


Spring 4-1-2017

A Continent Divided: Nationalism and the European Union

Vlad F. Perju

Boston College Law School, perju@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [European Law Commons](#), [International Law Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Vlad F. Perju. "A Continent Divided: Nationalism and the European Union." *Connecticut Journal of International Law* 32, no.2 (2017): 358-375.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

PANEL 3: THE RULE OF LAW CRISIS IN POLAND AND HUNGARY

Carmen Gonzalez: Hello everyone. We're going to get started on our third panel for the day discussing the rule of law crisis in Poland and Hungary and with that I'm going to turn it over to Professor Mark Janis.

Mark Janis: Well thank you to you all for sticking around for the best part of today's conference. I speak to you as an American and a little bit of an Englishman and of course I speak with distance from all of this because as you know England and America have never really been part of the European project. I graduated law school in England in 1972 and the right answer to the exam question, could or should Great Britain become part of the European Union or the Common Market, was then "no". One of the leaders of the European Union just a few months ago said and was widely reported in England speaking about Brexit saying, "It's going to be an awfully messy divorce, but frankly it was never a happy marriage". Britain never as you know, most Brits, never really accepted the European project. They accepted certain parts of the promise of the European Union but it's always been a different story and the same is of course true even more so for the United States. Many of our ancestors came here not to be European and isolationism here has always been strong. It really took the Japanese attack on Pearl Harbor to turn us away from isolationism in the 1930s when somebody coined a phrase now recently reemerged called "America First". Still, an English poet John Donne once wrote "Ask not for whom the bell tolls. It tolls for thee". And so what happens in Europe affects Americans and it also effects the British. In fact, the British are even closer. As the old British saying often goes: clouds over the channel, Europe is isolated.

When I look at this part of today's program, I think of the last hundred years. Not just back to 1945 but back to 1914 and the First World War and the great transformation in European society. Back in 1914, say you had the British Empire, Austria-Hungarian Empire, German Empire, French Empire, Russian Empire, and it was really a very different sort of place socially, economically, culturally. The First World War was of course the great dissolver of all of that. E.H. Carr, the man who among others invented a discipline now called international politics or international relations that's taught in many universities, wrote in the 1930s about what he called the 20-year crisis, you know from 1919 to 1939. And at this point in time with E.H. Carr we can really talk about an 80-year crisis. As Europe has struggled to find a new model if you will, the old model that it developed over time cracked in the early part of the 20th century and Europe has been struggling with a new model for 100 years.

Throughout much of the 20th century, the debate was among three groups. There were the fascists, there were the communists, and there were the liberals. If we were holding this conference here or anywhere in Europe in the 1930s we might have been taught that it was going to be the liberals who would lose, that the future was either with the fascists or with the communists. It didn't turn out that way. The weak sister ended up prevailing and at the end of the Second World War it was more or less the liberal democracies that in terms of economies and power, economic and military held sway. In the liberal democracies, the format was largely based on three sets of

rights. The first one was property rights. That is people who had property, should be able to protect their property against government. The second right was the right of majorities. Short translation of which is called democracy. That the majority should be able to rule.

And those two rights, or you could call them legs of a table of the rights of the liberal democracies have stood up pretty well. There's a lot of protection for private property. There's a lot of respect for majoritarianism. It's the third leg in the table that's given many countries huge problems and I don't subtract England and America from having those huge problems. That third leg of the stool is the protection of minorities against both property rights, the wealthy people, and majority rights, democracy. And there's a new term which I think was coined not so many years ago, 10-15 years ago called the illiberal democracy which is based only on two legs of the stool: property rights and democracy. Illiberal democracies explicitly repudiate the third stool which is respect for minorities. Whether they be political minorities or economic majorities or alien minorities or ethnic minorities or religious minorities. The idea is that democracy should rule. Now as many of the panelists before us have mentioned two of the shining examples of illiberal democracies are Hungary and Poland and we have three wonderful panelists who are going to tell us first about Poland and Hungary and then about a success story in Romania. So, we have two Daniels and a Vlad. Let me introduce the first Daniel, Daniel Kelemen, thank you.

Daniel Kelemen: All right, thanks very much. Thanks to Carmen and the organizers for having me, and to all of you for coming. And I think, as was said before, the organizers have done a great job organizing a conference that addresses different aspects of the "polycrisis" - the multiple intersecting crises that the EU is facing. We've talked about two of them already, the Brexit crisis and the Eurozone crisis. We could have also addressed perhaps the refugee crisis, and now we're going to talk about the rule of law or democracy crisis. Maybe it is not useful to rank them - and I don't want to belittle the significance of the others - but I would say that the crisis we're going to talk about here is the most profound and existential one for the EU. I'd put it this way—with the Eurozone crisis, the EU can lose money. The Brexit crisis is kind of like losing an arm – an important part of its body politic. In the refugee crisis, quite horrifically, vulnerable people can lose their lives. But this crisis of the rule of law and democracy is one in which, to echo the Ambassador, Europe can lose its eternal soul. Let me explain what I mean by that.

So, what I'm going to talk about really is the backsliding from democracy toward authoritarianism in a couple of member states in the EU. Specifically, I'm going to talk about why the EU hasn't done more about it to stop it and the threat it opposes to the fundamental values of the union. And let me just start by sort of laying out a couple of my premises before I get to my analysis so you know where I'm coming from. You might ask what kind of regime exists in Hungary? What kind of regime is being put into place in Poland there? It has only been in motion for a year so it is less far along, but I want to say I won't give into this idea of calling them illiberal democracies-- that's the term from Fareed Zakaria from a decade ago. I mean I think that term is an oxymoron and a sort of euphemism for reasons I can

explain later, but I view these as electoral authoritarian regimes. So, they have elections, yes, but not totally free and fair ones necessarily. They are often biased in favor of the dominant party. And while they have elections, they are authoritarian in many other respects, as I'll describe. Crucially attacks on the rule of law and on the independence of the judiciary are an integral part of the consolidation of this kind of electoral authoritarianism.

