Appendix A - Van den Bergh's Inaugural Lecture, 28 September 1936

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Paul B. Cliteur

In the United States and other Western countries, there is discussion about the predicament of liberal democratic societies. *Populist and Islamist Challenges for International Law* aspires to contribute to that discussion. The differences of opinion are huge, complaints are legion, and constructive proposals on how to move forward are rare. An exception is a group of commentators who seek inspiration in the concept of "militant democracy."

The basic idea of militant democracy is easy to understand: democracy, if it wants to survive, should be able to defend itself against the forces that undermine it. In this book,

several chapters address militant democracy. Militant democracy teaches that certain limitations on the fundamental values of free speech and freedom of association may be necessary to safeguard democracy in the long run. Key figures for militant democracy include the German-American constitutional theorist Karl Loewenstein (1891–1973), the Austrian philosopher Karl Popper (1902–94), and (less well-known) the Dutch constitutional scholar George van den Bergh (1890–1960). Van den Bergh discussed militant democracy in 1936, three years after the Nazis seized power in Germany and three years before the start of World War II. He reflected on the central question of what constitutional means we have at our disposal to deflect political catastrophe. We think his ideas are topical.

The contemporary discussion both in the United States and in Europe is about militant democracy, albeit not under this name. An example is a 2017 essay titled *On Tyranny* by American historian Timothy Snyder, professor of history at Yale. Snyder refers to Hamlet, the hero of Shakespeare's eponymous tragedy, who is rightly shocked by the abrupt rise of an evil ruler.[1] Snyder criticizes Americans who had convinced themselves that "there was nothing in the future but more of the same."[2] Fascism, Nazism, and communism seemed "distant traumas" that receded into irrelevance. Snyder coins that approach as the politics of inevitability, or the sense that history could move in only one direction—that of liberal democracy. This vision of history is teleological. It is a narration of time that leads toward a certain, usually desirable, goal. When communism collapsed at the end of the 20th century, we drew the erroneous conclusion that rather than "rejecting teleologies," our own story was true.[3] Snyder implicitly refers

1. Snyder, Timothy, *On Tyranny: Twenty Lessons from the Twentieth Century*, Tim Duggan Books, New York 2017, p. 117.
2. *Id*. at 118.
3. *Id*. at 119.

Albright probably chooses her words carefully, and although there is the implicit suggestion that the American president is associated with fascism, her explicit view is that Mr. Trump is the reason *why we are talking* about fascism.

That Albright does not focus on *Islamism* as a contemporary challenge may be deduced from her remark that Donald Trump, among other things, "nurtured a paranoid bigotry toward the followers of one of the world's foremost religions."[9] What we may conclude from this is that Albright thinks that a world religion is innocuous by nature. And, apparently, a world religion cannot mutate into a danger for democracy. Democracy and democratic ideals are open to the corrupting influence of populism (contemporary events abundantly testify to that), but a world religion, apparently not. Is that realistic?

This somewhat romantic view of contemporary events is totally absent in the work of another high-ranking author and ex-politician, Henry Kissinger. In his book *World Order* (2014), Kissinger makes the claim that Islamism is a full-fledged vision of "world order" and, thereby, an important challenge for liberal democracy.[10] This observation is highly relevant for our analysis of contemporary threats and challenges. Kissinger reminds us of the binary distinction between *dar al-Islam* (House of Islam, or the realm of peace) and *dar al-Harb* (the realm of war) and adds, "Still, the binary concept of world order remains the official state doctrine of Iran, embedded in its constitution; the rallying cry of armed minorities in Lebanon, Syria, Iraq, Libya, Yemen, Afghanistan, and Pakistan; and the ideology of several terrorist groups active across the world, including the Islamic State in Iraq and the

9. *Id*. at 5.

10. Kissinger, Henry, *World Order: Reflections on the Character of Nations and the Course of History*, Penguin Books, London 2014.

Levant (ISIL)."[11] Apparently, there is no lack of challenges these days. These challenges do not originate from "fascism," according to this analysis. The contrast between these two comments on our present crisis is striking.[12] Kissinger, as one of the few authors in mainstream doctrine within the United States, explicitly points out the dangers to a prevalence of Islamism, while Albright believes fascism is the real danger.

This "Is it fascism, or is it Islamism?"(or both?) discussion lies at the heart of the contemporary culture wars. On the one hand, there are those who, like Albright and Snyder, emphasize the dangers of a fascist revival, and on the other hand, there are authors like Kissinger who stress the dangers of Islamism.

An indefatigable proponent of the latter view (and much earlier than Kissinger) is the German scholar of international relations Bassam Tibi (of Syrian descent). In works such as *Islamism and Islam* (2012),[13] *Political Islam, World Politics and Europa* (2008),[14] and many others, he pointed out that the challenge for the 21st century will be Islamism. Islamism plays the role fascism and Nazism played in the 20th century.[15] Needless to say, this is a marked contrast to Snyder and Albright, both of whom are looking in a totally different direction. But whatever the answer to this specific question, it is clear that liberal democracies have come into bad weather. They must reflect on the question of how to protect their basic institutions at a time when they are confronted with many dangers.

