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An Ethos of Controversies: A Critical Analysis of the Interactive Legislative approach

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published in
Legisprudence
2012

DOI (link to publisher)
[10.5235/175214612800902516](https://doi.org/10.5235/175214612800902516)

document version
Peer reviewed version

[Link to publication in VU Research Portal](#)

citation for published version (APA)

Poort, L. M. (2012). An Ethos of Controversies: A Critical Analysis of the Interactive Legislative approach. *Legisprudence*, 2012(1), 35-55. [6]. <https://doi.org/10.5235/175214612800902516>

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An Ethos of Controversies: A Critical Analysis of the Interactive Legislative approach

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Legisprudence, 2012(1), 35-55

Published version: no link available

Link VU-DARE: <http://hdl.handle.net/1871/43832>

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AN ETHOS OF CONTROVERSIES: A CRITICAL ANALYSIS OF THE INTERACTIVE LEGISLATIVE APPROACH

L.M. Poort^{*}

Abstract

In this article, the interactive approach to law is critically analysed. The development of this approach finds its roots in both theoretical perspectives and legal paradigm developments. Addressing issues such as animal biotechnology: issues that are characterised by uncertainties, rapid changes, and moral controversies, require a more interactive legal paradigm so that norm development can respond to developments in society. The interactive legislative approach's basic elements include legal decision-making on a horizontal level (communication) and ongoing legal norm development in interaction with the specific field and society (responsiveness). Both elements strongly depend on a consensus-orientated way of thinking. To start, striving for consensus brings parties together by creating an arena in which parties are willing to co-operate. At the same time striving for consensus can justify the openness and flexibility of norms that are in need for further development. However, in this article, it is shown that for the interactive legislative approach's functioning in practice, a consensus-orientated way of thinking instead seems counterproductive. In furtherance of the argument, the results based on a twofold case-study concerning the regulation of animal biotechnology in Switzerland and the Netherlands are used. It is argued that due to a strong focus on consensus within these processes of legal norm development, legal practice faces difficulties stimulating an ongoing process of legal norm development which ensures the flexibility of legal norms. Instead of focusing on consensus, the author suggests legislators should follow an ethos of controversies. The latter contains a way of normative thinking in which the controversies are of main focus.

Keywords

Interaction; responsiveness; consensus; controversies; regulating moral issues; animal biotechnology

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A. INTRODUCTION

In this article, I will present a critical analysis of the interactive approach to legislation. This approach finds its roots in both theoretical perspectives of law and in legal paradigm developments in practice. From a practical perspective, a switch towards a more interactive legal paradigm can be seen when addressing issues such as animal biotechnology: issues that are characterised by uncertainties, rapid changes, and moral controversies. These issues require greater norm flexibility. From a theoretical perspective the interactive approach can be understood in similar vein to ideas on responsiveness and communicative approaches to law. The interactive legislative approach's basic elements include legal decision-making on a horizontal level (communication) and ongoing legal norm development in interaction with the specific field and society (responsiveness). The first element, horizontal decision-making, can best be explained as a method of decision-making in which actors in the field are approached as being co-producers of legal norms. The second element, ongoing legal norm development, requires norm flexibility, giving room for continuous adaptation in response to development of the norms in the field within which it intends to regulate. The functioning of both elements strongly depends on a consensus-orientated way of thinking. Striving for consensus can first of all bring parties together by creating an arena in which parties are willing to co-operate. Second, striving for consensus can justify the openness and flexibility of norms that are in need for further development.

In this article, I criticise the interactive legislative approach's functioning in practice, as far as it concerns the ongoing norm development. I argue that due to a strong focus on consensus within these processes of legal norm development, legal practice faces difficulties stimulating an ongoing process of legal norm development which ensures the flexibility of legal norms. In furtherance of my argument, I use results based on a twofold case-study concerning the regulation of animal biotechnology in Switzerland and the Netherlands. Instead of focusing on consensus, I suggest legislators should follow an ethos of controversies. The latter contains a way of normative thinking in which the controversies are of main focus.

In Section B, I explain the basic tenets of the interactive legislative approach. In the first subsection, I introduce and describe the main concepts and fundamental building blocks of the interactive approach. In the second subsection, I describe the consideration concerning the interactive approach from a more practical perspective. I do so by introducing the relevant case studies and their characteristic elements. Section C focuses on my critique against consensus-thinking as a way of stimulating and structuring legal norm development. This critique is illustrated by means of the outcome of the case studies mentioned earlier. In addition, I offer some theoretical reflection regarding such critique. In Section D, I discuss the ethos of controversies and further elaborate on the outcome of the case studies. Section E concludes with some remaining remarks

concerning the difficulties and implications of the ethos of controversies for legal practice.

B. THE INTERACTIVE LEGISLATIVE APPROACH

1. The Theoretical Perspective

The interactive legislative approach can be understood as one of the models within a broader movement towards more communicative approaches to law.¹ Other examples of communicative approaches are responsive regulation, really responsive regulation, communicative law, and communicative style legislation.² These communicative approaches to law share a common interest in the role of communication processes in the development and implementation of legal norms which are all orientated to ideas of Selznick on responsiveness and of Fuller on interactionism.

Selznick's responsive law approach focuses on dialogue instead of forced acceptance of the rules. Legislation developed through dialogue with society responds to the social needs and aspirations of society.³ Selznick therefore argues that rule-making should focus on the problem itself instead of following formal rules for guaranteeing the validity of norms.

Fuller analyses the relationship between reciprocity and legislation in his paper 'Human Interaction and the Law'.⁴ The paper's central question is whether the existence of law depends on a responsible interaction between legislature and subject. The assumption that legal practice finds its basis and justification ultimately in human interaction underlies this question. Fuller argues for the principles of 'reciprocity' and 'co-operative effort' should be strictly observed in order to ensure an effective legal order.⁵

Two characteristics of human associations, in general, enable a responsive interaction between actors in the field and the lawgiver. First of all, associations must be dominated by a principle of shared commitment which results in co-operation. Second, associations have to be dominated by legal principles based on reciprocity. The principle of shared commitment can best be explained in terms of

¹ W. van der Burg and F.W.A. Brom, 'Legislation on Ethical Issues: Towards an Interactive Paradigm' (2000) 3(1) *Ethical Theory and Moral Practice* 57; J. Brunnee and S.J. Toope, 'Interactional International Law' (2001) 3(3) *International Law Forum* 186.

² See e.g. B.M. J. van Klink and W.J. Witteveen, 'Why is Soft Law Really Law?' (1999) 3 *RegelMaat* 120; J. Black and R. Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law and Policy* 181.

