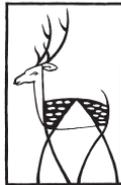


Understanding the Rule of Law

Geert Corstens

Translated by Annette Mills from the original Dutch
(*De rechtsstaat moet je leren, de president van de Hoge Raad over de rol
van de rechter*, Prometheus, Amsterdam 2014)



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A Democratic State Governed by the Rule of Law: What Does This Mean?

‘EVERY BANANA REPUBLIC has a bill of rights’ said the late Justice Antonin Scalia in 2011. He went on to explain that without the separation of powers, such a document had nevertheless no meaning: it was just ‘words on paper’.

The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours. I mean it literally. [But] the constitution of the Soviet Union did not prevent the centralisation of power in one person or in one party. And when that happens the game is over.

Scalia and Justice Stephen Breyer, both members of the US Supreme Court, were testifying before a public hearing of the US Senate Judiciary Committee on the role of judges under the US Constitution.

Scalia went on to say that only when there is a sound government structure, including an independent judiciary, do those ‘words on paper’ acquire practical meaning and are rights enforceable.

Take a look at Turkey, for example. In March 2014 the media reported that Prime Minister Recep Tayyip Erdoğan (now President) had blocked the use of Twitter. A newspaper report claimed that he was angry because recordings of conversations in which he allegedly instructed his son to remove large amounts of cash from a private residence in connection with a police corruption probe had been posted on Twitter. He demanded that the offending links be removed. When Twitter failed to do so, access to the site was blocked. Erdoğan claimed that the recordings were fabricated, as part of a plot to blacken the governing party’s name in the run-up to the local government elections on 30 March.

A week later Turkey blocked YouTube as well. On 2 April 2014, the Turkish Constitutional Court ruled that the Twitter ban had to be lifted because it violated freedom of expression, guaranteed by the Turkish

constitution.¹ By that time, the Turkish local elections were over. So this was hardly a resounding victory for free speech. And yet, a democratically elected government could not just do what it wanted. It too was bound by the law. That is the essence of a democratic state governed by the rule of law.

The term ‘democratic state under the rule of law’ means a state where citizens elect their own leaders, a state where government itself is bound by the law and helps ensure that the law is respected in the relations between citizens. The law guarantees everyone’s individual freedoms against contraventions by government or other citizens. This can only happen if the legislature, executive and judiciary are separate. And a crucial element is an independent court system which is truly accessible to the citizen. On paper, such a state could be established overnight, as it were, given the knowledge, experience and the models available to us nowadays. But in practice, even today the rule of law requires decades to grow and become meaningful. That is also true in the western world.

People in the western world live in democratic states under the rule of law. A simple but significant example follows: the Dutch state took its argument that it was not responsible for the deaths of three Muslims who had been sent away from the UN compound manned by Dutch peacekeeping forces in Bosnia right up to the highest court. But when this court finally decided otherwise, the Prime Minister said ‘We will of course act in accordance with this ruling. That is what happens in a state governed by the rule of law’.

This seems very straightforward but it isn’t. The rule of law in the Netherlands too has evolved step-by-step.

I. FROM LITTLE ROCK TO HUNGARY

The rule of law does not come about automatically, and without constant effort and maintenance it cannot continue to exist. Stephen Breyer, associate justice of the US Supreme Court, once gave the

¹ It would be interesting if the Turkish court were to explain its ruling in a YouTube clip and post a link to the judgment on Twitter, as the Dutch Supreme Court often does.

example of a chief justice in an African country who asked him: 'Why do Americans do what the courts say?' She wondered what the secret was.

