Trier Lecture on the Future of Europe

Trierer Vorlesung zur Zukunft Europas

Koen Lenaerts

Democracy as an EU Value

Volume 1

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Published by: Verein für Recht und Digitalisierung e.V.
Institute for Digital Law Trier (IRDT)

Trier, 2025
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Published by Verein für Recht und Digitalisierung e.V.,
Institute for Digital Law Trier (IRDT), Behringstr. 21, 54296 Trier, Deutschland

The German National Library lists this publication in the German National Bibliography; detailed bibliographic information is available at http://dnb.d-nb.de
This book is also available as E-Book at https://www.epubli.com/shop

ISBN: beantragt
URN: beantragt
DOI: beantragt

The Trier Lecture on the Future of Europe is sponsored by Trier University and the IRDT.

UNIVERSITÄT TRIER

IRDT Institute for Digital Law Trier

Foreword

The Law Faculty of Trier University and the Digital Law Institute Trier (IRDT) are proud to publish the first lecture of our new "Trier Lectures on the Future of Europe". This lecture series will provide a forum to develop and discuss fundamental questions regarding the future of Europe.The European way of life, European integration and European values cannot be taken for granted. Alternative models are on the rise. Can Europe preserve and develop its ideas of democracy, rule of law, fundamental rights, international peace, and solidarity – even when facing fierce political competition or war? And does Europe find good solutions to the great challenges of our time, including climate change, technological progress, migration, war or antidemocratic backlash? The lecture series will give prominent speakers an opportunity to treat these questions and to discuss them with a broader audience. Trier, a city of Roman heritage, located in the heart of Europe and close to many European institutions, is the ideal place to host this encounter.

We are very honoured that Prof. Dr. Dr. h.c. mult. Koen Lenaerts, President of the Court of Justice of the European Union, opened this series on January 24, 2025 with his lecture on "Democracy as an EU value". And we look forward to the lectures and encounters that will follow.

Trier, May 2025

Prof. Dr. Mohamad El-Ghazi
Dean of the Law Faculty

Prof. Dr. Antje von Ungern-Sternberg
Managing Director of the Digital Law Institute Trier

Content

Democracy as an EU Value

Prof. Dr. Dr. h. c. mult Koen Lenaerts

I. Introduction([1])

Madam President, Madam Honorary Dean, Mr. Dean, Ladies and Gentlemen, especially dear students in the room, I am extremely pleased to be able to contribute to this lecture series on the "Future of Europe". Naturally, it is well understood that when one speaks in a lecture series of this kind as the President of the Court of Justice of the European Union, one does so from a very particular perspective.

Given that a court is there to react to the cases brought before it, it never takes the initiative to pick up somewhere in the landscape a legal problem and says, "hey, that needs to be solved". No, a judge must wait until a case is brought before him or her. It is important to stress that fact, since the judicial process works in compliance with a framework of procedural rules. The legitimacy of a court depends on its strict adherence to the limits of its jurisdiction as laid down in the Constitution and the laws implementing it. Regarding the European Union, this means, in essence, that the Court of Justice must exercise its jurisdiction as defined by the Treaties – which are the TEU and the TFEU – and the Charter of Fundamental Rights of the European Union. It is what the French beautifully call '*le Bloc Constitutionnel*', which is the primary law of the European Union. When the Dean invited me to take the floor in this lecture series, I reflected on how I could, as a lawyer and a judge — and within the constraints I have just outlined — contribute to the debate. This is how I came to Article 2 TEU, a Treaty provision that contains the values on which the European Union is founded.

[1] This text constitutes the transcript of the lecture orally delivered by President Lenaerts on 24 January 2025.

II. EU Values

Article 2 TEU sets out the values on which the European Union is founded. That Treaty provision starts out with respect for human dignity in different languages and legal systems: 'Menschenwürde, la dignité humaine, Menselijke waardigheid'. In all these legal systems, that value comes first, followed by respect for freedom, democracy, equality, the rule of law and the respect for human rights. And then, that Treaty provision contains a statement of considerable importance: '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'. When you add it all up, you come to twelve values. An academic colleague once told me, in fact, that those twelve values correspond to the twelve stars on the European flag. I believe it is a fortunate coincidence that these numbers correspond, yet it serves as a powerful metaphor suggesting the idea of completeness. As you know, in the European Union, the European flag has always had twelve stars, irrespective of the number of Member States in the EU.

