

Transcript of the TrustTalk podcast Interview with Geert Corstens

Voice-Over: Welcome to TrustTalk. Today's guest is Geert Corstens who served as president of the Netherlands Supreme Court until his retirement in 2014. During his tenure, he stressed the importance for judges to speak out publicly about the rule of law and how the judiciary plays a vital role in protecting them. Government and politicians can enforce rules by force. Judges only have the trust of the people. To be impartial and independent are the two essentials of the judicial function. He talks about cases that get media attention, like the 2019 Urgenda case and the more recent curfew measures the Dutch government took to restrain corona. Judges are not sitting on the chair of politicians. They step in when asked about societal issues where politicians often fail to act or act contrary to the law or international treaties. Your host today, Severin de Wit.

Interviewer: Mr. Corstens, thank you for being our guest today. You have been President of the Netherlands' highest court, de Hoge Raad, from 2008 until you retired from the judiciary in 2014. When I contacted you to be interviewed for TrustTalk, talking about the role of trust in the judiciary, you were very quick to consent. I like to see that as an endorsement of the view that trust, in your view, is of great importance for the judicial system.

Geert Corstens: Yes, thank you very much. Trust is an important issue. And I suppose that for that reason, the current President of the Netherlands Supreme Court, Dineke de Groot, devoted her first speech as President to the issue of trust in the judiciary. So that's a very clear sign, I think.

Interviewer: It is, absolutely. If trust is the subject of debate or even a survey, mostly the focus is on only two of the three branches of government - what we call the Trias Politica, the legislative and the executive. Trust in the judiciary often seems to be considered a given. So my question is, during your tenure as a judge, how many times did you have an internal debate about trust and whether that is in danger of eroding?

Geert Corstens: Well, many times this was an underlying issue, and I devoted much attention to publicity of the judgments and the function of the Supreme Court in order to improve the trust of the people in the judiciary. And I tried to persuade my colleagues of the importance of this. However, I have to admit, I was not always applauded by them. For instance, I gave two times an interview to the largest newspaper in my country, De Telegraaf. And this journal had and has still a reputation as, let's say, a very popular medium that reflects the views of the man of the street, of the "man on the Clapham Omnibus". Colleagues did not appreciate that I appeared in such a newspaper, but my incentive was that the judiciary has to be trusted by everybody in this country. And in general, the readers of more

outstanding - we call them quality newspapers - belong to the same layer of society as judges do. And there is less necessity to persuade them. Now, what we have to do is to convince common people that the judiciary plays an essential role in protecting them. That the rule of law is also of great importance for them, as the separation of powers is, and as human rights are. And therefore, I also gave interviews not too frequently on TV programs.

Interviewer: It is interesting that you say that, because not so long ago our Prime Minister, Mark Rutte, encouraged corporate executives to speak out in public more often, to counter a growing mistrust of large companies and political tendency to scoff at big corporations being selfish and ego-centered. So it seems you encourage judges to be outgoing.

Geert Corstens: Well, as I just remarked already, I think that judges should utter themselves, but in the meantime, they have to remain at a distance, because you have to realize it's always possible that you are confronted the next day with an issue about which you have already spoken in public. But on the other hand, if the judiciary as a whole is criticized, somebody will have to explain what judges do. And this can be, for instance, the President of the Supreme Court, as I did this, or a President of a local court or tribunal that has been criticized.

Interviewer: So maybe Alexander Hamilton, one of the founding fathers of the United States, was right when he said in one of his Federalist Papers that - and I'm now quoting - the judiciary is the least dangerous branch of government.

Geert Corstens: Well, as you said already earlier, we have three branches of government, the legislature, the executive and the judiciary. They must be kept in balance, in order to prevent abuse of power. As in many organizations, social organizations, you have an executive boss and the supervisory board, on the other hand. And it's important that those bodies can control each other, can check each other, can review. And it's important that neither of these three powers in the state will exert abusive power. The idea is that citizens behold enough freedom. That's the underlying idea. And yes, the judge has, as my former colleague of the Israel Supreme Court, Aharon Barak, once said, the judge has "sword nor purse". The legislative branch of government and the executive can please people by giving them financial means and can enforce its measures by violence, if necessary. The judge has only the trust of people in its institution and in its functioning. And therefore, we are glad that in this country, the judiciary is in general the most trusted branch of government. That you have to realize.

