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REINTERPRETED EUROPE: AN ASSESSMENT OF EU (IN)ABILITY
TO DEAL WITH THREATS TO THE RULE OF LAW

by

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ABSTRACT

REINTERPRETED EUROPE: AN ASSESSMENT OF EU (IN)ABILITY TO DEAL WITH THREATS TO THE RULE OF LAW

Huso Hasanovic
Old Dominion University, 2021
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The European Union has been the primary promoter of democracy and rule of law to its neighbors to the east. Much of the early scholarship as well as official documents on the EU's transfer of norms to the east have shown some degree of optimism and expectation of serious reforms. Fast forward to its contemporary experience and the situation is significantly more grim than anticipated. Major think tanks like Freedom House, The Economist Democracy Index, and EU Venice Commission Reports show a stagnation and reversal on the question of rule of law, despite the millions of euros spent on anti-corruption and judicial reforms.

This dissertation examines the transformation in Europe's normative power i.e. rule of law norm from relative stability to a system where individual member states are openly challenging this cardinal EU norm. This study uses two case studies as reference points for assessing the robustness of the norm and examines the European community's responses in light of the rule of law crisis in Poland and Hungary. It seeks to answer questions regarding the consequences of the current crisis on the integration process itself. How to consider change in the Europeanization process? What impact will Europe's autocrats have upon on EU's self-understanding?

Ultimately, there is strong evidence that suggests norm contestation has led to a deeper commitment to the norm as more than a "moral duty", increasingly shifting to realm of interest when it comes to the EU. To this end, other factors which help shed light on the context of

contestation are discussed including domestic politics of case study countries, economic factors, and historical traditions. Thus Europe is in the process of re-identifying its own understandings, seeking to rearticulate principles at the bedrock of its foundation.

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This dissertation is dedicated to my father and mother who graciously instilled in me the value of work, family and kindness to others.

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NOMENCLATURE

CFSP	Common Foreign and Security Policy
CEE	Central Eastern Europe
DK	Democratic Coalition
EEC	European Economic Community
EU	European Union
MEP	Member of the European Parliament
MSZP	Hungarian Socialist Party (<i>Magyar Szocialista Párt</i>)
PiS	Law and Justice Party (<i>Prawo i Sprawiedliwość</i>)
PO	Civic Platform
TEU	Treaty on the European Union
U.S.	United States of America
UN	United Nations

CHAPTER I

INTRODUCTION

Europe and its Direction

Can the EU project survive its problems? It is a question that has been at the forefront of many EU observers and officials for at least the past decade. Over this time, we have seen financial crises, austerity measures, and crippling mass migration divide member states along once unimaginable fault lines. While some of these have calmed for now, their impacts have led to rise in populist and nationalist parties that have firmly planted themselves into the EU political landscape, changing it from within. In the May 2019 parliamentary elections, far right parties gained the most seats relative to the centrist and leftist parties in the European Parliament. This trend has expanded to even the traditionally liberal Scandinavian countries. Considering these results in the context of global development, Europe once thought to be the exception to the rule and a beacon of integration-ism, is leading the way to more nationalism. Liberal norms are under threat, as well as what we thought we understood about their diffusion. Europe once again being recast this time through the very mechanisms it thought would expand democracy and provide access to a common European identity which all member states share.

The EU has been the primary promoter of democracy and rule of law to its neighbors to the east. Much of the early scholarship as well as official documents on the EU's transfer of norms to the east has shown some degree of optimism and expectation of serious reforms.¹ Fast forward to its contemporary experience and the situation is significantly more grim than

¹ Mendelski M., "The EU's Rule of Law Promotion in Central and Eastern Europe: Where and Why Does it Fail, and What Can be Done About It?" Global Rule of Law Exchange Practice Notes, Bingham Centre for the Rule of Law, London, 2016.

anticipated. Major think tanks like Freedom House, The Economist Democracy Index, and EU Venice Commission Reports show a stagnation and reversal on the question of rule of law, despite the millions of euros spent on anti-corruption and judicial reforms. Poland and Hungary have been surging as the top violators for at least the past decade while the EU has struggled to maintain a consistent voice in addressing all of its problems.

Central and Eastern Europe's populist parties are birthing leaders that outright trample fundamental EU values including respect for human dignity and human rights, freedom, democracy, equality and the rule of law.² This new wave of leadership across Europe in their quest to remain in power have removed institutional buffers to democracy including intimidating the free press, packing courts, rewriting electoral laws, and complete disregard for EU norms. In Hungary and Poland alike, the judicial system has become a political arm of the government as a result of one-party rule. Hungary's Fidesz and Poland's Law and Justice (PiS) governments have firmly planted themselves in national institutions and threaten to cause serious divisions if able to sway more member states to their side in their battle against EU.

Ultimately the notion of an EU carried with it an understanding that the union would be ever closer, perhaps replacing nation states altogether, the EU project has stalled when it came to this holistic identity construction. Most of the empirical literature³ shows that people who identify as European view themselves as in favor of peace, tolerance, democracy and cultural diversity, and are in general agreement with Enlightenment values. The story they share emphasizes that being a European involves the acceptance of those values. Whether the definition can be included to include deeper and perhaps more controversial interpretation of

² EU Parliament Core Values <https://europarlamenti.info/en/values-and-objectives/values/>

³ Fligstein N., Polyakova A, Sandholtz. "W. European integration, nationalism and European Identity". *Journal of Common Market Studies*, vol. 50, issue S1, 106-122. 2012

identity is what has brought the subject back into discussion in mainstream politics. The idea of single European identity as abstractly perceived as possible is imaginable and thus probably exists in some form. However, this distinction of identity is always in relation to something or someone else, another community or group that is viewed as intrusive or in competition. For the Europeans, rejecting their nationhood isn't conceivable although the project of adopting another perhaps dual identity is. There can be a coexistence or perhaps a duality to how one defines their existence relative to others. What has been slow to churn have been the wheels of European exceptionalism and Europe's realization of an ever closer union. The EU project faces a dilemma because its attempt at creating an EU-wide identity have been interpreted as intrusiveness into the sensitivities of national identity of CEE member states.

Eurobarometer surveys (2005, 2010) that ask individuals to self-identify with their nation and or Europe show that the bulk of the population in Europe falls into two categories: citizens with only a national identity (46 percent in 2010); and citizens with a national mostly but also a European identity (41 per cent in 2010). These are people who in some circumstances might think of themselves as Europeans. In contrast to this group, the number of Europeans who self-identify as European only has remained low (three percent in 2010), as has the number of those who see themselves primarily as European but also with a national identity (seven percent in 2010).

This erosion of a common European identity is evident in the success of nationalist parties.⁴ The lines between EU values and those of individual states have been more pronounced and the EU brass has struggled to retain ground on establishing a common identity. The ultimate goal apart from the economic and political integration of the EU has been to foster a shared sense

⁴ Polyakova Alina & Fligstein Neil. Is European integration causing Europe to become more nationalist? Evidence from the 2007–9 financial crisis, *Journal of European Public Policy*, 23:1, 60-83, 2016.

of belonging, a new nationalism. Attempts over the years at a common EU Anthem (Beethoven ode to joy), a flag, citizenship, passport, a ‘capital’ (Brussels), and attempts to establish a constitution have been met with fierce resistance. These symbols of belonging are usually associated with nation states, not economic associations. An appeal to a common European cultural heritage is enshrined in the Treaty of Lisbon, which references the ‘cultural, religious and humanist inheritance of Europe’. A sense of being European dropped significantly in many European countries during the period 2005–10 and this was largely related to the economic downturn in each society.⁵ Europe’s future depends on its economics while its present depends on its societal identity. Europeans are growing skeptical and finding comfort in anti-EU rhetoric setting off a new-old debate about sovereignty and identity. There is little doubt that a less powerful EU or perhaps a renegotiation of the EU project itself would signal at the very least its symbolic end.

Europe has an uneasy history with populist movements and the integrationist past of 70-75 years some such as Robert Kagan have termed as the “anomaly” in European history. Its best years are ahead of it claim others who view the European project as part of permanent fabric in larger context of European-wide identity. While the chipping away of social democracy in Europe has only recently become a phenomenon, earlier EU critics warned of its expansion eastward precisely because of some of the problems it experiences today. Memory wars, mass migration, financial burdens are just some of the ways that have kept some eastern EU members in a state of bog, likely looking for alternatives often found in national sovereignty. Populists have gained all over Europe, and not only are they gaining seats in the European Parliament but also impacting the social dynamic of what it means to be European, a question that has long

⁵ Schimmelfennig Frank. "Europeanization beyond Europe", *Living Rev. Euro. Gov.*10, (2015), 1. URL <http://europeangovernance-livingreviews.org/Articles/lreg-2015-1>

plagued the hopefuls as well as the pessimists. From this discussion a heated debate has emerged between EU skeptics and its defenders about what Europe is appropriate going forward.

Rule of Law Crisis and Problem Statement

Under the umbrella of European values and representative norms lies a core and unmalleable concept of rule of law. Threats to it by its member states are taken seriously and can have wide ranging repercussions. Before the concept of rule of law was enshrined in the *acquis communautaire* and previously Article 2 of the Treaty on European Union, it first gained legal recognition in a landmark European Court of Justice case. "Les Verts" v European Parliament in 1986 set the legal foundations for what would become a core expectation of member states in later negotiations. In the case, a political party newcomer "Les Verts" from Paris lodged a complaint against the EU Parliament for disproportionate appropriation of EU funds to incumbent parties therefore making it more difficult for newer parties to enter the political arena. The court ruled that, "...the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.." ⁶

This landmark ruling legalized to a large extent, an already practiced norm that no one is above the law but more importantly that the Community itself as a foundational principle is subject to rule of law. National governments within their constitutions have language specific to establishing rule of law and often evoke it as a political tool in times of crises. For the EU, this concept is similarly being referenced to when it needs it most.

⁶ Judgment of the Court of 23 April 1986. Parti écologiste "Les Verts" v European Parliament. Action for annulment - Information campaign for the elections to the European Parliament. Case 294/83. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0294>

Establishing the rule of law as a core tenant came at Maastricht negotiations and further affirmed at the Treaty of Lisbon. The legal foundations enshrined in Article 2 as well recent crises have provide a clear pronouncement of expectations of EU member states. “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”⁷

What does rule of law mean to the EU? It is question that cannot be understated as we will see throughout this dissertation of the many ways in which EU is fighting to preserve its rule of law. The answer also requires an interpretation of the major contributors to its definition from legal scholarship and the various institutional backers tasked with its promotion. The European Commission from as recent as 2019 defines rule of law as the following:

Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognised by the European Court of Justice and the European Court of Human Rights.⁸

Norms enshrined in the *acquis communautaire* (the EU’s body of law) stress a compilation of an EU- wide identity rather than features of statehood. These symbols and normative acts are general and wide-sweeping in their construction but nonetheless are clear in the message and

⁷ Article 2 Consolidated version of the Treaty on European Union
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M002>

⁸ Communication from the EU Commission dated April 3, 2019
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163#footnote3>

purpose. Ian Manners has defended the concept of Europe as a normative power describing it as an “example” for other unifying polities to follow. The generalizability of these embedded norms are what separate the EU from others and its relative economic power give it the legitimacy to act in a normative way.⁹ Other scholars have also pointed to the EU’s legal frameworks arguing that legally binding commitments that countries sign up for upon EU membership add another layer of normative power. One of the strongest norms that EU defends are human rights and rule of law. European Convention on Human Rights has become a part of EU’s negotiating strategy often with prospective members or other non-EU trading partners. Thus the combination of legal, rhetorical, and institutionalized norms adds to their robustness.

On August 20, 1993 speaking at the anniversary of the foundation of the Hungarian state by King Stephen the Saint, Josef Antall the first conservative Prime Minister of post-communist Hungary said: “Independence, sovereignty and – ultimately – law and order can only prevail if a country stands on secure moral ground. Without law and order there can be no constitutionality, as chaos always leads to anarchy or dictatorship, restarting the vicious cycle all over again. St Stephen’s message is that being Hungarian, Christian and European are inseparable, and that together they form the very basis of our consciousness.”¹⁰

Yet the consciousness that exists within Hungarian society today is nothing like Antall may have predicted. Law and order are as vulnerable as ever and a sense of longing for European values has greatly diminished. How is Hungary going against the prevailing norms within the EU as identified by the Copenhagen criteria? According to major think-tanks, namely Freedom House Democracy reports, EU Venice Commission reports, Economic Intelligence Unit and

⁹ Manners, Ian. “Normative Power Europe: A Contradiction in Terms?” *Journal of Common Market Studies* 2002 Volume 40. Number 2. pp. 235–58

¹⁰ József Antall Prime Minister of Hungary Selected Speeches and Interviews Edited by Géza Jeszenszky p.240 https://www.martenscentre.eu/sites/default/files/publication-files/antall_jozsef.pdf

Transparency International Index, Hungary has slipped into a semi-democratic authoritarian regime with one party rule since Viktor Orban's ascent to role of Prime Minister in 2011.

Hungary has engaged in packing the constitutional court with Orban loyalists and Fidesz party members, changing the constitution itself as well as the electoral process in order to help Fidesz remain in power for the long term.

Orban has called for a "cultural counterrevolution" outright calling for more "Christian Hungarian babies" and talked of bringing back the death penalty to Hungary's legal system, severely undercutting EU position on abolishing death penalty. For the past nine years since Fidesz and Orban have been in power, thousands of new laws were passed that either directly or indirectly assisted Orban allies at the expense of traditional democratic processes. Private media conglomerates were bought by Orban allies and virtually all media over the past few years is pro-government. State run news outlets received new managers and those appointed to regulate the media are also Fidesz appointees under new laws passed by the majority-Fidesz parliament. But the extent of norm-violation of media openness didn't end there. Public radio broadcasters who showed solidarity with their fellows who were replaced or lost jobs under the new leadership were also pushed out from their positions. Important institutions created as part of the EU *acqui* that provide important checks on the powers of the executive were similarly packed with Orban allies. "State Audit Office, which monitors government expenditures, and the State Prosecution Service, which oversees criminal prosecutions as well as the board overseeing the National Fiscal Council, an independent body scrutinizing economic policy"¹¹ are just some examples.

¹¹ Kingsley P. "As West Fears the Rise of Autocrats, Hungary Shows What's Possible" *The New York Times*. Feb. 10 2018 <https://www.nytimes.com/2018/02/10/world/europe/hungary-orban-democracy-far-right.html?module=inline>

Independent judiciaries within the EU are seen as a core democratic principle and a check on the power of the executive and legislative branches. They make up of judges that transcend administrations and governments, meant to enforce the constitution over the political desires of those elected to office. The independence of national courts in interpreting and adjudicating EU law is an important element of EU norm spread. The national courts are thus vital sources of norm diffusion thereby EU's supra-organizational nature has looked to effectively influence the decision making of national courts to be in line with EU law¹². Recently a debate has emerged about the concepts of EU's soft law and its hard laws relative to the independence of national courts. As part of this debate national laws are said to receive guidance from EU law and thus judges must consider EU law when enacting decisions. Judge impartiality is thus at the very least expected to follow EU guidelines, thereby in theory dissuading judges from non-EU protocols. Chapter 23 of the *acquis* set the general guidelines for member states to follow: "...fundamental rights aim to maintain and further develop the Union as an area of freedom, security and justice. The establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law."¹³

In Poland the ruling Law and Justice party (PiS) since returning to power in May of 2015 has systemically marginalized its political opposition through passing new restrictions on freedom of the media and endangering the rule of law by packing the courts with party loyalists. In October of 2015, in one of the first acts of what is yet to come, PiS with its super majority in Polish Parliament passed a law that reshapes the functionality of Poland's Constitutional

¹² Korkea-aho, H. E. "National courts and European soft law: Is Grimaldi still good law?" *Yearbook of European law*, 37(1), 470-495. <https://doi.org/10.1093/yel/yey008>

¹³ EU Chapters of the *acquis*
https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en

Tribunal. The new law requires a two-thirds majority instead of a simple majority and hearings require more judges than before, acts that by design will slow the work of the judiciary.¹⁴ This was just the tip of the iceberg as the subsequent moves abolished the court's neutrality. National Judicial Council, which appoints judges, is in total control of PiS-run Parliament. This same National Judicial Council has power to suspend judges through a new disciplinary chamber.¹⁵ When the Polish judges submitted a request to EU's Court of Justice for a ruling and recommendation as to the validity of the chamber, the ECJ set out criteria that would test if the chamber violated judicial independence. Using those criteria, the Polish Constitutional Court ruled that the establishment of the chamber was in violation EU standards. Still the executive and legislature both refuse to act on the matter and implement the recommendations.

Since these events, PiS has continued to seek changes to Polish judicial system, one of which was a mandatory retirement age for judges. This would be a significant departure from existing Polish law that mandates judges serve until the end of their term. While this notion was eventually stopped by the ECJ and judges returned to their seats, the idea of bringing the judiciary under government influence has not. The chief prosecutor in the country is also its Justice Minister and a PiS member. The majority of Poles however in September 2019 poll view PiS reforms as a threat to judicial independence. In that same poll, 45 percent had a negative opinion of the courts with only 32 percent as positive.¹⁶ Jarosław Kaczyński, the leader of PiS and Poland's de facto ruler, has engaged in a war of words with top EU officials in similar vein

¹⁴ Cianski J. "Poland's constitutional crisis goes international" *Politico*. December 24, 2015
<https://www.politico.eu/article/poland-constitution-crisis-kaczynski-duda/>

¹⁵ Editorial Board. "In Poland, the rule of law is under ever greater threat" *Financial Times*. February 9, 2020
<https://www.ft.com/content/d2390d6e-49a2-11ea-aeb3-955839e06441>

¹⁶ Scally D. "The Polish judge facing down threats and the ruling party" *The Irish Times*, October 9, 2019
<https://www.irishtimes.com/news/world/europe/the-polish-judge-facing-down-threats-and-the-ruling-party-1.4045420>

to Orban in Hungary. Moreover, the two leaders view each other as allies and have publicly stated that they will not vote against the other when it comes to EU chapter 7 proceedings. The EU has various instruments and subcommittees that promote rule of law and democracy. This was not the case for most of its history and Europe learned its lessons along the various crisis points. In early 2000, Austria's far right Freedom party led by Jorg Haider formed a coalition government with Wolfgang Schüssel's People's party, also a conservative and anti-establishment party. This coalition led to backlash by member states over what they deemed was a breaking of a norm, the norm against creating coalitions with far-right extremist parties. The other fourteen member states ceased cooperation with Austria and a diplomatic row ensued between many national representatives. In the end, the losing side ended up being the EU, unable to reverse Austria's course and proving the need for tougher mechanisms that would enable it to have greater say over member states' internal politics.

Just a year prior, at the treaty of Amsterdam, the first version of Article 7 was formed in light of Europe's expansion to the east. Many observers and experts viewed the need for such a provision in the EU treaty due to questionable practices of many Central and Eastern European states regarding human rights and rule of law.¹⁷ Article 7 provided the EU with a buffer that some states would not revert to old habits and bring the rest of the EU with it. The article was further enshrined in Paris and Lisbon agreements thereafter in 2003 and 2007 respectively. As in the Haider case, there is always the threat that EU's intrusiveness could backfire. After imposing diplomatic sanctions and isolation of Haider and Schüssel's government, the EU realized its mistake when Austrian voters stood firmly with their leaders which led to even more anti-EU sentiment. After lifting sanctions, the diplomatic row ended with EU being perceived as the

¹⁷ Hervey G. & Livingstone E. "What is Article 7" *Politico* January 13, 2016
<https://www.politico.eu/article/hungary-eu-news-article-7-vote-poland-rule-of-law/>

losing side while Haider and his coalition government's popularity soared. This event although the article wasn't evoked against Austria, illustrated that there were no illusions to some calling Article 7 the "nuclear" option because of the risks involved in its undertaking.

Article 7 in its first and second chapter allows for the European Council, European Parliament, or the European Commission privilege of triggering proceedings against a violating member state. That member state which is found to be in "serious and persistent breach" of the values referred to in Article 2 may be summoned to explain its positions. Then the Council, Parliament or Commission may take away certain voting rights of the violating state.¹⁸

In 2017, the European Commission launched proceedings against Poland over its threats to rule of law. This was followed by proceedings against Hungary launched by the European Parliament for similar threats to rule of law. The effectiveness of the proceedings themselves are yet to be seen as the article is the last bastion of defense against threats to EU values. In the past, there were commissions launched against Poland and Hungary in what we know as the "pre-article 7" recommendations and many non-governmental observatory agencies such as Amnesty International have long been calling for tougher measures against the two violating states. Now however that moment has come and seemingly stalled, the EU toolbox for defense of its values requires a reshuffle. It is likely that new and updated article 7 proceedings will need to be written given the context in which they were formulated more than 20 years ago. We are now living in a much more contentious time where we can expect breaches and violations to be common practice. For that the EU requires an even stronger rebuttal.

¹⁸ Chapter 7 TEU
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M002>

Research Question and Methodology

This dissertation examines the transformation in Europe's normative power ie. rule of law norm from relative stability to a system where individual member states are openly challenging this cardinal EU norm. This study uses two case studies as reference points for assessing the robustness of the norm and examines the European community's responses in light of the rule of law crisis.

In order to establish the principle of rule of law as a practicing norm, I will use process tracing that will show the establishment of this norm over time throughout key European states, particularly in two EU heavyweights Germany and France as well as the two case study countries. The historical legal traditions in national laws regarding rule of law have allowed for a genuine pan-European adoption of the norm once the community itself was established after the second world war.

-What are the normative impacts of contestation on the robustness of rule of law?

-How have these impacts transformed EU's identity?

In order to answer these questions, I am applying the theoretical framework¹⁹ on norm robustness from Nicole Zimmerman and Lisbeth Deitelhoff (2019) et al. published in the special issue of *Journal of Global Security Studies*. They have developed four broad indicators for measuring robustness (concordance, third-party reactions to norm violation, compliance, and implementation). They find that types of contestation and structural factors of both challengers and norm defenders have strong effects on whether a norm remains robust or is in serious peril. A norm is labeled as strengthening when there is a rising number of legal ratifications and verbal

¹⁹ Deitelhoff N, Lisbeth Zimmermann, "Norms under Challenge: Unpacking the Dynamics of Norm Robustness" *Journal of Global Security Studies*, Volume 4, Issue 1, January 2019, Pages 2–17

sanctioning of violations by norm defenders. Below are condensed summaries of each criterion as adopted by framework:

Concordance: Concordance with the norm means an acceptance that said norms are generally legitimized in normative discourse and share a large percentage of support in public opinion polls. Evidence of this can be found in Eurobarometer surveys, legally binding commitments etc.

Third party reactions: Rhetorical reactions by top EU brass in sanctioning norm violators that seriously threaten the EU political landscape. This is an interesting metric because it can be difficult to assess the facticity of EU norms because we do not have *a priori* measure but rather the severity of the responses to norm violators after a norm has been deemed to be challenged. Evidence of this is normally compiled through official government speeches, documents, interviews by key figures involved.

Compliance: level of behavior consistent with the norm in question, the degree to which the norm has been utilized in moments of crisis and stability, by high ranking officials, courts, and other gov't institutions. The emphasis here is on the level of compliance when the norm is challenged.

Implementation: of the norm at all levels (domestic, regional, international) inclusion in organizations, institutions, domestic law. Evidence of this can be found if certain civil society groups are outlawed or if new institutions are set up to combat corruption.

In following Zimmerman and Deitelhoff, I analyze each of these subsets in their detail, finding appropriate evidence for strengthening or weakening norm robustness. The two case studies are an appropriate selection due to way in which perceived norm transposition has occurred in both countries. Both Poland and Hungary were relative success stories of the 1990s

with economic reforms and piecemeal political reforms that pleased many observers. Further the EU commitment to both countries in terms of finance and support by the Community culminated in their membership in 2004. They were touted as success stories and perhaps an example to be followed by other EU hopefuls.

Supplemental Questions

In addition to the central research question, this work addresses some other key questions about rule of law as a norm in the European context as well as broad sweeping generalizations from our case studies.

Under which conditions are challenges to norms likely to decrease their robustness?

How and why do norms remain robust when the forces that presumably maintain them are systematically eliminated? What can we learn from the spread of counter-norms in the EU?

How do illiberal norms take hold? How are they spread and why did they reverse course?

Are some norms more robust than others and what makes them so?

What characteristics of norm defenders are particularly effective?

How does a norm gain strength or weaken when embedded with other norms?

Significance

The EU project isn't going away; it is getting more complex. Recent trends have serious implications of "norm acceptance" for both current EU member states and those wishing to join in the future. What can the EU learn from the Polish and Hungarian experience? Are there elements that have been understudied within the Copenhagen criteria and do they require greater enforcement? If so, how? The EU's expansion is likely to be on hold disappointing many who hoped were next in line, like North Macedonia and Albania. Given the questions at hand and the current crisis this project is timely in its analysis of how and why there is an usurping of rule of

law in certain EU member states. These discussions dominate headlines but also the backchannel communications among member states and are at times the key point of contention.

Consequently, the literature on norms is vast, with some arguing their relevance to political decision-making, others their effectiveness. It is to the latter that this literature contributes. Much of the seminal works on norms focus on norm defenders as the primary drivers or sustainers of a certain norm. However, the mechanisms that we use to evaluate these norms defenders are often understudied or underdeveloped. Additionally, there is little that the existing literature offers when it comes to explaining counter-norm spread. This research contributes to the existing norm literature in two important ways. First, existing theories exercise deep ambiguity in how they are practiced and ultimately suffer from endogenous micro-political level of analysis which in the immediate post-Cold war era of reconfiguration of the international system went largely underestimated and understudied. Poland and Hungary benefited from the EU's desire to enlarge eastwardly and many of its shortcomings when it came to political reforms went unnoticed in the early years. The immediate goal is thus to re-open debates on norm diffusion literature in light of EU populism crisis and broader decline of democracy.

The other goal of the research is to contribute to literature on EU's normative power, which in recent years has been fiercely contested. Scholars from various schools (realist power based explanations as well as liberal institutionalist) have contributed to this debate however most existing analysis concerns the EU's immediate and distant neighborhood, overlooking norm conditions within the EU itself. This research studies norms inside the EU whereas previous literature has measured EU's normative power in relation to its policies in the neighborhood. Additionally, critical scholars have contributed to the field as well with norm contestation seen as the future wave of scholarship. This research adds to this literature as well due to its focus

away from traditionally studied third and second world countries by focusing exclusively on Europe, the nerve center of political norm origination.

Setup of Dissertation

The dissertation consists of seven chapters. It commences with an introductory chapter that outlines the problem at hand, raises a research question and methodology used to answer it. It is followed by a chapter that outlines the importance of the rule of law as a foundational principle for democracies and Europe in particular. This chapter sets the foundational underpinnings of the rule of law in European tradition. Here I provide quantitative evidence on the trends in rule of law development in Central and Eastern Europe (CEE) since 2010 as well as reports from key think-tanks. By understanding how leaders, institutions and society at large conceive the European legal system we can better understand the process of norm transfer. This is succeeded by a chapter on EU's largest enlargement in 2004 and the centrality of adopting rule of law framework. A major point of contention in this chapter is the lack of EU oversight regarding political reform in CEE in the pre-accession era. This chapter puts into context the application of European legal doctrines to national laws and the dynamics at play in the *acqui* process.

These chapters precede and give context to our two case studies in the following chapters on Poland and Hungary. It is here where the four-dimensional norm robustness framework is put to test against the events in the two member states. Chapter six covers EU responses to rule of law challengers and options for the future. This can help us understand the various ways in which norms sustain or perish when faced with significant pushback. Chapter seven concludes with contributions to the literature and recommendations for future work.

CHAPTER II

THE RULE OF LAW AS AN EXISTENTIAL NORM FOR DEMOCRACIES

Rule of Law in Democracies

The Glorious revolution of 1688 received its name largely because of the bloodless nature in which King James II was overthrown and a new King, William of Orange was appointed to the throne. This revolution was significant for at least two reasons. First, the lasting outcome of the revolution led to an irreversible devolution of power away from the monarchy and to the Parliament. The monarchy in England and certainly other parts of Europe was effectively diminished to a ceremonial role and the Parliament held power that was earlier reserved for kings. The other major outcome of the Glorious Revolution was the transformation of the relationship between monarch and subjects, in which the subjects held their representatives in a much more obligatory right, with power shifting to Parliament. This provided the backdrop for John Locke's *Social Contract* between man and government and his *Two Treatises on Government* illuminated the need for a government of all people subject to the same laws regardless of class or status. "Where-ever law ends, tyranny begins" John Locke states in Section 202 of Chap. XVIII in Book II of the *Two Treatises of Government*.²⁰ This set off a precedent in Europe for other Enlightenment thinkers to follow with Montesquieu and later Immanuel Kant making important contributions. It effectively established rule of law as an inalienable right and a necessity for the modern state in which man was ruled by laws and not by other men.