Breyer answered that there was no secret, that 'following the law is a matter of custom, of habit, of widely shared understandings as to how those in government and members of the public should [...] act when faced with a court decision they strongly dislike. That habit and widely shared understanding cannot be achieved without a struggle; it is a long, gradual development based on experience'.²

In the US too, the rule of law did not come about without a struggle. In 1954, in the case of *Brown v Board of Education*, the US Supreme Court prohibited the racial segregation in public education that had existed till then in the southern states. From then on, black students had to be admitted to the hitherto white Central High School in Little Rock, Arkansas. Led by Governor Orval Faubus, Arkansas opposed this development and defied the Supreme Court ruling. President Eisenhower understood that there would be little left of the rule of law if state governments could henceforth decide themselves which judgments they would abide by and which not. He announced on television that he was sending federal troops to Arkansas. He sent the 101st Airborne Division, revered by Americans as heroes of the Second World War. On 24 September 1957, 52 aircraft with 1,000 soldiers on board flew to Little Rock. They protected the first nine black pupils registered at the school from an angry white crowd at the school gates. Ultimately, their actions ensured that the nine pupils could continue to attend Central High. 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.

The same applies if the judiciary is not independent. The 'evil empire' Scalia referred to, Ronald Reagan's description of the former Soviet Union, did have a court system but it was characterised by what was known as 'telephone justice'. This has nothing to do with the modern custom of hearing witnesses in court cases by video link to save them long journeys. Telephone justice means that the judge receives a phone call from a party boss who instructs him on how to rule in a particular case.

² See S Breyer, *Making Our Democracy Work, a Judge's View*, New York, Alfred A Knopf, 2011, pp 22–23.

II. THE VULNERABILITY OF THE RULE OF LAW

Creating a democracy under the rule of law—where the law is more than flimsy ‘words on paper’, where government action is genuinely bound by the rules of law and where citizens have genuine access to the courts—demands time, integrity and constant commitment. Not only from the judiciary, but also from the other two branches of government, the executive and the legislature. All three must constantly articulate the message of the rule of law. This is necessary because the viability and the quality of the rule of law ultimately depends for the most part on the people. If they elect leaders who cut off access to the courts, or want to abolish the review of legislation in light of human rights treaties, the rule of law could decline rapidly. The rule of law in a democracy is not self-evident. It is not a binary concept, one or zero, a case of all or nothing. Instead, the rule of law exists in various degrees of quality. And once high quality is achieved it does not continue to exist without support.

Knowledge of the significance of the rule of law and a commitment to its cause must be passed on from generation to generation if it is to survive. ‘Liberty,’ wrote the eminent US judge Billings Learned Hand, ‘lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.’³

The same applies to modern Europe. Yet quite recently the Polish Government undermined the position of the Polish Constitutional Tribunal by ignoring some of their rulings. Some authors have spoken of a ‘creeping assault on the Constitution’.⁴ The European Commission’s first vice-president Frans Timmermans tried to convince the Polish that the measures taken by the Polish Government and parliament ran counter to the rule of law as referred to 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

³ Billings Learned Hand, *The Spirit of Liberty*, published in 1952.

⁴ Dariusz Mazur and Waldemar Żurek, ‘First year of the so-called “Good change” in the Polish system of the administration of justice’, December 2016 issue of *Státní zástupitelství* (Public Prosecutor), the journal of Czech public prosecutors: www.nsz.cz/index.php/en/magazine-public-prosecution.

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.

To date, these efforts have not resulted in major changes guaranteeing the proper functioning of the Constitutional Tribunal.

Similarly, and not so very long ago, in EU Member State Hungary, Viktor Orbán's democratically elected government lowered the retirement age for judges by eight years. This happened at a time when the country was enormously in debt and, in the European context, people were being encouraged to work longer to keep pensions affordable. At the same time measures were taken that greatly increased the ruling party's influence on the appointments of new judges to fill the hundreds of vacancies that arose. What is more, the highest Hungarian judge, Chief Justice András Baka (who had also been elected as President of the Network of the Presidents of the Supreme Judicial Courts of the EU) was removed from his post before the expiry of his mandate. The reason given was that according to yet another new rule he did not have the required five years' experience in the national judicial system, despite the fact that he had 17 years' experience as a judge in the European Court of Human Rights (ECtHR). Baka had in fact opposed a number of the Government's plans.⁵ The measures were reminiscent of those taken in the Netherlands by the German occupiers at the beginning of the war. There too the retirement age for judges was reduced, while the President of the Supreme Court was dismissed because he was Jewish. In both situations this created room to appoint judges sympathetic to the regime.

