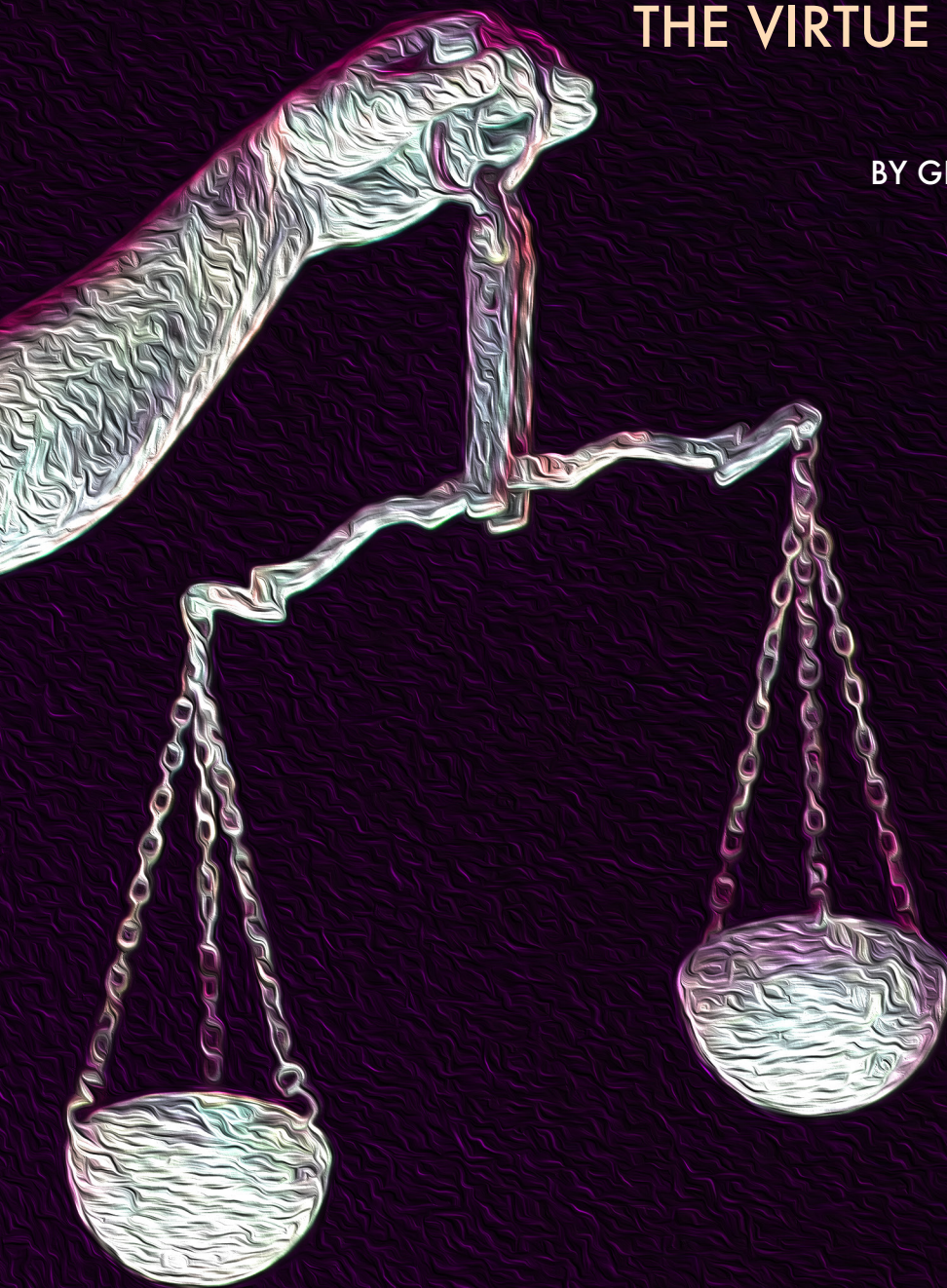


Criticism of the Judiciary

THE VIRTUE OF MODERATION

BY GEERT CORSTENS



Former Italian Prime Minister Silvio Berlusconi once described the judiciary as the “cancer of democracy.”¹ This presumably had much to do with his personal situation of being accused several times of crimes, including bribing a judge. Belgian Underminister Theo Francken announced in public that he would disregard a judgment of a Belgian court obliging him to deliver a visa to a Syrian family.² Former French President Nicolas Sarkozy qualified judges as “*petits pois sans saveur*” (peas without flavor).³ This sentiment was, in a way, echoed by French President François Hollande, who in October 2016 was quoted as saying: “*Cette institution, qui est une institution de lâcheté . . . Parce que c’est quand même ça, tous ces procureurs, tous ces hauts magistrats, on se planque, on joue les vertueux . . . On n’aime pas le politique.*” (This institution — the judiciary — is a cowardly institution, all those prosecutors and those high judges, they hide themselves, they act self-righteously, they don’t like politics).⁴ ▶

If there is no trust in the rule of law, it ultimately will collapse and society will be endangered.

Unfortunately enough, there are more examples. In my country of the Netherlands, Geert Wilders, the leader of the Party for Freedom, who was recently prosecuted and convicted of racial discrimination, attacked the judges in his case as politically biased, saying “No one trusts you anymore.” He proclaimed that if he were to be convicted, millions of Dutchmen should be convicted.⁵ Some years ago, when he was previously prosecuted for discrimination against Muslims, Wilders said that if he were to be convicted millions of people no longer would trust the judiciary.⁶

These types of criticisms are unwise for several reasons, which I explore in this article. Such criticisms undermine stability in countries governed by the rule of law. Furthermore, judges are in a bad position to react to criticism. But judges can and must act to counterbalance improper criticism and the related, and dangerous, problem of “tolerating the intolerants.”

Stability: Separation and Balance of Powers

In continental Europe, the idea of the *Rechtsstaat* encompasses several concepts, including that of the separation and

balance of powers. The essence of this concept is that legislative, executive, and judicial power must not be held by one body or person.⁷ The three branches of government to which these tasks are assigned must be kept in balance to reduce the risk of abuse of power.⁸ Because different institutions exercise the legislative, executive, and judicial powers, each of them can call the others to heel where necessary. In this way, they keep one another in balance and prevent one branch from assuming too much power.

