Cleveringa-lecture: "Some reflections on sense and sensibility in a European rule of law debate"
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Good evening ladies and gentlemen.

Prologue: Cleveringa lecture

Rudolph Cleveringa was a law professor at the university of Leiden when the Nazi's invaded the Netherlands on 10 May 1940. The Nazi's soon ordered that all Jewish staff members of the university had to be fired. On 26 November 1940 Cleveringa held a now famous lecture, in which he firmly expressed his protest against the dismissal of his Jewish colleagues. The Nazi's imprisoned him for his righteousness.

After the Second World War, it became a tradition to organise annual so called Cleveringa lectures, initially as a memorial, but nowadays in particular to emphasise the importance of the virtue to stand up against grave injustice within the state or society. Cleveringa lectures usually discuss current aspects of democracy and the rule of law.

Introduction

It is an honour that I may speak to you today at this Cleveringa lecture in Warsaw. I have chosen the title of this lecture to be "Some reflections on sense and sensibility in a European rule of law debate".

I will begin with an introduction on the words "sense and sensibility" in this title. Then I will address the rule of law. I will say something about the European Union and about behaviour and communication in relation to a rule of law debate. Then I will tell you something about an actual and concrete rule of law debate in the Netherlands, in which the Venice Commission of the Council of Europe provided an opinion. In this opinion, rule of law debates on questions of state and society are taken as a fact of life. The Venice Commission emphasised the necessity to have not only strong safeguards for the rule of law, but also problem solving abilities and resilience in coping with difficulties. I will conclude with some reflections as announced in the title of this lecture, particularly in relation to Poland.

A central theme in this lecture is the function of a lawyer – by this term I refer to all legal professionals, such as judges, academics, practitioners and civil servants – as an instrument to foster the prosperity and well-being of citizens within the state and society. I think this function demands amongst others a good understanding of the principles of justice, the ability to reflect on whether these are adequately respected in practice, and the intention to keep this ancient instrument up to date and available for future generations.

Sense and sensibility

The words “Sense and sensibility” remind us of the novel of Jane Austen with this title, or maybe some of you especially of the 1995 movie based on the novel.
The English author Jane Austen wrote Sense and Sensibility possibly partly already at the age of 19, in 1795. At that time, shortly after the Polish-Lithuanian Commonwealth adopted its written constitution in 1791, Poland lost its sovereignty, amidst conflicts in Europe between Russia, Austria and Prussia. Jane Austen lived in England. Her novel “Sense and sensibility” was published anonymously in 1811.

The story is mainly about a widow with three daughters who are dependent on marriage for their preferred social and economic position in society. After the death of their husband and father, their home is inherited by his son from a previous marriage. This son and his wife force them to leave the property. This is a first aspect I would like to highlight. The novel criticises early 19th century class structure and family law, especially with regard to the “cultural fixation on priority of male birth”[1] and related issues of social and economic autonomy. Then I would like to mention a second aspect. At that time, novelists criticised the focus on romantic, emotive sensibility in the literature of the last decades of the 18th century and placed the rational sense against it. Austen contributed in her novel to this ongoing transition, for instance by trying to picture one of the daughters, Marianne, with a character full of sensibility and another, Elinor, as a type with an overflow of rational sense.[2] However, as the story proceeds, it is getting more difficult for Austen to combine her wish to tell a realistic story with a preference for sense over sensibility in a character. It is exactly her realism that enables her to sketch a credible picture of elements of sense and sensibility in both characters. The tone in the novel may be characterised as ironic, not afraid of sharpness, humorously, realistic and willing to reflect and comment on social and economic boundaries in the living situation of people.

To illustrate the need for a balance - or perhaps even a necessary cohesion - between sense and sensibility, I would like to read you a short part of the first chapter of Sense and Sensibility, in which Jane Austen describes the characters of Elinor and Marianne:

“Elinor, this eldest daughter, whose advice was so effectual, possessed a strength of understanding, and coolness of judgment, which qualified her, though only nineteen, to be the counsellor of her mother, and enabled her frequently to counteract, to the advantage of them all, that eagerness of mind in Mrs. Dashwood which must generally have led to imprudence. She had an excellent heart;—her disposition was affectionate, and her feelings were strong; but she knew how to govern them: it was a knowledge which her mother had yet to learn; and which one of her sisters had resolved never to be taught.
Marianne's abilities were, in many respects, quite equal to Elinor's. She was sensible and clever; but eager in everything: her sorrows, her joys, could have no moderation. She was generous, amiable, interesting: she was everything but prudent. The resemblance between her and her mother was strikingly great.”[3]

[1] Ruoff, Gene (1992). Jane Austen's Sense and Sensibility. Harvester Wheatshaff.
[2] https://en.wikipedia.org/wiki/Sense_and_Sensibility; https://en.wikipedia.org/wiki/Jane_Austen
[3] Austen, Jane (2008, original in 1811). *Sense and sensibility*. London: Penguin Books Ltd, p. 8.

