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Vita Brevis, Ars Longa: In Memoriam Willem Witteveen

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Abstract

In this contribution we sketch the most important themes of Willem Witteveen's work. Rather than providing an academic overview we use one of his favourite metaphors, that of the house, to show the breadth of his interests and the approach that characterizes both his writings and his public achievements. Although most legal scholars will know of his work on legislation and the *Rechtsstaat*, his interest in legal theory, literature and art is equally significant to understand his contribution to legal scholarship. His work is unified by his rhetorical stance, which was always open to different voices of the present and the past.

Keywords

Rechtsstaat – legislation – rhetoric – law and literature – jurisprudence – rule of law

Introduction

On 17 July 2014, flight MH17 crashed. The Netherlands is in mourning. With one blow, 298 people perished, among them, Willem Witteveen, Professor of Legal Theory and Rhetoric and member of the Senate, his wife, Lidwien Heerkens, and their daughter, Marit Witteveen. With the sudden death of Willem, Dutch legal philosophy lost one of its most playful and independent minds. He

inspired us and many other scholars with his creativity and wide reading, not only through his written work, but also in conversation and discussion. It is difficult to write about him in the past tense. We wish to honour his memory by looking back on a few central themes of his work – not as a closure but as a way to keep it alive.¹

Willem was an escape artist. With humour and agility he managed to free himself of the restraints of conventions, bureaucratic procedures, and irritating rules that came across his path in politics, law, university administration, and scholarship. Increasingly he distanced himself from scholarship, at least from the serious scholarship as it is usually done, with its lengthy footnotes, precise analyses, and firm claims. He preferred to approach subjects as narratives; stories in which he let different voices be heard and confronted them to show their one-sidedness and limitations. One of his favourite sayings was '*Uit de botsing der meningen ontspringt de waarheid*', known in English as 'Truth springs from argument amongst friends', although more correctly translated as 'Truth springs from the clash of opinions'. He felt most at home in the realm of rhetoric. Willem tried to surpass existing frames and to form new connections: between scholarship and practice, law and literature, empirical and normative statements. Ever since his dissertation *De retoriek in het recht* (Rhetoric in Law), from 1988, he had been fascinated by figures of speech and literary devices in political, legal and scholarly language – irony, hyperbole, antithesis, repetition, metaphor, examples and stories – and he used them abundantly in his writing.² The metaphor was his favourite stylistic device. More than once he discussed and used Plato's metaphor of the Ship of State.³ He compared politics to a theatre.⁴ In *De denkbeeldige staat* (The Imaginary State) he adds a critical twist to this image: according to him, the political system has degenerated into a play in which one of its protagonists, the citizen, has lost its part and had become the audience, while the other players, politicians and administrators, have carried on with the performance undisturbed. To re-involve

1 Other Dutch commemorations include M Adams, E Hirsch Ballin and A Meeuwse, 'In memoriam: Willem Johannes Witteveen. Rotterdam 5 mei 1952 – Hrabove (Oekraïne) 17 juli 2014' (2014) 98(28) *Nederlands Juristenblad* 1931; F Jensma, 'Willem Witteveen was verdediger rechtsstaat', *NRC Handelsblad* (21 July 2014); M Sie Dhian Ho and P Kalma, 'In memoriam Willem Witteveen' (*Wiardi Beckman Stichting*, 23 July 2014) <www.wbs.nl/opinie/all/memoriam-willem-witteveen> accessed 28 April 2015.

2 WJ Witteveen, *De retoriek in het recht. Over retorica en interpretatie, staatsrecht en democratie* (PhD thesis Leiden, W.E.J. Tjeenk Willink 1988).

3 See, amongst others, M A P Bovens and WJ Witteveen (eds), *Het schip van staat. Beschouwingen over recht, staat en sturing* (W.E.J. Tjeenk Willink 1985).

4 WJ Witteveen, *Het theater van de politiek. Publieke retorica en de paspoortaffaire* (Amber 1992).

citizens in politics was part of his mission.⁵ The image of the house of the *Rechtsstaat* reappeared often in his writings and classes. ‘The *Rechtsstaat* is a house with many dwellings,’ he wrote in a study for the Wetenschappelijke Raad voor het Regeringsbeleid (WRR, Scientific Council for Government Policy).⁶ In the following, we will walk through some of the rooms of Willem’s thought to sketch the contours of the house he was constructing.