These governments go after other institutions too, such as the press and NGOs, but going after the judiciary is always step one or two in the formation of these types of regimes. So, our conference or our panel is about a rule of law crisis, but for me it's simultaneously about a democracy crisis.

So, I want to talk about the democratic deficit in the EU. My use of the term might sound odd because you have heard this term used differently by Peter Lindseth and other people who study the EU; when they talk about the democratic deficit, they mean a deficit of democracy at the EU level? Normally the term refers to the idea that EU institutions are too detached from the people, that they're not electorally accountable enough, et cetera. And this extensive literature criticizes the lack of democratic legitimacy of EU institutions. Well what I would push us to think about, for the purposes of my talk, is to sort of flip that notion on its head and say that the really important democracy deficit threatening Europe now is not at the EU level but at the national level in national capitals like Budapest and Warsaw.

Any democratic deficiencies the EU may have pale in comparison to what is happening in these member states. After I describe what has been happening in these countries, I come to my central question: why has the EU failed to do more about it? After all, democracy and the rule of law were conditions of membership for countries in the EU, these countries that joined. The EU treaties contain a list of the fundamental values of the EU in Article 2 which include democracy and the rule of law and there is even a procedure that was put in in the treaty Article 7 for basically imposing sanctions on states who violate those fundamental values of the union, yet nothing much has been done, especially in the case of Hungary.

What I'm going to ask us to think about, to understand this is to think of the EU as a kind of quasi federal system that is democratic, broadly speaking, at the federal level, but that has pockets of authoritarianism at the state or member state level. When you think about it that way, sadly it shouldn't be that surprising that you have some autocratic member states in this federal union, because in fact there's a big literature in comparative politics that tells us this is very common in big federations. See a couple quotes from prominent scholars in this field on my slides. I'll just read one of them from Ed Gibson from Northwestern, "Subnational authoritarianism is a fact of life in most democracies in the developing or post-communist world." What they mean by that is there are again states within otherwise broadly democratic federations where authoritarianism can persist for a long time. This should be no surprise to us here in America because of course we had it ourselves for decades. You've all heard of the solid south, right? And you know we had a form of authoritarianism in some southern states when the federation as a whole is democratic. Such subnational authoritarianism is common in some Latin American countries also. In Argentina, after the military rule was ousted they still had authoritarian leaders in some states like in San Luis for decades. In Mexico too, as

the national government democratized, some states remained authoritarian. This literature offers lessons about how local authoritarians survive in unions that are supposedly committed to democracy. The answer is, in short, party politics, and we are going to translate that story over to the EU, and then we can see the much the same is happening in Europe. In short, this literature shows that if the local authoritarian delivers votes or seats to a national party or coalition of parties at the national level, that that coalition needs to wield power nationally, they will protect and tolerate their local authoritarian - just like the Democratic party did for its southern democrats, in the US. And that's basically what's happening in the EU as we'll get to later in this talk.

This literature can also tell us something about when these authoritarian enclaves fall in these federal systems. Again, it is usually due to party politics. If the national party of which the authoritarian state is a member eventually finds them too embarrassing and worries that being associated with the authoritarian leader or party in that state would damage the national party's reputation, then they may dump them or pressure them to change their ways. Likewise, if the opposition parties nationally can intervene forcefully to support the local beleaguered opposition and help them mobilize more effectively, that could dislodge the local authoritarian.

One final theoretical point - and then I'll talk about Hungary and Poland: I think the problem we have in the EU today, essentially, is that the EU is in in what I view as an "authoritarian equilibrium." To address complaints about the democratic deficit at the EU level, the EU has given more importance to the European Parliament in policy-making. Also, they've given parliament a role in selecting the president of the European Commission, which is the EU's executive. All of this has upped the stakes of having a majority in the European parliament, and that in turn has upped the stakes of having European party groups stick together so they can run the EU. But that means that they'll stick together, even if that means protecting a local authoritarian who is one of their team. And that is I think the problem we face now and that is what has given Victor Orban so much cover as his fellow members of the European People's Party have protected his semi-authoritarian regime from EU pressure.

Alright, so, what is happening in Hungary? I mean how did we get to the point where in just the last two weeks - and by the way these are is just the latest abominations. We could go back over the past six years to see more - but just in recent weeks we have Hungarian parliament enact a law that asylum seekers are going to be subject to mandatory detention in containers at the border; we've seen them pass a law yesterday that would force the closure of the highest ranked and only remaining really independent university in the country, the central European University funded by the American-- Hungarian American financier George Soros; and also we have seen Orbán has just launched a "Let's stop Brussels" referendum which is actually like a "push-poll" where he's going to send all of these, mailings to every household saying "What's the area where Brussels is taking too much power away from us?" et cetera. The chutzpah is incredible. He put these placards of "Let's stop Brussels" for instance all over the subway in Budapest which was funded by EU money.

