

The individual case and the general rule

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1. Introduction

When I worked in Utrecht I discussed with much pleasure in the course on jurisprudence (Algemene rechtsleer) Titia Loenen's article 'Recht en het onvervulbare verlangen naar individuele gerechtigheid'.² In this article Loenen calls law – with a term borrowed from Kees Schuyt – a 'tragic hero'. This tragic hero succumbs to the enormous pressure exerted by a society that has too high expectations of legal solutions, expectations that the law can never fulfil. This idea appeals to me. I think she is right that too much is expected of the legal system. The expectations are often sky-high in the individual's search for *total justice*.³ The claims of individuals towards the state are formulated as *rights*, and the law should be there to compensate all of the individual's mishaps.

I was surprised by Loenen's distinct position that differentiation is not always best, but that the general rule should more often be adhered to. Loenen advocates the virtue of the *generality* of rules instead of differentiation and doing justice to the individual case. This is a clear focus on a rule-oriented perspective: cases are judged *equally* by applying the same set of rules; everyone has, from a legal perspective, the same rights.⁴ The same rights are therefore applied *equally*. This formality can be contrasted with a conception of equality, which is concerned with the *result* of equal treatment in reality.⁵ Being naïve or maybe even prejudiced I would have expected that Titia Loenen, as an expert in legal gender studies, would focus on how in reality

1 I am grateful to the anonymous peer reviewers and Marjolein van den Brink for their comments and suggestions. Special thanks to Charlotte Mol for fine-tuning my English.

2 LOENEN 1996.

3 Loenen took this term from FRIEDMAN 1986, at p. 23. LOENEN 2010b, at p. 323.

4 In the literature, the distinction between rule and result-oriented equality is often called equality in a formal and material sense. This distinction is elaborated by LOENEN 2010a, at p. 274.

5 LOENEN 2010a, at p. 274.

men and women come to unequal results. Because of the dominance of the legal system which is formal and rule-based, rules may be equally applied to men and women but the implicit reference point or dominant standard behind these rules are male-biased.⁶ Instead Loenen promotes a stronger focus on applying rules *without* differentiating on the level of the individual. She is thereby rowing in a different direction than advocates of the gender and law movement normally do.⁷ This surprised me, and triggered me to review her arguments in more detail.⁸

Loenen's proposed solution to prevent the 'tragedy of law' is to put more emphasis on *general* categories within *general* provisions and less emphasis on individual cases. Let me be frank, I was not immediately convinced of this solution. What I find problematic is that this formal treatment according to general categories can lead to the situation that the individual case is not in focus while the larger emphasis on general categories does not seem to fulfil a moral value in itself. To put it quite bluntly: also a band of robbers can exercise their power through general rules.⁹ Slavery, sex discrimination, or racial segregation can be all in accordance with general provisions.¹⁰ I discuss

6 The concept of a *dominant* or *implicit* standard is explained by Loenen in LOENEN 2010a, at pp. 294-295.

7 WESTERMAN 2003, at p. 9: 'Deze theoretici [beoefenaren van *genderstudies* en bij multiculturalisten] ontwaren in het zo bekriftiseerde regelgeleide en formele redeneren een bij uitstek mannelijk, of zo men wil westers paradigma, dat geen plaats biedt aan het anderszijn, maar integendeel alles van het mannelijk of, zo men wil, westerse dominante model wil gelijkmaken. Algemeenheid verschijnt in deze theorieën als machtsinstrument van de dominante groep. Daarvoor in de plaats zou moeten komen een particularistisch getint differentiatiedenken (...) dat recht doet aan het unieke en aan dat wat mensen van elkaar onderscheidt.' ('These theoreticians [practitioners of *gender studies* and for multiculturalists] perceive in the, much criticized, rule-guided and formal reasoning, an eminently masculine, if you like, Western Paradigm that provides no possibility for otherness, but on the contrary wants to uniformize everything of the male or, if you like, Western dominant model. Generality appears in these theories as an instrument of power of the dominant group. To replace this there should be a particularistic tinted differentiation thinking (...) which does justice to the unique and that what separates people from each other.') Footnote excluded.

8 Just to be clear: the concept of equality as such is not the topic of this essay. My essay is on the generality of rules and the relationship with individual cases, and not on analysing the concept of equality.

9 In this essay I often speak of *general rules* which in itself is a pleonasm: *rules* per definition are *general* otherwise they would not be rules but just decisions. But *general rules* is an established expression in the field.

10 TAMANAHA 2004, at p. 93.

this doubt in the first part of my essay in which the moral value of generality will be scrutinised.