Enlightenment thinkers really brought about a shift towards establishing rule of law as a lasting concept in western liberal democracies. The *Federalist Papers*, the French Revolution, and later

²⁰ Locke, J., Dunn, J., & Grant, R. *Two Treatises of Government and A Letter Concerning Toleration* (Shapiro I., Ed.). New Haven; London: Yale University 2003

British traditions adopted some form of reverence for the rule of law and perfecting it in principle.²¹

In Europe, it is precisely the British with the longest continuous tradition of the rule of law. It began with Locke, provided the exemplar for Montesquieu's work, culturally shaped *the Federalist* writers, and was the home of A.V. Dicey,²² a renowned constitutional theorist and jurist. F.A. Hayek similarly with British ties due to his studies in London stated in his most notable work *Road to Serfdom* that the rule of law "stripped of all technicalities means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."²³

The British tradition brought with it the consistency in exposing the fragility of the relationship between people and government. This has meant that over time expectations and promises became a common feature of political discourse and mostly citizen-centered. This profound feature separates the British even from their counterparts in Europe today. Despite Brexit and its messy divorce with the EU, Britain remains an important cultural centerpiece of mainland Europe, if for at least its legal traditions. A.V. Dicey once stated:

"If however we confined our observation to the Europe of the year 1889 we might well say that in most European countries the rule of law is now nearly as well established as in England."²⁴

German and French traditions are also the other big movers when it comes to development of Europe's legal traditions. German tradition in particular provides insights into how rule of law has justified the power of the state. The French however were more resistant to the adoption of

²¹ Tamanaha B., *On the Rule of Law: History, Politics, Theory*. Cambridge University Press 2004

²² Tamanaha B., *On the Rule of Law: History, Politics, Theory*. Cambridge University Press 2004

²³ Hayek Friedrich A, *The Road to Serfdom*. Chicago University Press 1944. 54

²⁴ Dicey A. V., *An Introduction to the Study of the Law of the Constitution* (MacMillan, 5th ed., 1897), p. 180.

the concept as a core constitutional principle perhaps more in line with the British tradition of keeping power away from government. Both countries however in their formal language exhibit the same definitional character maintaining that the rule of law is state-centric. In German *Rechtsstaat* means state of law; law-governed state, and similarly *état de droit* in French follows the same principle when defining rule of law.²⁵ The absence of reference to the state in the British tradition is not accidental, as the pluralistic forms of law origin and their legitimacy manifest deeply in British modern and past history.

The German concept of *Rechtsstaat* originating among scholars in the 19th century, is widely recognized as the posterchild of European efforts at a legal system which explicitly coined the term rule of law. Other languages now have direct translations of the word within their own language, adopting it within their constitutional documents. However, the German contribution does not end at its 19th century formulation of rule of law. When it comes to the European community, a normative agenda was always in its crosshairs and in the early 1960s this was especially evident with Walter Hallstein, Commission of the European Economic Community's (CEEC) first president. Hallstein is credited with establishing the *European Rechtsgemeinschaft* meaning European community of law. His vision for the Community was wide reaching, with social and political consequences. The *Rechtsgemeinschaft* in its legal form was much more of an ideal than scholars and jurists believed in its beginning stages. It is Europe's source of law in as much as its instrument of integration with a commonality that member states found necessary for integration. The supranational nature of the

²⁵ Krygier, Martin Evald John, Rule of Law (and Rechtsstaat) (August 15, 2013). UNSW Law Research Paper No. 2013-52.

Rechtsgemeinschaft brought with it the overriding effects over national laws, and the agreed conditions at the Treaty of Rome became the genesis of early European common law.²⁶

The concept of *État de droit* in French legal tradition has not had the same constitutional relevance or cultural impact that is evident in the German or British variants.²⁷ The term only came into existence as a direct translation of German word for rule of law. Unlike some of its EU member counterparts, *etat de droit* isn't found in the French National Constitution nor its Court's legal tradition and interpretation of general law. This however does not diminish the underlying currents that exist under the umbrella of the rule of law in France. Albeit no explicit mention of rule of law itself, there is a rich history in French national discourse about separation of powers, legal certainty, and fundamental rights.

The other major contributors to the European legal tradition, at least in the recognized scholarship have been the Central and Eastern European legal traditions. Particularly for our two study countries of Poland and Hungary. Unlike their German and French counterparts, Early Polish and Hungarian traditions resisted Roman law in the name of preserving domestic customary law.²⁸ Both states however were formally shaped by outside empires in terms of legal as well as social traditions: Austrian/Austro-Hungarian, the German (earlier: Kingdom of Prussia), the Russian and the Ottoman. After a brief independence period, the socialist experience of many countries vis a vie Soviet Union halted the widely established legal traditions that were more or less Western oriented. Upon transformation post 1989 these traditions were brought back into the mainstream and constitutionalized. Article 2 of the 1997 Polish

²⁶ Bogdandy A., "Beyond the *Rechtsgemeinschaft*, with Trust - Reframing the Concept of European Rule of Law (January 17, 2018). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-02. Available at <http://dx.doi.org/10.2139/ssrn.3103691>

²⁷ Costa P. and D. Zolo. *The Rule of Law. History, Theory and Criticism* (Springer, 2007)

²⁸ Rafał Mańko, Martin Škop, Markéta Štěpáníková. "Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?" March 2018. *Wroclaw Review of Law, Administration & Economics* 7(2)

Constitution: “The Republic of Poland is a democratic state governed by law implementing the principles of social justice.”²⁹

All in all, it seems that it was the 19th century which was crucial for Central Europe as being its formative period. This is because precisely at this moment the legal histories of Central European lands began to experience a common development, which brought them together for 200 years and still keeps them together. The commonality of this path has the following elements: 1) reception of foreign (Western) laws in the 19th century²⁹ (against the background of a tendency towards non-reception of Roman law before, as indicated above); 2) independence and efforts at building a national legal culture; 3) Actually Existing Socialism; 4) post-socialist transformation; 5) EU integration.³⁰

Definition and Embeddedness with Other Core Norms

Theorists as well as statesmen have tried to encapsulate the meaning of the rule of law as well as its intended purpose. Early Greek philosophers Aristotle and Plato were seemingly at odds with definitional character of the term. For Aristotle rule of law and not by man was essential but warned that its successful application required a just regime to enact and administer the laws in question.³¹ This would be in his eyes the difficulty in wielding justice if the powers in charge interpret laws for their own gain. Plato’s enduring contribution to the rule of law can best be summed up in his take in the *Statesman* where he defines use of law in government as: “like a stubborn, stupid person who refuses to allow the slightest deviation from or questioning of his own rules, even if the situation has in fact changed and it turns out to be better for someone to contravene these rules.”³²

The concept of the rule of law however, spans political tradition for many years and has often been weaved in as a culmination of other traditions that define political morality including

²⁹ Pech, Laurent, The Rule of Law as a Constitutional Principle of the European Union (April 28, 2009). Jean Monnet Working Paper Series No. 4/2009

³⁰ Ibid., 11

³¹ Aristotle, *The Politics* (c. 350 BC), Benjamin Jowett (trans.), <http://pinkmonkey.com/dl/library1/gp017.pdf>

³² Plato, *The Statesman*, (c. 370 BC), Alcibiades (Cambridge University Press., 2001)

human rights, democracy, and economic freedoms. The presentation of the rule of law as such has guarded it across the years as new contestations and ways of thinking have developed. The Enlightenment Era brought not only some these same debates back into the spotlight but also shed light on other core principles mainly around nation building. The rule of law is frequently cited as the key foundational principle for any new state or democracy.³³ This was especially important for post socialist states of Central and Eastern Europe whose contemporary rule of law problems have a long-standing history. The debate has shifted from a focus on domestic sources of law implementation and external influences on standing traditions. The post 1989 era saw the CEE countries bring in new reforms that not only transformed the social aspects of rule of law but also its political importance. Polish as well as Hungarian conditions both reflect a deep commitment to the importance of rule of law and the EU has from the onset emphasized the need for serious engagement on this topic.

The European Community in establishing its criteria for membership has viewed the rule of law as an existential norm, a state of being that simply new members must adhere to. The focus on reforms in potential member states has been pioneering. Organizations like the United Nations have adopted similar measures in their fight for rule of law norms in transitioning democratic states. The criteria and eventual law that EU member states follow are eerily replicated in United Nations formal criteria for rule of law. The criteria below, articulated by the United Nations Secretary-General in a report to the Security Council in 2004, provide a blueprint for Rule of Law Indicators among transitioning states.

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as

³³ Barro, R., 2000, "Democracy and the Rule of Law", in *Governing for Prosperity*, B. de Mesquita and H. Root, New Haven: Yale University Press.

well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability vi The United Nations Rule of Law Indicators to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.³⁴

Establishing something as a norm is not a one-off event, there is a series of generational contestations that a norm must endure in order to cement itself as an existing norm. Even with this, the process of contestation is never ending and the norm requires more strengthening through institutions, courts, and leadership rhetoric. The majority of scholarly work on norms suggests that they're always contested and that its defenders must always reiterate and uphold the norm in order to prevent its subversion. The rule of law norm within the EU was not just a byproduct of ideologues after the second world war but rather a constellation of national democratic traditions and perfecting of liberal traditions. A norm is labeled as strengthening when there is a rising number of legal ratifications and verbal sanctioning of violations by norm defenders. In practice based dimensions, compliance is universally accepted and there is high implementation across domestic, local and international levels.³⁵

The EU's mechanisms for addressing norm-violators whether in finance reform, corruption, crime or civil society erosion have been labeled selective and formal proceedings against member states are rare. This however does not mean that enforcement mechanisms are not in place and are not used in exceptional cases. For instance, the EU's preferred way of dealing with norm violators is rhetorical often done through public discourse, placating the norms defenders with strong rhetoric against the norm violator. This causes several outcomes

³⁴ Rule of Law Indicators: The United Nations Implementation Guide and Project Tools. Report of the Secretary-General on the rule of law. 1st Edition. 2011
https://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf

³⁵ Nicole Deitelhoff, Lisbeth Zimmermann, Norms under Challenge: Unpacking the Dynamics of Norm Robustness, *Journal of Global Security Studies*, Volume 4, Issue 1, January 2019, Pages 2–17

one of which traditionally has been norm strengthening. In recent times, despite the rise in challengers to various EU norms, this has remained the source of EU response.

Robust norms are generally legitimized in normative discourse and share a large percentage of support in public opinion polls. Europeans responding to Eurobarometer survey in September 2018, showed that satisfaction with democracy in the EU is generally high. In the survey 89 percent of EU-wide respondents were satisfied or very satisfied with freedom and speech and free and fair elections in Europe. “More than half were satisfied with media diversity (58 percent), the opportunity for civil society to play its role in promoting and protecting democracy (57 percent) and the rule of law (57 percent). In each case at least one in ten said they were ‘very satisfied’. More than three quarters of respondents (76%) considered that civil society has an important role in promoting and protecting democracy and common values. In particular, almost one third (32 percent) answered that the role of civil society in this area is very important. Just over one in ten (13%) thought its role is not important, although only 3% said it is not important at all. Although these figures are EU-wide and will vary by state, they show considerable public support for the EU’s core norms regarding human rights, rule of law, and equality. Within this particular study, as part of the 2019Eurobarometer survey the rule of law was defined as “the respect for independence of the judiciary, the integrity and impartiality of the electoral system.”³⁶

During the axiom of Maastricht negotiations in the fall of 1992, there were many skeptics as well as hopefuls ardently looking at public opinion polling about many of the critical issues on the table. One of those critical issues was the expansion of the duties and responsibilities of the

³⁶ European Commission Public Opinion Polling 2018.
<https://ec.europa.eu/comfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2018/surveyKy/2198#p=1&yearFrom=1974&yearTo=2005&surveyKy=2198>

European Court of Justice. Although the Court itself was relatively little known outside of policymaking circles, its importance to the treaty negotiators cannot be understated.

Three surveys of the mass public conducted in 1992 and 1993 in each of the member states were of critical orient of study. Initial findings for support for the European Court of Justice existed and the relative optimism about its capabilities were evident.³⁷ National courts however remained as the sole arbiter of legitimacy when it came to institutional trust and backing. National courts were more desirable form of adjudication and enjoyed greater legitimacy relative to the European Parliament or the European Court of Justice. During the Autumn of 1992 at the height of the fury over Maastricht the ECJ had a moderate degree of visibility; it was not as well-known as the European Parliament but was far from unnoticed. On several items designed to tap commitment to the institution, the ECJ had more enemies than friends, and thus did not stand on a bedrock of institutional legitimacy.³⁸ For instance, of those who were dissatisfied with the Court's performance, only a small proportion expressed a willingness to retain the Court if it continued to make objectionable decisions — the *sine qua non* of diffuse support for an institution.³⁹

Rule of Law as Foundational Principle of EU and its Legal Basis

The rule of law is declared in Article 2 of the Treaty on the European Union (TEU) as one of its foundational principles and thus is a robust and compulsory obligation of all its member states. Article 7 is loosely related to Article 2 in that if states are found in a serious and persistent breach of those values outlined in Article 2 then disciplinary action can be taken

³⁷ Richard C. Eichenberg, and Russell J. Dalton, 'Europeans and the European Community: The Dynamics of Public Support for European Integration', *International Organization*, 47 (1993), 507-534

³⁸ Gibson, J., & Caldeira, G. "Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis." *British Journal of Political Science*, 28(1), 63-91. 1998

³⁹ *Ibid.*, 1

against them. Rule of law is also one of the EU's foreign policy goals as stated in Article 21, and EU's behavior to that end is in large part inspired by its own transformation. The rule of law is also reiterated by the Preamble to the Treaty and the Charter of Fundamental Rights of the EU. However, there is no explicit definition of the rule of within any formal Treaties or EU legislation that would delegate a specific definition.

The official term or use of "rule of law" within EU treaties was established at the Treaty of Amsterdam in 1997. Some scholars have pointed to this fact as validation of how and why the EU is facing its rule of law crisis today. The relative late addition of the verbiage and the relative lack of definitional character have meant that the EU is at an impasse when it comes to addressing the naysayers. Albeit the 1986 *Le Verts* judgment came a decade or so sooner, it was still considered to be a relative late addition since the foundational treaty establishing the Union was signed in 1951 in Rome. Some scholars argue that the relative late progress on some of the key ideational perspectives about the EU stem from the reality that member states were facing at each stage of the process. On the one hand there is the idea of Europe and the other is the reality and domestic pressures that come with giving up sovereignty in such a voluntary fashion. The supra national character of the EU and its early ideas as articulated by Hallstein or even Jean Monnet were always a thorny issue with states opting to negotiate on the more agreeable items such as trade and tariffs. The negotiations regarding the idea of Europe (common identity, rule of law) were to come much later, however remained in the periphery early on without much substance.

Some critics of EU's responses in light of contemporary rule of law issues reflect on this earlier period as a missed opportunity, moreover as a key reason for why the rule of law is in

peril.⁴⁰ They argue that without an explicit definition within any EU treaty of the rule of law, the character of the word has meant different things to different interpreters. Moreover, the EU has never put in safeguards against the type of rule breaking we see today when it comes to the rule of law specifically. Even Article 7 they argue is a relative newcomer to the game only being firmly established at Maastricht in 1992. The EU cannot as it had for nearly four decades rely on the goodwill of states to abide by its rules and implement EU constitutional law arbitrarily. Perhaps even more alarming to critics has been the release of the EU's "A New EU Framework to Strengthen the Rule of Law" in 2014⁴¹, the first substantial document that recognized the need for a comprehensive approach to the rule of law question. The main characteristics of the new rule of law framework⁴²:

The new framework is fully based on the current EU Treaties and complements existing instruments, notably the Article 7 procedure and the Commission's infringement proceedings. This of course does not exclude future developments of the Treaties in this area. It is focused on the rule of law. The rule of law is the foundation of all values upon which the Union is based. By guaranteeing the respect of the rule of law, the protection of other fundamental values will be upheld. The Commission has taken a broad definition of the rule of law, drawing on principles set out in the case law of the European Court of Justice and the European Court of Human Rights, essentially meaning a system where laws are applied and enforced (see Annex 2).

⁴⁰ Petra Bárd and Anna Śledzińska-Simon. Rule of law infringement procedures: A proposal to extend the EU's rule of law toolbox. CEPS Paper in Liberty and Security in Europe No. 2019-09, May 2019

⁴¹ Communication from the Commission to the European Parliament and Council, 'A new EU Framework to strengthen the Rule of Law', available at http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf

⁴² European Commission presents a framework to safeguard the rule of law in the European Union Press Release https://ec.europa.eu/commission/presscorner/detail/en/IP_14_237

The framework can be activated in situations where there is a systemic breakdown which adversely affects the integrity, stability and proper functioning of the institutions and mechanisms established at national level to secure the rule of law. The EU framework is not designed to deal with individual situations or isolated cases of breaches of fundamental rights or miscarriages of justice.

Equality of Member States: the framework will apply in the same way in all Member States and will operate on the basis of the same benchmarks as to what is considered a systemic threat to the rule of law. The EU framework establishes an early warning tool to deal with threats to the rule of law, allowing the Commission to enter into a dialogue with the concerned Member State in order to find solutions before the existing legal mechanisms set out in Article 7 of the Treaty are to be used. The European Commission plays a central role in this new rule of law framework as the independent Guardian of the Union's values. It can draw on the expertise of other EU institutions and international organizations (notably the European Parliament, the Council, the Fundamental Rights Agency, the Council of Europe, the Organization for Security and Co-operation in Europe [OSCE], etc.).

Treaty of Rome 1957

Shortly after the devastation of the second world war the Council of Europe was created as a regional intergovernmental organization in Western Europe. Its primary goal was to “create a common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law.” From there the Council of Europe would be responsible with creating conventions that would ensure further integration on some of these core principles. Notwithstanding individual state interests such as economic prosperity, the early states sought to establish an identity that was more in line with cooperation

and coexistence rather than what they had experienced in the second world war. This was a determining factor in many of the early negotiations on what the face of the EU would look like. The early convention in 1950 within its Preamble included language that was similarly eschewed in the founding charter of the Council of Europe. The 1950 Preamble to the Convention states that "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."

Shortly thereafter in 1952 a *Comite detudes pour la constitution europdenne*, a group composed primarily of scholars, was established to assist in the drafting of a constitution or statute for a new European Political Community.⁴³ The scholars featured work on human rights and rule of law prominently. Although their work was not formally adopted due to objections of France, a more limited version was adopte at Rome in 1957. Much like the treaeties after it the Treaty of Rome focuses on economic integration rather than on rule of law or other human rights. With the conclusion of the meeting in Rome, the European Economic Community was officially established with France, West Germany, Italy, Belgium, the Netherlands and Luxembourg as the founding members. The Treaty of Rome was silent on rule of law protections or human rights protections in general. It appears that fundamental rights were not discussed extensively although they were at one point raised by the German delegation.⁴⁴ Konrad Adneuer of Germany, Guy Mollet and earlier Jean Monnet of France, and Paul Henri Spaak of Belgium

⁴³ Defeis, Elizabeth F. (2010) "The Treaty Of Lisbon And Human Rights," *ILSA Journal of International & Comparative Law*: Vol. 16 : Iss. 2 , Article 2.

⁴⁴ *Ibid.*, 1214

were the influential EU pioneers who narrowed gaps on many of the crucial issues prior to the eventual signing of the treaty in Rome.⁴⁵

Although language specific to the rule of law was not featured, it remained an essential element binding the negotiations. The signers were signing an open ended commitment to integrating Europe and creating a common space of citizenship. This open-endedness or flexibility within its official documents is what perhaps separates the EU from previous rigidity that government documents vastly employ. In this sense, the rule of law is an aspiration rather than something tangible that policymakers were able to formally postulate. The story of the treaty of Rome is one of classic debates between the ideal versus the real. On the one hand, negotiators had a normative idea of Europe transplanting national identity with a common European identity. On the other hand, the reality was that each state had interests and tangible needs that required hard bargains and negotiations, apart from the idealistic creation of new identity. To a large extent this is what continues to twist and turn the wheels of contemporary EU. The creation of the Court of Justice at negotiations implicitly suggested a respect for the rule of law and set the expectation that the courts and EU agreements are binding for all signatories. This is an important step in furthering the norm of rule of law in later contexts.

Maastricht 1992

The 1992 Maastricht negotiations created the European Union with three important pillars: The European Communities, Common Foreign and Security Policy (CFSP), and police and judicial cooperation in criminal matters (Justice and Home Affairs). The preamble of the Maastricht Treaty reaffirmed the EU's 'attachment to the principles of liberty, democracy and

⁴⁵ Laurent, P. (1972). The Diplomacy of the Rome Treaty, 1956-57. *Journal of Contemporary History*, 7(3/4), 209-220.

respect for human rights and fundamental freedoms and of the rule of law'.⁴⁶ The major driver of negotiations among member states and timing of those negotiations were economic, with strong willed leadership across the continent signaling the need for a reframing of the EU. Helmut Kohl of Germany, Jacques Delors as the President of the European Commission and François Mitterrand of France played key roles in structuring policy arguments to come. While the brunt of the work was concentrated on fiscal policy, these leaders and the institutions they sought to improve (within EU community) were based on a holistic belief about bridging an ever closer union. The process itself can be conceptualized as a reciprocal, non-deterministic, relationship between ideas and interests. Interests were shaped by ideas and ideas were used to promote interests. Those who sought to improve the position of their national banks and limit the influence of fiscal technocrats during negotiations is a feature of uniting all three key figures.

Despite Maastricht negotiations being dominated by economic and fiscal policy naïveté, scholars have emphasized the role of policy entrepreneurs as important promoters of ideas.⁴⁷ Without their inputs and decisive action that effectively legalized the concept of “rule of law” within the Preamble of TEU, the negotiations would have perhaps drifted so far out as to not include this important provision. The major purpose that policy entrepreneurs had on their side was the supra nature of EU law relative to national laws regarding fiscal policy. It had to become explicitly known to all member states that respect for judicial processes and existing EU laws were fundamental to EU's success in the fiscal arena.

It is important to note that the Maastricht Treaty did not adopt the language of the Court of Justice in the use of the term '*Communauté de droit*' (as adopted by the Le Verts judgement

⁴⁶ Raube, K., Burnay, M. & Wouters, J. "By way of introduction: the rule of law as a strategic priority for EU external action-conceptualization and implementation of EU law and policies." *Asia Europe Journal* 14, 1–6 (2016).

⁴⁷ Dyson, Kenneth H. F. | Featherstone, K. *The road to Maastricht: negotiating economic and monetary union*. Oxford: Oxford University Press 1999

earlier in 1986). In the French and German versions of the Treaties, the Union is founded on the principles of *État de droit* and *Rechtsstaatlichkeit*. The use of the term *Communauté de droit* in the Court of Justice, as distinct from *État de droit* and *Rechtsstaatlichkeit* which emphasize the state, was likely an effort to distance the Court from the state-centric concepts of the rule of law, and inspire an EU-centric understanding of the rule of law.⁴⁸

Lisbon 2007

Despite Maastricht being a success story in terms of establishing a guiding principle on the rule of law, it still lacked an actual bill of rights or charter by which rule of law criteria were defined. With the entry of Lisbon Treaty in 2009, a new Charter of Fundamental rights was established that would not only serve as protector of citizen fundamental rights but also of its member states. This was a significant breakthrough in EU relations. The treaty not only built on previous work of the European Court of Justice, Maastricht, Amsterdam and other signed agreements but sought to compile them into a coherent EU policy. It was at this stage that the rule of law framework perhaps for the first time was being taken in context independent of human rights doctrine of the EU. For years and throughout policy circles, the language associated with rule of law was generally in line with other fundamental human rights. This is not accidental as the early EU policymakers sought to make this explicit connection to human rights emphasize its importance. Negotiations at the Treaty of Lisbon in 2007 were a critical juncture when it came to upholding the rule of law. First, the enlargement of 2004 added new member states with mixed legal traditions regarding rule of law and human rights. The preliminary data emitting from the newly acquired member states was not what some EU

⁴⁸ Pech, Laurent, *The Rule of Law as a Constitutional Principle of the European Union* (April 28, 2009). Jean Monnet Working Paper Series No. 4/2009.

optimists were hoping for. The relative exercise in more integration was seemingly needed once again and a re-postulation of EU positions on key principles.

Different Interpretations by EU Member States and Rule of Law Impasse

In the summer of 2014, Hungary's Prime Minister Viktor Orban delivered a speech in which he signaled that "the new state that we are constructing in Hungary is an illiberal state, a non-liberal state" which would "not reject the fundamental principles of liberalism such as freedom."⁴⁹ He further argued that he did not believe "that it is impossible to construct a new state built on illiberal and national foundations within the European Union."⁵⁰ Within that same speech several other key remarks were made that explicitly butted against fundamental EU principles. Orban described the West as weak and questioned the social values they bring to the fore including corruption, sex and violence. He prided himself in seeking alternatives to liberalism, reneging on his commitments to the 1989 anti-communist cause and suggesting that the liberal path of Hungary for the past thirty years has not produced the success it can achieve on its own. He further saw the future in countries who follow alternative paths to prosperity and lauded Russia and China and Turkey as exemplary: "There is a race underway to find the method of community organization, the state, which is most capable of making a nation and a community internationally competitive.... [T]he most popular topic in thinking today is trying to understand how systems that are not Western, not liberal, not liberal democracies, and perhaps not even democracies, can nevertheless make their nations successful."⁵¹

⁴⁹ Pech, Laurent and Scheppele, Kim Lane, *Illiberalism Within: Rule of Law Backsliding in the EU* (August 23, 2017). Cambridge Yearbook of European Legal Studies

⁵⁰ Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, July 30, 2014:

<http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktororban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>

⁵¹ Puddington A, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, Freedom House, June 2017, p.35

The tenacity with which Orban has eschewed anti-EU rhetoric has caused a war of words with EU officials and formal sanctioning by the European Parliament in the form of triggering Article 7 proceedings for serious breach of EU fundamental law. At the treaty of Amsterdam in 1997, the first version of Article 7 was formed in light of Europe's expansion to the east. Many observers and experts viewed the need for such a provision in the EU treaty due to questionable practices of many Central and Eastern European states regarding human rights and rule of law.⁵² Article 7 provides the EU with a buffer that some states would not revert to old habits and bring the rest of the EU with it. The article was further enshrined in Paris and Lisbon agreements thereafter in 2003 and 2007 respectively. The inclusion of Article 7 at Amsterdam was important for at least two reasons. First, existing member states felt more confident with this safeguard in place being that the union was about to take on ten new members in the near future. Second, article 7 proceedings cover a wide array of behaviors by member states that could constitute to be in violation of fundamental values of the EU. This extends beyond simply Union law but also includes domestic and foreign acts by member states governments that are subject to upholding EU's core values.

Orban views his behavior as in line with that of the people of Hungary. His popular support has garnered even more radical behavior from 2010 onward. The main justification as is common in populist and authoritarian leaders is seeking a villain for whatever current dilemmas face the country. For Hungary, those villains⁵³ can be found in immigrants, European elite, George Soros or opposition parties. He has attacked EU leadership including Germany's Angela Merkel, France's Emmanuel Macron, EU's High Representative Jean Claude Juncker, EPP's

⁵² <https://www.politico.eu/article/hungary-eu-news-article-7-vote-poland-rule-of-law/>

⁵³ Puddington A., *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, Freedom House, June 2017.

Manfred Weber. These have been met with reprisal and an equal exchange of words. In March, when the EPP voted to suspend Orbán's Fidesz party from the coalition, it did so nearly unanimously with even Austria's now ousted Sebastian Kurz backing the suspension. Frans Timmermans, one of First Vice-Presidents of the European Commission and European Commissioner for Better Regulation, Inter-institutional Relations, the Rule of Law and the Charter of Fundamental Rights said of Hungary: 'The very functioning of the Union and its internal market is endangered if in one of its Member States the fundamental values, in particular the rule of law, are no longer respected.' Frans Timmermans, 12 April 2017

This peculiar stance is common within EU circles, most view Orbán's Hungary as slipping into autocratic rule, with the rule of law being the final straw. Fidesz's reforms outright create an illiberal state and the new constitution put in place under Orbán's rule does exactly that. Role models to follow as in Putin's Russia and Erdogan's Turkey, Orbán has found a way to completely weaken the opposition and make it impossible for their return to power in the near future. The institutions set up are designed to turn the existing political system upside down.

As usual, when the leaders – when the members of the great political elite – turn against their own people, there is always a need for inquisitors to launch proceedings against those who voice the opinion of the people. In our earlier four-year term, the European Union had a grand inquisitor, and her name was Madame Reding. That grand inquisitor failed, and now they've found a new one: the new grand inquisitor's name is Timmermans ... at this point in time, Poland is chosen as the inquisition's main target in order to weaken, to destroy, to break national governance. Viktor Orbán, 22 July 2017⁵⁴

Law and Justice Party (PiS) in Poland seemingly learning from the Hungarian experience employed very similar tactics on its way to electoral victory in 2015. According to their leaders Poland was in a state of bog and hampered by EU's oversight crushing Polish fundamental values in the end. Their painted image of Poland for the past 15-20 years was a stark departure

⁵⁴ Ibid., 35

from what scholars and generally EU political elite thought of Poland. Generally, Poland was regarded as one of the primary success stories of EU's eastern enlargement and democratization efforts following the end of the Cold war. But PiS changed all of that, and its first opportunity came after the 2015 elections in which they came in with a parliamentary majority. A series of changes were then in line for the Polish court system and its functioning vis a vis the EU.