But how did we get there and how did we get to a leader who started out as a liberal freedom fighter against communism now being the best friend in the EU of the former KGB agent, Putin? Well, I can't tell the whole story, and I've only got a few minutes so I'm going to be very fast but essentially what happened in the Hungarian case is a kind of constitutional revolution. In the wake of a scandal in the governing party of the left, Fidesz, which is Orbán's party, won a big majority in 2010. Fair and square they won a majority of votes, which translated into 2/3 of the seats in the parliament. The Hungarian constitution allowed that if you had 2/3 of the seats, you could rewrite the constitution. You had total power essentially, no checks and balances once you had 2/3 of the seats in parliament, and they did. So they rewrote the constitution doing moves to consolidate power and eliminate checks and balances, replace holders of any independent offices within government and then right away one of their key moves was attacking the judiciary. They packed the constitutional court enlarging its size so they could add Fidesz appointees and therefore get a majority in the constitutional court. They did other things like force early retirement of judges across the whole system to get rid of senior judges so then they could put in more Fidesz judges. They created a new office that would manage the judiciary, headed by the way by the wife of the guy who rewrote the constitution on his iPad, both of whom went to university with Orbán. They were all law students together. Then Orbán's government attacked the independent media, closed down opposition newspapers, et cetera, attacked civil society organizations and NGOs. And by the way, they've just presented a new law - I think today - modeled on Putin's foreign agents law to require registration of any NGO's with foreign funding. That is again going after Soros and others. But back to the past - in the run up to the 2014 election, they changed the electoral law to favor their Fidesz party and to try to assure that they would win. Once they won the reelection in 2014 using this new electoral system, then Orbán was out in the open about his ambitions. He said I'm going to build an illiberal democracy modeled on Turkey, China, Russia. Ok now I'm going to fast forward because I'm running out of time but some people look at this, and they say the problem is that the EU had lacked adequate tools to stop erosion of democracy and the Commission didn't enforce things strictly enough. Maybe they just need new tools of enforcement but I would say that partly traditional tools of enforcing EU law case by case, issue by issue don't work when really there's a macro thing going on which is a systemic attack on the rule of law and democracy. Case by case, you can't capture that. Likewise, relying on private enforcement by individuals to defend their EU rights doesn't work when some of the issues in question aren't justiciable. Like you can't bring a case for the fact the judiciary is not independent, right? And also, once he's captured the whole judiciary that whole mechanism of private enforcement won't work and then this nuclear option of Article 7 in the treaty where all the other states by unanimity could agree to punish the country, that doesn't work because of that high bar of unanimity, and there were those willing to protect Orbán. But that brings me back to my partisan story.

Why has Orbán gotten away with this? Orbán's party is a member of the European people's party which is the party of the center right, which CDU in Germany is a member of, and also the Republicans in France. So, it is the center right party even though he's drifted far to the far right and become authoritarian, they

protect him non-stop and they have up with his actions. Only last week did the party's unity start to break it appears because of the attack on Central European University, but for 6 years they've defended him non-stop against criticism because he delivers the votes they need to have a majority at the EU level and because he's their co-partisan.

In my last minute I'll say Poland has been a bit different and I can't tell the whole story but just in the past year Kaczyński came into power promising that he was going to "bring Budapest to Warsaw" - to do the same thing in Poland that Orbán did in Hungary. They won a majority, immediately tried to pack the constitutional court and eliminate the independence to the judiciary, they're still in the midst of a constitutional crisis where the government won't publish the constitutional courts decisions, et cetera. Poland has gotten into a bit more hot water though where the Commission has been more aggressive and triggered the beginnings of what could lead to Article 7, because Kaczyński's party is not part of the European People's Party. It is in a much weaker party group at the EU level, composed of more far right parties. Their only powerful party ally is the Tories, but they're on their way out the door, so they've lost leverage. So Kaczyński's been alone, and I think that's why there's been more action against him shortly, but we'll have to see how it unfolds. So just to conclude if I could. I have 30 seconds left. What could the EU do better about this? They could bring more infringement proceedings and be more aggressive. I don't think that will solve things. They could invoke Article 7, and suspend voting rights. I think they should. The problem now is there are two authoritarians, the Polish and the Hungarian governments, who swear to block action against the other. So you can only do it if you act against both simultaneously. Eventually I think the only way to get at these regimes is to find ways to threaten, to cut off their EU funding which they rely on, or for the center right to find its principles and to denounce Orbán and what he's doing and there's a fight going on within the party about that. The center right in Europe has to eventually decide whether they want to be the party of center-right democracy or go down in history as the party that defended the rise of autocracy within the EU. Thank you.

Daniel Hegedüs: Ladies and gentlemen, thank you for having me. I am greatly honored by the opportunity today to be able to contribute to this symposium. In my presentation, I would like to touch upon the issue of the interaction between the European Union and the Hungarian government, and especially the role of the EU in the Hungarian democratic backsliding process. But before doing so, please allow me to briefly address the issue of a very actual concern of Hungarian democracy today.

During the last two weeks, the Hungarian government rendered the functioning of the Central European University illegal by a very discriminative legislation, and rejected any consultations with the stakeholders of the academic community in Hungary. Due to the fact that the CEU, as a mission driven university, promotes democracy and liberal values in Central Europe, the attacks of the Hungarian government against the university shouldn't only be considered a great violation of academic freedom, but also as a further symbolic step showing the Hungarian government's disrespect toward the common liberal democratic value base of Western democracies. Bearing the fact in mind that CEU operates as an American

university in Budapest, the Hungarian academic community would highly appreciate if it could count on your solidarity in this very actual issue.

Coming back to my presentation, the Hungarian developments are frequently compared to Russia and Turkey, and therefore Hungary is also often labeled as a kind of illiberal democracy. Of course, these comparisons can be seen useful to underline the direction of authoritarian trends in the country, however they do not necessarily contribute to the understanding of the key characteristics of a very unique hybrid regime existing within the democratic community of the European Union.

In my presentation, I would like to provide an analysis of the Hungarian developments from the perspective of hybrid regimes theories. Based on the inductive theorization of the Hungarian regime's unique characteristics, I would like to offer the theoretical model of the "externally constrained hybrid regime", what we developed together with Prof. András Bozóki from the Central European University, as an explanation regarding the question how the contemporary political system of Hungary could be best described and categorized.

What are these unique characteristics mentioned before? Up to now, Hungary is the first and until now the only former Western type, consolidated liberal democracy which left the democratic development past behind, and evolved to a kind of hybrid regime. I said the only one, because I am convinced that in the case of Poland one still cannot observe any systemic repercussion of the quality of democracy. Poland is only temporarily a defective democracy. Not as Hungary, where a constitutional capture situation evolved, and in the case if Mr. Orbán would lose the next elections, it would be still a really hard task to bring the country back to the democratic development path. At this point I would like to point-out that hybridization is not a one-way process, as it was seen until now in the mainstream political science literature. Hybrid regimes cannot only develop as consequences of stuck or incomplete democratization processes, but as one can see in the case of Hungary, even consolidated liberal democracies can develop back to a kind of hybrid regime or start following an authoritarian development past.

