

# The Legal and Moral Dimensions of Solidarity

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## The ramifications of solidarity

Solidarity, briefly and therefore insufficiently defined as the individual and collective sense of mutual dependence and responsibility, is, it seems to me, essential to the possibility of an intercultural law. It is the intention of this essay to discuss primarily the sociological and socio-psychological phenomenon of solidarity in some details, and to refer to the possibility of intercultural law in a brief conclusion only.

Solidarity is, to begin with, a typically human virtue. Animals do in many cases possess the sense, or rather the instinct of mutual dependence, particularly in the presence of a threat from outside the herd. But the sense of mutual responsibility is a typically human virtue. It presupposes the ability of 'taking the attitude or role of the other', as George Herbert Mead formulated it, and then to look back from this position to one's own position in life. Charles H. Cooley even described man's identity as a 'looking-glass self'.<sup>1</sup> In other words, mutual responsibility as the core of solidarity is what has been called in sociology and social psychology a *symbolic interaction*. Solidarity is not a static state of affairs but a process of ongoing interaction within a cultural and societal framework of meanings, values and norms. Incidentally, almost all of our social actions are symbolic interactions, based upon values, norms and meanings which are embedded in language and in institutions.<sup>2</sup> Solidarity is thus part and parcel of the human condition.

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1 George Herbert Mead, *Mind, Self and Society*, C.W. Morris, (ed.), (The University of Chicago Press, Chicago, 1959, 11th ed., [1934]). Charles Horton Cooley, *Human Nature and the Social Order*, (New York, Schocken, 1962, [1932]). See also my *De theorie van het symbolisch interactionisme*, ('The Theory of Symbolic Interactionism'), at 68-86, (Boom, Amsterdam, 1973).

2 See Herbert Blumer, *Symbolic Interactionism: Perspective and Method*, (Englewood Cliffs, N.J., Prentice Hall, 1969). Also Zijderveld supra n. 1 at 73-86 on Mead, at 98-103 on Blumer.

Although he does not explicitly address the issue of solidarity, Donald Davidson's *charity principle* is heuristically relevant here.<sup>3</sup> It refers to the ancient philosophical problem of how we are able at all to understand what others are saying, feeling, thinking and doing. W.V. Quine, Davidson's main source of inspiration, addresses this problem in his theory of 'radical interpretation', that is, the interpretation of someone else's utterances without any prior knowledge of the speaker's meanings, as in the case of an anthropologist doing research among the natives of a non-Western tribe. In order to contact the natives the anthropologist must assume a world of meanings, and maybe even values and norms, which somehow can be translated in terms of his own world of meanings, values and norms. This is only possible if he charitably assume that there are similarities.<sup>4</sup>

According to Mapas, Davidson defines his principle of charity as 'the need to assume that most of a speaker's beliefs are true or that most of the speaker's beliefs are in agreement with our own'.<sup>5</sup> In a sense, Mapas adds, the charity principle entails 'an assumption of the rationality of the speaker', and expresses 'the presupposition of a common community and world'.<sup>6</sup> The latter refers to Davidson's 'holism' which actually draws him close to the symbolic interactionism of George Herbert Mead. The basic scientific discipline of Davidson's theory of interpretation is, as in the case of Mead, behaviouristic psychology, but unlike 'orthodox' behaviourists he views psychological elements, such as beliefs, sentiments, desires, etc. as being interconnected, not only within the individual, but also between interacting individuals, and between these individuals and their surrounding world (i.e. 'culture', 'society') as well. In this sense, Davidson's holism defines psychology as *social* psychology. In that case, charity is more than just an interpretive methodology. It contains a vision of human communication and, we may add, of human solidarity. Communication and solidarity are possible only, we may conclude, if we interact with others 'charitably', that is, with the fundamental assumption of a common world of meanings, values and norms. The charity principle is not just a methodological interpretive device, but also a *moral* view of human interactions and the society and culture within which they occur.<sup>7</sup> It is in fact a theory of solidarity.

3 Davidson asserts that he derived the 'charity principle' from publications of W.V. Quine who in his theory of 'radical interpretation' referred to Neil L. Wilson as the originator of 'the principle of charity'. Cf. W.V. Quine, *Ontological Relativity and Other Essays*, at 46, (Columbia University Press, New York, 1969). Donald Davidson explains his ideas about the charity principle in the essays published in *Inquiries into Truth and Interpretation*, (Clarendon Press, Oxford, 1991, 6th ed., [1984]). I made use of the very helpful volume by J.E. Mapas, *Donald Davidson and the Mirror of Meaning*, (Cambridge University Press, Cambridge, 1992).

4 Richard Grandy prefers to call this 'the principle of humanity'. Cf. Mapas, *supra* n. 3 at pp. 154ff.

5 Mapas, *supra* n. 3 at XIV.

6 *Ibid.*

7 Cf. Mapas, *supra* n. 3 at 185-191.

Solidarity is similar to sympathy. As the originally Greek word indicates, sympathy refers primarily to a feeling of identification with the suffering of others. Adam Smith translates the word by 'compassion', and defines it in an interactionist way:

'By the imagination we place ourselves in his situation, we conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him.'<sup>8</sup>

He gives an example too:

'Persons of delicate fibres and a weak constitution of body complain, that in looking on the sores and ulcers which are exposed by beggars in the streets, they are apt to feel an itching or uneasy sensation in the correspondent part of their own bodies.'<sup>9</sup>

Summing up he defines sympathy as 'our fellow-feeling with any passion whatever'.<sup>10</sup> However, as the Stoic Smith after all is, he adds to this view of human sympathy the idea that sympathetic feelings are secondary and derived sensations. The primary sensations are his very own:

'Every man feels his own pleasures and his own pains more sensibly than those of other people. The former are the original sensations; the latter the reflected or sympathetic images of those sensations. The former may be said to be the substance; the latter the shadow.'<sup>11</sup>

In the interactionist theories the dimension of power is generally neglected. Particularly in solidarity power plays a predominant role. It defines and often limits the range of options and actions of others, and it defines and broadens in consequence also one's own range of options and actions. Solidarity and power are crucial in the dynamics of a dominant group or class and the socio-economic minorities of a society fighting for emancipation. The inner solidarity of the working class in Marxism, for instance, was allegedly the precondition for its power. This holds true, of course, for any minority and its struggle for emancipation. Moreover, the opposition of the dominant group or class will strengthen the solidarity within the minority, although excessive use of force on the part of the dominant group may break the solidarity

8 Adam Smith, *The Theory of Moral Sentiments*, at 9, (Oxford University Press, Oxford, 1976, [1759]).

9 Smith, *supra* n. 8 at 10.

10 *Ibid.*

11 Smith, *supra* n. 8 at 219.

that exists and impede its organization. In that case it will turn inwards and create what in Nazi Germany once was called the 'inner emigration'. Or it will be expressed secretly in underground culture, as was the case with the *samizdat* in the former Soviet Union. Eventually the opposition may still be organized successfully and break the established power structure in a violent or peaceful revolution. An example of the latter has been the successful opposition of the Polish union *Solidarnosc* – *nomen est omen!*

Solidarity is essential to the democratic system. Although this was gradually forgotten because of its bureaucratically rational nature, the democratic *welfare state* was meant as a socio-economic system of solidarity. In his famous report *Social Insurance and Allied Services* of 1942 which presented a master plan for a socio-economically just society after the war, Lord Beveridge viewed the welfare state as a system of social insurance against 'Want, Disease, Ignorance, Squalor and Idleness'. He emphasized in particular the importance of voluntary associations, like the quite ancient 'friendly societies', as they function as a fertile soil for solidarity and as an impediment to state bureaucracy.<sup>12</sup> His warning was not heeded during the rapid development of welfare state arrangements in most Western-European societies. The state and its expanding bureaucracies became the dominant factor. In particular the sectors of health, education, and welfare rapidly bureaucratized and professionalized, causing an intensive rationalization and neutralization of solidarity. The relative high taxation of the welfare state, for example, was legitimized as distributive justice and as solidarity of the affluent classes with those who for whatever reason were in need of state succour. Naturally this moral dimension vanished rapidly. Taxation was increasingly experienced as a burden instead of a contribution to justice and solidarity.

