Chapter 3
The Emerging Interactionist Paradigm and the Ideals of Democracy and Rule of Law

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3.1 Introduction

The emergence of interactive legislation and its close cousin communicative legislation is not an isolated phenomenon.[1] It fits within a broader gradual shift towards an interactionist paradigm (Van der Burg 2014, 148; see also Witteveen 2007 and Chap. 1 in this volume). In this paradigm, interactional law becomes more important. The interventionist state model of top-down legislation by the state claiming exclusive and ultimate authority, using legislation for instrumental purposes, is becoming less dominant. Instead, law-making becomes a cooperative effort on the part of various stakeholders, of which the state is one, but not necessarily the most important.

This shift is a gradual and partial one. The interactionist paradigm certainly has not replaced the traditional paradigm of top-down instrumental legislation in the interventionist state; the two paradigms co-exist and intertwine. The shift may be more strongly visible in law with regard to ethically controversial fields such as biotechnology than in criminal law. Nevertheless, even in a field dominated by highly instrumentalist use of detailed black-letter law like tax law, we may encounter more horizontal and interactionist phenomena such as horizontal monitoring in the Netherlands and responsive regulation in Australia (Huiskers-Stoop 2012, 13 and 2015; Braithwaite 2003).

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[1] In accordance with Van Klink (2014), I prefer the phrase 'communicative legislation' for the latter type rather than 'symbolic legislation'.

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In this chapter, I will start by presenting the theory of interactive legislation in the context of this broader interactionist paradigm. I will show how different types of newly emerging legal phenomena can be seen as part of it. In addition to interactive legislation, we can mention responsive regulation (Ayres and Braithwaite 1992), communicative legislation (Witteveen and Van Klink 1999), negotiated rule-making (Coglianese 2003), co-regulation (Senden 2005), legally conditioned self-regulation (see Witteveen 2005), and regulatory capitalism (Braithwaite 2008). We can also include the theory of interactional international law as developed by Jutta Brunnée and Stephen Toope (2010). These phenomena all fit within the shift towards an interactionist paradigm, and can easily be fitted within the framework presented here, even if minor and major differences also exist between the various theories in this paradigm.

My purpose in the first part of the chapter is to identify in which respects these types of law differ from traditional instrumentalist legislation. I will compare these two paradigms using an analytic framework of four different dimensions. This comparison will be helpful not only to understand the broader interactionist paradigm but also the variations between the various types of legal phenomena belonging to it. Against this background, I will elaborate upon one specific subtype: namely, interactive legislation.

The second part of the chapter addresses normative concerns. If legislation by a democratically elected parliament is no longer the primary source of law, does this endanger the ideal of democracy? Does the decreased importance of formal legislation not also weaken the rule of law? I will argue that, on the contrary, interactionist law may reinforce both democracy and the rule of law – but only under specific conditions.

An important caveat is that I restrict myself to philosophical analysis in this chapter. Many empirical claims have been made by the proponents of the various positions discussed as well as numerous empirical criticisms.[2] Insofar as I discuss these claims and criticisms, I do so as a legal philosopher, trying to understand what these criticisms can tell us about how to understand and critically reconstruct the substantive contents of the respective positions, rather than inform us about their empirical validity.

One remark about the distinction between symbolic legislation and interactive legislation. Interactive legislation and communicative – or symbolic – legislation are distinct theories, although they belong to the same interactionist paradigm and there is much more overlap than difference between their central tenets. They overlap, for example, in emphasizing the expressive and communicative functions of legislation, the combination of which may be called the symbolic function (see Chap. 1 in this volume).[3] Some other shared tenets are the central role of ideals,

[2] See, for example, various contributions in Zeegers et al. (2005); Stamhuis (2006); Poort (2013); and Huiskers-Stoop (2015). For an overview and a reply, see Van Klink (2014).

[3] However, I believe we should avoid talking about 'symbolic legislation' as a distinct type of legislation. In my view, every statute may have expressive and communicative functions. The extent to which statutes have these functions may vary, but there is a continuum rather than a clear demar-