In the second and third parts of the essay I will try to prove why the generality of rules *does* matter by means of two arguments provided by Loenen in her article. In the second part I will discuss Loenen's argument regarding the division of power, more precisely the relation between the judge and the legislator, which is compromised by focusing too strongly on individual cases. I will show that the generality of rules is also of major significance in constitutional law in the discussion on the concept of statutes. In the third part I discuss Loenen's appeal to solidarity as an argument *not* to focus too much on individual cases. Finally, I will discuss whether my hesitation with regard to the *prima facie* lack of any moral value of generality has been overcome by these two arguments.

2. The moral relevance of generality

From a *moral* perspective it seems to be absolutely clear that *all* individual circumstances should be accounted for in the judge's verdict. Joseph Fleuren and Thomas Mertens stress the importance of doing justice to the individual case. They argue that because of the generality of rules of law the competence of judges to deviate from the general rule is implied in exceptional cases. As Aristotle remarked, it is impossible, and not even desirable, for the legislator to foresee every possible individual case.¹¹ Therefore, it is up to the *judge* to come to equitable verdicts at all times.¹² In rare cases, which were not

11 Loenen also refers to this quote from Aristoteles: LOENEN 1996, at p.123.

12 FLEUREN and MERTENS 2012, at p. 86: 'Wanneer de wetgever immers geen acht slaat en behoeft te slaan op wat zelden voorkomt, dan moet een andere instantie dat wel doen indien zoiets zeldzaams zich voordoet. Het ligt in de lijn van de filosofie van Aristoteles dat deugdzame burgers en goede bestuurders en ambtenaren in dergelijke (...) tot een redelijke oplossing proberen te komen, *ook al strookt die niet met een strikte toepassing van de wet*. Maar als dit niet lukt, dan is het woord aan de rechter. (...) uiteindelijk is het oordeel *onlosmakelijk verbonden met een weging van de concrete omstandigheden*.' ('When the legislature does not take notice or needs to take notice on what occurs seldomly, then another authority will have to do so if the exceptional case arises. It is in line with Aristotle's philosophy that virtuous citizens and good administrators and officials (...) endeavour to come to a reasonable solution, *even though it is not consistent with the strict application of the law*. But if they do not succeed, then it is up to the judge. (...) ultimately the judgement is *inextricably linked to a balancing of the circumstances at hand*.') Emphasis added.

explicitly foreseen by the legislator, the judge is allowed to differentiate from the general rule if applying the rule would lead to an inequitable result.¹³ In fact, according to Fleuren and Mertens, a judge *should not* apply the general rule in cases that would lead to an inequitable result.

Fleuren and Mertens' focus on an equitable outcome in the individual case is quite attractive. Is bringing justice in all cases the purpose of a just legal system? Yet, Loenen's focus on generality takes her in the opposite direction. Philosophically a link between Loenen's demand for *generality* can be linked with Immanuel Kant's demand for *universality* in his Categorical Imperative: 'Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.'¹⁴ Kant's Categorical Imperative demands a twofold *universality*: the *maxim* itself is a personal *rule* and therefore general and it must be again *generalisable* to become a universal law. Unfortunately, this Kantian approach still does not provide an answer to the question of what *moral value* is connected to generality. In modern ethics the Kantian approach is often criticised because it is too *rigorous* or *formalistic*.¹⁵ Kant's focus on the ethical duty itself without taking the consequences into account is nowadays viewed as being untenable.¹⁶

Another problem, more practical than philosophical, that arises from the general character of rules concerns the necessary categorisation of rules that leads to either over- or under-inclusiveness. For example the minimum age of 18 years for drinking alcohol.¹⁷ The *purpose* of this rule is to avert the bad effects of alcohol on young people's physical constitution. It is a good idea not to start drinking alcohol at a young age because of the damage to one's physical development. But there may be minors who reach the stage of physical adulthood much earlier, while some 18-year-olds might not yet be physically mature enough to consume alcohol, without damage to their

13 FLEUREN and MERTENS 2012, at pp. 73-87.

14 KANT 1993, at p. 30.

15 In the German philosophical discussion Kant is criticised because of his *rigorous* position. WESTERMAN speaks instead of Kant's *formalism*.

16 WESTERMAN 2003, at p. 7.

17 Tamanaha mentions the example of a minimum driving age of 16. That is not the best example of over- or under-inclusiveness because the requirement of a driving test which is an objective test to see whether people are mature enough to drive a car alleviates the potentially too strict categorisation. TAMANAHA 2004, at p. 81.

development. Therefore, the *purpose* of the rule – preventing minors from physical damage – is not always realised.