Think, for example, of the former Italian Prime Minister Silvio Berlusconi, who once tried to create immunity under the law for himself in order to avoid prosecution.⁹ The Italian Constitutional Court refused to go along with this and declared the law in question unconstitutional on the grounds that everyone is equal before the law. Quite recently, when a U.S. federal judge blocked an executive order from President Donald Trump by issuing a ruling that allowed immigration to resume, a not-very “presidential” tweet followed: “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridic-

ulous and will be overturned.”¹⁰ From the viewpoint of the separation and balance of powers, this is an unacceptable assertion. As a presidential candidate, Trump lost a procedure in a federal court and criticized the judge by stating: “I have a judge who is a hater of Donald Trump. A hater. He’s a hater . . . We’re in front of a very hostile judge. The judge was appointed by Barack Obama.”¹¹ It is difficult to qualify such a statement as appropriate from the perspective of the separation of powers.

In Poland, a constitutional crisis deepens¹² as parliament and the ruling Law and Justice party refuse to abide by rulings of the Polish Constitutional Tribunal regarding the constitutionality of new laws that restructure and weaken the tribunal. Observers speak about a “creeping assault” on the Constitution.¹³ The European Commission’s first vice president, Frans Timmermans, has tried to convince the Polish government that its efforts to weaken the Tribunal run counter to the rule of law as stated in Article 2 of the Treaty on European Union:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹⁴

The three branches of a democratic government — the legislature, the executive, and the judiciary — keep each other in check in making and implementing laws. The legislature draws the broad lines that the executive puts into practice. Then the courts decide individual cases brought before them. This balance also means that the legislature can adjust legislation following a court decision, after which the courts may be asked to interpret the new law and to apply it within limits determined by the constitution and international law (if review on these grounds is allowed). This is an ongoing process. In other words, under the rule of law no one has the last word.