communication, and horizontal elements in law. Moreover, there has clearly been a strong mutual influence, especially because after 1994 most of the core authors collaborated closely in Tilburg.[4] In my view, the difference is primarily one of perspectives. The theory of communicative legislation has been developed initially as an alternative theory of legislation and, consequently, the primary perspective was that of the legislator authoritatively creating a statute. The focus was on what happened after the enactment. The theory of interactive legislation has been developed in the context of emergent biolaw in fields where the legislator did not yet play a central role; the perspective was that of citizens and self-regulating practices. So the perspective on legal norm development was primarily horizontal; it included both the interactive process leading up to a statute and the process after the enactment – but embedding both processes in a broader process of moral and legal norm development.[5] Most of the differences between the two theories can be associated with these differences in perspectives. For example, the constitutive function defended by Witteveen and Van Klink (1999; see also Chap. 2 in this volume), is rejected by interactive theorists, because in their view the community of discourse is not constituted by the statute, but usually exists already long before the enactment; at most, we could say that this community is modified by the statute. A debate about the precise differences seems rather futile to me as, partly because of those different perspectives, various participants in the debate would draw the lines differently. Therefore, I will simply present the theory of interactive legislation as developed by Frans Brom and myself – however, with certain important modifications in light of Poort's internal criticism of the strong orientation towards consensus in our initial presentations.

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cation here. In fact, both Witteveen and Van Klink have also often carefully avoided such a reification of symbolic functions or symbolic elements. See Van der Burg (2005, 256) for an elaboration of this point and further references.

[4] For a more elaborate discussion of how the two lines of research have developed, see Van der Burg (2005, 245 ff.)

[5] There has been a long debate between the main proponents of communicative legislation, Willem Witteveen and Bart van Klink, and various critics, including myself. Their 1999 article on soft law was translated into Dutch, and presented as the opening article in Van Klink & Witteveen 2000. A number of contributors – including some who are sympathetic to an interactionist approach – then criticised it in that same volume; see the contributions by Marc Hertogh, Hans Lindahl, Bert van den Brink, and myself. A further round of critical discussion may be found in various contributions to Zeegers et al. (2005) and in Stamhuis (2006) and Poort (2013). These critics have argued that, at least in the original article from 1999, communicative legislation is still characterised by strong instrumentalist and top-down tendencies. Moreover, Lonneke Poort and I argue that there are important differences between communicative and interactive legislation precisely on those points of critique, and that the latter is less vulnerable to most of the criticisms. Willem Witteveen has emphatically rejected these criticisms. Bart van Klink has argued that there are only minor differences with interactive legislation (see, for instance, Van Klink 2014). Neither party in the debate has been able to convince the other, so I will leave the debate aside here. See Chap. 1 in this volume for a discussion of some of the main critiques.

3.2 The Emerging Interactionist Paradigm

In the modern interventionist state, legislation – including delegated legislation – has a central role. We may identify a number of characteristics of legislation in the interventionist state, in order to compare them with how law-making in the interactionist paradigm and its various sub-types is perceived. First, legislation is top-down. Legislator and citizens are in a vertical relationship in which the legislator has the authority to command the citizens. Second, legislation is an instrument in the hands of the political powers, to advance certain policy goals. Third, the state is the main initiator of legal change by creating new statutory rules. Fourth and finally, legislation is considered to be the main source of the law: the law changes as a result of the enactment.

In summary, law in the interventionist paradigm has four distinct characteristics:

1. Top-down perspective: Law-making is embedded in a vertical relationship;
2. Instrumentalism: Law is an instrument in the hands of the political authorities;
3. State-centricity: The state is the primary initiator of legal change;
4. Legislative supremacy: Legislation is the primary source of law.

Of course, this is an ideal typical sketch. Even in the heyday of the interventionist state, it did not completely fit reality. The state does not and did not control society in the way envisioned by the model, as numerous sociological studies have shown.[6] Even so, it is a model that has dominated legal and political discourse, and is still very much the general common sense. Constructing this model helps to identify in which respects law in the emerging interactionist paradigm differs from that in the traditional paradigm, and also in which respects the various subtypes of the interactionist paradigm differ.

The interactionist paradigm is radically different in all four dimensions. An ideal typical sketch includes the following:

1. Horizontal perspective: Law-making is embedded in a horizontal relationship;
2. Broad dialectical means-ends relationship: Law is both a means and an end for political authorities and other actors alike;
3. Societal orientation: Interaction within society is the motor of legal change[7];
4. Legislation is only one of the sources of law, alongside others such as interactional law and contract.

None of these dimensions is a question of black or white, as they allow for gradual answers. Most subtypes of law that I have mentioned above as belonging to the interactionist paradigm are hybrid in that they combine elements of the interventionist

[6] See, for example, Moore (1973); Griffiths (1986).

[7] Cf. the famous quote of Eugen Ehrlich in the 'Foreword' to Ehrlich (2002): 'the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself'.

and the interactionist paradigms. The differences between the various subtypes of the interactionist paradigm can be understood mainly as different mixtures of these elements.[8]

We may identify a pure ideal-typical form of the interactional paradigm, exemplified by Brunnée and Toope's theory of interactional international law. For Brunnée and Toope (2010), law-making is embedded in horizontal relationships. It is not an instrument in the hands of the state but emerges from the cooperation between many actors, including states that may have instrumentalist strategies. The emergence of these norms is not necessarily initiated by states, but can be initiated by each of these actors, and the basic source of law is interactional, horizontal law.