Protection of human dignity and human freedom

When Jane Austen was a teenager, the 1789 Declaration of the Rights of Man and of the Citizen came into existence. It is a declaration about what is called "natural and inalienable rights", such as freedom, ownership, security and resistance to oppression. The declaration recognises equality before the law and the justice system, and affirms the principle of separation of powers. In the essence, the declaration underlines the importance of respect for human dignity and human freedom. Poland regained its sovereignty after the First World War in 1918, and lost it again in 1939 at the beginning of the Second World War. As we all know, in those wars, people in Europe and all over the world suffered from severe violations of human dignity and human freedom.

After the Second World War, it took some more decades before Polish sovereignty revived. The lack of protection of human dignity and human freedom of Polish people functioned as an incentive in Poland to reclaim this protection peacefully. Amongst the rights and freedoms desired by the Polish people in society, the freedom of expression and the freedom of assembly and association were explicitly used as instruments to achieve independence for the Polish state. When I was a teenager, I saw on television what Lech Walesa did for Poland as a trade-union activist.[4] I remember the image of the courage he showed by standing up for the rights and freedoms of the Polish people within the rule of law. His initiatives would turn out to be important for Central and Eastern Europe as a whole. It took yet another decade of debate and protest, before the borders in Europe were reopened. The will of former Eastern Bloc countries to join the European Union as member states was very important, not only for the social and economic welfare of the people in the respective countries and for their rights and freedoms, but also for a stable and peaceful position of Europe in the wider world, in the short and long term.

The values on which the European Union is founded and its aim

Nowadays, the rule of law aspects I was talking of, are globally enshrined in declarations and treaties. International and national instruments are available to eventually enforce these declarations and treaties, in order to maintain the protection of rights and freedoms of the people. According to article 2 of the Treaty on European Union (TEU), the European Union is founded "on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Article 3 paragraph 1 TEU says that the aim of the European Union is to promote peace, its values and the well-being of its peoples. A European rule of law debate between people living in a member state of the European Union, is part of a dialogue based on these standards enshrined in law.

A rule of law debate, behaviour and communication

Of such a debate, human behaviour[5] is another natural part. In relations between human beings, someone's behaviour influences the behaviour of somebody else. The exchange of

[4] https://en.wikipedia.org/wiki/Lech_Wałęsa

[5] "Human behaviour is the potential and expressed capacity (mentally, physically, and socially) of human individuals or groups to respond to internal and external stimuli throughout their life." (https://en.wikipedia.org/wiki/Human_behavior#cite_note-:0-1)

both substantive information and information about relations, feelings and expectations is inherent to human behaviour. Behaviour hence has a communicative aspect. To exchange information, we communicate both on the informational level, in which substantive information is being exchanged, and on the relational level. At the relational level, we communicate about feelings, relations and expectations, i.e. about what we reveal of ourselves, about how we feel about another person and about what we expect from the other (what we want or aim at, what influence the messenger is trying to exert on someone).

In our communication, we experience aspects of so called basic emotions, like anger, fear, sadness, happiness, disgust, contemptuousness or amazement. Emotions have a signalling function. They may indicate that something is going on, interests are affected, needs are not met. If emotions are not taken seriously, the problem solving capacity of the person coping with emotions may be obstructed. If emotions are used to make a request, one is responding to other people's emotions while pursuing one's own goals.

Often, we do not take much time to listen and talk to each other in terms of distinguishing communication levels and emotions. This creates a basis for confusion, misunderstanding and conflict. I will give you a simple example. Mary and John are falling in love with each other. John invites Mary to have dinner tonight. In her reply, Mary does not accept the invitation and adds that John did not answer her preceding question to have lunch together tomorrow. It is unclear to what extent Mary rejects John's proposal on the substantial level, she could for instance already have another appointment for dinner tonight, and to what extent she reacts on the relationship level about the fact that John did not answer the proposal she made earlier. If John and Mary do not feel free to discuss their thoughts and feelings, they might get caught up in a situation of conflict, even though the intention of their proposals could be the same, for instance to express feelings of love by inviting the other one to share a table.