11. *Id*. at 103.
12. Albright, *supra* note 5, at 5.
13. Tibi, Bassam, *Islamism and Islam*, Yale University Press, New Haven and London 2012.
14. Tibi, Bassam, *Political Islam, World Politics and Europe: Democratic Peace and Euro-Islam versus Global Jihad*, Routledge, London and New York 2008.
15. Tibi, Bassam, "Introduction," in Paul Cliteur, *Theoterrorism v. Freedom of Speech*, Amsterdam University Press, Amsterdam 2019, p. 9.

As has been made clear in Chapters 3 and 4 of *Populist and Islamist Challenges for International Law*, what we think is lacking in the contemporary discussion is a thorough analysis of militant democracy as a concept.[16] For this reason, we want to end this book with a classical text on this issue that has not been published in English before: George van den Bergh's inaugural lecture at the University of Amsterdam in 1936. An oration, or an inaugural address, is a lecture a new professor delivers when accepting his office.

16. *See* Rijpkema, Bastiaan, *Militant Democracy*, Routledge, London and New York 2018; Ellian, A. and Rijpkema, B.R., eds., *Militant Democracy—Law, Political Science and Philosophy*, Springer Verlag, Berlin, Heidelberg, New York 2018; Ellian, Afshin, and Molier, Gelijn, eds., *The State of Exception and Militant Democracy in a Time of Terror*, Republic of Letters Publishing, Dordrecht 2012; Sajó, András, ed., *Militant Democracy*, Eleven, International Publishing, Utrecht 2004.

The Democratic State and the Non-Democratic Parties

Oration, given upon the acceptance of a professorship at the University of Amsterdam on 28 September 1936, by Dr. G. van den Bergh, LL.M. Translation by Sarah Strous.
N.V. De Arbeiderspers–Amsterdam, Hekelveld 15

Sirs, Mayor and Aldermen, Ladies and Gentlemen City Council Members!
Curators of this university!
Ladies and Gentlemen Professors!
Ladies and Gentlemen Lecturers and Doctors!
Ladies and Gentlemen Students!
And all of you gracing this ceremony with your presence!
Honored audience!

The question of what attitude a democratic state, such as ours, should adopt towards non-democratic parties has occupied many a mind these last few years. It has fascinated me for a long time as well.

I said: a democratic state *such as ours*. Our modern-day speech increasingly divides states into two large groups: the democratic states on one side, and the non-democratic, the dictatorship-states, on the other. Considered democratic are the governmental systems of countries such as the United States, England, France, Switzerland, and the Netherlands, which are based on the *rule of law*, where there is *freedom of conscience*, and where the principle of "governance by the consent of the governed" is recognized and lauded. This description is in perfect accord with a modern academic definition of the term "democracy," as offered, for instance, by my honored colleague and friend Bonger in his *Problems of Democracy*. It reads: democracy is a regime of collective self-governance

in which many of its members participate, either directly or indirectly; in which freedom of conscience and equality are guaranteed by law; and whose spirit is well-anchored in its members.

So when we use the terms "democracy" and "democratic" in this manner, we strike the right chord in both in the academic- and the common language sense. When it comes to the term "dictatorship," however, popular and academic terminology are not in accord. Thus far, constitutional science has understood *dictatorship* to mean, in a fairly general sense, the complete transfer of power, possibly in a democratic manner, from the community to a single person. However, these days the form of government labelled "dictatorship" is entirely different; scientifically it should be called "despotism."

In this oration, in order to remain intelligible, we shall conform to the language of our time when using the term "dictatorship." "Dictatorship-states," therefore, are non-democratic countries such as Germany, Italy, Russia. By non-democratic parties we mean, in this context, political parties that wish to change the democratic system of government to a non-democratic one, and that thus propagate the concept of dictatorship. Whether they openly extol the dictatorial outlook, adopt the euphemistic term "leadership principle" or use the misleading "true democracy" is, of course, immaterial.

So what attitude should our democratic state adopt towards non-democratic parties? In my estimation this question is often improperly applied, resulting from the fact that the parties in question do not shy away from employing illegal means. Thus, there is talk of parties that seek a change in the legal order "by using or advocating illegal means." Focus is then placed on researching which measures the democratic state is allowed to and should take against such "revolutionary" parties or their representatives.

Curiously, *this* question, on which much has been written both domestically and abroad, and which has also been posed by the government in proposals regarding a constitutional amendment, does not, to my mind, address the heart of the problem; nor is it, in essence, particularly interesting. Those political parties and persons who openly admit, or demonstrate by their attitude, that they use illegal means to combat the existing legal order, or are willing to do so should the desire arise, can expect nothing less than to be viewed as enemies by the state, and to be treated accordingly. Though there can be serious difference of opinion regarding the *method* of combating these "illegals"—I still regard the method proposed by the state commission, and adopted in slightly altered form by the government, as extremely questionable—I cannot discern in this a constitutional question of a principled and theoretic nature.

In my view, the larger, principled problem is posed by parties seeking to end democracy by exclusively legal means; parties that try to, by using propaganda and participation in elections, gain a majority in congress in order to, by amending law and constitution, turn our democratic state into a dictatorship.