Concerning the second unique characteristic, Hungary is the first ever hybrid regime in the European Union, and the country's EU membership has crucial systemic effects on the regime's functioning. That means that as an EU Member State with questionable democratic quality, Hungary calls for the partial revision of the linkage/leverage theory of Levitsky and Way arguing that the stronger are the links between a country and the Western democratic community, and the more influence the Western democratic community can exercise over a country, the higher are the chances of democratic consolidation. In a global comparison. Hungary unquestionably used to belong to the internal circle of liberal democracies. However, the Hungarian case underlines the fact that the systemic deconstruction of liberal democracy was still possible within the European Union. Therefore, also that political discourse should be partially revised, which defines the European Union as a family of democratic member states.

Changing the focus to the role of the European Union, I would like to argue that from a system theory perspective the European Union should not merely be considered as a kind of international environment for its Member States. The EU should rather be seen as a multi-level polity, a common supra-national, federal

superstructure of the political systems of its Member States. Being in this form a part of the national political systems, the European Union fulfills several system functions for its Member States. Regarding democratic quality, the EU not only opposes the democratic backsliding process of a Member State, what I call the EU's 'constraining function', but it can also contribute to the survival of defective democracies and hybrid regimes under EU jurisdiction. Furthermore, it can also support the legitimacy of such regimes. These three 'system constraining', 'system supporting', and 'system legitimizing' functions could be identified as the EU's key functions toward its Member States with systemic democratic deficit. Although as already mentioned, these functions are not identical for all countries within the EU, they can be considered fairly identical for Member States, which are net beneficiaries of the EU cohesion transfers, and show clear symptoms of democratic backsliding.

Focusing first on the 'constraining function', it must be emphasized that the European Union is built on the principles of democracy and liberal constitutionalism, as it is formulated in Article 2 of the Treaty on the European Union. As the fundamental principles of the European Union are also binding for the Member States, it could be perceived on the basis of Article 2 TEU that if Member States seriously violate these values, they also have to face certain consequences, including the possibility of sanctions. However, as the competencies of the European Union vary extensively among the different fields of democracy, fundamental rights, or checks and balances, the level of adopted standards and the existence of nuanced benchmarks can also diverge.

Although Hungary is often labelled as 'illiberal democracy', bearing the regimes key characteristics in mind, it hardly complies with the illiberal democracy definition of Fareed Zakaria. On the one hand, instead of the low level of human rights, the quality of fundamental freedoms can be considered rather fair in the country. If only the quality of human rights and fundamental freedoms should be put under the microscope, Hungary would most probably qualify as liberal democracy. On the other hand, representative democracy is seriously compromised and the existence of an 'uneven political playing field' is clearly identifiable in Hungary. Although the term of 'rule of law crisis' is actually widely used within the EU, 'democracy crisis' would be a better suiting terminology for the Hungarian case, as it offers a more precise, and more comprehensive explanation of the democratic backsliding phenomenon. Not only the institutional checks and balances are lacking, but the process of democratic competition is also seriously unfair, thus the country qualify as a hybrid regime between democracy and authoritarianism, for example as 'competitive authoritarianism' described by Levitsky and Way.

The reason behind this complex situation is the diverging quality of the EU's constraining function. On the one hand, lacking both the ideal legal toolkit as well as the firm political will to act, the European Union could not hinder the evisceration of "checks and balances" and the rule of law in Hungary. Nevertheless, it influenced and slowed down the process in some respects. The sheer fact that the Hungarian government has had to consider possible European reactions led to the famous 'peacock dance' policy of Mr. Orbán. On the other hand, based on the individual legal remedy option provided by the European Court of Human Rights (ECtHR) and on the fact that the European Convention on Human Rights and the ECtHR case-law

constitute an inseparable part of EU law, the EU has been able to secure a rather fair level of fundamental rights and individual liberties in Hungary. Present days, not the Hungarian constitutional institutions, like the Constitutional Court or the ombudsperson are the final guardians of the Hungarian citizens' fundamental freedoms, but the EU and the ECtHR.

To provide reference to the growing role of the ECtHR in the safeguarding of the fundamental rights of Hungarian citizens, the following data could be mentioned. The number of Hungarian applications to the ECtHR in Strasbourg rose between 2010 and 2016 by 1,177 percent. Currently Hungary has the highest number of applications on per capita basis in the whole Council of Europe region. While Hungary only counts for 1.25 percent of the population in the Council of Europe, it is responsible for 10.41 percent of all pending cases in Strasbourg. These figures also demonstrate the existence of the 'external constrain', which safeguards Hungarian citizens' fundamental rights and freedoms, and withholds the country from a further advance in a more authoritarian direction.

Switching our focus to the 'system sustaining function', Hungary receives approximately 3.2 percent of its annual GDP through transfers of the European cohesion policy. Although intended to provide public investments and facilitate economic growth, these European cohesion transfers also contribute to the abundance of misusable funds in the country. Hence, they create a financial incentive for the hybrid regime's elite to tolerate the above mentioned constraining function. Furthermore, they also stabilize the regime in general economic terms.

According to Freedom House, Hungary can be characterized by a phenomenon of 'reverse state capture', meaning that not public interests capture the state, but the state organizes and maintains its own corruption networks. Pursuant to the data published by Transparency International, 70 percent of all Hungarian public procurement tenders is affected by corruption, while the overpricing in these tenders totals up to 25 percent. Bearing in mind the above described nature and extent of corruption in Hungary, it is rather easily understandable how EU financial transfers contribute to the survival of the hybrid regime.