A crucial element of solidarity is the phenomenon of trust. One must be able to rely on the honesty of others in order to experience a sense of mutual solidarity. There is, one should realize, a difference between functional *confidence* and moral *trust*. I have confidence in the technical expertise of my garage-proprietor or in the medical expertise of my general practitioner. This is, as it were, a purely functional thing. However, if they cheat with the bills, or otherwise deceive me, I can no longer trust them. Trust is a moral phenomenon. A breach of confidence after a mistake or fault, can be mended, but a breach of trust is the end of the relationship and the end of mutual solidarity.

When trust declines, people will seek refuge in the law. Conflicts are no longer solved bilaterally but referred to the court. 'See you in court' is the

12 Cf. my *The Waning of the Welfare State: The End of Comprehensive State Succor*, at 15-45 ('The Rationalization of Care'), (Transaction Publishers, New Brunswick, N.J., 1999).

final statement in most aborted conflict resolutions. Increased juridification is one of the main indicators of a decline of solidarity and trust.

The question then is whom do we trust in contemporary, multicultural society? Can minorities trust the majority and vice versa? Can minorities trust each other? If not, solidarity which is one of the main pillars of democracy, will diminish, if not evaporate. A penetrating juridification will usually follow suit. In a relatively short period of time most Western-European societies have become multicultural and multi-ethnic, and the immigration of Turks and Moroccans in particular have introduced the Islam as a forceful, and to many a strange and new religion. It is often experienced as a threatening religion due to Islamist terrorism. Unlike the threats of the Cold War between the Western world with its NATO and the Soviet imperium with its Warsaw Pact, Islamist terrorism is largely invisible, until the terrorists strike that is. Islamist terrorists are loosely organized in hard to discover networks which often communicate with each other on the internet. Their beliefs and doctrines may be pre-modern, their *modi operandi* are modern, if not postmodern. Terror, fear, is what they intend to reap.

Fear is, of course, never a fertile soil for trust and solidarity. Generalizations, such as the fallacious opinion that 'the' Islam is inherently and essentially undemocratic and alien to the liberal way of life which we in the West have inherited from the Renaissance and the Enlightenment, contribute to a social and political climate in which neither trust nor solidarity can flourish.

### Conceptual distinctions

Definitions and conceptual distinctions are usually rather boring, yet they are necessary. Particularly in discussions about socio-cultural and political issues one ought to define one's concepts as clearly as possible and disentangle conceptual knots by means of conceptual distinctions, lest these debates peter out in fruitless misunderstandings, or end up in open conflicts. Davidson's principle of charity as a principle of rationality is of no avail, if not at least the concepts used are clear and mutually understood.

*Multiculturality* and *legal plurality*, to begin with, ought to be distinguished from *multiculturalism* and *legal pluralism*. Concepts ending with -ity (multiculturality, plurality, legality, urbanity, nationality, relativity, etc.) refer to facts, to actual, and in a sense 'objective' and 'non-normative' state of affairs. It is a sociological fact that Dutch society transformed since roughly the 1960s and 1970s into a multi-ethnic and multicultural society. Rejecting multi-ethnicity and multiculturalism as sociological facts is by now as silly as objecting to the natural-scientific fact of gravity.

However, concepts with the same root, yet ending with -ism (multiculturalism, pluralism, legalism, urbanism, nationalism, relativism, etc.) refer to ide-

ologies, to subjectively or intersubjectively held 'normative', political opinions. An ideology is a belief system which transcends facts, distorts them if necessary, and weaves normative, moral theories and opinions around them. An ideology may even invent 'facts', such as race in the case of racism, or the proletariat in the case of historical materialism. Multiculturalism then is the relativistic opinion which claims that the various (ethnic) cultures of the multicultural society should be allowed to realize their particular values, and to live according to their particular norms, not hindered by the dominant culture of the nation, if alone because such a dominant culture does allegedly no longer exist in an allegedly postmodern society. Now, if it is rather silly to reject or embrace multiculturalism, it is, of course, quite feasible to reject or embrace multiculturalism. It is an ideology which one can believe in and adhere to, or which one rejects philosophically and politically.

The same argument holds true for the concept of legal pluralism. In a fully modernized, complex society legal plurality is the actual, sociologically verifiable state of affairs. It is, to begin with, simply demonstrated by the various specializations in the legal discipline. Modern law in action too is characterized by a high degree of specialization. Strictly speaking then legal pluralism is the ideological and thus normative transformation of this fact of plurality. It is the opinion that law in theory and in action ought to be pluralistic, i.e. highly specialized and in that sense compartmentalized. However, one can also hold to the opposite opinion and given modern law's plurality rather search for a more unified and co-ordinated legal system. Specialization and compartmentalization, it could be argued, cause the (often unintended) bureaucratization and juridification of organizations and individual lives – i.e. more law, less legitimacy.

There is, of course, a connection between multiculturalism and legal pluralism. If one holds to the former, one will probably agree with the latter and favour one or the other form of multicultural law. This would, for instance, be the case when under certain conditions Islamic Sharia law would obtain a legalized position within a Western, democratic system of law. I return to this issue at the end of this essay.

Within the debate on multiculturalism and multiculturalism it is, I think, essential to further distinguish conceptually between *assimilation* and *integration*. This seems to be obvious but the two are often blurred, particularly in the political arena. Assimilation aims at the melting-pot model, whereas integration rather focuses on the mosaic model. If one demands ethnic minorities in a multicultural society to assimilate to the allegedly dominant culture of the nation, one believes in the possibility of (or demands in an authoritarian manner) a general neutralization of all ethnic and cultural differences. In the United States of America, as is well known, the idea of a melting pot was strongly favoured by the White Anglo-Saxon Protestants. A

similar idea lurks in the background of the debates on the multicultural society in the Netherlands, certainly on the part of the right-wing opponents of multiculturalism. Recently one of them proposed to add to the constitution the phrase that Dutch society is based upon Jewish, Christian and Humanist values. They constitute the *Leitkultur*, the leading, dominant culture to which Dutch citizens of whatever ethnic and cultural background will have to assimilate.

Integration differs from assimilation. It demands from all inhabitants to participate as citizens, as *citoyens* who have not just rights but also responsibilities, who do command over an active and passive knowledge of the Dutch language and through education and labour market possibilities, contribute to the Dutch economy. The dominant culture is one of socio-economic and political participation. Within this constitutionally assured framework, ethnic groups may stick to their cultural, and particularly religious background and traditions. The model is not the neutralized melting pot but the multi-coloured mosaic consisting of many differently coloured little or larger stones which together yet constitute a coherent, albeit ever changing and developing *Gestalt*.

