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Democracy and Minority Rights

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1.
Introduction.

For those who ever visited the Netherlands one of the most striking features is the great number of so–called ethnic minorities one meets in the streets, especially in the bigger cities. The Netherlands truly can be called a multi–cultural and multi–ethnic society.

Next to the people who migrated from the former Dutch colonies Antilles, there are also people from Morocco and Turkey who came to Holland in the 1960s as so–called 'guest–labourers', later to to be joined by their wives and children, the latter now having children of their own, so we can speak of a third generation already. In addition to these groups there are also people from Somalia, Cape Verdian Islands, Ghana, former Yugoslavia and many many more countries living in the Netherlands now as more or less permanent residents.

One can understand that this diversity of people living in one country will not only have positive consequences in the sense of a more 'colourful society' with an interesting variety of cultural manifestations in the sphere of religion, music, food etc., but that it can also be a source of cultural conflicts, discrimation and racism.

It is this more problematic side of the multi–cultural society that I would like to discuss here. What ways can be found to avoid the possibility of growing tensions and conflicts between people of Dutch origin and people who have migrated and will migrate to the Netherlands in the future? Two main themes that are directly

related with the problems of a multi–ethnic society, namely that of the idea of legal pluralism on the one hand and that of *a defensible democracy* on the other, will be dealt with here.

First I will draw a very brief sketch of the current social and political situation in the Netherlands (par. 2), to be followed by a description of the notion 'democracy' (par. 3), par. 4 will deal with the idea of 'legal pluralism' as a possible way of preventing and/or reconciling cultural conflicts. In the 5th par. the idea of a 'defensible democracy' will be discussed to be followed by some final remarks (par. 6)–

2.
Elections in the Netherlands.

March 1994 city–council elections were held in the Netherlands, followed by national elections in may 1994. One of the favourite items political parties were adressing in their election–campaigns was that of the **presence of ethnic–cultural minorities** in this country.

A worrying fact in this respect is that the right–extremist parties in the Netherlands, who not surprisingly are not very positive about the presence of people of non–Dutch origin in this country (especially the so–called Centrum–Democrats (sic!) and the Centrum–Party 86), have gained more votes than ever before, this at the cost of the more traditional parties (Christian–Democrats, Social–Democrats, Liberal Party). Support for these right–wing parties has come especially from the lower income–groups of Dutch society, that is people living in the same neighbourhoods as most of the ethnic minorities, mostly the older parts of city–centres. Still as the results of the city–council elections show also many people living in the so–called more 'respectable' neighbourhoods are inclined to vote for the right–extremist parties. Whereas the traditional political parties are (possibly rightfully) blamed for not taking the problems regarding these minorities and their relation with segments of the Dutch population really serious, the right–wing parties make no secret of their willingness to adress these problems with severe measures, which should eventually lead to a non–colourful Dutch society. And even though many people who will be voting for these parties do not really totally identify with the ideas these parties stand for, some of them see this choice also as a way of protest, a way of showing the traditional political parties that they have failed to create an effective and just policy that would have prevented the tensions that are said to have grown to unacceptable heights now within Dutch society.

Other and probably more important motives for people to vote for right–extremist parties could be the following two.

óPure' racism, that is the idea that non–whites are inferior to whites. The fact that some coloured people have a very different life–style, don't like to work and prefer living of social security–benefits, or do like to work, but only in same time,

are engaged in criminal activities as drug–dealing, burglaries and violent crimes, are not able to speak proper Dutch, don't have any respect for local (or national) habits, never pay for public transport, have lots of children for which they claim financial contributions of the state, cook funny and strange, play their music much too loud and much too long etc., will lead to the 'inevitable' conclusion that these attitudes can be ascribed to all the people that are not of Dutch origin.

A second motive could be a dissatisfaction with the own situation, following from things as a bad income–situation (low wages), (fear of) unemployment and bad living–conditions (ghetto–formation), a (supposed) relatively high crime–rate in the neighbourhood etc., in general to be defined as a kind of 'relative deprivation'.

Having speculated about the possible motives for people to vote for right–extremist parties (protest–votes, racism, relative deprivation) and assuming that these parties will indeed gain more political power, the question arises what to do about this worrying development. What to do about a situation in which a society faces a possibility of a segregation and polarization between an indigenous majority–population on the one hand and a diversity of minority–groups on the other. A society in which a part of the population is treated and judged as second–rate citizens because of their ethnic–cultural background cannot be judged as a civilized democratic society.