However, most interactionist theories are somewhere on the spectrum between the purely horizontal and purely vertical perspectives. Interactive legislation is quite close to interactional international law. Responsive regulation and communicative legislation – at least in their initial formulations (Ayres and Braithwaite 1992; Witteveen and Van Klink 1999) – are in some respects still close to the traditional interventionist paradigm. In my view, responsive regulation and communicative legislation started initially from traditional top-down, instrumentalist, and state-centric perspectives, but adapted and enriched these perspectives with a more sophisticated instrumentalism and a partly horizontal orientation. They emphasised dialogue, and regarded co-regulation and self-regulation as auxiliary sources of law. These initial formulations still had a hybrid character, as they contained elements of both paradigms. However, in their later work, both Braithwaite (2008) and Witteveen (2005, 2007) elaborated their ideas in a more consistently interactionist way.

Apart from variations on each of these four dimensions, various other differences may be important for fully understanding the theories and their mutual differences. A first distinction is that some theories are strongly prescriptive (Ayres and Braithwaite 1992) and others claim to be primarily descriptive (Van Klink 1998), whereas the theory of interactive legislation contains both descriptive and normative theses (Van der Burg and Brom 2000; Van der Burg 2005). A second difference is the field in which they have been developed. Is it one in which there is hardly any positive law – like emerging health law in its early stages – or in which there is much black-letter law – such as tax law – in which the debate focuses on whether there is overregulation? A third difference concerns whether the theory focuses primarily on conflicting interests – as in tax law and economic regulation – or on conflicting normative views – as in bio-ethical issues. For example, the theory of interactive regulation has only twice been applied to fields where conflicting economic interests dominate the scene. The first case study in which it was tested in such fields (Stamhuis 2006, discussing legislation on employee participation and

[8] Whereas Bart van Klink in his contribution to this volume groups the various types together, I suggest it is important to be perceptive to the differences between them. In my view, the initial formulations of communicative or symbolic legislation and of responsive regulation are much more vulnerable to various criticisms brought forward in the Dutch debate (see note. 5 above, and see also Van Klink's own critique in this volume) than are the more consistently interactionist versions such as interactive legislation and interactional international law.

corporate governance) seemed to suggest that it is not fully applicable in these contexts. However, the recent study by Huiskers-Stoop (2015) concludes on the basis of extensive empirical research that horizontal monitoring by tax authorities – which can be understood as a partial realization of interactive legislation – works better than traditional monitoring.[9]

Finally, a fourth difference has to do with the disciplinary background of the main authors: criminology (Braithwaite), political science and law (Witteveen), literary studies (Van Klink), and ethics and law (Van der Burg). The more legislation-centric approach of Witteveen and Van Klink may be partly explained by their specific disciplinary outlook, just as my own focus on horizontal and argumentative relationships may be partly traced back to my partial background in ethics.

3.3 Interactive Legislation[10]

For a comprehensive understanding of the theory of interactive legislation, it is helpful to understand the context in which it was developed. The context was that of the emerging intertwined disciplines of bioethics and health law in the Netherlands around 1990. At that time, there was very little positive law, let alone statutory law, in the emerging fields of health law and biolaw. If there was, as in the case of euthanasia, it was usually outdated, and medical practice took little notice of it. Healthcare practice developed its own moral and legal standards. (For a more elaborate sketch, see Van der Burg 2014, 127–134.)

In this context, some researchers developed a theoretical approach to describe the emerging processes in health law and biolaw (e.g. Ippel and Vorstenbosch 1994; Van der Burg and Brom 2000). We have named this process interactive legislation, as it builds on broad processes of interaction among a great number of societal actors at all stages of the norm-making and implementing processes.[11] I have argued that, at least in societal fields having 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 horizontal, interactive process in which various social actors participate, and among them, the legislator has an important role, though not necessarily a central one. Similarly, the implementation, enforcement, and control of legal norms is shifting from a vertical model in which

[9] Huiskers-Stoop (2015, 445) summarizes her findings as follows:

> It is likely that horizontal tax monitoring, compared to traditional tax monitoring, leads to better tax compliance, greater fiscal certainty, reduction of tax compliance costs and a better relationship with the tax authorities.

Perhaps, the difference may be partly explained by the fact that Stamhuis focuses on the stage in which legal norms are developed, whereas Huiskers-Stoop focuses on the stage in which the norms are implemented.

