play no role or only a marginal role. So far, most of the research on communicative ap-

proaches of legislation has only focused on the first part, the change in the character of legislative and implementation processes. This is only part of the story, however; therefore, it is important that these insights into legislation are supplemented by studies of how the living law develops (cf. Hertogh 2002).

Third, the hypotheses are gradualist claims. I do not claim that law was, until recently, merely a top-down process and that there was no interactionist dimension to law. I do not claim either that the interactionist model has completely replaced the vertical model or that it will do so in the future. All I claim is that the interactionist model has become stronger and, again, primarily so in specific fields.

2.2 *Normative claims*

Three normative hypotheses can be connected with these three descriptive hypotheses.⁵

Hypothesis 4: In certain fields, especially those with a strong ethical dimension, the development of legal norms should shift from a vertical model in which the legislator authoritatively sets standards for society to a more interactive process in which various societal actors participate, among whom the legislator is important, though not central.

Hypothesis 5: In certain fields, especially those with a strong ethical dimension, the implementation, enforcement, and control of legal norms should shift from a vertical model in which government bodies are the main enforcing actors to a more interactive process in which various societal actors participate, among which government bodies are important, though not central.

Hypothesis 6: In connection with the changes suggested in hypotheses 5 and 6, processes of norm development and norm implementation should merge into one continuous process of norm development and implementation.

The normative and descriptive claims are obviously connected. In the normative perspective, it is not only a fact that the changes mentioned take place, but these

4 Cf. Brom (1997) on biotechnology; Zeegers (2003) on embryo legislation.

5 See Van der Burg and Brom (2000, pp. 61ff). The formulation in this chapter is different in various respects, because the focus of the article was on legislation on ethical issues.

are also regarded as desirable and should therefore be promoted. The reasons why they are desirable can be various. One set of reasons may be connected to effects: it is likely that interactive norm development processes lead to a higher acceptance of the resulting norms and to greater norm conformity. Other reasons may be connected to normative ideals such as democracy or the rule of law, or to political philosophies such as liberalism. For example, it may be argued that, on the one hand, interactive processes lead to a higher participation in the norm-development process by all stakeholders and thus to higher democratic quality, but it may also be argued that the fact that Parliament becomes less central in the process leads to a loss of democratic quality. My hypothesis is that in an overall analysis of such considerations of effectiveness and of straightforward normative reasons interactive processes are valuable at least for certain fields and should therefore be promoted. Although in various publications theoretical arguments for these hypotheses have been presented – and have been demonstrated to be plausible in a number of case studies – we are still far from a general theory stating the specific fields in which and the conditions under which more interactive processes of legal norm development and implementation should be promoted.

2.3 Legislation

Where does this lead us with regard to statutes? In the traditional civil law model, statutes play a central role, being the authoritative sources of law. In the interactionist approach, their role becomes less central, but that does not imply that they become completely superfluous. This is, first of all, not because the above hypotheses only claim validity for certain fields of law, and do so only in a gradual way. The codification of legal norms that have emerged in communicative processes may still be useful, for example, in order to promote legal certainty. The instrumental and protective functions of law are still important and cannot be missed in a well-ordered society.

However, in an interactionist approach two other functions come to the fore; they are the expressive and the communicative functions. These two functions may be called the symbolic functions of law. Although the focus in this chapter is on

these functions, I should certainly not overstate my case; usually they are much less important than the protective, instrumental and regulatory functions. This leads to the following hypotheses:

Hypothesis 7: Law may have an expressive function: it may express what we, as a political community (or a part of it), hold to be essential, what the basic values are that we want to cherish.

Hypothesis 8: Law may have a communicative function: it may create a common normative framework and a vocabulary to structure the normative discussion on certain issues. This framework has both a substantive dimension (the law may present values or ideals, principles, and policies) and a procedural dimension (the law may create and support institutions and procedures that stimulate and organise further discussion processes on how to interpret, elaborate, implement and change this substantive framework).

Hypothesis 9: The importance of these two functions varies.

Hypothesis 10: Both functions have become more important in those fields where interactionist approaches have emerged.

These four hypotheses are primarily descriptive, but they can also be used for normative evaluation. For example, a law with a strong expressive function can be evaluated according to the criterion whether it expresses really common values or merely the values of the majority. Gusfield's famous case study of the Temperance Movement provides a good example of how we can criticise a law (or a constitutional provision) for not expressing common values but only those of a majority (Gusfield, 1976). Similarly, we may criticise laws with a strong communicative function for stating highly controversial values and thus failing to provide a common framework for discussion or for not including relevant sections of society (e.g., women in the case of embryo technology⁶) in the debate.

An analysis of these additional functions of legislation may not only be used for evaluation *ex post*; they can also be used to give guidance to legislators *ex ante*. If we are dealing with a field in which moral and legal norms are still rapidly evolving, it might be unwise to block further development by making a codification of

⁶ Cf. Zeegers (2003).

the norms as they have evolved up to now. In such a situation, it may be preferable to lay down the more fundamental values for which there is broad consensus and promote further discussion and experimentation in the relevant practices about how we should elaborate these basic values in concrete cases. It may then be counterproductive to try to formulate a comprehensive legal doctrine in the statute; we should rather leave the legal texts open for further development.