³ P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (Transaction Publishers 2001) 14.

⁴ L.L. Fuller, 'Human Interaction and the Law' (1969) 14 *American Journal of Jurisprudence* 1.

⁵ L.L. Fuller, *The Morality of Law* (Yale University Press 1964) 39–40.

a search for common ends or purposes, as the legal principle ‘refers to the situation where an association is held together and enabled to function by formal rules’.⁶

The principle of reciprocity implies a citizen’s duty to follow the rules,⁷ which can be traced back to the morality of duty. Fuller also distinguishes a morality of aspiration which relates to values which people cherish. Aspiration does not provide a good basis for legal rules, but this morality is relevant for responsible interaction between lawgiver and subject that may finally lead to a legal order. This morality is a guideline for action. In the communicative approaches, norm development additionally follows a morality of aspiration.

Witteveen and Van Klink claim that ‘the communicative style of legislation involves a continuing two-way effort, both from the legislator and (part of) the community’.⁸ As with Selznick’s responsive law, this communicative style of legislation recognises the purpose of the law translated into values in a more general sense. The legislature sets out one or more fundamental values that are considered essential in the community. Here, we can recognise the reciprocal nature of the relation between legislature and subject. The legislature lays down legal (open) norms that represent values cherished by society and consequently communicates with citizens about the extent of these values.⁹ At the same time, the legislature carefully weighs citizens’ ideas and concerns to come up with a good understanding from which to build a consensus about these shared values.

Baldwin and Black start from Selznick’s responsive law by developing a concept of ‘really responsive regulation’. They address questions concerning non-compliance. Responsiveness will contribute to compliance of rules. However, to be responsive, the regulator should not only respond to the individual preferences and concerns of the citizens. Additionally, the regulator should respond to the mindset in which these individuals operate, the broader institutional environment, the different logistics of regulatory tools and strategies, the regime’s own performance, and to changes in the foregoing elements. It is suggested that, only then, will the party being subject to regulation commit to the rules.¹⁰ Furthermore, merely focussing on the personal preferences of the people does not do justice to all aspects of regulatory activity. Consequently, such a regulation will face difficulties concerning compliance.

The interpretation of the role of the legislature according to the interactive legislative approach implies an additional prominent role for Fuller’s ‘co-operative effort’ between legislature and citizen, instead of emphasising the

⁶ L.L. Fuller, *The Morality of Law* (Yale University Press 1964) 71.

⁷ *ibid.* 72–73.

⁸ B.M. J. van Klink and W.J. Witteveen, ‘Why is Soft Law Really Law?’ (1999) 3 *RegelMaat* 120, 127.

⁹ B.M. J. Van Klink, *De wet als symbol: Over wettelijke communicatie en de Wet gelijke behandeling van mannen en vrouwen bij de arbeid* (W.E.J. Tjeenk Willink 1998) 101–108.

¹⁰ R. Baldwin and J. Black, ‘Really Responsive Regulation’ (2008) 27(1) *Modern Law Review* 69.

reciprocal nature of communication. The interactive approach's emphasis on similar ideas, such as the notion of Fuller's co-operative effort, explicitly highlights a shift within the communicative approaches to law from the vertical relation of conditioned self-regulation towards a horizontal level of interaction. It is largely for this reason, therefore, that this particular approach is studied in the research. Such an interpretation of interaction breaks through traditional paradigms. Similar developments can be noticed in scholarly debates among international law theorists in which the interactional model of international law is gaining popularity as a method to both establish an international legal system and international legal norms. The horizontal level of interaction on the basis of co-operative effort is an attractive model for state-transcending issues.¹¹

The interactive legislative approach as stressed by Van der Burg and Brom followed the line of thought that focuses on norm-development processes, in which the legal texts are a phase and not the end. Communication finds place on a more horizontal level and is, then, primarily built on interplay between the principle of reciprocity and co-operative effort.

Two main theses of this approach are:

Thesis 1: The process of legislation on ethical issues is structured as a process of interaction between the legislature and society or relevant sectors of society, so that the development of new moral norms and the development of new legal norms may reinforce each other.

Thesis 2: Legislation on ethical issues is designed in such a way that it is an effective form of communication and that, moreover, it facilitates an ongoing moral debate and ongoing reflection on those issues because this is the best method to ensure that the practice remains oriented to the ideal and values the law tries to realise.¹²

As the interactive approach, both follow a practical and a theoretical perspective, these theses have both normative and descriptive claims. On the one hand, the theorists argue that these theses describe the new developments in legal practice; on the other they claim the elements of the approach should be followed to stimulate communication and flexibility.¹³

¹¹ J. Brunnee and S.J. Toope, 'International Law and Constructivism: Elements of an International Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 43. Although Brunnee and Toope do not explicitly refer to an interactive model of decision-making, earlier roots can be found in the transnational legal process as described by Koh in the 1994 Roscoe Pound lecture. Koh follows similar claims on the value of interaction, especially for its dynamic and normative features, see H.H. Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 184.

¹² W. van der Burg and F.W.A. Brom, 'Legislation on Ethical Issues: Towards an Interactive Paradigm' (2000) 3(1) *Ethical Theory and Moral Practice* 57.

¹³ *ibid.*

Following first these two theses, it can be said that within this model of the interactive legislative approach, both a dynamic process and an interactive process of norm development is required. Interaction is understood as a process of communication on a horizontal level that requires the involvement of various social actors in decision-making. Here we can recognise elements of Fullers ideas. A dynamic process reflects the ongoing process of norm development which is still organised as an interactive process. In Selznick's words, the process should be responsive. After a deeper exploration of the model, I have identified the following elements: the use of open norms and the search for consensus.¹⁴ Open norms are the interactive legislative approach's response to complex moral issues.¹⁵ It is the lack of consensus on moral values or the existence of conflicting moral values that implies a need for open norms. Consequently, moral values play a prominent role in all stages of the exploration and ongoing development of these open norms. Ensuring moral debate in all stages of norm development implies both an explicit inclusion of moral (controversial) values in these stages and a reflection upon these moral values within these stages.

To ensure a continuing debate on norm development, consensus is considered to be one of the goals. Moral consensus among social actors is not presupposed but it is argued that a constructive interaction in this dynamic process is more likely to result in consensus.¹⁶ At the same time, the idea of possible consensus or an interpretation of a (temporary) decision as if it was consensus will stimulate this constructive interaction.¹⁷

In the next Section, I will introduce the case-studies in which I address both theoretical and the practical assumptions. Can the model describe legal practice and can the elements of the approach lead to the main aims of communication and flexibility that the approach wishes to stimulate?