These twelve values of Article 2 TEU are the foundation on which the Member States are ready to engage in a process of common governance. The aim of this lecture series is to think about the "Future of Europe", but do we actually know, in an easily stated catchphrase, what the European Union is and what it is not? In a very short sentence, the Court of Justice held that: "the European Union is not a State". It is a simple sentence, which is contained in Opinion 2/13, of the 18h of December 2014, on the conditions of accession of the European Union to the European Convention on Human Rights (the 'ECHR').[2]

However, that simple sentence does not provide a positive definition of what the EU is. The positive definition came in two Full Court judgments delivered in 2022. As a preliminary point, it is worth noting that Full Court judgments are very exceptional and are rendered by all 27

[2] Opinion of the Court (Full Court) of 18 December 2014, *Adhésion de l'Union à la CEDH*, Case Opinion 2/13, ECLI:EU:C:2014:2454, paragraph 156.

judges sitting as a judicial bench. It only happens when the Court rules on matters that are so important that they are existential for the survival and sustainability of the European Union. The two judgments concerned actions for annulment unsuccessfully brought by Poland, on the one hand,[3] and Hungary, on the other hand,[4] against the so-called 'Conditionality Regulation'.[5] By means of this Regulation, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, spelled out the conditions relating to the rule of law, which Member States, receiving financial subsidies from the European Union, must satisfy in order to receive these subsidies. Poland and Hungary argued that the EU did not enjoy competence to adopt the Conditionality Regulation. Indeed, the lack of competences is a ground of judicial review under Article 263(2) TFEU. This is because, according to the principle of conferral, the European Union can only legislate when there is a legal basis in the Treaties authorising the Union to do so ('*Prinzip der Einzelermächtigung von Zuständigkeiten*'). For the case at hand, the Commission, the European Parliament, and the Council had relied on Article 322 TFEU as the legal basis for the Regulation. According to that Treaty provision, the EU legislature may adopt legislative measures in order to protect the financial interests of the Union and the sound management of the Union budget. Therefore, the question was whether there was a link between compliance with the rule of law, on the one hand, and the protection of the financial interests of the Union and the sound management of the budget, on the other hand.

Hungary and Poland contended that the value of respect for the rule of law is merely aspirational, offering a general direction without a uniform interpretation, as each person understands them in their own way. According to these Member States, there is no common understanding

[3] Judgment of 16 February 2022, *Poland v Parliament and Council,* C-157/21, ECLI:EU:C:2022:98.

[4] Judgment of 16 February 2022, *Hungary v Parliament and Council,* C-156/21, ECLI:EU:C:2022:97.

[5] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

of those values in the EU, nor do they impose binding obligations upon them. In rejecting those contentions, the Court of Justice provided a positive definition of "the European Union". Accordingly, the European Union is not a State, but a common legal order, understood as a common governance structure for the participating Member States. According to the Court, this common legal order is based on the twelve values listed in Article 2 TEU.[6] Given that the Member States share these values in their domestic legal order, they establish a common governance structure, which incorporates these same values into its constitutional fabric, in order to attain common objectives. The Court said that the very identity of that common legal order is tantamount to complying with Article 2 TEU. The institutions of the Union can implement these values, develop them further, and protect them through the adoption of common norms, provided that those norms enjoy an appropriate legal basis, i.e. comply with the principle of conferral. As a reminder, in the case at hand, the legal basis was Article 322 TFEU.

At this stage, I would like to turn to the value of respect for the rule of law. In the Conditionality Regulation, the EU legislature spelled out ten principles that give concrete expression to that value. According to these principles, for example, equality of citizens before the law must be ensured; administrative authorities cannot act in an arbitrary manner ('*Willkür*'); an adverse decision needs to be reasoned, and those decisions are subject to judicial review. Any lawyer is familiar with those principles, which should seem self-evident and, at least in theory, do not need to be spelled out. The value of respect for the rule of law, rather general, is now given concrete expression in those principles. In turn, these principles are followed by concrete rules that set out the requirements necessary to respect these principles and, in the event of non-compliance, the sanction that would take effect. In summary, there are values, principles, and rules. It seems to me that I am paraphrasing Ronald Dworkin. Indeed, giving

[6] Judgment of 16 February 2022, *Poland v Parliament and Council,* C-157/21, ECLI:EU:C:2022:98, paragraphs 145, 264; Judgment of 16 February 2022, *Hungary v Parliament and Council,* C-156/21, ECLI:EU:C:2022:97, paragraphs 127, 232.

concrete expression to values is a Dworkinian approach. The Court, without mentioning Dworkin, says that EU values are concretized by the legislator, through principles and rules. The role of the Court is to enforce these principles and rules.

Democracy, the rule of law, and human rights protection form a triangle providing a framework that exists both at Member State and EU levels. That triangle forms the foundation of the trust that Member States have placed in each other as equals. That mutual trust, in turn, enables their participation in this shared governance structure and common legal order. The common governance structure is not an end in itself, but a means of achieving the policy objectives laid down in the Treaties, whilst upholding common European values.

