

University of Flensburg's 'Europa Prize'

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Thank you to the University President, Professor Reinhardt, and the Executive University Board, and Mr Scherf and the University Council for inviting me today.

Thank you to the University Council for awarding me the Europa-Price.

Thank you to Vice President Kraemer and Minister Albrecht and Ambassador O'Brien for your kind words.

Dr Prantl, thank you for your wonderful speech.

Good evening everybody,

Quite apart from my delight and gratitude in being here to receive this award, it is also a great pleasure to be in Flensburg itself and I have been intrigued by its history.

Irish people, as some of you may know, like to make connections with those they meet or with the places they visit and I found one of those connections when reading about the 100 th anniversary last year of the Schleswig referendum that determined the future nationality of this part of Europe.

The holding of such referendums had been agreed at Versailles, as the Treaty signed at the end of the First World War was being agreed. I understand that Flensburg became a much contested city with its inhabitants eventually voting to remain in Germany.

Exactly 100 years ago this year, a group of Irish men were also negotiating their country's independence with the British government in London having failed to get a hearing in Versailles to assert their small nation's right to sovereignty.

And while the Treaty that emerged on the 6 th of December 1921 ultimately led to the Irish republic, it was the promise of a border or boundary Commission that would determine the future nationality of the north of Ireland that had partly at least encouraged the Irish negotiators to sign that Treaty. They were confident that the demographics of three of the six northern Irish counties would pull them back into the south and away from British rule.



Without going into the historical detail, while a Border Commission was set up, no changes were ever made along the border created in 1920 and the tragic results of that decision have resonated down through the decades.

Even today we hear their echo in Brexit and the ongoing dispute between the EU and the UK about the flow of goods through Northern Ireland and how they should be checked. When reading about the referendums in this part of Europe, I reflected on how both Ireland and Schleswig have been dealing with minorities and minority issues for a long time, and how differently things might have been if the people of Northern Ireland had been able at that point to self-determine their own future.

But for the purposes of today I would like to reflect on the concept of the **rule of law**, how it relates to my work as European Ombudsman but also as it concerns the manner in which the EU is currently dealing with Poland and with what the EU considers as that country's challenge to the rule of law, the entity that binds this Union together.

I am not a lawyer and while some might see that as unusual for an Ombudsman, I consider it to be an asset enabling me to go beyond and see through apparent legal complexities that are at times used by the administration to hide or deflect or confuse.

I respect the rule of law – it is the foundation stone of my work and of the Union itself and without a foundation stone there is chaos and ultimately collapse.

What I do not respect is when the law is manipulated or abused, used as a means of avoiding the accountability and transparency without which the rule of law cannot flourish.

The respect and even reverence that is properly given to the rule of law and the courts that interpret and apply it is also capable of being exploited.

We need to guard against naïvete, assuming that the law is somehow detached from its political, social, cultural or even human hinterland. When we talk confidently about the 'rule of law' how certain are we that we are all talking about the same thing?

I recently watched an episode of an American TV series called *Succession*, which tells the story of a family who own a global media company. In that episode, the company is involved in a possibly criminal scandal and is looking for ways to avoid prosecution.

The head of the family is confident that he can do it. He says “ *The law is people and people is politics, and I know people* ”.

That is a rather crude statement, and fictional, but it does point to a certain truth, that the law is not a rigid, depersonalised, abstract thing but rather subject to the imprint of people, of politics and of the cultural mores that influence it at any given time.

The 19th century British jurist Albert Dicey is credited with the contemporary popularising of



the phrase 'the rule of law', characterizing it as being dependent on the independence and impartiality of the courts, and – in the case of Britain – on the supremacy of the common law.

I should also point out that the same man opposed votes for women, proportional representation, the right to refuse to accept unjust laws and, incidentally, the independence of the Irish state.

Dicey's views were, of course, of their time and hardly unusual in the England of his day.

They would also, arguably, have influenced his judgment on these matters. I suspect that he would have been perfectly comfortable with extolling the virtues of independent and impartial courts on the one hand and denying what we now regard as fundamental freedoms, or fundamental elements of the modern democratic state on the other.

In other words, the man credited with turning the phrase rule of law into a popular understanding of what makes democracies work was himself hostile to what we today accept are democratic norms. The contemporary, popular understanding of the phrase includes those democratic norms.