It is amazing and disappointing to see how little reflection is and has been done on this, as it strikes me as an extremely interesting constitutional question. I, at least, have been unable, despite diligent searching in Dutch and foreign literature, recent writings included, to find anything of meaning on the subject. I am aware of the dangers of not being able to test my own opinions against those of others. Still, though the path is unforged, we shall yet attempt to travel it, although our journey can be but a mere exploration of the terrain.

The attitude of the parties I refer to is packed with, must be packed with, internal contradictions. They scorn democracy,

they disdain elections, they judge the electorate's decision to be of no value . . . and yet by participating in elections they appeal to this selfsame electorate and cheer when the result demonstrates their progress. They wish to abolish all, or nearly all, of their opponents' fundamental rights, but when they perceive the merest encroachment on their own rights they complain of the "terror" they are subjected to. They (as the famous saying goes) demand of the democratic state, on the basis of its founding principles, all the rights that their dictatorial state, on the basis of its founding principles, would refuse its opponents. The entire strength . . . and weakness of their position can be found in these words.

Despite the repellent character of this behavior, many democrats are of the opinion that these parties, as long as they use strictly legal means, should be recognized as legally equal to the other parties. Some supporters of democracy even regard this theorem as axiomatic.

The train of thought that leads to this opinion is clear. In a democratic state everyone is entitled to try to convince the people of his ideas and to, in so doing, accomplish his ideals. The pursuance of profound, in-depth reforms is allowed. This is also noted by the *Koolen* State Commissions and the Constitutional Commission. Not a single party in our country would, given the required majority in parliament, refrain from making invasive alterations to the constitution.

A party with the singular goal of, through the legal process of constitutional amendment, replacing our country's monarchical system of government with a republican one is a lawful party. Can we then reach a different conclusion when it comes to a party that wishes to use legal means to change our democratic state into a dictatorial one?

At first glance, this argument sounds convincing; until recently, I too was enticed by it. The line of reasoning appears to be in complete agreement with the essence of democracy. It

is democracy's pride and glory that all honest convictions are equal in its eyes. To democracy, all principles are equipollent. The peaceful battle of minds must decide between them.

In fact, the truest essence of democracy can, in my opinion, be found more in its tolerance, in its respect for the personality of every person, than in the majority principle. Incidentally, democracy hardly unconditionally lauds this latter principle, as evidenced by the fact that in many democracies, ours included, a simple majority is not sufficient to amend the constitution. A democracy that requires a supermajority for most or even all of its laws is hardly unthinkable, but a democracy without respect for the personality of every person commits treason to its own nature.

The quintessence of democracy then, does appear to hold that proponents of the dictatorial state should also be given a fair chance. This conclusion seems inescapable.

Nevertheless, I have, after much contemplation and protracted doubt, come to the conviction that it is untenable. Is there a difference after all, then, between all other legally obtainable political goals and this one goal: the dictatorial state? Is the lawful abolition of democracy fundamentally distinct from any other lawfully made decision?

Close examination quickly reveals one important difference. One of democracy's strongest aspects is its power of "self-correction." Every democrat admits that democracy often leads to bad decisions. However, it offers many safeguards—more than any other system—for these decisions, as soon as their erroneousness has been proven in practice, to be revised. In a democracy, the circles of those affected and—in the last instance—the decision makers, overlap. The people make the decisions and personally undergo the consequences. They know their responsibility; they correct their own mistakes. In principle every democratic decision is revocable, although its consequences, of course, cannot always be undone.

Only one exception exists. There is one decision that is ex hypothesi not open to democratic repeal. It is the decision to abolish democracy itself. The lawful decision to put an end to democracy is—technically—a democratic decision, but it is the only decision that is unaffected by the self-corrective power of democracy. Already this makes it fundamentally different from any other.

This notion is more plainly expressed in the words of the English voter who asked the leader of the English fascists, Sir Oswald Mosley: "How can I get rid of you, if you don't please me?"

This preliminary remark will not do, however. We shall have to systematically examine the position of parties that wish to end democracy by lawful means.

First, iure constituto.

We start by observing that every political party (whether or not it regards itself as such) is an organization according to the Dutch law of April 22nd 1855, which organizes and limits the right to freedom of assembly (S. 32).

In its articles 2 and 3, this law states the following:

> "Art. 2. The organization inconsistent with public order is forbidden.
>
> Art. 3. Deemed inconsistent with public order is every organization that has as its goal:
>
> 1st. disobedience to or violation of the law or a legal ordinance;
>
> 2nd. violation or decay of public morals;
>
> 3rd. disturbing others, whomever they may be, in the exercise of their rights."

Similar stipulations can be found in the laws of many other countries. It would be highly interesting to include these

in our investigation, but for now that would constitute too much of a digression. Let us limit ourselves to Dutch law.

Unfortunately, it must be noted that the wording of these provisions leaves much to be desired. Their parliamentary history, too, is not very illuminating; regarding some of the more obscure phrasings, the Explanatory Note offers merely that they adequately explain themselves. This, in all probability, is also why many of the law's commentators make no or very few remarks on these crucial texts. Even a dissertation with the promising title *Forbidden Organizations* skirts the most interesting questions entirely.