These common objectives are well known. Among them is an area without internal borders checks between the Member States, the so-called 'Schengen Area'. It is a very beautiful objective, which must be accompanied by other policies. When internal border controls are no longer in place, it becomes essential to collaborate in securing the external border. This is why the establishment of an area without internal border checks must be accompanied by a common asylum and immigration policy, at least to an important extent. Similarly, the establishment and proper functioning of that area require judicial cooperation in criminal matters in order to prevent criminals from relying on free movement as a means of pursuing their activities with impunity. The exercise of free movement should not undermine the powers of the competent national court. As internal borders disappear, the arm of the law should acquire a transnational reach. The absence of internal borders must be accompanied by mechanisms that allow the Member States to retain their jurisdiction to prosecute criminals and enforce their punishment to maintain societal peace. This is precisely why the EU has adopted not only the European arrest warrant,[7] but also a whole range of legislative acts in the fields

[7] See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

of judicial and police cooperation in criminal matters. Common objectives that require interstate cooperation can only be better achieved when Member States work together within a common legal order which serves as a vehicle for common governance.

Air and water pollution does not stop at state borders. The same is true for clean air, clean water, sustainable energy supply. What about the safety of nuclear power plants prohibited in some Member States, but are allowed in others, often neighbouring? There is no nuclear energy produced in Germany, at least not for the moment. However, the French nuclear power plant, which is located in Cattenom, is approximatively 9 km from the Luxembourgish border, 35 km from the Belgian border, 12 km from the German border and, in particular, 48 km from Trier. If there is a problem with the Cattenom nuclear power plant, there is just as much a problem in Trier, as in Luxembourg or in Belgium. Even for Member States, which have chosen to rule out nuclear energy, the safety of nuclear power plants is an important common concern, which needs to be addressed in common. That is why there is a Euratom Treaty and implementing EU legislation on nuclear safety.

Similar examples are endless, not only in the context of the environment, but also in that of the internal market, transport, and social policy, to name just a few. A case is currently pending before the Court, and while I cannot comment on it at this stage, it nonetheless offers a compelling example. It concerns a new directive on some aspects of minimum wage in the Member States, which was adopted by the European Parliament and the Council under the ordinary legislative procedure.[8] However, the notion of "minimum wage" also includes "wage", which is excluded from the EU's social policy competences under Article 153(5) TFEU. Thus, the question before the Court is whether the content of the directive is '*ultra vires*'. The case was brought by Denmark , which was supported by Sweden. The EU is a common governance structure, which is based on the division of competence between the Union and the

[8] See Opinion of Advocate General Emiliou of 14 January 2025, *Denmark v Parliament and Council (Salaires minimaux adéquats)*, C-19/23, ECLI:EU:C:2025:11.

Member States. Within the EU, social policy can be harmonised, to a certain extent. EU legislation is the result of a subtle institutional balance between the three political institutions: the Commission, as initiative taker, the European Parliament, whose members are directly elected, and the Council, composed of representatives of national governments, which are democratically accountable at the national level.

Currently, and certainly in the future, there are and will be so many crucially important issues decided at the EU level. This is why I think it is important that we also reflect on the value of democracy. It is one of the twelve core values of the EU, one of the twelve stars. Not just at the level of the European Union itself, but also at the level of the Member States. In general, these two levels of democratic governance are so strongly intertwined with one another, that one cannot be fully understood without the other.

III. The Value of Democracy

Allow me to focus on the value of democracy. Just like the value of respect for the rule of law, which is concretised in principles and rules, for example by means of the Conditionality Regulation and the ensuing case law of the Court of Justice, a comparable development in the context of the value of democracy is also taken place. First of all, the value of democracy is in fact spelled out in the Treaties in several provisions. It should be noted that the Treaties themselves contain more provisions about democracy, than about the rule of law.

To begin with, democracy is mentioned in Article 2 TEU, as one of the EU values. In addition, there is a full title, Title II of the TEU, which speaks about the democratic principles on which the Union is founded. This Title II spells out two understandings of democracy, representative democracy and participatory democracy. Today, I will focus, in particular, on representative democracy, since it relates to the governance structures at both Member State and EU levels. The Treaty makes clear that

representative democracy operates along two parallel tracks. The first track is the European Parliament, whose members are directly elected by the EU citizens every five years. There is not yet a European constituency in the full sense, yet the system still embodies direct representative democratic legitimacy. The second track is the Council – and this is crucial for further analysis – that is legitimised through national governments. Each national government has always one minister in the Council. The particular minister depends on the different formations of the Council. The national governments are themselves democratically accountable, either to their national parliaments or to their citizens. This implies that the Council's democratic legitimacy is rooted in the democratic systems of the Member States.

Consequently, the European Union cannot be fully democratic, if democracy is not fully functioning in all Member States. Therefore, democratic backsliding in a Member State infects the democratic legitimacy of the Council, because the internal functioning of that EU institution is dependent on the democratic processes in the Member States. This raises the question of what role the Court of Justice can play in this regard. I am only asking the question in an academic capacity, but, of course, these cases might, one day, come to the Court. At the EU level, there are already many relevant cases on the value of democracy since the *Roquette Frères* judgment of 1980,[9] in which the Court sought to safeguard the prerogatives of the European Parliament in the decision-making process. Any textbook on EU constitutional law, including my own, explains this case law, which is crucially important, since it concerns the institutional balance within the legislative procedure, the control by the Parliament of executive processes, the implication of the Parliament in external relations decision-making, and so on.