2. The Practical Perspective

As mentioned in the previous Section, the interactive approach's proponents follow both a theoretical and a practical perspective. I have already explained the theoretical perspective. In this Section, the practical perspective is outlined. The practical perspective derives from the proponents' claims concerning

¹⁴ These elements are not only characteristic for the interactive approach, these are characteristic for communicative approaches in general. See e.g. B.M. J. van Klink and W.J. Witteveen, 'Why is Soft Law Really Law?' (1999) 3 *RegelMaat* 120.

¹⁵ W. van der Burg, 'The Irony of a Symbolic Crusade: The Debate on Opening Up Civil Marriage for Same-Sex Couples' in N. Zeegers, W. Witteveen and B.M.J. van Klink (eds.), *Social and Symbolic Effects of Legislation Under the Rule of Law* (The Edwin Mellen Press 2005).

¹⁶ Following Habermas in his idea of the 'ideal speech situation', see J. Habermas, T. Burger (tr.) and F. Lawrence (tr.), *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press 1989).

¹⁷ W. van der Burg and F.W.A. Brom, 'Legislation on Ethical Issues: Towards an Interactive Paradigm' (2000) 3(1) *Ethical Theory and Moral Practice* 57.

developments in legal practice. There is a growing interest for alternative approaches to law, especially concerning issues that are complex and have a strong moral impact.¹⁸ An example of such an issue is animal biotechnology which is a 'new biology' that refers to gene technology. In this application, knowledge of the structure of genetics is applied to influence and direct biological processes. An example of animal biotechnological procedures can be found in the use of so-called knock-out mice. Genes are responsible for the production of proteins which influence the functioning of the body. To understand which gene is responsible for the production of a specific kind of protein and thus indirectly for a specific function of the body, tests are done with knock-out or transgenic mice. In the embryos of mice, cells are implanted in which a certain gene is knocked out or changed in order to see what the function of that gene is.¹⁹ With these biotechnological procedures the researchers will gain insight into hereditary diseases. Additionally, these procedures are used for biomedical research about cancer. For the interest of human beings, these tests can contribute to a better treatment of these diseases. However, these mice will become ill with either cancer or hereditary diseases and eventually die. At the same time, due to gene technology these mice are more suitable for these tests and consequently, fewer animals are required. A contra-argument would posit against a further instrumental use of animals for the benefit of human beings. At the same time, researchers cannot foresee all consequences of the biotechnological procedures for both animals and mankind.

Due to the rapid developments in technology, the uncertainties concerning consequences of this technology and its strong moral impact, this issue requires control and at the same time flexibility. In the Netherlands and Switzerland, by regulating animal biotechnology, these complexities are acknowledged and a solution is sought in a more interactive approach.²⁰

¹⁸ W. van der Burg and F.W.A. Brom, 'Legislation on Ethical Issues: Towards an Interactive Paradigm' (2000) 3(1) *Ethical Theory and Moral Practice* 57; J. Brunnee and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).

¹⁹ The procedures are much more complex as I explain here, the cells need to be activated and the production of proteins is visualized by injecting fluorescing material. For more information, see CBD, CCMO and COGEM, *Trendanalyse Biotechnology 2004* (COGEM 2004); see also the Kennislink website at <<http://www.kennislink.nl>> accessed 16 May 2012.

²⁰ S. Grotefeld, 'Wie wird Moral ins Recht gesetzt?' [2003] *Archiv für Rechts- und Sozialphilosophie* 299; W. van der Burg and F.W.A. Brom, 'Legislation on Ethical Issues: Towards an Interactive Paradigm' (2000) 3(1) *Ethical Theory and Moral Practice* 57. Additionally, Denmark is an interesting case study for analysing the interactive legislative approach in general because of Danish experience in public consultation. Denmark is known for its methods of stimulating public debate and public involvement, for example through consensus referendums. Also in drafting the legislation on genetic modification and cloning of animals, these methods were utilized. It is therefore, that I have also studied the Danish case-study. However, for the sake of the argument I intend to make in this article, the Danish outcomes are less relevant. In Denmark, dynamics was not even stimulated. Consequently, conclusions concerning the difficulties that dynamics is facing in practice cannot be drawn from this case-study. The use of open norms and flexibility of norms does not fit the Danish roots in Scandinavian legal realism. Instead, most Danish legal practitioners as well as legal academics argue

In Switzerland, the regulation of animal biotechnology is a result of two referenda in which the Swiss people could vote on the implementation of the principle of 'dignity of living beings' (*Würde der Kreatur*) in the Swiss constitution. This is a good example of the Swiss tradition of direct democracy. The Swiss government has also actively searched for methods to stimulate public debate concerning this matter. These referenda and the ensuing (parliamentary) debates resulted in the Gene Technology Law (hereafter: GTL), which came into force in 2003. This legislation provides for a licensing procedure for biotechnological procedures using animals under the auspices of the Biotechnology Section of the Federal Office for the Environment. Furthermore, an expert committee on biosafety and an ethics provide advice concerning licensing. The expert committee, the Swiss Federal Committee on Biosafety, advises on biosafety risks. The ethics committee, the Ethics Committee on Non-Human Gene Technology (hereafter: ECNH) is appointed to advise the legislature on the ethical considerations on a case-by-case basis during the licensing procedure and on more general topics related to animal biotechnology. All their advice is open to the public.

In the Netherlands, animal biotechnology is regulated in the Animal Health and Welfare Act, which came into force in 1992. This Act merely creates a regulatory framework. Further rules concerning the licensing procedure involving animals are set forth in the Animal Biotechnology Decree, which came into force in 1997. This Decree, additionally, includes sections concerning the appointment of an ethics committee; the Ethics Committee on Animal Biotechnology (hereafter: the CAB). The CAB has already played a prominent role in the legislative process by co-producing the regulatory framework. The Decree assigns the CAB an important formal role in advising on the ethical concerns in licensing. Thereafter, The Minister formulates a draft decision based on the recommendations of the CAB. These draft decisions are open to public objection. After this public round, the Minister formulates a final decision.

As part of my research, I have analysed these regulations, their legislative procedures, and their functioning in practice to see whether they contain all elements of the interactive approach and, if so, whether this approach has led to the incentives of the interactive approach: communication on a horizontal level and flexibility of norms.