Finally, although this may well be superfluous in the present context, one ought to distinguish *legality* and *legitimacy*. In a democratic society which puts prime emphasis upon the rule of law one should realize that legality as the fact that laws are the foundation of the social order ought to be believed in, accepted, trusted in order for the social order to be a moral order consisting of values, norms and meanings. Human rights in particular supersede, and if necessary even overrule, the laws of a particular society. Hitler's regime, to give an extreme example, was initially (in 1933) legal, but it became obvious very soon that the tyranny he erected after his successful election as chancellor was utterly illegitimate. In other words, a social order based on the rule of law ought to be a moral order couched in legitimacy.

### **Society as a moral order**

Society can be viewed – and has in the past been viewed by functionalist sociologists – as a system consisting of scores of sub-systems which constitute a functional order. The comparison with the human body is then, of course, close at hand. Like the rather different organs of the body, each having its own, specific function, which co-operate in order to maintain the total bodily system, the organizations or institutions in society, it is argued, possess their own, specialized functions, yet contribute together to the maintenance and continuity of the social system as a whole. The founder of French sociology, Emile Durkheim, believed that this state of affairs was typical of a modernized society, ruled by an intense social division of labour. It

has led, he claimed in addition, to a specific type of solidarity, which he called 'organic solidarity' and a specific type of law, namely 'restitutive' or 'cooperative law'.

Durkheim had a functionalist conception of society, but unlike most functionalists he also viewed society as a moral order. In traditional societies, he argued, there exist only rudimentary forms of division of labour. The members of the tribe or clan perform tasks which are passed on from generation to generation, sanctified by a usually magically conceived tradition. These tasks are performed in a taken-for-granted, non-voluntaristic, mechanical way. The solidarity involved is, as Durkheim called it, a 'mechanical solidarity' which because of the modern connotation of 'mechanical' should rather be called 'traditional solidarity'. A dominant trait of this type of solidarity is the fact that 'like' prefers to co-operate with 'like'. Law in such a society is rather repressive and at the same time expiatory. Religion plays a dominant role in it.

However, Durkheim continues, when the division of labour in a society increases, as happened in Western societies ever since the Industrial Revolution, solidarity and law will be transformed fundamentally. The various sub-systems, performing their own specific and different functions, will have to co-operate in order to maintain a basic measure of order and coherence. 'Unlike' will have to co-operate with 'unlike' in a rational-professional rather than religious-traditional manner. Solidarity now changes into an 'organic solidarity' which better be called a 'functional solidarity'. And law changes also from being repressive and expiatory into being restitutive and cooperative. In traditional societies based upon 'mechanical (traditional) solidarity' law was predominantly penal law, whereas in modern societies, characterized by a radical and ever expanding specialization of tasks and functions, based upon 'organic (functional) solidarity' the centre of law will rather be administrative law, procedural law and contract law.<sup>13</sup>

A similar evolutionary theory of law, society and morality present Philippe Nonet and Philip Selznick in a brief, insightful book.<sup>14</sup> In their 'developmental model' both authors distinguish three stages of social and legal evolution, each of which contain the seeds of the next stage: repressive law, autonomous law and responsive law. *Repressive law* is based upon authoritarian, repressive power which does not care about the interests of the subjects whose position in society is very vulnerable. Its main characteristics are (1) the unity of state and law, i.e. there is no separation of powers; (2) the 'offi-

13 Emile Durkheim, *De la division du travail social*, at 99-102, 205-209, (Presses Universitaires de France, Paris, 1960, 7th ed., [1893]).

14 Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law*, (Harper Colophon Books, Harper&Row Publishers, New York, 1978).



cial perspective' is dominant, i.e. the interests of those in power rule; (3) there are specialized control bodies, such as the 'state police', which carry discretionary competencies; (4) there is a distinct class justice; (5) there is a legalistic moralism with emphasis upon punishment by law; it also is a typically low risk vision of law. But the germ of the next stage is present in repressive law, because the subjects are apathetic, while the administration and control institutions hold a discretionary power in an autonomous manner.

The characteristics of *autonomous law* are (1) there is the 'rule of law' to which not only the subjects but also those in power are subjected: nobody is above the law, there are strict rules and there is accountability which insures the existence of law and order; (2) therefore there is a strong focus upon rules and procedures: the value of fairness and the bureaucratic ethos of precedents supersede substantive justice: 'due process'; (3) this type of law is independent vis-à-vis the state, i.e. procedurally autonomous, yet politically subordinated, since legal institutions have to abstain from any formation of public policy; the courts thus depoliticize conflicts; (4) there is a strong focus on the courts and the legal rules which insure legality and cause the existence of legalism; (5) autonomous law has a low risk vision of law. Here too there is the germ of the next stage, because the rule of law restricts the power of the state, while the duties of citizens are defined which promotes a spirit of critique of the legalistic rule of law and the desire for a more responsive law.

The dominant features of *responsive law* are (1) it is a high risk vision of law, because (2) there is much less emphasis upon rules and procedures, and much more focus upon substantive justice with regard to social problems and issues; (3) legal institutions are viewed and treated as dynamic instruments for organizing or changing society; it is, unlike autonomous law, not politically value-free but explicitly normative and evaluative; (4) the focus is on societal goals, much less on procedural means; the search is for a legitimate social order which is not imposed on subjects but negotiated with responsible citizens; they are therefore not subjected to the law, but stimulated and facilitated in civic competence; (5) if autonomous law is highly bureaucratic, responsive law is characterized by a post-bureaucratic ethos.

What is the germ of a next stage? Nonet and Selznick come up with a remarkable observation. Responsive law (obviously this concept is inspired by the events of 1968 and the democratization of Western institutions afterwards) must still function in an autonomous setting. There is the possibility of autonomous courts which are called upon to solve social conflicts and do so with political and normative judgments. This would remind one, Nonet and Selznick claim, of the khadi-justice of repressive law. In that case, the third stage would return to the first by means of the second. This is indeed a high-risk vision.

Arguably the conception of society as a moral order is rather pleonastic. Human interactions, which are in a sense the stuff societies are made of, are always embedded in and regulated by values and norms. Morality is extended between good and evil, and there is, apart from the biological functions of the body, very little we do, feel, think and say which is not moral in the sense of being predicated in terms of good and evil, morally positive and morally negative. This is why Durkheim and others have called sociology a moral science. Not in the sense that sociologists ought to moralize about society, but in the sense that the focus of sociologists is on human interactions which are only understandable because they are embedded in values and norms. The substantial definition of what is good and what is evil will differ from society to society, and from time to time. Yet, the notion that there is goodness and evil is universal. In Kant's philosophy they are therefore called 'transcendental', i.e. a priori, prior to empirical experience.<sup>15</sup>

Ideally, there are three different worldviews regarding the phenomenon of morality: *moralism*, *amoralism* and *immoralism*. As three -isms they constitute three different types of ethos. They also pertain to three different societal structures and contain three different types of solidarity.<sup>16</sup> The ethos of *moralism* is characterized by a clearly distinguishable set of values, norms and meanings which is accepted without much relativising reflection, and accepted as God-given, or provided by Nature or Reason. It is a rather optimistic and activistic type of ethos, since it is believed firmly that the world can be improved by joint actions. The sense of community is well developed and firmly based upon a taken for granted mutual trust and loyalty. The belief in authority and strong leadership is dominant, while individualism is well developed although individuals are held accountable for their actions. There is a strong social control within distinct group boundaries which separates people in terms of insiders and outsiders. There is in the moralist ethos a tendency towards a double morality. Examples of such an ethos are the American Creed or the 'Protestant Work Ethic', and more recently the fundamentalist Islamism as in the Islamic Republic of Iran.<sup>17</sup> The ethos of *amoralism* is very different. Pessimism, fatalism and lethargy, caused by natural disasters, autocratic and corrupt local elites, and economic misery, reign predominantly. It is hard to organize people for the

15 This is not the place to elaborate on this point which was at the center of the neo-Kantian philosophy of values of Heinrich Rickert. See my recent monograph *Rickert's Relevance: The Ontological Nature and Epistemological Functions of Values*, (Brill Academic Publishers, Leiden, 2006).