Of particular importance to us are the questions raised by Article 3. It forbids: 1st. the organization that has as its goal "disobedience to or violation of the law." The wording of this is unfortunate and not very illuminating. A number of court cases have born this out. Nevertheless, it may be assumed that this provision outlaws organizations:

1st. whose goal conflicts with the law;

2nd. that employ unlawful *means*;

3rd. that, perhaps under certain circumstances, *intend* to employ unlawful means.

Forbidden first of all then, is the organization whose goal conflicts with the law. Quid iuris, if the organization works to effect the lawful abolition of a legal prohibition—if, in other words, it hopes to achieve the iure constituendo legality of something that can iure constituto only occur in violation of the law—should its goal then also be viewed as conflicting with the law?

Oddly enough, the Dutch author whom I discovered had discussed this question answered it in the affirmative. In a lecture entitled *The Political Organization*, given on January 12, 1891 in Amsterdam and later published, none other than

the perspicacious jurist J.A. Levy, LL.M, argued that such an organization falls within the legal prohibition. He offers the example of an organization that, by lawful means, wants to achieve the legality of carrying out the ecclesiastical consecration of a marriage before the civil marriage has taken place. Again, he considers this goal to be legally prohibited, although he greatly regrets this (p. 31 and 32).

This opinion, it seems to me, is untenable.

Let me offer an example of my own. An organization is founded with the sole goal of repealing the Dutch Shops Act[17] by purely lawful means. Should it achieve this goal, a host of presently illegal actions would, from that moment on, become legal. Nevertheless, it is clear as day, in my opinion, that this organization is perfectly legitimate. Without objection the Crown could even recognize it as a legal entity.

What is more: every political party aspires to the lawful elimination of one prohibition or another. In Mr. Levy's opinion then, every political party is an illegal organization. As such, the learned speaker must have judged rather too hastily.

So an organization may forcefully advocate the changing of a law, thus rendering an illegal act decent and permissible. As a general rule, this thesis must certainly be accepted. Regarding French law, the same conclusion is drawn by *Hauriou, Principes de Droit Public*, page 552. In a moment we shall investigate if our current law permits of exceptions to this rule, and if *every* organization that seeks to change the law through legal means is permissible.

Now we come to the, to our investigation extremely important, provision of article 3, sub 2.

This provision forbids the organization "that has as its goal the violation or decay of public morals." Of course one

17. SS: The Dutch law that stipulates when shops must remain closed for business, most notably on Sundays.

does not often find an organization whose Articles of Incorporation read, in article 1: "The organization carries the name: *Dutch Alliance for the Promotion of Immorality*. It aims to achieve the violation or decay of public morals." The awkwardly edited statutory provision should certainly not be interpreted in such a narrow, literal sense. The law can have no other intention than to forbid an organization whose goal violates or decays public morals, or—expressed more accurately (as art. 1690 of the Civil Code also puts it)—is in conflict with public morals, regardless of how useful or laudable the founders and members of the organization might find this goal. The law places assessment of this in the hands of the judiciary. In this, as in other parts of our legislation, the judge will have to decide if there is a violation of public morals.

Apparently, the legislator did not realize the difficulty of the task with which he charged the judge. This is all the more surprising since it is clear that the legislator was keenly aware of the fact that he was also designing the rules that govern political organizations and political parties. In this sense the law's history leaves no room for ambiguity. Numerous parliamentarians even took particular note of political organizations.

Our current law thus forbids the political party whose goal conflicts with public morality. And, leaving out any and all "political" considerations, the judge must decide! On what can he base his assessment? What handhold can he use?

The phrase "public morals" appears numerous times in our legislation. Also, and even especially, in administrative law. What does the Dutch legislator understand by this term?

In *Dutch Administrative Law*, Chapter V (Public Morals), J.W. Noteboom, LL.M, writes on this question (p. 430):

> "What, exactly, the legislator understands by public morals cannot be uniformly defined for the broad field

> of the law. This largely depends on the nature of the interest the law seeks to further. . . . In such a case . . . where the judge applies statutory regulations in the interest of public morals, it is not, or not primarily, his own subjective opinion regarding morality, in general or in a specific case, that decides the matter, but the question of what, in our country . . . counts as moral and is regarded as proper public morality." The author goes on to argue that "more than any other factors, the Christian religion and ethics have influenced the emergence of public morals in this country, and still influence the general moral conviction of our people."

I think that everyone must, if somewhat resignedly, admit the truth of these reflections. Resignedly, because they are hardly able illuminate the judge's task of assessing whether the goal of an organization or political party conflicts with public morals.

So after having done a modest analysis of the term "in conflict with public morals" we again ask if *every* organization that seeks a change in the law by legal means is permitted. Once more, I offer a number of examples. First, a rather crass one.

An organization, in this case a political party, seeks to effect a change in the law, the Penal Code in particular, that would decriminalize the killing of people belonging to a particular race or group. Quid juris? I am of the strong opinion that, according to current law, this organization is forbidden, including all that this entails for its members. As I see it, the judge would not hesitate for a second: he would call upon the here discussed provision of article 3, sub 2o, of the law of '55; he would decide that this organization "has as its goal the violation or decay of public morals" and is, for that reason, in conflict with public order and thus forbidden.