In both countries, I identified elements of communication on a horizontal level. In Switzerland, pre-parliamentary procedures left room for experts and individuals to comment on the draft-regulation. In particular, the ethics committee and experts on risks and gene technology were involved in designing the

that adequate regulation consists of clear legal rules. This entails a relevant outcome of the broader research as it is for identifying conditions under which this approach might function adequately, however not for challenging the dynamic element.

framework.²¹ The Dutch legislative process of the regulation on animal biotechnology also consisted elements of horizontal communication. Actors from the relevant field and a committee of ethicists were involved in drafting the law and designing the set of criteria that were used in the licensing procedure.²² Licensing decisions are open to public objection. The Minister is then obliged to organise licensing hearings in which the public can explain their objection. This procedure reveals a strong public participation.

The dynamics of the legal framework which was intended to stimulate flexibility of norms was less present in both countries. In both Switzerland and the Netherlands the legislature aimed for establishing an ongoing process of norm development.²³ In both countries it is recognised that development of legal norms will be more satisfactory if these interact with developments in the field. Consequently, both legislatures embedded open norms in the legal framework.²⁴ In Switzerland, the dignity of living beings needed to be taken into account in licensing and in the Netherlands, the legal framework included a norm enforcing ethical considerations to be taken into consideration during licensing. By a strong orientation towards consensus, both Swiss and Dutch legislature intended to concretise these norms into legal practice but failed in its attempt.

In Switzerland, norm development regarding the dignity of living beings stagnated prematurely. During the pre-parliamentary process, the ECNH formulated a definition in which dignity of living beings was explained as a gradual concept. Equally, the ECNH was aware that this definition was controversial and required further debate and challenging.²⁵ Even with the remarks of the ECNH that this concept required further debate, the authority complied with principle only to the extent of applying this definition in the licensing procedure to the individual cases and setting standards for similar cases.²⁶ Despite the urge for further consideration, this approach did not leave

²¹ Eidgenössisches Volkswirtschaftsdepartement, *Bericht über die Ergebnisse des Vernehmlassungsverfahrens zum Vorentwurf der Gen-Lex-Vorlage* (Bern 1998); ECNH, 'Vorläufige Stellungnahme zur Gen-Lex-Vorlage' (EKAH, September 1998) <<http://www.ekah.admin.ch/en/topics/dignity-of-living-beings/index.html>> accessed 16 May 2012.

²² Voorlopige Commissie Ethische Toetsing Genetische Modificatie van Dieren, *Advies inzake het dossier 'Weefsel-specifieke expressie van genen in de melkklier van genetisch gemodificeerde runderen'* (LNV 1992); F.W.A. Brom et al., *Het toetsen van biotechnologische handelingen bij dieren: Rapport van een commissie van externe deskundigen ten behoeve van de Commissie Biotechnologie bij Dieren* (CBD 1996).

²³ C. Errass, *Öffentliches Recht der Gentechnologie im Ausserhumanbereich* (Stämpfli Verlag AG Bern 2006) 114.

²⁴ *ibid.*; L.M. Poort, *Consensus and Controversies: An Interactive Legislative Approach to Animal Biotechnology in Denmark, Switzerland, and the Netherlands* (Forthcoming, Eleven Publishers 2012) ch. 7.

²⁵ ECNH, 'Vorläufige Stellungnahme zur Gen-Lex-Vorlage' (EKAH, September 1998) <<http://www.ekah.admin.ch/en/topics/dignity-of-living-beings/index.html>> accessed 16 May 2012.

²⁶ L.M. Poort, *Consensus and Controversies: An Interactive Legislative Approach to Animal Biotechnology in Denmark, Switzerland, and the Netherlands* (Forthcoming, Eleven Publishers 2012) 99. It must be mentioned that the Swiss Ethics Committee on Non-Human Gene-technology (ECNH)

room for fundamental debate on the extent and meaning of the norms. That would have not been problematic if the definition of ‘dignity of living beings’ as being a gradual concept was agreed upon by all actors involved. An example seems to illustrate differently. Nevertheless, the ECNH’s statement about a license application for a field trial with primates by Zürich’s ETH in 2007 led to crucial debates.²⁷ Both the ECNH’s own discussion and its response reflected fundamental disagreement on the interpretation of the definition of ‘dignity of living beings’. Especially theologians, raised fundamental criticism against dignity as a gradual concept. It was argued that it was not at all clear whether the interpretation of ‘dignity of living beings’ as a gradual concept was justified in the first place or could be explained in the individual case. This shows that the ECNH’s interpretation was not based on consensus among the parties: indeed, parties were diametrically opposed to each other’s views. Neglecting fundamental criticism on the ‘gradual concept’ in the first place, would appear to have resulted in an escalation of the debate.²⁸

Contrastingly, in the Netherlands, the CAB has to a certain extent concretised the open norms by setting some criteria and standards for application in individual cases.²⁹ Despite this, however, norm development actually stagnated (prematurely).

The CAB’s deliberations were restricted to individual cases as they were limited by the legal context of the licensing procedure. In this procedure, the CAB had the task of commenting on the moral impact of the use of animals in that particular case rather than general concept of integrity of animals. This process has not resulted in a set of general standards concerning the moral acceptability of animal biotechnology, only in a set of concrete standards.³⁰ In response to this lack of fundamental debate, the CAB initiated a series of broader debates on general themes concerning animal biotechnology.³¹ These meetings were partially

has published a few statements presenting a more general reflection on the dignity of living beings. Furthermore, associated academics have contributed to defining and exploring the concept. However, these explorations have mostly been confined to academic debate on the extent of the gradual concept as it applies in particular cases, and have not addressed the fundamental substance of the concept itself.

²⁷ L.M. Poort, Interview with A. Willemsen, Secretary of the ECNH (Spring 2007).

²⁸ J. Fischer, ‘Haben Affen Würde?’ (*Ethik-Zentrum*, July 2007) <<http://www.ethik.uzh.ch/ise/publikationen/publikationen-1/HabenAffenWuerde.pdf>> accessed July 2007.

²⁹ A. Meijer et al., *Evaluatie van het Besluit Biotechnologie bij Dieren* (USBO Advies 2005).

³⁰ L.E. Paula, *Ethics Committees, Public Debate and Regulation: An Evaluation of Policy Instrument in Bioethics Governance* (Athena Institute 2008).