The moral value of the generality of rules is a philosophical challenge. In itself, generality – *formal equality* – has little to do with justice.¹⁸ Although we may say that the equal treatment of equal cases is a means to achieve justice, it seems unlikely that equal treatment can be *equated* with justice. Being treated equally according to a general rule does not mean that the treatment is just.¹⁹ This entirely depends on *categories* that are imposed. These categories might not be morally justified according to contemporary understanding. Therefore, it boils down to developing criteria that concern the *content* of the law and to ask ourselves which categorisations are morally justified. Despite the difficulty of defending Loenen's position from a philosophical point of view, there may be an argument from constitutional law doctrine, as discussed in the next section.

3. Constraints from constitutional law

3.1. Division of powers

Loenen's other arguments as to why the generality of rules is of importance are derived from the *division of powers*.²⁰ Two specific lines of argumentation can

18 The emptiness of the principle of formal equality is demonstrated by Hans Kelsen in: KELSEN 1973. Kelsen explicitly attacks Kant's position, at p. 18-19: 'They [the concrete examples with which Kant attempts to illustrate the application of his categorical imperative] are in no sense derived from the categorical imperative, as the theory makes out, for nothing can be derived from such an empty formula. (...) But every precept of any given social order is consistent with this principle, for it says no more than that a man should act in accordance with general norms.' Also Peter Westen demonstrates the emptiness of formal equality in WESTEN 1982.

19 ROSIER 2010, at p. 58 footnote 8: 'Gelijke gevallen gelijk behandelen is een zuiver formeel beginsel. Het zegt niets over de inhoudelijke criteria die men moet gebruiken om vast te stellen of gevallen wel of niet gelijk zijn.' ('Treating like cases alike is a purely formal principle. It does not say anything about the substantive criteria that must be used to determine whether or not cases are equal.') Also HART 1994, at p. 159: 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.' Criticism of this statement can be found in WESTEN 1990, at p. 225.

20 Fleuren and Mertens discuss – partly implicitly – the constitutional position of the judge in paragraphs 3 and 4 (at pp. 80-84), in which they discuss Article 11 Wet algemene bepalingen (General Provisions Act) and the *contra legem* effect of reasonableness and fairness ('redelijkheid en billijkheid') and general principles of law.

be discerned within Loenen's argument of the division of powers. The first is that legal-political discussion in *parliament* is a fundamentally better forum to decide on questions of justice than the judges' chambers ('*raadkamer*').²¹ Judges always decide on a case to case basis. Their legal ruling is restricted to the case presented to them. I think this is an argument that makes *judicial activism* problematic. Drafting law for controversial cases must be a result of an exchange of *political opinions*, for which parliament is the most suitable forum.

Loenen's second argument is the *dependency* which is created by making the individual dependent on the decision of the judge to allow an appeal to reasonableness and fairness ('*redelijkheid en billijkheid*') or to apply a hardship clause. In situations of hardship clauses the state can play the role of the Great Benefactor, giving citizens privileges which were not foreseen by the rule.²² But, an appeal to reasonableness and fairness also makes the persons involved in the case dependent on the judge to decide. The legislator does nothing more with a statutory provision than providing a general proposal on how to decide cases; the judges are now in the position to overrule such proposals at all times. According to Loenen, that disturbs the traditional checks and balances between the legislator and the judiciary.

Fleuren and Mertens take a completely different position. As mentioned, they argue in favour of the judge and his unique position to do justice in individual cases. The argument of Fleuren and Mertens not only presupposes that the judge is capable of fulfilling his task properly, but it is also a normative position on the *desirability* of putting the judge in the position to bring justice to individual cases. Loenen is quite sceptical as to letting the judge to decide what an equitable outcome is in every case, as it would imply that the judge can always decide what the law requires. Fleuren and Mertens, on the other hand, have no issue with this implication.

21 LOENEN 1996, at p. 136.

22 LOENEN 1996, at p. 128: 'Hardheidsclausules versterken die positie van afhankelijkheid, ook als zij worden toegepast in voor de burger begunstigende zin; de staat werpt zich op als de Grote Weldoener, die gunsten kan verlenen waarin de regels eigenlijk niet voorzien.' ('Hardship clauses strengthen the position of dependence, even if they are used in a favourable manner for the citizen; the state acts as the Great Benefactor, who can grant favors for which the rules actually do not provide.').

