

The role of law in society

Keynote speech

Dr. Geert Corstens

President of the Supreme Court of the Netherlands

President of the Network of Presidents of the Supreme Judicial Courts of the European Union

Mister President, Presidents of other Supreme Courts in Latin America, Presidents of Caribbean Supreme Courts and Presidents of European Supreme Courts, Excellencies,

In het Spaans:

Het doet mij een groot genoegen U allen hier vandaag aanwezig te zien in deze unieke bijeenkomst. Ik heb de afgelopen jaren reeds vele bijeenkomsten van presidenten van hoogste gerechten mogen bijwonen. Maar een bijeenkomst als die van vandaag mocht ik niet eerder meemaken. U, mijnheer de president Rubén Ballesteros, en u, mijnheer de minister Sergio Munoz, bent erin geslaagd door uw inzet en enthousiasme zo vele collega's hier bijeen te krijgen. Reeds nu dank ik u daarvoor van harte.

J'en suis sûr que pendant ces deux journées à venir nous coopérerons dans un esprit de collegialité et d'amitié et que nous envisagerons d'aboutir à un résultat qui rendra la coopération judiciaire entre nos pays plus efficace et fructueuse.

I now continue in English.

1. The role of the judge in a modern society

I should like to make some remarks about the role of the judge in our societies and about the position of international law. I shall start with a brief examination of a case taken from the case law of the Dutch Supreme Court.

An example

On 20 October 2006, the Civil Division of the Supreme Court gave judgment in a controversial case concerning high-level security arrangements around the home of Ayaan Hirsi Ali who was a member of Dutch parliament at the time.¹ The ruling was at variance with the views expressed by the group of residents who had instituted the initial proceedings. The Supreme Court weighed the interests at stake, i.e. the public interest in protecting the life and safety of a public figure under threat, against the interests of other occupiers of the apartment complex in which Hirsi Ali's home was located. The Court held that persons living adjacent to a home subject to extra security precautions may be expected to tolerate a degree of nuisance and inconvenience. They may also be expected, to a certain extent, to live with the fear that they themselves may become the victims of an attack on the protected person. The ruling went on to explain that the State's actions in this matter affected society as a whole, to which Hirsi Ali's neighbours also belonged. The Supreme Court set aside the ruling of the appeal court, which had granted the residents' group's application. As a result the threatened parliamentarian could stay in her home.

This judgment of the Supreme Court was favourably received in some circles, though not in others. In this judgment the Supreme Court demonstrated its understanding of the public's desire to see judgments supported by detailed arguments. More important, though, is the fact that this ruling says something about the role of the courts in society. And I would like to make a number of comments on this issue.

2. The courts have no programme

The task of the courts is to apply the law. But this case shows that this is not always easy and that the law often leaves the courts a margin of discretion. Indeed, the law may allow for a number of different solutions, which the expression 'the myth of the unique solution' makes clear. Given the abstract level at which it works, the legislature cannot anticipate all possible circumstances.

¹ Supreme Court 20 October 2006, LJN AY7463, NJ 2007, 3, annotated by E.A. Alkema.

Reality is often far stranger than our wildest fantasies. What is more, the constant stream of new technologies and other forms of innovation are often difficult to accommodate under existing rules of law. For example, some years ago the Supreme Court had to decide whether the power to tap telephones already granted under certain circumstances by the legislature also covered the interception of fax messages.² The question then arises of how the courts legitimate the way in which they use their margin of discretion. How can they justify choosing to give priority to the interests of a threatened public figure over those of her neighbours?

The courts have no programme to follow in their work. In this they differ from politicians and government. Politicians usually work on the basis of a manifesto produced by their party, a collection of ideas concerning matters such as the organisation of the state, the permissible degree of government intervention, public safety, the financial system, sustainable energy, the multicultural society etc.

Judges have no such manifesto. That is in fact essential to their functioning. They are constantly on their guard against bias, preconceived notions, and opinions that appear self-evident. They try to understand and allow consideration of new and unexpected arguments presented to them. They are compelled to adopt a fresh, unbiased attitude each and every day. Any judge who claimed to perform his duties on the basis of social democratic, liberal, Christian democratic or even religious convictions would be failing to understand and indeed undermining his position. A politician is someone who wants to achieve something, who wants to help society to advance. In a sense – but be aware of the nuance, only in a sense – a judge wishes for nothing. He allows the case put before him to sink in. He listens, reads, tries to appreciate the full impact of the arguments adduced, asks whether there are possibly any other arguments. And then he reaches a decision, with all due respect for what has been put forward.

2. Justice as a mission

² Supreme Court 26 May 1992, NJ 1992, 753, annotated by T.W. v. V.