The question I would like to deal with could be phrased in general terms as: what room and/or protection can a democratic society afford and/or offer to minority–groups living in that society. And related to this the more concrete question whether or not, and if so, to what extent, different kind of people have a right to live in accordance with their own culture (values, norms, practices).

This question seems to be even more relevant in a time of a world–vide economic recession and political instability in different regions of the world (f.i. former Yugoslavia, countries in the former eastern communist world, some African states), this again leading to all kinds of migration–movements for political or economic reasons and thus to evermore new confrontations between different groups in society (that this theme is not only relevant for the current situation in the Netherlands can be illustrated by referring to recent incidents and developments in countries as Germany, Belgium and France)[1].

It must be emphasized that a society that is not willing to treat all inhabitants as principally equal in rights and status is a society that will find itself on the very dangerous and slippery road towards totalitarianism. Also from the minorities–perspective one cannot expect a positive contribution towards a more harmonious society once this direction has been choosen.

[1]It must be stated the support for right extremist parties in countries as Belgium, Germany and France is much higher than in the Netherlands. Also the number and seriousness of racial incidents in these countries give reason for great concern.

3.
Formal and material democracy.

In the 1992 Seminar at the Masaryk University of Brno in the Czech Republic Prof. Van der Wal of the Philosophical Faculty of the Erasmus University Rotterdam (the Netherlands) spoke about the *formal and material features of democracy.* I would like to try to approach the problem as posed in the paragraph above from the perspective as it was offered then by Van der Wal. His central thesis was that (the western model of) democracy is the idea of a political constellation that fits with our (Western) culture and its prevailing opinions about being–human, living together, authority and the like. Thus the idea of *formal democracy* as a totality of game–rules that regulates the political desicion–making process only in form/procedure without any substantial implication has to be judged as being insufficient. Democracy in the true (and substantial) sense also entails things as freedom, equality of all as human beings and the self–respect that follows from this, participation in government not as a privilege but as a right, openness and tolerance regarding different opinions and ways of life than one's own, protection of minorities and acknowledgement of fundamental rights, in short: *features of a material concept of democracy* (Van der Wal, 1992). Or as it is also stated in more legal terms: from the principles of democracy itself the consequence follows that citizens with a possible deviant opinion should also be involved in the process of legal normbuilding thus making it possible for them to give their judgement about the state–of–law and also making it possible for their opinions to be reckoned with in the preparation of laws and other decisions. Democracy is not merely the adding up of opinions but generally speaken it also entails respect for the conviction of others. (Van der Vlies, 1993)

Still as the basic idea of democracy includes the provision of quarantees for minorities, there will be some limits to what extend conviction of others can be respected. Minorities should not be so radically and permanently overruled that this would result in a minimum of self–realization and participation in the shaping of society. It is the meaning of human rights and fundamental rights to offer these quarantees as the lower limits that should be taken into account in decision–making, especially with regard to minorities. Minority–protection and a loyality–statement towards fundamental rights, thus again Van der Wal, are an integral part of the western concept of democracy.

The choice for democracy then is not only a choice for a certain way of thinking and living, at the same time it is a rejection of convictions and related political opinions and practices that are clearly at odds with this notion of democracy, whether these are of a right–extremist, left–extremist or a religious–fundamentalist kind.

One should realize at the same time that the concept of democracy should be seen as a contrafactual one, an ideal that will never be totally and ideally realized. It is an utopian concept that should work as a kind of standard from the point of which certain practices, opinions, values and norms can be judged in the sense

that they will or will not contribute to a development in a democratic direction. So even countries of which it is said that they have had a democratic tradition for a long time already cannot claim to be examples of 'true democracies'. Also in these countries one has always to be aware of actual developments that have to be judged as undermining or contributing to the democratic ideal.

In order to be able to create a kind of political–juridical system in which there is room for this qualitative (material) idea of democracy to develop, two aspects can be distinguished: a positive and a negative one, or democracy as a creative political constellation and democracy as a defensible institution respectively.