Interviewer: Yeah, that's true, but trust is a fragile asset and that is far from a given. Take the UK as an example. In the last years well known Edelman Trust Barometer, parts of the UK media openly attacked

the judiciary in a nation where the separation of powers has been a given for four centuries. So what is the best method to maintain trust in the judiciary in the Netherlands?

Geert Corstens: Well, I think that we have to show as judges and as former judges, over and over again, that we are impartial and independent. And these are the two essentials of a judicial functioning. We have two legs we stand on, and that is impartiality and independence. And this means, for instance, that judges do not interfere in media debates about, for instance, the virus measures. You have to take into account that tomorrow, you, or one of your colleagues, can be asked for a judgment in such a case. And if you have already given your opinion, the party that doesn't agree will not trust you. And every day again, you have to demonstrate when you are going to your court, you have to realize - when you are going, as we do on our bicycle there - you have to realize you have to be fresh and that you have no political program. We have no political programs. We have to be fresh in order to judge every case on its own merits.

Interviewer: Now, talking about political. There has been ample attention to court decisions that some people consider political, ranging from the often quoted 2019 Urgenda case, to the more recent court cases related to corona measures, you just briefly mentioned that, the measures taken by the government. These are questions by interest groups. And

Geert Corstens: sure,

Interviewer: In the book you wrote with Reindert Kuiper, it's called "*The Judge Seizes Power*", or in Dutch, "*De Rechter Grijpt de Macht*", you argue that the Urgenda case is simply about sharing the power with the two other branches of government, basically, and I quote, "keeping the Dutch government on its toes", not an attempt to seize power.

Geert Corstens: Well, thank you very much for quoting the title of our book, but it has a subtitle as well. And the subtitle is "And Other Misunderstandings About the Rule of Law". And I am of the opinion that judges have to be both modest on the one hand and courageous on the other hand. Modest, we have to be modest, because it is not the job of the courts to decide on organizational contours of the state or to shape society. That's not our task. That's up to politicians. But the judge has to be courageous as well. So the first element was modesty. But in the meantime, to be courageous, that means that when the executive does not obey the law, the judge has to be clear and has to render a judgment that states that the executive does not obey the law. Or, when the legislature has defined a law that is contrary to an international treaty, it is his task or her task, to declare that such a law may not be applied. But at the same time, he has to realize that the executive needs some room for performing its function. And he has

to realize that unlike national legislation, international treaties cannot easily be amended. That's my answer to your question.

Interviewer: According to many authors, distrust in the judiciary is a direct consequence of the rise of populism. Populists have a tendency of instrumentally exploiting the law and manipulating legal institutions, most notably courts. Marc de Werd, a Judge at the Court of Appeal Amsterdam said in a Dutch morning newspaper, I don't know whether that was De Telegraaf, but I recall it was

Geert Corstens: I suppose,

Interviewer: he said, populists are consciously suspicious of judges.

Geert Corstens: Yes, indeed. Sometimes they are, and we judges have to be on our guard. But in the meantime, we have to remain impartial and we have to render justice to all, also to those who oppose us. And that's what you have to make clear every day, again, that you are there for everybody. And the nicest thing a judge can be confronted with, is the positive opinion of a party in the proceedings that have lost the proceedings, but gives as his or her opinion, "we have lost this procedure, but we have been treated in a fair way". And that's the nicest compliment you can get as a judge. That's very important.

Interviewer: Justice rendered.

Geert Corstens: That's it, yes.