Since Paul Scholten (1875-1946) Dutch jurisprudential doctrine has the tendency to focus on decisions in individual cases. The consequence of that tendency is that the judge is put on a pedestal, as it is only the judge who is competent to make the *jump* from the abstract rule to the concrete verdict.²³ Therefore, it is always the judge who gives his interpretation on statutory provisions and the verdict must be legitimised by the judge's individual *conscience*.²⁴ For Scholten, justice plays a role in *every* decision: 'no step in law is taken without posing consciously or unconsciously the question of justice.'²⁵ According to him, even when decisions seem to follow logically from rules of positive law these rules are *applied* by the judge because they do not conflict with what the judge perceives as justice. Thus the *personal* aspect of the judge's decision is an important aspect of Scholten's theory.²⁶ The position of Fleuren and Mertens also comes very close to that of Scholten.²⁷ I think that it is difficult to draw a general conclusion concerning this debate regarding the position of the judge towards the legislator. Many constitutional lawyers would agree with Loenen's argument that controversial issues should be mainly decided in parliament instead of by the courts. Also her critique of the individual's dependency on individual judges' willingness to be lenient or grant exceptions is convincing. However, Dutch political practice is different: many controversial cases are no longer decided in parliament because clear political majorities and political consensus are often lacking.

23 SCHOLTEN 1974, at p. 74.

24 SCHOLTEN 1974, at pp. 134-135.

25 Quoted by: BROUWER 2004, at pp. 49-50.

26 BROUWER 2004, at p. 49. Brouwer links this to the doctrine of Personalism by Scholten's friend Ph.A. Kohnstamm.

27 FLEUREN and MERTENS 2012, at pp. 73-87 conclude their article with the following statement (at p. 87): 'De rechter moet voorkomen dat het niet zozeer de billijkheid is die corrigeert, maar het billijkheidsgevoel van de individuele rechter of raadkamer.' ('The judge must prevent that it is not so much equity which corrects, but the feeling of fairness of the individual judge or the court.').

Thus, the legislature adopts vague and imprecise provisions, leaving the difficult decisions to the courts.²⁸

To summarise the positions discussed, two strands can be discerned in the current debate: the high esteem of the judge and his capability to come up with an equitable solution in every individual case, on the one hand, and, on the other, authors like Loenen who clearly doubt the possibility and the desirability to put the judge in the position to decide on important controversial matters.

3.2. The twofold concept of a statute

The essence of a rule is its *generality*,²⁹ which must be viewed in contrast to a particular command. This concept is the basis of the *rule of law* or *rechtsstaat*. It means that legal authority is exercised by *rules*, not decrees. In this subsection I discuss this conception of the role of rules from the point of view of constitutional law, which is not expressed by Loenen, but which I consider to be of importance in defence of her position.

The core of the Dutch *rechtsstaat* concept is the notion of the concept of a statute. A formal and material conception of a *statute* is distinguished. This twofold concept of a statute has been the traditional *core* of the Dutch *rechtsstaat* concept. As I will demonstrate, in this *rechtsstaat* concept the *generality* of rules is regarded as a fundamental safeguard against *arbitrariness*. Therefore, it is the procedural *form* of the law, the enactment of statutes according to the legislative procedure, that possibly restricts arbitrariness.

28 Take, for example, the case of the regulation of euthanasia in the Netherlands. GRIFFITHS, BOOD and WEIJERS 1998, at p. 87: 'The legal vacuum created by the deliberate pace of political decision-making has been filled by the courts, which have accepted the task of reconciling the conflict between the explicit prohibition of euthanasia and assistance with suicide in the Criminal Code and the increasingly apparent fact that these MBSL are widely practiced and enjoy general public support. In a sense, the courts have thereby usurped the constitutional role of the legislature, but the latter has not protested. On the contrary, the Government itself (which in a parliamentary system is directly answerable to the legislature) has frequently and openly made use of the courts to secure legal development. And Parliament itself has exhibited only respect for what the courts have done.'

29 Rules are not an exclusive subject for *legal* scholarship. Also philosophical or sociological research on rules is carried out, for example the philosophical meaning of following a rule in Saul Kripke's interpretation of Ludwig Wittgenstein's discussion of teaching mathematical series (SOLUM 1999, at pp. 493-494) or sociological theories on rule-following behaviour (E.g. GRIFFITHS 2003).

A statute in the *material* sense is every statute that is *general* and *abstract*. Neither the *addressees* nor the *cases* in which the statute will be applied are predetermined. In addition, the statute has an external effect: it binds citizens and therefore is not meant to regulate only the government itself.³⁰ These *material* criteria determine whether a statute has the quality of a material statute. In contrast, *formal* statutes are defined by the procedural realisation. Every statute containing a legal action that is a product of the legislative process as described in the Constitution is a statute in the formal sense.³¹ The striking point now is that a *formal* statute is not necessarily a *material* statute as well. A *formal* statute regulating – for example – permission for the King, or his successors to the throne, to marry³² does not have the character of a *material* statute because it is *not* general and abstract. It only concerns *one* situation – the parliamentary approval of the proposed bride of the heir to the throne – on one occasion, thus it is merely a formal statute.