Granted, even in these terrible times, the darker elements of Dutch society have not yet strayed so far from civility, reason and morality that the founding of such a political party should be considered probable. The example shows, however, that not *every* change of the law by legal means may be pursued; it renders the so called axiom that every political goal, if pursued by lawful means, is permitted, ad absurdum.

Now for my second example: the political party that seeks to change the law in order to reinstate slavery. Should this supposition strike you as just as unlikely as the last one, then let me add: reinstating slavery in Suriname. It seems to me beyond any doubt that in this case too, the judge will not hesitate to apply article 3, sub 2 (violation or decay of public morals) and regard the organization as unlawful.

And do you think it possible for the judge to come to a different conclusion with respect to the next, third, example: a political party that would desire to strive for armed conflict with a certain foreign power, and that, in furtherance of this objective, would attempt to change, by legal means, all legislation blocking the way to this goal?

I consider it beyond any doubt that the moral consciousness of the Dutch people judges the goals of the three political parties offered as examples here to be in conflict with public morality.

Why does this moral consciousness react thus? Why does it consider the aforementioned organizations impermissible, and why does it judge differently when it comes to an organization seeking the reinstatement of the death penalty, or the abolition of labor laws, or withdrawal from the League of Nations? Why does it not judge these organizations to be forbidden, even though the vast majority of our people would probably view the realization of each of the aforementioned goals as a significant moral decline?

I believe there is a simple answer to these questions. In both case-groups there exists a conflict between the current moral opinions and the organization's goal. In one case-group, however, a *fundamental* principle is threatened; in the other only a *secondary* one. As an analogy, I would like to point to the principle of "ordre public" in private international law. Foreign laws, even if they differ from the Dutch legal opinions, casu quo apply in this country, *unless this would violate fundamental Dutch moral principles*. Foreign as well as Dutch law must bow to these principles.

Therefore, fundamental moral and legal principles are, in this sense, unassailable. Do not misunderstand me: I do not argue that these principles are *legally* untouchable, though this has often been asserted, at least with regard to some of these principles. I am speaking here of the rights renowned in the history of constitutional law, the *fundamental rights*; a number of which shall also prove significant to the subject we are discussing. They constitute the "unassailable" foundation of many a natural law-based constitutional system. Several legal scholars believe even now that these rights are legally untouchable. So does, e.g. *Hauriou* in his *Précis de Droit Constitutionnel* (p. 296, 297). In his opinion, fundamental rights cannot even be affected by constitutional revision. *Duguit* (*Traité de Droit Constitutionnel*, part III, p. 564) shares this opinion. In the United States, too, some jurists defend the thesis that "amendments" to the Constitution, whether they came about by constitutionally valid means or not, are unconstitutional and should be reversed by the judiciary if they violate such "supra constitutional" principles.

I cannot share this opinion; like *Struycken*, I believe that the fundamental rights cannot be viewed as "eternal, immutable rights." In general, I do not see why every desired change could not *legally* be made in a constitution; I can discern no legal argument for why a constitution, founded on moral

principles, could not be revised to become more immoral. Alas!—ab esse ad posse valet deductio.

Now, it is an entirely different thing to say that, as long as certain moral principles are alive in a people, it is a violation of public morals to attempt to change these principles. This last is what I have argued, and I continue to further said argument. The moral consciousness of the Dutch people appears to view fundamental moral principles as unassailable, in the sense that even the attempt to legally change these principles produces a conflict with public morals.

We have already discovered that certain fundamental principles, some fundamental rights in particular, are of great importance to the question we are discussing. A principle that comes to mind is *freedom of religion*, which, perhaps more than any other, forms the basis of our independent national way of life; also, the closely related *freedom of conscience* and, finally, the principle of *"equality before the law"* are—in this context—unassailable principles par excellance.

So what is the attitude of non-democratic parties when it comes to these principles?

Here we must *initially* make a distinction. Consistently "dictatorial," as a matter of principle, are generally the dictatorship parties on the "right." Insofar as the goals of these parties are intelligible to rational thinking and ethically responsive creatures, it must be assumed that that they do not accept said principles. After all, the dictatorial authority, the fully authoritarian state, can and may infringe on any of them. Insofar as these parties still hold reverence for beliefs, it is only for those of a particular race, or of a particular group, or of a leader appointed by a fascist miracle. They reject said principles once and for all, and also do not accept them as an aim, in the sense that they wish to strive for the circumstance in which they could and would want to accept them.

Aside from these parties, who are consistently anti-democratic on principle, we find other dictatorship-parties, mainly those on the "left," who are willing to, or at least say they are willing to, accept said principles. Only in the future, though; not yet. They consider a society in which these principles hold sway a noble goal worth striving for, but they do not acknowledge these principles on the way to this goal. On the way there, leadership shall be assumed by a group or class that is apparently privileged in an ethical or intellectual sense, or perhaps again by a miraculously-appointed individual. As such, these parties initially reject the principles in order to bring them to better fruition later.

