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Περιμένοντας
τους Βαρβάρους

LAW IN A TIME
OF CONSTITUTIONAL CRISIS

STUDIES OFFERED
TO MIROŚLAW WYRZYKOWSKI

EDITED BY

JAKUB URBANIK & ADAM BODNAR

C.H.Beck

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ON SOME OF THE PRE-CONDITIONS FOR DEMOCRACY UNDER THE RULE OF LAW

Abstract

Judging constitutional systems that are in crisis can, after a certain point, only be done on the basis of standards that are external to the relevant system. Those standards may partake of general constitutional principles underlying the relevant system, but are generally praeter-legal, and of a political or moral nature. This brief essay focusses on the undermining of democracy, and identifies the principle of openness as a major precondition of democracy under the rule of law. The crisis of democracy in many European and other Western states is not merely a constitutional, but more profoundly a political, moral and spiritual crisis.

Keywords

Constitutional democracy; Backsliding; Legal and political norms; Law and morality

It is an honour to pay tribute to a great constitutional scholar, who has rendered tremendous services to his fatherland Poland also as a judge, and who is a fine colleague and friend, from whom I have learnt so much.

This short essay, partly inspired by Konstantínis Kaváfis's poem whose title adorns this volume,¹ comprises a set of loosely connected propositions on the pre-conditions for democracy under the rule of law. I offer them in the awareness that we always bring with ourselves our whole personal history, and that is tied up with the social, political and academic traditions which inform much of the views one takes, even when we are moving in strictly academic disciplines. That the stories and the personal, cultural and political histories we have lived are different, does not mean that those who differ see each other as barbarians – and certainly not barbarians to watch out for. That would be watching out in vain.²

Precisely because we bring with ourselves our whole personal history that is tied up with the social, political and academic traditions, I cherish the stories which are part of the life story of Mirek Wyrzykowski. They link in a dramatic way with the memories I hold dear of spending the month of July 1980 in Poland with a group of fellow students, at the onset of the summer of Solidarność. Already earlier that month, we had

¹ The manuscript of this essay was finalized in October 2020.

He transliterated his name as C. P. CAVAFY. The poem is *Περιμένοντας τους Βαρβάρους* [*Waiting for the Barbarians*], written in 1898, published in 1904, of which a variety of translations into English exist. I have been able to consult J. MAVROGORDATO, *Poems by C. P. Cavafy*, London 1951; E. KEELEY, *C. P. Cavafy: Collected Poems*, Princeton 1975. For the translations below, though inspired by these examples, I have sometimes chosen more literal renderings.

² In the words of ΚΑΒΑΦΙΣ (cit. n.1):

Και μερικοί έφθασαν απ' τα σύνορα
και είπανε πως βάρβαροι πια δεν υπάρχουν.

[And some came from across the border, and said there are no barbarians any longer.]

met some of the people around *Robotnik*, people from catholic clubs of intellectuals, as well as from what was at that particular moment left of the Flying University (*Uniwersytet Latający*). We saw the country changing from July to August, and understood from what was explained to us when the first strikes broke out, that it would become really serious if the dockworkers on the coast were to join. How proud and excited our friendly contact persons were that the garbage men had begun their strikes in, if I remember correctly, Lublin by the time we left at the end of that July – garbage men, those who are lowest on the ladder of social esteem. The summer of *Solidarność* turned into the crisis of martial law. And only when the whole of Middle and East-European countries were in full crisis, culminating in the Fall of the Wall, would the promise of that summer of 1980 materialize in Poland; until the constitutional system subsequently established, began reaching its own critical point.

1. Inside – Outside

As an outsider, saying anything about the nature of this particular crisis is hazardous. So many much better-informed persons who have lived through this particular crisis, and Mirek is one of them, could speak authoritatively. The following remarks would therefore be hopelessly tainted with ignorance, were it not that I have attempted not to focus in particular on the Polish case. Unfortunately, we see a crisis of democracy under the rule of law in many other countries we may once have thought would be resistant to such dangers. Even cradles of democratic republican experiment like the United States, or parliamentary democracy like the United Kingdom, have recently shown themselves prone to threats to democracy. With all differences that we must carefully remain aware of, many states share some of the features of democratic decline. The kind of constitutional crisis we are talking about is, on the one hand, necessarily historically determined, but on the other hand not a matter that can only occur under isolated historical circumstances – there is no full uniqueness to democratic decline as such, although there are many path-dependent manifestations.