The European Commission tried to call Hungary to heel, the European Court of Justice found the sudden reduction in the retirement age to be in breach of European law⁶ and the European Court of Human Rights ruled that the removal of Baka was incompatible with the European Convention on Human Rights (ECHR).⁷

Yet none of this seemed to affect Orbán's popularity at the time. In the elections held in the spring of 2014, his party obtained for a second time a two-thirds majority in the Hungarian parliament. At the end of July, Orbán said they were building an illiberal or non-liberal state like

⁵ ECtHR, 27 May 2014, 20261/12 (*Baka v Hungary*).

⁶ ECJ, 2 November 2012, C-286/12 (*European Commission v Hungary*).

⁷ ECtHR, 27 May 2014, 20261/12 (*European Commission v Hungary*).

that in China or Russia, claiming that the financial crisis had shown that liberal democracies would not be able to ‘sustain their world-competitiveness’ in the years ahead. Hungary and Poland remind us of the vulnerability of the existing system, hammering home the message that whether the rule of law flourishes or fails is determined through democratic channels.

Since the end of the Second World War, the state of the rule of law has, on the whole, improved in most European countries. Slowly but surely safeguards to protect its survival are being constructed. This does not mean that relapse isn’t possible, as has happened in Hungary and Poland. But in such cases direct mechanisms generally come into effect to restore the rule of law.

In all 47 of the Council of Europe (CoE) Member States, governments nowadays are held to account if they fail to take sufficient account of fundamental rights. But this is not an automatic process. We have to fight for it. Think for example of developments in Russia, where homosexuality is still regarded as wrong and unnatural. In this battle minorities no longer stand alone, precisely because of the European Convention and its enforcement mechanisms. They know that they have right on their side. And that is a great achievement, from a legal and a moral perspective.

Article 7 of the Treaty on European Union provides for a mechanism to determine that there is a clear risk of a serious breach by a Member State of the values referred to in article 2 and to sanction this Member State. Sometimes this is called ‘the nuclear option’. In 2014 the European Commission established a ‘framework to safeguard the rule of law in the European Union’. This new framework included an early warning tool allowing the Commission to enter into a dialogue with the Member State concerned to prevent the escalation of systemic threats to the rule of law. In cases where no solution is found within the new EU rule of law framework, article 7 will always remain the last resort to resolve a crisis and ensure compliance with European Union values. The rule of law framework is now being applied with regard to Poland.

III. DEMOCRACY FROM PERICLES TO HITLER’S GERMANY

Our constitution does not copy the laws of neighbouring states; we are rather a pattern to others than imitators ourselves. Its administration favours

the many instead of the few; this is why it is called a democracy. If we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity; class considerations not being allowed to interfere with merit; nor again does poverty bar the way, if a man is able to serve the state, he is not hindered by the obscurity of his condition.⁸

These words come from an oration given by the Greek statesman Pericles (495–429 BCE), at a funeral ceremony for the fallen at the end of the first year of the Peloponnesian war.

Literally, democracy means government by the people. It is a venerable concept that relies on the principle that all human beings are equal. People enter into a contract with each other and are prepared to subject themselves to its rules as long as they are allowed in one way or another to participate in deciding the terms of that contract. Of course, equal rights in fact only applied to male citizens in ancient Greece, but it was a start.

The idea that people in society enter into a contract with others is of course theoretical. After all it is difficult to ask each and every person after they have been born whether they wish to subscribe to this contract and if they do, under what conditions. We are all part of a history that cannot be erased. The only meaningful solution to this problem is to enable people to choose the way their state and society is generally organised through their representatives. This is modern representative democracy as it exists in many countries. It is simply not possible to allow everyone to discuss everything. Often decisions have to be taken rapidly. You cannot wait until a disaster takes place.

Where less urgent but nonetheless significant decisions are concerned, the idea of a referendum is sometimes mooted: the entire electorate is consulted about a specific plan. This is what took place on 18 September 2014 in Scotland: every person who was entitled to vote could state whether they were for or against independence for their country. The traditional objection to the referendum is that a single question is put to the people without reference to its connection with other issues. For example, if you were to ask the electorate if income tax should be reduced by 10%, you would run the risk that euphoria about lower taxes might blind people to the fact that this would lead to cuts in public services.