Coming to the last function, the system legitimizing function, the lack of proper EU sanctions on Hungary due to the non-compliance with EU fundamental values, like democracy or rule of law, leaves the impression behind as Hungary still would be a kind of functioning liberal democracy. Unsurprisingly this argumentation is heavily exploited by the Hungarian government both in domestic and international context, and it helps to maintain the regime's democratic legitimacy. Last but not least, it contributes to a self-sustaining vicious circle of non-sanctioning democratic backsliding in the European Union.

Finally, I would like to sum up some conclusions. On the one hand, the EU's constraining function has been effective in that cases, when EU actions have had solid legal basis, like on the field of fundamental rights, concerning the case of the planned reintroduction of capital punishment. On the other hand the constraining function has been rather ineffective, when objective benchmarks were missing, like on the field of 'rule of law' and 'checks and balances'. These differences in the standard setting result in the strengths and weaknesses of the EU's constraining function, which influenced the main characteristics of the Hungarian hybrid regime.

Concerning the qualities of the regime, on the one hand I agree with Dan Kelemen that Hungary doesn't qualify as an illiberal democracy as defined by Fareed Zakaria. However, according to my opinion it doesn't qualify, because the level of fundamental rights is more or less tolerably high. On the other hand, I am convinced that the 'competitive authoritarianism' theory of Levitsky and Way offers the best explanation of the Hungarian regime characteristics, as the country clearly shows the key defining benchmark of 'competitive authoritarianism', the 'uneven political playing field' or systemically unfair political competition. At this point I only would like to refer to the fact, that the OSCE, the Organization of Security and Cooperation in Europe, classified the 2014 Hungarian parliamentary elections as 'free but not fair', meaning that one of the fundamental benchmarks of democratic elections was not fulfilled in an EU member state. Hence in my eyes, and again I agree with Dan Kelemen, Hungary doesn't undergo a rule of law crisis. Hungary, an EU Member State, shows clear signs of a very serious crisis of democracy.

How can this situation be changed in the future? As East-Central-Europeans are predominantly pessimistic, I would like to call the attention on two possible negative scenarios. The first scenario can take place, if the European Union cancels its generous cohesion policy during the renegotiations of the Multiannual Financial Framework (MFF), or denies the access to it for countries, which are not complying with the EU's fundamental values. In this case, without the appropriate financial incentive, Hungary could probably lose its interest in the membership, and can strive to an EU exit to also abandon the Union's constraining function.

Or, in the second case, if the French or the German elections take a wrong direction during 2017, the EU can cease to function as a liberal political and value community in the future, and can abandon its own external constraining function as well. Bearing the fact in mind that both cases result in a situation that there won't be any external pressure on Member States for democratic compliance, under these conditions Hungary and Poland could continue their journeys in the direction of more authoritarian waters. Thank you very much for your attention.

Vlad Perju: I would like to start by echoing Daniel's point about standing in solidarity with the Central European University. The actions of the Orban government have been particularly reprehensible. The Central European University has been over the past two decades or so, really one of the most extraordinary success stories of academic innovation in Eastern Europe. It has drawn brilliant students from all over the region. It has put them into contact with cutting edge research in their respective fields. The university has built extraordinarily successful departments. So, I hope that you will consider adding your name to one of these petitions that are circulating around about standing in solidarity with CEU.

As the last panelist of the day I have the opportunity to draw some connections with the discussions that have been going on before. Dan Kelemen presented the various crises of the EU and talked about ranking them. For myself, I think it's really interesting to what extent the story we are telling in this panel is quite different from the stories that have been told in the previous panels. I invite you to check, according to your own political intuitions, if these accounts align or they don't align. The Brexit situation and the Brexit panel have been essentially about how Brexit is a tragedy for

which the EU itself is partly responsible. For instance, the Union's political institutions are insufficiently responsive. It has, we were told, a European Court of Justice that has over-constitutionalized European politics. Its democratic deficit continues to be unmitigated. It is thus no wonder that things turned out the way they did with the Brexit vote. The Eurozone crisis panel has given us a similarly complex story. The gist of it was that, while some of the choices that have been made at the national level might be questionable, there is a lot to blame on the EU's methods for reaching major political decisions. Think, in this context, of the so-called voluntary bail-out (voluntary, as it has been correctly pointed out, only in the Inquisition sense of the term). Here, in the "rule of law" last panel of the day, we are offering a different account. That account, and I think that Dan put it very nicely, is about deep democratic (and constitutional) deficits at the national level. So, we're here looking at what kind of pressure the European institutions can put on national processes. In other words, we're asking a question that is really quite significant from the perspective of European constitutionalism, namely how the European Union can intervene in the relation between a national government and their own citizens. In this context, like the previous speakers, I too want to challenge labelling the situation in Hungary and Poland as moving in a direction that is sometimes referred to as illiberal democracy. Not because these regimes are not illiberal - of course they are - but they are also anti-democratic. While, formally speaking, they appear to have remained committed to the continuation of the regular electoral cycle, many of the reforms - from media control to reforms of electoral laws - reflect no commitment to a genuinely open competition for power among pluralist forces. Moreover, we have come to understand democracy as more than just showing up to vote on a given day. It is important in a democracy what happens in the period leading up to the vote, the kind of public deliberation that goes on. Those processes have been short circuited on purpose in Hungary and in Poland, and we should not turn a blind eye to these developments.