The novel question is the following: what about democratic backsliding in the Member States threatening the democratic legitimacy of the

[9] Judgment of 29 October 1980, *SA Roquette Frères v Council of the European Communities,* C-138/79, ECLI:EU:C:1980:249.

Council of the European Union? The Council is one of the two legislative 'chambers' of the EU. Member States are not transferring their sovereignty to the EU. Sometimes, academic writings use the expression "transfer of sovereignty". However, in my view, that expression is incorrect. Member States are the bearers of sovereignty, '*nach wie vor*'. The only decision they have made, in accordance with their own constitutional requirements, is to exercise their own sovereignty collectively, in accordance with the ground rules established in the Treaties (this is known as the 'the pooling of sovereignty').

One of these rules is that, in principle, the adoption of EU legislative measures requires agreement on the exact same text by both the European Parliament (whose members are directly elected) and the Council (whose members enjoy, albeit indirectly, democratic legitimacy), each with the required majority. This is similar to the United States, where both the Senate and the House must agree on the exact same text, down to the very comma, to be precise. In the United States, the 'Conference Committee' is in charge of resolving differences between the two parliamentary chambers. In the EU, the 'Conciliation Committee' between the European Parliament and the Council plays a similar role.

What can the EU do if there is democratic backsliding, not just rule of law backsliding that threatens the independence of the judiciary at the Member State level? There is extensive case law on the rule of law. That is why I am not going to talk about it today. Some scholars have argued that if a Member State were to rig elections, it would be in breach of Article 10(2) TEU, because it would no longer have a democratic representative of that Member State in the Council, thereby endangering the functioning of the Council. Until now, this problem only exists in scholarly writings. To date, the Court has not been called upon to rule on a case raising that question.

IV. ECJ Case Law

I would like to examine a few examples taken from the case law in which the Court examines the value of democracy. That case law shows that EU law not only protects and promotes democracy at the EU level, but also at the national level. It was '*bon ton*', five to ten years ago, to speak about the democratic deficit of the European Union. Strangely enough, you do not hear so much about it anymore. People are concerned with threats to democracy within the Member States, and turn to the EU in search of a means of protecting democratic processes and institutions.

The case law of the Court has focused on a number of crucial elements for democracy. The first two of those elements are transparency and accountability. The third is the freedom of the press and media pluralism. Of course, the development of those elements is a work in progress, both at the legislative and judicial levels of the EU. What about social media platforms, which are organising disinformation? What about big tech oligarchs, who aim to influence the voting behaviour of EU citizens? To the best of my knowledge, this issue has also emerged as a new source of concern for the elections in this country, and similarly affects various other Member States. What is freedom of information? What are the limits on the exercise of that freedom in the age of social media?

Another aspect is the implication of civil society and especially the fact that democracy relates to all people. During the Christmas break I read a marvellous book, 'On Freedom' by Timothy Snyder, or, if you prefer to read it in German, '*Über Freiheit*'. It is very well translated in German. In this book, he explains that democracy needs the inclusion of all people. If the gap between the extremely rich and the very poor becomes too wide, causing a segment of society to be effectively excluded, what, then, remains for the sustainability of a representative democracy model? What if people feel totally neglected and are indeed not sufficiently included? Let us cover all of these questions in turn, by reference to the relevant case law.

1. *Democratic Decision-Making*

Let us first talk about the democratic nature of the decision-making process in the EU. The Court was faced several times with so-called transparency cases. At first sight, a transparency case appears to raise rather technical questions on whether an EU institution met specific conditions when denying access to certain documents. In these cases, the Court deals with administrative EU law ('*Verwaltungsrecht*'), which does not seem systemically relevant. However, transparency cases are relevant, as the following examples will demonstrate.

Access Info Europe is a non-governmental organisation advocating transparency in government. By "government", I do not only refer to the executive , but also to the governance structure, to both the legislature and the executive, to the whole political system. This is important at the EU level, but also at the national level. Access Info Europe asked access to documents of the Council, which described the views of the Member States regarding the amendments introduced during the meetings of the Council.

The ordinary legislative procedure, the so-called 'co-decision' procedure, is described in Article 294 TFEU. It begins with a proposal from the Commission. The proposal is first examined by a Council working party, after which it progresses to the Committee of Permanent Representatives (COREPER), and ultimately to the Council of Ministers for final deliberation. If a common standpoint is found, the Council must enter into contact with the European Parliament. The legislative text will in the end have to be approved by a qualified majority vote in the Council, which equals to 65 percent of the population, representing 55 percent of the States. In the Parliament, the relevant majority is calculated in accordance with a quorum. All of this is spelled out in the rules of procedure of the European Parliament. The Council said to Access Info Europe, that: 'I can give you the amendments, which have been proposed inside the working groups of the Council, but not the identity of the Member States that proposed or opposed these amendments.' However,

this is exactly what Access Europe wanted and needed. This case is essentially putting the theory of a transparent and accountable government into practise. The Council's democratic legitimacy stems from the national governments, which are themselves accountable to their respective national parliaments or directly to their citizens. In order for national democratic structures to run fluently, citizens need to know the views of their own government on issues that matter. Did they oppose, propose, amend, and what was their position? This information is relevant to hold them accountable. It is about transparency and accountability.