This concept of the balance of powers is explicitly or implicitly articulated in constitutions. It is a constitutional requirement in Western democracies. Therefore, politicians who play active roles in those democracies must accept this concept. They may criticize the way other actors operate, but they should not go as far as undermining the other actors. If politicians do this, the stability of the state will be endangered. People who normally would accept judicial decisions will wonder whether they may decide not to abide by judicial decisions as these politicians do. It is the example that counts. Politicians must realize that the rule of law and the concepts of separation of powers and balance of powers depend on public confidence. If there is no trust in the rule of law, it ultimately will collapse and society will be endangered. Contributing to the collapse of the rule of law is not the task of politicians who want to operate in a state structure created and upheld by the rule of law.

If a representative of the government says that he will not implement a decision of a judge, any citizen against whom a court has ruled may be incited not to obey a court decision. U.S. President Dwight Eisenhower knew this to be the case with regard to *Brown v. Board of Education*. He understood that there would be little left of the rule of law if state governments could henceforth decide on their own which judicial judgments they would abide by and which they would disregard. He ensured, by military intervention, that the nine black pupils involved in the case could continue to attend Central High School in Little Rock.

It is not difficult to imagine the situation that would arise if the decisions of the courts were ignored. In essence, we would return to the law of the jungle.

I will give a good and a bad example of positions taken by a politician in my country. The Hague Court of Appeal and then the Dutch Supreme Court ruled against the State in one of the Srebrenica cases that followed the war in former Yugoslavia in the 1990s. In the case, three Muslim men were sent away from the UN compound

manned by a Dutch battalion in Srebrenica when it was clear their lives were in danger. The Muslims were subsequently killed by Bosnian-Serb soldiers and paramilitaries.¹⁵ The State was held liable, an unwelcome verdict for the executive. Fortunately, Dutch Prime Minister Marc Rutte responded appropriately, saying that the judgment would of course be implemented. This might seem obvious, but it exemplifies a proper relationship between the executive and the judiciary, which is crucial to the rule of law.

Now for the bad example: Prime Minister Rutte stated that Volkert van der Graaf, convicted of the 2002 assassination of Dutch political leader Pim Fortuyn, should not be eligible for early release.¹⁶ He had forgotten that prisoners in the Netherlands are eligible for release after serving two-thirds of their sentences unless they have misbehaved in prison. If this happens, the public prosecutor may address a judge in order to block the prisoner's release. This is laid down in legislation passed by the Dutch parliament; the courts and the executive must abide by these rules. Ultimately, van der Graaf was released.

Due to their constitutional position, politicians must respect the role of other players in the state. These types of untimely or unthinking criticisms and refusals to implement judicial decisions distort the balance between the three branches of government and can damage democratic institutions.

The Special Position of Judges

A second reason why politicians should not make statements that undermine public confidence in the judiciary is that it is hard for judges to react in public to those statements. Therefore, politicians have a responsibility to exercise restraint. As a judge, you always have to take into account that the same issue may soon be presented in your court. Parties can doubt your impartiality if you have already commented upon the issue in public. For example, in my former capacity as president of the Supreme Court of the Netherlands, I decided to comment in a

television interview on the words of Geert Wilders, who, as a defendant in his first trial for racial discrimination, had said that should he be convicted of discrimination against Muslims, millions of people would no longer trust the judiciary. I realized that by commenting on the words of this political leader I would no longer be in a position to judge his case in the Supreme Court, since I would be considered insufficiently impartial. Fortunately, this case did not come before the Supreme Court. I spoke out again in public more recently when Wilders, in his second prosecution for racial discrimination against Muslims, expressed doubts both in and outside the court regarding the integrity of the judges.