[10] Some fragments from Van der Burg (2014, 144–148) have been included in this section.

[11] In my view, the best presentations of this approach may be found in Van der Burg (2005, 2014).

government bodies are the main enforcing actor to a more horizontal, interactive process in which various societal actors participate, among which government bodies have an important, though not necessarily central role. Consequently, the separate processes of norm development and norm implementation are merging into one continuous process of norm development and implementation.

In terms of such an interactionist perspective, the role of statutes becomes less central. Moreover, as with legislation in the nineteenth century, the emphasis is as much on codification of norms that have emerged in society as on modification. As a result, the instrumental and the protective functions of law become less important, and two other functions come to the fore: the expressive and the communicative.[12] Statutes often formulate open standards rather than strict rules. On the one hand, these standards may express the common values of a society – or the values of the dominant group – and provide a common normative framework. The statutory formulation then has an expressive function. On the other hand, these standards may provide a common point of reference by which the norm addressees can be guided without being presented with too many detailed and overly restrictive rules. Moreover, the standards invite active interpretation and discussion on those interpretations, both among and between citizens and the various legal authorities. Statutes then also have a communicative function. Because of this continuing process of interpretation and implementation, and the strong focus on more general values and principles, moral norm development and legal norm development are often strongly intertwined.

In my view, a clear shift in perspective is noticeable compared to the traditional interventionist paradigm. The perspective is not that of the legislator, however, but of society at large, and involves a fundamental shift from a vertical to a horizontal relationship. There are vertical elements in this horizontal relationship, as the legislator may codify social norms and the conclusion of societal discussions, and then lend his authority to those norms. Nevertheless, the relationship is fundamentally horizontal.

The instrumental function of legislation is not denied, but is supplemented with communicative and expressive functions. The legislator can still try to use law strategically to further certain aims, although with a more sophisticated view of its functions. However, its view of legislation cannot be called instrumentalist in the usual sense, because the fundamental values and aspirational norms are not formulated by the legislator but have been developed in a broad interactive process in which the legislator provides only a marginal reformulation. In terms of the perspective of interactive legislation, the role of the legislator is much more marginal. Citizens and other stakeholders are respected as co-creators of law.[13]

Rather than being primary actors, the legislator and other state institutions are merely some of the actors engaged in the development of new legal norms. Instead

[12] For a discussion of the various functions of legislation, see Van der Burg (2001); see also Stamhuis (2006, 163) and Chap. 11 in this volume.

[13] There is a strong similarity here to Braithwaite's description of the largely horizontal interaction between the state and various societal actors in his recent work on regulatory capitalism (2008).

of taking the initiative, the legislator follows: he often codifies rather than modifies, and very rarely commands. Finally, an important source of law is legal norm development in society and in specific sub-practices like healthcare; hence, legislation is only one of the sources of law, alongside self-regulation and interactional law.

Let me illustrate this with an example in the field of biolaw. The notion of interactive legislation can be illuminating when one analyses legislation on embryo research, especially in the early stages of legal development.[14] In many Western countries, it has not been the legislature that developed the norms initially, but the research community in dialogue with other stakeholders such as patient organisations and the general public. Through self-regulation and committees, in continuous dialogue with many actors involved, norms were gradually developed and refined. Broad committees were often created by the government to provide advice on legislation and policy recommendations, but these committees usually relied heavily on a dialogue with the research community, ethical and legal experts, interest groups, and the broader public. Even so, in many cases the committees' recommendations were either still too open or too pluralist to be implemented, or they were too controversial. In most countries, it took considerable time before formal statutes were enacted.

Even then, the enforcement of these statutes was left mostly to the research community, through institutional ethics committees or animal experiment committees. The public prosecution rarely played a role in enforcing the norms. For embryo legislation – if enacted in the end – the expressive and communicative functions were very important. Rather than providing detailed norms and instructions, statutes often laid down certain basic principles and general rules. Without defining the concept clearly, such statutes expressed, for example, the intrinsic value of embryos. The concrete balancing of this intrinsic value against other values and interests was usually left to committees in which various stakeholders were represented. These committees were to balance the diverse values and interests at stake, not in general terms but in light of the details of the case at hand. The further development of norms and their implementation thus merged into one continuous process of norm development and implementation. Norm development basically took place in a more case-bound process.

This is just a general sketch. The picture may be slightly different for each individual country, but it seems that in many countries elements of interactive legislation on embryo research may be discerned. Other fields in which elements of interactive legislation may be discerned are biotechnology in general (Brom 2003; Poort 2013; Grotefeld 2003) and non-discrimination law and same-sex marriage (Van Klink 1998; Van der Burg 2005).