3 SOME EXPLANATORY NOTES

It may be helpful to clarify some points. As this book is devoted to confronting the communicative and social working approaches, it may help to clarify how my approach relates to the congenial communicative approach of Witteveen and Van Klink and to that of Griffiths.

3.1 Rules

Griffiths rightly remarks that the difference between various authors is sometimes simply that their research interests are different. This is certainly true with regard to Griffiths' approach in comparison with mine. I am interested in how legal theory and practices and ethical theory and practices respond and should respond to the phenomenon of change and how these theories and practices are related. Griffiths is interested in how to explain rule-following. I believe that this focus on rule-following is much too restricted, for a number of reasons, some of which might also be of relevance to the task Griffiths has set for himself.

In recent years, many authors have argued that both law and ethics consist of much more than rules, and that a focus on rules alone would be much too restrictive. It is my experience is that medical professionals often strongly resist the formulation of rules because their thinking is much more to be understood in terms of professional ideals, virtues, and values, on the one hand, and of casuistic re-

sponses to concrete circumstances that vary with every case, on the other.⁷ An adequate understanding of the thinking, talking and self-understanding of doctors therefore cannot restrict itself to rules.⁸ Whether understanding their behaviour in terms of rules is adequate is of course a different matter. However, it seems to me that if one wants to study the social working of law, a focus on rule-following behaviour as the only effect considered relevant might lead to missing important effects. Even if this restriction leads to a better methodological quality of the research in some respects, it may also lead to a certain degree of blindness to relevant dimensions in other respects. Let me illustrate this with the example of anti-discrimination law. Behaviour that demonstrates the discrimination of gays and lesbians may be the result of many different motives, and may be combined with very different attitudes. If one takes a long-range perspective on social change, it may be important to notice that even if a new statute has hardly influenced the actual discrimination of gays and lesbians on the work floor, it may have been a factor in attitude changes with regard to gays and lesbians. For example, we may find that many stereotypes about gays and lesbians have disappeared. In the long run, such a change in attitude may be very important not only to counteract discriminatory behaviour, but also to make a more civil society, in which gays and lesbians feel respected.⁹ The focus on rule-following behaviour in Griffiths' approach may blind us to those dimensions of social reality.

A communicative approach should take a much broader focus than on rules alone. Both with regard to official law and with regard to the connected practice, we need to pay attention to the full range of what law encompasses: not only traditional doctrinal elements such as rules, principles, values, ideals, and concrete decisions in cases, but also involves attitudes, stories, metaphors, conflicting perspec-

7 See Van der Burg, Ippel et al. (1994).

8 This is in line with Griffiths (1999, p. 103), who argues that there is an incongruence in the meaning of legal and medical *concepts*. It goes further than his view, however, in claiming that there is also an incongruence in key *conceptual categories* – while many lawyers (and sociologists) tend to focus on rules as the primary category, many doctors focus on other standards.

9 Witteveen and Van Klink (1999, p. 135) rightly remark that studying the effects of laws with a strong communicative function may require a long-time perspective rather than a short-term view.

tives, procedures, and so on. If we want to study how practices react to change, we should take a similar broad focus as well. This does not mean – to avoid potential misunderstandings – that rules are not important (they still are a central, probably the most central category of law), but that both in order to understand law and in order to improve it, we must take a broader focus.

3.2 The symbolic working of legislation

This approach may be labelled a communicative approach, and it pays attention to the symbolic functions of law. It is strongly indebted to the work of Willem Witteveen and Bart van Klink, although there are some significant differences with their views, especially with the wording in Witteveen and Van Klink (1999). It is not a theory about the 'symbolic working of legislation' as its scope is much broader. Moreover, it seems to me that we should avoid talking about 'symbolic or communicative legislation'. This is, in my view, an unjustified reification of laws with a strong expressive or communicative function as if this function is the only function of the law in question.¹⁰ No law is purely communicative; therefore, it is misleading to speak about 'communicative laws'. Legislation has many functions and only rarely are the expressive and communicative functions the most important ones. Similarly, as we should distinguish between the expressive and communicative functions, we should also avoid the common denominator of 'symbolic function', as this suggests a unity of the two functions that need not exist.

We should also avoid the suggestion that communicative legislation is a full-blown alternative to instrumental legislation. It should be put more modestly: paying attention to the communicative and expressive functions of legislation is important in order to understand fully the role of law in society. And if we are in a process of change and legislation has a part to play in that change, we should

¹⁰ In other publications, Witteveen (e.g. 1999, pp. 66 and 48-9) is very careful to avoid such a reification of constitutional legislation or symbolic laws; he speaks of laws that have a constitutive *function* and of significant and symbolic *elements* in statutes. For a similar cautiousness, see Van Klink (1998, p. 299).

be aware that sometimes a more communicative style might be a more adequate contribution to the process of change than an instrumentalist style.