4.
An open and creative democracy[2].

One possible way of trying to contribute to democratic developments, especially with regard to the minority–problem, could be to try to realize some kind of legal pluralism, that is giving room to other kind of norms and values that that of the majority of the population.

Regarding ethnic–cultural minority–groups the Dutch legal system does not always know how to deal with the attitudes of these newcomers. On a number of terrains the established legal culture, a mixture of christian values and liberal institutions, collides with the sometimes strongly deviating social and especially religious norms and values of some outsiders (f.i. funeral practices, compulsory education, raising of children, marriage and divorce, initiation–rites, religious duties. Mostly it regards matters in the field of upbringing, family and religion).

The question whether some degree of legal pluralism could contribute to reducing conflicts between in– and outsiders goes beyond the field of description, it is a normative, legal–political question. (Bovens, 1993)

Before discussing the possibility of a kind of legal pluralism to contribute to a less conflictuous or even harmonious kind of society, it should be noted that there exists a Babylonic confusion between jurists (in general) on the one hand and legal antropologists/social scientists on the other regarding the meaning of this notion.

Being aware of the fact that this is a rather schematic distinction, the following differences can be mentioned:

1. A normative (juridical) versus a descriptive (social–scientific) approach;
2. Juridical centralism (state–law) versus decentralism (folk–law).
3. A plurality of legal systems versus one of legal sources.

[2]This paragraph is largely based on an article by M.A.P. Bovens, "Babel binnen het recht. Een multidisciplinair perspectief op rechtspluralisme", in: N.J.H. Huls en H.D. Stout (red), Recht in een multiculturele samenleving, Zwolle, 1993, 159–172.

4. A reserved or negative attittude versus a more neutral or even positive attitude.[3].

Advocates of legal pluralism would say that a variety in status, applicability and background of legal rules makes it easier to deal with social conflicts and to incorparate new developments in the *corpus juris*.

Still an (official) introduction by the state (i.e. a centralist form of legal pluralism) of seperate legal systems for ethnic or religious groups in the Netherlands is not really possible because the different population–groups are not easily seperated in a geographical and social sense. From a perspective of legal security and legal equality it is also not desirable to create seperate legal systems because it would put the orienting and integrative funciton of law at risk (Bovens, 1993: 166).

Par. 1 of the Dutch Constitution does not allow a different treatment of people on the basis of religion or life–philosophy. Also Par. 8 of the Law of General Provisions (Wet Algemene Bepalingen) states that the law is applicable to everyone living in the Kingdom of the Netherlands.

A pluralism in the sense of legal sources is a different matter. Every modern society has a certain variety of legal sources. Legal pluralism in this sense cannot be introduced, it exists[4]. Seen as a legal–political instrument this form implies an acknowledgement by the legislator, magistrates and civil servants of religious and cultural customs and rules as an additional legal source (Bovens, 1993: 166–167).

Allowing for cultural customs and religious rules to be used s arguments in the weighing of interests prior to decision–making of judicial magistrates is nothing new. What is pleaded for is to extend this practice to the customs and practices of cultural and religious minorities.

Two kind of arguments are used here: instrumental ones and arguments that are derived from the notion of the state–of–law.

[3]The distinction between juridical centralism (state–law) on the one hand and decentralism (folk law) on the other refers to the distinction between the idea that all legal rules in principle can be traced to one official source, that they are hierarchically and systematically ordered and should be uniformly applied, and the idea of decentralism that states that any form of self–regulation of a semi–autonomous social field can be called law.

For juridical centralists legal pluralism refers to the situation in which the central state allows different legal systems to be applied regarding different population–groups within one (national) legal constellation (cf. former colonies of EC–law, international private law). from a decentral antropological or functional juridical perspective the fact whether or not norm are seen as binding in a social field is crucial. Legal pluralism then is not seen as a pluralism of legal systems but one of legal sources.

Finally centralists have more reservations regarding the phenomenon of legal pluralism that is seen as inferior, atavistic, difficult, unworkable, unpredictable and confusing. It is seen as a heritage of an undeveloped past that should vanish on the way to modernization (the modern state–of–law) From a decentral perspective legal pluralism is more neutrally and also positively judged (an interesting phenomenon that is described and analyzed). Legal pluralism defined as a multitude of legal sources means that it is a standard–situation and not an anomaly or atavism (Bovens, 1993).