At first, the General Court ruled in favour of Access Info Europe. The Court of Justice confirmed this, by reference to Article 10 TEU and to the democratic principles of the EU, the two layers of democratic governance in the common government structure.[10] It was essential that there was democratic oversight in the Member States over what the government is doing at European level through the national parliaments, NGOs, and the citizens, so that the government cannot come home and say: 'Well, Brussels imposed this on us!'. They are co-actors in the process. This is how the EU, understood as a common government structure, is intended to function. It channels the exercise of Member State sovereignty through collective institutions, thereby ensuring that Member States retain responsibility for the exercise of that sovereignty. Ultimately, the Council was compelled to disclose the names of the Member States, acknowledging their role in the decision-making process.

In the next stage of the legislative process, when the Council and the Parliament disagree on their initial positions, the institutions must negotiate with each other. They convene in what is informally called "Trilogues". The latter involve the Council, the Parliament and the Commission, which try to reach a formal agreement already in the first reading. The "Trilogues" are not mentioned in the Treaties. Their basis is an inter-institutional agreement between the Council, the Commission and the Parliament, in which they agreed that informally, they will

[10] Judgment of 17 October 2013, *Council v Access Info Europe,* C-280/11 P, ECLI:EU:C:2013:671.

try to reach an agreement in the first reading, so that formally, they can adopt the legislative act as a first reading text. Actually, over 85 percent of legislative acts were adopted in the first reading between 2019-2024. This is a good thing for the output legitimacy of the EU and the efficiency of the process. However, the negotiations within Trilogues are secret. In a follow-up case to *Access Info Europe*, De Capitani requested from the European Parliament access to the documents of the Trilogue negotiations. In particular, he requested access to the documents identifying the authors of the proposed amendments and of the compromise text. Here again, the General Court said that the Parliament must give access in real time and any time thereafter to the documents of the Trilogue so that accountability can be allotted.[11] The Parliament did not appeal the case.

This shows that transparency is enormously important for accountability at the national level. The European Union process should be a subject of discussion in the national politics, in the Bundestag, in the Folketing, in the Federal Parliament in Belgium, and in the Tweede Kamer van de Staten Generaal in the Netherlands. It should be a subject of discussion at the broader public level.

What is Protocol (No 1) annexed to the Treaties on the European Union? It is not to be confused with Protocol (No 2) on subsidiarity and proportionality, although that latter protocol also relates to democracy, which requires matters to be dealt with as closely as possible to the citizen, yet in an effective and efficient way. Protocol (no 1) is hardly spoken about. In my view, it is much more important, because it states that the Commission must send all legislative proposals to the national parliaments, a few months prior to the start of the deliberation processes at the EU level. Why is that? It is because the national parliaments must examine these proposals and give instructions to their governments. There

[11] Judgment of 22 March 2018, *De Capitani v Parliament,* T-540/15, ECLI:EU:T:2018:167.

should also be a debate in civil society. That is why transparency and accountability cases are so important. They are fully in line with the way primary law was meant to be applied.

More often than not, members of the executive find it sometimes very comfortable to conduct their work in a way that is shielded off from the public eye. Yet in the long run, this is not sustainable, because the sustainability of the democratic legitimacy and the support for a common governance structure can only exist '*auf Dauer*' when citizens feel involved. This implies that they have the possibility – directly or through different actors of civil society – to intervene in the legislative processes. This can occur through social partners, consumer organisations, environmental organisations, business organisations, or any organisations that is bale to voice their concerns.

However, transparency can sometimes have legal limits when there is, for instance, personal data to be protected. Then you have to make a balancing of rights. Here again, the task to balance the rights is essentially a democratic task. Article 52(1) of the Charter of Fundamental Rights of the European Union states that any limitation on the exercise of a fundamental right enshrined in the Charter needs to be provided by law. Why by law? If the limitation is provided by law, it is also democratic. The fine-tuning of the balance between opposing fundamental rights, in my example transparency vs personal data protection, is a democratic choice incumbent upon the legislator. The judge will only step in when there is a manifest error of assessment. That, I think, is a very important first step for transparency.

I would like to include one small footnote about accountability. Accountability also includes the fight against corruption and fraud. You may be astonished that I am saying this here in a speech about the value of democracy. However, let us face it. How is democracy oftentimes undermined? It is undermined because governments are not respecting the applicable rules in the field of public procurement ('Vergaberecht'). They award the contract to their friends. It becomes even worse when

corruption concerns contracts financed largely by EU funds. When public contracts are handed out to the friends of the ruling party or to the friends of the friends of the ruling party, who then, with the windfall profits they have so realised, buy the (social) media outlets, the democratic structure within a country can be quickly undermined. I will not be more specific on this particular example. In summary, corruption facilitates the use of public funds in a way that *de facto* undermines democracy, media pluralism, and so on, which is very problematic.