A final caveat may be in place here. Proponents of interactive legislation do not defend a general normative thesis that law-making is always better if it is more horizontal and non-instrumentalist, and if it is less state-centric and relies less on the idea that the legislature is the highest legal authority. Proponents merely suggest that there is an emerging interactionist paradigm in which interactional law plays an

[14] The example has been elaborated in Van der Burg (1996).

important role, and that this may sometimes work better. But they do not want to argue that this interactionist paradigm will, or should, replace the interventionist paradigm completely. On the contrary, in many situations we simple have to rely primarily on traditional theories of legislation. The interactionist paradigm may offer additional elements as well as an alternative in some situations, but it cannot replace the traditional paradigm entirely.

What we need is an eye for variation.[15] Sometimes a more interactionist approach works better, while at other times a traditional interventionist approach is to be preferred. Ayres and Braithwaite (1992, 101) argue convincingly 'that there is no such thing as an ahistorical optimal regulatory strategy'. Interactive legislation may be more adequate in areas where ethical controversies are crucial, but I doubt whether it would fully work in the field of tax law. The relationship between the taxing state and the taxpayer is basically of a top-down character, even if horizontal elements can be incorporated into it, especially in the implementation stage, as the experiences in Australia and the Netherlands have demonstrated (Braithwaite 2003; Huiskers-Stoop 2012, 13 and 2015; Gribnau 2015).

3.4 Democracy

After this presentation of interactive legislation against the background of a broader interactionist paradigm, it is time to address my second theme. Various concerns have been raised against interactive and communicative legislation. In the traditional paradigm, the focus is on state legislature as the main actor in the field, which is supposed to be democratically elected and therefore legitimate. Putting law-making in the hands of other actors has led to criticisms that this may threaten our democracy. Similar arguments have been made with regard to the rule of law: namely, if state legislation is no longer at the core of our understanding of law, can the rule of law still offer protection?

These concerns have also been addressed by authors advocating communicative legislation (e.g. Witteveen and Van Klink 1999, 137). I have argued that if we develop a different and more substantive understanding of the ideals of democracy and the rule of law, under certain conditions interactionist forms of law can even be seen as more democratic and more supportive of the rule of law (Van der Burg 2000).

An important aspect of democracy is equal participation in decision-making and law-making processes; other relevant aspects concern fair procedures and minority rights. Citizens, and especially those most affected by certain decisions or laws, should have a say in these processes. In the traditional, formal understanding of democracy, this is done through elections. Citizens elect members of parliament and, directly or indirectly, these representatives have an influence on decisions and laws. However, the election of members of parliament is not the only way in which

[15] Van der Burg (2014, 9). I derived this phrase from private conversations with Philip Selznick.

democratic participation can be guaranteed. In fact, the direct participation of all stakeholders in interactive legislation may even be considered more democratic than the merely indirect participation through their representatives in parliament. Of course, interactive legislative processes do not always directly involve all stakeholders personally. However, if procedures are designed well, they may include recognisable representatives of all the relevant interests and views, whereas in parliamentary parties, such a representation of all relevant interests and views is not always guaranteed. Moreover, interactive legislation does better justice to the ideal that citizens especially should have a say in matters that are important to them, because they are only included in the interactive process insofar as they are in fact affected. In parliamentary decisions on, for example, gas extraction in the north of the Netherlands, the votes of those living in that area weigh precisely as much as the votes of citizens living at the other end of the country; in interactive legislation processes, however, it is possible to take into consideration the fact that some citizens are affected more than others.

This certainly does not mean that interactive legislation is always more democratic. We can formulate additional requirements for interactive processes in order to guarantee that they really are democratic.

1. An important requirement is that the processes should truly be inclusive: that is, all stakeholders should be involved. This was clearly not the case in the process leading to the Dutch Corporate Governance Code of 2003 (the Tabaksblat Code), as labour representatives were explicitly excluded from the Tabaksblat Committee (Stamhuis 2006, 139). Inclusiveness is not an easy requirement, because the more stakeholders involved, the more difficult it becomes to reach an agreement. This dilemma is illustrated by the Tabaksblat Code process: if labour interests had been included, the committee would probably not have reached consensus so easily. However, the result of relying on an 'old boys network' was that there was only a 'pretended consensus' (Stamhuis 2006, 153).
2. A second requirement is that the process should be open and allow for the full articulation of all views, rather than being prestructured in a way that favours specific views or conceptual frameworks – and excludes others. An interesting illustration is offered in Margo Trappenburg's analysis of medical ethical debates. Her conclusion was that two of the four debates she had studied – those on organ transplants and on medical experiments with legally incompetent human subjects – were legally structured.[16] The legal framework dominated the debate so much that only arguments that fitted in that framework were effectively allowed during the debates.[17]
3. A third requirement acknowledges that interactive processes are vulnerable to abuse by vested interests. Therefore, there should be adequate checks and balances to protect the interests of minorities and give them a full say. In every

[16] Trappenburg (1993, 340–343). See also Stamhuis (2006, 86).