Behaviour and communication are used by people to express their will, needs, rights, interests, duties, etcetera. They are also used to look for solutions in cases where such manifestations seem incompatible. Here, we are approaching the area of problem solving and conflict or dispute resolution. Usually, if we get into a situation of conflicting interests, there is an increased risk of listening more to ourselves than to others, of losing our grip on our everyday rational debating and negotiating styles. In other words, of acting on the basis of our sensibility, while forfeiting our logic and common sense. In the teachings I am involved at the law faculty of the Vrije Universiteit Amsterdam, courses were added – to the common traditional legal education – about the basics of Harvard Negotiating,[6] mediation, and theories of conflict resolving instruments like the so called escalation stairs or escalation ladder of Friedrich Glasl, and the conflict mode instrument of Thomas Killman. In this way, law students get acquainted with behavioural aspects of conflict resolution mechanisms within a debate or dialogue about aspects of law. Knowledge and skills about types of conflict, patterns in the escalation of conflicts, validated possibilities to deescalate a conflict or to recognise somebody's preferred conflict styles, these things support today's lawyers in combining the law in the books with the law in action, in connecting the intuitive sense for justice with a professional attitude.

Like every debate, a rule of law debate takes place on the informational level, in which we share substantive information, and on the relationship level, in which we share information about feelings, relations and expectations. The rule of law defines an area within which a

[6] Roger Fisher, William L. Ury and Bruce Patton, Getting to yes: Negotiating Agreement Without Giving In, 2011.

community experiences a peaceful living situation. Living in a community in peace enables human beings to strive for prosperity and well-being in the short and long term. Within this area, people are supported to deal peaceable with emotions, including peace-threatening emotions. Within this area, democracy functions as an instrument to have a free and undisturbed debate and to look after interests of one's own and interests of the community, including opposing and conflicting interests. If someone for instance questions the functioning of democracy as such in this debate, this person is not attacking the rule of law, unless the questioning has no other aim than to silence someone else in a free and undisturbed democratic debate. An example of a debate within the area of the rule of law, is the yellow vests movement in France (*Mouvement des gilets jaunes*), that began in France on 17 November 2018 as a peaceable incentive of citizens for more economic justice and later for institutional political reforms.[7] These people communicated by behaviour – like sitting on the streets while wearing yellow vests – their complaints as substantive information. At the same time, they communicated about their basic emotions on the relational level, particularly with regard to their requests for improvement of their position in society and their well-being in their living situations. Behaviour and communication in a rule of law debate are key instruments in order to successfully promote peace, prosperity and well-being for the people who build a community.

From behaviour and communication to law and justice

Human beings use different aspects or instruments to bond together in communities, like family, religion, trade, education, labour, or law. The sense of peace and safety within one's own community may differ from that sense towards people outside that community. As an example you could think of the difficulties homogeneous communities might encounter when they are getting mixed with members of minority groups.
The sense of peace and safety towards people within a community may be touched by communication on both substantive and relational level. As an actual example of this you could think of a person who lives in a community that openly rejects COVID19 vaccination for religious reasons, while this person recognises the benefits of being vaccinated against COVID19 but does not want to feel rejected; then sometimes a vaccination location is chosen outside the own community. A state or society with a focus on the principles of justice, problem solving and resilience will have no reasonable doubt about making vaccination locations accessible for members outside the community of a location.

Law is an ancient and current instrument with good credentials to regulate behaviour in order to prevent and resolve conflicts in favour of peaceful relations. Lawyers and law students have a responsibility for the adequate functioning of this instrument. However, law is not synonymous with justice, as we know from the past. During the Second World War, the Nazi's even made laws on which they based crimes against humanity. More generally, they used law out of touch with the delicate but essential balance between sense and sensibility, in a formalistic manner. An example is provided by a Dutch attorney who wrote a book about the course of his life after his arrest for political reasons in the second World War.[8] He was imprisoned in the Nacht und Nebel camp (Night and Fog) in Natzweiler. Night and Fog camps were founded on a directive issued by Adolf Hitler in 1941. The intention was to let people disappear while keeping their community uncertain about their fate. One day an official message was handed over to this Dutch attorney in the Night and Fog camp in

[7] https://en.wikipedia.org/wiki/Yellow_vests_protests
[8] Floris B. Bakels, Terug uit Nacht und Nebel, mijn verhaal uit acht Duitse gevangenissen en concentratiekampen.