Interviewer: A member of parliament and a populist politician called the alleged growing influence of the judiciary "a dikastocracy", or what we more commonly would call "government by judges". The legal profession immediately dismissed the idea of government by judges as irrelevant and non-existing. However, you know, we live in a time where trust is won and lost within society on the battlegrounds of media and public opinion.

Geert Corstens: Yes, and well, in line with what I just told you, judges have to emphasize that they have no political program. They apply the law not on their own initiative. It's on the initiative of a party, or of the public prosecutor. On the request of one of the parties involved in the case. Judges are obliged to render judgment. Well, they in fact, involved, they may postpone, but not they may not postpone, as politicians may do. They may not refuse to render the judgment. And in doing so, they show restraint, acknowledging that the executive has its own responsibility, that judges are not legislators. This may

enhance public trust. In particular, if judges remain at a distance and show extreme integrity, that's very important.

Interviewer: Yeah, intellectually, that's all true. But there is a clear and present danger that we, and by we I mean, maybe, I'm sorry to say that "the intellectuals" - between brackets - underestimate the undercurrent of people feeling left behind, ignored by the elite. Take the case of a group against corona measures. When the Court of Appeal in summary proceedings refused their claim to lift the State's corona curfew order, the group immediately dismissed the court's judgment and called the judgment at a press conference, quote, "the end of the rule of law". Big words, right? Of course, these are heavy handed allegations which can be easily dismissed, but in order to maintain trust in the courts and the judiciary, would you agree that we should take these feelings serious and address them?

Geert Corstens: Well, this is an interesting illustration of this point. In first instance, this group, Viruswaarheid, applauded the decision of the judge who in line with them declared the curfew invalid. But then in appeal, the decision was overruled. And they immediately described the judge, the judiciary, this court, as a corrupt institution. This is how populists react. And the only right answer to such comment is to remain firmly upright, to demonstrate judicial craftsmanship and not to demonize people, nor laughing at these utterings. Stay upright, do your job and show that you are impartial and independent. That's my answer to this question.

Interviewer: I want to quote Harvard Professor Noah Feldman, who said that criticism of judges is often driven by what he calls and this is a little bit of a difficult sentence, but I'll try to translate it, he said, "the imagined ideal of the cloistered monk justice, innocent of worldly vanities, free of political connections, and guided only by the gem-like flame of inward conscious", or in plain English, judges are humans, too.

Geert Corstens: Well, I don't know if I understand this quote perfectly, but I should answer that, this is why I encourage judges to speak out, not too frequently in public and to show that we are human beings. And I have many times underlined that judges, like policemen, like general practitioners, like attorneys, in daily contact with all layers of society, with poor people, nasty men, captains of industry, murderers, thieves, rapists,

Interviewer: Anybody,

Geert Corstens: Anybody.

Interviewer: And now we are quoting, I read another quote, which I like to confront you with, is one of your colleagues, Lord Leslie Scarman, member of the UK House of Lords, and he said *"Great judges are in their unique ways, judicial activists, but the Constitution separation of powers must be observed. If judicial independence is not to be put at risk, for, if people in parliament come to think the judicial power is to be confined by nothing other than the judges' sense of what is right, confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges"*.

Geert Corstens: Yes, well, this is exactly what I meant with my words about modesty. As I told you, not only you have to be courageous, you also have to be modest as a judge. And we judges are not the ones who define the great outlines of the organization of the state, nor of society. Our legitimization lies in the laws we apply and the doctrines of law that are in many cases founded in long lasting traditions, many cases beginning with Roman Law. We must not conceal that sometimes there are choices to be made. But in that case, we have to give reasons for these choices. Motivation is essential, and as I have enhanced during my tenure as President of the Supreme Court, but also before that time, I have always applauded judges who render their judgments in clear language, easily to be understood. And if it is not possible to do this in the judgment, please, give a press release, make press release, give an interview, not you as the judge who who made the judgement, but as a Press Judge, make it clear to the people what's the decision and what is the motivation.

Interviewer: In plain words, you mean

Geert Corstens: in plain, clear language.