In theory, then, two groups of non-democratic parties can be distinguished. For our subject though, this difference can have no practical consequences. Just as any party-goal cannot be an end "in and of itself," but is always the means to reach an even higher objective, so every means a party uses also constitutes a goal. The party that, in a democratic society, regards the dictatorial state as a means to achieving the "truly" democratic state, presently has the dictatorial state as its goal. Not to accept this assertion is to find oneself powerless in the face of he who argues that a thousand-year dictatorial empire is a necessary precondition for the establishment of "true" democracy.

The democratic state is faced with non-democratic parties: parties that work to bring the dictatorial philosophy to ascendancy. These parties' ultimate intention in doing so can be, no, must be immaterial to the democratic state.

So, the dictatorial philosophy, as espoused by the non-democratic parties, constitutes the negation of respect for the individuality of every person, and also threatens every one of the aforementioned "unassailable" principles to a greater or lesser extent. Should the non-democratic parties succeed in gaining power, they will abolish the freedom of conscience

and seriously endanger the freedom of religion. They will label a part of the population as inferior. But their greatest sin, perhaps, is that the defense and dissemination of views that differ from those of the ruling party will no longer be allowed. This will force other parties, insofar as they do not helplessly submit, into illegality. From then on, a change in the legal system will *only* be possible by illegal means. With that, the state is essentially destroyed.

As such, we can only conclude that in accepting the dictatorial philosophy, non-democratic parties strike at the heart of the fundamental principles the Dutch people hold dear. That is why their goal is in conflict with public morals, in conflict with public order. That is why they are, under current law, *unlawful organizations*.

Iure constituto—this is the conclusion we have reached—the non-democratic party is an unlawful organization. Now, does democracy have an obligation, out of its *own* principles of tolerance, to reject this standard of law, to abolish it, and to recognize the non-democratic parties as equal to the other parties? This is the same question raised, in slightly different form, at the start of this oration. In light of the reflections discussed, how should we answer it?

Again: does the follower of the dictatorial philosophy have the right to demand that the democrat, on the basis of *his* principles, respect his convictions, convictions which in fact disavow that very same respect for another's beliefs? Or is this a paradoxical demand?

The anti-democrat's call is, indeed, paradoxical. See here the paradox in its various incarnations:

With regard to the freedom of conscience:

> "Democracy respects everyone's convictions, including, therefore, the convictions of those who do not value this respect";

or:

"Democracy is tolerant of everyone, including, therefore, of the intolerant."

With regard to the principle of personal freedom:

"Democracy grants freedom to everyone, including, therefore, to those who wish to strip others of their freedom."

With regard to equality before the law:

"In a democracy, everyone is equal before the law, including, therefore, those who wish to abolish this equality."

With regard to "Governance by the consent of the governed":

"In a democracy, the people are the final arbiters of government policy. Therefore, the people can decide that they will no longer decide on government policy."

With regard to the freedom of constitutional amendment:

"Democracy accords everyone the right to pursue amendment of the Constitution in furtherance of his ideals, including, therefore, those who wish to amend the Constitution in such a way as to render it insusceptible to amendment."

or:

"In a democracy, the people decide on the system of government. Therefore, they can decide to no longer decide on the system of government."

After what we have already argued, is it even necessary to contest these statements and demonstrate their paradoxical

character? We only wish to make the following remark, "pour discuter il faut être d'accord," and even about at least two things: primo people must agree to wish for an exchange of ideas, and secundo at least one axiom that is foundational to the discussion must be universally agreed upon.

This is no different in human society. A people can only live in peace in its society and state when it does not disagree on at least two things, namely, first, that it wishes to live in peace, and, secondly, that it recognizes at least one foundational principle against which all ideals can and must be tested.

So it is in the Dutch democratic state as well. In this state, where the principles of *freedom of conscience* and of *equality before the law* are sacrosanct, in the sense developed here, all social and political opinions must be tested against these principles. It is with these principles as a touchstone and a foundation that the peaceful battle of minds is fought here. Acceptance of this touchstone and of this foundation is a precondition for entry into this peaceful battle. Parties that attack these pillars of our state are its enemies. The state must combat them with all the power at its disposal. Whether it will de facto prohibit them is a matter of expediency, but *combat* them it must. This will be its attitude towards the parties I have postulated. This is also be how it will take action against the parties of dictatorship.

He who has recognized and lived through this has unraveled the paradox. He has learned to acknowledge:

> that respect for the individuality of every person can only exist on reciprocal terms,

or, as my honored mentor and colleague Scholten puts it *(Thoughts on Power and Law)*:

> "only if I acknowledge and respect others, do I, myself, have a right to acknowledgment and respect,"

> furthermore: that the principle of tolerance carries with it the fight against intolerance,
> that freedom may not grant its enemies a carte blanche,
> that equality before the law presupposes respect for this selfsame principle,
> that a right to decide does not imply the power to decide to abolish this right,
>
> and in summary:
>
> that democracy may utilize the dictatorial instruments of power for one single goal, namely for defense *against* dictatorship.