From a moral point of view, situations of crisis, κρίση, are situations of judgement, as the original Greek etymology of the word suggests. They bring us outside the framework of that which is to be judged. The thing to be judged cannot adequately and sufficiently be judged by the standards that the thing itself contains. It is of course difficult to say what the moment in time is when one can speak of a real crisis. It is a gliding scale, where the tipping point is difficult to determine, and is itself a matter of controversy as to its occurrence and as to its reversibility. The example of judicial independence is a notorious example. When can one say that the Polish judiciary is no longer to be considered an independent judiciary in terms of the ECHR, the *EU Fundamental Rights Charter* or Article 19 *TEU*? Do all Polish judges have to be actually placed in a situation where acting independently is factually impossible – is it enough that Polish courts are liable to pressures which makes them no longer independent? Should it be a majority, an overall normative situation, or are a few sufficient because some cases can spoil the whole lot? Will there not always be one heroic judge left?

These are issues Polish judges must have been experiencing in a most direct manner – just as they pose baffling questions to the external courts that have to consider this matter in the context, for instance, of recognizing judgments.

As long as the problem is not generalized, and the tipping point has not yet been reached – if one can at all safely guess whether it has been reached or not – it may be that the norms internal to the legal system can still be used as standards to judge the

situation. But by the time such a thing as an ‘independent judiciary’ has become no more than an empty label that applies only nominally to the judiciary in a legal order, an external standard of judicial independence becomes relevant. The tipping point shifts the standards from internal to external ones.

2. Constitutions and Constitutional Crisis

As a constitutional lawyer from the Netherlands, I am schooled in a constitutional order that is quite different in nature from most continental European constitutional orders. The concept of a constitution is not that of the French revolutionary type, where constitutions claim to actually constitute the political system *ex nihilo*; where the function of a constitution is to determine and impose itself on political reality and political praxis. The Dutch constitution (comprising its Constitution, *Grondwet*, a small set of important unwritten rules of constitutional law and some organic pieces of legislation) is, on the contrary, rather the result of political reality and the political praxis. The constitution’s nature and intent is not to modify, but to codify. This kind of constitution is not revolutionary but evolutionary. It is like the British constitution. There is no identifiable single constitutional moment at which the ‘original’ constitution entered into effect and a ‘new’ polity came about. It is not like the *US Constitution* which, according to its Preamble, not only constitutes the state system but even actually constitutes the people: ‘We the people of the United States’ – the United States whose people did not truly exist until the Preamble said so.³

So I have been taught – and I actually teach – that the Dutch Constitution is not going to prevent wars, it is not going to prevent a revolution, and it will ultimately be unable to prevent itself from being grossly violated, ignored, toppled over and replaced by a different one.

Now this, I submit, is actually also the case with other constitutions that are of the revolutionary type. Also, the revolutionary type of constitutions are ultimately vulnerable to their undermining and replacement with another, different constitution. The very notion of a revolutionary constitution implies that another revolution can overturn it, even if it contains ‘eternity clauses’ of whatever kind.

3. Critical Implications

For constitutional lawyers, the prime characteristic of constitutions is their legal character. The implication that in deep crises the constitution itself is rendered an inadequate standard to judge the situation, means however that, as legal criteria, the constitutional norms can hardly operate as a satisfactory standard – except, as I have just suggested, perhaps in the in-between borderland of a crisis not having reached the tipping point referred to above. The story of overturning constitutional courts may illustrate this. At the moment when the overturning of a constitutional court and the replacement of its members was initiated, it still made perfect sense to adjudicate on its constitutionality. But after the whole system and its personnel have been turned upside down, one may reach the point where the norms of the Constitution itself can no longer have real legal significance. Of course, the new situation can be resisted. But when the whole system of judicial review has evolved into a different one, we may have to

³ This is not universally the case with original constitutions. They not always constitute the people. Poland is a case in point.

abandon the norms by which such *originally* could be adjudicated; legally speaking, they no longer apply. Yes, again there are shadowy borderlands in-between the old legality and the new legality. But I would submit that the norms in their original meaning are, as such, no longer a useful standard. If we seek standards for evaluating the new situation, we have to leave the realm of positive law, and we move into the context of other standards that are not necessarily the standards of positive law. We critically arrive in the realm of the pre-commitments, the pre-understandings of constitutional norms and of constitutional values. These are normative standards, certainly. But they may be, and may have to be, other than the legal standards of positive law.