16 In what follows I make use of an earlier publication of mine: *The Waning of the Welfare State*, supra n. 12 at 76-84.

17 Another quite different example is the ethos of *iemoto* in Japan. Cf. Francis L.K. Hsu, *Iemoto: the Heart of Japan*, (John Wiley, New York, 1975). Cf. my *The Waning of the Welfare State*, supra n. 12 at 77-79.

improvement of their fate, since they acquiesce in the existing structures of power and authority. They often retreat into what has been aptly called 'amoral familism'.<sup>18</sup> There is a general distrust at work here, in particular with regard to individuals who do take initiatives, as one assumes they are motivated by ambitious impulses and personal gains only. There is generally no sense of public responsibility, and the social control is exerted in an intimidating and often violent fashion by single powerful individuals and terrorizing groups, as in the case of the mafia on Sicily.<sup>19</sup> The sources of personal failure are sought in God, the gods, nature, or fate. Examples of this type of amoralism can be found in the many different cases of extreme poverty and destitution. 'People living on the very edge of subsistence,' a British historian once wrote, 'have (...) precious little interest in morality.'<sup>20</sup> In fact, in such a situation people cannot afford the luxury of moralism, let alone of immorality.

The ethos of *immorality* bears the following characteristics. Traditional values and norms (tradition in general) are permanently open to question, if not forthwith rejected. Emphasis is placed upon personality, spontaneity, freedom, experience, expression, rather than on diligence, production, work. There is a weak link between rights and duties, while trust and loyalty are generally treated with suspicion since they are viewed as rather old-fashioned values hampering individual experiences and self-expressions. It is an ethos of consumption, since not only goods and services, but also feelings, ideas, events, and often even partners and friends are being consumed, and summarily dropped after they eventually fail to satisfy the needs of the individual. Moreover, in this ethos style supersedes content, and the emphasis is more upon emotions than upon rationality.

It stands to reason that involvement, if at all existent, is an emotional and always temporary *engagement*, i.e. not a deeply felt commitment to a cause. Immoralists are easy to be mobilized for a demonstration as long as the event is emotionally gratifying and fun to participate in. But it is hard to bind them to a party and to party control. Authority is rated low and equality is usually defined in terms of an equality of results rather than of opportunities. However, since unequal results are unavoidable, even in the most prosperous of societies, dissatisfaction and even resentment will be dominant emotions. They are, of course, reinforced by incessantly rising expectations. Finally, the notion of a public realm for which the individual bears

18 Edward C. Banfield, *The Moral Basis of a Backward Society*, at 85-104, (The Free Press, New York, 1965, [1958]). Poor peasants, for instance, are very hard to organize for the betterment of their socio-economic position. See G. Huizer, *Peasant Rebellion in Latin America*, (Penguin, London, 1979, [1973]).

19 Cf. Anton Blok, *The Mafia of a Sicilian Village, 1860-1960*, (Harper Torchbooks, New York, 1975).

20 Geoffrey Barraclough, *Turning Points in World History*, at 41 (Thames and Hudson, London, 1979, [1977]).

responsibility is weakly developed, if at all existent. The immoralist sees the society, the state, the bureaucracies as the realms of inauthenticity and alienation which causes the emergence and gradual prevalence of a pervasive anti-institutional mood.

Searching for examples, we could go back in history and refer to many romantics in the 19th century who put up a fight against the bourgeois, moralist ethos of their days. Nietzsche and Oscar Wilde come to the mind, of course, immediately. According to most so-called postmodernists there are as far as morality is concerned no legitimate and valid borders and barriers anymore which are being dictated in a top-down manner and gyrate around a single, traditional centre. After God and the related religious values and virtues have been declared 'dead' first, the end of the Human Subject, the Human Ratio and the bourgeois values and norms is announced next – not solemnly, of course, but with an ironic grin.

In a society characterized by the amoralist type of ethos, trust and solidarity will be restricted to the family or the clan. Beyond these in-groups distrust and maybe even hatred and fear will reign. In fact, powerful organizations like the mafia will abuse such feelings to their own benefit. In the immoralist type of ethos trust and solidarity may be present and at work, but they must satisfy private feelings and enable private expressions. The aims of this trust and solidarity, as in the case of charity, are usually far remote from the direct social environment. In this way, responsibility and direct involvement can be avoided. Most immoralists love humanity, but should not be bothered by the troubles and difficulties of individual persons in their direct environment. The moralist type of ethos, on the other hand, is an 'ethos of responsibility', of which trust and solidarity are crucial components. Charity, for instance, is direct, concrete, and diligently administered. It is not the doing-good of the chequebook variety, but the involved solidarity of a Mother Theresa in Calcutta.<sup>21</sup>

21 Richard Rorty goes a step further in this concreteness. He claims that truly liberal solidarity focuses primarily on our 'own people', on the ethnos we belong to: 'our sense of solidarity is strongest when those with whom solidarity is expressed are thought of as "one of us", where "us" means something smaller and more local than the human race.' Richard Rorty, *Contingency, irony, and solidarity*, at 191, (Cambridge University Press, Cambridge, 1991, [1989]). According to Rorty solidarity is compassion with the pain and suffering of people we can identify with: 'we are under no obligation other than the "we-intentions" of the communities with which we identify.' (at 198). He calls this 'ethnocentrism' but it is, he adds, an ethnocentrism which is dedicated 'to creating an ever larger and more variegated ethnos.' Idem. The anthropologist Clifford Geertz criticized this ethnocentrism. Rorty's repartee was that he rejected the fashionable anti-ethnocentrism of liberal intellectuals: 'We have become so open-minded that our brains have fallen out.' He is, he claims, 'an anti-anti-ethnocentrist' which allegedly is not the same as an ethnocentrist. Richard Rorty, 'On Ethnocentrism: A Reply to Clifford Geertz', in: *Objectivity, Relativism, and Truth. Philosophical Papers*, vol. I, at 203ff. (Cambridge University Press, Cambridge 1991).

In a society which relatively recently transformed into a multi-ethnic and multi-cultural system, there will be scores of tensions between the traditional solidarity and moralistic ethos of non-Western immigrants on the one hand, and the immoralistic ethos and modern-functional solidarity of the original population on the other hand. One may expect though that within the succeeding generations of the initial immigrants this moralistic ethos and this traditional solidarity will not vanish but rather neutralize and lose their sharp, so-called 'fundamentalist' edges. Only when they are marginalized by the majority which calls for unconditional assimilation and demands the abandonment of ethnic traditions, ceremonies, and lifestyles, will an ideological return to ways of the ancestors emerge as an attractive option. Solidarity as the individual and collective sense of mutual dependence and responsibility will then come to a halt, much to the detriment of society as a whole.

I have called society-as-a-whole a social system. This should, however, not be read in a functionalist sense. In fact, society is first and foremost a moral order, based upon values, norms and meanings, consisting of symbolic interactions within institutional settings. The three main moral factors in a society are language, religion and law. They are, in a sense, the main carriers of values, norms and meanings which render man's thoughts, feelings and (inter)actions not only understandable but also morally accountable. Let us briefly focus our attention on these three factors.