1 The Room of the Democratic *Rechtsstaat*

The first room in Willem’s house is one of the largest: the democratic *Rechtsstaat*. It is the study in which he was often to be found thinking, writing, and reading the classics: Plato, Montesquieu, Vico, Fuller, Arendt and many other great thinkers. It is an enormous room, almost a house in itself, with high walls and a sky-blue ceiling suggestive of infinity. It is also, to be honest, a bit of a mess. The bookshelves overflow. The imaginary furniture – a motley collection of usages, rules and principles – forms a haphazard pile. There is no unity, but this was part of its charm for Willem. He regarded the democratic *Rechtsstaat* as a collection of authoritative commonplaces (or *topoi*), which had become attached to the idea of the *Rechtsstaat* over time, and which sometimes collided and sometimes reinforced each other. Willem was continually rearranging the furniture. He regarded the project of the democratic *Rechtsstaat* as unfinished and unfinishable. In the WRR study he added an important component: the idea that the rule of law also applies to non-governmental organizations (‘rechtsstatelijkheid’, *Rechtsstaat* as a quality). It encompasses a range of quality criteria to stimulate the continuing democratization of society. Willem valued the participation of citizens and the publicity and transparency of public administration. For him, these criteria were not only binding on the government but also on other powerful organizations, like businesses, school boards or health care institutions.⁷ This insight remains relevant as organizations outside of government gain ever more power.

5 W J Witteveen, *De denkbeeldige staat. Voorstellingen van democratische vernieuwing* (Amsterdam University Press 2000).

6 W J Witteveen and B M J van Klink (with contributions of W. de Been and P. Blok), *De sociale rechtsstaat voorbij. Twee ontwerpen voor het huis van de rechtsstaat* (WRR Voorstudies en achtergronden V116, Sdu Uitgevers 2002) 42. See also W J Witteveen, ‘Inhabiting Legality. How the Dutch keep reconstructing their *Rechtsstaat*’ in S Taekema, A de Roo and C Elion-Valter (eds), *Understanding Dutch Law* (2nd edn, Eleven 2011) 101–129.

7 Witteveen and van Klink (n 7) 59.

2 The Room of Legislation

In the room of the democratic *Rechtsstaat* there is an alcove built especially for legislation. This alcove, one of Willem's favourite spots, has been extended and rebuilt over time so that it has become a room on its own. He had grown disappointed with the old furniture and replaced it with a more contemporary design. Willem resisted the idea of legislation as an instrument that can be put to work by authorities at will to steer the behaviour of citizens. He preferred to think of legislation as a tool for communication between government and citizens. A law should be effective for its envisaged addressees and, at the same time, offer points of orientation for those who need to interpret it. If it succeeds in respect to both, it has symbolic value.⁸ He believed legislation could only work if it is knowable for citizens, written in understandable language, and if it fits their practices and underlying values. Legislation is an interactive process in which citizens are involved to give meaning to legal norms, both in the phase of making it and in the phase of implementing and interpreting it.⁹ Willem was not an armchair philosopher. He left his room regularly to take his place as a prominent politician and senator for the Dutch Labour Party (PvdA), actively discussing the content of legislation on the basis of the quality criteria he had formulated. He dedicated himself to improving the position of less privileged groups in society and to protecting the freedom of citizens, in a time when government officials aim to limit freedom in the name of security.

3 The Room of Interactionism

In this room our tour also begins in front of the bookcase, where we find volumes by Fuller, Moore and Llewellyn. Lon Fuller was a legal philosopher whom Willem especially admired, not only because of his elegant parables (King Rex and The Case of the Speluncean Explorers), but even more because of his interactionist conception of law.¹⁰ Willem felt a close affinity with this conception

8 On the symbolic value of law, see W J Witteveen and B M J van Klink, 'Why Is Soft Law Really Law?' (1999) 14(3) *RegelMaat* 126; W J Witteveen, 'Turning to Communication in the Study of Legislation' in N Zeegers, W J Witteveen and B M J van Klink (eds), *Social and Symbolic Effects of Legislation under the Rule of Law* (The Edwin Mellen Press 2005).

9 W J Witteveen, 'Twee communicatiemodellen en het bereik van de wet' in W J Witteveen, H D Stout and M J Trappenburg (eds), *Het bereik van de wet* (W.E.J. Tjeenk Willink 1992).

10 W J Witteveen and W van der Burg (eds), *Rediscovering Fuller. Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999).

because interactionism sees law as a communicative phenomenon. Law is shaped in human interactions that give rise to reasonable expectations. Through interactionism, Willem was also able to include the social context of law. Law is a social practice, it consists of the activities of people, and as such cannot be grasped by a purely legal doctrinal approach. Willem appealed to Sally Falk Moore's anthropology of law: law only gains its full meaning in everyday practice, in what ordinary people do with law. American Legal Realism is an equally inspirational source in this regard because it pays attention to the links between law and society and investigates ways in which law can make a meaningful contribution to social problems. Following William Twining, he saw legal realism as a broad, polyphonous movement, and he took care to avoid the more extreme sceptical thinkers and positivists therein. His favourite Realist was Karl Llewellyn, who, in an eccentric style, developed a useful theory of legal reasoning by way of the Grand Style of judging.¹¹ For Willem an important component of the theory was 'situation sense', the consideration of a broad range of facts to enable a balanced judgment. Such a method suited him: a practical, non-deductive orientation, without a strict protocol, but attentive to context. In Willem's interactionism, law is determined by context and has a dynamic nature: it is continually shaped and reshaped in its application and by the meaning it is given among people.