The first crisis to emerge concerning the independence of the courts came shortly after the elections in which PiS had a resounding victory. In Polish, Sejm, the parliamentary body of the Polish government, PiS held 235 legislators out of 460 deputies.⁵⁵ Sejm voted to void the election of five new members of the country's constitutional tribunal. This vote they claim was in protest against the acts done by the previous government who they accuse of appointing new judges when opinion polls showed that PiS was likely to win the October 25 parliamentary elections. President Andrzej Duda followed up on the work of the Parliament and refused to swear in the new judges. Instead, Duda and the Parliament chose to select five new members in the place of the old new five. This set of actions has been labeled as a coup by some in Europe and domestic opposition. PiS was accused of endangering the rule of law by packing the court with party loyalists. In December, the Polish constitutional tribunal ruled that the previous government and PiS were partly to blame for the crisis. It ruled that two judges were selected improperly by the previous government but that the three others were selected in accordance with the constitution by the lame duck parliament.

Unhappy with the Court's ruling and seemingly intent on revamping the existing structure of its top court, PiS sought more changes. In October of, in one of the first acts of what is yet to come, PiS with its super majority in Polish Parliament passed a law that reshapes the

⁵⁵ Karatnycky A. "Give PiS a chance" Politico, December 15, 2015.
<https://www.politico.eu/article/give-pis-a-chance-poland-kaczynski-andrzej-duda-szydlo/>

functionality of Poland's Constitutional Tribunal. The new law requires a two-thirds majority instead of a simple majority and hearings require more judges than before, acts that by design will slow the work of the judiciary. This was just the tip of the iceberg as the subsequent moves abolished the court's neutrality. National Judicial Council, which appoints judges, is in total control of PiS-run Parliament. This same National Judicial Council has power to suspend judges through a new disciplinary chamber. When the Polish judges submitted a request to EU's Court of Justice for a ruling and recommendation as to the validity of the chamber, the ECJ set out criteria that would test if the chamber violated judicial independence. Using those criteria, the Polish Constitutional Court ruled that the establishment of the chamber was in violation EU standards. Still the executive and legislature both refuse to act on the matter and implement the recommendations.

Since these events, PiS has continued to seek changes to Polish judicial system, one of which was a mandatory retirement age for judges. This would be a significant departure from existing Polish law that mandates judges serve until the end of their term. While this notion was eventually stopped by the ECJ and judges returned to their seats, the idea of bringing the judiciary under government influence has not. The chief prosecutor in the country is also its Justice Minister and a PiS member. The majority of Poles however in September 2019 poll view PiS reforms as a threat to judicial independence. In that same poll, 45 percent had a negative opinion of the courts with only 32 percent as positive. Jarosław Kaczyński, the leader of PiS and Poland's de facto ruler, has engaged in a war of words with top EU officials in similar vein to Orban in Hungary. Moreover, the two leaders view each other as allies and have publicly stated that they will not vote against the other when it comes to EU chapter 7 proceedings.

For Duda and Kaczyński, the EU's intrusion into Polish society's way of life is the main driver of the discord. In similar fashion to Orban, they have created a villain in the EU and its liberal traditions that they only alternative seems to be majority rule in Poland. In attacking the Polish constitutional courts and revamping its functionality, PiS is eliminating the first line of defense against potential repercussions for their plan to depart from liberal state function. To that end, they have moved as far as back as rescinding previous decisions and villainizing the work of the courts in previous governments. Speaking about a 2012 Court decision to increase the retirement age to 67 President Andrzej Duda made the following comment: "I have no doubt that the Constitution was also violated by the actions of the Constitutional Tribunal, when it ruled that increasing the retirement age of all Poles against their will is in accordance with the Constitution, because that's what it ruled. Was the Tribunal acting in the name of Polish society and the Polish state? Or did it rule for some narrow ruling caste, aligned with that group's interests at that time? I think that everyone can answer this question."⁵⁶

The Polish case has some unique features however that separate it from the Hungarian experience. While true that PiS and Fidesz share a commonality in that they're conservative with strong anti-EU stances, PiS for many years prior to taking over government was in the opposition often voting in pro-EU measures. Their leader, Jaroslaw Kaczyński is known for his pragmatism and like many other top leaders in the party spent decades in the fight against communism and oversaw the country's transition to democracy in 1989. This experience has left many in the party to be skeptical of those in charge, stemming from their time spent as dissident anti-communist activists. During their times spent in the opposition, their party would be infiltrated by informants and pro-communist factions, a defining mark on some politicians within the party

⁵⁶ Rule of Law Poland

<https://ruleoflaw.pl/president-andrzej-dudas-attack-on-polish-constitutional-court/>

even today. Many hold a conspiratorial view of Polish domestic and foreign politics. Their interpretations of existing constitutional law rest on the idea that Poland was perhaps too much infiltrated by the liberal elite during its transition to democracy and that some of those legacies need to be unwoven. The people of Poland seem to be buying the pitch by PiS as public opinion polling shows support for PiS mainly due to some of its welfare programs that affect majority of the voting population. Paradoxically however, public opinion polling also shows an overwhelming pro-European stance by survey respondents in Poland. There is also a share of the people that believe in the good old days of when the government would provide social protections. Others support PiS because there is a belief that a less obstructed government would be more efficient and pragmatic when resolving key issues important to the country.

There are also the leftover effects of the accession negotiations done throughout the 1990s. Many Poles were elated at the prospect of joining the European Community in the early nineties promising social and political reforms as well as economic prospects for its struggling economy. The percentage of those in favor of the accession in 1994 was about 77%, jumping as high as 80% in 1996.⁵⁷ These numbers however started the decline as the negotiations intensified. By the year 2000, only 55 percent of respondents said they were in favor of EU accession. Reasons for this are plethora and a wide array of scholarship has focused on this issue, with the majority pointing to the stark difference in a “general idea of Europe” that Poles initially agreed upon with the reality of specific reforms needed that pushed many away once information became more available. This suggests an underlying current of intrusion that many Poles felt about the EU and something that has perhaps permeated through contemporary politics.

⁵⁷ Kucharczyk J.. Poland's Road to Europe in the Eyes of Public Opinion <https://www.iwm.at/transit-online/polands-road-to-europe-in-the-eyes-of-public-opinion/>

The center-right opposition in Poland, the Civic Platform (PO), has been marginalized since the 2015 elections and since the departure of its top leader Donald Tusk to the Presidency of the European Council. It has struggled to find a voice and a coherent strategy that is appealing to the Polish voter. Its lack of ideas⁵⁸ and forward thinking has made it a reactionary party, only reacting to initiatives of the PiS which enjoys the upper hand since taking over some of the country's top media outlets and influential institutions. The Civic Platform had been the dominant force until the 2015 PiS victory who had gained respect of Brussels but lost its appeal to those affected by globalization and economic changes in Polish society. The mismanagement of key economic industries and political dishonesty by 2015 had turned many Poles away and the party simply stagnated. The “illiberal democracy” project of the Poles seemingly will continue for quite some as the safeguards to a once liberal Poland are systemically removed.

EU's Normative Project

EU's external promotion of its ideas, transformation, and its value system make it a significant area of study if at least on a normative scale. To this end, the EU has been described as a “normative power”⁵⁹ and a “cosmopolitan”⁶⁰ power. Despite the normative nature of some of its external action programs the EU internal workings are the appeal to the outsiders. This being its structure, operability of the various institutions and most importantly adherence to fundamental values of human rights and rule of law. Often the two norms have been used interchangeably with many of the EU reports coupling rule of law norm in conjunction with

⁵⁸ Wilcek M. “Poles at the polls: Five things to know” October 11, 2019. Al Jazeera. <https://www.aljazeera.com/news/2019/10/11/poles-at-the-polls-five-things-to-know>

⁵⁹ Manners, Ian. “Normative Power Europe: A Contradiction in Terms?” *Journal of Common Market Studies* 2002 Volume 40. Number 2. pp. 235–58

⁶⁰ Forsberg T. “Normative power Europe, once again: a conceptual analysis of an ideal type” *Journal of Common Market Studies* 2011 49(6):1183–1204

human rights. This has changed in recent times, notably with the 2014 adoption on the new framework to protect the rule of law. This debate over whether to continue its relative close connection with human rights or disembark as a standalone principle interestingly has not been the subject of major debate. Intuitively the standalone principle in theory reflects a nuanced and serious approach that allows for greater engagement of all EU institutions. It can on the other hand be risky as disassociating with “human rights” language when many of the rule of law violations coincide with human rights violations as well. But the Europeans have used these terms interchangeably and the fragmented and varied nature of addressing norm violators has some alarmed.⁶¹

Unpacking Europe’s multi-layered cake of core norms with many stakeholders at each level adds to the complexity of analyzing impacts of their contestation. The difficulty lies in avoiding the cliché of privileging one component over another with EU member states responsible for assisting fellow member-states in upholding EU values while at same time protecting their own citizens from such attacks. Finally, responding to challengers from the outside and events that shape the landscape of EU politics places an additional burden on member-states. This threefold dynamic manifests in different ways and separately for member states. In light of these dynamics, it can be difficult to assess the facticity of EU norms because we do not have *a priori* measure but rather the severity of the responses to norm violators after a norm has been deemed to be challenged. The extent of that norm being challenged places another roadblock to correctly assessing whether a norm has met the criteria for response. These criteria are often situational and vary in context, austerity measures put in place against Greece were deemed by some to be way too harsh relative to that of Ireland or Italy. The unequal and often

⁶¹ Argyropoulou Venetia. “Enforcing the Rule of Law in the European Union, Quo Vadis EU?” *Harvard Human Rights Journal*. Volume 32, Spring 2019

situational responses by the EU have portrayed an image of an unstable EU, unable to act as a collective and instead as an institution that selectively engages its norm violators. On the other hand, the EU leadership is much like judge in a courtroom, only able to respond to certain cases which it subjectively believes is worthy enough of recognition because it seriously threatens the political landscape of the EU project. To that end, it has its defenders in the form of leadership from Brussels and pro-EU stances from officials across the continent.

The norm defenders are also ones that issue formal EU declarations and serve in the capacity of informing the public about happenings within the EU. To this end, EU president, members of the Council play a critical role. Heads of state such as Germany and France who make a large portion of EU parliament also have the responsibility of defending EU values when they are under threat. Germany's Angela Merkel as well as France's Emmanuel Macron have remained largely pro-European when it comes to addressing Hungary and Poland. Speaking in response to EU's inquiry into rule of law obstruction in Poland, Merkel stated the following about the rule of law in EU: "This is a serious issue because the requirements for cooperation within the European Union are the principles of the rule of law."⁶² Her affirmation here was similarly echoed by Macron who said that Polish citizens "deserved better" from than a government who is at odds with the EU. Similar sentiments have been common throughout pro-EU circles that eventually have led to article 7 proceedings against Poland. In the words of President Jean Claude Juncker, the President of the European Commission: "The Commission is determined to defend the rule of law in all our Member States as a fundamental principle on which our European Union is built. An independent judiciary is an essential precondition for membership in our Union. The EU can therefore not accept a system which allows dismissing

⁶²Angela Merkel: we cannot hold our tongues on risk to rule of law in Poland. The Guardian <https://www.theguardian.com/world/2017/aug/29/angela-merkel-poland-judicial-reforms-courts>

judges at will. Independent courts are the basis of mutual trust between our Member States and our judicial systems.”⁶³

The EU has various instruments and subcommittees that promote rule of law and democracy. Besides Article 7 and the New rule of law Framework set out in 2014, the EU Commission, EU Council, Parliament, all have various subcommittees that are tasked with reporting on and defending EU core values. The EU Commission has infringement procedures it can evoke against member states it deems to be in violation. However the existing mechanisms seem to follow a general tendency of all EU institutions to assume that stalling solves problems.⁶⁴ This lack of quick and decisive action is what many are frustrated with. Additionally, even the newly unveiled Rule of Law framework in 2014 is seemingly designed in similar fashion when problems are slow moving and time is on the side of the EU. Within this framework there is ample time for the EU to gather all relevant information and find incriminating evidence against the violating state through various mechanisms. It gives time to the EU to effectively lead a campaign against the violating state and form an alliance of states that base their position on the objective findings of the research commissions. This time is also something that serves the violating state as it similarly is able to muster support during the time of the investigation all the while painting the image of an unable EU.

Subcommittees and EU Instruments Tasked with Upholding Core EU Values

Critical engagement by the EU in regards to the Hungarian case began as early as 2011. Then EU Commission President José Manuel Barroso in a customary joint press conference with Viktor Orban coming in as the Council’s rotating president, Barroso criticized recent Hungarian

⁶³ Pech, Laurent and Scheppele, Kim Lane, *Illiberalism Within: Rule of Law Backsliding in the EU* (August 23, 2017). *Cambridge Yearbook of European Legal Studies*. p.4

⁶⁴ *Ibid.*,17

laws targeting media openness and independence. This public chiding was followed by formal inquiries into the new Hungarian government's attempts to disrupt core EU values. When the Barroso Commission ended its term with largely the status quo remaining if not getting worse, the Juncker Commission took over as the lead guard against threats to EU values. The 2014 landmark "rule of law framework" established by the commission mostly as response to Poland has several elements. Having put forth three recommendations to Poland regarding the independence of its judiciary, the Commission was left unsatisfied with continued 7(1) TEU for the first time by submitting a Decision of the Council on the determination of serious breach of the rule of law by Poland.⁶⁵ Pursuit to the article 7 proceedings, two hearings were held however not resolution was reached as Hungary vetoed its findings. This led to the Commission sending the case to the European Court of Justice where the court issued a ruling finding Poland in breach of EU law regarding removability of judges by forcing an early retirement age. From there the decision has stalled as the Commission has not moved to sanction any Polish officials or the government itself in a tangible way.

The Council of the EU has its own mechanisms when it comes to governing rule of law. In December 2014 the Council on the topic concerning role of the Council in safeguarding rule of law and made conclusions that a "dialogue among member states will take place once a year in the Council, in its General Affairs configuration, and be prepared by the..(Presidency)."⁶⁶ The subsequent annual meetings have been mostly symbolic with no concrete principles established that would bring significant conclusions to addressing the rule of law crisis. Agreements were reached however that the intensity and frequency of the meetings should increase as the issue has

⁶⁵ European Commission Press Release IP/18/5830
https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5830

⁶⁶ Council of the European Union Press Release
<https://www.consilium.europa.eu/en/meetings/gac/2014/12/16/>

become more pressing. However, the general skepticism regarding Council of EU's annual meetings remains. The EU Parliament has been critical of the work that the Council has produced and has called on them to initiate article 7 proceedings to determine whether a serious and persistent breach has occurred in Hungary.⁶⁷

The European Parliament in 2016 proposed another alternative mechanism: a Legislative Initiative Report on the establishment of an EU Pact on Democracy, Rule of Law and Fundamental Rights.⁶⁸ This new Pact would provide an annual assessment on the state of the rule of law, democracy and human rights in member states but focus on those states that are recommended by Parliament for study. Hungary was the first to be entered into the study and a report was issued by the Commission that combined research done by the Council of the EU reports as well as UN reports. European Parliament resolution in June of 2015 on the situation in Hungary outlined several key points of contention with Hungary combining research done intra-institutionally as well as other EU reports including the EU Justice Scoreboard and others.⁶⁹ All continued highlighting the need for firmer EU engagement as the system rule of law crisis was widening in Hungary. The one criticism scholars have pointed to regarding Parliament's proposed framework is concerning the timing of its presentation, as the Parliament had already called for Article 7 proceedings against Hungary and issued several press reports warning about the dangers to rule of law in Hungary.

⁶⁷ Argyropoulou Venetia. "Enforcing the Rule of Law in the European Union, Quo Vadis EU?" *Harvard Human Rights Journal*. Volume 32, Spring 2019

⁶⁸ *Ibid.*, 43

⁶⁹ European Parliament resolution of 10 June 2015 on the situation in Hungary
https://www.europarl.europa.eu/doceo/document/TA-8-2015-0227_EN.html

ECJ Case Laws that Reinforce and Reference Rule of Law

Since establishing rule of law as a foundational principle of the EU in the landmark "Les Verts" v European Parliament in 1986, the Court finds itself having to defend the established precedent of this core EU value. While the judgement of the Court holds that even the EU itself is subject to its own laws it has protected the EU as its guarantor of core values it espouses. The ECJ judgement against Poland in October 2018 found three key obstructions made by the government regarding impartiality of judges citing Article 160 of the Rules of Procedure. First is asked of the Polish government (1) "to suspend the application of the provisions of national legislation lowering of the retirement age for Supreme Court justices; (2) to take all necessary measures to ensure that the affected Supreme Court justices may continue to perform their duties in the same post, while enjoying the same status, rights, and working conditions as they did prior to enforcement of the relevant provisions; and (3) to refrain from adopting any steps to appoint new justices to the Supreme Court to replace the affected Supreme Court justices."⁷⁰ Finally in November the Polish government complied with the findings of the ECJ.

In June 2019 in a separate case against Poland, the ECJ ruled in favor of the Commission ruling that Polish government was breaching EU law when it lowered the retirement age of judges and granting of the powers to the President to suspend judges. The ECJ called upon Article 19 of the TEU citing that EU law requires member states provide sufficient remedies to ensure legal protections for EU citizens, which subsequently requires independence of courts. Hence by invoking article 19 as central to their judgement the courts are explicitly defending the rule of law and calling on precedent. This precedent comes from what the literature has identified as the "Portuguese case" (*Associação Sindical dos Juizes Portugueses*, C-64/16) and the "Irish

⁷⁰ Argyropoulou V. "Enforcing the Rule of Law in the European Union, Quo Vadis EU?" *Harvard Human Rights Journal*. Volume 32, Spring 2019

Case” (PPU LM (Case C-216/18)).⁷¹ The Portuguese case established the precedent that EU member states were responsible to act in conformity with the fundamental EU rights and values regardless whether member states were implementing EU law. This meant that for Poland they were to apply EU core values outlined in Chapter 2 TEU regardless whether their case in question was concerning any other EU law. In the Irish case, the Court ruled if it is found that a person may not receive a fair trial in the state where an extradition is sought, member states may choose not to send suspects there. The ruling against Poland in the earlier cases has potential ramifications on functionality of the its entire judicial system as shown here. If there are extradition requests coming out of Poland and there is now an existing judgement that questions the impartiality of judges on Polish Supreme Court, then states are within their legal right to opt out of fulfilling those requests. This decision almost immediately manifested when a Spanish Court sent a letter to a Polish district court meant to determine whether the Polish court is independent enough to permit an extradition request.⁷²

⁷¹ Bignami Francesca. *EU Law in Populist Times: Crises and Prospects* Cambridge University Press. p.451

⁷² *Ibid.*, 451

CHAPTER III

EU ENLARGEMENT AND THE CENTRALITY OF THE RULE OF LAW

Early Accession Negotiations with Poland, Hungary

Existing academic analysis relating to EU Commission's articulation of EU values throughout Maastricht and Copenhagen criteria cast a negative verdict on its ability to explain political criteria for membership. The often vague and broad sweeping expectations of potential member states to adhere to EU's criteria for "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities,"⁷³ have partly succeeded in interpreting language to practice. The focus on detailed economic reforms outweighed the focus on the political, combined with a winding clock, the EU placed itself in a precarious situation. The outlined economic changes that were to be implemented, were following the logic of herd mentality, that is once the economic changes were in place then the other reforms will follow suit, including rule of law and government structures. The lack of specifics in EU's accession negotiations was called out by many scholars. As Dimitry Kochenov stated "The candidate countries were asked to comply but were not told with what."⁷⁴

Following the collapse of communism and re-establishing of democratic societies in Central and East Europe, the European Economic Community viewed an opportunity for expansion. Diplomatic relations were soon established between the EEC and newly democratizing states. The next coming months following the democratizing efforts in Hungary

⁷³ Conclusions of the Presidency - Copenhagen, June 21-22 1993
<https://www.consilium.europa.eu/media/21225/72921.pdf>

⁷⁴ Janse Ronald, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement," *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, Pages 43–65, <https://doi.org/10.1093/icon/moz009>

and Poland respectively, the talks between dignitaries and high level officials continued with EU keen on preparing the states for intensified economic and political integration. The earliest formal trade agreements and diplomatic talks mostly occurred as a result of economic promise that the EEC presented to CEE countries and vice versa. Poland and Hungary were both eager to as part of their democratic transition, open up markets and privatize industries that would usher in new wealth and increase standards of living. The EEC relied on two primary vehicles that outlined its criteria for accession to the EU. Criteria at Maastricht were a continuation of EU integration although on a much more intense way beyond economic matters. The Copenhagen summit in 1993 further outlined criteria for associated states for membership to the Union. In its conclusions, the European Council found that its need to “maintain(ing) the momentum of European integration, is... important consideration in the general interest of both the Union and the candidate countries.”⁷⁵ In keeping its momentum going, the EU sought to establish mechanisms through which it could coordinate reforms within CEE states through EU involvement, specifically through common commissions. Its particular focus was on the importance of national laws being congruent with EU’s community law, something which required time and adaptation. “The European Council underlined the importance of ⁷⁶approximation of laws in the associated countries to those applicable in the Community.”⁷⁷ “Toward this end officials from the associated countries should be offered training in Community law and practice and decided that a task force composed of representatives of the Member States and the Commission shall be established to coordinate and direct this work.”⁷⁸

⁷⁵Conclusions of the Presidency - Copenhagen, June 21-22 1993

<https://www.consilium.europa.eu/media/21225/72921.pdf>

⁷⁶ Ronald Janse, Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement, *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, Pages 43–65,

⁷⁷ *Ibid.*,15

⁷⁸ *Ibid.*,15

Among questions discussed at Copenhagen Summit in 1993 were the political transformations occurring in prospective member states. The emphasis on rule of law and human rights were further outlined in the opening remarks about associated countries in the conclusions of the Presidency. Recent scholarship has questioned the legitimacy of EU's vitriol against Poland and Hungary citing, EU's lack of detail and specificity in initial negotiations regarding political reforms. If there hasn't been clear articulation of expectations, then how can you blame countries for creating their own interpretations they ask. The credibility of the EU in terms of its negotiating power rests on this pillar and its 2014 Rule of Law framework demonstrated the need to address these critics. For some the release of the framework was affirmation that the EU was partly mistaken or wholly responsible in its pre accession and accession talks with CEE countries.

While the early programs in earliest transition periods proved effective at providing some economic relief, namely the PHARE program, their focus on political efforts came much later post Copenhagen. The PHARE program was established as a grant program in 1989 to support the process of economic reform Poland and Hungary and through this the first waves of change would be the main financial instrument through which transitioning countries were being financed. The Cannes European Council of June 1995 confirmed the indicative financial allocation for PHARE for the five years 1995-1999 as 6,693 billion ECU.⁷⁹ The annual budget was being allocated annually depending on the progress of each individual state.

The primary vehicle for understanding Eastern enlargement prior to accession negotiations have been the pre-accession criteria outlined by the Copenhagen summit. In its early

⁷⁹ European Commission Decision on the implementation of the PHARE programme in the EU candidate countries (15 June 1998)
https://www.cvce.eu/en/obj/european_commission_decision_on_the_implementation_of_the_phare_programme_in_the_eu_candidate_countries_15_june_1998-en-ff1f1b1c-14ce-4d31-bcb4-6fd3357e2a43.html

assessment, the Commission drafted a strategy that would open doors for further dialogue and planning on behalf of EU institutions and prospect states. In its final pre-accession document from July 1994, the Commission emphasized four key developments as a goal of the negotiations and a pre-cursor to *acqui* process. Those four were⁸⁰:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy;
- capacity to cope with competitive pressure and market forces within the Union;
- ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

The political requirements and shift to more intense political transformations occurred only after 1996, merely three years after initial Copenhagen criteria, with the Council tasking the EU Commission to do composite a paper on negotiations.⁸¹ The applications of submitted member states were to be reviewed by the Commission first and then recommendations were to be sent to Council. The commission compiled a questionnaire for prospect states which would be the main source of information for the Opinions.⁸² In July of 1997, the Commission published Agenda 2000, providing 10 opinions on the applications for membership including Hungary and Poland. Both countries were deemed ready for further negotiations and accession talks proceeded shortly thereafter. Agenda 2000, laid out a more enhanced dialogue and assessment of each

⁸⁰ The Europe agreements and beyond: a strategy to prepare the countries of Central and Eastern Europe for accession, Communication from the Commission to the Council. COM (94) 320 final, 13 July 1994. [EU Commission - COM Document] <http://aei.pitt.edu/2948/1/2948.pdf>

⁸¹ Janse Ronald, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement," *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, Pages 43–65,

⁸² Janse., 47

country than was earlier done by Copenhagen. Under his new framework, three different types of documents regarding assessment were to be compiled. The first, Regular Reports, were annual reports on progress made for the year toward accession. These were by design a measurement of progress made. The second, Composite Papers, also called Enlargement Strategy Papers are forward looking outlines that for each member state. The third type of document, the Accession partnership established short and long term priorities and individual objectives for each new member state. These contained only very brief assessments and were not as substantive in content as the Regular and Composite Papers.⁸³

Today's indices and quantification of democracy and rule of law provide us with a clear picture of where countries are in terms of their progress toward democratic values. Freedom House Reports, World Justice Project reports, The Economist are just some of many who provide regular standardized reports of state of world's democracies. These are fairly recent and were not available to EU negotiators in the 1990s during enlargement. "Indeed, never did the Commission take the step to formulate a general and systematic set of such standards in Agenda 2000 or in the general part of the individual Opinions or in Regular Reports or in Composite Reports/Strategy Papers. It did have standards, as we shall see in section 5 of this article, but they were implicit in their assessments in Agenda 2000 and the other documents. Furthermore, the Commission never explained how it had arrived at its standards; Agenda 2000 and the other documents had no footnotes or annexes on this matter. No reference was made to academic literature, the constitutional traditions and features of member states, or the case law of the ECJ or the European Court of Human Rights. It was unclear whether it made use of Freedom in the World. Furthermore, the Commission's assessments invariably took the form of rather loosely structured

⁸³ Janse, 48

narratives; the assessments usually followed a particular route, including, for example, the independence of the judiciary, access to justice, and backlog in delivering justice, but this system was not made explicit for the reader.”⁸⁴

Hungary Negotiations

After the fall of Communist parties in 1989 and the subsequent elections that birthed new parties into the mainstream, Hungary’s application to join the EU in March of 1994 came as no surprise. This zeal for enlargement continued even as negotiations became gradually more painful and detailed. The general consensus among EU members rested on the notion of enlargement at all costs and for Hungarian negotiators entry at all costs. This culminated in generally positive reports from the Regular and Commission reports on Hungary’s progress to membership.

Summary of 1998 Regular Report

In its 1997 Opinion on Hungary’s application for EU membership, the Commission concluded that: “Hungary presents the characteristics of a democracy with stable institutions guaranteeing the rule of law, human rights and respect for and protection of minorities.”⁸⁵ In its assessment of Hungary’s democratic institutions namely Parliament, it described as it as operating “well” and that other institutions of the government operate “smoothly.” It lauded that opposition plays a functioning role within Hungary’s Parliament and institutions. The Report described the non-approval of draft law regarding Parliamentary representation for minorities as “regrettable.”

⁸⁴ Janse, 50

⁸⁵ Regular report from the Commission on Hungary's progress towards accession 1998. COM (98) 700 final, 17 December 1998. [Bulletin of the European Union Supplement 5/98]. [EU Commission - COM Document] http://aei.pitt.edu/44530/1/hungary_1998.pdf

When it comes to Hungary's judicial system, similar echoes of satisfaction were present in the report. The addition of two additional judges to the Constitutional Court, totaling 11, pleased the Commission and ensured smooth functioning of other institutions. The observers were also impressed with other addressed weaknesses including reforms made to speed up court procedures and overhaul of the judicial branch that ensured its independence from the executive through the formation of a National Judicial Council consisting of 15 members. Of the 15 members, one is delegated by the executive, Minister of Justice while the other 14 are chosen by a secret majority ballot among regional and upper level judges. The role of the National Judicial Council is to serve in a supervisory capacity among the courts ensuring legality, proper procedures, budget and appointment of judges.

Summary of 1999 Regular Report

In its initial 1998 regular report on the progress made by Hungary, the Commission concluded that:

“Developments in Hungary confirm that Hungary fulfils the political Copenhagen criteria. Hungary's institutions continue to function smoothly. Elections have taken place in free and fair conditions and allowed a smooth transfer of power in 1998. Continued attention needs to be paid to combating corruption more effectively and to improving the situation of the Roma.”⁸⁶

The 1999 Report also included conclusions about preparedness of Hungarian judiciary for EU accession. According to the *acqui* criteria, national laws and EU laws require cohesion and an eventual EU special training would need to occur in prospect states. To this end Hungary had set up training programs and courses for judges in EC law, with 106 judges completing the

⁸⁶ Regular report from the Commission on Hungary's progress towards accession 1999. COM (99) 505 final, 13 October 1999. [EU Commission - COM Document]
http://aei.pitt.edu/44531/1/hungary_1999.pdf

training and another 700 going through the program. The case load of the Supreme Court continues to be a problem per the Report as well as the computerization of equipment.