Corruption undermines the agora idea of a basic framework within which, as Jürgen Habermas has written, deliberative democracy can thrive. That is why the Court of Justice of the European Union has a very strict and stringent case law on combating fraud and corruption with EU funds. We had a whole range of Romanian cases, Hungarian cases and others, which are pending. The idea boils down to the very notion of the rule of law, which also lies behind the Conditionality Regulation, and is fundamental in a democratic society. Member States cannot use Union money in a way incompatible with the objectives for which that money has been handed out. If something goes wrong, there should be sanctions and recovery of the funds illegally handed out, both of which should be subject to judicial review. This is a crucial element in order to have democracy work in an even-handed way, with equal opportunities before the law.

2. Free Press and Media Pluralism

The second point is free press and media pluralism. The Court of Justice has in its case law always protected and enhanced media freedom, notably the freedom of the press. The freedom of the press is not only the institutionalised press; but there is also the so-called citizen journalism, which is protected. Nowadays, people take photographs with their iPhones and are able to post everything on social media. This all falls within the freedom of expression and, where the person concerned seeks to inform the public, within the freedom of the press. The Court said it already in 2008,

in the *Satakunnan* case, that the processing of data for journalistic purposes applies not only to media undertakings but also to every person engaged in journalism as an activity.[12]

In several cases before the Court, the individual citizen was protected because of the exercise of journalistic activities, although it was a private person spreading ideas accompanied with pictures taken on the spot. One case, which I find very telling, is the *Buivids* case of 2019, which was a Latvian preliminary reference.[13] As part of the bench that judged this case, I am still very familiar with the facts of the case, which are as follows. A person was interrogated at a police station and felt unfairly treated by the officers. He recorded the entire incident on his iPhone. Then, he blurred the faces, made the police officers hazy, and posted the video on social media. The Latvian police authorities objected to the posting of the video. However, the person concerned posited that it could do so as a citizen journalist. The Court of Justice ruled in his favour. This case raised questions relating to personal data protection, which is subject to EU harmonisation. Data protection was therefore the nexus to substantive Union law. The person won. That is very important to remember.

More recently, in the *Real Madrid* case,[14] the Court, sitting in Grand Chamber, delivered an important judgment, which was rendered on the 4th of October 2024. This case involved a dispute between Real Madrid—one of the most renowned and successful football clubs in history—and a journalist from Le Monde, a leading French newspaper. The journalist had written an article stating that a few Real Madrid players were suspected of doping and that they had been assisted by the same doctor involved in a doping scandal in cycling.

Real Madrid argues that this article undermines its reputation and that of its players, having suffered non-material damage. Thus, Real Madrid, as a club, and also on behalf of its players, brings the case before a

[12] Judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia,* C-73/07, ECLI:EU:C:2008:727, paragraph 58.

[13] Judgment of 14 February 2019, *Buivids,* C-345/17, ECLI:EU:C:2019:122.

[14] Judgment of 4 October 2024, *Real Madrid Club de Fútbol,* C-633/22, ECLI:EU:C:2024:843.

Spanish court. The Club wins at first instance, on appeal, and before the 'Tribunal Supremo' in Madrid. The journalist and Le Monde lose. The Spanish courts find that the allegations contained in the article are not true and considered to be defamation. As a result, both the journalist and Le Monde are ordered to pay damages for the amounts, with interest and costs of proceedings, of 500,000 euros for Le Monde and of 50,000 euros for the journalist. Since the defendants have their assets ('*Vermögen*') in France, Real Madrid has an interest in executing the judgment in that Member State.

Real Madrid is therefore a case involving private international law ('*Internationales Privatrecht*'). That law determines the competent court, the applicable law, and under which conditions the recognition and execution of judgments in civil matters – for example, a tort case – in another Member State can take place. Real Madrid claimed that 'the damage is being suffered in Spain.' Under the Brussels I Regulation,[15] Spanish Courts enjoy jurisdiction to rule of the tort case. That is covered by Article 7 of the Brussels I Regulation.

Real Madrid brings an exequatur procedure in France, seeking to enforce the Spanish judgment. Subsequently, the French court takes the view that an award of damages of such an amount against a journalist would unduly limit the exercise of the freedom of expression and freedom of the press. Execution of that Spanish judgment would run against the '*ordre public*', the public order in France.' The case goes, in France as well, all the way up to the 'Cour de Cassation', which is the highest court. The latter French court asks the Court of Justice via a reference for a preliminary ruling, whether the '*ordre public*' exception, which is provided for in the Brussels I Regulation, can be fleshed out with the protection of the freedom of the press, taking into account that the journalist has the right to make an error. A journalist cannot really be free in expressing his or her views without the right to err in good faith and, of course, to be

[15] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

contradicted then, by other journalists and by other authorities. This is the marketplace of ideas – thesis, antithesis, and synthesis.