A second, and related, point concerns the element of surprise about the turn of political events in Hungary and Poland. The common reaction to that situation has been along the lines of: "the European Union let them in and all of a sudden look what they're doing. Who would have thought?" In reality, if one had actually paid attention, one might have seen this coming. I recommend, in this context, a conversation from 2007 between Vaclav Havel, the intellectual then-president of the Czech Republic, and Adam Michnik, the Polish dissident. Havel asks Michnik if he saw the situation at the time in Poland exceptional from the larger political developments in Central and Eastern Europe. Michnik answers: Poland is in no way an exception. I could give multiple examples from other countries. A Slovak coalition, the Euro Sceptic rhetoric of Vaclav Klaus, the anti-communist radicalism of Viktor Orban who reinvented himself in his career. The post-communist radicalism of Viktor Yanukovich. [Yanukovich, in case you don't remember, is the former president of the Ukraine who's now a tenant in Hotel Putin. The real model is the consistent and effective authoritarianism of Vladimir Putin. We should look at the practices of Putin to understand the nature of the threats to democracy in countries in post-communist Europe." Looking back at this prediction a decade later, we should keep in mind - as Gráinne de Búrca told us this morning - that there are

specificities to each of these jurisdictions. At the same time, as Michnik's prediction shows, one should also understand what brings together the different experiences, what makes them be part of the same wave. In this second dimension, what stands out is cross-learning among jurisdictions that turn authoritarian. Methods of undermining democracy and constitutionalism have been traveling across borders. They are tested in one place, then whatever works travels and is used in another place. So, there have been a lot of migration of constitutional techniques that we have seen over the past decade or so.

I want to take this as a starting point for my intervention about a jurisdiction where things could have turned out as badly as they have in Hungary and Poland - but didn't. That jurisdiction is Romania. We need to understand why constitutional democracy in Romania did not implode, and specifically the EU's role.

If you had placed yourself 5 years ago, in the summer of 2012, the EU's most urgent political problems included the the explosion of Roma by the French, the fast pace at which Viktor Orban undermined the constitutional state in Hungary, and, finally, the crisis of the rule of law in Romania.

Very briefly, about what happened in Romania - and, I should add, this is representative of the pace at which the rule of law crisis unfolds in various jurisdictions. Romania is a mixed, semi-presidential system, where the president is directly elected and the president and the prime minister both have executive authority. A common challenge to all mixed regimes that are EU members is to decide who will be representing the country in the European Council. As Federico pointed out earlier today, the European Council brings together heads of state or of the government. What happens when there is both a head of state and the head of government? The question is particularly urgent in a situation of so-called cohabitation, when the president and prime-minister belong to opposing political forces. In many mixed jurisdictions, such as Finland, Poland and now Romania, the question about who gets to represent the country in the European Council typically goes up to the constitutional court. The court decides, and the political actors abide by that decision. But, in Romania's case, there is a twist. No long before the Court's decision came down, holding that the president has the competence to participate in the European Council meetings and that the prime minister can represent the country only when expressly delegated by the president, control over the Official Journal changed from Parliament to the Executive. This matters because the decisions of the Constitutional Court must be published before they can come into effect. And the Executive delayed the publication of the decision of the constitutional court on participation in the European Council by long enough for the prime minister to get on that flight to Brussels to attend the meeting of the European Council.

Then the next thing that happened, within a matter of days, concerned the Ombudsman. I should mention that this is happening in July, when the members of Romanian parliament are on vacation. Now, Romanian MPs take their vacation very seriously, as you could imagine. Probably even if Mr. Putin was to declare war on Romania, the members of Parliament would be hard-pressed to reconvene. So, all of a sudden, an extraordinary session of the Romanian parliament is called in the middle of July. What for? The official reason was to assess the activity of the Ombudsman. Now, I should tell you that the ombudsman is not particularly distinguished

institution in the country's overall institutional architecture. The position has been occupied by individuals of no particular distinction, or who, in any event, did not want to rock the boat. But the reason why the ombudsman's position mattered in July 2012 was that the only the ombudsman has standing to challenge *ex ante*, that is, before coming into effect, the constitutionality of an emergency decree adopted by the executive. So, in other words, if the ombudsman is politically obedient, the government can oftentimes make immediate changes in the legal order by using emergency decrees. So, in the end, the 2012 parliamentary majority managed to replace the ombudsman and then proceeded to enacting a number of executive orders, including one that curtailed the jurisdiction of the constitutional court. Still, the Romanian politicians were not as effective and radical as Poland's Law and Justice Party, although there is a family resemblance between the two cases. As you might know, in Poland, the parliamentary majority enacted controls on the docket of the country's constitutional tribunal, decided on a blocking majority in the constitutional tribunal, enacted requirements about new quorum requirements in that judicial body. Furthermore, the Polish executive not only delayed but it went as far as declining to publish decisions of the constitutional court. You see my point about how mechanisms for eroding constitutional democracy migrated across jurisdictions.

In Romania, things came to a head when, following the measures I mentioned above, the parliamentary majority voted to suspend the president. The Constitution requires a referendum following such a vote in Parliament. In anticipation of the fact that the president's suspension from office would only be temporary unless confirmed by a popular referendum, the executive sought to lower the quorum threshold for deeming referenda valid. The constitutional court stepped in to hold the lowering of the threshold unconstitutional. Since the court decision derailed the attempts to remove the president from office - no one believed that the court-endorsed 50% participation rate of all citizens above voting age in the coming referendum, which was organized in less than a month, not to mention in the middle of the summer - the critical question became if the executive and its supporting parliamentary majority would comply with the decision of the court. One could envision something similar to the Polish scenario, as it unfolded later. For instance, would the decision of the court be published in a timely manner and produce its effect? The initial signals from the executive showed reluctance to comply. Yet, eventually, the decision was published and the majority stated that it would comply. It is true that attempts were made - unsuccessfully - to rig the referendum, and indeed Mr. Dragnea, the future president of the Social-Democratic Party, which was one of the two main parties before the effort to unseat the president, would eventually be criminally convicted for his acts during the referendum. So, why did the political majority comply with the decision of the Court?