⁸ From a translation by Richard Crawley of Thucydides' *The History of the Peloponnesian War*.

In a representative democracy where the broad organisation of state and society is established by the representatives of the people, it is usually possible to arrive at feasible solutions which have the approval of the majority of the representatives. In the best possible scenario that majority corresponds to a majority of the electorate. In the worst possible scenario, there is a large gap between the two.

Nowadays, democracy is based much more on the equality of all human beings (not just male citizens), in contrast to Pericles' time. And it means that everyone must be able to express his or her views. A two-tier society, like that of the Greeks and later in the era of slavery, or of racial segregation as in the US and South Africa, is therefore unacceptable. The right to vote must not be based on wealth or income, or on gender. In a modern democracy, the right to vote is universal.

Time and again, democracy and the rule of law are mentioned in the same breath. In this book, I do it too. But they are not synonymous. A democracy is not automatically a state governed by the rule of law. In 1930s Germany, Hitler's dictatorship came into being through democratic decision-making.⁹ Under his leadership the Nuremberg race laws were enacted in 1935. These were founded on the idea that people were not equal: they discriminated against Jews. The South African apartheid system too was based on human inequality. What is more, the 'marketing' of segregation in the US, under the motto 'Separate but equal' could not hide the fact that black people were systematically discriminated against. Discrimination based on characteristics like race, origin or religion is regarded as incompatible with human dignity and therefore with the principles of the rule of law. Human dignity means

⁹ 'Adolf Hitler (1889–1945) became Chancellor of Germany on 30 January 1933. On 27 February 1933, an arson attack was carried out on the *Reichstag* (German parliament building) for which the Dutch national Marinus van der Lubbe (1909–1934) was convicted and sentenced to death by beheading on 10 January 1934 in Leipzig. In the elections following the fire, held on 5 March 1933, the Nazi Party (NSDAP) made substantial gains but did not obtain an absolute majority. A few weeks later, on 22 March 1933, the new regime opened the first concentration camp in Dachau. One day later, Hitler and his adherents persuaded parliament to proclaim the Enabling Act (*Ermächtigungsgesetz*) which together with the Reichstag Fire Decree (*Reichstagsbrandverordnung*) granted the new government dominated by the National Socialists far-reaching powers which were not subject to parliamentary scrutiny. Hitler's dictatorship was born.' From *De Hoge Raad en de Tweede Wereldoorlog* (The Dutch Supreme Court and the Second World War) by Corjo Jansen and Derk Venema, Amsterdam, Boom, 2011, p 5.

that nobody is judged on the basis of his or her gender, descent, ethnicity, sexual orientation, political affiliation, religion, philosophy of life, etc. All these characteristics determine his or her individuality and must be accepted. People should be judged on their actions.

What I'm trying to say is that it is possible for legislation that is flagrantly in breach of the concept of the rule of law to be passed through democratic processes. On the other hand, it is barely conceivable for the rule of law to exist without democracy. After all, as we saw just now, the idea of the rule of law is based on equality among citizens. In that case how could one defend a form of government like a dictatorship or an oligarchy? Of course, you could theoretically elect a dictator through democratic processes and guarantee that in due course he would be set aside through those same processes. And there are republics that grant a great deal of power to their presidents, like the US and—to a lesser degree—France and, presumably in the near future, Turkey. Monarchies are another variation on this theme. In Europe at least, monarchs have few powers and it is possible to change the constitution in order to abolish the monarchy. There is thus no dictatorship by the sovereign, just as in the modern Western republics referred to just now there is no dictatorship of the president. What is more, in those modern democracies both sovereigns and presidents are bound by the law.