### **Language and the moral order**

When a small, say three-year-old child begins to speak, he discovers that the world around him, which was an undifferentiated mass before, is a structured reality, that there are to begin with persons around him who are related to each other and who perform certain predesigned roles. A three year old girl knows who her father, who her mother, and who her brother is. When asked who her father, mother and brother are, she will point at them without much reflection. Reflection about the people around her starts, when she is asked who the father of her mother is. She will point at her own father, but hesitantly so. It is then quite a discovery to be told that her grandfather and grandmother are the father and mother of her mother, and that the other grandparents who also visit her family regularly, are the mother and father of her father. A next lesson in kinship relations is the fact that both her parents have a brother and sister also, called uncle and aunt. If they have children, they are nephews and nieces. Emotionally and socially her ties with them are not as strong as the ties that bind her to her own sister and brother. But she will discover soon that these ties are different and more intense than those with her kindergarten chums. The important thing is that to the

young child these familial relations are not functional and rational, but emotional and in a sense even moral, since they are intrinsically valuable.

In a sense the nuclear family is a mini-society in which the child, growing up, learns and practices the basic roles and rules of social life. He learns that there are two sexes, that there are different generations (grandparents, parents, children), that one has to operate within a group where one cannot at liberty realize one's own will and desire, but has to take into account the interests and feelings of the other members of the family. Conflicts and conflict solving, so prominently present in society at large, is also learned and practiced in the nuclear family. Needless to add that a disintegration of the nuclear family can have disastrous effect on a society at large.

In all this, language, in particular speech, plays a dominant role.<sup>22</sup> It does so not only in a functional way, facilitating the proper functioning of the child in later life, but also, and predominantly so, in a moral manner. Language is in a sense the storehouse of values and norms, pointing out the rights and wrongs of our thoughts and feelings, actions and interactions. The young child learns through his participation in the language games around him the do's and don'ts of social life. Not just the functional do's and don'ts, like 'don't play with fire', or 'watch the traffic in the street', but above all the moral do's and don'ts, like 'don't pull the cat's tail, that hurts the animal', 'look me in the face when I'm talking to you'.<sup>23</sup> These are admittedly petty examples, but morality begins at this very basic, linguistic level, not at the abstract level of moral philosophy and moral theology, which list and discuss such abstract moral values as 'honesty', 'chastity', 'modesty', 'loyalty', etc.

As to solidarity, the child learns very early in life, that is when he begins to speak, the difference between 'I' and 'you', and soon next between 'we' and 'they'. Piaget claims that young children are rather ego-centric and that their cognitive capacity is not much influenced by the social, adult environment. Instead, as to the cognition of a young child he assumes in a typically structuralist approach 'a structure more or less independent of external pressures'.<sup>24</sup> Piaget's celebrated research focuses mainly on the cognitive capacities of young children, much less on their moral capabilities. Yet, it is safe to assume that he views the young child's 'ego-centrism' also as a moral characteristic. The philosopher John Dewey has a different opinion. He takes a

22 The 'classic' study on the speech of children is Jean Piaget, *The Language and Thought of the Child*, transl. by M. Gabain, (Meridian Books, Cleveland, Ohio, 1969, 14th ed., [1955]).

23 This is not the place to discuss Quine's theory of linguistic individuation, although it does bear on the present discussion. Quine argues that during infancy the child learns to distinguish singular, individual and general objects: this and that apple vis-à-vis apples, or my mother vis-à-vis mothers. With this individuation the child learns contextuality. Quine, *supra* n. 3, at 9ff. It is by this individuality and contextuality, we may add, that the child acquires notions about do's and don'ts. They are the preconditions of morality.

24 Jean Piaget, *The Child's Conception of the World*, transl. by J. and A. Tomlinson, at 30, (Littlefield, Adams, Totowa, NJ 1969, [1929]).

crying baby as an example. At first this crying is a series of meaningless, physiologically conditioned screams, but after the gratifying reactions of the mother the baby's screams change into signals calling for the mother's attention and her gratifying reactions. In a sense the baby puts himself in a situation in which not just he but also his mother participates: 'He puts himself at the standpoint of a situation in which two parties share. This is the essential peculiarity of language, or signs.'<sup>25</sup> In other words, there is no ego-centrism at work, but rather the participation in an interaction, of which language is an essential component.

This idea is also at the centre of George Herbert Mead's theory of meaningful interaction. In our daily interactions, in particular in our discussions and other linguistic exchanges, signals become meaningful symbols the moment I assume the attitude of the other. For example, in order to make sense to his students, a teacher should internalize the role of a student. While addressing the students in front of him, he addresses also himself in the internalized role of a student. Likewise, if they really participate in the teaching-learning interaction students will unconsciously internalize the role of a teacher and not only listen to the teacher in front of the classroom but at the same time to the teacher-within-them. Meaningful (symbolic) interaction depends on this (unconscious) process of taking-the-role-of -the-other. Mead then went on by saying that in society at large we use to internalize the attitudes or role of generalized others: the teacher, the police officer, the bureaucrat, the politician, etc. This we have learned in a long process of socialization, and it helped us to function in a society which we understand cognitively and morally.<sup>26</sup>

As to the latter, the sociologist C. Wright Mills drew the conclusion that the generalized others in our daily interactions which are as it were deposited in our language, constitute an ethos, a dominant system of values and norms which tells us how to think, act and feel:

'By acquiring the categories of a language, we acquire the structured "ways" of a group, and along with the language, the value-implications of those "ways".'<sup>27</sup> The conclusion is that language is at the very heart of society as a moral order.

<sup>25</sup> John Dewey, *Experience and Nature*, at 178, (Dover Press, New York, 1958). See also at 179.

<sup>26</sup> Mead, *supra* n. 1, at 42-51, and *passim*. For Mead's brief, rather normative treatment of morality, cf. *ibid.*, at 379-389 ('Fragments on Ethics'). Once more, Mead's ideas converge strongly with Donald Davidson's previously discussed principle of charity. In fact, it is curious that Davidson had obviously no knowledge of Mead's major publications.

<sup>27</sup> C. Wright Mills, 'Language, Logic, and Culture', in: C. Wright Mills, *Power, Politics, and People*, at 433, (Ballantine Books, New York, 1963). Also: 'Along with language, we acquire a set of social norms and values. A vocabulary is not merely a string of words; immanent with it are social textures – institutional and political coordinates. Back of a vocabulary lie sets of collective action.' *Ibid.* See for a discussion of language within symbolic interactionism my monograph on this socio-psychological and sociological school, *supra* n. 1, at 124-132.

## Religion and the moral order

Taking the role or attitude of the other in our daily interactions may well be the origin of religion. After all, the generalized others we have internalized after our birth in a never ending process of socialization, exert, as C. Wright Mills claimed correctly, a measure of social control over our thoughts, feelings and actions. The roles of these generalized others constitute in fact what we have been used to call 'society'. Through language we learn what society expects from us, what the ways and manners are by which we operate, think, and feel. We are, of course, not mere puppets on the strings of society, we do have a free will and we are able to say 'no' when we believe we should.<sup>28</sup> That is precisely the component of our Self which Mead has called 'the I' – it is the force in us which internalizes the roles of others in our interactions, the factor which may cause us to become an heretic or a deviant, internalizing quite different roles and quite different meanings and symbols. Yet, we still do need generalized others. Our Self is, as the earlier quoted Cooley remarked, a 'looking-glass-Self'.