A defendant is, to a certain extent, free to criticize the bench. But a defendant who is also a member of parliament should not sow the seeds of doubt among his followers concerning the integrity of judges. By the time Wilders' second case was being heard, I was no longer chief justice. I criticized his statements in a national newspaper and gave an interview duplicated in many additional publications. Perhaps my colleagues still sitting on the bench were pleased that somebody who no longer runs the risk of being accused of lack of impartiality took a stand.

All this does not mean that judges cannot be criticized. The judiciary is open to criticism: in fact, the whole system of appeal is based on judges' awareness of their own fallibility. Criticism keeps us on our toes, but in public debate it should be expressed with due respect for the position of members of the judiciary. Untimely or unthoughtful criticism uttered by politicians damages the judiciary, which is handicapped in its possibilities to react, and this can distort the balance among the three branches of government.

On the other hand, we must prevent divergent opinions from being forced underground. Diverging opinions must be heard, even if they are on the edge of being disadvantageous to the position of judges and to the rule of law in general. A free and open society must demonstrate that it can withstand attacks. It is the

task of our leaders to give warnings when attacks on the rule of law take place and to act proportionately. This may imply prosecuting offenders. It is preferable that those leaders initially try to discourage them through debate and dialogue. My personal approach has always been to enter into dialogue, because it is easier for people to keep enemies at a distance than nearby. If you keep in contact, your opponents generally will be less inclined to oppose you in an exaggerated way. You and your opponent will understand each other better.

Reactions of the Judiciary and Others

The above does not imply that judges and the judiciary always have to remain silent in the face of criticisms from politicians. The reactions must be threefold. First, judges must not let themselves be provoked into reactions that reflect the harsh tone of their opponents. Remain serene. Do not diverge from your normal *modus operandi*. Remain authentic. Sometimes, as I have done, a judicial leader may speak out, loudly and publicly. But we must demonstrate that we do not allow ourselves to be carried away by emotion in our responses; we have to remain reasonable and moderate. Moderation is an essential virtue in public life. We have to display integrity and honesty. That may sometimes entail hard judgments. If a judge believes that the evidence before the court requires an acquittal, then acquittal must follow, even if the general public is baying for a conviction. The opposite also applies. It is not the duty of the judge to please the public. See the title of the well-known book by the French prosecutor Éric de Montgolfier: *Le devoir de déplaire* — essentially, *The Duty to Displease*.¹⁷ In the long run, this will contribute to the authority of the judiciary.

Second, in order to prevent a potential lack of trust in the judiciary, judges should seek the support of the population by being open, transparent, and communicative. In modern times, the judiciary has the obligation to communicate in an open and accessible way about its operations. We can no longer just render judgments

without explanation to the general public. We must deliver press releases, give clarifications via ‘press judges’ (colleagues of those judges who rendered judgment in a case who speak to the press), and make abstracts of our decisions available in easily accessible language. The Supreme Court of the Netherlands even tweets abstracts of important judgments. Make summaries of your major judgments available to the wider public. Let ‘press judges’ give interviews with regard to specific cases. These efforts can help prevent untimely and unthoughtful criticism.

Third, it is important that not only judges but also other lawyers and citizens make clear why we have the rule of law and why we are dedicated to the separation of powers. People must be made aware of the rule of law’s significance for the freedom of all. It is not just the plaything of lawyers. Academics and politicians who are not lawyers sometimes neglect this. It is essential that our political and social leaders remain clear on this issue: The rule of law is essential for every one of us. We want to have equal opportunities, we want an executive and a judiciary that operate independently from each other, we want fundamental rights to be respected, and we want everyone to have unimpeded access to an independent and impartial tribunal. It is the responsibility of all who are leaders in society, be they politicians, social leaders, businessmen, educators, or, particularly, members of the legal profession and the judiciary, to remedy the lack of understanding regarding the immense importance of the rule of law by constantly emphasizing it. Ensuring everyone has equal opportunities is indeed a major challenge, certainly in countries where minority groups face significant problems. What is needed in such cases is an open and honest debate between majority and minority groups. We have to explain the meaning of the rule of law and the role of the judge in this respect, what he or she does in practice and why it is so valuable. The more familiar people are with these issues, the more they will appreciate their importance. All students, not only law students, have to