³¹ T. Visak and F. Meijboom, *Integriteit van dieren: Bouwsteen of Struikelblok? Verslag van de eerste discussiebijeenkomst over biotechnologie bij dieren* (Centre for Bioethics and Health Law 2002); T. Visak and F. Meijboom, *Op zoek naar alternatieven – maar voor welke doelstelling?* (Ethics Institute 2003); T. Visak and F. Meijboom, *Het maatschappelijk belang van een doelstelling: Zoeken naar goede argumenten – Verslag van de derde discussiebijeenkomst over biotechnologie bij dieren* (Ethics Institute 2003); T. Visak and F. Meijboom, *De waarde van een machtsvrije dialoog voor verdere verdieping: Verslag van de vierde discussiebijeenkomst over biotechnologie bij dieren* (Ethics Institute 2004).

successful, as they drew new input. At the same time, however, the meetings did not stimulate an ongoing learning process regarding animal biotechnology as no new arguments were brought to bear.³²

In the next Section, I argue that one of the explanations of these difficulties can be found in a strong strive for consensus. I will argue that striving for consensus risks counteracting ongoing norm development and flexibility.

C. CONSENSUS

1. An Ethos of Consensus

An ethos of consensus is a way of thinking in legal practice that seeks to structure decision making processes around a search for consensus. It includes consensus as an ideal outcome, as well as a regulative ideal. The idea of consensus as an ideal outcome is derived from Habermas' idea of the ideal speech situation. Habermas presents a normative theory of a procedural democracy in which the ideal political process is one that aims for consensus under ideal circumstances. Under ideal circumstances, all discussants can participate in debate with equal opportunity and equal power, and without any constraint. If all parties consent to an outcome at the end of this discussion, it should represent the ideal outcome.³³

The second conception defines consensus as a regulative ideal. Consensus as a regulative ideal is a more dynamic concept. Here, consensus is not the ideal outcome of a political process, but rather an orienting aim. Proponents of consensus as a regulative ideal consider the outcome as less foundational for their decisions. They acknowledge that in legislative politics a consensus may never be reached. Instead, they emphasise the benefits of aiming for consensus as a method for structuring deliberation. Gutmann and Thompson, for example, do not consider aiming for consensus as an ideal outcome, but consider aiming for consensus only as a method of reducing disagreements and ensuring openness to other people's viewpoints.³⁴ Consensus, then, functions merely as a regulative ideal for rational debate in which discussants persuade using rational arguments.

Despite the differences between these concepts, their tendency to collapse onto one another means that they are best considered together as part of the same 'ethos of consensus'.

³² B. Bovenkerk and L.M. Poort, 'The Role of Ethics Committees in Public Debate' (2008) 22(1) *International Journal of Applied Philosophy* 19.

³³ J. Habermas, T. Burger (tr.) and F. Lawrence (tr.), *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press 1989); N. Rescher, *Pluralism, Against the Demand for Consensus* (Clarendon Press 1993) 190.

³⁴ A. Gutmann and D. Thompson, *Democracy and Disagreement* (Harvard University Press 1996).

An ethos of consensus was present in both case study countries, and had implications for the interactive legislative process in each of them. In Switzerland, consensus was considered as both an end and a starting point for norm development. This perception of consensus becomes most apparent in the development of the concept of dignity of living beings. This concept played an important role in regulating animal biotechnology since it was one of the incentives to call for regulation in the first place. At the beginning of the legislative process, there was no consensus on the concept of 'dignity of living beings'.³⁵ Actors agreed on the importance of the concept, but not on its meaning. The ECNH emphasised the need for further elaboration, as it made clear that not all members were agreed on the preliminary conceptualisations.³⁶ In that sense, consensus was considered a regulative ideal. A search for consensus was, therefore supposed to structure norm development.

Nevertheless, the gradual conception of dignity of living beings was presented as if based on a consensus, and it functioned as a basis for the regulatory framework.³⁷ The responsible authorities adopted and applied the ECNH's interpretation of the concept without further questioning its meaning. The preliminary conceptualisations started to function as an end, the ideal outcome. In general, ECNH's policy statements are presented as being based on consensus, even if not consented to by all of its members. Interestingly, this concept started to function as if it were based on consensus.³⁸ In other words, as if the concept was the ideal outcome. As seen in the previous Section, the strong drive for consensus during norm development resulted in constructing 'dignity of living beings' as a gradual concept. Further debate on 'dignity of living beings' was restricted to crystallizing the gradual concept. The concept itself was not further questioned. There was no need for further fundamental debate on the gradual concept since the ideal outcome had already been reached. In reality, however, this consensus was superficial and many divergences still existed.³⁹ Rather than establishing dialectic, the connection between consensus as a starting-point, consensus as an ideal outcome, and consensus as a regulative ideal seem to have counteracted further development.

In the Netherlands, during the legislative process, it was emphasised that no consensus yet existed concerning the extent and meaning of the intrinsic value of

³⁵ ECNH, 'Vorläufige Stellungnahme zur Gen-Lex-Vorlage' (EKAH, September 1998) <<http://www.ekah.admin.ch/en/topics/dignity-of-living-beings/index.html>> accessed 16 May 2012.

³⁶ *ibid.*

³⁷ Eidgenössisches Volkswirtschaftsdepartement, *Bericht über die Ergebnisse des Vernehmlassungsverfahrens zum Vorentwurf der Gen-Lex-Vorlage* (Bern 1998).

³⁸ L.M. Poort, Interview with A. Willemsen, Secretary of the ECNH (Spring 2007); L.M. Poort, Interview with K.P. Rippe, Chairman of the ECNH (Spring 2007). Both Willemsen and Rippe emphasised the consensus policy of the ECNH.

³⁹ B. Bovenkerk and L.M. Poort, 'The Role of Ethics Committees in Public Debate' (2008) 22(1) *International Journal of Applied Philosophy* 19, 27.

animals.⁴⁰ The legislature stated that this concept needed further development but should be included in the legal framework as an aspiration. The concept of intrinsic value of animals could thereby guide the process of deepening and strengthening the moral status of animals. A search for consensus was regarded as one of the mechanisms that would structure and actively stimulate further norm development.⁴¹

To a certain extent, the process led to further crystallisation of norms. In the evaluation of the CAB it became clear that about 90 per cent of its recommendations were based on a unanimous decision. Furthermore, the CAB was able to establish 'substantial' consensus on applications regarding a variety of research.⁴² In many issues, the CAB reached consensus on both the problem definition and its solutions. It seems that processes of fact-finding in the individual cases contributed to the development of a set of well-functioning practical standards,⁴³ and concrete norms.⁴⁴