The Court of Justice indicated, and this is crucially important, that the amount of the damage may not have a chilling effect on the exercise of journalistic activities in the Member State of execution (France). And if there is – given the extreme amount of these awards – the risk of such a chilling effect, which is as a matter of fact to be assessed by the referring court, in this case the French courts, then there should be a reduction of the enforcement. It is a bit technical. Importantly, however, it does not mean that the Spanish judgment is being changed. The judgment and the amount of the damage remain valid in Spain. If the journalist and Le Monde have assets in Spain, they can still be seized. Only in France, the assets can be seized to a lesser amount than that determined by the Spanish courts, a proportionate amount. The Court refers to the principle of proportionality, which it applies in a way similar to that of German Courts ('*Verhältnismäßigkeitsprinzip, geeignet, erforderlich, angemessen, in drei Schritten*'). This way, they could indeed reduce the award of damages. Through this example, it becomes clear that the freedom of the press in the Member States is something that is protected by EU law. This protection is very important for democracy.

Let us now take a look at the first sign that the Court is also sensitive to abuses of the freedom of the press, which lead to indoctrination, hate speech, call for war, or the setting up of peoples against one another. I am talking about the judgment of the General Court in *Russia Today France (RT France) v Council*.[16] In this case, the Court said that media pluralism is to be protected. However, when a media outlet is used as a means of spreading propaganda that calls for hate, war or genocide, the Member States should limit this protection. As the saying well known goes: Tolerance should always prevail, but we should be intolerant for intolerance. This is a big idea and an important point here. In the case *RT France v Council*, RT France lost the case. The case revolved around the fact that

[16] Judgment of 27 July 2022, *RT France v Council,* T-125/22, ECLI:EU:T:2022:483.

RT France was put on the sanction list after the invasion by Russia of Ukraine. RT France came before the General Court and argued that this decision should be annulled because it limited its freedom of the press. The Court held that the freedom of the press is not an absolute right but may be limited in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union. This means that where there is an overwhelmingly important objective and the limitation is proportionately pursued, the freedom of the press may be limited. This is exactly what the Court found here.

The Court said that the content of the channel was propaganda echoing the Kremlin talking points, justifying the invasion and advocating war and hatred between the people, spelling out that the Ukrainian people is not a people, and that they should be '*vernichtet*', annihilated. Therefore, the Court said that this contradicts the very fundamental values of the EU – the Court even refers to that first value '*Menschenwürde*' –, which should be always protected and should always prevail.

3. Civil Society

My third point is the implication of civil society. The Court of Justice has ruled on cases relating to social dialogue and, in particular, to agreements concluded between the management and labour at the EU level. In that regard, the Treaties provide that social protection legislation can be negotiated by social partners at EU level. The question then arises: Is the political process obliged to make such agreements binding? The Court has said that they are not obliged. The institutions can do it, but they have a margin of discretion. As important as the objectives sought by social agreements may be, they have to be balanced against other interests. This needs to be done through the lens of representative democracy.

The same applies for the European citizens' initiative ('ECI'), the one million signatures for inducing legislative initiatives.[17] In the *Puppinck*

[17] See Article 11 paragraph 4 TEU and Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.

case decided in 2019,[18] the Court stated that the ECI gives impetus to the democratic life of the EU. If the Commission does not take up a legislative proposal despite the fact that the ECI meets all the relevant requirements, the Commission must explain the reasons behind its refusal and justify its decision. That explanation can be challenged before the Court. The action for annulment is admissible because the explanation closes the procedure, i.e. it is an '*acte faisant grief*'. That said, the Commission must have the prerogative of making the balancing exercise. Even the signatures of one million people must be balanced against the interests of 450 million people. It is always a concern to have a specific interest group taking the lead – thereafter, democracy as a whole must come into play. Of course, at the level of the common government structure, where the 27 Member States exercise their own sovereignty in common, many interests have to be balanced against each other. This balance cannot be so one-sided or so one-focused that it could, for example, simply follow an agreement between the social partners or an ECI.

The Court of Justice has also examined cases concerning the protection of civil society organisations inside the Member States. In *Commission v Hungary*,[19] which was decided by the Grand Chamber, Hungary was blacklisting all the NGOs receiving funds from other Member States, and more or less characterizing them as inimical funding partners that must be distrusted. This was stigmatizing Hungarian NGOs getting money from other Member States, for example, from Germany or from France, as though the money was coming from the enemy. In the European Union, in a common government structure, the democratic debate must be able to be conducted at both Member State and EU levels. It must also be transnational, since German, Danish, Belgian nationals, to name a few, may share the same interests in protecting democracy in Hungary. Looking at the map of the EU, we are all in the same boat, are we not? The Court in fact emphasised, with a view to the democratic

[18] Judgment of 19 December 2019, *Puppinck and Others v Commission,* C-418/18 P, ECLI:EU:C:2019:1113.