[4]Griffiths: legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion (1986:4).

Regarding the first, acknowledgement of more legal sources would ease the process of integration of minorities, so it is said. Connecting to the Dutch legal culture would be easier and would prevent unnecessary conflicts to emerge because of a too severe attitude of authorities.

Secondly the legitimacy of the legal system would be enlarged because judicial decisions would be more adjusted to the feeling of justice of citizens.[5]

Objections to these kind of arguments could be the following: pluralism will lead to societal disintegration because it will result in fixation and conservation of the immigrant–cultures. A referral can be made here to the interesting phenomenon of a more severe attachment to cultural traditions by groups that have left their original surroundings as a way of coping with a new and insecure environment.

And secondly pluralism will lead to more conflicts between different groups in society because the idea of differential treatment could also be explained as a kind of preferential treatment for certain groups at the cost of discrimination of others. In this respect a lot of criticism is heard in Dutch society about a policy of 'positive discrimination'[6], a criticism that seems to be fruitfully exploited by the right–extremist parties.

Arguments that are derived from the State–of–law perspective seem to be more convincing. As Art. 27 of the United Nation Treaty of Civil and Political Rights states: members of ethnic, religious and linquistic minorities within a state have the right to enjoy collectively their own culture, to profess and practically apply their religion and to use their own language.

Legal rules then can also be seen as being part of a culture, and often they are strongly related to religious regulations and rituals (especially in family–law).

The principle of equality also leads to a more positive valuation of the admission of ethnic regulations and religious practices as a source of unwritten customary law.

It is stated by Bovens that already in the beginning of this century, thus long before the entry of many ethnic minorities in the Netherlands, the right of minorities to learn, pray and organize themselves in accordance with their own norms and within their own circles was strongly established in the Dutch state–of–law (Bovens, 1993: 169)[7].

Still, Bovens continues, from a legal–theoretical point of view, some limits must be set to the extent to which a mild form of legal pluralism (i.e. pluralism in the

[5]Still these (hypothetical) arguments can only be verified through empirical research, thus Bovens.

[6]Those in favour of a policy of so–called 'positive discrimination' will emphasize the fact that it is not so much discrimination that is at stake here, but an attempt to reduce longlasting social–economic deprivation. A way of making–up for results of discrimatory treatment of minorities in the past and present with regard to f.i. housing–situation, employment, education etc.

[7]The Netherlands has (always) been characterized as a 'pillarized society', meaning that different political and/or religious groups (i.e. for instance catholics, protestants, liberals, socialists) always have enjoyed a rather great autonomy in several spheres of life (e.g. education, trade–unions, leisure–activities and –associations).

sense of legal sources) could be realized:

First and foremost a differentiation should be made regarding the legal field that is adressed: private, administrative or penal law;

Regarding civil law three formal conditions can be formulated:

- the customary law of minority–groups must be relevant (a practice that is generally accepted as a legal duty) within the own group;
- Principle of additionality: obligatory legal regulations cannot be set aside by rules of customary law.
- Principle of voluntariness or facultativity (exit–option): individual members of a cultural group should be free to make their own choice whether or not they prefer to make use of Dutch law and/or international (human right–) treaties.

As far as material conditions are concerned only some general remarks can be made, that have to be substantiated depending on the legal question and the legal field at hand. It should always be considered if it is acceptable to the Dutch legal order to allow ethnic and religious practices as legal rules. Protection of individual autonomy then should be the lower limit in this respect. Or as it is stated by Goldschmidt: an infraction of the democratic state–of–law cannot be allowed and fundamental human rights should be protected (Goldschmidt, 1983: 251–259).

Regarding these material and formal conditions the same can be said when administrative law is concerned. As examples in which legal pluralism could be realized one can refer to funeral practices, regulations with regard to commercial activities (f.i. opening– and closing–times of shops, ritual slaughtering of animals), educational facilities, holidays etc. It should be added that the facultativity–option as mentioned above, could also be of importance for those not belonging to these cultural minority–groups: in certain instances it is very well imaginable that they should also have a right to make a choice what kind of regulation they prefer to be applicable.