Most importantly, we should avoid a focus on legislation. In an interactionist approach, legislation is only one moment in the continuous process of change. It may play a role, certainly, but it is not the starting point, nor does it provide the basic frame of reference for understanding the process of change after the law has been passed. Here at least a difference of emphasis with Witteveen and Van Klink (1999) can be discerned. Their focus is on legislation; they talk about it in terms of the 'constitutive moment' and the 'interpretive community' of a statute. For purely analytical purposes, this may be a useful structure. However, the risk is, as with Griffiths' focus on rule-following, that this perspective is far too restrictive to understand long-term processes of change. Witteveen and Van Klink regard the statute as the central category of analysis, and they even state that a statute constitutes an interpretive community, in this way almost 'reifying' both the statute and the interpretive community.¹¹ If one wants to understand how a specific statute has influenced reality, such a focus may be legitimate and, precisely because of its restrictions, lead to valuable partial insights. But for my broader interest of understanding processes of legal and moral change, this restriction would lead to too many blind spots.

Moreover, taking legislation as a starting point for analysis easily leads to regarding the legislature as the central actor in normative analysis. How should the legislature react to particular problems or changes? If the normative question is posed in such a way, it may easily lead to centralist and instrumentalist tendencies that should be avoided. In the normative parts of their article, Van Klink and Witteveen do not manage to avoid this risk, as some of the contributions in this volume rightly remark, for example when they talk about legislative styles as 'means' to direct the behaviour of citizens (Witteveen and Van Klink, 1999, p. 129).

¹¹ For a criticism of this tendency to 'reify' law, to treat law as a social force or an actor in itself, see Cotterrell (1992, p. 64).

In a consistently interactionist approach, the normative perspective of the actor should also be broadened. There are a number of actors who may deal with moral and legal change and can help to solve problems, and the legislator is only one of them. Society should be analysed more in terms of a network of actors interacting with each other than of one central actor interacting with all other actors.

In line with the latter remark, an interactionist perspective is critical towards a top-down model of law, but it does not replace it with a bottom-up perspective. The latter metaphor still implies there is a vertical relationship, whereas an interactionist perspective prefers the metaphor of a network of horizontal relationships.

4 CASE STUDY: THE ROAD TO OPENING UP CIVIL MARRIAGE¹²

In 2001, the Netherlands was the first country to open civil marriage to couples with the same sex. This decision did not come overnight; it was the result of a long process, basically starting with the sexual revolution of the 1960s. The question is how we can explain this quite radical step.¹³

Obviously, there are very many factors that may provide partial explanations. In this case study, I will focus on only one dimension of the underlying social processes, viz. the societal debates, in the light of Article 1 of the Constitution, on the Equal Treatment Act. My thesis is that because of the intense opposition against this Act, the equality principle of Article 1 received a much stronger symbolic value than before. As a result, the ensuing public debate about opening up marriage to same-sex couples was structured in terms of this equality principle. This laid the 'burden of proof' not, as usual, on those who wanted to change the existing law, but on those who opposed equal rights to marriage.

12 This section incorporates part of a lecture I gave (as chair of the national board of the Remonstrant Church, a small liberal Protestant church) at the European Forum for Gay and Lesbian Christian Groups in Heemskerk, the Netherlands, on 3 May 2003. The Remonstrant Church was the first church in Europe, in 1986, to adopt church blessings for non-marital relationships and abolish every distinction between same-sex and different-sex relationships.

13 The Netherlands is no longer the only country where same-sex couples can get married. Belgium followed the Dutch example in 2003.

Of course, this is only one part of the explanation and, even so, I cannot do justice to the full debates in society about homosexuality, marriage, and so on. I will limit myself here to the debates that are connected with the Constitution and the two legislative debates. Nevertheless, it may be helpful to give at least a brief sketch of the general background against which these debates took place.

4.1 The general background

The Netherlands is a very liberal country. It is famous (or notorious) for its liberal policies not only with regard to same-sex marriages, but also with regard to such issues as drugs, prostitution, and euthanasia. I want to highlight three aspects of this liberal character of Dutch society.

First, it has its roots in history. Since the Reformation, the Netherlands has been a country of minorities; the Dutch Reformed Church never comprised more than a large minority or a small majority of the population. Even the strongest groups had to tolerate groups and practices they despised and had to compromise with some of those groups in order to ensure the smooth running of society. This tradition of tolerance and compromise made it possible to accommodate and incorporate the challenges of the youth and sexual revolutions of the 1960s rather than fighting it. The self-identification of the Netherlands as a tolerant country, moreover, makes it possible in debates to appeal to the value of tolerance as a shared value. Especially in the early stages of the emancipation of gays and lesbians, such appeals were rhetorically often quite effective.

Second, since the 1960s, cohabitation has become very popular, both as a stage leading to marriage and as an alternative to marriage. The acceptance of sex outside the marriage even became broader; its moral condemnation nowadays seems limited to a small, orthodox Protestant segment of society, the Roman Catholic bishops, and various immigrant groups, especially those from Muslim countries. Many people belonging to the younger generations are living – or have lived at some point in their lives – with their partners while not being married. This popularity of non-marital sex and non-marital cohabitation has weakened the traditional views

of marriage considerably.¹⁴ These views were not only, like in many other countries, attacked by more radical groups such as feminists and gays and lesbians, but were also effectively weakened by those changing practices among the population at large. Marriage was no longer regarded as a requirement for cohabitation, let alone for sex.