[19] Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations),* C-78/18, ECLI:EU:C:2020:476.

principles on which the Union is founded, that there must be a lively democratic debate inside the Member States, conducted through NGOs connected across state lines and funding partners all over the European Union. This is a very important judgment of 2020. Another important judgment of 2020 was on the Central European University.[20] Universities play a crucial role in consolidating democracy at the national level, and it should be able to remain open to inputs from both within and outside the EU. This should be part of academic freedom, and it should not be steered by the government as such. All these Hungarian cases had sufficient connecting factors to substantive EU law, which give the Court of Justice jurisdiction to rule on them.

4. Inclusion of Minorities

Finally, the last element that I would like to explore today is the inclusive character of democracy. The Court of Justice has an extensive case law on protection of minorities, and thereby all minorities are included. This can be seen in the Court's case law on the principle of non-discrimination on grounds of race, ethnic origin, gender, sexual orientation, and handicap. All these cases are based on directives 2000/4321 and 2000/7822, but also sometimes directly on Article 21 of the Charter of Fundamental Rights of the European Union. The non-discrimination principle is applicable in all the fields of EU law. The underlying aim is inclusion. Democracy is not the rule of 50 plus one.

The minority is just as much part of the democratic ensemble, which is governed by, of course, a vote. Surely, the minority will have to accept the vote after a fair interaction between all the concerned stakeholders and representatives of the people. However, members of a minority

[20] Judgment of 6 October 2020, *Commission v Hungary (Enseignement supérieur),* C-66/18, ECLI:EU:C:2020:792.

[21] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[22] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

should not be excluded from the employment market, the services market, and the goods market, because they belong to such a minority. Peoples who are marginalized are a threat for democracy. People who get alienated from the system, in which we live, turn against the system. They are easily manipulable by social media, in particular by the giants of the social media, who determine the content that people read in their social media accounts through data mining. They find themselves in a sort of closed tunnel vision that can never allow for a deliberative democratic system, as Jürgen Habermas has defined it. This is why, when the Court of Justice rules on these discrimination cases, it is also ruling on democracy, both inside the Member States and at the level of the European Union as a whole.

As stated before, the European Union is not a State, it is a common governance structure, created to reach common objectives. To that end, the Member States, and no one else, as '*Herren der Verträge*' have conferred competences on the Union. In so doing, they exercise parts of their own sovereignty in common. That pooling of sovereignty remains a choice because a Member State can withdraw from the Union according to Article 50 TEU. The exercise is in common, but the exercise happens on the basis of the Treaties, which contain fundamental rules that are constitutional in a substantive sense of the word "constitutional".

V. Conclusion

The key value on which the EU – understood as a common governance structure – rests is democracy. That value initiates at the national level and progressively permeates the EU level. The EU is founded on democratic principles, as enshrined in the relevant provisions of the TEU and TFEU, and reflected in the institutional roles played by the Council and the Parliament. The value of democracy is operationalized through key principles, such as transparency and accountability, freedom of the press, and the participation of civil society. Those principles seek to establish a

marketplace of ideas that unfolds through democratic deliberation, involving thesis, antithesis, and synthesis. Moreover, it includes normative objectives, such as the protection of minorities, social inclusion, equality and a fair distribution of wealth. Social justice is a necessary condition in order for democracy to work properly. When the wealth of the top one percent continues to grow, while the bottom 50 percent proportionately become poorer, democracy, as we know it, faces a huge problem. In the political systems of China, Russia, and even the US, the power is increasingly concentrated in the top one percent of society. Consequently, the lower 50 percent of the population feels largely excluded. Such developments pose a deeply destabilizing prospect for the future of democracy. The future of Europe is inextricably linked to the future of democracy as a system of governance, first and foremost, in the Member States. Democracy entails a renewed commitment to social justice, social inclusion, transparency, and accountability, as well as ensuring meaningful access to decision-making mechanisms through various input channels. This ultimately ensures that people will feel involved and concerned.

Democracy is, in fact, a value that will define the future of Europe as a self-standing model - distinct from the US, Russian, or Chinese models of governance, to name only the most prominent comparators. The identity of the European Union, as the Court of Justice defined it in the Conditionality Judgments, is founded on the twelve values of Article 2 TEU, symbolized by the twelve stars of the European flag, with democracy at their core, shining brightest among them.

Thank you very much.

List of Abbreviations

COREPER	*Committee of Permanent Representatives*
ECHR	*European Convention on Human Rights*
ECI	*European Citizen's Initiative*
ECJ	*Court of Justice of the European Union*
EU	*European Union*
TEU	*Treaty on European Union*
TFEU	*Treaty on the Functioning of the European Union*

Trier Lecture on the Future of Europe

Trierer Vorlesung zur Zukunft Europas

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