However, norm development on a higher aggregation level has not been established. One explanation is possibly the role of the CAB. Despite its official advisory role, in reality, the CAB has a decisive role. The Minister draws up a draft decision based on the recommendations of the CAB. The draft decisions are open for public comment. These objections can be clarified during a public hearing chaired by the CAB. Thereafter, it and advises the Minister after giving due consideration to public comment. Officially, the Minister should then decide on licensing. However, in reality, the Minister adopts the advice of the CAB. The practice of licensing has evolved into a more decisive role of the CAB. A decisive role seems to bring in other responsibilities. As the Minister adopted the CAB's advices, the CAB also took the legal consequences into account.⁴⁵ In other words, their context of advising on moral concerns became, indirectly, a legal one. Consequently, the CAB's reasoning received undue emphasis in the legal decisions and by so doing the CAB's role of advice developed into one of influence. Further norm development on integrity or fundamental debate on the moral status was unnecessary since consensus on the standards has already been reached. In other words, the ideal outcome had already been reached. Consensus

⁴⁰ F.W.A. Brom et al., *Het toetsen van biotechnologische handelingen bij dieren: Rapport van een commissie van externe deskundigen ten behoeve van de Commissie Biotechnologie bij Dieren* (CBD 1996); L. Fretz, and L. Sterrenburg, *Het maakbare dier geregeld: Politieke besluitvorming en genetische modificatie van dieren, een rapportage aan het Parlement* (NOTA 1993) 35.

⁴¹ B. Bovenkerk, *The Biotechnology Debate: Democracy in the Face of Intractable Disagreement* (Springer 2011) 180.

⁴² L.M. Poort, Interview with E. Schroten, Chairman of the CAB (Spring 2009); A. Meijer et al., *Evaluatie van het Besluit Biotechnologie bij Dieren* (USBO Advies 2005).

⁴³ L.E. Paula, *Ethics Committees, Public Debate and Regulation: An Evaluation of Policy Instrument in Bioethics Governance* (Athena Institute 2008) 77, figure I.11.

⁴⁴ L.M. Poort, Interview with E. Schroten, Chairman of the CAB (Spring 2009).

⁴⁵ L.E. Paula, *Ethics Committees, Public Debate and Regulation: An Evaluation of Policy Instrument in Bioethics Governance* (Athena Institute 2008).

on the legal level in concrete cases seems to have downplayed the urge for fundamental debate in a broader context.⁴⁶

In Switzerland and the Netherlands, norm development was restricted to developing legal standards that were easily applicable in licensing practice. The norms were not further concretised or developed to a higher aggregation level. The minimum definitions were adopted without further challenge. These definitions were treated as if they were based on a consensus. Their content was consequently supposed to be justified and consequently left alone.

In Dutch and Swiss legislative practice, the presence of an ethos of consensus seems to have led to the premature stagnation of norm development. Temporary political achievements were no longer contested, even when it was clear that they required further development. The ethos of consensus undermined the possibilities for dynamic norm development and did not act as stimulation for further debate.

These examples illustrate the limits of aiming for consensus i.e. consensus as regulative ideal. Aiming for consensus may, to a certain extent, structure debate and ensure positive attitudes towards decision-making processes and their outcomes. The common focus on reaching consensus in a particular case will often lead actors in the same direction. At the same time, however, the search for consensus seems to idealise this willingness to co-operate and assume it will automatically lead to rational debate or a further crystallisation of norms. Willingness to co-operate does not imply that all parties consent on how to reach a common end. During the norm development process, differences in problem-definition, on the direction in which a discussion should move, as well as on new controversies can be brought to light. Furthermore, aiming for consensus runs the risk of excluding controversies or differences. Actors who do not accept the problem-definition or the direction of the discussion may risk exclusion from the process. The previously mentioned Swiss primate case exemplifies this risk. The ECNH interpreted dignity of living beings as a gradual concept. Licensing standards relied upon this conception. However, discussions concerning particularly controversial license applications involving biotechnological procedures with primates revealed that not all actors had consented to the gradual concept. During the legislative process, the lack of consensus on the definition of 'dignity of living beings' did not seem problematic, as the temporary status of the definition was emphasised. However, in licensing practice, dissenting concerns and viewpoints were not re-introduced. The fiction of consensus on the gradual

⁴⁶ Currently, the Dutch Minister has decided the CAB is no longer required for exploring the moral status of animals in light of animal biotechnology. According to the Minister, the amount of unanimous decisions made clear that the moral status has been crystallized. The members of the CAB question this conclusion. The chairman stated that even though they have reached unanimous decisions and substantial consensus on several biotechnological procedures with animals, the moral status requires further debate, see L.M. Poort, Interview with E. Schrotten and S. Beukema (Spring 2009).

concept masked the fact that parties were still diametrically opposed, which resulted in heated debates.

It is, thus, doubtful whether positive attitudes still exist at the end of debate. The excluded are no longer involved in development of the norms. Aiming for consensus leads to exclusion of groups that may jeopardise the possibility of reaching consensus. Open and positive attitudes towards decision making are more difficult to sustain if dissenters feel that they are not taken seriously or if they have no space to challenge decisions. According to Honig, these groups will eventually withdraw from decision making and radicalise.⁴⁷ Furthermore, exclusion undermines the rationality of debate, which, in consensus theory, is built on equal power and equal opportunity.⁴⁸

An example of this can be found in the Dutch licensing procedure. In public hearings about licensing, questions about the moral acceptability of animal biotechnology were put aside with a simple 'this is not the forum for asking these questions'. The CAB sidelined arguments that went beyond their context of interpretation. The public did not have equal opportunity or equal power to express their concerns since the CAB did not respond to their objections using rational arguments.

Aiming for consensus tends to exclude viewpoints. Consequently, an ethos of consensus would appear to be an undesirable not a feature in an interactive legislative process aiming for an ongoing process of norm development. Focusing on consensus tends to downplay the complexity of difficult issues. According to Rawls, the exclusion of viewpoints is the price we pay for addressing fundamental political questions. He argues that although it may be unfair to restrain ourselves and others from using non-neutral arguments, it is required for finding a solution that is acceptable to everyone in a pluralistic society.⁴⁹ However, the necessity of finding a solution cannot justify the exclusion of viewpoints. Rather, as Van der Sluijs et al. argue in the context of environmental sustainability, there should be more space in debates for diversity and uncertainty in knowledge and views. As an example of this principle, Van der Sluijs et al. suggest that making room for dissent will help provide a better picture of the status of climate science. Without a good picture it is difficult to develop prudent policies.⁵⁰ The exclusion of certain viewpoints without consideration therefore cannot be justified.⁵¹ In the same way, we cannot be convinced that a consensus

⁴⁷ B. Honig, *Political Theory and the Displacement of Politics* (Cornell University Press 1993).

⁴⁸ N. Rescher, *Pluralism, Against the Demand for Consensus* (Clarendon Press 1993) 190.