Third, the Netherlands is, when compared with countries such as the United States, a small country with strong internal social ties. It is, therefore, difficult for someone to live a homosexual life in secret – one's family is never far away and may easily find out about it. In combination with the general liberal attitude, this has led to many gays and lesbians coming out of the closet, not only to their friends, but also to their families and colleagues, or to the public at large. As a result, almost everyone knows some gays or lesbians personally. Research in the Remonstrant church has indicated that not knowing gays or lesbians personally was the main factor explaining the negative reaction of some of the respondents to the church blessing of homosexual commitments; it seems likely that a similar thesis holds for opposition against opening up civil marriage.¹⁵ The strong social integration of the Netherlands, combined with a large group of gays and lesbians out of the closet, thus promoted a broad acceptance of homosexuality. Of course, this is a self-reinforcing process: the more people are out, the easier it becomes for others to come out of the closet in their turn and the easier it becomes for public figures to come out of the closet. In the Netherlands, there are relatively few public persons who are not out. As a consequence, the debate about marriage was not one about an abstract issue; it was one about whether gay and lesbian neighbours, relatives, and colleagues should have the right to marry.

Thus, at least three characteristics of Dutch society have played a role in the broad acceptance of same-sex relationships: the liberal tradition in general, the widespread practice of cohabitation and its general acceptance, and the visibility of gays and lesbians, both in the public domain and in the personal sphere. It is only against this background that we may understand the much more limited debate

¹⁴ Maxwell (2000, s. 4.3) also mentions this as part of the explanation why the Netherlands accepted same-sex marriage.

¹⁵ Bundschuh (1992).

on the Constitution and the two legislative proposals. What I will try to do in the following is therefore a partial analysis, which should be part of a much broader analysis. I do not want to suggest that debates on legislation stand on their own; they are embedded in broader societal processes. Nevertheless, it may be helpful to make such a partial case study, because it may help to get a clear insight into at least one factor in the process.

4.2 Article 1 of the Dutch Constitution¹⁶

In the 1970s, in the aftermath of the discussions in the 1960s about our democratic system, the Dutch Constitution was considerably revised. After a lengthy parliamentary procedure, the new Constitution took effect in 1983. The most important change was the introduction of a new chapter on fundamental rights. Until then, the various provisions on rights had been scattered over various chapters of the Constitution. Not only were these provisions brought together in a new chapter, but also a number of new rights were introduced, especially various social rights (dealing with issues such as employment, social security, public health, and the environment). It was decided that the first Article of this chapter should be the article in which the norms of equal treatment and non-discrimination were formulated.¹⁷

The decision to place the equality norm at the beginning of the chapter was not intended to express any special ranking; it was mainly justified on technical-systematic grounds. It was clear that this Article had a different meaning than the other constitutional rights, as it did not express a clear right. Legal commentators' opinions differed about the implications of this. Some (especially those from Christian Democratic and orthodox Protestant backgrounds) held that it meant that, from a legal point of view, it was a very weak, even almost meaningless provision;

¹⁶ This subsection and some of the following subsections are largely based on chapter 8 of Van der Burg (1991); see that chapter for further literature references. See also Van Klink (1998).

¹⁷ Article 1 of the Dutch Constitution reads: 'All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.'

that it had no independent meaning, but should only be read in conjunction with the other constitutional provisions on rights. Other commentators held that it was a 'meta-right' and that it had indeed a different status – a special and stronger one.

The interesting point is that, although the overwhelming majority of the political parties and the legal community agreed that the place of this provision at the beginning of the chapter should not be interpreted as giving it a special meaning, in the public debate it soon received a privileged status, precisely because it was the first article. Appeals to 'Article 1 of our Constitution' were made as if this article expressed the most fundamental norm of our society. Thus, society soon took its own road of interpretation, diverging both from the original intentions of the Constitutional legislature and from the dominant interpretations in the legal community. It was in the context of the debate on the Equal Treatment Act that these appeals to Article 1 as the basic norm of our society became most frequent.

4.3 *The debate on the Equal Treatment Act*

In 1981, the government published a draft bill for an Equal Treatment Act. It prohibited discrimination on the grounds of sex, homosexuality, and marital status. The underlying idea was that this was an implementation of the new Article 1 of the Constitution, which had already been passed by Parliament, though had not yet entered into force.

This draft bill caused a storm of criticism from the religious right, as it implied that a Christian school would not be allowed to fire a teacher for being a lesbian.¹⁸ It seriously threatened the freedom to live according to Christian beliefs and violated major constitutional rights such as the freedom of religion, the freedom of education, and the freedom of association. Moreover, the draft bill for many opponents sym-

18 Whereas the political and legislative debate mostly focused on the discrimination ground of sexual orientation (the issue of sexual discrimination had already been debated in connection with previous statutes), in the case law in the period 1994-1998, this ground was only at stake in 5 per cent of the cases. The ground of sex was at stake in more than half of the cases and the ground of race or nationality (added in the final draft of the bill) in 24 per cent (Havinga, 1999, p. 336). This was quite different in the political arena: in the same period, five out of twelve *kamerfragen* (questions in Parliament) related to the Equal Treatment Act dealt with the issue of sexual orientation (Groenendijk, 1999, p. 558).

bolised for many opponents that the Netherlands was going to lose its Christian character.