[17] See also Poort (2013), arguing that too strong a focus on consensus may lead to the exclusion of certain viewpoints.

decision- making process, the protection of minorities can be vulnerable. In parliamentary procedures they can often be ignored because their voices are not important in terms of establishing a majority, or simply because the election system makes it effectively impossible for minorities to be elected at all: for instance, in a winner-takes-all district system. In interactive legislation processes, we may design institutions such that at least every voice can be brought to the table and be heard. For example, by including representatives from all the relevant interest groups, even if they are small, or by structuring consultation processes so that every group can put forward its views.

4. A final requirement is the promotion of a broader orientation towards consensus in the decision-making processes. We need a culture in which a narrow majority is not felt to be satisfactory, and in which all participants are willing to continue the dialogue until a consensus or a compromise has been reached that can be accepted by all or almost all stakeholders – or at least one that is not considered too strongly unacceptable. Such a consensus-oriented culture would fit into the Dutch tradition of consociationalism, of power sharing. However, this tradition should be reinvented and restructured to deal with the usual criticisms that, in its traditional form, it is not inclusive and open enough (see De Been 2012.)

   As both Jellienke Stamhuis and Lonneke Poort have shown, this focus on consensus may lead to the suppression of minority views and dissenters, and to a premature or pretended consensus.[18] I believe their criticisms are justified, but this does not mean that we should skip altogether the orientation to reaching a broad consensus or to constructing a broadly acceptable compromise. Of course, consensus or compromise will often not be possible. Nevertheless, all parties can at least aspire to broaden the majority and to do justice as much as possible to minority viewpoints. It will therefore only work well if this orientation towards consensus and compromise is accompanied by inclusiveness and openness.

Each of these four requirements focuses on a different dimension as regards how interactive processes may go wrong from a democratic point of view: these are lack of inclusiveness; lack of openness for relevant arguments and views; domination by vested interests; and uncompromising attitudes by majorities. The partly informal and unregulated character of interactive processes may make it sometimes more difficult to provide adequate checks and balances and guarantees, but it may also offer opportunities for promoting inclusiveness, openness, and respect for minorities in ways that parliamentary procedures cannot. Moreover, these requirements should not be met only by interactive legislation; they are just as important in traditional democratic decision-making, and are frequently as much at risk there as in the context of interactive legislation.

[18] I fully agree with the critiques by Poort (2013 and Chap. 5 in this volume) that the initial formulations by Frans Brom and me (and by Witteveen and Van Klink as well) were formulated too indiscriminately, suggesting implicitly that consensus should always be the desirable and possible outcome. The positive roles of dissensus and compromise should have been included.

3.5 The Rule of Law

A similar critique of the interactionist paradigm has been made with regard to the rule of law. If the rule of law is identified with a *Rechtsstaat*, a state ruled by law as formulated in statutes and constitutions, the interactionist paradigm then provides a very poor image indeed. However, a different understanding of the rule of law is also possible. We need not restrict law to state-made law, nor do we need to apply the rule of law only to state action. Philip Selznick has interpreted the ideal of legality broadly as 'the progressive reduction of arbitrariness' (Selznick 1961, 100). He applies this broad conception of the rule of law to contexts other than the state; legality may thus be relevant to every situation in which there are power imbalances and risks of abuse of power. The advantage of a Selznickian approach is that it provides a broader range of application of the rule of law than does the traditional *Rechtsstaat* model, by including power relations in which the state is not the dominant power but, for example, powerful commercial organisations or unions. Consequently, it also provides guidance in the more horizontal relations of interactional law. Moreover, if we focus on the reduction of arbitrariness as the core meaning of the ideal of legality, we may see that types of law other than state legislation may also help to curb the arbitrary exercise of power. Constitutional customary law, self-regulation, or international interactional law may also be effective means to provide for checks and balances and control of power.

The rule of law is not based on one simple ideal, but refers to various ideals or values. It can be argued that interactive legislation endangers at least two of these ideals: namely finality – the peaceful closure of conflicts – and legal certainty. I will focus on legal certainty, and examine only briefly the issue of finality, since both Nicolle Zeegers and Lonneke Poort discuss it in this volume.