Regarding penal law some examples can be mentioned of a possible conflict between Dutch criminal law and practices of minority–groups: (Turkish & Moroccan) kidnapping, (African & Jewish) circumcision of children, (Turkish & Moluccan) blood feud (vendetta), (Islamic) polygamy, (Hindu) funeral rituals.

In order to give some credit to ethnic–cultural differences in this field one could think in terms of reduction of punishment, or (maybe) in extraordinary cases cultural background factors could play a role in exclusion of punishability (f.i. force majeur). 't Hart mentions two penal law–cases in which the cultural background is not accepted as an excuse in court and one in which it is.

He refers to a case between two people from Surinam, in which the accused threatened the other person because he was afraid to be physically touched by the other who was supposed to have the power of 'black magic'. His excuse in court was based on self–defence but this was not accepted by the Supreme Court. In his comment on the verdict of the Supreme Court 't Hart remarks: "the question, how

a suspect could 'in all reasonableness' feel about a certain situation and his reaction to it, cannot be exclusively answered from a dominant (Dutch) native/indigenous culture–pattern and its related, as self–evidently experienced, valuations". This criticism comes down to a reproach of a lack of openness in the explanation of the judicial dogma of 'self–defence' i aconcrete case, a lack of openness for the possibility of another kind of reality–experience.

The next example mentioned regards a Turkish kidnapping–case. The suspect, together with his brother kidnapped a Turkish girl, with whom he had fallen in love. By abducting her he wanted to force her to marry him.

The referral to the cultural background of the offender in this case is even used as a reason for a more severe punishment by the Regional Court: because of his cultural background the suspect should have realized what serious consequences an abduction would have had for the victim if she would not have agreed in a forced marriage.

Finally a case is dealt with in which the cultural background was accepted in court, a case of rape: the (threat of) violence that made the victim consent in sexual intercourse could under certain circumstances also consist in the threat of an epilepsy– or heart–attack by the offender of whom the victim knew that he was involved in spiritism and voodoo ('t Hart, 1993: 85–98)[8].

That one has to be careful with accepting 'minority–cultural arguments' in court is clearly expressed by Van Walsum, who warns for the stereotyping and discriminatory effects this could have. As an example in this respect she refers to the trial on the murder of the Turkish Union–leader Karamanlis in the Netherlands. The defence argued that it was a case of 'blood feud' (vendetta) and thus pleaded for a milder verdict, in the eyes of the Turkish community it was nothing else than a political assasination (Van Walsum, 1992).

One must conclude to a limited applicability of legal pluralism in penal law as a way of indirectly contributing to a less conflictuous society as far as the relation minorities–majority is concerned. Indirect in the sense that members of minority–groups in this way will experience an interest in their cultural background as a (positive) factor in judicial decision–taking. Private and administrative law clearly offer more room for differential treatment in this respect.

5.

A defensible democracy.

Having discussed the (im)possibilities of legal pluralism to contribute to a better understanding of ethnic and cultural minorities, and thus to a hopefully better

[8]In the examples mentioned here the cultural background seems to work only in favour of the victim but not in favour of the offender. Which does not mean that this will or should always be the case.

understanding between different population–groups, I would now like to switch to the second more defensive and repressive kind of approach in assuring the material notion of democracy to be (possibly) developed.

The approach relates to the kind of measures needed to protect the democracy itself: the most clear examples in this respect are the prohibition of anti–democratic parties and the banning of people form performing certain public functions (cf. Berufsverbot' in Germany). Political parties that intend to use the formal democratic system with the final purpose of destroying democratic institutions and values and replacing them by racist and/or totalitarian (fascist, fundamentalist) ones should be excluded from the political process (Van der Wal, 1992). Of course it will by no means always be easy to discern democratic tendencies from undemocratic ones, which should lead to the reservation that as long as there are any doubts as to the (un)democratic features of a certain political party, this party should be allowed to participate in the public political debate. Only when, also through this debate, it becomes undoubtedly clear that a party doesn't have any respect for democratic values and even intends to destroy them, this party should be expelled from the political process.

Janmaat, the leader of the extreme–right Centrum–Democratic Party (CD) and also member of the Dutch Parliament, seems to be very close to this limit of acceptability, if he has not already crossed it!