The typical example of a non-material, yet *formal* statute was the budget act, conceptualised by the German constitutional law scholar Paul Laband in 1870. Following the wish of Otto von Bismarck, the participation of parliament was required regarding, as Michael Stolleis calls it, ‘the most sensible part of the modern state.’³³ Of course, because of the lack of generality and abstractness this budget act could not be considered to be a regular – *material* – statute. But to ensure the involvement of parliament in deciding on the budget, the *form* of a statute was required, instead of just an act of government.³⁴

Two major arguments figure in this discussion on the constitutional admissibility of merely *formal* statutes. The first one is rooted in the doctrine of law of the *Enlightenment*. This doctrine entails that law should be solely composed of statutes as the highest expression of the *general will* – *volonté générale* – of the people. An example is the Constitution (‘*Staatsregeling*’) of the Batavian Republic, in which, according to Article 5, ‘the statute is the

30 DE BLOIS (ed.) 2010, at pp. 99-106.

31 In the Dutch Constitution statutes are the product of the procedure prescribed in Articles 81-88 Grondwet.

32 Article 28, clause 3, Grondwet.

33 STOLLEIS 1992, at p. 370. My translation.

34 Typically a Koninklijk Besluit (Royal Decree) in Dutch constitutional law.

will of the total societal body, expressed by the majority of citizens or their representatives'.³⁵ Kant's generality requirement is also echoed here.³⁶

In documents like the Constitution of the Batavian Republic the spirit of the French Revolution is reflected. *Equality before the law* was first and foremost a way for the bourgeoisie to gain access to public offices and secure ownership. The privileges of the nobility and clergy were abandoned completely. A law which consists of a set of general provisions was the perfect tool to accomplish this purpose through legal means. Böhntlingk still adhered to this Enlightenment concept of a statute as a *material* general and abstract rule;³⁷ statutes ought to express the people's general will. In this Böhntlingk followed Jean-Jacques Rousseau's concept of *volonté générale*.

Böhntlingk's second argument concerns legal certainty. The essence of the legality principle for Böhntlingk is to prevent arbitrary acts of government.³⁸ The conception of *rechtsstaat* which Böhntlingk embraces is government by *general* and *abstract rules*. In his 'new concept of the *rechtsstaat*' ('*nieuwe rechtsstaategedachte*') Böhntlingk demands that all acts of government are brought under general rules.³⁹ The key example is the Meerenberg case from

35 Article 5 Staatsregeling van 1798 (Constitutional Rules for the Batavian People 1798): 'De wet is de wil van het geheele maatschappelyk lichaam, uitgedrukt door de meerderheid of der burgeren of van derzelve vertegenwoordigers. Zy is hetzy beschermende of straffende gelyk voor allen. Zy strekt zich alleen uit tot daaden, nimmer tot gevoelens. Alles wat overeenkomt met de onvervreemdbare regten van den mensch in maatschappy, kan door geene wet verboden worden. Zy beveelt, noch laat toe, hetgeen daarmede strydig is.' ('The law is the will of the total societal body, expressed by the majority of citizens or their representatives. The law is either of protective or punitive equality for all. It extends only to acts, never to feelings. Everything which corresponds to the inalienable human rights in society, may be prohibited by no law. It bans, and does not allow, anything which is in conflict with this.')

36 Article 6 Staatsregeling van 1798 is an expression of Kant's Categorical Imperative and the biblical *Golden Rule*: 'Alle de pligten van den mensch in de maatschappy hebben hunnen grondslag in deze heilige wet: doe eenen ander niet, hetgeen gy niet wenscht dat aan u geschiede, doe aan anderen, ten allen tyde, zoo veel goeds, als gy in gelyke omstandigheden van hun zoudt wenschen te ontvangen'. ('All the duties of man in society have their foundation in this holy law: do not do unto others what you do not want others to do unto you, do unto others, at all times, as much good as you would wish to receive from them in similar circumstances.')

37 Surprisingly enough BÖHTLINGK and LOGEMANN 1966, at pp. 22-24, refer on these pages to Carl Schmitt's elaboration in *Constitutional Theory* (at pp. 138-147) on this – according to Schmitt – 'liberal-democratic' *rechtsstaat* conception of a statute.