The opposition movement can be characterised in Gusfield's terms as a symbolic crusade (Gusfield, 1976). Although the criticism was directed against this draft bill, the underlying concern was that of the dominance of traditional Christian values in Dutch society. In hindsight, it seems like the last stand to fight the secular character of modern Dutch society. Orthodox Protestant and Evangelical groups, until then very fragmented, rallied together against the draft bill. They had some success. Not only did the protests delay the legislation for more than ten years, they also led to a stronger organisation of the Evangelicals and Orthodox Protestants, with their own broadcast company, new schools, newspapers, and a political party.

Yet, this initial success was merely a Pyrrhic victory. In the long run, the opponents did not win because in the ensuing debate it became increasingly clear that it was only a small – if highly vocal – group in Dutch society that opposed homosexuality and the equal treatment of gays and lesbians.

The principled arguments of the opponents mainly went along three lines. The first line of criticism was that by such a statute, the state would impose an ideology of equality.¹⁹ The second line was that the draft bill would violate other constitutional rights.²⁰ A third line of criticism was often brought forward in internal forums of the opponents, but did not play an important role in the political debate. This argument was that homosexuality and unmarried cohabitation were against God's law and that God had given man and woman different roles in society, and that therefore the law should reflect those Christian norms. I am certain that this

19 This criticism was most clearly formulated by the small orthodox Protestant party GPV and more implicitly by the large Christian Democratic party. The draft bill had been introduced by the State Secretary for emancipation affairs, Mrs Kraaijeveld-Wouters, a member of the latter party; the final text was co-defended by a member of that party, the Minister of Justice, Hirsch Ballin. (The new text of Article 1 of the Constitution had also been defended by a Christian Democratic Minister of Justice, De Gaay Fortman.) As the initiative for the Equal Treatment Act was both strongly supported and criticised by members of the Christian Democratic party, this party's position on it was quite uncomfortable and, as a result, its criticism was often unclear.

20 This argument was supported by almost all who opposed the draft bill; in the parliamentary discussion – apart from the parties mentioned in the previous note – it was also put forward by the small parties SGP (orthodox Protestant) and RPF (the latter party combines Evangelical and orthodox Protestant groups).

was the deep and sincere conviction of some of the opponents, but in the pluralist tradition of the Netherlands this type of argument does not hold much water in the public debate. The role of this line of criticism remained mainly restricted to mobilising part of the opposition; in the political debate, it had a strong expressive function, but failed to lead to open communication with the proponents, as most of them preferred to discuss the issue in secular terms. Therefore, I will ignore it in my analysis of the public debate.

The first line of criticism, the suggestion that an anti-discrimination statute would be a form of unjustified legal moralism was politically almost ironical. It was an appeal to the neutrality of the state in moral issues, an ideal which had been invoked by the secular parties in their fight for liberal policies with regard to issues such as soft drugs, abortion, and euthanasia. And this very ideal was now turned against them. Therefore, this could have been a very strong argument if the opponents had been able to make the case that a controversial ideology on equality was behind the law. However, they were not successful in this respect, because Article 1 of the Constitution, to which the proponents appealed, could hardly be regarded as a controversial ideology. It had only recently been debated in Parliament and had been supported by a substantial majority in both the House of Representatives and the Senate.

The suggestion that an anti-discrimination law would impose a controversial equality norm may even have backfired. Until then, both in Parliament and in the legal community, Article 1 of the Constitution had been considered a very weak provision with mainly symbolic meaning. The fact that the underlying ideal of equality was so strongly criticised by a relatively small segment of society, drew greater attention to it. If something becomes controversial, you cannot take it for granted; you must take a stance on it. The debate led to increased awareness among the population at large of the discrimination against homosexuals and of the need to counteract this. The criticism from intolerant Christians also forced liberal, through rather indifferent groups in the churches and in society at large to take a stand. When the choice was between the intolerant religious right and equal rights for homosexuals, most people did not want to ally themselves with the religious right.

As a consequence of the failure to get the first line of criticism accepted, the second line of criticism became the most important line in the public debate. The debate on the Equal Treatment Act soon came to be regarded as a debate about how to decide between conflicting constitutional rights: on the one hand, the equality principle and the non-discrimination norm of Article 1, on the other hand, the freedom of religion (Article 6), the freedom of association (Article 8), and the freedom of education (Article 23). The exemplary case became that of a teacher at a Christian school. Should the school with an appeal to the latter three freedoms have the right to fire her for being a lesbian or should the non-discrimination principle prevail? In the final text of the 1994 Act, the case was largely left undecided because of the introduction of the clause that, even in a denominational school, the 'mere fact' of sexual orientation could never be the ground for firing an employee; it was left open what additional facts precisely would constitute a legitimate ground.