Next to his continuous degrading statements regarding foreigners and immigrants in general, he has also lately made some rather concrete statements with regard to the Dutch minister of Justice Hirsch–Ballin, who because of his Jewish origin should not be allowed to be the Dutch Minister of Justice: "I won't hold it against them that Jews move like nomads, but they shouldn't be allowed to perform public functions"[9]. The same kind of remarks are made regarding another member of the Dutch government, the state–secretary Gabor, who is of Hungarian origin (his parents fled from Hungary in 1956).

Regarding the more general statements of Janmaat about foreigners and immigrants, the Public Prosecution in the Netherlands indeed started criminal proceedings on the basis of racial discrimination (art. 137c,d, Dutch Penal Code). Still the accusation Janmaat was faced with, was judged 'too vague' by the court. The accusation made no clear distinction with regard to statements made by Janmaat himself, and statements made by the Centrum–Democratic Party in general. Another problem is that Dutch penal law until now does allow negative remarks to be made about foreigners, strangers, immigrants and nationality as long as no reference is made to race or the colour of skin. The leader of this extremist party is well aware of this: "It is a kind of political sport of us to express the viewpoints of the CD in such a way that nobody can feel offended about it from the perspective of the Dutch Penal Code. They can search as much as they like. In ten years time they

[9]As cited by H. van der Neut en W. Wedzinga in: De Volkskrant, 27–1–1994.

have found nothing. I play the game of the wolf in sheeps' clothes."[10]

Still a second attempt is going to be made by the Dutch Public Prosecution to bring Janmaat to court, this time with a more specified formal accusation.

Next to the court–proceedings regarding his more general remarks, it is very well possible that he will be prosecuted for his remarks about the (Jewish origin of the) Dutch minister of Justice. As already stated insults and discrimination of groups of people because of their race can be prosecuted on the basis of the Dutch Penal Code.

Still one can pose question–marks regarding the effectivity of criminal prosecution of members or party–leaders of right–extremist parties. Such proceedings will mot have any effect on the political party itself, but only on the person in question and only with regard to specific activities that have been committed in the past.

Another, maybe more effective, possibility, as proposed by Bolsius, would be to start court–proceedings on the basis of art. 20 of book 2 of the Civil Code. This paragraph states that a legal person/body which purpose or activity collides with the public order can be declared illegal and dissolved by the court on demand of the public prosecution. As political parties in the Netherlands are legal persons, they fall within the range of this article. Unjustified limitation of the freedom of others or damaging the human dignity of others (f.i. through racial discrimination) are contrary to the public order as meant in this paragraph. As it is stated by Bolsius, the criminal law–way will be restricted only to the consequences of the conviction itself and only for the convicted person. The civil law–way will not stop short with the conviction but will extend itself also over the time thereafter. The political party will remain illegal once this is declared so by the judge. Also this civil law prohibitionary declaration can be combined with par. 140 section 2 of the Criminal Code which makes it punishable to participate in the continuation of an illegal organisation. Members of an illegal party can be prosecuted if they want to start a new party of the same kind. It is admitted that it sounds undemocratic to prohibit certain political parties, but this juridical party was introduced as a way to protect democracy, as a legally admitted exception to the constitutionally guaranteed freedom of union and freedom of speech.[11].

6.
Final Remarks.

The strongest defence of democracy as a juridical–political constellation lies in its openness to pluriformity and its willingness to allow and create possibilities for public rational debate. People with diverging ideas should in principal have a chance to speak them out, to discuss them with those who have different opinions. Only

[10] idem.

[11] Bolsius E.J. in: Volkskrant 28–4–1994.

in very extreme situations, that is when when fundamental rights and values are challenged in this debate (incl. the idea(l) of democracy itself) should one resort to means as a prohibition of certain political parties, that is only as an *ultimum remedium*.

In the meantime, more generally speaking, a society would do well to create space for different kinds of cultural expressions and practices, thus creating a basis of acceptation and respect for differing opinions, of free choice out of different life–styles, and for an understanding of people who will and should never be all the same of a kind!

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SUMMARY

Demokracie a práva menšin

Jedním z charakteristických rysů Nizozemského království je velký počet zde žijících etnických skupin.

Různorodost nizozemského obyvatelstva je již patrná na první pohled. Nizozemí bylo po staletí útočištěm cizinců, kteří se sem uchylovali z náboženských či politických důvodů.