Natzweiler. It stated that the Nazi authorities in the Netherlands had decided to delete him from the register of attorneys. This example shows that legal reasoning as such is not a guarantee for justice or consistent action. The use of law out of touch has an alienating effect. If law and power are not sufficiently linked to principles of justice, the core function of law - to regulate behaviour in order to prevent and resolve conflicts in favour of peaceful relations - does not guarantee the rule of law.

A universal and timeless way to link law and power to principles of justice, is to take power away from the individual and hand it over symbolically to a divine or secular entity, like a clergyman or a prince, who accepts that power with the promise of being a servant of the community and of the principles of justice. The past and the present provide us with examples in which this promise is not kept, where power is used for the achievement of individual goals rather than the promotion of peace, prosperity and well-being of the people and contrary to furthering respect for human dignity and human freedom. The idea to spread power within the rule of law between parliament, government and judiciary may give the peaceful community a chance that members of these three powers will call each other to account for the fact that they accepted their power under the promise of being a servant of the community and of the principles of justice. Before the 1789 Declaration of the Rights of Man and of the Citizen came into existence, philosophers like Hobbes, Locke and Rousseau thought about the conditions that make people able and willing to live together in peace and to overcome their fear of each other for the sake of prosperity and well-being, when a deity or an absolute ruler would no longer symbolise power. The answer was sought in a political model based on reason and on a social contract. In this political model, the state and the citizen also impose restrictions on each other: as long as the state guarantees peace, freedom and equality for all, people in the community refrain from interventions that threaten peace; if the state fails in its guarantees, people are allowed to oppose the state. In this political model, behaviour in human relations is bound by the law, and state actions like the making, application and enforcement of the law need a lawful basis. The reason based part of the political model took for granted that behaviour is based on truth and reality. The social contract basis of the political model assumed that behaviour is based on mutual trust between the citizen and the state and between citizens. Basically, an essential part of the social contract idea is also a fundamental principle of law: *pacta sunt servanda*, which means that the state and its citizens are expected to perform and implement their agreements in good faith. In this political model, institutions like parliament, government and judiciary also function as a guarantee for justice in the living situations of individuals. *Pacta sunt servanda* is not a purely rational concept. The aspect of *good faith* indicates that in a debate about the performance of an agreement people will need to ask each other questions and to listen to each other, in order to understand each other's substantive information, behaviour and communication.

Ideas like these were used when the function of divine or secular absolute rulers in symbolising power further decreased. Written constitutions came into use, with one of the first being the Polish-Lithuanian Commonwealth constitution in 1791. In constitutions, ideas about the spread of state power were combined with the idea that a peaceful community has an interest in ensuring that the power over the principles of justice belongs to nobody, instead of belonging to a divine or secular absolute ruler. Nowadays, the idea of the anonymous nature of power has become central to the rule of law.[9] A peaceful community uses this idea as an instrument to uphold the rule of law, especially to delineate the area within which a community perceives a peaceful living situation; the area where the rule of law supports

[9] Dorien Pessers, De rechtsstaat voor beginners, Uitgeverij Balans 2011.

people to deal peaceable with emotions, including peace-threatening emotions, and where democracy functions as an instrument to have a free and undisturbed debate and to look after interests of one's own and interests of the community, including opposing and conflicting interests.

So, essentially, the spread of power between parliament, government and judiciary within a state is not only aimed at striking a balance between those three powers within a state, but also to regulate that nobody within the state has the final say. Fundamental rights are part of the written or unwritten constitution. The constitution provides everyone with the same rights that can lead to prosperity and well-being. The state has the duty to respect the fundamental rights of its citizens, regardless of whether citizens are part of majorities or minorities. Citizens must respect the fundamental rights of other citizens. Public office holders and citizens are loyal and bound to the constitution, instead of being bound to divinely given or inherited power. The constitution enables to have laws that may regulate the public and private area and the areas of the state and the church, but it also prevents that citizens are deprived from fundamental rights. Indispensable for a constitution in order to function as a stable basis for a peaceful community, is the basis of *pacta sunt servanda*, every state and citizen is expected to perform agreements in good faith, including the agreement that the power over the principles of justice belongs to nobody.