These contradictions are, I suspect – to a greater or lesser degree – present in many courts and court systems around the world. Independence and impartiality either wafer thin or real, do not always protect against prejudice and bias, including political or socio-cultural bias on the part of individual or groups of judges. But the dichotomy is also there in the manner in which they view their role and indeed the limits of their judicial reach.

This was summed up in a book written about the Irish Supreme Court some years ago by the Irish journalist Ruadhan MacCormaic.

He writes “ *At either end of the spectrum of judicial decision- making are the theorists and the pragmatists. The theorists see themselves almost as automatons, embodying the French philosopher Montesquieu's claim that judges ... are only the mouth that pronounces the words of the law, inanimate beings, who can moderate neither its force nor its rigor'. The pragmatists are more results oriented: they will the just outcome and then search for a legally permissible way to bring it about.* ”

The blatant politicisation of the United States Supreme Court brings these matters to another, worrying, level. It seems at times that the Judges are reading from not one, but two very different constitutions and where certain rulings currently reflect the undeniable policy preferences of the U.S. political right wing.

The polarisation of the US Supreme Court has been evident for decades but up until this point – when the reality of right wing bias has become so obvious that even some of the Judges themselves are reportedly embarrassed by it – the political system by and large has chosen to ignore the elephant in the room or been incapable of finding a way to remove it.



The now deceased US Supreme Court Judge, Antonin Scalia, was a self-described and proud 'originalist'. This meant that he interpreted the now 234 years old U.S. constitution as originally intended by its authors, or as he considered that they originally intended. The Constitution was not for him a living document, but rather, as he said, it is 'dead, dead, dead'.

Scalia, an ultra-conservative Catholic, a father of nine, and an enthusiastic hunter, weaponized his seat on the court to act against gun control, abortion, affirmative action for minority groups, and gay rights throughout his three decades on the bench, using clever argument and disarming humour to seduce the politically timid and the legally and intellectually intimidated.

Yet when he died, the tributes from all sides of the legal and political divide were worthy of those normally paid to a fallen Emperor. Many people were happy to feed the myth that if someone has lasted thirty years on the revered Supreme Court of the United States of America they could not possibly have been doing harm. That they could not in fact, have been, as Scalia's detractors claim, a homophobic and arguably racist bigot.

The then American President Barack Obama, praised Scalia for dedicating his life, as he put it, 'to the cornerstone of our democracy: the rule of law'. Even he had felt compelled to utter public words of praise, to endorse the fairy tale of the great Scalia, the upholder and defender of the rule of law when in fact the man had twisted it in his own image to deny rights to those he did not think worthy of having them.

I make these reflections in order to consider the fragility of that precious rule of law, how it can be weaponised and twisted out of shape by clever people.

Those who believe in the rule of law as the fundamental cornerstone of a modern democracy in a sense agree to play the game, but in the expectation that others will also agree to play the game.

They recognise the imperfections of any democratic system of checks and balances but there is an implicit agreement that those imperfections – or rather too much criticism of those imperfections - will not be allowed to derail and destroy the greater good.

Scalia and others exploited that noble purpose for their own ends and the rule of law – as practised in the United States – has suffered as a result.

Those who believe in the rule of law also trust that the desire for power of political leaders will not reach a tipping point where they decide that the rule of law – and the institutions that protect and defend the rule of law– are simply getting in their way.

If they do so decide then we can expect the well-worn playbook to emerge – the insidious undermining of those institutions – from the courts to the media, and the slow crumbling of the foundations of democratic life and usually in plain sight.

The European Union hangs together on the thread of the rule of law – the shared agreement –



among other matters - to subordinate relevant domestic law to EU law – laws that are made collectively by the member states alongside the European Parliament.

But threads by their nature are slender things, easily broken and difficult to repair when broken.

The European Union now faces what some have described as an existential crisis in relation to Poland's transformation of the judiciary in the past few years, a transformation viewed as diluting the independence and impartiality of courts and eroding the separation of powers in Poland.

EU institutional agonising over what to do is ongoing but matching the rhetoric to the action remains the challenge as the deliberative pendulum swings between the possible imposition of severe financial penalties on the one hand, and continuing dialogue on the other.