Partly in connection with this last statement, we wish to make one more significant remark. We believe to have proven that Dutch society admits of "unassailable" moral and legal principles. A danger lurks here, for which we cannot caution strongly enough. Beware of overextending the scope of said unassailable principles! Always keep in mind that personal convictions, however serious, deeply felt and sacred they may be, may not, at least not on these grounds alone, be considered "unassailable."

In a dissertation well worth reading *(Democratic Freedom and Socialist Right)*, by which Mr. B van den Tempel gained the degree of Doctor of Juridical Science at this university, the author thought to equate the philosophy of socialism with that of respect for individuality of every person. Consequently, he came to the conclusion that the philosophy of socialism *must* be accepted, that it is immoral to reject it, and that a dictatorship in furtherance of socialism can thus, under certain circumstances, be justified.

I have forcefully opposed this thesis by Mr. Van den Tempel; I still reject it utterly. One should not try to give the impression that socialism, or other beliefs about the most desirable organization of society, can be directly and inescapably

deduced from a single ethical premise, a single "unassailable" ethical principle. On the contrary, a long chain of numerous ethical and logical arguments, all of which permit of disagreement, connects the starting point to the conclusion of such a claim. I do, indeed, agree with Mr. Van den Tempel that the principle of respect for the individuality of every person can only be fully realized in a socialist society, but I do not wish to impose this, to me, very serious and deeply felt conviction on anyone else. It is this selfsame respect for the individuality of socialism's opponents generally, and a number of them in particular, that prevents me from doing so. The intended "unassailable" ethical principle, if properly applied, thus limits its own scope, though it is conceivable, and even likely, that societal and moral progress will gradually broaden that scope. He who does not favor socialism is free to do so; but he who rejects freedom of conscience is a victim of his own teaching!

We have extensively argued that, according to current Dutch law, under article 2 and article 3, sub 2o. of the Law of '55, the dictatorship parties are unlawful organizations.

As such, we also accept this principle iure constituendo. But we would like to alter the principle's mode of application in current law.

Because we regret that it ius constitutum places the decision on the fundamental questions discussed here in the hands of the regular criminal judge, which, due to factual nature of the decision, might deprive us of a ruling by the highest court. Moreover, as I see it, current law lacks sufficient safeguards for a strictly impartial decision on these highly subtle issues.

Iure constituendo, the political party accused of being an unlawful organization should, in my opinion, be tried in front of the privilegium fori of/that is the Supreme Court. Alongside the law of '55, whether it be altered or not, a separate law on *political organizations* must be enacted on the basis of article 9, paragraph 2, of the Constitution. A carefully drafted

provision concerning unlawful political organizations must be included in this law. Again, the principle of current law can, in my opinion, remain in force; the ban will have to affect the political organization that uses, or is willing to use, illegal means to pursue a legal goal; or whose goal conflicts with the law, with public order or with the fundamental moral principles held by the Dutch people. The procedure outlined in this law will have to be planned very exactly; the claim that an organization should be declared unlawful must come from the Attorney General. In order to attain the strongest possible safeguards for an impartial decision, as well as strengthen its authority, the law should, in my opinion, stipulate that a ban can only be declared unanimously.

If desired, the foundations of this law can be laid down in a new paragraph to article 9 of the Constitution, but this is hardly necessary.

The new law on Political Organizations must, in my opinion, also include provisions of a different nature; namely it should contain mandatory requirements for the organizational make-up of political parties that wish to nominate candidates for the House of Representatives and the States-Provincial.[18]

The political party has increasingly become, at least in a certain sense, the foundation of our system of government, but it is still not recognized by the law. This is an anomaly that, also due to the rise of the dictatorial parties, has become untenable.

Legal regulations must be enacted, on the basis of which party members are accorded a fair amount of influence on the election of the party leadership and on the composition of the candidate-list for the House of Representatives and

18. SS: the parliament and legislative assembly operative in each of the individual Dutch provinces. In the Netherlands, the members of the States-Provincial elect the national senators.

the States-Provincial. Another requirement that must also be made: complete transparency of the party's financial management, to be monitored by the state. These legal conditions will have to be met, on penalty of non-recognition as a political party.

Consequently, (mainly to prevent evasion of these requirements) the Elections Act will have to be supplemented with a provision granting the right to nominate candidates for the House of Representatives and the States-Provincial only to officially recognized political parties. Of course, it will have to be possible to found new political parties, which, if they meet the legal requirements, will attain official recognition.

However interesting the question of party regulations might be, we shall continue no further on the subject, since it only partly touches on our problem.

We have seen that our democratic state is not legally powerless, also under current law, in the face of non-democratic parties. For them, a ban looms.

This does not mean, however, that I personally aspire to such a ban. We are, in my opinion, still able to trust in the common sense and moral compass of the vast majority of our people. But, should these terrible times cause an increase in spiritual and moral degeneration, then we, good Dutch citizens, do not have to stand blithely by as our cultural heritage is tarnished, our system of individual rights collapses and tyranny strikes at the very soul of who we are as a people. Then we shall use not only the weapons of the mind, but also the legal instruments of the state to defend against the attackers of our most precious commodities.