We can leave aside the details of the debate and the legislative outcome.²¹ What is interesting in the context of this chapter is the rhetorical structure of the debate. The dominance of the non-discrimination norm in economic life in general was initially contested, but this was a lost cause. The opponents had to accept that the state, employers, or housing companies in general were no longer allowed to discriminate on the basis of sex, marital status, or sexual orientation. Their main line of defence consequently became that of creating an exception for their own private, denominational institutions, especially churches and schools; these should have the right to exclude employees who cohabited without being married or who were homosexual. Thus, the debate on this criticism again reinforced the dominance of the equality norm. It was this rhetorical structure that dominated the ensuing debate on civil marriage.

21 The Act of 1994 differed in important respects from the draft bill, the most important difference being that it had become a 'broad' statute, in which also discrimination on the grounds of religion, political conviction, race, and nationality is prohibited.

4.4 Opening up civil marriage

The debate on the Equal Treatment Act had firmly established the non-discrimination norm and, more in particular, the norm that non-married couples, whether same-sex or different-sex, should enjoy the same privileges and have the same obligations as married couples. This implied that the state should remove all discriminatory provisions in its statutes. The Equal Treatment Act implied no legal obligation for the state to do so, as the Civil Code (regulating marriage), the Equal Treatment Act and other Acts are all statutes with a similar hierarchical status. One strategy for the state and for the gay and lesbian movements was to try to remove all the legal differences between married couples and non-married couples. This was combined with a second strategy, that of individualisation, the aim of which was to remove all legal differences between those who were living with their partner and those who were living on their own. Especially social security law and tax law underwent a double change: they recognised the position of non-married couples on an equal footing with married couples, and they individualised most regulations with regard to benefits and burdens, aiming to make no difference between persons living their lives in the context of a recognised two-person relationship and those who do not.

One major difference was, of course, the institution of marriage, which had only been open to different-sex couples. There are two relevant dimensions of marriage; one is that it provides many specific privileges, rights and possibilities, and some obligations, for example in family law, inheritance law, and immigration law; the other is that it is an institution with a highly symbolic importance, which is generally valued quite highly. The non-discrimination norm can provide grounds for criticising the exclusion of gay and lesbian couples both from the material advantages and from the symbolic advantage of marriage.

Given the dominance of the non-discrimination norm, it was clear that there was a strong impetus to open up civil marriage. Initially, however, the focus was on the step-by-step removal of differences in treatment with regard to the material advantages and obligations connected to marriage and connected to being part of a couple. But this could not remove the most fundamental difference: that same-sex

couples could not marry. To provide a solution, in 1997 the Dutch legislature imitated the legislation in Scandinavian countries and introduced a second type of legal relationship alongside marriage, registered partnership, which has almost the same legal consequences as marriage (except with regard to children).²² But after this law was enacted, the pressure for opening up marriage itself to same-sex couples became stronger rather than weaker.

The long debate about the Equal Treatment Act had given the equality norm a strong and wide support. Because of the dominance of this norm, the case was easily made, and it was generally accepted that restricting marriage to different-sex couples violated the basic rights of gays and lesbians. The creation of the parallel institution of registered partnership even reinforced this feeling of discrimination; in the debate about opening up marriage, various references were made to the famous criticism by the Supreme Court in *Brown v. Board of Education* (1954) of the 'separate but equal' doctrine.

This meant that the burden of proof came to lie with those who opposed opening up marriage to same-sex couples. The opposition came from various Christian groups, both within Parliament and outside, but they put their arguments mainly in religious terms (like the third line of argument discerned in the debate on the Equal Treatment Act). The opponents thus failed to provide any arguments which could convince people with different or no religious convictions.

How strong the rhetorical climate in favour of equality and non-discrimination had become, I experienced when I published a paper in the widely read *Nederlands Juristenblad* (Van der Burg, 1997). I argued that denying the symbolically valuable title of marriage to same-sex couples violated the principle of equality and I criticised various arguments in favour of traditional marriage. To my surprise, no one responded to this challenge. To me, this meant that the opponents had almost admitted defeat, being unable to break through the dominant view that they denied equal rights to gays and lesbians.

22 Registered partnership still exists as a possibility both for same-sex and for different-sex couples.

My assumption is that the opening-up of marriage was in fact an irreversible process after the debate on the Act. Proponents even explicitly referred to the Equal Treatment Act. In 1996, the first parliamentary motion that urged the government to take steps to open up civil marriage explicitly referred to the basic principle underlying the Act.²³

The debate on the Equal Treatment Act influenced the debate on civil marriage in two ways. First, the debate had strongly reinforced the dominance of the equality norm and the non-discrimination norm, and had made clear that any legislation or practice conflicting with these norms needed strong arguments to be justified.²⁴ The problem for the opponents was that they could not provide such strong arguments. An example is the argument given by the then Minister of Justice, Hirsch Ballin, in 1990, that 'marriage is a social and legal institution that also has international implications'.²⁵ This is a fact, but it does not qualify as an argument against changing that institution if it is considered discriminatory. Other arguments referred to a long tradition or to the Christian roots of the institution, but again these were no convincing arguments in the light of the undeniable fact that the exclusion of same-sex couples was considered discriminatory.