The principles of justice are not a purely rational concept. They are designed by human beings, who share while dealing with principles of justice both substantive information and information about feelings, relations and expectations.
On the level of relationship, principles of justice are amenable to an appeal to emotions, needs or values. It is for instance imaginable that somebody tries to use them to explain progress or decline. To safeguard that the power over the principles of justice will belong to nobody in the short and the long term, a constitution enables citizens to have a society based on truth and reality and to keep and further their mutual trust in good faith. To this aim, a constitution demands, in addition to striking the balance between the three powers, behaviour based on legality, truth and mutual trust, in exchange for manners for participation, openness and insight into the exercise of power.
Such aspects of a responsive social contract and of democratic legitimation are part of constitutions in a rule of law based state. Within the part of a constitution about the legislative power, we will for instance identify the right of citizens to free elections, the right to vote, the right to have open access to public information, and constitutional guarantees for the making of legislation with respect for human dignity and human freedom. With respect to the executive power, we usually recognise in a constitution the post-election commitment of a government, the possibility to remove a member of the executive, aspects of publicity and legality of the use of the power of administration, and the right to legal protection against the exercise of that power. For the power of the judiciary, it is essential that a constitution guarantees the independence of the judiciary from the legislature and the executive. It is for instance key to prevent the legislative and executive power from taking undue influence on the judiciary in providing individuals with the protection of the law, and to guarantee the enforcement of judgments. It is also important to prevent the legislative and executive power from interfering, particularly through restrictions on independence, in the power over the principles of justice that belongs to nobody. It is essential that a constitution acknowledges the functioning of independence, impartiality, accessibility, professional competence and openness for the administration of justice.

The Childcare Allowance Case in the Netherlands

Before I will try to connect some lines of the above with some reflections on the rule of law situation in Poland as one of the member states of the treaties of the European Union, I would like to draw your attention to a recent example of a rule of law debate in the Netherlands in which law, behaviour and communication collided in a way that injured the rule of law. Earlier this year, the Speaker of the House of Representatives of the States-General of the Netherlands requested the opinion of the Venice Commission of the Council of Europe on the legal protection of citizens in relation to the so called Childcare Allowance Case.

In short, the history of this case may be described as follows. In 2005, the Dutch Parliament adopted an act that established a complex childcare allowance system, in which parents buy specific preschool and out-of-school childcare services on a regulated market from a registered childcare centre (kindercentrum - e.g. a kindergarten) or childminder (gastouder). Under this scheme, the parents are reimbursed for part of the cost, depending on their income, as an allowance. That "allowance" (toeslag) is a provisional and conditional "advance" paid by the State to the applicants in advance. The State covers only part of the costs of childcare. Parents must always pay the remainder themselves. Their personal contribution is mandatory, and they must be able to demonstrate that they provided it with relevant bank statements. The system was designed in such a way, that the allowance was paid upon an application by the parents setting out an estimate of the childcare costs for the following year. Due to minimal initial verification, nearly everyone who applied would receive “advances” for the allowance. Afterwards, the effective right to the allowance was made dependent on proof that one’s income was below a certain level.

The executive assumed that the law prescribed that a parent had to repay the full amount for the whole year if afterwards a part of the requested proof was lacking. This was also the case if only a small part had not been paid (or proven to be paid). The Administrative Jurisdiction Division of the Council of State accepted this until 2019. This application of the law contributed to high repayment demands. Requests for repayment could go back to the previous five years. The strict application of the law was not mitigated by any proportionality test or a hardship clause.[10] It took many years before it became clear that a fair amount of the parents involved, were victims of grave injustice within the state and society. The legal system of childcare allowances was complex and took little account of contemporary human behaviour and communication in the living situation. The sincere political wish to prevent fraud with childcare allowances was translated in an excessive focus on sensibility, disturbing the balance with the sense that authorities must take care of legal protection and legal certainty.

In January 2021, the Prime Minister sent a letter to the President of the House of Representatives, in which he apologised on behalf of the Government for unseen hardship that the parents and their children had to endure. The Prime Minister announced a series of reforms concerning the benefit system but also general measures to improve how warning signals could be taken more seriously, on improving access to administration, improving legislation, avoiding discrimination, and providing information to Parliament. The same day the Government stepped down. Subsequently, elections took place.[11]

[10] See for these and other details the Opinion of the Venice Comission, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)031-e, p. 1-6.
[11] Opinion of the Venice Commission, no. 24.