For one, there was tremendous pressure from the European institutions and especially from within the European socialists with whom Romania's social-democrats are affiliated. Secondly, also at the supranational level, there was already an existing mechanism in place, a mechanism for cooperation and verification, that had been set up at the time when Romania joined the European Union in 2007. The existence of this mechanism provided the necessary expertise for the European experts to know the country and be able to interpret, more or less in real time,

institutional developments. It also provided them a vocabulary that was politically neutral in which they could frame their demands. But the third, and I think most important reason why they attempt to undo the constitutional state in Romania failed, was that the politicians in charge were too inexperienced, too young to follow through with what would have been an obvious and radical breakdown of the rule of law pillar of the constitutional state. They blinked in precisely the way that Kaczynski in Poland or Orban in Hungary never did. Politicians like Victor Ponta, the then-prime minister, essentially did their own cost benefit calculus on what each course of action would entail. They decided that giving in to the demands that were coming from the European Union was more advantageous. It was certainly good for the country that they reached that decision but it is important to keep in mind that they also could have decided otherwise. While the implications or risks of the illegality of disobeying the constitutional court might have been part of the calculus, it is hard to believe that it played a very big part - precisely because unseating the president promised to give them control over the judicial system, the kind of control that would have then immunized them from prosecution. Thus, the decision whether or not to comply with the court was reached in a space that was more or less de-juridified. This is relatively clear at the municipal level, but is also arguably true from the European, supranational perspective. The means available to the European institutions to influence developments at the national level are essentially political. In Romania as elsewhere, EU influences through political pressure. As far as the European court of justice is concerned, its role is basically non-existent. Contrast this to Peter Lindseth's diagnosis earlier, about the overconstitutionalization of the European space. The following example should make this contrast event more evident.

A recent development is enormously concerning. It involves the strategic way in which the concept of identity, of constitutional identity, has been deployed not by the European Court of Justice but by national constitutional courts. These courts have essentially drawn lines in the sand to defend the otherwise highly questionable actions taken by national governments. National/constitutional identity is a concept born in the decisions of the 1970s of the German constitutional court. The concept then becomes part of the European treaty through a process that I don't have time to describe here. What we have seen recently is that, as opposition to Viktor Orban for example in Hungary is becoming a bit stronger, as Orban no longer has the votes to enact constitutional amendments in exactly the terms he wants, he can rely on the constitutional court that by now he controls to defend and entrench his policies. The umbrella of national constitutional identity has essentially immunized policies of the Hungarian government that have deeply undermined both constitutionalism and democracy. This is an extremely important development because, while one might think that political pressure from the EU might have some effect on the actions of a national government, we now see those actions being protected by constitutional courts that have been politically captured. So much for celebrating the concept of constitutional identity. Rather, this has become the new battlefield on which the fate of the "rule of law" might turn. Thank you.

Mark Janis: We have a few minutes for questions. Is that ok? Very good. So please. Sir?

Audience member: Thank you for your insight. Both the Poles and the Hungarians live in what has been historically a very dangerous part of the world. Russia seems to consider that their own buffer zone and with the decline in the strength of NATO, US is at a distance, I think there's some-- I've read some articles that suggested that there's some concern within both Hungary as well as Poland about Russia flexing its muscles and I was just wondering how much of that fear may have got into the current crisis that we're having in those two countries, the constitutional crisis?

Daniel Kelemen: I'll say something about that. Yeah, it's a great question. I mean I think that interestingly Hungary and Poland although their regimes have much in common in sort of the vision they have for the kind of regime they want to build; their stance vis-a-vis Russia is very different, right? Where Orban some people view him as, throw out the term Putin's trojan horse in the EU, right? He's done this nuclear deal with Russia where he's basically done a contract with the Russians to build big nuclear power stations in Hungary and even though the EU has the sanctions regime on Russia in reaction to the invasion of Ukraine, despite that Orban has had Putin to visit and welcomed him, talk about warming up relations with Russia, et cetera. You know Poland of course, the Kaczynski regime is very anti-Russian and they justify some of what they're doing on the kind of nationalist anti-Russian terms but then strangely their simultaneously kind of anti-German, right? Which usually you're one or the other but the Poles manage to do both.

Audience Member: Thanks. So, I think it's a question to Dan, but it's probably a broader question to the panel. So, you talked about how nothing has been done yet against the breaking down of democracy or whatever, which one you want to call it. One reason you mentioned was the EPB and how it basically wants Orban for counting beans in the European parliament but I want to suggest that there is-- that the problem is deeper and that really it's not just strategic but the EPB has parties that share many of the-- of Orban's takes on several issues including refugees for example and here I think that the EU has a problem in the sense that the EU itself is facing a problem of declining legitimacy based on what it has or has not been doing on the issue. I'm teaching EU law this semester and we just covered the refugee crisis, and I just got an email, a very long email from a really unsettled student who was saying, he was asking me how is it-- I don't understand. How is it that the Turkey deal doesn't violate the right to non-refoulement from the 51 Geneva convention? They just couldn't wrap their heads around the idea that the deal is numerical, quantitative one for one. So, the way that the EU is dealing with the refugee crisis, what we've already done even before it was like a crisis of-- and notice the crisis as we call it crisis because we think it's a crisis that all these people are coming in as opposed to there's a crisis because they are refugees and they don't have a home, right? Even before this crisis we were paying money to Libya for maintaining prisons essentially and making sure that people don't get on the boats. So, I think the EU is in a very

tricky position where it's wasted quite a bit of its symbolic capital in that regard. I wonder what your thoughts are on the topic.

Daniel Kelemen: I'll just say something quickly so others can chime in. I mean first I agree completely the EU Turkey deal is an abomination and actually I think people give it credit for stopping the refugee flow which I think is a bit of a mistake. I think it was more to do with the closure of the Balkan route, but anyway that's another discussion but I think your first point was yeah that many in the EPB besides just wanting his votes or his power, they actually agree with his values and I think that's true. There are many people in the EPB that, specifically with regard to the Hungarian response to the refugee situation kind of embrace that and certainly Orban becoming the kind of face of a get-tough stance has helped strengthen him Europe wide, but just on my specific topic here what I'd point out is this. You know the refugee deal and Orban's stance on refugees is more of let's say late 2014, 15, and 16, whereas the EPB had been defending him as he eroded democracy already for years before that was the big issue. So, this-- you know this issue intersected with that issue but it exists you know separately from it.