The second way in which the earlier debate influenced the one on marriage was in its rhetorical structure. The central debate on the Equal Treatment Act had the rhetorical structure of a conflict of constitutional rights, in which an *exception* was claimed for organisations with a religious conviction. This structure also influenced the debate on civil marriage. When opponents argued that the new concept of marriage conflicted with their religious views, the easy reply was that no one

23 '...being of the opinion that in line with the General Equal Treatment Act there is no objective justification for the marriage prohibition for same-sex couples; resolves, that the legal marriage prohibition for same-sex couples be lifted ...', (quoted by Maxwell, 2000, n. 36). The motion was passed by a vote of eighty-one to sixty. In later reports and debates, the reference to the Equal Treatment Act and the underlying ideology was frequently repeated, both by proponents and by opponents.

24 There is an interesting parallel here with the Hawaii case and other recent US court cases, where the courts also held that there was a strong argument against excluding gay and lesbian couples from marriage (because this seemed to be based on a suspect classification), and that a heavy burden of proof that it was nevertheless justified lay on the shoulders of the state.

25 Quoted in the *Gay Krant*, 24 March 1990 (my translation).

prohibited churches to stick to their definition of marriage in their church practice. The debate on the Equal Treatment Act had focused on whether or not to make exceptions for religious institutions, and it had resulted in granting them a special status. The same type of compromise seemed available in this case: the churches and other organisations would not be forced to accept same-sex marriage in their internal rules, and everyone would still have the right to enter a traditional marriage with the traditional beliefs associated with it. In this way, the religious arguments against same-sex marriage could easily be laid aside and neutralised.

It is interesting to confront this with the rhetoric of the debate in the US. There, the attempt to phrase the debate as one of equal rights for gays and lesbians has not been successful, even if the legal forum, the state courts, initially recognised it.²⁶ Conservative opponents framed it in terms of special rights for gays and lesbians and as an attack on family values and Christian tradition by radical groups. The liberal movement was not able to restructure the debate in terms of equal rights.

Of course, there are many other factors which explain the difference; the debate on legislation is part of much broader societal processes.²⁷ The most important differences between the US and the Netherlands are the underlying social acceptance of homosexuality and of cohabitation, which is quite broad in the Netherlands, though much less so in the US, and the much more secular character of Dutch society.²⁸ Even so, it seems plausible that the debate on the Equal Treatment Act set the rhetorical parameters for the ensuing debate on opening up civil marriage,

26 For the US debate, see Maxwell (2000).

27 In a comment to an earlier draft of this chapter, Willem Witteveen (a member of the Dutch Senate) suggested that in the Dutch Senate (where members are in general older and more experienced politicians than in the House of Representatives, on which I focused) the rhetorical structure may have been partly different. The members of the Senate may have been influenced by the debate of the 1970s and early 1980s (in connection with the work of the Melai committee) on sexual offences, in which the liberty principle was the guiding principle. As a result, the debate in the Senate on same-sex marriage may also have been structured in terms of the liberty principle. I did not analyse the debate in the Senate, but if his suggestion proves correct, it would still support my general claim that earlier debates may rhetorically structure current debates.

28 For example, in 1990 polls showed that 95 per cent of the Dutch population thought that one should let homosexuals be as free as possible to live the way they choose. In 1996 52 per cent of those polled agreed that same-sex couples should be allowed to marry. Maxwell (2000, n. 230 and s. 4.2).

by reinforcing the equality principle and by structuring the debate in terms of creating exceptions for religious groups.

5 EVALUATION

What can we learn from this case? We should avoid easy generalisations, because this is a very specific case, and the debates have a strong focus on statutory and even constitutional provisions. In the social struggle for equal rights for women, unmarried couples, and gays and lesbians, legislation was and is an important focus, as many forms of discrimination had a statutory basis, especially in the legal institution of marriage. In situations like this, a focus on statutory law is to be expected in social debates. This is also an exceptional case, as both Article 1 of the Constitution and the previously existing exclusiveness of civil marriage were well known, whereas usually one of the problems on which studies of 'symbolic' legislation (e.g., Aubert, 1969) focus is the lack of knowledge about the concrete legal norms that need interpretation and implementation. And a final caveat is that it is, of course, impossible to draw general conclusions from one case. Nevertheless, the case study provides some interesting insights.

1 Article 1 of the Constitution had an expressive function. Both in the debate about the Equal Treatment Act and the debate about same-sex marriage, Article 1 was invoked as expressing the basic normative principle of our Constitution and of our democratic society. An interesting observation is that it thus received a much stronger status and meaning than was envisaged by most of the framers as well as by most members of the legal interpretive community.²⁹ This indicates that the expressive function should not be interpreted as something a legal text has or does

not have, but as something which may develop (as well as diminish) in the interpretation by society or by groups within society.³⁰

2 The first chapter of the Constitution also had a communicative function; in both debates, it provided the *topoi* and the rhetorical framework for dealing with conflicting *topoi*. The constitutional rights were the *topoi*. The rhetorical framework was that the non-discrimination norm should be the basic norm, whereas the other three rights might provide protected spheres which might be exempted from the equality norm. Again, this rhetorical framework should not be taken as something that was already there and could automatically be appealed to. In fact, the rhetorical framework emerged only during the debate on the Equal Treatment Act and was then transferred to the same-sex marriage debate.