But—one can finally ask—what if, despite all the state's defenses, the dictatorship parties manage to gain the support of a majority, or even a vast majority, of the people?

My first answer is that I consider this, in the case of The Netherlands, a highly unlikely scenario. It is possible to ask

all sorts of hypothetical questions, such as what ought to be done should one of the postulated parties gain supremacy. Perhaps, though, this remark will not suffice in the case of the dictatorship parties. Well then, in that case the population's democratic minority, despite still being the majority in Parliament due to party-bans, is likely to eventually lose control of the government. At that point the government departments in the Hague will be run by a party apparatus that retains the appearance of a normal government, and whose leadership will likely also have that pretention. Perhaps the trains will still arrive on time, and large national celebrations might even erupt. But a Dutch state, as it emerged from the 1579 freedom-struggle, and as it was reborn from the second fight for freedom in 1813, will no longer exist . . . until, sooner or later, the eternal hunger for liberty will cause it to arise from the ashes once again.

Curators of this university!

In deciding on how to fill the vacancy left by the demise of my predecessor, you have placed my highly esteemed colleague from Groningen at the top of the nomination list. I would like to sincerely say that I have considered it a great honor to have been named alongside this splendiferous person and scholar.

Ladies and Gentlemen Administrators of Amsterdam!

It has been only a few years since I, due to a constitutional disagreement, departed from your midst. I remember the time when it was my privilege to be a part of the governing body of Amsterdam with great fondness, both in the personal and in the professional sense. In your administration I have learned much about the practice of constitutional and administrative law. My faith in the virtue of our state and municipal institutions has, through what I have seen and experienced in your midst, been confirmed and strengthened.

Now your choice, by which I am so honored, has tasked me with a responsibility as fine as it is serious. I am infused

with gratitude, joy and humility in accepting it. I dearly hope never to belie the trust you have placed in me.

Esteemed Colleagues, particularly those of the Faculty of Law!

I cannot appreciate enough the privilege of being called upon to hold a professorship at my Alma Mater, the university at which I myself was educated. Some of you, not only in the Faculty of Law, have been my teachers. They know my shortcomings better than anyone, and I will certainly turn to them when I, as a novice, am in need of guidance and teaching.

When he stood in this spot six years ago to accept this position, my greatly mourned predecessor rightly called attention to the fact that "constitutional science has, over the past few years, widely branched out into related fields." Partly for this reason he advocated the necessity of cooperation, and called upon you, his colleagues, to give effect to his plea. I, standing where he then stood, I now gladly coopt his words.

It is my honor to say a few words about his legacy. In the past months I have read and attempted to absorb his entire oeuvre, the great volume that he, in his short life, has committed to paper. And again, I was struck by the breadth of the scientific field grasped and commanded by this man, so weak of body but strong of mind. There was not a single part of that field he had not combed through in detail, and in which he did not make new discoveries. The science of constitutional and administrative law has lost much by his death; a great scholar is no more.

In my mind, however, the chair to which I am now called is not merely Huart's, but belongs even more so to the, to me, unforgettable Struycken. Struycken passed away long ago; even in my dissertation I could do no more than laud his memory. But to this day professor Struycken lives on in my memory, and certainly also in that of my fellow students.

There he is behind the lectern, hardly an imposing figure in appearance. But then his euphonious voice rings out . . . and we, students, we are all soon caught under the spell of his words. His argument is masterful, both in content and in style; in one moment unrelentingly forceful, in the next gently ironic. This is how he stands before us in our memories, and this how he still speaks to us from his writings.

Never have I dreamed that I would one day be his successor. The thought of this now being the case tightens my chest and moves me more than I can say. I am Struycken's disciple, and I hope to not be wholly unworthy of the great master.

Ladies and Gentlemen Students!

We live in a dreadful era. Even more so than in the Great War, which you have been privileged not to, or at least not consciously, have lived through, everything that gives life value seems to be faltering. In a number of large states on our continent the law has lost its force; and power, violence and randomness now rule. That which seemed an incorruptible part of our European culture is being wounded in its very essence, or has already been destroyed. Both science and civilization are being threatened by delusions. It is as if Ovid sang especially for our time: "Omnia iam fient, fieri quae posse negabam."[19]

In the Great War, our country was one of the few small places on earth where peace, humaneness and reason found refuge. Today that is again the case. But much greater now is the *danger*. The vast majority of our people still resist the whims of the day. The law still reigns here, and a political system based on the longstanding principle "to each his own" still holds sway. But the swell of the storm that rages along our borders can already be seen in our midst.

19. SS: meaning, "Everything which I used to say could not happen will happen now."

We want to keep Holland! Ladies and Gentlemen Students, I will consider it my main responsibility to instill in you a reverence and love for our democratic system of government. I hope to show you how the best thoughts of many generations have been anchored in our Dutch Constitution, how the experience of centuries and the wisdom of many great thinkers have built our state, shaping it into a beautiful whole. Because of this political system, of which we may be proud, our people can continue to build their future in unity, in *Dutch* unity, so in a unity that is based on diversity and that emerges in freedom.

It is in this spirit, Ladies and Gentlemen Students, that I hope to work among you.