Dictatorship only exists when there are no checks on the 'leader' and there is no representative assembly standing in his way. Where this happens, it is not only morally wrong; it is not viable in the long term. European and South American history has demonstrated this time and again. The Arab Spring would seem to confirm it. There too, people demanded an end to repressive regimes, more political freedom, democracy and human rights. They wanted an end to corruption, unemployment and food shortages. We know of no better model than a democracy under the rule of law to achieve those aims. Because if it is stable, such a state also offers the best economic environment. The World Justice Project's Rule of Law Index shows that the quality of the rule of law in a country runs in tandem with its gross national product. Countries where the rule of law is weak also score less well in terms of prosperity; the converse is also true.¹⁰ The explanation is fairly

¹⁰ The World Justice Project is supported by the Neukom Family Foundation and the Bill and Melinda Gates Foundation.

simple: no one wants to do business with or in a country where agreements cannot be enforced and the only thing that ultimately counts is the opinion of a ruler who is not subject to checks and balances. Justice Breyer's remarks on this subject are well worth considering. He believes that companies will not want to invest in countries where the rule of law is not respected, where government is corrupt, where if you become involved in a dispute you are unable to gain access to an independent and impartial tribunal, where there is no predictability whatsoever. Breyer in turn quoted Alan Greenspan's observation that 'the rule of law and property rights appear to me to be the most prominent institutional pillars of economic growth and prosperity'.¹¹

IV. THE RULE OF LAW AND THE MALTREATMENT OF PENGUINS

L'état, c'est moi. ('I am the state').

Every man's house is his castle. Even though the winds of heaven may blow through it, the King of England may not enter it.¹²

In other words, in his own home even the poorest man can resist the power of the monarch.

So if you maltreat a penguin in the London zoo, you do not escape prosecution because you are the Archbishop of Canterbury.¹³

The first quotation is attributed to King Louis XIV, known as the Sun King and an absolute monarch. He believed himself to be above the law. The second quotation expresses the opposite view: even the King is bound by the law. And the third says the same thing in a different way: however lofty your position, you have to observe the law. No one is above the law, not the king or his ministers or the highest judges.

¹¹ Alan Greenspan, *The Age of Turbulence: Adventures in a New World*, Penguin Books, New York 2007, p 255.

¹² Likely source is William Pitt, Earl of Chatham, in a speech before the House of Commons in 1766. See B H Rosenwein, *Negotiating Space, Power, Restraint and Privileges of Immunity in Early Mediaeval Europe*, Manchester University Press, 1999, p 184.

¹³ T Bingham, *The Rule of Law*, London, Allan Lane, 2010, p 4.

How is it possible that the King himself may not enter your house without your permission, today as in the past? The reason is that the inviolability of the home is enshrined and protected in various constitutions and the European Convention on Human Rights. Any exceptions must be clearly defined in law. Consequently, sound legislation is required to ensure that basic rights cannot be too easily infringed. That is the task of the legislature. The executive, including the police, has to obey those laws. But if there are no checks on compliance with the law it is possible for its practical significance to decline; it becomes simply 'words on paper'. In this sense, the judiciary plays an important role. It keeps the executive in check.

The law governs the relations between citizens and between citizens and government. The words attributed to Louis XIV are thus in line with his vision of himself as God's representative on earth, but they are completely incompatible with the rule of law. 'Equal justice under law' is engraved on the front of the US Supreme Court building. An idea that would have given the Sun King the cold shivers. He decided himself which rules would apply to him.

In a state governed by the rule of law everyone is equal before the law: high-ranking officials are also bound by the law, including the Archbishop of Canterbury. But sometimes you have to go to court to experience that that is the case.

V. THE SEPARATION OF POWERS: MONTESQUIEU AND BERLUSCONI

Another famous Frenchman, Montesquieu, made an immense contribution towards ensuring that power does not come to rest in a single body, so that no one is above the law. 'C'est une expérience éternelle que tout homme qui a du pouvoir est porté à en abuser (...). Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir.' As one English translation puts it: '[It is] an eternal experiment, and one any man with power is tempted to abuse. [...] If power is not to be abused, the world must be so organised that power puts a stop to power'.¹⁴

¹⁴ Translation by Parliament of Canada.

Montesquieu explained the concept of the separation of powers in *De l'esprit des lois* (The Spirit of Laws), published in 1748. The essence of this idea is that legislative, executive and judicial power must not be held by one body or person. These three branches of government must be kept in balance to reduce the chances of an abuse of power. 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 other in check and prevent one branch 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 to avoid prosecution. 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.