Emile Durkheim came to a similar conclusion, when he stated that man is in fact a *homo duplex*, 'un être individuel' (the proper object of psychology), yet also 'un être social' (the proper object of sociology). The social being, he claims, represents in us a higher intellectual and moral order, which we may call 'la société'.<sup>29</sup> The roles we play have been defined by him as 'collective ways of acting, thinking and feeling' which constitute the proper domain of sociology.<sup>30</sup> They are treated by the sociologist as 'objective facts', called 'institutions', which exert a strong social control over the individual. Now, according to Durkheim the social facts, or institutions, constitute society, and it is Society in its most generalized, well-nigh metaphysical appearance, which religion calls God, or the gods, or divinity. Society as a moral order is, in Durkheim's sociology, also a religious order. In God, or the gods, or divinity human beings worship in fact Society.<sup>31</sup>

Durkheim has been criticized for this 'sociologism', i.e. the well-nigh total immersion of religion in a rather static vision of what 'society' is all about. The German sociologist of religion Thomas Luckmann takes a rather diffe-

28 This is, of course, a formidable dilemma in sociology which was elegantly discussed by Ralph Dahrendorf, *Homo Sociologicus. Ein Versuch zur Geschichte, Bedeutung und Kritik der Kategorie der sozialen Rolle*, ('Homo Sociologicus. An Essay on the History, Relevance, and Critique of the Category of the Social Role'), (Westdeutscher Verlag, Köln, Opladen, 1964, 4th enlarged ed., [1958]).

29 Emile Durkheim, *Les formes élémentaires de la vie religieuse*, ('The Elementary Forms of Religious Life'), at 23, (Presses Universitaires de France, Paris, 1912).

30 Emile Durkheim, *Les règles de la méthode sociologique*, at XXII, (Presses Universitaires de France, Paris, 1947, 10th ed., [1895]).

31 See Durkheim, *supra* n. 29 at 1-28 ('Introduction') and at 593-638 ('Conclusion').



rent position with regard to the relationship of religion and society. He does not start from the Durkheimian institutional position, but rather from the Meadean interactionist approach. In the symbolic interactions which in fact constitute what is being called 'society', people transcend their individuality, since they take the role of the other, and next internalize that role as part of their Self. This transcendence is, according to Luckmann, the origin of religious transcendence, in fact it is an 'invisible religion' which exists and operates prior to the institutionalized, objective, visible religion of various religious organizations with their rituals, ceremonies, professionals, hierarchies, etc. The sociology of religion, according to Luckmann, focuses usually too one-sidedly on the institutionalized and organized forms of religion, but should look at the 'invisible religion' prior to and as it were behind these institutional facades.<sup>32</sup>

Both sociological theories of religion can be and have been criticized for the inherent dissolving of religion in the phenomenon of 'society' – seen either as the totality of institutions, or as the totality of symbolic interactions. Yet, they do drive home the main point that religion is as constitutive of the moral order, as language is. In fact, if a dictatorial system robs people of their language and/or religion, it not only attacks their collective identity, but also undermines their moral order. The reaction may well be for religion to go 'underground' and to be organized as a clandestine church, where the inner solidarity may well be strengthened, waiting for the political possibility to come out in the open and occupy a legitimate position in society.

Since we defined solidarity in terms of symbolic interactions, Luckmann's theory of the invisible religion would lead to the conclusion that solidarity too is in its essence and origin an inherently anthropological-religious phenomenon.

## Law and the moral order

Positivism, that is the scientific ideology which claims that reality (either 'nature' or 'culture') ought to be investigated and theoretically described and analyzed in a natural-scientific, value-free ('objective') manner, has been rather predominant in the legal discipline. The classic formulation of legal positivism has been Hans Kelsen's *reine Rechtslehre* ('pure doctrine of law') which claimed that law-in-theory ought to abstain from normative, moral value-judgments. As to law-in-action Kelsen believes that a legal system is legitimate, if it is the result of state regulated due processes, instituted by a democratically elected parliament. The consequence of this argument is that

<sup>32</sup> Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society*, (Macmillan, New York, 1967).

the laws of nazi Germany were legitimate since Hitler and his party came to power by means of democratic elections. The problem of this position is, of course, that the moral value of justice is disregarded. Or, it is rather defined by Kelsen in an instrumental manner: justice refers in his view to 'the correct social order; an order which accomplishes its aim completely because it satisfies everybody.'<sup>33</sup> The *reine Rechtslehre* wants to represent law as it is without legitimating it as just or disqualifying it as unjust. It searches for the real and possible law, not for the correct law. It refuses to make value-judgments about positive law.<sup>34</sup> It stands to reason that a legal order is viewed by Kelsen as a system of coercion and of a specific social technique: acts against the desired societal order meet with punishments, such as the withdrawal of goods like life, freedom or economic values.<sup>35</sup> Kelsen concludes that law is 'an apparatus of coercion' (*ein Zwangsapparat*) and ought to be seen in an instrumental manner 'Law is characterized not as a goal but as a specific means.'<sup>36</sup> Although not in the crude form and content of Kelsen's *reine Rechtslehre* positivism and its concurrent instrumentalism has been very influential in legal theory up till today.<sup>37</sup> Law, and in particular criminal law, is still predominantly seen in an instrumental fashion, as, for example, an efficient method to fight crime, or to re-socialize criminals – that is, as a truly Kelsenean *Zwangsapparat*. But that is only one side of the issue, and fails to see *justice* as the essential feature of law. A society constitutes a moral order, if it is based on a legal system in which justice is the core value. In a democratic society the justice of criminal law consists of proportionality in the apportionment of punishments by an independent, autonomous court. In criminal acts not only individuals but also society in general have been victimized and harmed. Collective values and norms have been damaged. Therefore, the punishment after a due process is not only an attempt to restore the damaged moral order, but also an act of revenge on the part of the constitutional state on behalf of the injured victims, as well as of the damaged moral order.

In his by now classic statement *The Concept of Law* (1961) H.L.A. Hart argues that the connexion between law and morality is 'necessary' or 'essential', while justice is in its turn essential to the morality of law. However, there is a distinct difference here: justice is a distinct segment of morality. It is general-

33 Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, at 13, (Franz Deuticke, Leipzig, Wien, 1934), My translation, ACZ.

34 *Ibid.*, at 17.

35 *Ibid.*, at 29.

36 *Ibid.*, at 32.

37 For an extensive and critical discussion of legal instrumentalism see R. Foqué and A. C. 't Hart, *Instrumentaliteit en rechtsbescherming*, ('Instrumentality and Legal Protection'), (Gouda Quint, Arnhem, 1990).

ly deemed to be wrong, bad, or even wicked, Hart argues, if a father grossly maltreats a child. But it would be incorrect to call this treatment unjust.

“Unjust” would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault, or if he had punished the child for some offence without taking steps to see that he really was the wrongdoer.<sup>38</sup>

A law forbidding the criticism of the Government can legitimately be called a bad law, but a law forbidding blacks to use public transportation or the parks is correctly called unjust.

In fact, Hart adds, just and unjust is similar to fair and unfair. The rule should be ‘treat like cases alike’. However, this should be completed by ‘and treat different cases differently’. Red-haired murderers should be treated in the same way as others, but the child and the adult, the sane and insane should be treated differently. ‘Any set of human beings will resemble each other in some respects and differ from each other in others.’<sup>39</sup> The colour of the skin, or the status of one’s birth ought to be unimportant, a position of responsibility, like that of a state minister, on the other hand, renders the difference relevant. Yet, this is, of course, jurisprudentially problematic because, as Hart asserts,

‘the law itself cannot determine what resemblances and differences among individuals the law must recognize if its rules are to treat like cases alike and so be just. Here accordingly there is much room for doubt and dispute.’<sup>40</sup>

It refers to the problematic relationship between equality and inequality. This is, of course, not the place to elaborate this important issue in further detail. It suffices to emphasize that the criterion of fairness refers in the end to the legal value of proportionality in the distribution of burdens or benefits by law.