⁴⁹ S. Grotefeld, 'Self-Restraint and the Principle of Consent' (2000) *Ethical Theory and Moral Practice* 87. He refers to J. Rawls, *Political Liberalism* (Columbia University Press 1996) 29–35.

⁵⁰ J.P. Van der Sluijs, R. Van Elst, and M. Riphagen, 'Beyond Consensus: Reflection from a Democratic Perspective on the Interaction between Climate Politics and Science' (2010) *Elsevier Editorial System for Current Opinion in Environmental Sustainability* 6.

⁵¹ B.J. Wolthuis, 'Rechtsvorming als debat: De overtuiging het juiste antwoord te geven als voorwaarde voor goede rechtsvorming' in E.J. Broers and B. van Klink (eds.), *De rechter als rechtsvormer* (Boom Juridische Uitgevers 2001) 108–112.

reflects ‘the ideal outcome’ if all possible viewpoints have not been incorporated. Besides, an outcome of debate is more valuable if its foundations have been explained and shared with others. Parties still doubting whether an outcome is the right answer for them may be, in that case, more willing to accept it.

D. AN ETHOS OF CONTROVERSIES

This Section explains the ethos of controversies, which will be presented as an alternative to the orientation toward consensus. This ethos structures decision-making processes and norm development around an exploration of controversies. Additionally, the ethos of controversies emphasises the political nature of decisions that have been made by pinpointing where conflicts may still exist.

An ethos of controversies responds to the failures of an ethos of consensus in addressing complex issues with significant moral impact. For complex issues characterised by strong moral disagreements, such as animal biotechnology, legal and moral norms have not yet been crystallised. In other words, it seems that for these issues the current legal and ethical framework vocabulary runs short.⁵² It seems too premature to search for consensus. I will argue that instead a confrontation of viewpoints, concerns, and preferences – an ethos of controversies – can therefore help to stimulate further norm development for all such issues.

This Section starts with a subsection in which the circumstances of an ethos of controversies will be explored. Then, in the second subsection, the stages of the norm development process in which an ethos of controversies can operate will be highlighted.

1. The Circumstances of an Ethos of Controversies

I argue that an ethos of controversies should be applied when using an interactive legislative approach to regulate issues with strong moral impacts. To come to a better understanding of an ethos of controversies, we have to explain the circumstances it seeks to address.

The ethos of controversies corresponds to Waldron’s respect for disagreement; both are responses to similar political circumstances. Although decisions have to be made, awareness of unresolved moral conflict is important. As Waldron argues, this shows more respect for opinions which have been excluded from decisions. Waldron’s ‘circumstances of politics’ begins by explaining Rawls’ circumstances of justice. These circumstances are those aspects of the human condition that make justice necessary as a virtue and as a practice: moderate

⁵² B.C. van Beers, *Persoon en lichaam in het recht* (Boom Juridische Uitgevers 2009) ch. 2.

scarcity and the limited altruism of individuals.⁵³ According to Waldron, the circumstances of politics are developed along similar lines. There is a need for a common framework or course of action on some issues among members of a certain group. The need for common action, combined with a lack of agreement on what course of action to take or on the framework itself, defines the circumstances of politics.⁵⁴ Animal biotechnology issues are characterised by a strong moral pluralism and rapid change. In particular, the intractable dimension of moral disagreements on issues such as animal biotechnology requires an ethos of controversies. This moral disagreement requires further elaboration since the various controversies that characterise the issue are still in development. Issues like these are difficult to address, because there is a current need for regulation despite strong moral disagreement. Such issues have a dimension of ongoing discourse that cannot be resolved by the explication of clear-cut decisions. At the same time, there is a need for controlling and guiding the development of these issues. As Van der Burg claims, 'the most obvious institution for control is the law'.⁵⁵

The need for a framework or course of action establishes a commonality for political discourse. Indeed, without a disagreement there would be no need for discussion in the first place.⁵⁶ Furthermore, it is important to respect that disagreement may persist. Respecting disagreement, even when a decision has been made, can arguably, do more justice to the various viewpoints of individuals.⁵⁷ As was clear in the Swiss primate case, ignoring different viewpoints eventually resulted in heated debates. When disagreements are recognised and respected, it is more likely that individuals will be willing to accept the decision that has been made, even if their own preferences or viewpoints are not reflected in the decision itself.

An ethos of controversies shares the agonists' understanding of the conflicting nature of opinions in a pluralist democracy. Both underline that issues characterised by intractable moral disagreements involving a dimension of non resolvability. Agonists, however, merely argue against deliberative democratic theories. According to Mouffe, deliberative democrats seem to ignore the conflicting dimension of pluralism and therefore erase the essential 'undecidability' of politics with a strong focus on consensus. Mouffe argues that the deliberative idea of commonality is in fact politically constituted. She refers to deliberative democrats who perceive outcomes as being the result of moral consensus and, according to her, consequently fail to 'recognize the political

⁵³ J. Rawls, *A Theory of Justice* (Harvard University Press 1971) 126–130.

⁵⁴ J. Waldron, *Law and Disagreement* (Clarendon Press 1999) 102.

⁵⁵ W. van der Burg, 'Law and Bioethics' in P. Singer and H. Kuhse (eds.), *A Companion to Bioethics* (2nd edn., Blackwell 2009) 64.

⁵⁶ J. Waldron, *Law and Disagreement* (Clarendon Press 1999) 103–105.

⁵⁷ *ibid.* 109.

nature of its own exclusion'.⁵⁸ On this last point, the concept of an ethos of controversies seems to cohere with agonistic ideas on politics. In legal politics, decisions have to be made. At the same time, it is necessary to recognise inherent lack of resolvability in the conflicting nature of pluralism.⁵⁹ The recognition of conflict will do better justice to the conflicting aspect of pluralism and help to establish a legal discourse that is more realistic.⁶⁰

In contrast to Mouffe's ideas, however, an ethos of controversies retains a strong deliberative dimension, as this ethos insists on a dialogue between actors. Whereas agonists generally criticise deliberative democracy theory and its focus on deliberation as a basis for legitimacy, an ethos of controversies emanates from a critique against consensus as a regulative ideal. An ethos of controversies is a response to the failure of an ethos of consensus which the case studies showed to be insufficient in stimulating further norm development regarding complex issues with strong moral impacts. The presence of incommensurable values argues against consensus as a regulative ideal. However, this does not mean that an ongoing process of norm development is impossible. Even incommensurable values can be articulated and confronted with each other in a debate. An ethos of controversies still values interaction, which helps to ensure that norms are orientated to practice.