Even today, many elements of the way the state is organised in European countries go back to the ideas of Montesquieu. The various constitutions and the legislation based upon them are imbued with the idea of the separation of powers. This prevents a concentration of power that might give someone the idea that he or she can stand above the law like a Sun King. Under the rule of law, everyone is bound by the law.

The three branches of government—the legislature, the executive and the judiciary—keep each other in check in making and implementing laws. The legislature draws the broad lines which the executive puts into practice. Then the courts decide in the 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 the 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.

VI. PROTECTING HUMAN RIGHTS

Protecting everyone's fundamental rights, otherwise known as human rights, is a crucial aspect of the rule of law. These are rights arising from the dignity of each human being, like the right to life and the right to freedom of expression. They guarantee everyone's individual

freedoms, including those of people who belong to an ethnic, religious or other minority.

Human rights are rights accruing to everyone everywhere in the world. Their purpose is to protect people against the power of the state and must ensure that everyone can retain their human dignity. For example, they mean that every individual can have and express his or her own opinion freely. Or that the government may not use random violence against its citizens. They include the right to education, enough to eat and a roof above your head. States have agreed with each other that they will guarantee these rights for everyone. Regardless of race, colour, sex, language, religion, political or other opinion, national or social background, prosperity, birth or any other status. Human rights form the basis for all legislation and policy laid down by government.

This is how the Netherlands Institute for Human Rights explains the concept on its website.

Human rights are the backbone of our civilisation. They are enshrined in the highest legal sources, like international treaties and constitutions. This confers on them a powerful legal status. For it is not easy to change the constitution or a treaty. Former associate justice of the US Supreme Court, William Brennan, once stated that the purpose of the constitution was to declare that certain rights were of a higher order and to put them ‘beyond the reach of temporary political majorities’.¹⁵ That is singularly apt. It also makes it clear why judges who are not directly, democratically elected are entitled to review legislation: because they have to award priority to a higher source of law. Especially when a temporary political majority wishes to do something which is incompatible with those sources or if the executive fails to respect fundamental rights.

In many countries courts may review the constitutionality of legislation and treaties. Individual human rights can also be protected against breaches by the legislature or executive via international human rights treaties. To a large extent, we have the role played by the European Convention on Human Rights (ECHR) in recent decades to thank for this. The Convention was concluded in Rome on 4 November 1950.

¹⁵ William J Brennan Jr, ‘The Constitution of the United States’, in David M. O’Brien (ed.), *Judges on Judging*, Washington D.C., CQ Press, 2009, pp 212–223, p 215. ‘It is the very purpose of a Constitution—and particularly of a Bill of Rights—to declare certain values transcendent, beyond the reach of temporary majorities.’

It was preceded by the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. The aim of the Declaration was to prevent as far as possible future injustice and atrocities such as those perpetrated during the Second World War (as a result of events in Nazi Germany). The ECHR establishes an explicit link with the Universal Declaration by referring to the contracting parties as 'likeminded and [with] a common heritage of political traditions, ideals, freedom and the rule of law'. The ECHR also established an international court, the European Court of Human Rights, responsible for monitoring respect for human rights, as enshrined in the Convention, once all national remedies have been exhausted.

VII. BALANCE BETWEEN THE POWERS WITH FREEDOM OF THE CITIZEN AS ITS FUNDAMENT

We have thus a complex interplay of issues: government must be bound by the law, the settlement of disputes and imposition of penalties must be the province of the judiciary, fundamental rights must be respected. The underlying priority is that the freedoms of citizens must be protected. The state organisation is not there to thwart the people, but must aim to promote the freedom and welfare of us all. If the legislature saddles us with laws which substantially limit our freedoms, it is fortunately always possible to have recourse to the courts. They can assess whether such a limitation on freedom was excessive in a specific case. For example, whether it was permissible to make wearing the niqab a criminal offence. Or if granting tax advantages to businesses was overly prejudicial for private persons. If the legislature passes rigorous legislation, the executive can sometimes try to temper its effect when it is implemented.