In any case, proportionality is in fact the very core of the legal system’s morality. Punishment or indemnification ought to be in proportion to the injury and damage brought about by the crime. Procedural law is for that reason an essential precondition for a fair trial in which proportionality must be heeded carefully. But proportionality has another dimension as well. It needs the ability on the part of the prosecutor and the judge to take

38 H.L.A. Hart, *The Concept of Law*, at 154, (The Clarendon Press, Oxford, 1990, [1961]), p. 154.

39 *Ibid.*, at 154ff.

40 *Ibid.*, at 157.

the role of both the victim and the criminal, to empathize with both parties, and to then arrive at a just verdict. Or to say the same more bluntly, proportionality in a verdict presupposes the ability on the part of the prosecutor and the judge to 'take the role of the other' (Mead) and to then imagine what it really does to someone to be sentenced to prison, sometimes even for the rest of his or her life. It is necessary at the same time, to empathize with the physical and mental injuries suffered by the victim and/or his or her relatives. In other words, this is solidarity as a form of symbolic interaction.

Needless to add that we are discussing here legitimacy beyond legality. The latter is the correct functioning of the legal system according to the laws that have been instituted in a democratic manner by the proper authorities. Legitimacy is the moral constitution of the legal system which is constitutive to the moral order of society. Naturally, legitimacy has always been of crucial importance to law and maybe to criminal law in particular. As to the latter, the legitimacy of the sanctions eventually imposed on the offender is not primarily seen in terms of revenge on behalf of the victim, but rather in terms of a social atonement after the criminal attack on the moral order. In other words, punishment is legitimated as a sort of restoration of the damaged social and moral order. Moreover, the prime focus is on perpetrators and their possible return to the social order after their imprisonment. Since a due, fair process is essential to a democratic, constitutional state, the prime attention has always been focused on the position of the offender, much less on that of the victim and his or her relatives and other consociates.

This has been criticized severely by postmodernists who claim that a uniform, coherent social and moral order does no longer exist, and can therefore not be damaged. The consequence of this idea is that the prime focus on offenders should be changed into a prime focus on victims. For instance, discussing solidarity, Richard Rorty argues that in postmodern morality the simple question 'Are you suffering' constitutes the basic legitimacy of criminal law. In this postmodernist view there is no longer a coherent, uniform social and moral order, and there are no longer encompassing ideologies which carry, as 'great tales', the values and norms which allegedly are being damaged by criminals and criminal acts. The focus must rather be on the victims of criminal acts with whom we must sympathize, on whom our solidarity must focus.<sup>41</sup>

Following Rorty, the Dutch sociologist and criminologist Hans Boutellier calls this the 'victimization of morality' which, he claims, has great implications for criminology and criminal law.<sup>42</sup>

41 Richard Rorty, *Contingency, irony, and solidarity*, at 189-199, (Cambridge University Press, Cambridge, 1989).

42 Hans Boutellier, *Solidariteit en slachtofferschap: De morele betekenis van criminaliteit in een postmoderne cultuur*, ('Solidarity and the Position of Victims. The Moral Significance of Criminality in a Postmodern Culture'), (SUN, Nijmegen, 1993), My translation, ACZ.

'It is not so much the violation of an ideologically anchored norm which ought to be restored, but the concrete, individual suffering to which must be done justice. This is, in my view, the essential meaning of the attention of criminal law directed towards the victim.'<sup>43</sup>

The problem in this 'victimological' turn in criminal law is the rather broad definition of the concept of 'victim'. Criminal actors too are not rarely viewed as victims – of 'society', or 'family circumstances', or 'mental problems', etc. In the end, we somehow are all victims of something and as a result our solidarity evaporates into rather thin air, or degenerates into a rather vague emotionalism which may warm our hearts and moods but will not enlighten our minds and spirits. As a result solidarity or sympathy acquire, often unintentionally, rather immoral characteristics. Moreover, according to the value of a due process, whose aim it is to arrive ultimately at truth – truth about the criminal act – it has always been necessary to restrict the legal proceedings to those facts which are legally relevant. Emotions, feelings, irrational observations and comments are not welcome. Victims, or their relatives, can be summoned to testify in court, but it is questionable whether their emotions can contribute to the legal proceedings substantively, as most proponents of the 'victimological' approach want. Moreover, a general 'victimization' of morality may well lead to a culture in which a Nietzschean 'slave morality' rules over man's ideas, emotions and actions. The generalized label of victim robs people of their honour and self-esteem, and will eventually lock them up in passivity, thus rendering them extremely vulnerable.<sup>44</sup> There is no doubt that this brand of victimological solidarity, inspired by postmodernist philosophies, is morally well meant. Yet, it constitutes in the end an unintended perversion of solidarity as it deprives its subjects of their most relevant human asset, namely the ability to establish one's life according to one's plans, initiatives and practical engagements.

### **Solidarity and intercultural law**

Within the relatively short period of four decades Holland transformed into a multicultural society. Prior to roughly the mid-1960s, the Netherlands were apart from regional differences predominantly mono-ethnic. The cultural diversity that did exist was of a religious and secular-ideological

<sup>43</sup> *Ibid.*, at 29. My translation, ACZ. See also at 101-126.

<sup>44</sup> See my essay 'The wisselende aandacht voor slachtoffers. Enkele cultuursociologische overwegingen', ('The Changing Interest in Victims: Some Cultural-Sociological Reflections'), in: *Het opstandige slachtoffer. Genoegdoening in strafrecht en burgerlijk recht*, ('The Rebellious Victim. Satisfaction in Criminal Law and Civil Law'), Proceedings of the Dutch Lawyers' Association, 2003-I, at 1-32, in particular 14-16, (Kluwer, Deventer, 2003). See Boutellier's rejoinder in the Proceedings of 2003-II, at 9-13 (Kluwer, Deventer, 2004).

nature: Roman-Catholicism, various forms of Protestantism, Judaism, Social-Democratic Humanism and Liberal Humanism. This potentially divisive diversity of religious and secular worldviews was pacified or accommodated by the curious system of pillarization.<sup>45</sup> Strong cultural diversities emerged after the mid-1960s when so-called 'guest workers' from Southern-Europe, Morocco and Turkey were recruited for menial industrial jobs, and in the 1970s their relatives were reunited with them, settling down in the big cities of the Netherlands. After roughly the 1970s also many, then still Dutch citizens from Surinam emigrated to Holland, prior to Surinam's independence in November 1975. Ever since, many inhabitants of the Antilles and the Cape Verde Islands, as well as refugees from Mid-Eastern and African countries emigrated or fled to Dutch society. Today, multiculturalism is an objective, sociological fact, particularly in larger cities such as Amsterdam, Rotterdam, Utrecht and The Hague.

An important issue nowadays is what solidarity means in this multicultural society, and how multiculturalism affects the social and the legal order. It stands to reason that only a few dimensions and components of this very broad question can be dealt with here.