4. Legal Standards, Political Standards, Moral Standards

Efforts to anchor a constitutional system by means of unamendable ‘eternity clauses’ suffer the same fate as other constitutional norms of positive law when things get that far. Apart from possibilities to amend (or remove) the eternity clauses themselves, however cumbersome the process for amending the unamendable provisions in a formally admissible manner may be, above all they ultimately have a meaning as moral markers, not as rules that could change the political facts at the basis of any constitution.

Constitutional standards are political standards that in ordinary times are applied as legal norms. In critical situations the standards are political standards which may stand outside the positive legal norms. They are standards with which to judge the political situation, and are themselves based on political values. This is not to say they are of the nature of arbitrary partisanship. In fact, such political values include constitutional principles that cannot properly be said to be positive law or reduced to an explicit constitutional provision. An instance of this is the idea of division or separation of powers. As a principle it has more or less technical expressions in positive norms of constitutional law. But it is also a value that transcends positive constitutional law. Such values are an appropriate standard the closer they are to the traditional constitutional arrangements of the relevant state.⁴

There are also principles or values that are, at least mostly, not derived from legal norms but are nevertheless crucial to the proper functioning of the democratic system under the rule of law. Among these are behavioural rules of a moral nature, and as they relate to the functioning of a constitutional order, we may consider them principles of constitutional or political morality.

For democratic debate, for instance, the civility of discourse is important to parliamentary deliberations. It requires transparency to avoid conflicts of interest, which detract from the common good, the *res publica*, that politics is to serve – the falling away from this is corruption, *corruzione* in the sense of Machiavelli, the breakdown of the republic.

Most parliaments have deontological rules, usually enshrined in or based on their Rules of Procedure. Again, it is the spirit that imbues these rules that counts. And it is

⁴ Let me clarify the point I want to make. It is not that states which transition from a long term autocratic form of government to a democratic system under the rule of law, may rely less easily on constitutional meta-principles such as separation of powers due to a lack of historical legitimacy of such principles, and that consequently these states may be liable to ‘constitutional backsliding’ more readily than states with longer term constitutions, as is sometimes held. Indeed in some states with authoritarian traditions, recourse might perhaps more easily (and successfully) be had to ‘emergency’ situations and the principle of concentration of leadership rather than of division of powers, though empirically this is a difficult assertion to sustain when we look at Europe during the present corona crises. The point I want to make, I emphasize, is a matter of the perceived legitimacy of the relevant principles, not a matter of some states more easily backsliding than others – all states can.

that spirit that can be the standard when democratic politics slides into corrupt politics, politics that fall away from serving the common good.

Just as any other constitutional legal norm, merely formal adherence to the letter of the rules empties them of meaning. Thin conceptions of the rule of law, reducing it to the requirement of a formal basis in legislation, also in democracies, empties them of the meaning that makes politics democracies; they become no more than the elegant canes, beautifully worked in silver and gold, the bracelets with so many amethysts, the red embroidered togas of the consuls and praetors that have been brought out to impress the barbarians.⁵

5. Mobilizing the Judicial Apparatus to Combat your Political Opponents

One of the many possible ways in which democracy is not at the service of the commonweal of citizens, but merely in function of the powers that be, is the use of executive powers in order to influence the behaviour of other powers to the detriment of political opponents.

Executives are potentially liable to do so, because of the inevitable links between the classic branches of government. In parliamentary systems of government, which are predominant within the European Union, the relation between executive and legislature are determined by the parliamentary system of government. Part and parcel of that is that a main function of parliaments, *i.e.* parliamentary majorities, is not primarily to legislate but to keep the executive in power. This works well when a government enjoys a comfortable majority in parliament; the executive tends to be the dominating power in the relationship with parliament. The executive can carry out its political programme through parliamentary legislation, which might turn into a mere rubber-stamping exercise of government plans, a phase that might be dispensed with either through accelerated proceedings or systematically through delegation of broad regulatory powers by act of parliament to the executive, if necessary with Henry VIII clauses and all.⁶ Under such circumstances, it is all the more important to observe the principle that political opponents should not be silenced by means of crushing dissenters through parliamentary proceedings, ignoring the principle that any voice should in principle be heard, even if it would not change the vote.