Let me first put the issue of finality into perspective. As representing a value associated with the rule of law, finality and closure are primarily important with regard to court decisions on concrete conflicts. There is nothing in the interactionist paradigm that makes this impossible: courts can still make final decisions and thus end conflicts. The same is true, for example, as regards animal experiment committees: their decision on a concrete experiment is final, or – if it is advice given to a board or to a minister – the latter's decision is final. Only with respect to legislation is there no finality. Whereas in the traditional paradigm the debate is intended to be closed after a statute has been passed, in the interactionist paradigm the debate continues. However, the issue then is whether we truly prefer closure that may be premature – with the result that the law may soon be changed again or that it is ignored in practice – rather than an ongoing debate in which the norms develop gradually. Real closure in legislative debates is only provided if all stakeholders accept the outcome or the norm. I suggest that at least in certain contexts, such as issues with a strong ethical dimension, such a real closure is more likely to happen in interactive legislation than in traditional top-down legislation, where it is always the question of whether all stakeholders will accept the authority of a statute they do not support.

Even so, it may look as if in interactive legislation the debate continues endlessly, and no closure may ever be reached. There are two replies to this critique.[19] The first is that interactive legislation is not the only type of legislation recognised in legal interactionism. Sometimes the legislature simply has to cut through the Gordian knot, because there is no consensus or compromise in sight and legislation simply cannot wait. This is perfectly legitimate. Legal interactionism certainly does not claim that we always have to wait until there is consensus or compromise.[20] Legal interactionism would be extremely naïve to suggest that decisions or statutes should always be made on the basis of consensus. This is often impossible; consequently, a decision or statute will not satisfy all citizens or political parties. That is the condition of politics. Some critics have argued that this is a moment of violence or exercise of power, but to me this seems like a trivial observation rather than a critique, as this exercise of power is inherent in every form of political decision-making in the context of a modern state. So it is not specific to interactive or communicative approaches but a characteristic of politics as such. (See the contributions by Van Klink and Poort in this volume about these critiques.)

The second reply is more positive. Indeed, in some cases there is no consensus, no possibility for compromise, and not even a solution supported by a political majority. No political closure is reached and the debate may linger on. Sometimes, however, that need not be a disadvantage. If the debate persists, this prevents untimely closure. It leaves the dynamics of law open for the future, and it endures pluralism with regard to views of the good law. Perhaps living with that uncertainty is more attractive than living with a sham certainty or an untimely closure.

This brings me to the second value associated with the rule of law: namely, *legal certainty*. It is the ideal that we can know the law and may rely on it, and can predict the behaviour both of officials and of other citizens bound by the law. This formulation of legal certainty relies strongly on there being legal authorities. In an interactionist perspective, the role of these authorities is less central, so we might be tempted to believe that interactive legislation endangers legal certainty. Again, it depends on the perspective as to whether this is true or perhaps even the reverse.

We may discern two dimensions of the ideal of legal certainty. The first is *epistemic or doctrinal certainty*: knowing in detail the content of the law, the legal

[19] Both replies have been inspired by many discussions with Lonneke Poort. She suggests (Poort 2013) that we should look for an alternative approach in public debate, an ethos of controversies, and separate it from legislative and decision-making processes. I am sceptical about this two-track approach because, in my view, the two tracks are too closely connected. I suggest that a more promising perspective to address the criticisms made by Poort is by reconstructing the Dutch tradition of consociationalism. This tradition can and should be revised by orientation towards broadly inclusive consensus and inclusive compromises without denying the importance of dissensus and the frequent need for making decisions and formulating legal norms when consensus or compromise is not or at least not yet possible.

[20] See for a similar point the contribution by Poort in Chap. 5 in this volume, arguing that we must accept the need for temporary decisions.

doctrine. The second is *practical certainty*: being able to predict the behaviour of state officials and other citizens.[21]

Interactive legislation is clearly detrimental to doctrinal certainty. The use of aspirational norms and the reliance on society and various practices for further norm development and specification makes it more difficult to specify in detail the legal doctrine. If we cannot rely on law in the books, it is more difficult to write detailed books about the law. However, except for legal scholars and lawmakers, doctrinal certainty is not a very important value in itself. As a result of their training, lawyers – especially those in the Civil Law tradition – may have a tendency to overestimate the importance of doctrinal certainty, because their education has focused mostly on legal doctrine. I want to suggest that doctrinal certainty is merely a subservient value, in the service of practical certainty. For ordinary citizens, what law in the books tells us is less important than what will happen in practice. Will I be fired or not? How much tax will we have to pay? If I stick to the traffic rules, will I be able to avoid accidents because I can expect other citizens to do so as well?