Following an ethos of controversies may not solve the conflict, but that is not what is or should be aimed for within the interactive legislative approach. This approach aims at finding a way to cope with – not necessarily resolve – complex issues with a strong moral impact. The interactive legislative approach should therefore start with a better understanding of the controversies.

2. An Ethos of Controversies

The ethos of controversies is designed to deal with issues that are characterised by controversial moral viewpoints. Instead of primarily aiming to bring controversial viewpoints closer together and come to an agreement, an ethos of controversies aims to do justice to the various viewpoints on an issue. An ethos of controversies presents a more realistic approach to the legal decision-making processes, as it takes into account their political nature.

The design of an ethos of controversies differs from that of an ethos of consensus. An ethos of consensus structures deliberation through a common focus on consensus that can eventually legitimate decisions.⁶¹ An ethos of controversies

⁵⁸ C. Mouffe, 'Deliberative Democracy or Agonistic Pluralism' (1999) 66(3) *Social Research* 756. See also A. Schaap, 'Agonism in Divided Societies' (2006) 32(2) *Philosophy and Social Criticism* 262.

⁵⁹ *ibid.* 757.

⁶⁰ ⁶⁰ C. Mouffe, 'Deliberative Democracy or Agonistic Pluralism' (1999) 66(3) *Social Research* 756.

⁶¹ S. Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in S. Benhabib (ed.), *Democracy and Difference* (Princeton University Press 1996) 67–94.

focuses instead on problem-definition and on structuring norm development. The ethos of controversies operates in three stages.

First of all, a focus on the controversies of an issue means that the various viewpoints, concerns, and preferences must be articulated. A stocktaking of all these viewpoints, concerns, and preferences can contribute to problem-definition and may lead to a better understanding of the issue at stake.

Instead of focusing on the commonalities among the various viewpoints, an ethos of controversies structures the discussion around a focus on the differences, thereby providing insights into the conflict. Without an emphasis on the controversies, there is a risk that viewpoints will be ignored,⁶² disagreement will not be addressed and problem definitions will be simplified. In order to avoid these risks, an ethos of controversies encourages the recognition of the conflicting viewpoints by showing respect to all of them.⁶³ A well-considered decision can only be made on the basis of a comprehensive description of the problem.⁶⁴ A problem-definition focused on conflict is then a precondition for norm development and decision making since here the process of problem-definition, aims to explicate the various viewpoints, concerns, and preferences of all parties. Without sufficient problem-definition, gaps in understanding the issues at stake will infect the solutions to the problem, as people begin to follow and believe the incomplete definition of the problem.⁶⁵

Second, debate in an ethos of controversies is built on confrontation among these various viewpoints, concerns, and preferences. Debate is structured around a confrontation that acknowledges differences in reasoning. This forces the various actors to explain, think through but to also reconsider their viewpoints. Viewpoints, concerns and preferences are no longer loose statements, as their reasons are explicated and can be discussed. Confrontation, consequently, should contribute to stimulating further norm development.

Nevertheless, in the end, decisions have to be made,⁶⁶ and it would be less complicated to make these decisions if everyone agreed. However, as the case studies made clear, issues such as animal biotechnology have a dimension of undecidability. People express fundamental disagreements, especially with respect to the moral impact of these technologies. An ethos of controversies should not be understood as a decision-making method. It is difficult to legitimate decisions on the basis of an articulation and discussion of the controversies that characterise an issue. However, these controversies should at least have a role in

⁶² B. Barry, *Political Argument* (University of California Press 1990) 240.

⁶³ J. Waldron, *Law and Disagreement* (Clarendon Press 1999) 111–112.

⁶⁴ B.C. van Beers et al., *Humane biotechnologie en recht* (Handelingen Ned. Juristen Vereniging, Kluwer 2009).

⁶⁵ J. Brand-Ballard, 'Consistency, Common Morality, and Reflective Equilibrium' (2003) 13(3) *Kennedy Institute of Ethics Journal* 255.

⁶⁶ B. Bovenkerk, *The Biotechnology Debate: Democracy in the Face of Intractable Disagreement* (Springer 2011) 144.

decision making. The third stage of an ethos of controversies is therefore awareness of the conflict that still exists after decisions have been made.

Of course, a remaining point of criticism could be that even with acknowledging that the moral conflict may still exist after decisions have been made, in the end, viewpoints are still excluded. Does an ethos of controversies may still involve a kind of window-dressing? I claim that it is not, as awareness of the conflict will contribute to acknowledging the political character of decisions. This acknowledgement in turn will contribute to stimulating a more open debate during further norm development. This should encourage flexibility toward decisions that have been made, as these decisions will be confronted by the conflicting viewpoints that still exist. Furthermore, even although a minority viewpoint is excluded from the current legal decision, its role in the moral debate is still there. This ensures minorities can keep and follow their own moral judgements.

The interplay between these three stages stimulates an ongoing process of norm development. Furthermore, by operating in these three stages, an ethos of controversies aims to do justice to individual opinions. As a result, it is likely that people will be more willing to accept and respect decisions, even where they may not reflect their own personal preferences and viewpoints.

E. CONCLUSION

The ethos of controversies responds to the failures of the dynamic character of the ideal-typical model of the interactive legislative approach. However, it could be asked how an ethos of controversies has to function in the regulatory practice? I consider there to be an important role for both legal institutions and advisory expert committees in this process.

If both legal institutions and ethics committees follow an ethos of controversies, ethics committees may feel less obliged or tempted to present a unanimous statement in order to increase their influence on decision making as we have seen in the Dutch case. By focusing on the conflictual dimension of decision making, ethics committees are not forced to come to moral judgment either legal judgment prematurely.

An ethos of controversies may, then, help to ensure that ethics committees' input is taken seriously, and thus that legal and moral norm development can still interact. By foregrounding conflict, ethics committees may contribute to increasing awareness of the political nature of decisions in which moral values play a role. As a result, ethics committees are more likely to acknowledge that decision making does not necessarily reflect the settlement of the moral conflict.

However, the institutionalisation of ethics committees in a context of legal politics still risks the domination of the legalistic context in practical thinking. We should not underestimate the tendency of law to fall back on legalistic frames of

thinking. Presuming a role for ethics committees in bridging the gap between legal norm development and moral debate may still involve only a temporary successful interaction between moral and legal norm development. Ethics committees may still fall back to a focus on developing legal standards. An additional institution or method that could assist ethics committees in stimulating moral norm development may therefore be required. Further research is required into how to structure the ethos of controversies in current legal practice. Moreover, further research is required into how to prevent legal domination of moral norm development.