⁵ Cf. ΚΑΥΑΦΙΣ (cit. n. 1):

Πατί οι δυο μας ύπατοι κ' οι πραιτορες εβγήκαν
σήμερα με τες κόκκινες, τες κεντημένες τόγες;
γιατί βραχιόλια φόρεσαν με τόσους αμειθύστους,
και δαχτυλίδια με λαμπρά, γυαλιστερά σμαράγδια;
γιατί να πιάσουν σήμερα πολύτιμα μπαστούνια
μ' ασήμια και μαλάματα έκτακτα σκαλιγμένα;
Πατί οι βάρβαροι θα φθάσουν σήμερα
και τέτοια πράγματα θαμπώνουν τους βαρβάρους.

[Why have our two consuls and praetors come out today wearing their embroidered, their scarlet togas? Why have they put on bracelets with so many amethysts, rings sparkling with magnificent emeralds? Why are they carrying elegant canes beautifully worked in silver and gold? Because the barbarians are coming today and things like that dazzle the barbarians.]

⁶ Πατί μέσα στην Σύγκλητο μια τέτοια απραξία;
Τι κάθοντ' οι Συγκλητικοί και δεν νομοθετούνε;
Πατί οι βάρβαροι θα φθάσουν σήμερα.
Τι νόμους πια θα κάμουν οι Συγκλητικοί;
Οι βάρβαροι σαν έλθουν θα νομοθετήσουν.

[Why isn't anything going on in the senate? Why are the senators sitting down and why don't they legislate? Because the barbarians are coming today. What laws shall the senators make now? Once the barbarians are here, they'll do the legislating.]

In parliamentary systems where there is a high level of political fragmentation and governing majorities are small, unstable or absent, the chances of abuse of procedure and the prevalence of political immorality of other kinds may be reduced. And at the same time, as the executive is called to govern, the incentives might equally well be greater. It is clear that what is decisive is political morality as informed by democratic morality, on which some remarks are made below.

The worst kind of turning against political opponents is when the powers that be turn against their opponents through their leverage over the judicial system. In the sphere of criminal law, this is commonly the lever of control over the public prosecution. The appointment of the prosecutors general and the ability to instruct the public prosecution are the recipe for getting a grip on who gets prosecuted for what – if the executive wants to play that game. Again, political morality comes into this. We do not need to look into the history of Ukraine to see what devastation the powers that be can cause to democratic government in an open society. Purely exemplary is the complaint of the 45th President of the United States, barely nine months into office:

The saddest thing is that because I'm the President of the United States I'm not supposed to be involved with the Justice Department, I'm not supposed to be involved with the FBI, I'm not supposed to be doing the kinds of things I would love to be doing and I'm very frustrated by it. I look at what's happening with the Justice Department, why aren't they going after Hillary Clinton with her emails and with the dossier and the kind of money (...)?⁷

At that moment, the idea of separation of powers evidently was still operational insofar as it evidently 'frustrated' the president, but unfortunately it was not his last attempt at instrumentalising the powers of the Justice Department within the judicial system to attack political opponents.⁸

The other leverage that executives have, is via the power to appoint judges. In itself I adhere to the view that the appointment of judges by the executive, whether or not under parliamentary scrutiny or assent, does not as such need to interfere with the independent exercise of the judicial function, in particular if there are, preferably legally binding, objective criteria concerning candidates' eligibility relating to professional abilities, and a transparent procedure. It is a general constitutional feature of very many democracies under the rule of law that the executive appoints judges, although the appointment of judges to the constitutional courts tends to be dealt with in different ways, which aim to provide checks and balances and at the same time guarantee a form of democratic legitimacy. Neither of these procedures inherently affect the independent function of judges after they are appointed.