Interviewer: In an article you wrote in the Duke Law's magazine, Judicature, or if I'm pronouncing that well

Geert Corstens: Judication,

Interviewer: oh that is a difficult name, I have to say, for a magazine. But anyway, that judges are in a bad position to counter criticism publicly. And you seem to argue there that this is the more reason why politicians should not make statements that undermine public confidence in the judiciary.

Geert Corstens: Yes, if judges interfere in issues that are at stake, they run the risk that they have to decide in such a case. And this is why they are handicapped in giving reactions, because the next day a similar case can be put to them and the other actors in the state should be conscious of that and

therefore be reluctant in their criticism of the judiciary, because judges cannot, as politicians can, as members of the executive can, they can speak freely in public. We cannot because of that reason that the next day we have to give again this session in such a case, in a similar case, that's the reason why politicians should be reluctant. This does not mean that the politicians may never give reactions to judgments, they are allowed, sure, they are allowed to do so, but

Interviewer: not like I think you mentioned in your book when Berlusconi reacted to one of his judgments against him. Yes, there was fear. So that was.

Geert Corstens: Yes. Well, he qualified judges as well in a very, very nasty, nasty negative, very, nasty words. This does not mean that you may never criticize judges. You may do so, but do it, firstly, wait until you have read the decision, and then second, you have to do this in a, let's say, polite way, do it not in a way that undermines the authority of the judge.

Interviewer: Right. So far, we discussed whether the judges are getting too much in the government's chair, but a slightly different point of view, in a column in the Dutch newspaper NRC, the columnist, Caroline de Gruyter, argues that judges are becoming more powerful, mainly because politicians are neglecting their duties. How do you view this?

Geert Corstens: Well, I think Caroline de Gruyter is right. It is not that judges like this is not that they really welcome that they have to decide in cases that, in fact belong to the domain of politicians. Judges, but they have to decide if requested, you have to do so, you are not allowed to refuse to render justice. And politicians should be willing to take decisions in time. It make judges more vulnerable if they have to intervene too frequently in issues that have to do with the organization of state and society. That's up to politicians. And a very nice case we had in this country, was the case of euthanasia. As you know, in this country, well, already, I suppose, 20, 25 years ago, there was a big debate in society and also in political circles, about whether or not to allow euthanasia

Interviewer: "euthanasie", in Dutch

Geert Corstens: euthanasie in Dutch. Yes. There was a big, big debate. Politicians could not come to an outcome. They could not decide. And then, on a certain day, judges were confronted with such a case.

Interviewer: I remember that case. It was this doctor who committed euthanasia, was was sued by the prosecutor.

Geert Corstens: Yes he was sued and he was prosecuted in first instance, in second instance, in appeal. And the case came also to the Supreme Court. And then we decided in those days, this was in the 80s of last century, we decided that there can be situations that euthanasia is allowed, but there was no law about that. Well, there was an article in the Penal Code that said that in cases of urgency, you are you are allowed to trespass the law.

Interviewer: So that was more related to a situation of rape and that kind of

Geert Corstens: Well, this was a general clause in Article 40 of the Penal Code that gave room for people who trespass the law, but did this was a very good for very good reasons. And this article was interpreted by the Supreme Court and also by the lower courts in a way that it could be applied in these cases of euthanasia. And what happened next was that there came in the end, a bill and what the bill did, well, the Minister of Health applauded herself and her party applauded her because they had introduced this possibility. But what they do with this law was exactly, literally, copying the text of the Supreme Court's judgment. So it was the legislature who followed the courts.

Interviewer: sometimes judges have to force the direction of politicians rather than.

Geert Corstens: So this was Montesquieu reverted.

Interviewer: Yeah, exactly, exactly.

Geert Corstens: So and well, that sometimes. Sometimes happens.

Interviewer: Mr. Corstens, thank you very much for being our guest today. It was very insightful. I wish you a pleasant remainder of the day. Thank you for being available.

Geert Corstens: it was a pleasure for me as well.

Interviewer: Thank you.

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