38 VAN OMMEREN 2009, at p. 63.

39 BÖHTLINGK and LOGEMANN 1966, at p. 17.

1879 in which the Crown was considered to lack the authority to enact on its own – without parliamentary consent – a general regulation prescribing penalties for specific criminal offences.⁴⁰ A contemporary problem is the increasing *delegation* of legislative powers. The link between the parliamentary statute and a concrete act of government has in many cases become really thin.⁴¹

For a long time the purely formal statute has been criticised as being at odds with the principles of the *rechtsstaat*. Even half way into the 20th century, Böhrling claimed that the Dutch Constitution prescribed a *material* concept of a statute, thereby criticising the practice of budget acts, royal marriage acts, etc.⁴² Böhrling was, as Van Ommeren correctly points out,⁴³ in a minority position regarding the claim that the Dutch Constitution (*‘Grondwet’*) prescribes a *material* concept of statutes. This shows the controversial character of this topic.

From a legal certainty perspective, the *generality* of rules is not a purpose as such, but a safeguard against light-hearted limitations of the rights and legal expectations of citizens.⁴⁴ The generality of the rule *forces* the legislator to design a statute which can be imposed on all those whom the law addresses. In this sense *generality* is not promoted because of a desire for equal treatment, but to limit arbitrary law-making. Citizens’ rights

40 Hoge Raad 13 January 1879, *Rechtspraak van de Week* 4330. In Hoge Raad 22 juni 1973, *Nederlandse Jurisprudentie* 1973, 386 (*fluoridering*) it was decided that the delegation of far-reaching authorities – *de facto* forcing civilians to accept an intrusion (in this case: fluoride in drinking water) – should always be based on a parliamentary statute.

41 This was already noticed by constitutional lawyers in the 1920s but it is still an ever increasing problem which is located mainly in the elaborate route of the adjudication of public authorities.

42 BÖHRLING and LOGEMANN 1966, at p. 51: ‘wetgevers niet bevoegd bij wet in formele zin [...] andere regels te maken dan naar buiten werkende algemene regels.’ (‘legislators are not competent by an act of parliament [...] to create *different* rules than outward functioning general rules.’) It must be noted that the book was finished earlier than its publication in 1966 because of the sudden death of Böhrling in 1958.

43 VAN OMMEREN 2009, at pp. 60–65.

44 A good example can also be found in Article 19, first clause, of the German Constitution (*‘Grundgesetz’*): ‘Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz *allgemein* und nicht nur für den Einzelfall gelten.’ (‘Where, under this Basic Law, a fundamental right can be limited by law or pursuant to a law, the law must apply *generally* and not just for an individual case.’) Emphasis added.

and liberties cannot be limited by an ad hoc decree but must always be based on a pre-established general rule. In this sense the classic expression of the *rule of law* is ‘government of laws, not men’ – as formulated by John Adams in the Massachusetts Constitution. This expression is in the first place directed at eliminating the tyrannical sovereign monarch (‘not men’),⁴⁵ and in the second place prohibiting decrees (‘of laws’) historically ordained by the sovereign monarch but later on also by holders of political office.⁴⁶ The famous administrative and constitutional law scholar Léon Duguit later expressed it as:

‘The law can be bad, unjust, but this danger is reduced to a minimum because of its general and abstract composition. The protective character of the law, indeed, its *raison d’être* itself, lies in its general character.’⁴⁷

The *generality* of rules is an essential part of the *rechtsstaat* or the *rule of law*; it prevents arbitrary – *ad hoc* – lawmaking. The *form* of the law, its enactment according to the constitutional procedure by the legislature, requires *generality* and therefore universality. General rules bind the state to its own rules, thereby enhancing the *predictability* of the law. Legal certainty in the sense of the predictability and foreseeability of the law can only be conceived of in a system of general rules. The generality of rules is a requirement of the *rechtsstaat* that should still be taken very seriously; in view of the aggravating complexity of the legal system with its articulated legal norms and delegation of authority, the principle of the generality of rules is permanently in danger.

45 As in the famous words of John Locke, *Second Treatise of Government*, Section 202 of Chapter XVIII in Book II: ‘Wherever law ends tyranny begins.’

46 In the 19th century constitutional law was mainly engaged with the reduction of the political power of the sovereign monarch. At the start of the 20th century many constitutional theorists commenced an attack on the ‘will theory’ of constitutional law. In this theory the will of the monarch was law, as clearly expressed in John Austin’s Command Theory in his *The Province of Jurisprudence Determined*. HART 1994, Hart’s Chapters II-IV of *The Concept of Law* are a rejection of Austin’s Command Theory.

47 DUGUIT 1923, at p. 97; *Traité de Droit constitutionnel*, vol. II, 1923, at p. 145. I quoted this translation in English from SCHMITT 2008, at p. 196.