It further went on to confirm that Hungary has achieved “stability of institutions guaranteeing democracy and the rule of law.” This rather positive outlook on the status of Hungarian institutions and reforms made toward establishing safeguards that would ensure compliance with said changes created further optimism that Hungary is ever closer to membership.

Summary of 2000 Regular Report

The year 2000 brought on more significant and detailed reports about the situation in Hungary. The report was almost twice as long content wise and included some new provisions that were not included in the two prior reports. This could be due to the December 2001 deadline for Hungary to meet all requirements of the *acqui*. The intensified reporting on its progress could have also been impacted by significantly more changes in the run up to the deadline.

The judiciary has continued to see progress in terms of training of Hungarian judges in EU law and EU case law. There has been a “stable” relationship between the Constitutional Court which ensures that other courts (local, state, supreme) are in line with Hungarian constitution and EU law. This court’s judges have been deemed apolitical and do not affiliate with any political party. Their number stands at 11.

More progress could be made toward implementing minorities into Parliament. This for the third year in a row has been lacking in progress and the Commission points this out in their report. It has also praised some of the work done in shifting functions and responsibilities of some positions with government in order to increase efficiency and ensure compliance. The level of compliance by the Hungarian Institute of Public Administration has been lauded, specifically the amount of training of local administrators and police forces.

In a letter exchange on the day that the report was released, Dick Benschop, then Netherlands Junior Minister for Foreign Affairs, and Péter Gottfried, Head of the State Secretariat for Integration in the Hungarian Foreign Ministry, concerning the latest progress in the process for the enlargement of the European Union further illustrated the zeal for enlargement from both sides.⁸⁷ The letter exchange not only lauded positive reports but stressed that timing was of the essence with Benschop stating: “It is time we get on with enlargement.”

Summary of 2001 Regular Report

As in previous reports, progress is being made and the Commission singles out specific reforms made by Hungarian Parliament to ensure the *acqui* are being met. The creation of Ombudsman office, with four ombudsmen that would investigate violations of constitutional rights and provide remedy for such situations was seen as a key building block of stable democracy and rule of law. T The Ombudsmen are elected for six years by a two-thirds majority of votes in Parliament.⁸⁸ The Ombudsmen answer to the Parliament and have to present an annual report on their activity. Their opinions and recommendations are made available to the public. Representation of minorities continues to be a problem and no progress has been made on this front, defying EU law as well as own Hungarian Constitutional ruling from 1992 that deemed the absence of such a system unconstitutional.

There was also work done to reform the Public Administration structure and improve efficiency and accountability. To this end a new law was passed by Parliament in July 2001 that would improve training and pay for civil servants while also ensuring that hiring practices are

⁸⁷ Correspondence between Mr. Péter Gottfried and his Dutch colleague Mr. Benschop (8-9 November 2000). [ON-LINE]. [Budapest]: Ministry of Foreign Affairs of the Republic of Hungary, [s.d.]. Available on http://www.kum.hu/euint/index_quot.html

⁸⁸ Regular report from the Commission on Hungary's progress towards accession 2001. SEC (2001) 1748 final, 13 November 2001. [EU Commission - SEC Document] [http://aei.pitt.edu/44533/1/hungary_SEC_\(2001\)_1748.pdf](http://aei.pitt.edu/44533/1/hungary_SEC_(2001)_1748.pdf)

fair and open to all. The EU was also pleased to know that civil servants would be required to answer EU related questions during their training examinations.

The judiciary continues to see improvement and operates at “full strength.” The Commission is pleased that National Council of Justice is functioning as set forth in its previous guidelines. The number of judges trained in Community law continues to increase and the amount of overall judges to fill vacancies has improved. The “main problem” remains the overloaded Supreme Court which effects the efficiency of their work, with many court cases being backlogged anywhere from 6 months to a year.

Summary of 2002 Regular Report

After the 2002 elections and the shifting of government from Centre-right to a socialist-democratic majority, the EU found satisfaction in the fact that no extremist party (left or right) was able to meet the 5% threshold. In addition, the elections were fair and free and had the highest turnout to date. As before, “the constitutional obligation to ensure direct parliamentary representation of minorities in a systematic manner remains unfulfilled.”⁸⁹

The report expressed overall satisfaction with changes being implemented in the judiciary. Measures taken to improve efficiency and structure of courts have been well received and working. There is a continued need for budget strengthening in order to keep up with inflation rates in the country. The report is pleased with the Parliament’s decision to implement the Regional Courts of Appeal as this has freed up some of the work by the Supreme Court. When it comes to perception of corruption, Hungary still ranks high among its polled citizens. Further measures have to be undertaken in addition to ones already started in 2001. The new

⁸⁹ Regular report from the Commission on Hungary's progress towards accession 2002. SEC (2002) 1404 final, 9 October 2002. [EU Commission - SEC Document]
[http://aei.pitt.edu/44534/1/hungary_SEC_\(2002\)_1404.pdf](http://aei.pitt.edu/44534/1/hungary_SEC_(2002)_1404.pdf)

measures adopted in this report are singled out as positive progress. For example, the declarations of assets became compulsory for senior civil servants.

Summary of 2003 Comprehensive Monitoring Reports

The 2003 final report on Hungary began with a positive and encouraging assessment of the economic trajectory of Hungary. Improvements were made in fiscal policy and macro-economic restructuring that had positive effects on the economy.

Rule of law and an independent court system are considered to be a norm at this point in Hungary. The comprehensive report in each of its assessments and its conclusions has described the judicial system as such and in compliance with EU law. The problems with corruption addressed in some of the earlier reports are a misnomer, and work continues to be needed, however the report give a satisfactory grade for Hungary's efforts to this end. "The Hungarian law enforcement system appears to be adequately structured for the fight against corruption."⁹⁰

Poland Negotiations

Poland, as the other CEE states receives PHARE funding for its economic, social and political sectors. Funds are allocated through a variety of conditional reforms and programs that reflect EU landscape.

Summary of 1998 Regular Report

In its 1997 Opinion on Poland's application for EU membership, the Commission concluded that: "Poland presents the characteristics of a democracy, with stable institutions guaranteeing the rule of law, human rights and respect for and protection of minorities."⁹¹ The

⁹⁰ Comprehensive monitoring report on Hungary's preparation for membership 2003. SEC (2003) 1205 final, 5 November 2003. [EU Commission - SEC Document]
[http://aei.pitt.edu/44535/1/Hungary_SEC_\(2003\)_1205.pdf](http://aei.pitt.edu/44535/1/Hungary_SEC_(2003)_1205.pdf)

⁹¹ Regular report from the Commission on Poland's progress towards accession 1998. COM (98) 701 final, 17 December 1998. [Bulletin of the European Union Supplement 6/98]. [EU Commission - COM Document]

elections of 1997 brought in a coalition government and a new Constitution was adopted shortly thereafter. There have been reforms in terms of devolving power among state, regional and local levels.

Rule of law was strengthened by giving Constitutional Tribunal power to resolve issues of conflict between different branches of the state authority and citizens the ability to have their constitutional rights protected by the tribunal. The independence of the judiciary has also been strengthened through the Lustration process, which prohibits judges to be appointed to seat if they were found to be working for Secret Service prior to 1989. The report stresses that more work needs to be done on anti-corruption and that Polish authorities “have not responded adequately in relation to the importance of the issue and little progress has been made on the establishment of a genuine anti-corruption policy.”⁹²

Summary of 1999 Regular Report

“Poland’s political institutions continue to function properly in conditions of stability, including ongoing "cohabitation" between the executive and the president. The 1997 Constitution has proved to be a stabilizing factor since its introduction.”⁹³

Parliament continues to function as expected according to EU standards and the opposition plays a full part in activities. When it comes to the judiciary, the report expressed concern and stated that “little progress” has been made in addressing constraints previously identified in the 1998 report. Those include enforcement mechanisms of the courts and their administrative capacity. This has culminated in potential breaches of due process and access to courts as citizens look to bring their cases to court. There have been a number of Polish citizens

⁹² Ibid., 11

⁹³ Regular report from the Commission on Poland's progress towards accession 1999. COM (99) 509 final, 13 October 1999. [EU Commission - COM Document]
http://aei.pitt.edu/44592/1/poland_1999.pdf

that took their cases to the “European Court of Human Rights (ECHR) in particular regarding alleged breaches of related Article 6 provisions on the due process of law and the right to be judged within a reasonable timeframe.”⁹⁴

In general the independence of the judiciary continues to be respected.⁹⁵ Some concerns have been brought up regarding the placement of Public Prosecutor’s office under the Ministry of Justice as this could bring about political pressures on the Prosecutor’s office.

Summary of 2000 Regular Report

Recent political development concerns the end of the coalition government which was the longest serving post-communist government. The work of Parliament continues to surround EU integration and attempts at harmonizing Polish law with the *acquis* have experienced a “renewed drive.” New Committees on European Law have been created on a cross party basis in the Sejm and Senate to oversee the adoption of EU related legislation and a new approach designed to speed up this process has been adopted.”⁹⁶

The judiciary has seen progress with many structural changes since the last report. There are additional layers of judiciary and new court chambers have been set up to deal with backlog of cases. The training of judges in EU law continues as well as the hiring of new judges to fill important new posts. Corruption continues to be an issue within the court system as public opinion of the court system in general is negative due to high costs and corruption. More will need to be done to address systemic problems and increase the power of the Public Prosecutor’s office with more staff and better funding.

⁹⁴ Ibid., 14

⁹⁵ Ibid., 14

⁹⁶ Regular report from the Commission on Poland's progress towards accession 2000. COM (2000) 709 final, 8 November 2000. [EU Commission - COM Document]
http://aei.pitt.edu/44593/1/Poland_2000.pdf

Summary of 2001 Regular Report

The report once again lauds the stabilizing effect of the 1997 Constitution on the well-functioning of Polish institutions. The Parliamentary elections held in September 2001 have led to a coalition government being formed.

The Commission expressed concern that corruption continues to hamper the work of the judiciary. Polish law, specifically “Article 173 of the Polish constitution ensures the independence of the courts, and article 178.1 provides for the independence of judges. According to article 180, judges cannot be dismissed against their will, and according to art. 181 they enjoy near total (both professional and personal) criminal immunity. Such immunity can only be lifted by a disciplinary tribunal which is made up of judges and which meets in closed session. The lack of transparency of this system is a source of concern and makes a precise assessment of corruption problematic.”⁹⁷

Summary of 2002 Regular Report

Polish Parliamentary system continues to see elements of EU standards, specifically when it comes to its election function and reporting of funding by political parties. A core feature of transparency and openness with the public regarding all contributions and amounts paid into political campaigns is beginning to take shape with this election year proving essential. The commission is pleased that there has been universal cooperation toward this end by the Polish political parties.

“Over the last year the on-going reform of the judiciary has continued and steady progress has been registered. The introduction of a new layer of courts and, the acceleration of

⁹⁷ Regular report from the Commission on Poland's progress towards accession 2001. SEC (2001) 1752 final, 13 November 2001. [EU Commission - SEC Document]
http://aei.pitt.edu/44594/1/poland_2001.pdf

procedures, as well as the computerization of the judiciary and the prosecutor's office, have improved efficiency. However, efforts are still needed to improve the efficiency of the judiciary, in particular in view of accession, and enhance public access to justice, which remains limited. Concerns persist with regard to perceptions of corruption among the judiciary.”⁹⁸

Summary of 2003 Comprehensive Monitoring Reports

The 2003 comprehensive report served as the final report just prior to accession in 2004. The report overall was mostly positive and provided a summary of what came before it in the other reports. The work done by Parliament and the executive to pass new measures regarding civil service training and public administration re-structuring. The improvements made to the judicial system have shown promise in the number of cases being heard each year and overall efficiency they operate under.

The immunity of judges is provided for in the Constitution, which gives a very broad interpretation of such immunity. The immunity applies to the judge in his professional and private life, as well as after his retirement. It can only be lifted by a collegium composed of randomly chosen judges, and only this part of the procedure is open to the public. The law does not specify explicitly the grounds for lifting immunity. The very wide interpretation of penal immunity of judges, alien to other legal systems in Europe, is not in itself a guarantee of independence, but is viewed rather as a privilege in Poland.”⁹⁹

⁹⁸ Regular report from the Commission on Poland's progress towards accession 2002. SEC (2002) 1408 final, 9 October 2002. [EU Commission - SEC Document]
http://aei.pitt.edu/44595/1/poland_2002.pdf

⁹⁹ Regular report from the Commission on Poland's progress towards accession 2003. SEC (2003) 675 final, 5 November 2003. [EU Commission - SEC Document]
[http://aei.pitt.edu/44596/1/poland_SEC_\(2003\)_1207.pdf](http://aei.pitt.edu/44596/1/poland_SEC_(2003)_1207.pdf)

The Treaty's Ratification and Accession

The European Treaties are binding agreements between member states. Maastricht negotiations as well as subsequent additions at Lisbon sealed the Treaty on the European Union. In addition to specific articles within the TEU (of which there are 55 total), certain provisions and declarations exist which further are considered law and are part of the totality of EU law. Thus membership in the EU emphasized specific values regarding democratic statehood, rule of law, respect for human rights and dignity. The pre-accession criteria for many new CEE states most often began with political transformations as the pre-requisite for further negotiations. This is evident in the Commission reports on each candidate country, where political criteria are first order of business before the economic and *acqui* specifics are deliberated. This in itself is more than a symbolic gesture by the EU. Its belief that political stability, and democratic institutions must precede economic discussions emphasize the importance of the rule of law norm.

As evident in the EU Commission reports, there was continued support for EU integration throughout Hungary's accession process. This continued even with different governments in office and political parties on either side of the isle. Thus the various "elite" in the country were favoring European integration with the first part of the nineties mostly reserved for negotiations that were mostly based on elitist preferences.¹⁰⁰ As the integration process deepened, so did the intensive involvement of the population with regional interests, national as well as professional interests changing. The EU referendum being the final outcome of negotiations, there was a need for more promotion of EU values and ideas to the masses. While there was no shortage of enthusiasm for elite to integrate, the work needed to get citizens was a

¹⁰⁰ Ágh, A. "The Hungarian Parliament and EU Accession in an East European Context. *Társadalom És Gazdaság Közép- És Kelet-Európában / Society and Economy in Central and Eastern Europe*, 21(1), 43-75. 1999
www.jstor.org/stable/41468406

difficult road traveled. Thus there was a need for “new deal” or new “social contract” between people and their government. This act would renew public interest in political process overall and EU integration specifically. Once Hungarian and Polish Parliaments established new Constitutions in 1997, the population was in part an active member of the negotiating team with the EU. The elitist approach had transformed to the next stage where more stakeholders would possibly provide roadblocks unseen before.

This approach uncovered several underlying accession dilemmas and characteristics one of which viewed the integration negotiations as a three step process. In the first stage, after applying for membership a series of structural changes are made at the governmental and procedural level. It is at this stage where elitist networks are most prominent and dominant. Even at this stage, the role of the Parliaments increases as public awareness becomes more profound and the stage is set for serious reforms. But it is at the second stage where the role of the public and thus Parliament becomes dominant and more pronounced as the need for ratifications and certain reforms intensifies. The third stage is when the role of the public becomes crucial and necessary to uphold the work done up until this point. This is where the publics become articulated societies with civil society groups, organizations able to restructure interests and preferences that will eventually culminate in a favorable or unfavorable outcome on the referendum. Just prior to the vote for membership, citizens become fully immersed with the state of the negotiations and take on the role of primary beneficiary or loser of their outcome. This is critical because history has shown varying degrees of positive or negative outcomes on memberships for instance, Norway and Switzerland publics decided against EU membership, while only slight majorities were won in three other member states.

This path to membership was especially unique to the Central and Eastern European states. The CEE states uniquely transitioning toward democracy at the time of negotiations, were at overlapping stages of the process with the publics becoming more engaged earlier than in some other well established democracies. In Poland and Hungary for example, the shift toward representative democracy in its infancy stages ushered in a new era of political activism and interest organization, a phenomenon that other states already established.

Hungarian Path

In Hungary, the process of ascension was taken up by various ministries that take up specific issues in liaison with the Prime Minister's Office. This model of institutional coordination with EU criteria most closely resembled the German model in which the centralized figure (Prime Minister-PM) devolves tasks down to the ministers in a particular area of need. This ensures coordination across the various structures of government but also a point person (PM) that would serve as the glue of the coordination mechanisms.

The public opinion in Hungary in its feelings toward the EU showed some variation in the nineties as the entire process of shifting away from socialist system cast doubt on becoming another "dependent" in the European union. The process of public mobilization-demobilization-remobilization corresponded with the public mood toward integration. In the early stages, the public was mobilized in the form of social movements and democratic expression against socialist systems, demobilized with the rise in political parties in off election years, and again remobilized during election cycles. Europeanization was an elitist project and many Hungarians grew frustrated with the notion of high politics that did not affect things on the ground. Just as quickly as democratic zeal consumed the nation in 1989, the zeal for Europeanizing waned

particularly in the early nineties.¹⁰¹ Combined with elitism, was the notion of emancipation away from external vices that plagued the country for nearly 45 years. Hungarian society's increasing negative view of the Union could have also been attributed to the lack of effective communication strategy of the political parties at large. Euro issues were a distant reality, far away from the average Hungarian's conception of European identity.¹⁰²

In 1997, a major change in attitudes toward the EU swept across Hungary, bringing positive outlook on EU integration as well as interest in EU matters.¹⁰³ This was in part due to economic, social, and political developments that had been decided earlier but were now beginning to impact society. For example, the 1995 successful management of the economic crisis which began to show some early results in 1996 and certainly 1997 where the economy grew 3.9 percent and 4.1 percent respectively. The estimated increase of real wages was 10 to 15 percent notwithstanding the overall improved standard of living.

The image of Europe in Hungary had experienced a change as well. Prior to mid-nineties, there existed a traditionalist view of Europe, as in simply a continent that Hungary is geographically part of with some cultural context. But that image also went through a change, with the public increasingly viewing itself as a distinct European polity and a community of nations in EU. The new Euro images were most often found among the younger population, eager to seize opportunities offered by the EU in a normative and economic sense. The more interested the average Hungarian became in politics, the more likely they were to support

¹⁰¹ Ágh, A. "The Hungarian Parliament and EU Accession in an East European Context. *Társadalom És Gazdaság Közép- És Kelet-Európában / Society and Economy in Central and Eastern Europe*, 21(1), 43-75. 1999
www.jstor.org/stable/41468406

¹⁰² *Ibid.*, 58

¹⁰³ *Ibid.*, 59

integration. This close correlation amounted to political activism and popular support for the EU, a stark difference to years earlier.

The 1997 NATO referendum would serve as the apex of Hungarian integration with its European neighbors where the increasing popularity of integration (EU, NATO as well) would be tested at the polls. The results were paradoxically positive and negative. Positive in a sense that they resulted in an overwhelming support for NATO membership (85.33 percent) and negative because turnout was low for European standards (48.63 percent).¹⁰⁴ “At 45%, turnout was much lower than expected. This was due to: a sense that a ‘Yes’ result was inevitable; a failure by citizens to perceive individual benefits from accession; and partisan effects among right-wing voters as regards attitudes towards both the EU and the left-liberal government.”¹⁰⁵ At the time Hungary was the only country to hold a referendum on NATO membership. The referendum was significant in several ways. First, the national consciousness of Hungarians was now clearly shifting toward Euro-Atlantic integration and this was the precedent of what was yet to come. The political backdrop of EU ascension was such that cross party consensus was reached on EU membership. The bi-polar Hungarian system left no room for anti-EU parties that could potentially hinder the country’s path to citizenship. The left in the country, saw the EU as a path to democracy and modernization and the right viewed EU membership as a return to Hungary’s political and cultural roots. The relative lack of opposition to the EU meant that the discussions among the different parties centered mostly on efficient ways of getting to membership and hammering out of technical details instead of deterministic attitudes about EU.

This approach to the EU contrasted with the increasingly polarized and confrontational nature of Hungary’s general party politics. The bi-polar party

¹⁰⁴ Referendum briefing No 4: The Hungarian EU accession referendum, 12 April 2003” *Opposing Europe Research Network*. Archived from the original (PDF) on 17 December 2010
<https://web.archive.org/web/20101217235421/http://www.sussex.ac.uk/sei/documents/hungary4.pdf>

¹⁰⁵ *Ibid.*, 1

system generates a pattern in which exclusive left-liberal and right-wing coalitions alternate in government and ‘oppositions oppose’. As the April 2002 parliamentary elections approached, the incumbent right-wing prime minister, Viktor Orbán of Fidesz, introduced a distinction between ‘good’ and ‘bad’ EU accessions and suggested that the continuation of his government’s domestic policies was required if Hungary was to achieve a ‘good’ accession. However, the two elite camps are also divided more deeply, by material interests and by different approaches to Hungarian history and nationhood. Polarization reached its peak so far in the 2002 parliamentary poll, which saw Orbán make an increasingly nationalist/anticommunist/economic populist appeal against his domestic Socialist and liberal opponents, designed to attract even those voters previously supporting the extreme right Party of Hungarian Justice and Life. The contest was bitter, tightly fought and utterly absorbing for the political elite, and also saw unprecedented mass mobilization. In the end, the Socialist liberal coalition narrowly defeated the right-wing government.¹⁰⁶

Foreign policy in general however, and more specifically EU integration were not salient issues at the time of the vote. The differences among Fidesz and Socialist Liberal parties on the other were more on the stylistic level rather than substantive issues concerning integration. Both sides had to for example consistently pledge about protecting national interests abroad and accusing the other of betraying the nation in terms of concessions when negotiating with EU.¹⁰⁷ The referendum results to join the EU echoed similar number to earlier NATO referendum. With a low turnout (45.6 percent) and an overwhelming support to join (83.8 percent) Hungary once again demonstrated a lukewarm stance toward integration despite their being near unanimous support amongst the elite. This public EU-skepticism is trend unique to Hungary as the other CEE states joining in 2004 had larger turnout rates and relatively more enthusiasm for EU membership. Even Orban hailed the results of the referendum as a sign of progress and “What

¹⁰⁶ Ibid., 3

¹⁰⁷ Batory Agnes, ‘Europe and the April 2002 Hungarian Parliamentary Elections’, Opposing Europe Research Network Election Briefing No 1. <https://www.sussex.ac.uk/webteam/gateway/file.php?name=epern-election-briefing-no-1.pdf&site=266>

binds us together is not whether we voted Yes or No, but that we are Hungarians and that we want to be the winners of the future."¹⁰⁸

Polish Path

Like Hungary, Poland's break from communism and eventual redefining of geopolitical identity came after 1989 when most salient political party leaders recognized the need to turn West and repulse socialism. The elite in Poland centered on the West or EU as its true place in terms of civilizational and cultural belonging. This same elite believed that democracy and future progress in economic, social and political spheres could be found in Europe. These sentiments continued even among the leftist socialist parties which suffered greatly during Polish democratizing efforts until making a comeback through their support of the EU issue.¹⁰⁹ This picture, however by the year 2000 had changed in Poland. The dominant parties on the left and right were beginning to experience pushback against their EU negotiations through the emergence of small fringe parties that mobilized well enough to win seats in Parliament. The parliamentary election in 2001 showed a clear division on the issue of EU integration. The party that won third most seats in Parliament and 10.6 percent of total vote was Self-Defense, party that ran on the platform of EU disadvantaging Polish farmers. This tapping into a population that was underrepresented in national negotiations about EU membership were signs of a vibrant democracy at play per EU observers. But the problem of EU acceptance was much profound that as another party, League of Polish Families, bounded by a rigid nationalist and Catholic ideology won 8 percent of the votes in Parliament. The opposition to the EU was now making a serious share of the Parliamentary vote and would have to be contended with. The League of Polish

¹⁰⁸ Thorpe, Nick "Hungarians lukewarm about EU". *The Guardian*. London (2003-04-14). <https://www.theguardian.com/world/2003/apr/14/eu.politics>

¹⁰⁹ Taras, R. (2003). Poland's Accession into the European Union: Parties, Policies, and Paradoxes. *The Polish Review*, 48(1), 3-19. www.jstor.org/stable/25779367

Families had brought another dimension to the anti-EU rhetoric reflecting on the value of Polish and Catholic identity over globalists or EU agnostics.

The role of the Catholic Church and Vatican was also seen as under threat. The EU values being espoused by top EU brass rested on tolerance, respect for human rights, and inclusiveness. This meant that the Catholic church in its defense of the EU was seen as being pressured to give into the EU in its support for values that it ultimately eschews. Pope John Paul II saw the integration of Poland into the EU as a “historical necessity”¹¹⁰ and other clergy similarly echoed the same sentiments urging for integration. There was some opposition however with 75 percent of priests in Poland saying that the negotiations with EU were poorly managed and another 61 percent saying that Poland would be a second class country within the EU. Political parties that recognized the seriousness of imposition that a liberal EU would impose on a religious Poland were steadfast in their opposition to integrating. Some core Catholic doctrines would have to be reconsidered (abortion, euthanasia, homosexuality). Combined with other EU skeptics, there would need to be serious reconsideration of EU stance toward Polish membership. The reports that were coming out of Poland about its reforms painted a picture of vibrant democracy, without much reservations about core issues.

Thus the four main problematic areas in EU –Polish relations were successfully captured by the nationalists and brought into the mainstream. The EU was forced to make certain concessions to Poland regarding EU budget aid, agriculture, and sale of land to foreigners. Poland ensured that it must not be a net contributor to the EU budget in the first few years of its membership. Its government believed any other scenario would have been difficult to sell to the public and would not reflect the true state of Polish economy. The other concession by the EU

¹¹⁰ Ibid., 9

was concerning direct subsidy payments to Polish farmers over the next decade. This was a salient issue for most Poles as two-thirds live in rural settings and agriculture makes up a sizeable portion of Polish economy. Nationalist parties also harped on the idea of keeping Polish land in Polish hands. The sale of property to foreigners would be gradually allowed after a 5 year and 7-year transition period for certain plots.¹¹¹

Public opinion of Poles on membership in the EU was certainly intensified since 1999. Up until the referendum in 2003, a steady 60 percent of Poles signaled they would vote in favor of membership while only 25 percent against. The other striking statistics is that just over 50 percent of Poles believed that Poland would be a second-class member of the EU. “In the light of the difficult issues that needed to be tackled, the accession negotiations themselves inevitably focused to a large extent on the concessions that had to be made by the Polish side. This, in turn, raised the profile of the European issue in Polish politics in a very negative way: Brussels was increasingly seen as a focus for conflict and hostility. In this sense, the more recent polling data were arguably simply more accurate reflections of the true levels of support for Polish EU membership and therefore represented a kind of reality check.”¹¹²

One overall comment in relation to Polish parties' attitudes towards Europe is that they have paid very little attention to the future trajectory and the kind of EU of which they want Poland to be a member.³ Most party statements on the EU and European integration have focused on the detail of the accession negotiations, particularly criticisms of other parties' approaches to them. In fact, parties have tended to view the accession process in large part through the prism of domestic politics. This is, perhaps, inevitable given that domestic politics is at the top of the political agenda at the moment. Nevertheless, it does make it extremely difficult to predict how Poland will contribute to future debates once it is in the EU member and, therefore, what kind of a contribution it will make to the EU's future development.”¹¹³

¹¹¹ Szczerbiak, Aleks (2002) The political context of EU accession in Poland. Royal Institute for International Affairs. *Chatham House*

<https://www.chathamhouse.org/sites/default/files/public/Research/Europe/polish.pdf>

¹¹² *Ibid.*, 10

¹¹³ *Ibid.*, 6

Nonetheless Poland held a referendum that was by contrast to Hungary better in terms of voter turnout. Some 58 percent of the eligible voters cast their vote with 77 percent giving approval to join the EU as a full member. While these numbers are not the worst (hence Hungary) during that enlargement round, they were still somewhat lower than the standard set by Norway and Denmark respectively during their referendums. The political outcome of membership domestically was a short term win for the left while the right was outmaneuvered since the leftist government in charge was able to secure favorable terms on some issues.

Durability of Reforms

The EU's decision to expand eastwardly was inherently a conundrum for international theorists.¹¹⁴ On the one side there were rationalists (realist and liberal) who attempted to explain the enlargement and thus Europeanization of the continent through various power and institutional paradigms. The other side approaches mainly stemming from constructionist or sociological approach emphasizes social interaction among various actors that culminate in social structures which in turn shape and influence actors. The durability of reforms made by our two case study countries can be analyzed from both of these approaches.