Postupně se zde asimilovali přistěhovalci z bývalých holandských kolonií, zejména Indonésané a obyvatelé Holandských Antil a Surinamu. Žijí zde lidé různé pleti, náboženského vyznání a národních kultur.

A právě tato různorodost ve složení obyvatelstva může vést ke konfliktům, diskriminaci a rasismu.

Tomuto problému „mnohobarevné" společnosti, je věnován následující příspěvek, jenž byl přednesen T. van Dijkem v průběhu týdenního semináře Lergang 1994, konaném na naší fakultě.

Obsahovou náplní příspěvku je myšlenka právního pluralismu a myšlenka obranyschopné demokracie.

Autor své posluchače nejprve seznámil se současnou sociální a politickou situací v Nizozemí, zejména z pohledu voleb, které proběhly v březnu a květnu tohoto roku.

Právě od národních voleb se očekávala podstatná změna dosavadní politické scény a odchod nejsilnější vládní strany křesťanskodemokratické CDA do opozice.

Určité signály již byly patrné po obecních volbách, ve kterých křesťanští demokraté zaznamenali jistý neúspěch. Na druhé straně však úspěch zaznamenaly pravicové extremistické strany zejména Centrum–Demokraté a Centrum–Strana 86. (Znepokojující skutečností v tomto ohledu je právě to, že tyto strany nejsou právě příliš pozitivní ve vztahu k etnickým menšinám, a přesto se jim dostalo velké podpory zejména od nižších příjmových skupin, žijících většinou ve starších částech města).

Autor naznačuje motivy, pravděpodobně vedoucí voliče pro odevzdání svého hlasu těmto pravicově–extremistickým stranám.

Jedním z možných motivů je myšlenka tzv. „čistého" rasismu – „Pure" racism – (předpoklad, že charakter a schopnosti jedince jsou determinovány rasou a že jedna rasa je biologicky nadřazená druhé), v podání autora – barevné obyvatelstvo je podřízeno bílé populaci. Další z motivů spočívá v nespokojenosti s vlastní situací a postavením občanů ve společnosti.

V závěru druhé části je položena otázka, která je formulována takto: „Jaké místo

a/nebo ochranu může demokratická společnost dovolit a/nebo nabídnout menšinám žijícím uvnitř této společnosti?"

Mají tedy rozdílné skupiny lidí právo žít v souladu s vlastní kulturou (hodnotami, normami a zvyky)?.

Otázka nabývá na závažnosti v období, charakterizovaném celosvětovým ekonomickým poklesem a politickou nestabilitou. Autor zdůrazňuje skutečnost, že společnost, která není ochotna považovat všechny své obyvatele jako zásadně rovné v právech a povinnostech, je společností, jež se bude nacházet na velmi nebezpečné cestě vedoucí k totalitě.

Ve třetí části příspěvku – „Formal and material democracy", je vylíčen autorův názor na demokracii, se zaměřením na její formální a materiální rysy. Formální koncept demokracie je pokládán za nedostačující. Demokracie v pravém smyslu znamená také svobodu, rovnoprávnost, otevřenost a toleranci k odlišným názorům a způsobům života, ochranu menšin a uznání základních práv... tedy stručně řečeno jde o rysy materiálního konceptu demokracie, jenž je dále autorem rozveden.

„Volba demokracie tedy není jen volbou určitého způsobu myšlení a života, současně je to odmítnutí přesvědčení a politických rozhodnutí a zvyků, které jsou na kordy s touto představou demokracie, ať už jsou pravicově–extremistické, levicově–extremistické, či nábožensko–fundamentalistické povahy".

„An open and creative demokracy" – Otevřená a tvůrčí demokracie, je název čtvrté části příspěvku, ve které se autor snaží naznačit způsoby, které by byly schopné přispět demokratickému vývoji společnosti (zvláště s ohledem na menšinový problém). Jednu z možných cest nachází v myšlence právního pluralismu, který podle jeho slov, skýtá prostor pro utváření dalších norem a hodnot než těch, které jsou vlastní většině obyvatelstva.

Otázkou zůstává, zda by mohl právní pluralismus přispět ke snížení napětí mezi původním obyvatelstvem Holandska a nově příchozími.