be confronted with the significance of the rule of law. This should even be taught in secondary schools. As a retired judge, I have in mind the famous words and recommendation of former U.S. Supreme Court Justice Sandra Day O’Connor: “An old judge is like an old shoe. Everything is all worn out except the tongue.”

A Related Topic: Tolerating the Intolerants?

We must speak out; in fact, democracy and the rule of law are closely intertwined and require vigorous defense. We must stand for these essential elements of society if they are attacked.

First, democracy: In principle, there is and has to be equality amongst people. I see no argument why any human being should be excluded from this idea. Democracy is based on it. Abandoning equality results in the abandonment of democracy and the introduction of dictatorship. Any decision that results in abolishing democracy cannot be accepted. Such a decision runs counter to human dignity. A true democracy has the right and the obligation to oppose the abolition of democracy. In order to defend democracy, we must oppose those who want to abolish democracy, even if a majority would vote for abandoning democracy. In this approach, democracy is considered to be a substantive notion. It is not only a formal notion in the sense of the majoritarian vote; it also has to do with human rights. Where the dignity of each human being is at stake, democracy requires intervention in order to save the human dignity of each human being.

According to the famous Austrian-American philosopher Hans Kelsen, a democracy is no longer a democracy when it wants to continue to exist despite the majority no longer wanting to sustain the democracy. If I understand him correctly, he accepts this consequence of his approach of democracy, which is in his view a formal notion.¹⁸ This idea was echoed by a former Dutch minister of justice who stated that if the majority wants to introduce Sharia Law, it must be implemented.¹⁹ I do not agree with this idea. Democracy does not imply

It will ultimately be upon the judiciary to withstand movements that threaten democracy and the rule of law itself.

acceptance of its own suicide. I prefer to consider democracy as more substantial.

Second, the rule of law: Institutions of the state are entitled to oppose those who want to undermine the rule of law, particularly the separation of powers, by using democratic procedures. This is the concept of “not tolerating the intolerants.”²⁰ The best-known example of the opposite, tolerating the intolerants, is the undermining of the Weimar Republic by Adolf Hitler via the democratic process itself. In March 1933, the National Socialist German Workers’ Party was sustained by a near-majority of voters. Then Hitler proposed his Ermächtigungsgesetz (Enabling Act), which consolidated power within the executive branch. The Enabling Act amended the Weimar Constitution to give the Cabinet of Germany — in effect, Chancellor Adolf Hitler — the power to enact laws without the involvement of the Reichstag. It passed with the required two-thirds vote in both the Reichstag and Reichsrat on the 23rd and 24th of March 1933. It followed on the heels of the Reichstag Fire Decree, which abolished most civil liberties and transferred state powers to the Reich government. The combined effect of the two laws was to transform Hitler’s government into a de facto legal dictatorship.²¹

Jan-Werner Müller called this the “democratic dilemma”: the possibility of a democracy destroying itself in the process of defending itself.²² One can also speak about a defensive or militant democracy.²³ In my country, even before World War II, a professor of constitutional law at the University of Amsterdam, George van den Bergh, stated that in a democracy political parties may be forbidden. He connected this with the idea that a democracy must always allow for the possibility of self-correction by the people. An autocracy abolishes this possibility of self-correction. Therefore, any decision to abolish democracy along with the possibility of self-correction must be opposed.²⁴ Aharon Barak, a former president of the Supreme Court of Israel, once said: “A constitution is not a prescription to suicide, and civil rights are not an altar for national destruction.”²⁵ Joseph Goebbels, Hitler’s minister for propaganda, once said: “It will always remain one of the best jokes of democracy that it provided its mortal enemies itself with the means through which it was annihilated.”²⁶ On several occasions the European Court of Human Rights accepted the notion that a national state must withstand those parties that will undermine democracy itself. The Court stated in the case of *Socialist Party and*