Power based approaches regarding EU expansion center on economics as being an indispensable form of modern power and as such states pursue outcomes that maintain and strengthen their position relative to others. The EU operating within realist framework was seen as expansionist opportunist acting on its security needs by balancing perceived threats. Thus the threat of other emerging economies in the 1980s such as Japan coupled with competition with United States, EU's hopes to keep balance or outmaneuver its competition could best be

¹¹⁴ Schimmelfennig, Frank. (1999) "The Double Puzzle of EU Enlargement: Liberal Norms, Rhetorical Action, and the Decision to Expand to the East". Pittsburgh, PA
<http://aei.pitt.edu/2379/1/002531.PDF>

achieved through further enlargement.¹¹⁵ This is a view that some in the public sector certainly felt in the CEE. Albeit strong elitist support for reforms and adopting of EU values, publics in Hungary and most loudly in Poland were not amused with the power grab that the EU was accused of. The void left by communism and progress made by the European community to the West left smaller “unaligned” countries with a choice of a flourishing EU or self-isolation. This Hobbesian choice was something that some pundits and party influencers particular in Poland were touting. Indeed, as noted by Leslek Kolakowski: “You do not wish to be in the European Union? Then you must want dependence on Moscow.”¹¹⁶ Either way the political conscious of at least some of the electorate in Poland and Hungary seemed to adopt a pessimistic view about EU intentions. Despite there being a steady intent to join the community, this suspicion would have far reaching consequences once ascension was completed.

The liberal perspective on enlargement can be seen through the idea of complex interdependence. International interdependence leads states to think less in military terms and more in economic gains leading to greater cooperation through organizations. The EU being the prime example of a supranational organization that economically wields power as a collective. States that join under the liberal assumption are making a rational choice based on maximizing their absolute gains. Thus the CEE countries have economically to gain by joining the EU despite their gains being relatively outweighed by the EU gaining in even greater numbers. This too has been the subject of the debate in Poland and Hungary. Particularly Polish farmers who saw a losing scenario for their industry despite their being clear advantages overall when all facets of the economy were aggregated in to standard of living. The big picture tells of a different

¹¹⁵ Joseph Grieco as quoted in Schimmelfennig, Frank. (1999) “The Double Puzzle of EU Enlargement: Liberal Norms, Rhetorical Action, and the Decision to Expand to the East”. Pittsburgh, PA

¹¹⁶ Taras, R. (2003). Poland’s Accession into the European Union: Parties, Policies, and Paradoxes. *The Polish Review*, 48(1), 3-19. www.jstor.org/stable/25779367

story when it comes to EU and CEE. There is a clear asymmetrical interdependence in the long term, where the CEE is the more dependent actor and thus more vulnerable if the relationship were to end. This analysis also contributes to the economic factors being seen as an EU power play. By extending the hand of membership to the CEE, the EU is risking little while rewards are amplified. The same can be somewhat true of the CEE since there will be absolute gains which would make them absolutely better off being in the EU rather than alone. This means that the political reforms could also have served as a means to an end, a veneer of changes that would lead to economic prosperity. The substantial political reforms albeit approved by the elite showed worrying signs in public dissatisfaction or outright apathy. The full picture perhaps became clearer by the results of the referendum in Poland and Hungary where low turnout ensured that pockets of dissatisfaction were left behind.

Sociological theories that explain eastward expansion rest on very different assumptions than rationalists. This theory assumes that actors, their preferences and interests through social interaction create the community which in turn shapes them. This community or environment that results from these interactions is thus context bound, and accepts rationality as constructed rather than observed.¹¹⁷ Thus the goals and objectives of supranational organizations such as the EU are determined by standards of legitimacy and appropriateness at the given time. This brings us to the dichotomy as outlined by March and Olsen in 1989, the (rationalist) “logic of consequences” and the (constructivist) “logic of appropriateness”. Similarly the power of collective in shaping relevant institutions can be summed up as a key driver within the logic of

¹¹⁷ Schimmelfennig, Frank. (1999) “The Double Puzzle of EU Enlargement: Liberal Norms, Rhetorical Action, and the Decision to Expand to the East”. 11 Pittsburgh, PA
<http://aei.pitt.edu/2379/1/002531.PDF>

appropriateness since the role of individuals is minimized.¹¹⁸ For the EU and Europeanization literature, this has presented a twofold dynamic. On the one hand pre-accession meant that stability of existing political norms within CEE were being shaped externally by the EU but by the same token were being domestically shaped since there was an outside incentive to do so. Schimmelfennig's social learning model posits that the legitimacy of EU's ideas and values as perhaps an explanatory model of norm transfer. In juxtaposition, the external incentives model relying on rational choice bargaining posits that the process of incentives, threats and material standing of each actor matter in terms of maximizing one's utility.¹¹⁹ The second dynamic that unfolded in terms of reform process in CEE was that each mainstream political party in Poland and Hungary were pro-EU, with some later emerging as anti-EU in Poland. This has meant that either model could not be used to effectively predict the ongoing contemporary crisis since the "entry to membership" was the primary catalyst of social learning as well as external incentive. Once states gained entry into the EU, the EU lost its main reward and reinforcement mechanism. Although Poland and Hungary still enjoy economic gains and are net beneficiaries, the political climate has reared its ugly head.

Many other models have predicted the elements of norm transfer from west to east.¹²⁰ The lasting impact that this perceived "transfer" has had on academic works is that its produced a legitimate conceptualization of a West and an East in juxtaposition to one another. This pre-occupation with one- direction of influence has falsely created a narrative of an Eastern "other"

¹¹⁸ March, James and Johan Olsen. "The New Institutionalism." *American Political Science Review* 78(3):734-749. 1984

¹¹⁹ Schimmelfennig, Frank. Ulrich Sedelmeier, *The Europeanization of Central and Eastern Europe*. Cornell University Press, 2005., 10

¹²⁰ Ekiert, G., Kubik, J., & Vachudova, M. A. (2007). Democracy in the Post-Communist World: An Unending Quest? *East European Politics and Societies*, 21(1), 7–30.

an thus an attempt to socialize without the other being able to reciprocate.¹²¹ Some of this literature fails to account for the normative similarities that states have with the EU. The legacies left behind by Communism in Poland and Hungary respectively, sow deep cultural and social differences to the West. Economic inefficiencies, governance backwardness, corruption are quite common across CEE states in their pre-ascension assessments, these legacies in turn leave brittle institutions and high corruption as a relative norm in the East, a problem which the EU was sounding the alarm on throughout negotiations and post-ascension. The earlier ascribed label of the EU as being an elitist project without serious public input and effective political parties that can communicate the values of Europe to their loyalists can be interpreted through the sociological framework. The political parties in CEE tended to “follow the herd” when it came to integration without the type of grass roots movements needed to transform public expectations of government, a key component of the agent-structure relationship. The elitist top-down approach is one of the main critiques of EU internal and external policies. As Cas Mudde¹²² points out about EU’s internal struggles by placing the blame away from the electorate, as EU integration was always an elitist construct without the input of the masses, and places the burden on the major party decision makers. Mudde says that contemporary elitist politics of fear and populist rhetoric at highest levels of EU have eroded democratic values, while individual countries have largely failed in integration policies.¹²³

But those that view EU’s political values as inherently embedded in democratic and human rights principles in the community's actions, treaties and jurisprudence posit another dimension that portrays EU’s values as a political struggle to set the rules by which the

¹²¹ Krasnodebska, Maria. “Socialization as a power discourse: conceptualizing the Eastern enlargement of Western international institutions”. *Poznan University of Economics Review*. 2014, Vol. 14 Issue 3, p7-22. 16p.

¹²² Mudde, Cass. *On Extremism and Democracy in Europe*. Routledge. 2016.

¹²³ Mudde., 77

community would respond to applications for membership. This meant that the establishment of these values resulted from interactions with outsiders that pushed political actors to define clear separations between “us” and “them.” Specifically, EU’s first enlargement in 1973 was testing its normative political power in ways that in years prior would have been only reserved for the economic side. The European Community began as an economic union and continued as such making important headway in normalizing free-trade policies. The requirement for trade with the EU and membership was that markets were free and open, thus bypassing the democratic and human rights charters established at the Treaty of Rome. The real test of EU commitment to democracy and rule of law came in 1962 when Spain under General Franco was considering EU membership and closer EU integration. Franco’s government had committed itself to a gradual process of economic liberalization in the late 1950s and was hopeful that this would be enough to guarantee its future in NATO as well as EU. Indeed, high level government officials from Spain were regularly touting their desire for better EU ties and further Spain’s eventual integration into the community. There was a lot of sympathy for the Spanish cause within the community, particularly the two heavyweights Germany and France.¹²⁴ “France could only be favorable to such approaches which, without undermining the integrity of Community, would increase its trade volume and thus its weight. Of all the candidates, Spain was the most important; as a European country, it obviously had its place in the future within a truly European organization.”¹²⁵ This outlook was also shared by some of the smaller members of the community. A Belgian foreign ministry study concluded that democracy and human rights were not possible criteria for the community. European Commission President Walter Hallstein in a

¹²⁴ Thomas, D. (2006). "Constitutionalization through enlargement: the contested origins of the EU's democratic identity." *Journal of European Public Policy* 13(8): 1190-1210.

¹²⁵ *Ibid.*, 1199

1961 speech on EU expansion was interpreted by the Spanish as sharing the same view as the French government that all can and should apply for membership regardless of status. Thus an uphill battle that was faced by defenders of democratic values. The ensuing debate among those who wished to establish a normative constitutionalized Europe grounded in democratic political norms resulted in a new “charter” that built upon the flexible and fluid outlined in the Rome treaty. “The resulting Birkelbach Report, as it came to be known, constitutes a significant step beyond the Treaty of Rome and an important landmark in the constitutionalization of the EC (Birkelbach [2]). While recognizing that Article 237 had opened the EEC to 'any European state,' Birkelbach and his colleagues used the preamble's reference to 'liberty' and its aspiration to 'ever closer union' as the basis for arguing that the treaty imposed strict political conditions on membership. 'The guaranteed existence of a democratic form of state, in the sense of a free political order, is a condition for membership,' the report asserts. 'States whose governments do not have democratic legitimacy and whose peoples do not participate in the decisions of the government, neither directly nor indirectly by freely-elected representatives, cannot expect to be admitted in the circle of peoples who form the European Communities.' The report also proposed that respect for human rights could be a condition for community membership: 'One could ... suggest requiring of States that wish to join the Community that they recognize the principles that the Council of Europe has posed as a condition for those who want to be members of it.' A footnote explains, 'This involves above all recognition of the principles of the rule of law, human rights and fundamental freedoms (cf. article 3 of the Statute of the Council of Europe).' With regard to association, the report left open the question of 'what attitude we must take regarding European states that do not fulfill the political conditions of full membership’.”¹²⁶

¹²⁶ Ibid., 1200

Lasting Impact on Further Enlargement Proceedings

Further enlargement is likely to last a lot longer and painful for candidate states. The recent positions of EU Commission President Ursula von der Leyen paint a picture of optimism but also intensified EU oversight. The European Union has by in large pumped the brakes on further expansion at least in the short term albeit negotiations have been opened with North Macedonia and Albania after initial halt.¹²⁷ This however doesn't abstain the EU from the responsibility of external governance, that is to say its "neighborhood socialization" and implementing the EU system of rules to states that remain just below the threshold of membership. While its formal expansion has ceased, its influence continues to be expansionary particularly with those states whose integration process is in advanced stages. Amidst the growing pessimism about EU's future, it is perhaps beyond EU's borders where the sustainability of its primacy is really being tested.

In light of Brexit, Hungary and Poland backsliding, and threats from emerging states such as China and Russia the EU maintains a hardline position with prospect states. This has meant that the measures in place that would be punitive for states to leave the EU upon joining, and measures in place to prevent democratic backsliding in new members. France has been the leading voice in this regard with changes made to the enlargement draft due to French and Dutch pressures for tougher measures against "reversibility" of membership. The new enlargement draft is "subject to stronger political steering, based on objective criteria and rigorous positive and negative conditionality, and reversibility."¹²⁸ This has elements of rationalism within it, far

¹²⁷ Euro Observer "EU preparing to unlock North Macedonia and Albania talks" March 20, 2020
<https://euobserver.com/enlargement/147821>

¹²⁸ Euro Observer "EU preparing to unlock North Macedonia and Albania talks" March 20, 2020
<https://euobserver.com/enlargement/147821>

from a strategy of persuasion and logic of argumentation that Finnemore and Sikkink emphasized were key to maintenance of a norm.¹²⁹

These conditions of ascension are reminiscent of an earlier period in EU history when applying for membership was open to all EU countries under Article 237 of the EEC treaty. That has since changed and new prerequisites have to be met one of which is the respect for the rule of law as stated in the Preamble and various declarations and acts. The watershed moment came in 1962 when Spain under Franco considered applying for membership with the EU. The EU put safeguards in place to ensure that its normative dimension was fundamentally based on democracy and human rights. Therefore, the moment was symbolic as much as was tangible in that the EU had to force a reinterpretation of its own guidelines and affirm that which it believed was common practice.

¹²⁹ Finnemore, M. and K. Sikkink (1998). "International Norm Dynamics and Political Change." *International Organization* 52(04): 887-917.

CHAPTER IV

CASE STUDY: POLAND

Executive Summary

In recent years discussing patriotism in the EU has become an increasingly politicized and contentious issue. This chapter seeks to uncover reasons for a Polish resurgence of national identity and sheds light on the various ways in which Poland has transformed its relationship with EU. Within the greater context of national vs outsider perspectives, foreigners may view contemporary Polish politics as rife with prejudice and socio-political backwardness, while domestic patriots may be viewed as supporters of the ruling PiS party (Law and Justice Party) and support for their controversial laws. Yet there are many other patriots in Poland considered to be progressives and liberals who differ from mainstream Brussels in their function and visions for the EU. Operating under the presumption of an East-West divide, misconceptions have often directed EU policy toward Poland and vice-versa. The first part of this chapter analyzes the different value systems of EU and Poland and seeks to answer the question whether a divide really exists. Polish historical experience factors heavily into its contemporary identity and thus is an often neglected factor just as are the perceived national interests of wealthy member-states that get realized through EU institutions. The second part is EU focused, arguing that EU has operated as an interest based union rather than norm-centered. This decision makes it difficult to galvanize support on a normative basis without lucrative interest-based incentives. The last part covers Polish domestic politics, tracing the fall of the liberal left parties and effects of majority rule system set up under the current PiS government on the rule of law in Europe. Here a perfect storm came together for the ruling PiS party that effectively was able to connect internal

divisions with an outside force (EU) that timely pushed for policies that were heavily rejected in Poland. Consequences on the rule of law were negative with the EU courts remaining as the last bastion of hope for the EU to reverse some of the laws in place since PiS has come to power.

Uneasy Partnership and Unspoken Assumptions Europeans Hold About Each Other

The enlargement of 2004 was special in that it was merging two worlds that had been in opposite spaces for nearly forty years. This by no means that the differences in these two worlds were solely shaped by forty years of living opposite lifestyles, their differences exist as a culmination of learned traditions and histories that crisscross even across the most homogenous societies. Poland's contemporary experience has long mirrored that of its previous generations, with large segments of the Polish population living in rural areas not just as an economic decision but a lifestyle preference.¹³⁰ Immediate issues with the EU aside, the Poles have a way of seeing the world that is unique to their own experience and the myriad of reasons for such would require a dissertational endeavor on their own. Other scholars have attempted to explain what these differences are and how the physiological differences factor into politics and beliefs about the other side. One of the earliest works by John Feffer traced the fall of the iron curtain and the attitudes of the people of the East toward their new reality, capitalism and West. The majority of respondents in their interviews with Feffer presented a great sense of optimism but also apprehension.¹³¹ The apprehension stemming from the competitive nature of the world they're about to enter and the injustices and inequities that will follow. A reset of social order that will birth new winners and losers much like the reset that brought about communism at the

¹³⁰ Przemysław Sadura (2019) Poland's Futures: A View from the Countryside. *Green European Journal* May 8. <https://www.greeneuropeanjournal.eu/polands-futures-a-view-from-the-countryside/>

¹³¹ Krastev Ivan and Stephen Holmes. How liberalism became 'the god that failed' in eastern Europe? *The Guardian* October 24, 2019 <https://www.theguardian.com/world/2019/oct/24/western-liberalism-failed-post-communist-eastern-europe>

end of second world war. This “wariness” was common throughout the Eastern bloc, as shown by Feffer’s interviews with people of Poland, Hungary, Bulgaria, Romania, and Czechoslovakia. Feffer’s assessment and subsequent interviews with those same individuals some 25 years later remained more or less in line with the attitudes of the past. There was an air of resentment toward the West, a feeling that after all there exists a difference between “us” and “them.” Indeed, many acknowledge the economic modernization, the increase in wealth overall, but also many lament the obligatory values and political and social practices imposed by the West. This has some historical significance in that Polish society prides itself on its “autonomous” nature having resisted imposition of other systems in the past.

Polish society resists the classification of ever being a full totalitarian state.¹³² Apart from its eastern neighbors, Poland has a natural degree of “societal pluralism” which have de facto increased the ability of civil society to reject certain totalitarian and authoritarian regimes in its history. Milovan Djilas, in his examination of totalitarian regimes across Eastern Europe and Soviet Union found Poland to be the exception due to its unique characteristics. Djilas emphasized the role of the Catholic Church in maintaining a measure of autonomy in Polish society. He similarly pointed to peasant holdings remaining private after Soviet invasion as well as the 1944 uprisings as signs that Polish society never viewed anybody else other than themselves as its “liberators.” The subsequent revolt in 1956 also had a significant impact of Polish internal autonomy. This de facto power of the Catholic Church generated a relationship with the Soviets that rested on power recognition and negotiation that would lead to concessions for Poland unlike any other country under Soviet influence. There was always a cautious

¹³² Linz, Juan J., and Alfred C. Stepan. 1996. *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*. Baltimore, MD: Johns Hopkins University Press.p.255

approach to the delicacy of the religion question, an atheist totalitarian regime versus a devoted Catholic population. The power struggle that ensued between Communism and Catholic Church is analogous to the power struggle of the 1989 democratic transition and the contemporary EU rift. Several similarities still permeate today. Communist Poland had substantially more priests per capita than any other country in the world.¹³³ This fact only applies to European Catholics today, with some numbers of clergy declining overall and less religiosity across the country. However, the Catholic Church has experienced a renaissance of sorts under PiS platform and leadership. Kaczynski has urged young people to adopt morals of the Church and find solitude in religion as opposed to the material offerings of the West.

Since becoming an independent state in 1945, the Polish national antagonism centered around anti-Soviet hegemon sentiments which provided a deep reservoir of resistance on all fronts. The Catholic Church in many ways was just one of these sources of resistance, with more rural peasant populations being the other. Law and Justice party (PiS) continues to have strong support in rural areas, correlating with past occupied parts of country. The Polish agricultural sector remained un-nationalized during the Communist era, and largely negotiated its own private cooperatives that were privately owned without state interference. This double front of resistance to the “outsider” in its early history provided a similar blueprint for its negotiations with the EU some decades later. Within those negotiations, albeit voluntarily wanting to become a part of the EU community, concessions were made by the “outsider” EU when it came to Polish agricultural sector and its blessings were received by the Catholic Church. Thus the fear of external involvement in shaping Poland’s future is something that is deeply rooted in at least some parts of the Polish population. This segment of the population views the need for a strong

¹³³ Linz, Juan J., and Alfred C. Stepan. 1996. *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*. Baltimore, MD: Johns Hopkins University Press.p.255

independent state in order to fend off the economic and political interests of others at Poland's expense. Political parties have not been able to exploit this resource as a meaningful game changer at the polls until PiS rebranded its strategy. PiS and Kaczyński could be viewed as filling a void as illustrated by the amount of proportional support they receive among rural and conservative parts of the country.

So what are the ideals and values that Poles hold dear that other EU states don't? The answer requires an analysis of the PiS party platform and the mechanisms it has adopted to gain power and assert its position throughout local and national elections. In 2011, Jarosław Kaczyński published "Report on the State of the Republic of Poland" and what became a manifesto that outlined the problems as well as solutions for Poland regarding its foreign relationships.¹³⁴ The PiS concept boils down to: "a sovereign Nation, a safe family and a civilization minimum for an individual". Everything begins with the nation as an organizing principle, often nation is spelled with a capital "N" in official party documents. From the perspective of belonging to a nation, all other aspects of existence branch out but repay their debt to the nation they belong to. In this way, PiS is viewing Poland not as a political entity but as an organic historical community, an identity that exists outside of the political definition of the term. The specific model of "Polishness", emphasizes Catholic religion, uniqueness of the Polish

¹³⁴ Access to the published excerpts from the report in English here: "Report on the State of the Republic of Poland". <https://wpolityce.pl/polityka/111772-jaroslaw-kaczynski-raport-o-stanie-rzeczypospolitej-tylko-u-nas-fragmenty-programowej-publikacji-prezesa-pis>

In the report, Kaczyński criticizes Donald Tusk's government for solidifying power among the two ruling parties with at all levels and not giving room for the opposition to participate in government. He also critiques the lack of vision by Tusk and his party, ambiguity in their approach to governing. This publication was of course three years prior to Tusk taking on the role of President of the European Council (2014-2019) at which point their domestic "feud" spilled over into the international arena with Kaczyński's PiS taking over government in the 2015 parliamentary and presidential elections.

historical experience, and the value of its cultural and ethnic homogeneity are something to be defended.¹³⁵

To this end the value of the nation is best realized in the international arena by how much sovereignty it has. The stronger sovereignty increases the importance of the nation in the international arena and thus able to realize its own interests. By being a member of the EU, sovereignty that PiS wishes Poland to have is threatened if not all obsolete. Thus in having been asked about this dilemma with sovereignty and EU membership Kaczynski responded that “there is no loss of sovereignty if there is a possibility of leaving the EU by unilateral decision of the national authorities.”¹³⁶ This implies that Poland doesn’t view the EU commitment as binding and more so as “a la carte” where it can choose what EU policy is suitable for its sovereign nation. Having the option of leaving thus grants it powers that are natural to a sovereign nation, the ultimate dimension of independence. This view of international relations is all too familiar to its scholars, with primacy of interests and balance of power as the drivers of policy. Poland is of great geopolitical significance with Russia to the east, Germany to the west all the while Visegrad region allows it other alternatives for friends and cooperation. This geostrategic position gives Poland some anxiety as the balancing between Germany and the EU on one end and Russia on the other places this competition “over the head” of Poland according to former Foreign minister Witold Jan Waszczykowski.¹³⁷

The official PiS program outlines “for us Poles our own state has also got another meaning – no sovereign Polish state existed for 123 years. We could not decide on our own fate,

¹³⁵ Balcer Adam, Piotr Buras, Grzegorz Gromadzki, Eugeniusz Smolar, Change in Poland, but what change? Assumptions of Law and Justice party foreign policy, *Stefan Batory Foundation*, Warsaw 2016, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Otwarta%20Europa/Change%20in%20Poland.pdf>

¹³⁶ Balcer Adam, Piotr Buras, Grzegorz Gromadzki, Eugeniusz Smolar, Polish views of the EU: the illusion of consensus, *Stefan Batory Foundation*, Warsaw 2017, https://www.batory.org.pl/upload/files/pdf/rap_otw_eu/Polish%20views%20of%20the%20EU.pdf

¹³⁷ *Ibid.*, 3

which is why we have recognized the Polish state as a value of the highest order, and any form of undermining its sovereignty or existence are unacceptable, dangerous to the nation and a threat to Polishness in the current and historical dimension”.¹³⁸ This viewpoint goes against the traditional identity building that EU has worked on in recent years. A union of states or a community of nations seems to be the preferred position preferred by PiS program when it comes to its relationship with the EU. When Kaczynski speaks of the European community, he speaks to their invasive character and holding Poland hostage to its own strategic interests against Russia. Kaczynski has singled out Germany as a state that interferes in Polish domestic policy and tries to treat Poland as a “vassal” state in the German-Russian competition. This fear of external interference has historical roots as Poland’s history from wars past have proven it to be place where many foreign armies have clashed. This perhaps remains in some distant memory, certainly is something that gets mentioned by PiS as talking point when talking against the European Community. The importance of internal agreement and homogeneity is thus viewed in high regard as any internal opposition exists merely as a vassal of the external competitor. Thus the party platform has accused others of attempting to weaken the central power of the government and in turn that of the majority. Therefore, decentralization and a focus on minorities’ rights and regional identity are futile efforts for PiS as they lead to weak domestic structures and loss of state sovereignty in the international arena.

Adding to the complexity of Polish history has been the legacies left behind by many of these invading armies and regimes. Some issues continue in contemporary Polish political life. In particular, the massive scale of Nazi extermination camps that destroyed Poland’s Jewish population, the largest in the world prior to the war, and the complicity of Poles with the Nazis.

¹³⁸ The Law and Justice Party’s Programme 2014, p.11, <http://old.pis.org.pl/dokumenty.php?s=partia&iddoc=164> (in Polish)

In 2018, PiS introduced the “anti-defamation law” prohibiting claims that ‘the Polish Nation’ was responsible or co-responsible for Nazi crimes.¹³⁹ This legislation would effectively disassociate Poland from the Holocaust and be punitive to those who present history as it was. This attempt at historical revisionism was met with a lot of resistance throughout Europe and particularly at a time when the rise of the far right has also led to a rise in anti-Semitism during the same time span. The law was toned down some to include lesser punishments but nonetheless remains on the books. For PiS, this has been a popular way of galvanizing support from its far right supporters whom have protested in large numbers against supporting victims and families of victims with restitution from the Polish government. PiS leader Jaroslaw Kaczynski has said "Poland has no obligations resulting from the war, neither legally nor morally."¹⁴⁰ Thus from the eyes of PiS, mainstream history contradicts the main ideological platform that it has sought to establish: that is to portray Poland as a nation of heroes whom have been victimized throughout its long history. Any complicity with Nazi crimes would obviously distort that image. So on the one end, PiS has figured out that nationalistic myths regardless of historical veracity pay dividends at the polls. On the other hand, the law put forth is direct fodder to extremists within the party that follows a similar path to other ways of doing politics in Poland and Hungary. In Viktor Orban’s style, PiS put forth a law that it knew was too harsh, then later scaling back just enough to where it could present itself to the outsiders as fixing the problem they themselves created. While the issue has remained somewhat under the radar when often discussing Poland’s battle with EU over its courts, laws on the books as such also are in contradiction to EU laws which could also play out in future case laws.

¹³⁹ Ray Larry & Sławomir Kapralski (2019) Introduction to the special issue – disputed Holocaust memory in Poland, *Holocaust Studies*, 25:3, 209-219

¹⁴⁰ Sieradzka Monika “Poland and Israel at odds over Holocaust restitution” May 13, 2019 *DeutscheWelle* <https://www.dw.com/en/poland-and-israel-at-odds-over-holocaust-restitution/a-48724524>

Albeit mostly homogenous, Poland does have ethno-regional divisions that have been a point of some contention domestically. Namely the regions of Silesia and Kashubia in western and central Poland differ from the common Polish language and customs. The region of Silesia was only incorporated into Poland in 1945, prior being part of Germany even though language spoken there was Polish.¹⁴¹ The second region, Kashubia lies closely to the city of Gdansk and has its own unique language and customs not considered to be ordinarily Polish. This Western Slavic community self-identifies as Polish however differs from non-Kashubian Poles.¹⁴² Silesia was recognized as an official ethnic minority post-1989 as part of Polish push for European membership. A system of minority rights protection is a pre-requisite for EU membership and the Silesians making up the largest ethnic minority in Poland were granted this self-identification. Kashubians were recognized as a linguistic minority but not an official ethnic minority in the traditional sense. As a result, the Silesians have enjoyed local and provincial self-governments with a lowered threshold for minorities and it has members in the Polish Sejm. Contemporary experience has rolled back some of the early successes in legitimizing the voices of self-identifying ethnic minorities in Poland.¹⁴³ The nation being the ideological backbone of PiS party platform along with it carries an understanding that homogeneity and a common language, religion, and historical experiences are what make a state stronger in the international arena. In Polish former nationalist movements, the Kashubians and Silesians were seen as Poles who had “forgotten” their true ethnic Polish and historical origin.¹⁴⁴ Contemporary PiS stances echo those same sentiments: Historically, there is no such thing as the Silesian nation. One might

¹⁴¹ Kurczewski, J. (2007). Self-Identification Structure in Opole Silesia and the Kashubia: A Comparative Analysis. *Polish Sociological Review*, (157), 87-104. Retrieved June 1, 2020, from www.jstor.org/stable/41275003

¹⁴² Ibid,1

¹⁴³ Kamusella, T D & Nomachi, M 2014, “The long shadow of borders : the cases of Kashubian and Silesian in Poland”, *Eurasia Border Review*, vol. 5, no. 2, pp. 35-60

¹⁴⁴ Ibid.,40

add that the Silesian identity is just another way of defining oneself other than as Polish and presumably the acceptance of camouflaged German allegiance.” However, at least some of this minority’s activists ostentatiously demonstrate their disloyalty to Poland.”¹⁴⁵

PiS has also generally criticized what they view as an attempt to divide and disunite the Polish nation by emphasizing ethnic minority differences. In particular, “Donald Tusk’s emphasis on his Kashubian identity” has been subject to criticism along with his party’s position more aligned with the EU, concerned with multi-culturalism and rights protections. PiS has been able to shift the conversation to suggesting overt and covert cooperation between its internal and external enemies under the cover of multi-culturalism. Kaczynski has been especially vocal in this arena, with conspiracy theories mounting since 2010 when his twin brother died in a plane crash near Russian city of Smolensk.