Last month, after a combative appearance by the Polish Prime Minister before the European Parliament in Strasbourg, Ursula Von der Leyen, the President of the European Commission said, a propos a recent Polish Constitutional Court ruling on the supremacy of EU Law:

“ This ruling calls into question the foundations of the European Union. It is a direct challenge to the unity of the European legal order. Only a common legal order provides equal rights, legal certainty, mutual trust between Member States and therefore common policies. This is the first time ever that a court of a Member State finds that the EU Treaties are incompatible with the national constitution ”.

President Von der Leyen then laid out a number of options that the Commission could take but it remains unclear what they may eventually be.

What is clear however is that in the eyes of the institutional EU, Poland is no longer 'playing the game' and the magic thread that binds the member states is therefore fraying.

And so we arrive at a familiar historical crossroads. How do we act now and how will those actions – or inactions - be judged by history, by future generations?

The EU cannot ignore the elephant in the room but is it possible to tame the elephant without provoking chaos as it and its allies stampede around the room doing even more damage?

These are, ultimately, political questions irrespective of any future ECJ rulings in relation to the Treaty compatibility of Union actions against Poland.

The political rhetoric from both sides seems stark but the ever present real politique takes on its familiar grey hue.

Decision makers look to the impact of financial penalties not just on the Polish government but on the people. They wonder if such actions will simply further embolden those in power rather than weaken them? How might they retaliate? What about the geopolitical implications? What



about the Polish election in two years-time, might that solve the problem?

But those who know their history will also know that future generations tend to ignore the contemporary political and other complexities surrounding any particular historical outrage. They will not care about the EU's institutional politics in 2021, or the hinterland of geopolitics, or an election taking place in 2023. They will look only to what happened next and judge accordingly.

The Czech writer Milan Kundera wrote “ *We go through the present blindfolded... Only later, when the blindfold is removed and we examine the past, do we realise what we've been through and understand what it means.* ”

Slightly less poetically, the former British Prime Minister Margaret Thatcher once said:

" The wisdom of hindsight, so useful to historians and indeed to authors of memoirs, is sadly denied to practicing politicians. "

But in the case of Poland and its court system are either of those observations necessarily true?

Mme Von der Leyen's statement about Poland and the ruling of its constitutional court was fairly unambiguous. This ruling she said 'calls into question the foundations of the European order'. No one, in other words, is wearing blindfolds. Everything is happening in plain sight.

And while hindsight is indeed denied to practising politicians, in a way is beside the point because what is not denied is political choice and political choices made in full knowledge of the relevant facts.

I would not like to be in the position of having to make such decisions. But bad things start to happen when well meaning rhetoric becomes unmoored from any subsequent action that might give real and concrete meaning to it.

When the European Commission says strongly and unambiguously that our Union based on the rule of law is being directly challenged, most citizens would anticipate an equally strong and unambiguous pushback to that threat.

Or at least a transparent and clear articulation of the options and the possible consequences of invoking those options. It is counter-productive, I would suggest, not to be open and frank with citizens.

So let us reflect on transparency and on how it impacts on the Polish situation. I have spoken of the European Commission and most of the public and media focus is on the Commission as they wait for it to act, yet all of which obscures the real decision makers and that is the EU Council – the body that represents the member states and who may ultimately decide what if anything does happen to Poland.

It is enormously difficult to get a clear picture of what exactly is happening within the EU Council



on this issue. Records are scarce and those that are published provide little substantive information. For some member states, there may be issues of domestic concern that may impact on how ultimately they want to see Poland treated. It is possible that some of these matters that are discussed behind closed doors at Council meetings will make it out into the open. However, for the most part, the EU citizens will be shut out.

I speak of the rule of law and of the challenges it faces because an Ombudsman is part of that rule of law matrix and the work that I do as European Ombudsman absorbs and deals with some of the complexities and contradictions that I have just outlined.

I am not a judge. My office is not a court and I do not make binding decisions but I attempt to make sure that EU institutions match their rhetoric about the rule of law and democratic values and accountability and transparency to their actions in their dealings with citizens.

In particular I try to make sure that they match their actions to the words of the EU treaties which are modern documents and very much alive, alive, alive.

My work is also influenced by my very strong personal belief of the EU being a force for good in the world and therefore If I were to sum up my work using non legal language, I would say that I try to keep the good guys good.

Because bad acts, even small unremarkable ones, that go against the values that the EU administration is obliged to uphold, drains that precious, fragile democratic resource and allows bad actors in to play their undemocratic games.

Another influence on my work is a tendency to trust, to take things at face value, to believe not just that things are true if they are stated to be so but also that the person stating them to be true believes that too.