Daniel Hegedüs: Yeah probably just one further point. If the EPB would change its position and would not follow this party family based etiquette within the European parliament it's not only the case of the EPB concerning the previous cases of Slovakia and Hungary, also the European socialists were not able to sanction their own party family members. But we clearly see the example of Poland their piece, their justice parties not belonging to any of the big European party families. The European Commission could start a rule of law in the spring of 2016. Perhaps it will finish the procedure without any clear conclusion and without the capability to sanction Poland as a member state in any form because to a sanctioning you need an article 7 procedure and any effective concluding of an article 7 procedure in the European council currently is unrealistic. I only see one point where there is some development at European level. During the earlier years there was always the argumentation that the council or the commission anyhow at European level, the actors do not start an article 7 because if they do not come to the conclusion of any sanction then it could be interpreted as a kind of failure and now the interpretation changed and many argued even if we couldn't close an article 7 procedure with sanctions at least should initiate it and signalize the great concerns concerning the quality of democracy in these member states.

Mark Janis: Yes, please?

Audience Member: Thanks Mark and thanks to the panel. A great presentation. I have a question which in a way follows up on this and it's really, Dan, going to your point about politics but try to understand also the institutional dimension of it. I think your comparison between what's happening in Europe today and the example of the United States with the Southern Democrats during the desegregation it's great in a way how it signals how the democratic party was tolerating behaviors by members of their party which in fact ideologically speaking were very different from

what the north conception was but I'm wondering there then to what extent also the institutional differences between the European Union and the United States matter? I mean the United States at some point after *Brown v. Board of Education*, the US president could send the 101 airborne to police black kids in Little Rock, Arkansas. In Europe, there's nothing like that. So, you have the party dimension but you don't have the institutional structure for the center to police compliance at the national level. Of course, that leads back to my point that I think the lack of an executive power at the central level in Europe allows the expansion of this crisis. So, my question to you is how could you ever sort of reform that system and deal with institutional dimensions with the political dimension as well and just a final comment-- it's very interesting if you go back to the draft treaty creating European political community in 1954, one of the powers which was given to the super national authority was precisely to enforce human rights at the state level. So back in the 50s the concern was that you could have a new fascist regime as you know breaking off again in one of the member nations and of course that has been-- that was not taken in the Rome treaty but we are basically back at square one in a way so how do we solve that problem?

Mark Janis: Let me just toss in one thing. I'm sorry I'm looking at my phone here because I've left my US Constitution, my pocket edition behind, so it's hard to do this stuff. As I almost remembered, section 4 of article 4 of the American Constitution reads "The United States shall guarantee to every state in this union a republican form of government" and my memory of constitutional law is that this has never been an operative constitutional provision in our history. That is, I don't remember this happening and one sees the parallel here. It's very hard politically even with such a provision to have the central union protect these kinds of rights. So, if Europe is having trouble with this, all I can say is we tried and we weren't able to do it. We're no model.

Daniel Kelemen: Yeah, I mean I would agree with that and I would just say two things on that point on Federico's question. You know one point is, and I mentioned this in my talk that some of the fundamental values that are supposed to be protected and guaranteed in all states in article 2 of the treaty including let's say democracy, they're not actually things that are sort of individually judiciable. So maybe in an ideal world you'd want the EU to pass, and I don't think this will happen for lots of reasons but you want them to pass sort of legislation, secondary legislation that gave a concrete right. So, let's think like a European voting rights act or something but there is none. Right? So that's-- I mean the closest we've come-- I'm not a US constitutional law expert to kind of getting at the issues I think you're talking about is yeah individuals can bring voting rights act challenges right but there is nothing like that. So, there's no way that you as a citizen can take advantage of all the powers the EU legal system has for individuals which are many, right, it makes the system impressive, but you can't use that against the fact that your country is no longer a democracy. And then the last thing I'd say, look the EU is developing, it's getting a lot of power in many sensitive areas but the EU I think will never be a traditional kind of state. So, the last thing the EU will ever do is like deploy troops to integrate

a school somewhere. That kind of thing is just not going to happen and so therefore if you're not going to have real state coercive power from the center I think at the end of the day the only thing you can have is go back to like the Greek punishment, banishment, right? So, if you can't force states to do something you have to have a threat of exclusion, right? You have to say ok, you're not going to take refugees Hungary? You're out of Schengen. Right? No more free movement for you until you take—or eventually expulsion from the union. Because it's just a pipedream to think you'd have force.

Mark Janis: These were knowledgeable choices taken by sensible politicians after the fall of communism. There was a choice that Europe had which either bringing in the ex-communist states or not and there was much debate about it whether or not this made sense. Whether or not it threatened the viability of the European Union not only in economic terms but even more political terms and I can remember reports by distinguished groups of lawyers, you probably know some lawyers, saying that you know x or y state should not be brought into Europe because they didn't have a traditional rule of law, they weren't ready to have democratic governments and the political leaders said: "yes we understand you but we want to take the risk." We want to see if whether or not we can imbue these states with these values back and forth and justice. There have been efforts that the EU has made financially in terms of experts and to try to educate the central Europeans in these forms and sometimes it's worked and other times it really hasn't. So, these were risks. So, if you will it is just early days yet. We'll come back and do this in 50 years and you'll tell us what you think. So, we shouldn't be too unjust. I think this is a good time to wrap up. I promised you the best panel. I delivered.

It had nothing to do with me. It just had to do with the panelists but I want to say in fairness to the other panels and to Ambassador Vimont that they were great too and I think the Journal was great and I think the law school was great and I think the weather was great and I wish you all a very good weekend.