Poland has been experiencing a societal transformation since its break from Communism. If there was a learning curve in the 1990s to join the EU, there is now an ongoing learning curve to stay within it. The transition from modernity to post modernity remains ongoing: Poles are having less children, standards of living are higher than before, and roles of women have long mirrored that of capitalist countries. In collaboration with University of Warsaw and other top universities in Europe, European Value Systems surveys have been conducted throughout Europe since the 1980s. Data available for Poland from four different eras (1990, 1999, 2008 and 2017) show a changing and transformative period in Polish society. The importance of religion and work in daily life has been on a steady decline with the lowest percentages coming in the latest 2017 survey. Work as a crucial aspect of life was higher in 2008 than 2017 and people tend

¹⁴⁵ Adam Balcer, Piotr Buras, Grzegorz Gromadzki, Eugeniusz Smolar, Change in Poland, but what change? Assumptions of Law and Justice party foreign policy, *Stefan Batory Foundation*, Warsaw 2016, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Otwarta%20Europa/Change%20in%20Poland.pdf>

to value free time and relationships with friends. Relative to other Western European countries these trends are similar. Poles view Catholicism not so much as a religious matter of faith but rather an identity an endemic part of their culture. Those polls as evaluated by sociologists have also revealed a very unique characteristic in Polish society: generalized fear and this fear does not correlate with almost any of the other indicators - for example, social group, age or values.¹⁴⁶ The sources of this fear are difficult to untangle but sociologists have suggested that based on the data that most feel that they are experiencing a disintegration in society. This disintegration comes from disillusionments about work-life balance, and perceptions of success and failure.

Another aspect that these value surveys have revealed about Polish society concerns its relations with other ethnic groups. While the questions regarding which neighbor's respondents would be accepting of, Jews and homosexuals have been ranking higher than Muslims or immigrants of Middle Eastern descent. This trend has been increasing since about the 2008 influx of migrants. Overall there is a wariness of other cultures particularly ones that radically differ to that of traditional Poland. "There is increased acceptance of divorce, homosexuality, cohabitation, euthanasia and premarital sex. Disapproval to contraception, abortion and offering gifts has declined."¹⁴⁷ Abortion rights in Poland remain a controversy. The current law restricts abortions except in cases of where the mother's life is in danger, if pregnancy is the result of rape or if the fetus is severely impaired. Surveys of Polish society show approval or support of the current law. Despite this there have been internal as well as external pressures by many human rights groups to amend the law to make it easier to have abortions. Despite these efforts, some PiS parliamentarians and conservative groups have considered new "popular initiatives" that aim

¹⁴⁶ Ludwika Tomala, PAP - Science in Poland

<https://poland.pl/social-issues/social/poles-increasingly-value-friends-and-free-time/>

¹⁴⁷ CBOS Public Opinion Research Center https://www.cbos.pl/PL/publikacje/public_opinion/2010/07_2010.pdf

to make the current law even more restrictive. In addition, protections offered to minorities in Poland have been generally under threat since PiS has been in government.¹⁴⁸ As recently as 2016, the Sejm rejected a draft which assumed the punishment of "hate speech" also on the grounds of sex, gender identity, age, disability and sexual orientation.¹⁴⁹

Much to the dislike of Brussels, Poland has significant support behind many of domestic actions. In that sense, it is doing the will of its people despite there being an ideological dispute with mainstream liberal Brussels. Much to the dismay of many human rights groups and EU Council, the Polish PiS operates very much as a majority-rule democracy. Removing safeguards for minorities and even threatening greater isolation through various conspiracies threatens the democratic spirit and values that the EU is based upon.

It is precisely the Western ideals of political pluralism, government transparency and tolerance for others coupled with years of imitation politics that have reached the point of liberal democratic collapse.¹⁵⁰ As argued by Stephen Holmes and Ivan Krastev, the unforgiving push for liberal democratization made to mimic that of the West without offering an alternative has alienated many in the East. They contend that the obligatory nature of the instituting Western practices and values is the cause behind the current populist wave and anti-Western rejection. This view however neglects the experience of individual CEE member states, and paints all with the same brush. Indeed, if Poland and Hungary are similarly moving in the same direction, then how would this view explain the relative lack of illiberalism in other states? Slovakia, Romania, Czech Republic have ebbed similarly to Poland and Hungary but none have leaped as far as the

¹⁴⁸ Human Rights Watch, Poland: Reject New Curbs on Abortion, Sex Ed
<https://www.hrw.org/news/2020/04/14/poland-reject-new-curbs-abortion-sex-ed#>

¹⁴⁹ <https://www.gazetaprawna.pl/artykuly/990147,sejm-odrzucil-projekt-nowoczesnej-ws-karalnosci-mowy-nienawisci.html> (English Translation via Google Translate)

¹⁵⁰ Krastev and Holmes, 2

two frontrunners in suppressing opposition and constitutional change. There is value however in the potential of agitation that EU demands have caused. After all, the popularity of the EU project remains high in Poland, but deeper integration or even defense of liberal style values remain lukewarm.¹⁵¹ But many EU pundits and pro-integrationists point to the high public opinion ratings of the EU within Poland to defend EU's soft positions on Poland's violations of rule of law among others. While it is indeed a fact that Polish citizens value their membership in the EU and view it in high regard, this fact needs to be put into perspective since profound differences exist in Polish society regarding its connectedness to the EU. While membership approval is high, specific policies by the EU have rubbed Polish citizens wrongly: the attitude towards migrants of different cultures, and whether to enter the Eurozone.

Eurobarometer surveys are a useful tool in highlighting the state of the European Union in its member states and the progress on EU citizenship values. Poland has been a consistent backer of the EU and its citizens still see a lot of good in the EU partnership. The most recent surveys from 2019 reveal that a majority (75%) of respondents feel "attached" to the European Union with 24% feeling "very attached" and only 25% percent being "against." This in relative terms to other member states is striking since Poland ranks among the highest.¹⁵² The belief that EU Member States are close in terms of shared values is also widespread across CEE member states. Slovakia (73%) Poland (70%) and Hungary (+10 percentage points to 61%) all polled "close" values with that of the EU. Meanwhile France (53%) and Sweden (55%) were among the highest polling "distant" values from the EU. The most associated value with the European Union in Poland is democracy (37%) and peace (37%).¹⁵³ Thus for Polish society the European

¹⁵¹ Krastev and Holmes., 2

¹⁵² Eurobarometer Survey 2019 OpenDataPortal
https://data.europa.eu/euodp/en/data/dataset/S2253_91_5_STD91_ENG

¹⁵³ Eurobarometer Survey 2019 OpenDataPortal

route is quite clear but the consensus on membership is no longer of great significance. Top EU brass fail to recognize that there are now nuanced ways that this EU support can be interpreted. For example, when looking at specific EU policy choices regarding immigrants or providing asylum, Poles overwhelmingly reject such notion. Certain liberties guaranteed in the West, such as freedom of expression and loose marriage laws are frowned upon in Poland. Despite there being less of a religious angle to Polish sentiments, these beliefs have now planted themselves even among many moderates who view multi-culturalism with a grain of salt. As part of PiS campaign strategy, Kaczynski who often has very far-right views, Kaczynski has stepped aside and allowed for more appealing and more moderate members of the party to run for office. Andrzej Duda was such a choice, considered a moderate relative to Kaczynski, however Kaczynski still remains President and founder of the PiS party.

“While reports in the press are frequently complaining that the policies which PiS are pursuing are leading Poland away from the European mainstream, it is worth pointing out that the critics seem to be unaware of just how many Polish citizens would be pleased by this.”¹⁵⁴ Indeed, research has shown that Poles generally feel misunderstood and unappreciated, seeing Western countries as patronizing and judging Poland with dismissiveness. This research has spanned time from the 1990s¹⁵⁵ into well after integration in 2011 and 2014¹⁵⁶ showing the same sentiments.

https://data.europa.eu/euodp/en/data/dataset/S2253_91_5_STD91_ENG

¹⁵⁴ Balcer Adam, Piotr Buras, Grzegorz Gromadzki, Eugeniusz Smolar, Polish views of the EU: the illusion of consensus, *Stefan Batory Foundation*, Warsaw 2017,

https://www.batory.org.pl/upload/files/pdf/rap_otw_eu/Polish%20views%20of%20the%20EU.pdf

¹⁵⁵ Davies, Norman. Polish National Mythologies *The Milewski Polish Studies Lecture* 1996 no. 4 Central Connecticut State University

https://www.ccsu.edu/polishstudies/files/Milewski_Polish_National_Mythologies.pdf

¹⁵⁶ Galbraith Marysia. 'Poland Has Always Been in Europe': “The EU as an Instrument for Personal and National Advancement” *Anthropological Journal of European Cultures* 20 (2), 21-42

Crux of the EU: Primacy of Interests Over Norms

Failures of CEE member states to move their agendas forward have created consequences that reinforce prior generalizations and misperceptions about each side. On March 1 2017, the European Commission published its White Paper on the future of Europe. The challenges faced by Europe included rule of law concerns, populism, and Brexit. These agendas guided the white paper series and were the opening of this debate on how to proceed forward. Within the publication were five potential scenarios for Europe to move forward. The possibilities covered range from the maintaining of status quo, to a change of scope and priorities, to a partial or collective leap forward.¹⁵⁷ Each of the five scenarios overlaps with some of these ideas and they are simply meant to serve as a framework or guide for policymakers. Weeks later at a European Summit at the Palace of Versailles, the four top EU states met to discuss a way forward for Europe amid the white paper publication and begin talks for a united front on a desired scenario. Emmanuel Macron of France, Angela Merkel of Germany, Mariano Rajoy of Spain, and the President of the Italian Council of Ministers Paolo Gentiloni all met with goal of reaching consensus. What came out of the talks was a “relaunch the political dynamic to re-establish faith in Europe”¹⁵⁸ particularly through choosing the most appropriate way forward given Brexit and populist challenges. The four country bloc opted for the scenario that pushes for a multi-speed Europe, one that is based on “differentiated integration” rather than an “ever closer Union.” This way the lagging member states in terms of economics would be given preferential treatment as would those with social and political dynamics that differ than that of mainstream EU. Under this

¹⁵⁷ White Paper on the future of Europe

https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf

¹⁵⁸ Aline Robert, “Versailles: A summit to restore faith in Europe.” Euractiv June 3, 2017

<https://www.euractiv.com/section/future-eu/news/versailles-a-summit-to-restore-faith-in-europe/>

scenario a “coalitions of the willing” emerge to work together in specific policy areas. These may cover policies such as defense, internal security, taxation or social matters.

This message sent by the four-country bloc was not well received by other member states particular CEE members. The leaders of the Visegrad Group (Poland, Czech Republic, Slovakia and Hungary) met only a day later in Warsaw and put forth their own plans for Europe going forward, a plan that differed in practice to the one chosen by the West. The leaders state that the EU’s unity is of “vital importance and should always be the starting point of our approach”. “Reaching consensus is indispensable if we want to foster confidence in our activities,” they state, before adding that enhanced cooperation is also an option, as the EU treaties foresee, but that “any form of enhanced cooperation should be open to every member state and should strictly avoid any kind of disintegration of the single market, Schengen area and the European Union itself”.¹⁵⁹ This sent a clear message to the core powers that their preference for a two speed Europe is insensitive to the needs of smaller states. In this way the Visegrad four with Poland at the forefront have been acting as a voice for the smaller and less privileged member states. This action was one in a long line of others that CEE states perceive as discriminatory against them. One example of this has been the road transport industry. This industry makes up a sizeable contribution to the CEE economies, precisely Romania and Bulgaria where up to 15 percent of the economy rests on this industry. The frustration from the East has come as a result of the West imposing protectionist measures for their local businesses that puts the smaller, less wealthy trucking companies of the East at a comparative disadvantage. Workers in the East are paid East wages despite working across the EU, at times for most times of the year their freight is either loaded and dropped in the West or both. There is a problem of exploitation because CEE

¹⁵⁹ Gotev Georgi., “Visegrád Group spells out its vision of EU’s future.” Euractiv March 3, 2017 <https://www.euractiv.com/section/central-europe/news/visegrad-group-spells-out-its-vision-of-eus-future/>

member states cannot be competitive with the Western companies and thus end up taking less money in contracts under harsher working conditions since the company they're officially "employed" by is a subsidiary registered in the East.¹⁶⁰ Thus, it has been issues like these that have slowly turned the wheels of patience against the EU. Despite there being a convergence on issues related to free flow of labor, it is becoming clear that CEE states feel exploited due to disproportionate wages. Despite there being consensus in the Visegrad four on how to proceed with their negotiation, there is a feeling of being misunderstood and at time powerless among the CEE in their disputes with the West. These kind of issues are all too familiar to them and usually the outcome is not in their favor. Thus, resentment and further division ensues because neither side seeks to give up their national interests and that which works for their communities. In lieu of this, issues have been falling under the sphere of interests rather than communal goals of progress. One of the key critics of such EU approach have been Ivan Krastev and Stephen Holmes. Norms fall by the wayside when interests of each member state are threatened. Thus the EU's treatment of its Eastern friends has been through the lens of interest under the guise of liberal norms and prosperity for all. The blowback from this kind of approach is becoming most evident now that populists are in charge and their constituents have felt the many economic changes as a result of EU membership.

Polish Security Concerns Unaddressed by the EU

Poland has relative to some of the other CEE member states been most vocal about the need for a more defense spending by the EU. Despite being a NATO member, it views itself as a security buffer for Western Europe sandwiched geographically between Russia to the East and Europe in the West. This position coupled with Russia's irredentism in Ukraine and Georgia

¹⁶⁰ Crina Boros, Jeff Poortmans. "Deadlock in Brussels over Trucking Wages." November 2, 2018 <https://theblacksea.eu/stories/deadlock-brussels-over-trucking-wages/>

prior, have caused added anxiety to a Polish state that is uniquely Europe's first physical line of defense. "Since 2016, more than 70 formations and military units, including two divisions and three brigades, were set up in Russia's Western Military District. Established in 2010, the structure covers 26 entities of the Russian Federation, bordering Norway, Finland, Poland, Estonia, Latvia and Lithuania. The minister said that Russian troops in the district have received some 5,000 units of new and overhauled weapons and equipment over the past years, raising the ratio of deployed new gear from 39 to 54 percent. By the end of this year, more than 350 new facilities are to be put into operation in the Western Military District."¹⁶¹ Poland has reacted in kind to this Russian threat on its borders by moving one army division to its eastern border and inking a deal with the US to acquire the Patriot system. That response has been mostly done through the channels of NATO, and the United States in particular, the security ally that Poland has found most reliable. Polish Defense Minister has said Poland is determined to strike a deal that would secure the permanent presence of U.S. troops in Poland in exchange for Polish financial support. Poland feels vulnerable to Russian influence and as a member of NATO, it doesn't enjoy the kind of permanent NATO troop presence that its counterparts in Germany do. While this kind of unilateralism on behalf of Poland to engage the US in confronting Russia head on has worried some Brussels officials concerned with sparking new Russian tensions. Germany having the most balanced relations with Russia in part due to its natural gas need supplied by Russia, has been walking a tight rope when addressing tensions between its Polish EU and NATO ally and Russia. Poland has thus grown in resentment toward Brussels on this issue and a lack of support either in official statements or action has shown that America is its most trusted

¹⁶¹ Adamowski Jaroslaw. Amid Russian military buildup, Poland reacts. Defense News August 27, 2018 <https://www.defensenews.com/global/europe/2018/08/27/amid-russian-military-buildup-poland-reacts/>

ally in its confrontation with Russia.¹⁶² A near perfect illustration of this was when Vladimir Putin engaged in historical revisionism by accusing Poland of being co-conspirators with Nazis and partly to blame for the onset of the second world war. This was met with harsh criticism by Poland and other American officials but not by the core EU member states.

Another point of divergence between Polish and EU officials has been the question of immigration, specifically the responsibility of each member state in taking on asylum seekers. The European Council has adopted the term “responsibility sharing” in its official documents. The general guidelines adopted by the European Council on June 27, 2014 say that “the Union needs an efficient and well-managed migration, asylum and borders policy, guided by the Treaty principles of solidarity and fair sharing of responsibility, in accordance with article 80 of the Treaty on the Functioning of the European Union and its effective implementation” and that “The Union’s commitment to international protection requires a strong European asylum policy based on solidarity and responsibility”.¹⁶³ In practice what has transpired has left some member states worse off because they are the first point of entry (Greece, Italy). Other EU members such as Germany have called on “solidarity” to help take in refugees and asylum seekers by setting a quota on each member state. The 2015 approval of asylum quotas was accepted by and passed by EU interior Ministers which would see some 160,000 asylum seekers distributed across the EU continent. Hungary voted against while Poland interestingly approved the measure. Once passed, these quotas became mandatory on every EU member state irrespective of their vote for it. Thus when Hungary, Poland, Czech Republic and others refused to take in any refugees the European

¹⁶² Poland versus Putin: Dispute over history, December 13, 2019 *DeutscheWelle* Retrieved from <https://www.dw.com/en/poland-versus-putin-dispute-over-history/a-51847283>

¹⁶³ European Council (2014): Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues. 2014/C 240/05. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0724\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XG0724(01)&from=EN)

Commission brought forth a lawsuit against the three states.¹⁶⁴ Unfortunately for Donald Tusk's domestic politics back home in Poland, public opinion was against any asylum quotas and called on Poland to protect its cultural homogeneity. This would prove to be one of the last moves of Tusk's PO Civic Platform party while in government. Though quickly backtracking by calling the EU's quotas "ineffective" and speaking of a split "between east and west"¹⁶⁵, Tusk's party was ousted at the very next election by PiS.

Despite there being a reliance on American support when it comes to security matters, Polish society at large is wary of outside powers and its perceptions abroad.¹⁶⁶ November 11th marks Polish Independence Day, when in 1918 after nearly a century of non-existence as a state, Poland became a sovereign state with its own distinct borders. This independence lasted until 1939 with the Nazi invasion that sparked the second world war and again its sovereignty renewed in 1945. Prior to the 20th century, Poland was for better part of two centuries portioned among Russian empire, Austro-Hungarian empire, Prussian empire. A nation that played such a significant role in Europe throughout the 15th and 16th centuries had ceased to exist as a legitimate independent state. The sense of Polish national identity did not waver however and attempts to "Germanize" or "Russify" the Polish nation were met with more resistance. "Poland was a prisoner, but its soul was unbound."¹⁶⁷ This resilience to the outside invader remained as part of Polish national identity, rearing its head at yet another important junction in its history.

¹⁶⁴ EU to sue Poland, Hungary and Czechs for refusing refugee quotas, (December 7, 2017) *BBC News*, Retrieved from <https://www.bbc.com/news/world-europe-42270239>

¹⁶⁵ EU 'has east-west split' on migrant quotas, (December 17, 2017) *BBC News*, Retrieved from <https://www.bbc.com/news/world-europe-42352876>

¹⁶⁶ Galbraith Marysia. 'Poland Has Always Been in Europe': "The EU as an Instrument for Personal and National Advancement" *Anthropological Journal of European Cultures* 20 (2), 21-42

¹⁶⁷ Davies, Norman. Polish National Mythologies *The Milewski Polish Studies Lecture* 1996 no. 4 Central Connecticut State University

Throughout its national history, Poland has been on the losing end of failed revolutions, failed uprisings or abandonment by its former allies. Polish experiences did not forget the outcomes of the conferences at Yalta, Teheran, and Potsdam where their fate was decided for them. And worse, that fate was that Poland would be handed over into the hands of the Soviets. These experiences have caused a lot of anxiety about external allies or enemies deciding the fate of Poland without it being in position to decide its own. Despite its independence in 1989 and basis for democratic page in its history books, deep mistrust continues to shape foreign policy opinions.

Within this political history lies also a religious history that has paralleled experiences with that of the Polish political state. Successful military battles against the Ottoman invaders in 1673 and in 1683 against the Tatars role of religion became more salient. Equally successful were the Counter-Reformation movements that kept Catholicism as the main driving religious force in Poland. These events were not forgotten once Poland became a vassal state of the Russian empire, Austro Hungarian and Prussian empires. A large part of preserving “Polishness” during those time periods meant preserving Catholicism. Thus Catholicism became synonymous with Polishness, a feeling that most Poles share in today’s public opinion polling. Receiving blessings from the Catholic Church and John Paul II during its EU ascension proceedings, Poland was uniquely relying on a religious society to enter a secularized liberal democratic world. The role of the Pope in advocating for Polish membership is in many ways understudied. The political freedoms that exist in Poland today can be sourced back to the Catholic Church’s bravery and solidarity of the time. So the power of the Church in shifting narratives as they relate to politics cannot be studied apart or separately from Polish national identity.

Domestic Politics: How the Center-Left Parties Contributed to Their Own Downfall

The fundamental framework as outlined by Kacyznksi in 2011 centers on the following fundamentals:

1. Ensuring the sovereignty of the Nation: first, it means the sovereignty of the nation state over other states and international entities; second, the functioning of an efficient democratic mechanism within the country. Belonging to the EU is not a loss of sovereignty if there is a possibility of withdrawing from it through unilateral decisions of state authorities.
2. Increasing the cultural resource of the Nation - both by developing education and organizing it, by supporting the development of science and art, and by strengthening and intensifying patriotic attitudes, treated as the basic factor of national integration, building intergroup and interregional solidarity and a great source of motivation for various type of activity, ranging from civic, through cultural, charity, sports and economic.
3. Increasing the wealth of the community and the individual wealth of Poles - primarily by ensuring GDP growth at a rate corresponding to the need to quickly make up the difference between Poland and rich countries of the European Union (as well as other rich countries), while maintaining the principles of social and national solidarity in its economic dimension and from the perspective of demographic development.
4. Development of all kinds of infrastructure (housing, communication, medical, educational, cultural, scientific, hydrological, sports, recreational, administration) - satisfying the individual and collective needs of Poles.
5. Market repair and control - by ensuring safe trading and real competitiveness

6. External security of the state in the military and economic dimension - ensuring its strong position and the security of its citizens, including security towards its own state (observance of civil rights).

In one of the earliest reports per the European Commission regarding Poland's entry into the EU, Polish political parties' primary modus operandi was EU ascension and Polish democratic reforms. Fast forward to contemporary issues and the parties are split along similar fault lines. PiS with its platform released in 2011 set the backdrop for a strong national state with sovereign politics. Despite the platform being published in 2011, circumstances surrounding the rest of the EU and politics changed the dynamics at home. The migration crisis altered many of the political landscapes in each of the member states. For Poland, the migration crisis was presented as a threat to its cultural homogeneity. Polish public opinion was quickly against the idea of settling immigrant waves and providing refuge to outsiders. Despite there being available data that showed this discontent with how the official Brussels brass was handling the migration problem, Donald Tusk's PO (Civic Platform) party took a lukewarm stance on the issue. Voting for the Brussels approved immigration quota system, Tusk's party sealed its fate at the next presidential elections. PiS having spent several years in opposition before returning to power in 2015, seized on the opportunity to turn public opinion polling into votes at the polls. The program as outlined by Kacyznski in 2011 would be finally realized.

The fall of the Civic Platform party only accelerated the rise of PiS. In a series of scandals starting in 2012 with what became known as the Amber Gold scandal, Civic Platform and specifically Donald Tusk were on the defensive. The Amber Gold business affair was essentially a pyramid scheme that took in money from thousands of Poles promising them high returns on their investment only to never receive any money in return. The founder of the Amber

Gold company was a known criminal with prior charges of money laundering and embezzlement. “While prime minister it is alleged that Tusk ignored information given to him by the head of the Internal Security Agency and the president of the National Bank of Poland, who warned him that his son was involved in the Amber Gold Ponzi scheme. It is also alleged that Tusk's government did nothing when in December 2009 the state-run Financial Oversight Commission, KNF, issued a warning that Amber Gold had no permit to carry out banking activities. At the time Amber Gold owned almost all shares in OLT Express airlines, which employed Michal Tusk, the prime minister's son.”¹⁶⁸ The media in Poland were quick to publish this story in what became as the worst business affairs scandal since the country’s independence in 1989.

This scandal was followed by another equally disturbing in the eyes of Polish society when in 2014, leaked conversations between senior Civic Platform officials that embarrassed the government. The secret audio recordings show central bank governor Marek Belka and Interior Minister Bartlomiej Sienkiewicz discussing the removal of another minister and ways to put pressure on a private businessman. In a separate recording Poland’s Foreign Minister Radoslaw Sikorski was recorded as labeling the US Polish alliance as “worthless”. The leaking of this conversation came two weeks after President Obama visited Poland amid the Civic Platform re-establishing strong US Polish relations. The rest of the leaked conversations included the Foreign Minister calling Polish society “murzynskosc”, a very derogatory term racially charged that is roughly similar to “like a Negro.”¹⁶⁹ He also lauded Poles as having very shallow pride and “low self-esteem,” which wasn’t received well in public opinion polls. Tusk as head of the Civic

¹⁶⁸ Donald Tusk's elephant in the room November 6, 2020 *DeutscheWelle*, Retrieved from <https://www.dw.com/en/donald-tusks-elephant-in-the-room/a-46168594>

¹⁶⁹ Nolan Feeney, Report: Poland's Foreign Minister Blasts 'Worthless' U.S. Relationship *Time* June 22, 2014 <https://time.com/2909289/poland-foreign-minister-worthless/>

Platform party reacted reluctantly to sanction members of his party and was thus presented as a weak and ineffective leader. PiS constantly showed Tusk as a puppet of the EU and drew connections with his corruption scandals at home with that of the way of Brussels. Additionally, a personal feud between Kaczynski and Tusk formed when Kaczynski accused the Tusk government of cooperation with Russia in covering up the true story of Smolensk air crash which killed then President Kaczynski. The sheer accumulation of scandals resulted in a lot of animosity being sent the way of Civic Platform leadership and many moderates found themselves voting to restore faith in government and nation offered by PiS.

Tusk serving in the role of European Council President after his then loss in the national elections proved to be an even greater point of contention with Poland. Having voted his party out of power, and his immediate association with EU made many wary of the Brussels and its plans for Poland. Henceforth, during Tusk's reelection vote in the European Council in 2017, all EU member states voted in favor of a second term except Poland. Quite the opposite was happening, Poland was preparing charges and hearings against the former Prime Minister for tax fraud and host of other charges.¹⁷⁰ These kind of charges and scandals that have plagued Civic Platform party are without doubt a self-inflicted wound that the opposition was able to exploit. Serious grievances still remain about the EU's silence over these matters and close cooperation with Tusk's party during this time. It has become a hallmark of attacks against the EU. Kaczynski and his government were upset that they were the sole opposition to Tusk's reign as European Council President when they feel they have the most to say on the matter. Thus the issue was presented as another EU patronizing act against Poland whom opinions were dismissed and unrecognized when it really mattered.

¹⁷⁰ Michal Broniatowski. Tusk faces Polish tax probe. June 17, 2019
<https://www.politico.eu/article/european-council-president-donald-tusk-faces-polish-tax-probe/>

Consequences on Rule of Law in Poland - Rule of Law Not Rule of Iron Fist

Concordance with the norm means an acceptance that said norms are generally legitimized in normative discourse and share a large percentage of support in public opinion polls. The primary driver of PiS foreign policy and its direct relation with the EU is Euro pessimism. “The European Union is a failing utopia. We were told that the European identity will be postmodern based mainly on European institutions and universal principles of human rights, but it has not worked out. This utopia is ending before our eyes”.¹⁷¹ Poland’s Euroskepticism and prediction that the EU is on its last legs partly contributes to the rule of law problem. If Poland has been finding itself on an island when it comes to contesting EU policy, then it would be reasonable to assume that Poland is acting irrationally. However, since there is at least a region wide (CEE) problem raised with Brussels policies then the problem persists at much more systemic level. The Poles have been on the wrong end of the battle during many disputes with the EU. An example of this was the voting in the European Parliament on the resolution on changes in Poland on 13 April 2016. PiS could count on the support of only 18% of EMPs. Not counting Fidesz and the Tories, no serious group that were not openly Eurosceptic or in power in any EU country voted with PiS. The main “defenders” of PiS were opposition parties, nationalists and Euro sceptics that were also in the vast majority pro-Russian.¹⁷² Thus Poland has been branded as a violator of rule of law conditions amidst its politicization of its domestic courts.