I do not mean that I am either naïve or credulous but rather that I do not go through life as a cynic. I therefore take it as read that the values of the European Union do not exist as limp and lifeless words on a Treaty page but are, rather, daily given life by the member states and by the European administration.

My job I consequently see as straightforward. I hold the acts of the administration up against the light of those Treaty values and if they are incompatible, I let the administration know in the non-cynical expectation that the alleged act or acts will be rectified.

As this audience is neither naïve or credulous either, you will therefore not be surprised to learn that it doesn't always quite work out that way.

But I persist.

I persist when I note the conflict between the high rhetoric of the European Commission's climate strategy and the awarding of a contract to a company some of whose clients may not



share those strategic aims, as it did recently.

I persist when I point out that the failure to conduct a sustainability impact assessment as part of a trade deal with Latin America, amounts to maladministration.

I persist when I persuade the EU's foreign service administration that not paying some of its young trainees violates the Treaty's non-discrimination value.

I persist when I insist that allowing key personnel in sensitive regulatory areas of the Commission's work to take up lucrative posts in the matching areas of the private sector should not be at the expense of the public interest.

I persist when I ask the Council – the body comprising Ministers from all of our member states – that the positions taken on proposed laws by those Ministers should be made known to the people they represent in their respective representative democracies.

My office does take risks. We take risks at times in the expectation of a loss – the refusal by the administration to accept a particular difficult recommendation. But we do that in the spirit of the words of another former US Supreme Court judge Ruth Bader Ginsburg who noted that a dissent is a marker not to the present but to the future, awaiting a fresh intelligence, a fresh sensibility finally to see it through.

Sometimes it has been intimated to me that I do not live in the real world, as though the Treaty words I spoke of are a sort of multi lingual fairy tale, fed to credulous children and Ombudsmen but obviously not to be taken COMPLETELY seriously by the grownups.

I am further told on occasion that nothing will ever get done if the citizens of this democratic union are given too much information about what their democratically mandated representatives get up to in the Council.

But I persist nonetheless.

And two weeks ago, after persisting with the European Banking Authority, that agency made the brave decision to make publicly available the voting record of their national board representatives concerning regulatory breaches in relation to a major European bank.

The heavens have not fallen as a result, rather accountability has been strengthened alongside citizen trust in the European Banking Authority – the body created in the wake of the financial crisis precisely to restore citizen trust in banking regulation in the EU.

I asked the European Banking Authority to remember its own origin story, to remember why it existed, to reject the impulse to feed its citizens a fairy tale that would obscure what was happening at board level when it came to decision making.

No one of those cases is in itself monumental. But collectively, they are, I believe consequential



because they serve to reinforce the values of our democracy, they encourage the institutions not to serve their own internal interests but rather the interests of everyone in this union. And in supporting my Office, by agreeing to my recommendations, they are also upholding the rule of law by recognizing the European Ombudsman as one part of the scaffolding that holds our democracy in place.

Like most of us, looking at challenges to the rule of law in the EU, looking across at the US and the increasingly talked about possible return of Donald Trump to the US Presidency, I veer between despair and optimism about the future.

The writer Anne Applebaum in her 2019 book, *Twilight of Democracy*, imagines possible scenarios but ultimately accepts that anything is possible.

She writes: “ No political victory is ever permanent, no definition of the ‘nation’ is guaranteed to last, and no elite of any kind, whether so-called ‘populist’ or so-called ‘liberal’ or so called ‘aristocratic’ rules forever. The history of ancient Egypt looks, from a great distance in time, like a monotonous story of interchangeable pharaohs. But on closer examination, it includes periods of cultural lightness and eras of despotic gloom. Our history will someday look that way too. ”

She may be right but I choose optimism nonetheless, in the hope at least that those periods of cultural lightness will long outlive and outlast those of despotic gloom.

The rule of law is part of that lightness, of that light, and that’s why it is precious. The last few years have shown that we can never take it for granted. When my children were young I used to read to them a poem about how everyone can shine a light to cut through the darkness. The last line read ‘you in your small corner and I in mine’. The office of the European Ombudsman inhabits a small corner of the EU, but I hope that we do nonetheless succeed in shining a light and keeping some of the darkness that might threaten the rule of law at bay and I thank you, Europa University of Flensburg, on behalf of all of my colleagues for recognising that today.