4. Solidarity

Loenen stresses in her article the paradox in her position: ‘it is in each individual’s interest that it is not always sought to do justice in the individual case. After all, it is in the interest of each citizen that the general rules are applied, even in situations when the application leads to inequitable results in his/her case, as without this generality society cannot function properly’⁴⁸ (translation JK). According to Loenen ‘society cannot function properly’ without the ‘generality of rules’, because unlimited demands and expectations striving for ‘total justice’ may be harmful to other citizens’ rights and interests. This is difficult to refute. The human freedom to act is always constrained by *social* limitations. The mere fact of living together in the same space implies that we are limited by others when we wish to satisfy our demands. When demanding a certain good we can always be confronted with another person who wishes the same good. Freedom, therefore, is necessarily *limited* by rules. The *point* of having law at all lies in this limitation of freedom.

But I suspect that Titia Loenen takes the argument one step further. For Loenen ‘living together means giving and taking.’⁴⁹ In order to allow society to ‘function properly’ freedom is not only restricted due to necessity, but it also demands *reciprocity* among members of society. Solidarity is the set of ties that bind people in society together;⁵⁰ this is based on *reciprocity*.⁵¹ It is

48 LOENEN 1996, at p. 134: ‘Bovendien is het, hoe paradoxaal dat wellicht ook klinkt, evenzeer in ieders *individuele* belang dat er niet altijd gestreefd wordt naar recht doen aan het individuele geval. Iedere burger heeft immers belang bij algemeenheid van regels die toegepast worden, ook al valt toepassing soms voor hem/haarzelf onbillijk uit, aangezien de samenleving anders niet goed kan functioneren.’ (Moreover it is, however paradoxical as it may sound, just as much in everyone’s individual interest that there is not always strived to do justice in the individual case.’).

49 LOENEN 1996, at p. 134: ‘Samenleven betekent geven en nemen.’

50 LOENEN 2010b, at p. 307: ‘[...] [K]an solidariteit worden gefundeerd in het bewustzijn van mensen dat zij voor een menswaardig bestaan afhankelijk zijn van anderen. Solidariteit lijkt dan meer een eis van redelijkheid en wederkerigheid: mensen kunnen niet zonder elkaar.’ (‘[...] can solidarity be founded in the consciousness of people that for a dignified life they are dependent on others. Solidarity then appears to be more a requirement of reasonableness and reciprocity: people cannot live without one another.’).

51 I speak explicitly of *solidarity*, based on *reciprocity*, to distinguish this from solidarity as *altruism* in which reciprocity is not present.

a matter of giving and taking. Not only of tokens, like gifts,⁵² but also of helping of each other and caring for each other.

Helping and caring as expressions of solidarity have largely become a task of the government.⁵³ It is thus *externally* organised solidarity, which is organised outside the immediate relationship between the people involved. Durkheim would call it *mechanical* – as opposed to *organical* – solidarity.⁵⁴ Think of medical care, retirement, unemployment, etc. The reciprocity that characterises solidarity is now hidden in the relation between taxpayers funding these social arrangements, on the one hand, and, on the other, benefactors of these collective arrangements. The distribution of social services is primarily made by the government as an intermediary. The link of solidarity is no longer directly visible: the one delivering (a taxpayer) does not see the result (someone receiving extensive medical care). The one who is receiving help and care cannot do anything in return for the one who has helped him because there is no concrete person or group delivering solidarity, but only the abstract group of taxpayers.

Understandably, the benefactors do not recognise that as a matter of fact they in turn are supported by their fellow citizens. From the viewpoint of solidarity the obligation to do something in return for the help received is still there. But people receiving help and care from the state often do not see it that way. For them it is a *right* which is owed to them by the state, and the state is obliged to deliver ‘total justice’.⁵⁵ Expectations regarding the help and care that the state can offer everyone to achieve a good standard of living are sky-high, but it is mostly forgotten that solidarity is still a matter of giving *and* taking, and not only a matter of taking by people who claim to have a right to a high standard of social arrangements. This *a*-symmetry is the core of Loenen’s critique of the arrangement of solidarity by the state.

In my understanding the problem with the state organisation of solidarity as perceived by Loenen is that in the long run it does not achieve its goal of a society in which people are really living together, in the sense of

52 The classic example is gift exchanges (the Kula ring) among the inhabitants of the islands of the Trobriand Islands, described by Bronislaw Malinowski in *Argonauts of the Western Pacific* 1922.

53 Described in detail by LOENEN 2010b, at pp. 312-327.

54 LOENEN 2010b, at p. 308.

55 LOENEN 2010b, at p. 323. Titia took this term from FRIEDMAN 1986, at p. 23.

helping each other and caring for each other. State-organised solidarity has, on the contrary, made solidarity itself quite unpopular, but a society without solidarity is an empty and meaningless one. As Loenen points out, the popularity of personal freedom has grown, at the expense of the most vulnerable and marginalised people in society, which is the 'true crisis of the welfare state'.⁵⁶ The greatest challenge to present-day society is the question as to how or by what state-organised solidarity can be replaced.