But in the absence of a programme, do judges have no interests to serve? Yes they do, and their lodestar is nothing less than justice. Shaping and administering justice is their mission. But justice can never be a programme providing detailed guidelines for action in specific cases. As a mission it compels judges in the first place to be just in terms of procedure. That is not simply a formal requirement: it requires judges to concretise the balancing of competing interests: as in the Hirsi Ali-case. This does not automatically lead to an outcome in one direction or the other. Often, there is a margin of discretion. In that case, the judge has to absorb all the information and then come to a decision. He may have to weigh the importance of promoting the use of sustainable energy against legitimate expectations, or the importance of good relations between different ethnic groups in society against that of a not overly interventionist government.

3. La prudence et l'audace

Our judge may then reach a decision that is unwelcome to one of the parties or to politicians or government. But the fact that a decision is unwelcome does not in itself mean that the courts thereby lose legitimacy. That is precisely the role of the judiciary: to shape justice in specific cases, irrespective of whether the result pleases some people or not. And it is precisely in such circumstances that members of the judiciary can show that they are good judges, and demonstrate what I heard a professor at the anniversary of the French Constitutional Council in 2008 call 'la prudence et l'audace', prudence and boldness.

If their rulings run counter to prevailing opinion, judges will sooner or later be accused of living in an ivory tower. They have to be prepared for such accusations. They can best do this by establishing the facts carefully and thoroughly and to provide as clear and well-substantiated grounds as possible for their ruling. Judges must also be aware of the mood of society, which they have to take into account as one element in the balancing of interests. Sometimes they have to demonstrate a degree of self-belief; sometimes they need a certain conformism, if

they know that their judgment will not be upheld on appeal. On the other hand, they should sometimes dare to strike out in a new direction, demonstrate the creativity of non-conformism. As I said, being a judge calls for both prudence and boldness.

4. Functional and institutional legitimacy

By acting in this way, the courts legitimate their decisions and inspire trust. As the former president of the Israel Supreme Court, Aharon Barak said: “the Judge has neither sword nor purse. All he has is the public confidence in him. This fact means that the public recognizes the legitimacy of judicial decisions, even if it disagrees with their content”. It seems to me that this reasoning is based on the notion of just courts, of justice that consists in considering all the interests involved in the case, in weighing those interests, determining their relative importance and finally giving a decision, preferably within a reasonable time. In doing so, the courts are supported by a legal system that contains a set of established rules often distilled from centuries-old ideas and principles, to achieve over time the status of rules of law. They reflect important values, and often have an intrinsic significance, expressing deep-rooted feelings about what justice is.

5. Le devoir de déplaire

Through judgments based on justice and arrived at in a just way and in reasonable time, the courts make an important contribution to the legal system which I would like to call the ‘grammar of society’. Without such a grammar society cannot function, indeed cannot exist. By adding to the grammar and using it correctly, the courts create stability and reliability. They are not susceptible to hype or passing fads. What they must not do is swim with the tide or bend like reed in the wind. They must remain firmly upright. Only then can they contribute to the stability of society. The prominent French public prosecutor, Eric de Montgolfier, entitled his autobiography *Le devoir de déplaire*, the duty to displease.³ There is some exaggeration but the message is highly relevant to the functioning of the courts.

³ Eric de Montgolfier, *Le devoir de déplaire*, Michel Lafon, Neuillysur Seine, 2006.

6. The position of international law

Dominique de Villepin, of whom I borrowed the expression, used it with regard to international law: international law as the grammar of the international society. Without international law the international society cannot function in a proper way.

The national societies we all live in have an ever increasing international component. National societies and states are more and more intertwined. This reflect on the judicial arrangements that are needed to govern the interaction between individuals, companies and the authorities of the states. We have to take into account the international effects of what we are doing on a national level.

Despite the organisational differences we all are aware of the importance of international cooperation. We in our capacities as presidents and members of supreme courts will try here in Chili in these days to give an impetus to international judicial cooperation. It is important to contribute to a better functioning of the international judicial cooperation in a spirit of mutual confidence and respect.

A well established legal order and stable international cooperation are very important for society as a whole . If foreign investors are not convinced that in case of conflict a dispute in the country of investment will be resolved according to international minimum standards by independent and impartial judges, they will refrain from investing in that country. If a foreign country is not convinced that its citizens will be treated according to international minimum standards by independent and impartial judges of the country that requests the extradition of these citizens, they will not be willing to extradite. It is not only a question of fairness but also of practicability that cooperation on the basis of well recognised standards of law is needed.

I am very glad to know that in this country, there exists a well established tradition of the rule of law and of openness towards international law. And that this openness is a cornerstone of your foreign policy.

I should like to end my speech by underlining once again the importance of the rule of law. We judges are the ones who play a central role in maintaining the rule of law. I am sure that we in this spirit will cooperate.

Muchasgracias.