Před diskusí o možnosti právního pluralismu přispět k utvoření harmonické společnosti, je však poukazováno na existenci rozdílných názorů právníků (všeobecně) a právních antropologů či sociologů na tuto otázku.

Autor v této souvislosti uvádí následující rozlišení:

1. *Normativní (právní) přístup oproti přístupu popisnému (sociálně–vědeckému),*
2. *Právní centralismus (ústavní právo) oproti decentralismu „lidové" právo,*
3. *Pluralita zákonných systémů oproti jedinému zdroji práva,*
4. *Rezervovaný nebo záporný postoj oproti více neutrálnímu nebo i kladnému postoji.*

Holandské zákonodárství se snaží řešit problematiku přistěhovalců, hledá optimální směr, jenž by vedl k přibližování se menšinovým kulturám. Nicméně (oficiální) zavedení státem (tj. centralistická forma právního pluralismu) zvláštních právních

systémů pro etnické nebo náboženské skupiny v Nizozemí není reálně možná, protože jednotlivé skupiny populace nelze snadno oddělit od sebe v zeměpisném ani sociálním smyslu. Pod zorným úhlem právní jistoty a rovnosti před zákonem rovněž není žádoucí vytvářet samostatné právní systémy, protože by tím byla dána v sázku orientační a integrační funkce zákona (Bovens, 1992:166–167).

Tato základní teze, jež byla převzata od Bovense, je dále autorem rozpracována.

Myšlenka právního pluralismu může být adresována různým právním odvětvím. Je jasné, že v odlišných právních odvětvích bude uplatněn jiný stupeň právního pluralismu.

Z právních odvětví je zde zastoupeno občanské právo, správní právo a právo trestní.

Pokud se týká trestního práva, zde se autor zmiňuje o konfliktech mezi holandským trestním právem a zvyky menšinových skupin např. mezi Afričany & Židy – obřízka dětí, Turky Molukánci – krevní msta, Muslimové – polygamie atd.

Abychom mohli těmto etnicko–kulturním odlišnostem přisoudit nějaký vliv v oblasti trestního práva, měli bychom v mimořádnýchpřípadech zohlednit faktory kulturního pozadí jednotlivých případů. Tyto faktory by mohly hrát svoji roli ve vyloučení trestnosti (vis maior).

Na tomto místě jsou zmíněny dva trestněprávní případy, ve kterých nebylo přihlédnuto ke kulturnímu pozadí případu, v dalším případě tomu tak naopak bylo. Poslední částí příspěvku je věnována myšlence „obranyschopné" demokracie, ve které autor navazuje na předcházející pojednání o možnosti právního pluralismu přispět k lepšímu porozumění etnickým a kulturním menšinám.

S nadějí přispět k porozumění mezi různými skupinami obyvatelstva, věnuje autor pozornost obrannému a potlačovacímu přístupu. Přístupu, jenž se dotýká řady opatření nezbytných pro ochranu demokracie samé. Nejvýstižnějším příkladem bude formulace zákazu nedemokratických stran a vyloučení jejich členů z veřejných funkcí.

Vůči těmto stranám autor doporučuje zdrženlivost a to až do té doby, dokud zde nebudou žádné pochybnosti o anti–demokratických rysech těchto politických stran.

V této souvislosti se autor zmiňuje o výrocích vůdčího představitele extremně–pravicového Centra–Demokratů (CD) a člena parlamentu – Janmaata.

Další poznámky se týkají efektivnosti trestního stíhání členů nebo představitelů pravicově–extremistických stran (možnost trestního postihu či postihu na základě občanského řízení).

Theo van Dijk svůj příspěvek končí slovy: „Nejsilnější ochrana demokracie jako soudně–politické konstelace záleží v její otevřenosti k demokracii a její ochotě dovolit a vytvořit možnosti pro veřejnou racionální diskusi. Lidé s odlišnými názory by měli mít možnost o svých názorech volně hovořit, diskutovat o nich s těmi, jenž mají názory odlišné. Pouze jen ve velmi extrémních případech, ve kterých základní práva a hodnoty jsou v této diskusi ohroženy, by se mělo sáhnout k zákazu těchto politických stran (tento prostředek je chápán jako ultimum remedium)."