Liefde, solidariteit en recht. Een interdisciplinair onderzoek naar het wederkerigheidsbeginsel.
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The principle of freedom, the principle of equality, and the principle of reciprocity together belong to the constitutive principles of the modern legal order. Traditionally the principle of freedom attracts the attention of legal scholars. The principle of equality caught and held attention during the recent past. The principle of reciprocity however stayed out of the limelight, as if its meaning and content were self-evident. But does indeed the principle of reciprocity refer only to the simple retributive justice of do ut des, or the complementarity of rights and obligations?

This book defends the following thesis. Where - regarding the question of solidarity in a pluriform and multicultural society - no new theoretical impulses are to be expected from the principles of freedom and equality, the principle of reciprocity does offer such impulses. Reciprocity not only is the structural principal of the social and legal order, it is a mechanism of a comprehensive solidarity as well.

This comprehensive character is described and analyzed by means of the core elements of the concept of reciprocity. Those elements are - first of all - identification and recognition. They come into existence as soon as in the person of the other the own person is reflected. This reflection of “the other” in “the own” does not happen of itself. A mediating factor or instance is needed. This intermediary is called a “symbolic order”: a common system of meanings, establishing rules and coordinating expectations. Reciprocity as a mediated relation implies that reciprocity can only be understood with inclusion of those intermediaries.

In the symbolic order of kinship where through family resemblances, family histories and family stories the own is reflected in the other, family members give and take according to each others needs, relying on a rough balancing out in the long run. Services and gifts are not settled without delay by the contractual rule of do ut des. On the contrary, parents give to children, and children give to their children according the moral rule of do quia mihi datum est: I give to others because once there has been given to me. In the same way altruism can to be understood as an ethic of gift giving.

Distinguishing marks of the ethic of gift giving are its personal character and compelling force. In the gift of love and care the spirit of the giver is present. Only by way of a counter gift this spirit can return to the foyer d’origine. If it becomes clear that no counter gift is forthcoming, the giver will feel a sense of deprivation, not in his material possessions but in his very personality. Reciprocity as an ethic of gift giving corresponds with the original etymological me-
Liefde, solidariteit en recht

of reciprocity (reciprocare) as an ongoing movement forwards and backwards.

Not only in the context of kinship reciprocity takes the form of an ethic of gift giving. Within homogenous social groups where through the symbolic order of a common language, history, culture and tradition in the other the own is reflected, reciprocity takes the form of an ethic of gift giving as well. Parties exchange services according to each others needs in the confidence of a rough balancing out in the long run. Parties take alternating positions as creditor and debtor. Just as in kinship, this alternating inequality proves to be a solid basis of solidarity.

But what happens between human beings if social resemblances, common language, culture or history don’t exist as mediating instances? How is solidarity between strangers accomplished?

In this respect modern law - in particular the idea of the social contract and the principles derived from it - plays its historic symbolic role. If between human beings nothing of the own is reflected in the other, and they - being strangers - are not capable or willing to identify with or to recognize each other, modern law forces them to recognize the other at least as a co-member of the community of law. In this way law functions as a symbolic order through which in the other the own legal subjectivity is reflected.

Initially this reflecting legal subjectivity only yields a morality of mutuality: parties are - according to their social contract - willing to acknowledge legal, determinate rights and to fulfil legal, determinate obligations. But they can not be forced to recognize moral rights and to fulfil moral duties.

Yet a community of law will not acquire any solidarity - in the sense of reciprocity - until within the legal symbolic order reflects more than just a common legal subjectivity. The growing influence of the norm of reciprocity is the essence of the so called “socializing of law”. During that process the norm of reciprocity compelled to the recognition of some indeterminate rights and indeterminate obligations.

In that respect it did not came as a surprise that the so called “reciprocal legal relation” came into existence as a new concept in private and public law. However, it is still not clear which morality this new concept actually embodies: a morality of reciprocity or a morality of mutuality.

The affective reciprocity of kinship, the social reciprocity of the homogenous social group, and the rational reciprocity of law are only analytically distinguishable. In the reality of everyday life the three forms of solidarity interfere. The legal norms of freedom and equality redress imbalances in the indeterminate rights and duties of kinship and the social group, in order that reciprocity can be what it ought to be: the liberty to loyalty and duty. Conversely, within the legal order a morality of reciprocity can only come into being if the le-
gal subjects get social allies, for instance by communication, exchange and common participation in social activities. By turns the capacity of legal subjects to social reciprocity depends on the affective reciprocity they have experienced in kinship. Love, solidarity and law are indissolubly connected by their common mechanism of reciprocity.
The notion of reciprocity contains many elements. A first aspect is the sense of trust and confidence that is necessary to establish a relation of cooperation. The growing influence of the norm of cooperation in the legal order is reflected in numerous aspects of modern legal relations. By pressing the concept of reciprocity extended to the recognition of duties including rights and obligations, a new perspective emerges that stresses the reciprocity of cooperation in a hierarchy of mutuality.

The effective reciprocity in the sense of solidarity, the social solidarity at the heart of the modern cooperative order, is only analytically distinguishable in the context of legal relations. The legal order of freedom and equality reduces obstacles in the societal and social relations, but duties and social bonds as the social group, in order that reciprocity can be achieved, must be promoted to the liberty to loyalty and duty. Conversely, within the legal order a morality of reciprocity can only come into being if the le-