¹⁷¹ A professor and PiS Member of Parliament Zdzisław Krasnodębski as quoted in Adam Balcer, Piotr Buras, Grzegorz Gromadzki, Eugeniusz Smolar, Change in Poland, but what change? Assumptions of Law and Justice party foreign policy, Stefan Batory Foundation, Warsaw 2016, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Otwarta%20Europa/Change%20in%20Poland.pdf>

¹⁷² Balcer Adam, Piotr Buras, Grzegorz Gromadzki, Eugeniusz Smolar, Change in Poland, but what change? Assumptions of Law and Justice party foreign policy, Stefan Batory Foundation, Warsaw 2016, p.16 <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Otwarta%20Europa/Change%20in%20Poland.pdf>

Domestically, Polish society views their country as a follower of the rule of law of its nation and in line with that of the EU legal confines. Public opinion polls show this to be the case among most Poles surveyed.¹⁷³ Polish Prime Minister Mateusz Morawiecki defended the government's legal reforms, saying they were "deeply needed." "Poland is as devoted to the rule of law as the rest of the EU."¹⁷⁴ "The only change this decision makes is that now we must effectively finalize what we have begun — all the way to the very end," said Justice Minister Zbigniew Ziobro. "This is in order for Poland to be respected and this will be guaranteed to us by the rule of law."¹⁷⁵ After the European Commission issued several rebukes in official statements and proceedings were started under Article 7 violations, Polish government remained steadfast in making changes to its structure. The EU Court of Justice ruled in June 2019 against Polish law that forced scores of Supreme Court judges into retirement Its decision was that Polish law is contrary to EU law.¹⁷⁶ The judges were replaced by others loyal to Poland's ruling Law and Justice Party. Rule of law as an existential part of political discourse is salient across Polish society however the interpretation of this cardinal norm differs. Because of the anti-EU backlash stemming from certain policies, EU's legitimacy has suffered in creating a narrative that Polish society is endangered by acts of PiS. Thus there is a combination of poor timing for the EU as well as good timing for PiS since it has been able to use the EU's position to show more proof of conspiracy against it. Since there exists considerable debate within Poland as to the importance of the rule of law domestically, then concordance with the norm is strong domestically and regionally, notwithstanding the colliding interpretations of the norm.

¹⁷⁴Maia de la Blaume. Brussels puts Warsaw on path to sanctions over rule of law. *Politico*, December 20, 2017 <https://www.politico.eu/article/frans-timmermans-brussels-puts-warsaw-on-path-to-sanctions-over-rule-of-law/>

¹⁷⁵ *Ibid.*, 2

¹⁷⁶ Gall Lydia. EU Court Condemns Poland's Judicial Takeover *Human Rights Watch* <https://www.hrw.org/news/2019/06/25/eu-court-condemns-polands-judicial-takeover>

Various citizen and interest groups and international nongovernmental organizations have sounded the alarm to the perceived attack on the rule of law in Poland. Poland's new law has been criticized by the country's Supreme Court and Ombudsman and by several international bodies, including the Venice Commission of the Council of Europe and some U.S. congressional members.

There have been four infringement proceedings thus far as they relate to Polish rule of law violations. ECJ has ruled in three of them while one is still pending. The rulings have all been summarized here. Important to note that since Ursula von der Leyen has become the new Commission President, she has appointed a team of experts in rule of law as part outreach to the Visegrad Four countries — Poland, Hungary, the Czech Republic and Slovakia. The new appointee to the post, Věra Jourová, hails from the Czech Republic and is a member of Andrej Babis's political party which has had its own accusations of violations of EU law. Thus the joint actions of the courts combined with that of the political pressures have thus far if anything sent a message that the EU isn't letting this issue die down.

June 2019- A ruling by the ECJ ruled that Poland is out of compliance with EU law in its early retirement of judges. Poland has not acted upon this ruling nor taken measures to enforce the court's ruling.

November 2019- Ruling said Polish courts will have to determine whether a newly created disciplinary chamber (Constitutional Chamber) for judges and the National Council of the Judiciary, which is responsible for judicial appointments, are "sufficiently independent."¹⁷⁷ This decision essentially pits the responsibility of deciding back on the Polish Constitutional courts.

¹⁷⁷ Zosia Wanat Commission launches 4th infringement procedure over Poland's rule of law. *Politico* April 29, 2020 <https://www.politico.eu/article/brussels-launches-4th-infringement-procedure-over-polands-rule-of-law/>

Subsequently, the Polish Supreme Court has also ruled that Polish Constitutional chamber is illegitimate.

April 2020- The ECJ ruled that Polish Constitutional Chamber, which served in the function of oversight of judges and could recommend removal or appointment of new judges is against EU law. This decision comes as the previous decision of the court gave the jurisdiction back to the Polish courts to decide on the matter.¹⁷⁸ Since there were concerns over the independence of the judiciary and due process, the ECJ took on the case itself and made the ruling that the newly established chamber was illegitimate.

In response to this verdict, there was immediate dismissive reaction from Poland suggesting that the ruling is an attack on Polish sovereignty. The ECJ lacks “competence to assess, not to mention to suspend, the constitutional bodies of member countries..” said Sebastian Kaleta, a deputy justice minister of Poland.¹⁷⁹ In their response to the Polish response, the ECJ released a statement that read "the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law.” Thus EU law is the supreme law of the land and national laws being derived from EU should match EU law books.

Conclusion

In this chapter, I have identified some key unique features of the Polish experience that highlight some of the contemporary differences that exist between it and core EU. Consistent themes of subjugation and resistance are present in both its recent and distant history. For the better part of the past two centuries Poland has been on the receiving end of ideological and

¹⁷⁸ Zosia Wanat Commission launches 4th infringement procedure over Poland’s rule of law. *Politico* April 29, 2020 <https://www.politico.eu/article/brussels-launches-4th-infringement-procedure-over-polands-rule-of-law>

¹⁷⁹ *Ibid*

material battles fought by outside empires. These experiences have instilled certain identities which rest on the fundamental value of protection of nation, faith, and the Polish state. With this notion of resistance of external forces, sociologists have identified a generalized fear of disintegration of society. Some 30 years after its 1989 independence, many societal transformations are affecting the Polish mainstream. Population aging, youth migration, and less traditional family lives are all culminating with other externally-onset anxieties such as migration and EU top-down demands. Polish society is overwhelmingly pro-EU but the divergence on specific issues such as refugee quotas and security concerns to the east have fallen on deaf ears in Brussels. Similarly, the corruption and scandals of the liberal pro-EU Civic Platform party in government caused another disconnect with Polish locals and perceived EU silence over the matter caused many to view the EU as a collaborator against rather than a protector of law and justice. Thus there are differences that exist and will perhaps always exist between the European East and its West, however those differences aren't rooted in permanent juxtaposition to one another. Their acknowledgment alone presents enough misunderstandings about the other side. While true that Polish populists have seized a moment, it is equally true that that moment was EU-inflicted with its passivity to Poland's electorates. Same as its society's commitment to the EU remains strong, so does its citizens commitment to the rule of law. However, because EU and Poland are viewing the issue from two different points of origin, Polish citizens' view is being lost in the muddied proceedings between EU and Polish government.

CHAPTER V
CASE STUDY: HUNGARY

Executive Summary

The EU's hard work of molding its new member states to reflect European values that rest on basic principles of protecting human rights and rule of law seemed to have hit an impasse in Hungary soon after its official ascension to membership in 2004. A series of domestic scandals by the ruling transitioning party and a general but painful economic transition that caused many economic woes for the average worker soon thereafter disillusioned many Hungarians about the prospects of EU. Soon after initiation into the union, the political enthusiasm with which all political parties were able to garner public support significantly wore down and parties that emphasized greater role of national politics over EU preferences gained traction. Further, a general discontent with austerity measures and loss of certain industry jobs post 2004 ascension further spiraled EU resentment. Albeit the heavy presence of EU money and new industries springing throughout the country, the transitioning liberal parties were unable to retain power and Fidesz with its far right policy agenda centered on critique of EU values took charge in 2010. Fidesz government established a hybrid political system under which it has maintained power. Within this system, Fidesz has concentrated power in the executive while maintaining control over not only the legislative branch but virtually all other spheres of social life including commerce, media, education, and even sports. This turn away from liberal democracy and the vast support that Fidesz has been able to garner was slow churning and culmination of a series of developments in the liberal left, in 2002, 2006, 2010, as well as economic crisis and EU's perceived abandonment of Hungarian interests.

The first part of this chapter will trace the fall of the left and the events leading up to the crucial elections of 2002 and 2006 as well as elections of 2010, which firmly planted far-right Fidesz in power. The events surrounding each of these elections give insights into the major points of contention on issues surrounding EU membership and domestic matters. It is argued that the painful economic transition post-accession was mismanaged by the socialist party in power and its own scandals that turned the electorate away, and toward far right Fidesz. Next the major theme throughout this research concerns the EU primacy of own short term interests over norms which guide it. The position of the EU on many of the pressing issues in Hungary post ascension like the EU's silence on the perceived mistreatment of ethnic Hungarians living outside Hungary's borders in other EU states as well as the handling of the migration crisis created a spark needed for permanent entrenchment of Fidesz as the "savior" of Hungary.

Lastly domestic politics regarding the dramatic fall of the left and the rise of ultra nationalist Jobbik has further allowed for Fidesz to capture the centrist vote. The social democrats since their initial defeat in 2010 have been fragmented with several new parties emerging on the scene. Further the emergence of Jobbik as an ultra-right, nationalist party, appears to make Fidesz a moderate cementing its legacy as a centrist party when in fact its rhetoric and policies are almost exclusively far right conservative. The combination of EU's performance when it comes to Hungarian interests and the way in which domestic politics in Hungary have transformed have created the perfect storm of rule of law breakers. The EU's hard work on maintenance of rule of law values and respect for human rights has very much been contested due to its selective application and the EU has become a target for gaining political points as a result of migrant issues. While Fidesz has firmly planted itself in virtually all aspects

of Hungarian social life, the subsequent “battle” with the EU has yet to climax given new EU mechanisms that limit member states rule of law violations.

Elections of 2002 Created a Permanent Cultural - Political Division in the Country

The election that ended Viktor Orban’s first term as Prime Minister in some ways came as a blessing in disguise for his party later due to pending economic hardship and inability of left to mitigate economic crisis following their victory. Following the largest turnout ever recorded in Hungarian elections (70.4%), the social democrats (MZSP) and their new coalition of center left parties promised a smooth transition to the EU while increasing wealth, and fighting poverty and corruption. Their major focus on raising economic standards and fighting corruption resonated well with many Hungarians who were eagerly anticipating EU entry. Along with their many promises, the social democrats also appointed Peter Medgyessey as the country’s Prime Minister, a former finance minister and banker whose previous experience was to benefit the party and propel the country closer to EU economic standards. It is important to note however that the election in itself was very contested and that opinion polls showed a near even split in support for the social democrat and conservative parties. The outcome of the election was narrowly won by MZSP whom only achieved a 10-member lead over Fidesz in a 368-member Parliament. Popular support for MZSP reached its axiom in this election (2.3 million votes for the party).¹⁸⁰

Several characteristics made this election year worthy of study regarding its impacts on the rule of law in Hungary today. Despite there being a record setting voter turnout, the majority of voters were undecided and a lack of clearly articulated differences among parties pertaining to the economic situation further complicated the vote. In the end, the most loyal supporters of each political party voted with the party while the undecideds were evenly split among the two major

¹⁸⁰ Bíró-Nagy Andras & Tibor Kadlót. “Strengthening Social Democracy in the Visegrad Countries” Friedrich-Ebert-Stiftung November 2016 <https://library.fes.de/pdf-files/bueros/prag/13129.pdf>

MZSP and Fidesz and two smaller Alliance of Free Democrats and Hungarian Democratic Forum parties. Thus the Hungarian Parliament became a four-party assembly with Fidesz and Hungarian Democratic Forum as being the center right and MZSP and Alliance of Free Democrats as being the center left. For the first time since Hungary has held democratic elections, the number of parties in Parliament has fallen below six and the ideological difference has become more clear among the right and left. The Hungarian electoral system, having formerly supported some half a dozen parties, had now elected a legislature in which 90 per cent of the seats were divided between just two parties.¹⁸¹ The four parties ousted previous far right and far left from their seats whom more or less advocated for either slowing integration or conversely intensifying integration with the EU.

Initially, the issues that Fidesz and MZSP mostly based their election campaigns were reflective of a healthy democratic ideological difference. On the one hand, Fidesz being the incumbent party touted its progress made toward implementing reforms needed for EU ascension, economic packages such as “promising subventions and tax relief for families having children or taking out home loans, and announcing plans to build more bridges, motorways and dams.”¹⁸² While hoping to strike a chord economically, Fidesz also demonstrated its pride in Hungarian interests and values by steering right on social issues. Emphasis on family and traditional values were the hallmark of its 2002 campaign while still maintaining an eye toward Europeanization. The Social Party on the other hand ran on the platform promising welfare, security and progress. It also claimed that there was a split in society which it would repair, and addressing needs so as to create equal opportunity, and make improvements in health care.

¹⁸¹ Benoit K. “Like Déjà Vu All Over Again: The Hungarian Parliamentary Elections of 2002”. *Trinity College*. November 2012 https://kenbenoit.net/pdfs/Benoit_2002_JCSTP.pdf

¹⁸² *Ibid.*, 123

Perhaps the most interesting assertion during the campaign was that the country was fighting to restore democracy which previous Fidesz administration had run into the ground, denying rights to criticize the government as claimed by the Socialist Party. Chairman of the party, László Kovács, stated this position bluntly: “The issue is whether we retain democracy, or see the possible emergence of an extreme right-wing dictatorship.”¹⁸³

The democratic debates or the warnings by the Socialist Party were considered to be part of democratic process, a necessary and healthy part of being democracies. In the European Commission reports on the elections of 2002, the Commission is “very pleased’ with the election process and the overall turnout which was a concern in some earlier reports. In the eyes of the Europeans, Hungary had taken an important turn toward democratization.

Concerns if any existed about the rule of law in Hungary after the 2002 elections received another blow after the existing Prime Minister Medgyessey resigned in 2004 after his own party lost confidence in his ability to maintain a coalition with Alliance of Free Democrats. This was preceded by a series of events that plummeted Medgyessey’s popularity. Soon after being elected, news reports came out of that Medgyessey was a counterespionage officer of the -then- Ministry for Internal Affairs prior to 1989. Admitting to his position in the then Communist government and claiming that his role was mostly to protect Hungary by steering it to join the International Monetary Fund, was widely unpopular and shifted public opinion of the government. The very next European Parliament elections of 2004 were overwhelmingly won by Fidesz further complicating Medgyessey political career. His resignation was again reflective of a democratic system that rewards or punishes based on the deeds of the candidates. The resignation did not affect EU policy toward the country and it lauded the new appointee Ferenc

¹⁸³ Ibid., 123

Gyurcsany. Coupled with the failed promises of welfare change and economic relief, the left in Hungary remained in steady decline since this moment. Despite receiving another mandate in the 2006 elections, largely as a result of the EU referendum of 2003 and eventual ascension in 2004 that brought with it a sense of optimism and new jobs, the left dwindled in the political landscape with their new face Gyurcsany embroiled in his own scandals that plummeted the left even further.

The situation in Hungary was not as perhaps alarmist then as it may appear now, but the ways in which the country changed governments throughout the 1990's and early 2000's reflected a commitment to the rule of law in so much that government left and came as the electorate opined. To a large extent the underlying variable in those years was the prospect of EU membership, but as reflected in the 2002 elections, mere two years before membership, Hungarian pride in values was not as privileged as its economic situation at the ballot box. Thus a key transition occurred in 2002 and post membership in 2004, economic prospects became the key issue at the ballot box each election year and parties were measured on their ability to deliver, and importantly the term "liberal" received a rotten name in Hungary¹⁸⁴ as a result of failed promises of Social Democrats. Thus the deep mistrust of the party that led Hungary in the immediate before and after EU membership could have impacted voter sentiments toward the EU. The liberal parties were seen as the elite which was benefitting the most during the transition period and in turn this fact being overlooked by the EU is something that Fidesz still reminds its voters of. The underlying component here is still economic, the elite in Hungary are viewed with disdain with ties to corrupt politicians that further their own interests at the expense of the common people. Despite there being progress made in terms of combatting corruption in the

¹⁸⁴ Waller Luke. "The Conservative Subversive" *Politico* Accessed April 19, 2020 <https://www.politico.eu/list/politico-28/viktor-orban/>

form of sanctioning and court reforms, Hungary still ranked below score less than 5 out of a clean score of 10 on the Corruptions Perception Index in 2002.¹⁸⁵ The EU Commission report in 2002 stated: “Surveys indicate that corruption continues to be a problem in Hungary. In line with the long-term anti-corruption strategy adopted in 2001, a number of new measures have been taken during the reference period.”¹⁸⁶

During this important period the potential seeds for a rift with the EU were planted. While Fidesz along with other political parties, and business organizations, sought to join Europe, their expectation of Europe was perhaps resembled something that of “early” EU. In its earliest stages the EU community was an economic project, an idea that sovereignty can be pooled but still remain national. After a long-denied sense of autonomy former Communist states just now joining the EU were 50 years behind after all. This experience is something that only Eastern member states had to go through, and is one that often is undervalued by the EU progressives in the West. Fidesz campaigned on the grounds of being in the EU but that is only as a vehicle to a strong Hungary. The interpretation of such campaigning can be two fold. First, the state can be stronger as a result of what the EU offers it, free movement of goods, people, new markets, increase in wealth etc. The second and perhaps truer to what the Fidesz was touting was the idea that Hungary would be stronger because its already capable of joining the EU and can do so much more. This implies a one-way relationship where Hungary’s success as a nation is a result of its own doing and EU membership is just another vehicle for realizing Hungary’s true potential as a nation.

¹⁸⁵ 2002 Corruption Perceptions Index
<https://www.transparency.org/en/cpi/2002>

¹⁸⁶ Regular report from the Commission on Hungary's progress towards accession 2002. SEC (2002) 1404 final, 9 October 2002. [EU Commission - SEC Document]
[http://aei.pitt.edu/44534/1/hungary_SEC_\(2002\)_1404.pdf](http://aei.pitt.edu/44534/1/hungary_SEC_(2002)_1404.pdf)

Crisis of 2006: First Major Political Crisis Since Accession to the EU

Hungarian dissolution with the way their country was run began soon after transitioning to the EU. While the pains of economic and social changes were to be expected, the Hungarian Socialist Party commonly known by its acronym MSZP (Magyar Szocialista Párt), became riddled with scandals and corruption that pegged to party to nearly mere fringe status present-day. Ferenc Gyurcsány, then Prime Minister was recorded on audio, In the spring of 2006, one month after the socialist MSZP won a second government term. Still famous quotes are such as these: “Clearly, we’ve been lying for the past 1.5-2 years”, “We’ve f****d up, not little, but big”, “We’ve lied morning, day and night”. The vulgar speech sparked massive riots and protests in the capital city.¹⁸⁷ The reason for this being so widely problematic for the people of Hungary was the strangling economic situation in the country with large numbers unemployed and public debt surging, while prices of goods were at an all-time high. The promises made by the ruling MSZP had not come true and the second mandate given to the party in the elections in 2006 was narrowly won, viewed by many as a second chance to do right by its promises stemming several election cycles back. Many believe that Ferenc Gyurcsány’s infamous Speech put an end to the careers and political aspirations of many left-wing local politicians.¹⁸⁸ One year after the speech, a poll conducted among voters showed only dismal 15-20% support for MSZP. The speech could not have come at a worse possible time, one month after the election in which far right parties like Jobbik and Fidesz had made a formidable challenge.

In particular, was peculiar the rise of Jobbik, which campaigned on the slogan of bringing back the traditional Hungarian interests and values. The small, newly founded party ran on an

¹⁸⁷ This is Why Orban’s Hungary is set to Stay (December 7, 2016) *Eyes on Europe*. Retrieved from <https://www.eyes-on-europe.eu/this-is-why-orbans-hungary-is-set-to-sta/>

¹⁸⁸ Fetser: Gyurcsány released the Ószöd speech (September 20, 2016) *Budapest Sentinel* <https://budapestbeacon.com/fetser-gyurcsany-released-the-oszod-speech/>

anti-EU, anti-globalization and pro-Christian agenda that pushed it very far right on the political spectrum. Mostly attacking all other political parties because of its fringe far right stances, its rise was stymied at the elections when it only garnered 2.2 percent of the vote, not meeting the 5 percent threshold needed to enter Parliament. Nonetheless their rise and exposure to the electorate has left some lasting impacts First, Jobbik was challenging Fidesz as the conservative party in the elections, a move which enabled Fidesz to appear centrist and appeal to a wider audience. The small party continued its rise throughout the next election cycles and today has 19 percent membership in the National parliament. Some analysis have even maintained that Jobbik is a large part of the reason why Fidesz will likely continue to stay in power appearing a moderate conservative party in relation to Jobbik.¹⁸⁹ The politics of the country have moved so far to the right that even the moderate parties are appearing as leftist social liberals. As I earlier noted, the MZSP once the largest Hungarian Socialist party has now reduced in size to just 15%-20% of what it used to be. The space that other smaller fringe parties such as Green party and Alliance of Free Democrats used to occupy, is now largely been occupied by either Fidesz or Jobbik.

The effects of 2006 speech scandal of Prime Minister caused a hysteria in the country. Anti-government protests suspected to be organized by Fidesz turned into riots in some parts of the country, with demonstrators calling for Gyurcsany to resign. A couple of weeks later, at the local municipal elections, Fidesz won majority of the seats signaling tough times ahead for the Social Democrats. Gyurcsány's continuation of austerity measures to reduce the country's budget deficit through cutting spending in social programs. More on the economic issues will be

¹⁸⁹ This is Why Orban's Hungary is set to Stay (December 7, 2016) *Eyes on Europe*. Retrieved from <https://www.eyes-on-europe.eu/this-is-why-orbans-hungary-is-set-to-sta/>

addressed in the next subheading. The popular opinion of the social democrats and Prime Minister remained low throughout the 2006-2010 transition year. Gyurcsany soon thereafter resigned as the country's PM after facing opposition within his own party over the handling of economic crisis. Combined with low popularity in public circles, and low confidence that a coalition government could maintain in the face of austerity measures, Gyurcsany resigned in March of 2009 calling himself a "hindrance to further economic and social reforms."¹⁹⁰

After breaking with the MSZP, Gyurcsany established a new political left party, the Democratic Coalition (DK). Several other leftist parties emerged; "Együtt (Together) emerged first as a movement and later reconstituted itself as a party under the leadership of Gordon Bajnai, also a former prime minister supported by the MSZP, and after a split from the LMP a formation called Párbeszéd Magyarország (Dialogue for Hungary) was established, completing the fragmentation of the left-liberal political spectrum. These shifts in the political arena had the most adverse effect on the MSZP, as the organization, facing a serious credibility crisis, lost its status of independent political alternative and found new challengers on both right and left. Reflecting the current balance of political power, the MSZP not only has to face the governing Fidesz from the position of opposition, it also has to fight for the title of the leading opposition party against the far-right Jobbik and, simultaneously, to face new parties compete for the attention of opposition voters on its home turf, fraught with division. In short, instead of the right-left rivalry that characterized previous years, today the Hungarian Socialist Party must hold its ground on three fronts."¹⁹¹

¹⁹⁰ 'Obstacle' Hungary PM to resign (21 March 2009) *BBC News*
<http://news.bbc.co.uk/2/hi/europe/7956610.stm>

¹⁹¹ Bíró-Nagy Andras & Tibor Kadlót. "Strengthening Social Democracy in the Visegrad Countries" Friedrich-Ebert-Stiftung November 2016 <https://library.fes.de/pdf-files/bueros/prag/13129.pdf>

The scandals essentially fractured the left altogether whom could not recover from the bad publicity as well as economic strains done by tax hikes and cuts to spending. This has played right into the hands of Fidesz whose time in opposition was spent in highlighting the failures of the government. Their populist rhetoric and thus dominant narrative particularly during these times prior to the migration crisis, was based on the triangle of nationalism, the securitization of Hungarians abroad related to the vision of a war between civilizations, and anti-liberalism and anti-establishment sentiments.¹⁹² Hungarian nationalism is generally connected with a sense of victimhood of history and past glory prior to the various external impositions on Hungarian sovereignty. This newly won sovereignty is presented as being at stake again with the liberals viewed as selling the country and its institutions to outsiders. The correlation with the EU here is unavoidable. As part of that popular rhetoric, conservatives reflect on the restrictive nature of Communism and draw connections to liberal practices today.¹⁹³ Among other things they state the Communisms of the past restricted freedom of speech and thought combined with brutal violence and that the liberalism of today has roots within Marxist ideology. “Condensed Marxism was gradually replaced by condensed liberalism, that is, political correctness as a new 21st century means of restricting freedom of speech and thought.”¹⁹⁴ This formulation of liberalism presents a very dangerous correlation with something that is widely a painful history. The message is simple: a strong nation state is the most important tool in preventing another loss of sovereignty. Thus the relationship with the EU naturally had an underlying current characterized by mistrust and fear of imposition that came to a head with migration crisis. At

¹⁹² Kerekó Peter, Bulcsú Hunyadi, and Patrik Szicherle. “Anti-Muslim populism in Hungary: From the margins to the mainstream” (July 24, 2019) *Brookings*

<https://www.brookings.edu/research/anti-muslim-populism-in-hungary-from-the-margins-to-the-mainstream/>

¹⁹³ Kövér László: “Marxizmus helyett liberalizmus,” *Magyar Idők* (blog), December 3, 2015, <https://magyaridok.hu/belfold/200740-200740/>.

¹⁹⁴ *Ibid.*, 1

one point, Fidesz has warned the Europeans of not imposing “Sovietization”¹⁹⁵ upon its member states.

Widespread Economic Discontent Amplified by 2008 Global Financial Crisis

Hungary experienced relatively rapid growth in terms of GDP per capita between 1995 and 2004. By the time Hungary had officially transitioned from socialist rule in 1989, its economy had been well positioned to operate under free market rules. This was because during its socialist years, many reforms were undertaken that directly were tied to freeing Hungary of economic job losses and stagnation. Joining IMF and World Bank organizations as well as rolling out new taxes to assist with fiscal needs of the government were all done prior to the 1989 transition. Thus, when the communist system collapsed, Hungary relative to its other CEE counterparts was well positioned to operate under free market system. Despite these initiatives being in place and Hungary better suited than others, the transition itself resembled the same fate as other CEE member states. The early nineties saw a period of economic contraction, and rates of unemployment skyrocketed. “In the period of 1989 to 1994 the number of employed declined by nearly 30 percent, from 5.3 to 3.8 million and turned standing even in the period of recovery.”¹⁹⁶ Employment topped in 2006 at 3.93 million only, stopping the bleeding and slowly reversing course. While the EU 27 average rate of employed in the age group of 15- 64 moved from 60.7 percent (1997) to 64.2 percent (2010), the similar figures in Hungary were 52.4 percent (1997) and 55.4 percent (2010). These numbers are not impressive if looked at from the prospect of what the average Hungarian was hoping EU membership would bring.

¹⁹⁵ “Hungary’s Orban Rejects ‘Sovietization’ by Brussels, defends nation state,” Reuters, October 23, 2016, <https://www.reuters.com/article/us-hungary-orban-idUSKCN12N0PJ>.

¹⁹⁶ Morva Tamas. Austerity Policy in Hungary and Specific Feature Answer of the Government. Retrieved from http://www2.euromemorandum.eu/uploads/ws1_morva_austerity_policy_in_hungary_and_specific_feature_answer_of_the_government.pdf

Some sectors were hit harder than others, in particular the agricultural and industrial workers suffered layoffs and company closures due to the inability of these industries to compete with the more technologically advanced Western companies. Even the earlier period of growth which facilitated the rapid modernization of the economy fueled by a massive inflow of foreign direct investment could only temporarily provide relief. The long term unemployment of a new generation of workers led to a decrease in services offered and exodus of workers West. The resulting trend led to massive poverty in many small villages and towns that once relied on the sale of their subsistence to those living in presumed wealthier cities and with jobs. Villages with working age population have up to 70 percent unemployment. Inflation also led to an increase in consumer goods and basic items such as food and durables, household energy and clothing. The Hungarians were not ready for such rapid change affecting their bottom-line.

Fidesz government in its first mandate 1998 enforced a 60% increase in the minimum wage implemented in two steps. The MSZP when won the 2002 elections by a very narrow margin and implemented similar fiscal policies by raising wages of public-sector employees by 50% and introducing a 13th monthly salary as well as a 13th month pension.¹⁹⁷ These policies led to a massive surge in public debt, as people started spending more while still making less. As a result, household consumption increased by 33% between 2001 and 2005, while GDP increased by just 18%. For the next several years as Hungary joined the EU, its economy had received favorable borrowing on capital markets most likely as result of soon joining the EU. This favorability concealed the fact that Hungary's soaring public debt was going to have to be addressed sooner rather than later. Upon ascension in 2004, Ferenc Gyurcsány promised voters

¹⁹⁷ The Chokehold of Populism - Hungary's Economy 22 May 2012
https://www.boell.de/en/navigation/europe-north-america-sandor-richter-hungarys-economy-14647.html#_ftn4

new reforms which would increase FDI and bring new jobs.¹⁹⁸ The elections of 2006 were narrowly won by MZSP and its socialist block but many viewed this win as a second chance given to the party to deliver on its promises made in previous elections.