Others v. Turkey:

It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a state is currently organized, provided that they do not harm democracy itself.²⁷

In its famous Feb. 13, 2003, judgment, the Court accepted the prohibition of the (majoritarian) Turkish Refah Party because of its anti-democratic character.²⁸

This case law teaches us that it will ultimately be upon the judiciary — which in many countries has the power to forbid anti-democratic parties or can give rulings via other procedures — to withstand movements that threaten democracy and the rule of law itself. The judiciary, in particular constitutional and supreme courts, must therefore resist and prevent attempts to delegitimize any branch of government. Delegitimization threatens the stability of the democracy.

Conclusion

It may surprise the readers of this article that I do not pay attention to the concept of contempt of court. In my country, we don’t have this concept, so I have no experience with it. But — and this seems important to me — the recognition of the value in ongoing dialogue, separation of powers, the special position of judges, and the virtue of moderation must be found in the hearts of men and women. If they are not there, then these values will, in the end, disappear. Judges, lawyers, and politicians must convince those who prefer to shout at judges that in the long term it is better for society at large if a stable and fair system of law that delivers justice to all of us is maintained, no matter whether we are a man or woman, belong to the majority or minority, are Protestant, Jewish, Catholic, Muslim, or atheist, white or black, straight or gay, conservative or liberal, etc.

Of course, the government has to respond when people have justified concerns about public safety. There must always be room for the victim in criminal proceedings. My first reaction when ▶

I read of jewellers being raided time and time again is anger. I also sometimes think: Lock them up and throw away the key. It is precisely the job of the judiciary, however, to not convert these very human and comprehensible responses into a judgment and to instead be aware of all the circumstances of the case. Judges who do their job properly and arrive at balanced decisions — which as the statistics show, may often involve imposing a heavy sentence — deserve respect and support. What I am trying to say here is that if judges worry about politicians or other opinion makers who utter sweeping condemnations of their rulings, it is not because they are too thin-skinned. In criticizing the judiciary, the Leitmotiv of

politicians should be, as it is for the judiciary's response to criticism: *moderation*.

A former minister of finance once said to me: I sometimes get decisions from your Supreme Court that I don't like, but I never got the impression that my case wasn't tried fairly. I hope that newly elected political leaders will understand that this is how the rule of law operates. It protects citizens and other parties. Even if a citizen, government, or other entities do not receive judgments that please them, they may count on the commitment of judges that when they are again involved in a lawsuit, there will once more be an independent and impartial decision rendered in the framework of a fair procedure. The rule of law is not an instrument

that protects special groups of citizens. It protects everybody. _____



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³ Agence France Press, *Magistrats: critiques récurrentes de Sarkozy avant celles de Hollande*, LE POINT (Oct. 13, 2016), http://www.lepoint.fr/politique/magistrats-critiques-recurrentes-de-sarkozy-avant-celles-de-hollande-13-10-2016-2075768_20.php.

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⁶ Quoted by the author in the Dutch television program "Buitenhof" on Oct. 24, 2010.

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¹⁹ Dutch newspaper ALGEMEEN DAGBLAD 13th Sept. 2006, <https://www.nd.nl/nieuws/politiek/donner>.

²⁰ KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 581–82 n.4 (one-volume edition 2013) ("We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant.").

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²³ RIJKEMA, *supra* note 21, at 21.

²⁴ GEORGE VAN DEN BERGH, DE DEMOCRATISCHE STAAT EN DE NIET-DEMOCRATISCHE PARTIJEN [THE DEMOCRATIC STATE AND NON-DEMOCRATIC PARTIES] 1–21 (1955).

²⁵ Jan-Werner Müller, *supra* note 22, at 1253.

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