As we saw earlier, the concept of the rule of law is based on the separation of powers. We accept the exercise of powers by others because rules are necessary to achieve a degree of order in society. And those rules have to be enforced. Traditionally, we have the legislature that sets general rules, the government which applies those rules in its actions and the courts which in the event of disputes between citizens, companies, institutions or government agencies, or of failure by citizens to observe the rules of law, provide a solution or impose penalties.

That is why it is so important for citizens, institutions and companies to have easy access to the courts. It is pointless to grant decision-making powers to an independent and impartial judiciary if it is impossible to have recourse to the courts, because litigation is too expensive, too time-consuming or too complex. In such circumstances the legislative and executive branches can act unchecked. I'll return to this point in subsequent chapters.

In answer to the question of why we have the rule of law, the former head of the Dutch Scientific Council for Government Policy (which published a report in 2002 entitled *The future of the national constitutional state*), Michiel Scheltema, responded that it was 'to protect citizens from arbitrariness and to guarantee legal certainty and equality of treatment'.¹⁶ The rule of law is there for citizens.

If the executive over-extends its powers in a way that affects individual citizens, the legislature can call the executive to heel. It can, for example, prohibit the police from searching people if there are no good grounds for suspecting that they have committed a criminal offence. The courts too can intervene at the request of a citizen whose freedom has been infringed in this way. And if the courts assume too much power, the legislature can call them to heel through new legislation. This is also possible through new international law if a court has based its ruling on international law.

In this way an equilibrium is established. In other words—and I'm going to repeat this several times—no one has the last word, not even political leaders. In this context the phrase 'the primacy of the political sphere' is sometimes heard. This is based on a misconception: that it is politicians who make the ultimate decisions. And that idea is the reverse of how things should work in a democratic state governed by the rule of law: each of the powers holds the other in check, so a balance is achieved. The result is moderation, one of the four cardinal virtues.¹⁷ This is not to say that the legislature must always be circumspect. In a democracy it is the legislature's responsibility to set out the broad structure of the state and—depending on one's political opinions—of society. The legislature also determines the conditions subject to

¹⁶ M Scheltema, *Staatscourant* (Government Gazette), no. 36, 20 February 2003, p 5.

¹⁷ Moderation (*temperantia*), courage (*fortitudo*), wisdom (*prudentia*) and justice (*justitia*) are the four cardinal virtues, derived initially from Plato's scheme.

which government may act against its citizens. Legislation is enacted by the government of the day together with the representatives of the people; it is thus the expression of what they believe to be necessary and desirable. It is also the basis for the decisions taken by the executive and the judiciary. Which means those decisions too are democratically sanctioned. Later, we will see that laws do not regulate matters down to the smallest detail and that they sometimes contain loopholes. Or can be overtaken by new developments the legislator had not anticipated.

Here we have a broad outline of a democracy governed by the rule of law. It may sound very abstract. So perhaps an example of the opposite might be useful. In other words, what does a country look like without the rule of law, a state where no one is bound by the law? In 2012 a Dutch daily newspaper described the situation in the Democratic Republic of the Congo as follows. ‘Politicians steal freely from the state. The government pays no salaries, or they “get misled”, so teachers ask parents for bribes. No policeman will accept a complaint without “motivation money”. Journalists pay members of the security services to avoid arrest. Soldiers whose wages have not been paid loot and plunder, while militia members commit rape.’¹⁸

Under the rule of law, the fact that everyone is bound by the law serves to protect our freedom and our human dignity. Nevertheless, living in society presupposes certain curtailments of that freedom by others and by government. Living in a community requires tolerance and moderation (*temperantia*, in Latin). This involves listening to others, taking account of the interests and values of others, being slow to demonise others. What matters for the rule of law is that only properly legitimised infringements on our freedoms are allowed, and that there is no imbalance between the power held by government and citizens. In a democracy governed by the rule of law power is conferred by the law, not by rulers. The law creates possibilities but also determines their limits.

¹⁸ *NRC Handelsblad*, 17 September 2012.