In my view, when we discuss the rule of law in terms of legal certainty, it is practical certainty rather than doctrinal certainty that is most important. If we want to evaluate whether interactive legislation endangers legal certainty, we should focus on practical certainty and, moreover, we should take a comparative approach. We might ask whether interactive legislation is better or worse than instrumentalist legislation.

If we understand the ideal of legal certainty not in terms of knowledge of certain rules in the statute book but in regard to citizens being effectively able to rely on reasonable expectations regarding the behaviour of state officials, public organisations, and other citizens, we are able to obtain a more positive evaluation of interactive legislation. For if interactive legislation is based on existing patterns in a professional practice, everyone involved in that practice will already be acting according to the new statutory rules before the statute has even been enacted. And if the implementation of the statutory norm is based on an open and inclusive process, every stakeholder will also know what to expect from other actors in terms of more detailed norms. It may be different for non-stakeholders, but then again, the question is why would they be interested? Usually they would not take an interest in those outcomes. If they did, however, the approach would be the same as in the traditional paradigm; they should consult a legal expert – in that case, someone who also knows the field itself – and ask what – according to her expert view – the positive law is.

Moreover, we should not overestimate the degree of practical certainty offered by traditional legislation. The outcomes are often unpredictable if the law has to be applied to specific situations. Ask a lawyer to predict who will win in specific labour or divorce cases, and she will only be able to do so correctly in far less than one-hundred percent of the cases, let alone that a lawyer can predict accurately how

[21] Huiskers-Stoop (2015, 40) makes a similar distinction between objective or legal certainty (knowing the formal rules and their correct application) and perceived or fiscal certainty (the feeling that the fiscal obligations of the company are known).

much compensation a court will award to the plaintiff in the case of a labour conflict or how high the fine will be in a criminal case. Of course there are easy cases, but we certainly should not overstate the degree of certainty and predictability the rule of law provides to ordinary citizens. Moreover, the prediction is only based on past official acts of courts and legislatures, and they may revise their view of the law. Courts may overrule precedent, politicians and other officials may decide to no longer enforce a statutory norm, and legislatures may create a new statute. This is especially true in those fields in which interactive legislation has been advocated, such as biomedical ethics, where social and moral norms evolve rapidly, and it is uncertain when or whether the courts and other legal officials will follow.

However, we need not look at those fields to understand why interactionist forms of law may offer a solution regarding the lack of practical certainty. Tax law is a field that is strongly dominated by very detailed and specific rules; there are few aspirational norms. Doctrinal certainty will usually be realised to a high degree. Even so, there is often a crippling practical uncertainty about how tax authorities will actually interpret and apply these rules in complex cases such as the activities of multinational firms. Firms cannot wait for years to know which part of their sales volume and which part of their costs will be taken into account by the Dutch tax office. In order to make investment decisions, they need to know these details in advance. In the 1990s, this need for practical certainty has given rise to a practice of horizontal implementation: namely, rulings. Negotiating with the tax authorities and obtaining rulings about how the authorities will deal with future situations is a means of addressing this type of practical uncertainty.[22] In 2005, the Dutch tax authorities introduced a new, even more horizontal and interactionist tax practice, called horizontal monitoring. In this monitoring practice based on mutual trust, transparency, and understanding, taxpayers can be practically certain that the final tax assessment will be in accordance with the tax return filed. This illustrates that even in a field so strongly dominated by detailed black letter law as tax law, there is not only room but even a need for a more interactionist approach.[23]

This, however, is not a conclusive argument. Again, there are no general arguments on which legislative strategy or which type of law is best. It depends on the specific conditions and problems. Nevertheless, I think that the example of rulings shows that legal certainty in the form of practical certainty may be improved rather than impaired by interactive legislation and interactional law.

It is not a question of whether the traditional or the interactionist paradigm is the best solution in general. Under certain conditions the traditional type of legislation may best serve democracy and the rule of law, while in other situations interactive

[22] Of course, there are also negative aspects to this practice of rulings, especially if they lead to constructions in which multinational firms pay very low taxes. I do not claim that the practice of rulings is *always* good, or that it should not be changed in some respects. I merely use it as an example to show that horizontal interactional law may improve practical certainty rather than be detrimental to it.

[23] For horizontal monitoring in Dutch tax law practice, see Huiskers-Stoop (2012); Huiskers-Stoop and Diekman (2012); Gribnau (2015); and Huiskers-Stoop (2015).

legislation will do this. Which of the two paradigms a scholar prefers may be less an objective issue than a matter of personal character. Some legal scholars may prefer doctrinal certainty, while others opt for openness and dynamics – for both positions there are good albeit inconclusive arguments. In legal scholarship as much as in positive law, we should be aware of the risk of untimely closure. Thus, let the debate continue.

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