The opinion of the Venice Commission of the Council of Europe starts with a general remark about the rule of law, which is that it should be made clear from the outset that, in general, the Venice Commission is of the opinion that the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law.[12] The Venice Commission notes that some of the key elements in the Dutch Childcare Allowance Case, such as rigid legislation to prevent welfare fraud and insufficient internal and external control of administrative agencies, were prominent features in similar cases in Norway and Ireland and that the suggestions developed in its opinion may apply also to other countries.[13] Then the Venice Commission analyses the relevant national rule of law aspects of the Dutch Childcare Allowance case.

In its conclusion, the Venice Commission reminds us that we must not consider 'the rule of law' as a purely formal concept in the meaning of 'rule by law', but as a substantive and normative concept, meaning that the law must be accompanied with guarantees against abuse of legal powers. It continues with four observations. Firstly, in general, as I just mentioned, that the Netherlands is a well-functioning state with strong democratic institutions and safeguards for the rule of law. Secondly, the shortcomings in individual rights protection uncovered in the Childcare Allowance Case are serious and systemic and involve all branches of government. Thirdly, "it appears that eventually the rule of law mechanisms in the Netherlands did work. The reports of the Ombudsman, the Parliamentary committee, and the legislative amendments show the reaction of the different mechanisms in the Dutch system. The rule of law issues revealed by the Childcare Allowance Case are taken seriously by all branches of government, which is very positive. In the interest of its citizens, the Netherlands appears to be capable and willing to address and redress its mistakes." Fourthly, "in this case, this reaction has taken a much longer time than it should have, and serious damage was caused to the families involved and those who attempted to expose the problem faced much resistance."[14]

In connection with the perspective of the function of a lawyer as an instrument for the prosperity and well-being of citizens within the state and society, especially three aspects in this opinion of the Venice Commission catch our eye: 1) the rule of law is a substantive concept, meaning that the law must be accompanied with guarantees against abuse of legal powers, 2) resilience is essential for the functioning of the safeguards for the rule of law, and 3) the time for recovering damaged mutual trust is far from unlimited.

Some reflections in relation to Poland

Now I will turn to some reflections on sense and sensibility in a European rule of law debate in relation to Poland.

The current debate in Poland and the European Union on the rule of law in Poland has characteristics of both sense and sensibility. With sense, I refer to the European and international treaties, directives and regulations, in which the promotion of human rights, peace and social and economic prosperity has been put in writing. These rules have been put together by the use of - amongst others - logic and common sense. With sensibility, I refer to the fact that judges, legislators and civil servants at EU level and in the various European

[12] Opinion of the Venice Commission, no. 32.
[13] Opinion of the Venice Commission, no. 38-40.
[14] Opinion of the Venice Commission, no. 133-135.

nation states do not operate in a sterile setting or vacuum, but are influenced by their own and others' passions, morality, interests, and by current social and economic developments. Viewed this way, sense and sensibility both had a profound influence on the promotion of human rights, peace and economic prosperity in Europe throughout the last decades. But somehow, sense and sensibility have gone too far apart in the current rule of law debate in relation to Poland. It will be key to reconcile them.[15] We do not need to let go of passions and notions of morality, but these should be governed by the wisdom of common sense. In this way, debates on the rule of law can have sensible outcomes and consensus can be achieved, for the benefit of the people of Poland and the European Union as a whole.

That being said, let us have a closer look on the rule of law debate in relation to Poland, while taking into account the need to reconcile sense and sensibility.

I will not try to enumerate the existing points of conflict about the rule of law in Poland. A major problem is – amongst others – that Polish authorities are obstructing the independence of the Polish judiciary, although Poland is party to treaties according to which it is obliged to safeguard the independence of the judiciary. Polish authorities are unilaterally interpreting and breaching multilateral treaties to which Poland voluntarily has chosen to be party. These treaties are based on *pacta sunt servanda* and thus have to be enforced in good faith based on mutual trust between the contracting states. This problem causes lots of other legal problems within Poland, and between Poland and other member states and institutions of the European Union.