Here political morality and the potential of its corruption enters into the picture again. The annoyance with the independence of the judicial machinery that frustrates

⁷ *Larry O'Connor Radio show*, 2 November 2017, transcripts on <http://edition.cnn.com/TRANSCRIPTS/1711/05/ip.01.html>; for further tweets along the same lines, see: <https://www.redstate.com/streiff/2017/11/03/donald-trump-not-happy-justice-department-neither/>. That same President managed to turn the somewhat convoluted and more nuanced constitutional doctrine of a strongly unitary executive (see e.g. L. LESSIG & C. R. SUNSTEIN, 'The President and the Administration', *Columbia Law Review* 94 (1994), pp. 1–123), into a diatribe for easy consumption which asserts 'I have an Article II [of the Constitution] where I have the right to do whatever I want as a President'; for a compilation these assertions in the context of investigative powers of the Justice Department and the public prosecution see https://youtu.be/sl_gO3uOds8. In the context of his powers over state governors, the claim is that '[w]hen somebody is president of the United States, the authority is total', (13 April 2020), see <https://www.youtube.com/watch?v=r3QXrQDQTDYo>.

⁸ We should add that the whole matter spiralled out of hand when the president was impeached by the House of Representatives, but the Senate in quasi-judicial role, presided by the Chief Justice of the Supreme Court, acquitted him – an entirely political procedure in more than one sense of the word 'political', in which separation of powers formally disappears.

power-seeking elected despots,⁹ logically tempts them into ‘normalizing’ the courts, filling them with politically friendly judges in order to make them work in function of the power holders’ claim to have authority because the people want them to have that authority. Again we may look at the United States for a long historical tradition of politicized appointments, as could be seen in the days of *Marbury v Madison* in 1803, up to the appointment of Justice Amy Barrett in 2020. But we need not look for examples in barbaric America, where the police happen to shoot to kill blacks more easily than whites, and people carry guns to election booths, presumably on the interpretation of a patriotic constitutional provision on defending the republic that has been turned into the right to defend your most individually perceived self against any other person, and with arms equipped with a killing power which is a manifold of any of the deadliest weapons that existed in the days of the Founding Fathers. Also highly civilized European countries with great cultural achievements in literature, music, arts and politics are now resorting to turning the judicial apparatus into a bench of friends to fight the ‘enemies.’

6. Democratic Openness and Civic Morality

From McCarthyism to ‘the deep state’ conspiracy theory, many democratic systems have been prone to setting up their own barbarians to watch out for. The drive to a ‘security’ discourse after the attacks of ‘9/11’ has transformed the enemy from an external figure, to the enemy among us. And Covid-19, the corona virus that has beset us from the beginning of 2020, has created opportunities for large scale deviations from anything ordinary in the rule of law – from the right to a public hearing in court to legislation by executive decree (with or without a formal state of emergency being declared), to the postponement or actual calling for elections as it befitted those in power.

Setting up artificial enemies is pernicious to democracy because in times that fears for barbarian enemies are cultivated, ordinary democratic procedures may be abandoned. But a more profound problem is in its obliteration of the necessity of openness that is a precondition for democracy. Democratic openness assumes civic equality and inclusion for the operation of deliberation and debate between citizens, as well as between their representatives, about the desired course of things within the polity in a democratic fashion. Democratic openness assumes the ability to put forward and argue about all possible matters relevant to and in the *res publica*. It takes the reality of differences of views between citizens into account by allowing them into the exchange that should contribute to the quality of the discourse that issues into decision-making. It must be inclusive, that is to say, not a matter of those who are ‘in’ and those who are ‘out’ on which populist forces thrive. Democratic openness makes for an open society; democratic societies must be open societies.

Openness should not only concern the question who participates in the debate, it should also concern the substance of what is debated. This openness is not a matter of giving up on truth at all, as is sometimes urged by some secularists who may be tempted into thinking of democracy as premised on scepticism that may end up in deadly nihilism, rather than in terms of an ever ongoing attempt to articulate a truth about the ever vulnerable common good, about what is best in the ever changing circumstances at any particular moment in time. Nor is it about the imposition of one’s own convictions.