The room of interactionism can also be seen as one in a series of spaces branching off a larger hall, the other spaces containing legal positivism and natural law, which Willem often combined with interactionism. The connection between the three easily fills a dining hall in the house, with a large table at which we find a plurality of thinkers all worth studying: the hall of perspectivism.

4 The Hall of Perspectivism

Willem described perspectivism as a stance or, in other words, as the switching of point of view in order to see the problem in a different light. A perspective, or strong position as he called it, is a source of arguments to approach a topic. Such perspectives have the power to persuade, but they are one-sided: for a balanced view it is necessary to use other perspectives as well. Willem's take on perspectivism is grounded in rhetoric: he regarded it as a method to find arguments both in research and in education. It is therefore the central idea of his introductory course book, *De geordende wereld van het recht* (The Ordered

¹¹ W J Witteveen, 'Realist Idealism and the Rule of Law' in W van der Burg and S Taekema (eds), *The Importance of Ideals* (Peter Lang 2004).

World of the Law).¹² Perspectivism gave him the opportunity to include the many voices he found interesting, without having to choose between Plato or Pettit, Derrida or Dewey, Vico or Voltaire, Machiavelli or Montesquieu, Hart or Hegel.¹³ Among these, he preferred the classic thinkers over the contemporary ones: for every theme he found inspiration in the philosophers of antiquity, humanism and the Enlightenment. Often he chose to highlight a lesser-known perspective, such as interactionism in legal theory rather than positivism or natural law, and republicanism in political theory rather than liberalism and communitarianism. He acknowledged the one-dimensional character of all these approaches, but did not reject them because of it. On the table there is truth, shaped like a diamond, but each person present can only see one facet, so we can never be sure what the diamond is in its totality.

5 The Liberal Arts Common Room

We arrive at the last room: Liberal Arts. One of Willem's achievements in education was the establishment of a Liberal Arts bachelor in Tilburg, in which his wide-ranging interests were translated into a curriculum, allowing him to introduce students to different traditions and great thinkers.¹⁴ Liberal Arts is often seen as a broad course in which all scientific disciplines have a place, but strictly speaking it is an even broader concept: the arts should also be part of the Liberal Arts curriculum. The combination of scholarship and art characterizes Willem: he painted and drew in his spare time and wrote poems during senate sessions, but also sought the literary in scholarship and the scholarly in literature. The field of law and literature was a source of inspiration: to investigate language in the law, to study imaginative literary adaptations of legal themes, and to find different forms in which to express thoughts about law.¹⁵

12 W J Witteveen, *De geordende wereld van het recht. Een inleiding* (Amsterdam University Press 1996).

13 He was involved in the translations of Montesquieu, *De l'esprit des lois* (Boom 2006) and of Hegel, *Grundlinien der Philosophie des Rechts* (Boom 2014). See also W J Witteveen, *De wet als kunstwerk* (Boom 2014).

14 The same broad approach led the guest lectures he gave at Venice International University in Venice. In the first year, together with Odile Heynders, Alkeline van Lenning and Sanne Taekema, he taught the courses 'Imagining Rhetoric' and 'Approaching Justice' from a philosophical, legal, literary and social-science perspective.

15 Willem wrote a number of essays, two under the pseudonym Willemijn Wibaut, in W J Witteveen and S Taekema (eds), *Verbeeldingsmacht. Wat juristen moeten lezen* (Boom Juridische uitgevers 2000), 95–99 and 205–208.

In Willem's work the playful sentences and lively images stood out. He had little patience for the conventions of legal scholarly writing and amused himself by ridiculing the excesses of bureaucratic and statutory language. During his last presence at the summer course 'Law, Language and Literature'¹⁶ he gave a talk about his new book, *De wet als kunstwerk* (The Law as a Work of Art), in which he spent at least five minutes giving a spirited declamation of the statutory definition of the cigarette.

Having come to the end of this unavoidably incomplete tour of the house of Willem's thought, we ask ourselves what was the source of his playfulness and love of the arts. How did he succeed in making poetry out of something as prosaic as legislation? Why did he abhor parochialism and try to unite what was seemingly incompatible? Why his fascination for the exterior of the interior? One might see it as a way to make life's seriousness bearable. The otherwise unbearable weight of existence asks to be compensated by lightness. At the same time, it is a rhetorical strategy to make the set convictions in academia and politics fluid again and to show the relativity and provisionality of our thought constructions. Although legal philosophy has lost an inspiring thinker, Willem has left a rich body of work and it is up to us to explore it in all its facets.

¹⁶ SSR summer course for the judiciary, 25–27 June 2014, Middelburg. Willem had been one of its lecturers since the first edition and also organized a session on bureaucracy, based on readings of Kafka and Matsier.