To begin with, the interactional and reciprocal nature of solidarity is of special importance. In the multiculturalist ideology solidarity entailed, usually unintentionally though, a kind of negative tolerance.<sup>46</sup> In fear of being accused of nationalism or even racism, authorities tolerated life styles and actions of cultural minorities which not rarely transgressed the limits of the constitution and the laws of the country. In particular the treatment of women, and increasingly also the attitude towards homosexuals contained forms of discrimination which were illegal, yet tolerated, or ignored.<sup>47</sup> The statistics of the criminality on the part of particularly Moroccan and Antillean youngsters were not seriously heeded. Integration, usually misunderstood as assimilation, was a central policy issue, yet there was little emphasis upon the need of basic linguistic skills (passive and active knowl-

45 Cf. the 'classic' dissertation of Arend Lijphart, *Verzuiling, pacificatie en kentering in de Nederlandse politiek*, ('Pillarization, Pacification, and Turning in Dutch Politics'), (J. H. de Bussy, Amsterdam, 1968). English edition by the author: *The Politics of Accommodation: Pluralism and Democracy in The Netherlands*, (University of California Press, Berkeley, 1968). This is, of course, not the place to discuss pillarization in detail.

46 I discussed this in more detail in my essay 'Negatieve tolerantie: verdraagzaamheid wordt autoritair als wederkerigheid ontbreekt', ('Negative Tolerance: toleration turns authoritarian when reciprocity is absent'), in: M. ten Hooven (ed.), *De lege tolerantie* ('Empty Tolerance'), at 185-190, (Boom, Amsterdam, 2001).

47 This is called in Dutch *gedogen*, i.e. permitting behaviour which is strictly taken illegal, yet not persecuted and punished for the duration of the legalization of it by parliament. An example was abortion prior to its legalization. However, *gedogen* has developed gradually into a kind of culture in which illegal behaviour is being tolerated for reasons of (political) convenience, as in the case of so-called 'coffee-shops' and the consumption of soft drugs.

edge of the Dutch language) as a precondition for participation in the labour market. There was at the same time considerable hesitance to apply justice to illegal or criminal acts by members of cultural minorities for fear of being accused of discrimination or even racism. In a sense, cultural minorities were 'victimised' and often led themselves to be 'victimised' which led to a plethora of professionals and organizations assisting and advising these 'victims' – a clear example of 'victimization'. In line with Dutch society in general, ethnic minorities organized themselves and were thus able to gather substantial state subsidies, while playing the role of 'underdogs' in need of assistance. Negative tolerance too is a matter of reciprocity.

All this changed radically after 9/11 and the so-called Fortuyn-rebellion. Tolerance was now labelled derisively as 'correct politics', and what was formerly considered to be 'incorrect right-wing politics', had now become more or less accepted as the correct way of dealing with a despised multiculturalism. Since the negative solidarity and tolerance were rather paternalistic, and the related multiculturalism short-sighted, one can applaud this change in the political arena, although one can have doubts as to the often radical turn towards a populist, well-nigh neofascist approach to ethnic minorities, those of the Islamic persuasion in particular. The threat of Islamist terrorism enhances the fear for and misunderstanding of the various Islamic currents in Dutch society. Particular politicians, often driven by the desire to reap electoral fruits, throw around with blatant generalizations about 'the' Islam and 'the' Muslims.<sup>48</sup>

As to legal plurality, the position of the Islamic Sharia-law within Western societies is much in debate these days. There always has been legal plurality, since the Roman-Catholic Church and the Protestant Churches have their own ecclesiastical legal systems. Canon law is an accepted phenomenon, but is restricted to the inner organizational structure of the church. Criminal acts of ecclesiastical functionaries, as in the case of the paedophile scandals within the Roman Catholic Church, cannot be dealt with within the Church but are being dealt with by secular courts. Analogically, like canon law the Islamic Sharia can occupy its autonomous position within our non-Islamic society as long as it does not deviate from the Constitution and the laws operative in this country. If the latter were to be adjusted to the Islamic Sharia, this should be done by the existing legislative power, i.e. the parliament, according to the democratic rules and procedures of the country. Without a majority in parliament it is unthinkable that those elements of Sharia criminal justice which are in opposition to fundamental human

48 The current generalizations and concurrent accusations regarding 'the' muslims reminds one of the little joke Hannah Arendt once recorded: 'An antisemitic claimed that the Jews had caused the war; the reply was: Yes, the Jews and the bicyclists. Why the bicyclists? asks the one. Why the Jews? asks the other.' Hannah Arendt, *The Origins of Totalitarianism*, at 5, (Meridian Books, Cleveland, New York, 1958, [1951])

rights, will ever be incorporated in the present constitutional and legal system. But those components of Sharia law which do not deviate from our constitutional laws and the Universal Declaration of Human Rights (1948) of the United Nations can be part of our moral order, comparable to the canon law of the churches. In this respect one can indeed speak of intercultural law.

## Conclusion

If it has not yet been done, it would be important and scientifically relevant to investigate comparatively the intrinsic nature and socio-cultural functions of Roman-Catholic, Protestant and Islamic canon law within the setting of our Western, (post)modern society. There are obvious differences, such as the fact that the Protestant and Roman-Catholic ecclesiastical laws refer primarily to the inner organization of their churches, whereas the Sharia contains scores of norms with regard to the proper lifestyle of Muslims, as well as to the ceremonies and rituals of the Islamic faith. In other words, they pertain to society as a moral order. In line with this much broader approach the Sharia also contains rules of criminal justice which are in conflict with the secular laws and constitutions of Western societies. Roman-Catholic canonical law contains punishments but those are related to the inner hierarchy of the church, and are not criminological. However, the most influential difference is the fact that Christian ecclesiastical law is not seen in terms of divine revelations, but based upon legal traditions which are being revised continually in accordance with necessary adjustments to socio-cultural changes. The core of Sharia law, in contrast, is believed to be revealed in the Quran which together with the exemplary behaviour of the Prophet (the hadith) is the prime source for legal specialists when they formulate the rules of the Sharia. There are other sources as well, but the Quran and the hadith are the most sacred ones which strictly speaking do not leave much room for interpretation and adjustment to circumstances, which is not to say that such interpretations and adjustments are not at all discussed by Islamic legal scholars.

In terms of the possibility of intercultural law it will be necessary to enter into an open debate between these forms of religious law and between them and secular, constitutional law. The debate should take place in a spirit of mutual respect and reciprocal solidarity. Yet, this debate must also take place within the limits of a parliamentary democracy in which the Constitution, the Declaration of Human Rights, and the various national laws and international conventions constitute a rather stable set of legal conditions. They are, however, not couched in a metaphysical, or dogmatic-religious stability but changes and adjustments can be introduced, albeit through rather strict legislative procedures.



Likewise, ethnic minorities are in our multicultural society at liberty to cherish and enact their own values and norms, but this is also limited by a set of conditions that could only be changed or adjusted through legislative procedures. The issue of Islamic educational institutions is an interesting case since it is a demonstration of intercultural law in practice. Article 23 of the Dutch constitution rules that schools based upon a religious or non-religious worldview can be financed by the government as long as they fall within specific criteria of quality. If they conform to these criteria, they are certified, licensed and subsidized by the state, and naturally subjected afterwards to the inspection authority of the government. Within these strict conditions one could view 'Islamic schools' as contributions to the early emancipation and integration of Islamic citizens, as has been the case some four decades ago in the case of Roman-Catholic citizens, albeit admittedly in a different set of socio-cultural and political circumstances. In any case, it needs tolerance, trust and reciprocal solidarity to accept and even stimulate such a pristine pillarization of Islamic fellow-citizens. It is scientifically and politically a fascinating example of intercultural law-in-practice.