3 Debates need not always be harmonious, and legislation need not always be consensual in order to have important effects. In fact, this case shows the opposite: a strong debate and very intense opposition against a proposal led to increased support for the original proposal and for the underlying ideals. The mobilisation of the Evangelical and orthodox Protestant groups led only to a Pyrrhic victory. They managed to delay the legislation, though at the cost of a greater support for the values underlying it, which then made the movement towards the opening-up of civil marriage irreversible. That is the irony of their Symbolic Crusade: in the long run, it contributed to even more radical changes in the law than those they tried to stop in the first place.

4 The debate leading to legislation is as important as the introduction of the Act. The Equal Treatment Act has been criticised for giving little concrete support to the struggle for equal rights and for its restricted effectiveness.³¹ However, I think the most important effect connected with the Act (at least with respect to the discrimination ground of sexual orientation) is not the result of its enactment, but

29 See also Witteveen and Van Klink (1999, p. 132), who, commenting on the interpretation of Article 1 in the debate on the Equal Treatment Act, note that for many political conservatives the sudden symbolic prominence was surprising in the light of the history of the constitutional revision.

30 For a similar insight, although phrased differently, see Van Klink (1998, p. 42).

31 For an overview of such criticisms, see Van Klink (1998).

the result of the lively debate in the years before it was enacted. This debate not only gave a stronger support to the struggle for equal rights for gays and lesbians, but also, in the long run, for the opening-up of civil marriage.

5 Should we, in terms of Witteveen and Van Klink, regard the debate as one in which there is a constitutional moment (the enactment of the revised Constitution) and an interpretive community constituted by that Constitution? At first sight, this case supports their view of symbolic legislation. It is a highly specific case, as legislation was central to the public debate and the Constitution was an important source for *topoi*. Perhaps their model is a useful analytical tool at least for cases like this?

However, it seems to me highly artificial to see the debates on the Equal Treatment Act and on civil marriage merely as debates in the light of the Constitution, let alone as debates where 'the constitutional moment generates a new dynamics' (Witteveen and Van Klink, 1999, p. 132). This is not only reifying the Constitution, but also turning things upside down. There has been an ongoing social debate about the emancipation of women, non-married couples, and gays and lesbians since the 1960s. In this debate, the new Constitution offered useful *topoi* (or rather it reinforced *topoi* already present in the debate), but the debate was certainly not constituted by the Constitution. We could say, however, that it gradually became a constitutionally structured debate.³² Moreover, it was as just much the debate on the Equal Treatment Act that was invoked as Article 1 of the Constitution. The first chapter of the Constitution was an important text in this general debate, but certainly not the only one; the Bible also was an important text and, in the debate about civil marriage, the Equal Treatment Act also was referred to. Moreover, in my experience, this debate was not primarily about texts, but about personal experiences and the feelings of concrete individuals. What does marriage mean to me personally? What is the importance of my relationship? Is my marriage

32 With a variation on the concept of a legally structured debate, introduced by Trappenburg (1993). During the debate on the Equal Treatment Act, it gradually became a constitutionally structured debate. Because this structure was conferred to the subsequent debate on civil marriage, the debate was already constitutionally structured from the start.

becoming less valuable if gays can also get married? How should we interpret the biblical texts about sexuality? Is it in the interest of children to grow up with two lesbian mothers? These were the type of arguments that dominated the debate. It would be naive and one-sided to try to structure the debate in such a way that the Constitution is one of the leading sources, let alone the constitutive source. Such an analytical instrument may easily blind us to important dimensions of the broader social processes underlying the legislative debates.

6 This case study is purely descriptive. In terms of my earlier hypotheses in section 2, we may say that it corroborates or illustrates descriptive hypotheses 1, 3, 7, and 8.³³ With regard to the normative hypotheses (4, 5, and 6), the descriptive analysis obviously does not yield any direct results.

Can we nevertheless draw any normative lessons from it? Here we must be very careful. In one way we can, as my 1997 article, which was part of the debate, illustrates. I explicitly appealed to the expressive function of law to make the critical point that the existing exclusiveness of marriage would be a strong type of discrimination even if it would not imply any material disadvantages for same-sex couples (Van der Burg, 1997). For critical studies, appeals to the expressive and communicative functions of the law may be useful.

However, it is a different thing to base normative recommendations on empirical analyses like these. We should not infer that if a draft bill meets strong opposition, this will always reinforce the underlying ideals; in the US, court decisions making similar statements as the Equal Treatment Act rather seemed to reinforce conservative attitudes towards gays and lesbians. For a full analysis of the way to promote specific social and legal changes, we need a much broader research perspective. A rhetorical structure that contributes to the realisation of fuller justice in one context may be counterproductive in a different context. Moreover, for a full normative evaluation we also need substantive analyses of what would constitute fuller justice.

33 For hypothesis 2, this case study is not relevant, but Van Klink's doctoral thesis (1998) on the Equal Treatment Act provides adequate material to make it plausible with regard to that statute. With regard to hypotheses 9 and 10, one case study is obviously not enough to study variation.

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