⁹ I intend this word in the original sense of the word *δεσποτεία*, the power or lordship over persons and things they regard as theirs, the accumulation of which was viewed by Plato as the cause of maladministration of the polity; see Plato’s *Laws*, 698a, where it is said of the Persian empire, that ‘its present evil administration is due to excess of slavery and of despotism.’

7. What is Constitutional Politics and Constitutional Law? What is Ordinary Politics and Legislation?

To what extent does openness require one to distinguish constitutional politics from everyday ordinary politics? Is precommitment to certain values necessary in constitutional politics as much as in ordinary legislation? Ordinary legislation must, after all, observe the limits set by constitutional rules and norms.

The implicit and inherent endurance and resilience of constitutions as opposed to the flux of everyday events and ordinary politics is a translation of the distinction between constitutional law and ordinary law, between constitutions and legislation. The relative immutability, depending on their degree of formal and substantive entrenchment, of constitutions as compared to the flexibility of ordinary legislation is evident. This entrenchment and endurance is also what makes an authoritative and legally binding declaration of unconstitutionality qualitatively different from a judgment rendering a judicial interpretation and application of ordinary legislation. The latter can be changed if the legislature disagrees with a judicial interpretation of legislation, whilst changing the constitution is in most European countries considerably more difficult to achieve, and entails costs in terms of constitutional stability and of the relationship between courts and the other political branches.¹⁰

The difficulty lies in how to make the distinction between the two. Of course, democratic openness should ideally apply to constitutional politics if a constitution is to be democratic. However, constitutions derive their superior status from their stronger degree of entrenchment as compared to ordinary legislation. Were we to extend democratic openness so as to achieve full substantive flexibility and draw this to its logical conclusion, the difference between constitutional law and politics and ordinary legislation in everyday politics would disappear.¹¹

Admittedly, drawing the distinction in any substantive manner between what should be constitutional and what should be the object of ordinary legislation is very difficult. One might say that the level of abstraction of constitutional norms is generally higher than in ordinary legislation and that of delegated instruments is even more concrete. But that is not always so. Thinking of the founding EU Treaties as the core of the constitution of Europe, we must notice that although one might say that the Treaty on European Union is more general and the Treaty on the Functioning of the European Union is more technical and concrete – which, by and large, it is indeed – it is still so that the TFEU contains very important constitutional rules that determine the constitutional function of the EU's institutions, as well as of the role of citizens and their rights, in particular (but not only) their citizenship rights.

The matter is further complicated by the fact that many constitutions contain provisions that are specifically intended to codify and entrench a negotiated compromise that basically freezes the political conflict dominating ordinary politics – a constitutional agreement to disagree and get on with normal life. Sometimes such compromises aim to be a real solution to a stalemate that threatened to paralyse the political system. Post-conflict constitutional arrangements in the context of (near or actual) civil war provide

¹⁰ This is all the more evident in a country like the Netherlands, where courts cannot adjudicate on the constitutionality of acts of parliament, but can review them against certain international treaty provisions such as the ECHR – the latter can hardly be changed, though the treaty could, at high political cost, in principle be withdrawn from altogether.

¹¹ An example of this fairly radical approach is Joel I. COLÓN-RÍOS, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power*, London–New York, 2012, but who eventually settles for 'weak constitutionalism'.

various examples; but also other forms of deep political conflict have led to compromises that could only unlock ordinary politics by codifying them at the constitutional level.¹²

Yet another difficulty lies in the general and abstract nature of constitutional provisions as such. In socio-ethical questions this becomes evident, but it is not only in that type of context that this problem occurs. More generally it is a problem of constitutional authority. Is determining the scope of the right to life as a constitutional right a matter of purely constitutional nature, and therefore a matter to be determined by those who have the formal power to amend the constitution? Or is it constitutional courts only? Or is it a matter that can be interpreted and regulated by ordinary legislation? These questions can be raised regarding the right to life or the right to marriage, if they are covered by constitutional provisions, but indeed on matters other than private morality, such as the scope of freedom and privacy of correspondence: does that apply to email messages, and if so, only encrypted messages or all messages, and what does that entail for constitutional arrangements that require judicial approval for gaining access to that correspondence? What about 'radio or television' if that is specified under a constitutional provision: does that include cable networks and content that is transmitted via internet on call? Who is to decide this? Does adaptation either to new moral and cultural insights, or to new technological developments require constitutional amendment, after open public debate and constitutional deliberation by the constitution-amending power? Or can it also be decided by constitutional courts on the basis of the stylized procedures based on *audi et alteram partem* and its sequels? Or indeed through relevant ordinary legislation by the legislature, based on public debate and an open dialogue characteristic of democratic decision-making on important matters?