In my opinion, in the discussion on solidarity the generality of rules is relevant in two ways. First, general rules may be regarded as the expression of solidarity; they can express certain common goals of a society. For example, the constitutional provisions on social security are expressions of these common goals.⁵⁷ These constitutional provisions are expressions of largely shared values in society. But they are not only expressions of these values; they also function as guidelines for the development of new legislation. Secondly, the generality of rules expresses an *abstract* choice between interests. It is not the interests and position of the parties in a specific case that are considered, as in a judge's decision. This *abstract* balancing of interests in statutes by the legislature reflects what solution is best for society as a whole. We are reminded of Aristotle's remark that it is impossible, and not even desirable, for the legislator to foresee every possible individual case; it is a duty for the legislature to come up with *general* rules, and to have the judge to come up with concrete decisions in individual cases. But judges should be reluctant to put their decisions in place of the general balancing of interests by the legislature. Judges are not equipped with the instruments, such as departmental staff, to review the general effects of their decisions, and it is very questionable if politically controversial decisions should be made by judges instead of the legislature in view of the democratic legitimacy of the judiciary. If people understand the concept of solidarity as reciprocity properly, it makes sense to sometimes *refrain* from claiming one's right in court, because then the *a-symmetry* of only taking and not giving back is recognised. Therefore, in

56 LOENEN 2010b, at p. 326.

57 Expressed in Article 19 (clause 1: 'It shall be the concern of the authorities to promote the provision of sufficient employment.') and Article 20 (clause 1: 'It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.') Grondwet.

many cases, the abstract choice between the interests of the legislator should be respected instead of seeking individual justice.

5. Conclusion

The generality of rules is a tricky legal theoretical topic. On the one hand, it is very hard to phrase a solid philosophical argumentation. A moral approach seems to demand a focus on doing justice to the *individual case* and not on generality. On the other hand, lawyers and legal scholars know that the generality of rules *does* matter. In her article ‘Recht en het onvervulbare verlangen naar individuele gerechtigheid’ Titia Loenen takes a position in favour of the generality of rules and I think with good reason. She draws attention to the danger that a shift within the balance of powers is inevitable when citizens become dependent on the courts to decide systematically whether a deviation from the rule is required because of reasonableness and fairness.

However, the constitutional law argument regarding the division of powers can be expanded, as I have tried to show in this essay. The essence of the generality of rules in the conception of *rechtsstaat* or the *rule of law* is to rule out *ad hoc* legislation. The traditional *rechtsstaat* doctrine requires statutes to be general and abstract rules. Constitutional legal scholars, notably Böhtlingk, have advocated sticking to a concept of a *material* statute. The core of his argument is still attractive and gives us an argument to embrace the generality of rules as much as possible: it is a safeguard against *ad hoc* regulation because it limits infringements on citizens’ rights or interests by demanding the generality of the rule.

I think that Titia Loenen is actually concerned with the foundations of solidarity in our society. Her article can be interpreted, as I have shown, as a warning. Citizens claim a *right* to support and care from the state, which has almost monopolised solidarity. Thus, citizens have become dependent on the state, while at the same time their expectations of the level of social arrangements are sky-high. They demand ‘total justice’ from the state, while the taxpayers are really providing the funds for these social arrangements. Reciprocity, as the core of solidarity, is no longer in the picture; those receiving help and care do not feel any obligation towards the state, and those paying

for that help and care see a state-dependent group that is demanding 'total justice'.

Loenen sees the biggest challenge nowadays as providing solidarity with a new foundation, which avoids a restoration of the older arrangements of solidarity in families and religious communities. The gains of being free from these institutions are clear; these institutions were oppressing for the free development of individuals. What would be a good replacement for these institutions? In recent years the welfare state has increasingly been dismantled, for instance regarding social and unemployment benefits. Altogether society has undeniably taken a turn to a more egocentric mentality of taking care of one's own business first. The competition among people in the workplace and on the job market is increasing. The welfare state with its over-institutionalised arrangements no longer exists, but at the same time alternative social arrangements, based on a different form of solidarity, have not yet been formed.

What will be the demands on the legal system in the coming decades? The 'tragic heroism' of law probably no longer lies in the expectations of citizens towards the social welfare state. But the expectations towards the legal system have not yet been relinquished. Illustrations of such expectations can be found in criminal law with its increasing focus on the victim, and in the expected benefits of *regulating* previously hardly regulated agencies like financial institutions or public housing co-operations. Titia Loenen's appeal for the generality of rules has demonstrated to me that abstract rules can serve as a means to achieve a prudent legal system, not based on *ad hoc* rules.

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