We are currently debating these problems in a situation where sense and sensibility have grown too far apart. Polish authorities focus on the legal path, take a formal approach, and tempt other authorities within the European Union to get stuck in legal disputes. These disputes are created by violations of the independence of the judiciary by Polish authorities, thus complicating the joint attention for geopolitical aspects of a stable global position of the European Union. On this path, the answers and solutions sought for, are necessarily mainly of a legal nature, both within Poland and at the level of EU institutions.
We all can see how on this path, the rule of law debate is hardening. This debate seems to be getting more and more out of touch with the delicate but necessary balance between sense and sensibility. For instance, some years ago, we were talking about the naming and shaming of Polish judges on billboards in Poland, which was distressing, considering the authorities' responsibility to account to the public that the power over the principles of justice belongs to nobody. Nowadays, we witness the prosecution of independent Polish judges by a disciplinary court that lacks judicial independence. We also see how politicians in the international community are getting prepared to support those who stand up against the breakdown of the rule of law, for instance by speaking up or even discussing economic measures against Poland. The international community clearly supports the Polish people who returned on the European scene in 1989 and strengthened their mature and sovereign position in Europe in 2004.

The path of unilaterally breaching treaties a state is a party to, is a path of uncomfortable legal certainty. The *pacta sunt servanda* principle is such a fundamental part of a treaty, that it is realistic to expect that sometime and somehow a treaty will come to an end – formally or effectively – for such a unilateral acting party. As a result of unilaterally breaching the EU treaties that support Poland socially and economically, Polands 1989 hard-won sovereignty

[15] A similar line of thought (albeit on a different subject) was provided in the 19th Annual David R. Tillinghast Lecture on International Taxation by Manal Corwin on 30 September 2014 at New York University.

could suddenly turn out in a loss of prosperity and well-being for the Polish people. Furthermore, Poland's position in a stable Europe and the position of Europe in the wider world could change seriously.

Following a strictly legal path means also that debaters limit their chances to observe possibilities to deescalate this increase of conflicting interests, through behaviour and communication. I would therefore plead for a situation in which conflicting interests are debateable, within the limits of the rule of law. The European area of the rule of law has been shaped throughout the centuries. It is amongst others defined by normative and written boundaries, such as ideas about human dignity, human freedom, the balance between the three powers of state, treaties, and the *pacta sunt servanda* principle. The area of the rule of law is moreover a safe space, that allows for interaction and discussion on both the substantive and relational level. And last but not least, as the Venice Commission emphasises, the rule of law space should allow for problem solving abilities and resilience in coping with difficulties. In a free and undisturbed debate within the limits of the area of the rule of law, sense and sensibility could be reconciled.

Here, the will, needs, rights, interests, and duties of the Polish people – majorities and minorities – are essential, as well as the virtue of individuals to stand up for grave injustice and to contribute to an open rule of law debate. Relevant in this debate are also the views of all member states and the institutions of the European Union. Here, we need to explain again and again why the power over the principles of justice belongs to nobody. We also need a realistic, rule of law based story about the position and role of Poland within the Eurepean Union in the short and long term. It should be kept in mind that social and economic welfare in Poland might be seriously endangered if we do not further connect law, behaviour and communication to reach a situation in which conflicting interests are debateable.

For a free and undisturbed debate within the area of the rule of law, it will be key that people are able and willing to live together in peace and to overcome their fear of each other for the sake of prosperity and well-being. For this, it is a necessity that citizens perceive that the power to regulate their living situation is in the hands of people who behave themselves as servants of the community and of the principles of justice, which principles are enshrined in article 2 TEU. If behaviour within the three powers of a state is not sufficiently based on truth, reality and mutual trust, it is getting all the more important to contribute to the resilience of the will to stabilise and protect the rule of law in the interest of the people.

In a European rule of law debate, we sometimes need a reflection as in a Jane Austen novel : ironic, not afraid of sharpness, humorously, realistic and willing to reflect and comment on human interactions and boundaries in people's living situations. We need to take time to listen and talk to each other in terms of distinguishing communication levels and emotions. We must take care that time is not running out. We need behaviour and communication in a rule of law debate that show both the willingness and our actions and dilemmas in enforcing our treaties in good faith. In the meantime, let us not forget that the very essence of a human rights approach within the rule of law is respect for human dignity and human freedom.[16]

Closing

These reflections bring me to the end of this Cleveringa lecture at the University of Warsaw. I am looking forward to the Q&A session. Thank you for your attention.

[16] ECtHR 29 April 2002, Pretty/United Kingdom, 2346/02, no. 65.