There are no easy answers to these questions, beyond saying that constitutional politics requires openness if a constitution is to be democratic, and that if every day politics and ordinary legislative acts are to be democratic, they must be the result of open and public debate, which presupposes a fundamental commitment to an openness that requires sincere engagement with the views of others.

8. The Closing of Minds, Spiritual Death and Emptiness

Openness is ultimately rooted in a moral quality of citizens, without which democratic institutions lose their democratic nature. Without this openness being fundamental for democracy, nominally democratic institutions become substantively despotic or tyrannical. Democracy hinges on civic virtue and the virtuous habits, the ethos, of citizens and politicians. A democracy will not function if it is not supported and defended by citizens and politicians alike. And this can only be successful if founded in the virtue of openness.

Around us in Europe, we can sense the danger of the closing of minds, among other things through an ever wider spread rejection of science by anti-vaxxers, coronadeniers, climate change denialists, and others. Certainly, the role of experts in political decision-making should not lead to blind technocracy. In political discourse there

¹² In the Netherlands, the constitutional provision on financial equality between schools, run under the authority of municipalities, and privately run denominational schools (originally in particular protestant and catholic schools) was adopted in 1917 as a compromise in which protestant and catholic political parties would agree to universal suffrage and the liberal and socialist parties would allow state financing of protestant and catholic schools. This compromise did not mean that protestants and catholics (though the latter, as a relatively disadvantaged group, to a more mixed degree) full-heartedly supported universal suffrage, nor that liberals and socialists thought that denominational schools were a good idea, let alone their financing by the state – but that was the historical compromise in order to break through a decades long mutual blockade that obstructed engaging in ordinary politics.

should be an openness to realities other than that of political tinkering and bickering; openness to other realities, such as openness to debate on technological change, taking on board insights from those who have authentic knowledge about relevant phenomena; it should be open to economic discourse, to social realities such as the cleavage between the privileged and the deprived, also in terms of wealth and in terms of opportunities in education and access to health care, to the realities of cultural, ethnic, racial and gender inequalities, to problems of the sick, the poor, the migrants, none of whom might have easy access to public debate.

Democratic openness entails openness towards what is different from us and different from me; it is openness that must transcend the individualist understanding of the ego. This ethos of openness to the other – or as Levinas would have it: the Other – determines the spirit of a society, and also of political society.

The closing of minds at the basis of political closures can therefore be considered a spiritual crisis as well.¹³ The spirit of democracy is the spirit of openness, the closing of minds, when complete, its spiritual death, where there is merely emptiness. The emptiness that becomes obvious when the senators, the emperor (αυτοκράτωρ), the consuls and praetors preparing for the barbarians were told by people returning from the borderlands, that ‘there are no barbarians: what shall come of us now, without the barbarians – they were a kind of solution (...)’¹⁴

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¹³ It is disconcerting to notice that it is in countries in which the Catholic Church is supposed to be an important moral force, that we see such a deterioration of the quality of democracy. It leaves room for speculating that the nature of Christianity as an openness to the transcendent divine as precondition for the openness to fellow-humans, the sharing of the incarnate Word in humanity as the arch-type of human solidarity which transcends borders, and in Scripture is presented as a sign and message to all nations, may have lost its leavening power – it may have hardened from a living faith as a ‘Way’ (*Acts 9:2; 18, 25–26; 24, 14*), into a sterile set of doctrinal rules, which stands in contrast to much of the teaching of JPII and his successors of in the office of Peter, regarding openness and solidarity as being founded in openness to the divine; see in particular the very recent *Fratelli tutti*, by Francis, where ‘openness’ is a key concept that is used more than 20 times.

¹⁴ (...) Είπανε πως βάρβαροι πια δεν υπάρχουν.
Και τώρα τι θα γένομε χωρίς βαρβάρους.
Οι άνθρωποι αυτοί ήσαν μια κάποια λύσις.