The incoming global economic crisis of 2008 brought back many of the lingering problems that plagued the country since transition. Namely, government deficit and public debt has steadily ballooned each year since 2002. This culminated in nearly unsustainable 12% government deficit for 2006 alone, a figure that is far below the average in other CEE states, and certainly not permitted for an EU member state which requires members to at the least balance their spending/revenue ratios. Despite an EU backed plan that cut spending and raised taxes the deficit was only cut by a few percentage points and in 2007 Hungary still had a 66% government deficit, a staggering figure relative to its neighbors in Czech Republic and Slovakia with 29%. Thus the raise in taxes, and a fall in real wages, while maintaining a high level of expenditure placed Hungary in a precarious position when the financial crisis eventually made its way into Hungary.

Hungarian banks borrowed heavily internationally, particularly in the months preceding the financial crisis of 2008. Such rate of borrowing meant that they were borrowing at higher interest rates and were thus having to lend money to consumers at the higher interest rates. This combined with inflation that was somewhat similar to other CEE member states, put the average Hungarian borrower in a tough position. As a result of the rapid inflation on consumer goods, property values decreased, real wages decreased and to make matters worse, predatory hard money lenders swooped in to provide much needed loans to consumers who otherwise wouldn't be able to get low rates with banks. So, in 2008 to get lower rates, many consumers and businesses

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switched to foreign currency loans - 90% of new mortgage loans were made in foreign currencies.¹⁹⁹ Further many of those loans were mortgages on homes that were now highly susceptible to changes in whatever currency they were taken out in. “Hungarians who took out mortgages in Japanese yen and who have seen a 40% surge in their debt in just three months as the yen's value has soared to a 13-year high. Ordinary people with loans pegged to foreign currencies now face the prospect either of much higher payments if the forint continues to fall, or the chance to convert their foreign loans into local ones but to then pay horrendously high (11.5%) Hungarian interest rates.”²⁰⁰

In many ways, the 2010 elections were a referendum on the government's ability to respond to the 2008 financial crisis. The economic crisis revealed a number of hidden contradictions in economic policy, the roots of which go back to the Maastricht decisions.²⁰¹ In a poll prior to the election, a stunning 72 percent of Hungarians are stated that they actually worse off now economically than they were under communism.²⁰²

Crux of the EU: Primacy of Interests Over Norms

In 1999 during Orbán's first stint as Prime Minister, little academic attention was paid to the conservative historical and national narratives that were a part of Fidesz's campaign. For long the Hungarian periods of regime change were marked by the “creation of new political identities and historical ‘truths’ which were always in line with the respective new government's

¹⁹⁹ Days of new flats, cars and generous state benefits over as currency collapses. *The Guardian*
<https://www.theguardian.com/business/2008/oct/29/hungary-forint-imf>

²⁰⁰ Ibid

²⁰¹ Morva Tamas Austerity Policy in Hungary and Specific Feature Answer of the Government. Retrieved from
http://www2.euromemorandum.eu/uploads/ws1_morva_austerity_policy_in_hungary_and_specific_feature_answer_of_the_government.pdf

²⁰² Wike Richard. Hungary Dissatisfied with Democracy, but Not Its Ideals. *Pew Research Group*
<https://www.pewresearch.org/global/2010/04/07/hungary-dissatisfied-with-democracy-but-not-its-ideals/>

ideological perspective.”²⁰³ And so began an attempt by Orban to create a pan-Hungarian identity that stretched beyond its immediate borders but anywhere where Hungarian empire once covered. In 2001 Hungary's parliament passed by an overwhelming majority the so-called status law. The law entitles ethnic Hungarians living in Romania, Slovakia, Ukraine, Yugoslavia, and Slovenia to a number of benefits, most of them available within Hungary.”²⁰⁴ Some of the special privileges included ability to vote in absentia and certain allowances for enrolling in Hungarian language training and annual allowances for having two or more children. Although this had been passed under the guise of reconnecting ethnic Hungarians with their main homeland from a cultural aspect, critics of the law accused Fidesz of buying elections since the majority of the voters abroad supported this initiative. Domestically, this presented Hungary with an opportunity to effectively employ a new labor force and raise population growth since Hungary as rest of Europe has a negative population trend.

The EU’s stance on the matter was exercised through the Venice Commission Reports. Although no EU member state was effected by the Hungarian status law, it was still considered worthy of European attention since these are prospect member states. The Venice Commission, the investigative body of the European Council, released a draft report “On the Preferential Treatment of National Minorities by their Kin-State.” “The report examines the preferential treatment provided by Austria, Slovakia, Romania, the Russian Federation, Bulgaria, Italy, Hungary, Slovenia and Greece to ‘national communities’ living abroad and it consistently refrains from reporting on the approaches adopted by individual states. The Commission declares

²⁰³ Toomey Michael, "History, nationalism and democracy: myth and narrative in Viktor Orbán’s ‘illiberal Hungary’." *New Perspectives. Interdisciplinary Journal of Central & East European Politics and International Relations* 26.1 (2018): 87-108

²⁰⁴ Eugen Tomiuc. Hungary: Status Law Causing Dispute with Neighbors. October 4, 2001 *Radio Free Europe* <https://www.rferl.org/a/1097612>.

that a new and original form of minority protection is emerging. The Hungarian preferential law is not a unique and unprecedented phenomenon (as Romania described it) but is a part of a new, accepted and positive direction of minority protection. Thus the Commission evaluates the appearance of preferential laws as a positive phenomenon.”²⁰⁵ However the Commission’s stance was general and earlier indications from directly EU brass indicated their disapproval at Orbán’s tactics.

While most observers could point to the status law and claim that it was a part of Fidesz reelection campaign and a populist move, there are some who view this move as part of a greater initiative to pursue new national narratives, ones that seek a reunification of Hungarian nation and territory. The fact that Orbán has exacerbated these narratives since his reelection in 2010 speaks to the importance of this strategy, which overwhelmingly favors the conservative party. Indeed, the intensification of these narratives has led to a surge of new policies that have proven to be of significance for reelection of Fidesz.

Another example of the creation of these new narratives was the adoption of Citizenship Law in 2011 which extended the possibility of citizenship to any Hungarian-speaking descendant of Hungarian citizens who lived within the country’s pre-1920 borders. Another attempt at creating a victimhood ideological perspective stems from the metaphorical comparison of the 2006 anti-government protests and the 1956 Hungarian revolution which relies heavily on the view that external forces play a role in destabilizing Hungary and thus must be fought against. The idea is that just as before in Hungarian history, there are domestic traitors as well that aide the external imposition and all are thus culpable and must be removed from society. In some

²⁰⁵ Sólyom, László. *The Hungarian Status Law: Nation Building and/or Minority Protection* edited by Zoltán Kántor, Balázs Majtényi, Osamu Ieda, Balázs Vizi, Iván Halász p.366
http://src-h.slav.hokudai.ac.jp/coe21/publish/no4_ses/chapter14.pdf

ways the interwar period is also a painful moment in time regarding the country's history. The fragmentation of the Hungarian nation occurred then after the Allies victory in WWI.

Hungarian concerns over the treatment of ethnic Hungarians living abroad was brought to the political forefront by Orban's Fidesz. Although problems regarding ethnic Hungarians in neighboring Slovakia and Romania had been brewing since the early 1990's, the media attention and focus of the European administration was on the much more pressing issues regarding enlargement and wars in the Balkans. In Slovakia, which has up to half a million ethnic Hungarians, there have been attempts by the Slovakian governments to integrate the Hungarian society more closely through education programs and language training. A proposed language law would ban the use of any other language other than Slovakian when dealing with public documents. This presented a massive challenge to many Hungarian communities in Slovakia accusing the Slovak government of abuse. The same type of mass protests and movements were held again in 2009 when there was another proposal to pass the law through²⁰⁶. Official documents would have to be in Slovak, and there were fines up to 5,000 euros for not respecting this law. The use of Hungarian language for instruction in schools was disallowed as well as Hungarian street signs removed in towns that were mainly populated by Hungarians. Slovakian government in 2009, now as a member of the EU, was viewed as continuing the operation of oppression of ethnic Hungarians and trying to curb the influence of mainland Hungary within its borders. Throughout the 1990's this had been mostly a state to state problem with the European community serving as arbitrator who mostly couldn't provide a position that was favorable for either side. For Hungary this was an even worse answer than taking a position. Europeans were

²⁰⁶ "Protests over Slovak language law". BBC News. 2 September 2009
Retrieved from <http://news.bbc.co.uk/2/hi/europe/8232878.stm>

sending the message that their preference for calming of tensions rather than providing long term solution was the modus operandi.

For Fidesz and particularly Orban, this EU position wasn't enough. The perceived "abuses" of basic rights suffered by Hungarians were described as being against European law and standards. An official rebuke of Slovakian policies was expected particularly since the EU has protection of human basic rights as part of its charter. The many ways in which Slovakian policies continued for over at least a couple of decades exacerbated the Hungarian response. In 2009, an official visit by the Hungarian president to Slovakia was canceled and the President's rejected from entry due to the tensions between the two states. There was not much improvement in the relations after Orban came back to power in 2010 and enforced the Citizenship law that would grant citizenship to all Hungarians living abroad. In response Slovakia pushed forth a law of its own that said any Slovak citizen who applies for citizenship of another country loses their Slovak citizenship. The game of cat and mouse that the EU seldom took positions on, and rather a passive approach to the problems with its two members, only led to more animosity against the EU. For the Hungarians this was a clear breach of rule of law and European values, that a member state would be discriminating against citizens of a separate ethnic minority. On the other hand, Slovakia was upset with the idea for doing little to protect the sovereignty of its member states when other countries are openly meddling in domestic affairs of fellow members. The populist rhetoric from both camps helped fuel their own rise domestically. Robert Fico in Slovakia was able to paint the EU as do-nothing bureaucrats and a fellow member state as a dangerous enemy emboldened by the EU.

A similar problem was faced by Hungary and the EU in the case of Romania. Romania has a sizeable population of ethnic Hungarians that number in the one and half million. They

make up the largest ethnic minority in the country and have been a significant source of vote for Orban's Fidesz. Reacting to the Citizenship law enacted by Fidesz in 2011, the Romanian authorities opted for a much more conciliatory response than Slovakia relatively and welcomed the attempts by Hungary to give citizenship to ethnic Hungarians by waiving the residency requirement. This has led to Romania being touted as an example of a proper treatment of minorities. The success in Romania as being in the proper interpretation of EU standard on the treatment of minorities has also fueled further action on behalf of Orban to deal with the problem equally across all member states. Despite ethnic Hungarians enjoying an increase in autonomy and distinct cultural development, their ties to Hungary still remain and many cast their vote in particular for Fidesz. EU's problem here is really two-fold. On the one hand if the EU chooses to sanction Slovakia or another member state for discriminating against ethnic minorities then it must also arbitrate this request in many other parts of its territory. The expectation is that states would behave in a normative sense and disengage from policies that may be perceived as discriminatory to minorities. On the other hand, the EU being passive in their own interpretation of the law, and expecting rather than demanding EU congruence on these issues has led to it losing credibility. The Hungarians see this as a major weak point in the EU makeup. If the EU enforces its own rules sporadically, and without much backing in the enforcement department then those laws are mere statements on paper. Fidesz has done work on the campaign trail to describe the perils of this type of governance. They point to these issues of EU political correctness and how that is the new way of actually silencing the masses and popular opinion. This also concerns some of the core issues that are in its own charter. For the Hungarians this is an unacceptable hypocrisy and the basis for their attack on the EU's interpretation of its own laws.

Migrant Crisis and the Spark Needed by Fidesz

The EU has a certain openness towards freedom, security, and justice for asylum seekers and refugees. When the migration crisis started to seriously affect the EU's external borders (Greece) there was a common agreement that some new protocols will have to be enforced to deal with the situation. The majority of migrants had a final destination on their journey: Germany or Scandinavian countries. Getting there from Turkey and other parts of Europe's periphery meant that crossing over thousands of miles of other EU member states was always going to be problematic. Earlier EU Dublin regulation mandated that asylum seekers can apply for asylum only in the first EU member state they enter. In practice this mandate was very much abandoned, with Germany being the member state to take on the most asylum applications despite being the most insulated away from entry points. Further with some countries such as Hungary who took very proactive measures of keeping migrants out through border reinforcement, it was clear that the EU needed a revision to its long standing policy on asylum.

Per the European Commission's new recommendations, there approximate 160,000 asylum seekers among EU states would be evenly shared under a new migrant quota system. The attempt at redistributing migrants all over Europe in order to relieve some of the hardest hit member states was received poorly in Central Europe. The Visegrad states congruently opposed the quota system despite having to take in less than 30,000 migrants all together. The attempt at creating a universal "European" immigration system on a whim when there is significant difference in national government positions on the matter turned out to be a political disaster. For one, the variation in asylum policies is a long standing norm within EU states. Germany with a very pro-immigrant culture has a history of assimilating migrants through workforce programs, language training, and social benefits. The French have a system that is different from that of

Germany which is one of the most generous in all of Europe. National policies differ as to the budgets which these governments propose for these matters. Sweden and Denmark are again vastly different from one another despite being similar in many other ways. So the EU has by enacting a policy that is viewed as top-down, done itself somewhat of disservice since states engage with cultural topics differently. For the nationalist parties across Europe, their base was easily energized and created a euphoria against EU mechanisms that would serve the elite in Brussels. There was an overwhelming desire upon all Europeans to do something about the migration crisis. The polls showed support for new policies (74 percent) while there was a lot of variation on what that policy should be.

The quota system in Hungary was described as an elitist project meant to force multiculturalism and diversity that would in the long term liberalize the social landscape of the country. Fidesz regularly campaigned on the notion that migrants were demonizing Europe and traditional society of Hungary. Drawing upon national narratives of sacrifice for Europe and victimization of Hungarian people, Fidesz made connections between the modern day migrant incursion and that of Muslim and Ottoman empires of the past that were stopped at the gates of Vienna and Budapest. “We also know our own history,” Orban said, “Those who wanted to gain a foothold in Europe always came across this route. And Hungary was the last defensive line, if you like, a gate to and for the West.”²⁰⁷ These narratives were even more pronounced when there was word of crimes committed by the migrants either against each other or domestic population. The sense of fear as well as the need to respond to that fear was heavily propagated as was the notion that Europe’s leadership in Brussels seeks these kind of developments. At the very

²⁰⁷ McAuley James. Hungary’s Viktor Orban is widely expected to win Sunday’s election. Why is he so popular? April 7, 2018 *The Washington Post*
https://www.washingtonpost.com/world/europe/hungarys-viktor-orban-is-widely-expected-to-win-sundays-election-why-is-he-so-popular/2018/04/07/0f491c54-36b2-11e8-af3c-2123715f78df_story.html

earliest, Germany and France's proposal of the quota system to the Commission was not supported as it was regarded as another way of Germany advancing its own state interests on the rest of the members of the EU. Fidesz were able to present Germany as the driver of Europe and thus its national interests on that of Hungary. The Commission and the rule of EU Parliament was simply a vessel through which Germany and the other power France were exercising their national interests. Hungary in this way created a two pronged difference between itself and that of the EU. On the cultural side, it lamented the direction that Europe was headed and the political side lamented the real-politik nature of EU whose institutions are largely run by the big powers.

The yearning questions for the EU aside from having to appropriate the migrants physically among accepting members also concerned their referendum on EU values. If the EU is to maintain an openness towards freedom and justice, then those values must be shared by at least the majority of its member states. The fact that there was a lot of pushback on the quota system was reflective of an EU that operates more as a political agreement rather than community. Aside from this, the legacy left behind by EU in dealing with austerity measures after economic crisis of 2008, continued to plague relations with smaller and poorer EU members. In this way, the EU is being viewed as an encroacher on the traditional values and soul of national identity while disregarding the identity that broader EU represents. Polls showing greater support for an EU-wide solution to the migrant policy were high despite there being disagreement on the eventual proposals. When individual member states such as Hungary decided to act unilaterally, the European Court of Justice and European Court of Human Rights cited the country for treatment of migrants and their living conditions. The negotiations are ongoing and a host of new proposals by the EU stemming from beginning of crisis in 2015 are leading to new talks with the Visegrad countries who have taken a firm stance on keeping

migrants out of their lands. In September 2020, European Commission proposed a "compulsory solidarity mechanism" consisting of quotas for each country to take in refugees, as well as a grant of 10,000 Euro per adult taken in, funded from the EU's budget.²⁰⁸ The stance taken by the Visegrad countries has emphasized a more rigorous border control and turning back migrants whom are undocumented. They also wish to receive funding for more effective border patrol in the form of barriers and fencing. While the EU has conceded in the form of more border screening and increased funding, the Visegrad states remain unhappy with EU proposals. Orban has said "the breakthrough will come when the Hungarian proposal is accepted that says that nobody can enter the territory of the European Union until one of the member states closes their asylum procedure".²⁰⁹ Other Visegrad states are now shifting the goal posts that wish to focus on addressing the problems at their source, a problem that the EU can only do so much about. While systemic attempts at creating a meaningful policy have been escaping it, the EU's desire for a deal has a lot to do with its attempts to reestablish its values as a union. It seeks to be accommodating and open to other cultures and societies while the political gridlock it finds itself will inevitably require more political will on its own behalf and that of the opposition.

Fidesz populist takeover of Hungary has been mirrored in other parts of Europe and beyond. In order to understand fully the populism under which a state becomes abject to, an often understudied of rural participation is often understudied.²¹⁰ In general, post-socialist countries, including Hungary, have a profound agricultural past which continue through today where 48.7 percent of arable land in Hungary making it a significant contributor to the country's

²⁰⁸ EU migration policy: Eastern European leaders get tough on new plans (September 24, 2020) *DeutscheWelle* <https://www.dw.com/en/eu-migration-policy-eastern-european-leaders-get-tough-on-new-plans/a-55040039>

²⁰⁹ EU migration policy: Eastern European leaders get tough on new plans (September 24, 2020) *DeutscheWelle* <https://www.dw.com/en/eu-migration-policy-eastern-european-leaders-get-tough-on-new-plans/a-55040039>

²¹⁰ Scoones, I., M. Edelman, S. Borras et al. (2017) Emancipatory rural politics: confronting authoritarian populism. *The Journal of Peasant Studies* 45 (1) pp. 1–20

economy. During its negotiations for EU membership, agricultural sector was a point of contention being that Hungarian agricultural businesses rejected many EU regulations without monetary concessions and being able to own their industries outright rather than foreign ownership. A clause was put in prohibiting cooperatives and foreign companies to buy agricultural land in Hungary. Upon accession many Hungarian small and large agricultural firms received subsidies from various EU programs particularly Common Agricultural Policy of the European Union (CAP) that allowed for growth of new and larger firms.²¹¹ The result was a re-focus on reforms concerning employment practices, product regulations and structure of firms. These developments albeit economically successful amplified existing issues of identity, territory and meaning already important in the agricultural and rural areas of the country. EU regulations and the various visible changes to the traditional way of doing business stigmatized traditional livelihoods leading to political opportunities that would have otherwise been non-existent. The perceived imposition on traditional aspects of Hungarian rural life was a lifeline to many far right parties whom used this to position the discourse on identity and broader cosmopolitan attacks on the common man.

²¹¹ Megyesi, B. (2016) Landscape after accession: the effects of agricultural and rural policies on farming – results of a case study conducted in Western-Hungary. HETFPA Working Papers 2016/18.

CHAPTER VI

THE RULE OF LAW UNDER SIEGE: EU RESPONSES

Executive Summary

In this chapter, I analyze the responses by the European Union in light of threats to the rule of law and their effects on the European common identity. Previous scholarship has broadly identified normative and institutional approaches undertaken by the EU to salvage what has been a tumultuous decade. As written about here, the face of the EU to the distant observer remains one where democracy and rule of law are cherished. To the frequent observer, the EU's tumultuous decade has inevitably changed EU's own understanding between ideals of Brussels and realities of its members. Rule of law will remain a cornerstone of EU policy, although much more refined and articulated than ever before. Theoretically, the cyclical outcomes of norm contestation by rule-setters and breakers logically lead to such re-definition. Thus far, the norm remains robust, in so much as the contestation has not diffused elsewhere and its norm defenders are plenty.

The first part of this chapter will trace three core normative ideals that guide EU behavior when dealing with systemic threats to its own understanding. First, the "all affected principle" positions the agenda at the communal level, effecting all members of the European Union equally. The next is that a response to the potential effects on breakdown of rule of law require "oneness of community." Finally, "consistency" of the messages and actions taken to defend EU values. Institutionally the EU has similarly undertaken on 2014 and 2020 Frameworks on Rule of Law and Article Seven proceedings against Hungary and Poland. Each have led to an articulation of various laws and guidelines that defend the values of EU. This has aided the normative aspect

of reifying the norm. Thus the measures by which EU guides its policy have been two fold, normative and institutional with each serving to reinforce the other.

Lastly, the combination of EU's performance when it comes to Hungarian and Polish domestic interests and the way in which domestic politics in Hungary and Poland have transformed have created the perfect storm of rule of law breakers. The political choices in these states remains in the hands of the public and the EU can only watch and anticipate changes if any in the next election cycle when the existing administrations could be voted out.

Normative Principles of Reinforcing EU Rule of Law

The EU's response toolkit continues to affirm a normative approach to dealing with breaches of rule of law. Within this response are three key principles under which the EU Council, EU Commission and its Presidents have sought to defend the community: "community as one" principle, the all affected principle, the consistency principle. Apart from the institutional approaches, the normative approaches often guide public discourse as well as institutional framework under which the EU positions itself when negotiating with rule breakers. Through normative acts the EU can set the agenda and build trust where it needs it most, or on the contrary can lead to erosion of trust if perceived as being unaccountable or uneven in application. Thus the EU justifies its involvement in reinforcing certain fundamentals through the EU Charter and through the ideas and interpretation of the Union as a whole.

The first normative argument stems from the Union's own charter where it is established as a "Community of Law" and a process of "integration through law." Within this community there is accepted mutual recognition of laws enacted and laws passed by national states as well as those passed as part of community. This means that in order to operate as a true community, member states laws and confidence in other member states' laws should be of utmost priority.

Thus mutual recognition of fellow member states and their laws, in accordance with broader set of EU laws. Establishing this type of congruence is a working project and is part of the normative landscape within which the EU operates in. Without mutual trust and recognition among member states, there is no community, particularly where there are deeply entrenched histories of neighboring member states who are now part of the same community. So how has the EU defended this notion of “oneness” of Community? The one key principle of EU functioning is the unanimity requirement on some key proposals. Those proposals that are deemed sensitive to the functioning of the EU fall under the umbrella of requiring unanimous agreement among all member states. These proposals mostly concern taxation, social security, new member adoption, and foreign and defense policy. However, in its most recent amendments to its own proposals, the EU has both contracted and expanded coverage of the unanimity requirement. The 1987 Treaty of Rome saw a contraction of unanimity regulation while the 2007 Lisbon amendments expanded the scope of the unanimity regulation returning them to their previous coverage.²¹²

Operating as a community of one is important for the EU for several other normative reasons. First, it affirms the EU’s own charter which carries with it the principle of a single EU entity able to make unitary binding decisions. Second, the EU itself is a norm exporter and thus has many procedures and mechanisms it uses in conducting foreign policy. It is able to do so easier and with legitimacy when there is unanimity in its message. Thus the “oneness of the EU” is embedded in its constitutional principles as well as its foreign policy objectives.

The “all affected” principle carries with it a basic assumption about the following: that the violations of rule of law affect national citizens, EU citizens, citizens beyond the EU where

²¹² European Union Law: Access to Glossary of Summaries. Accessed December 1, 2020
<https://eur-lex.europa.eu/summary/glossary/unanimity.html>

EU has significant influence. Thus the damage done will inevitably trickle down to impact the quality of all decision making within the EU since the violating member state has the legitimacy of being an EU member. This principle is closely aligned with the EU's primacy principle which states that EU law prevails over national law whenever the two are in conflict. This has been to some extent challenged by the various member states apart from just Hungary and Poland. There is also some debate as to how national courts can reconcile this requirement with their national constitutions and in cases where the EU has not taken a clear position. Thus as a result, different member states from Czech Republic to Germany have through their interpretation softened the ability of the primacy principle to really function the way it was intended. Some of the problems that the all affected norm faces concerning this is that it is increasingly likely that more challenges can lead to an abandonment of the principle itself at least in an operational way. This inevitably leads to problems when it comes to individual national courts recognizing the legitimacy of the other national courts with a different interpretation.

The consistency principle²¹³ carries with it a strong normative argument that the EU has an unequivocal interest in preserving its own charter and abide by agreements signed. This way it seeks to send a message of unity and above all consistency in the way member states talk about the rule of law. This is a part of the reason why there remains a strong norm even within the language of the most frequent violating member states. This consistency has been somewhat questioned by those who view the EU as being inconsistent in its approach to the dealing with violators. They argue two important points. Firstly, the rule of law within the EU lacked a formal definition until 2014 and thus has resulted in justifiably vague interpretations. Second, that the

²¹³ Herlin-Karnell, E., & Konstadinides, T. (2013). The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration. *Cambridge Yearbook of European Legal Studies*, 15, 139-167. doi:10.5235/152888713809813521

EU at the present has not withdrawn funds or severely punished violators in part because there was such ambiguity to its definition. Since adopting a formal definition and implementing various commissions to investigate violations, the EU has at least in a formal regard institutionalized this cardinal norm.

EU Institutional Approaches to Rule of Law

The EU has by en large heard the message of many of its critics when in 2014 it initiated a new framework on the Rule of Law. This framework came after the debates within the Commission about the need for a systemic approach to rule of law violations. Already by 2012, the European Union's rule of law norms were facing threats from member states, including Hungary and Poland. There was also a need to reaffirm the position on the importance of rule of law for the many incoming new member states that were looking to meet ascension criteria. There was a vacuum that the Union looked to fill and by taking a firm stance (at least on paper) the rule of law threats. What transpired was mostly a paper tiger where the difficulty came at the conclusion of the mechanism's protocols. Under the framework, in order to invoke any measures against the violating member state, the law requires unanimity. This posed a problem when there are multiple states under investigation, then they may do as Hungary and Poland, and simply declare cooperation with the suspected state in the form of voting against any sanctioning by the Commission. This proved to be an untenable outcome, with procedures against Poland and Hungary stalling in the official circles. However, if any victory can be ascribed to the proceedings against rule of law violations, they can be found in the symbolism of holding states accountable. Indeed, the framework itself as well as the investigative reports that emerged served as a precursor to the later mechanisms as well as raising awareness of the issue. Additionally, the

2014 mechanisms in its capacity was mix of preventative and punitive measures, a framework that would later similarly guide the way EU conducted negotiations on later protocols.

The Article 7 Proceedings

The Article 7 proceedings themselves were an institutional undertaking that required the establishment of new commissions and investigative work that would lead to open voting by the EU Council to take away certain membership privileges of the violating state. The proceedings themselves have a three stage process: Commission assessment, Commission recommendation, Follow-up to the Recommendation²¹⁴. In the first stage, the commission collects and examines all relevant information to assess the severity of the breach of EU values. In the second stage, the commission issues "rule of law recommendation" addressed to the Member State asking it to resolved certain problems under a given time frame. In the final and third stage, unless there has been work done by the member state to rectify issues by the allotted time, then Article 7 is invoked and procedures to vote are enabled. Poland and Hungary have both reached this final stage where a vote never transpired being that the two countries would veto any action against the other.

The 2020 European Rule of Law Mechanism

The 2020 budget negotiations within the EU were expectedly difficult with Article 7 proceedings stalled over Hungary and Poland, and with continued perceived value threats from the two states. New Commission President, Ursula von der Leyen, has committed to upholding core values²¹⁵ of the EU in the form of linking EU budget funds to rule of law compliance

²¹⁴ European Commission presents a framework to safeguard the rule of law in the European Union. March 11, 2014 https://ec.europa.eu/commission/presscorner/detail/en/IP_14_237

²¹⁵ Paradavi. Marta "The rule of law in Europe is not negotiable" *International Politics and Society* October 15, 2020 <https://www.ips-journal.eu/topics/european-union/the-rule-of-law-in-europe-is-not-negotiable-4727/>

guidelines. While Poland and Hungary objected heavily to the conditionality rule, eventually a deal was reached and the budget was adopted.²¹⁶ The terms of the conditionality rule have been included however both sides claim victory over the other in terms of their meaning. For the EU, the conditionality rule was a significant landmark in that it for the first time was able to link EU funding to rule of law compliance. On the contrary, Hungary and Poland have claimed that no such conditionality exists unless each nation state agrees to the findings in the annual agreed upon rule of law report. Further the courts will have the final say over the legality of such linkage between funding and political values. While scholarship on the breakthrough deal has also been somewhat divided, there are a few important takeaways that can paint a coherent picture on the overall state of rule of law.

First, framework focuses on four main pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances. Being that Poland as well as Hungary have both judgements against them in the ECJ on some of the matters, the new rule of law conditionality does not seem to have *a priori* effect. Von der Leyen herself has concluded that the new rule of law guidelines will take effect as of new year 2021. The distinction here made by Leyen addressed some concerns raised by observers about the ECJ needing to verify terms of the guidelines before they take effect.²¹⁷ However with the given background of our two states, there is likely to be future proceedings being that laws on the books in the national member states already exist and those are in conflict with the EU's own constitutional laws. The focus on the main pillars allows the EU to save face and at least on paper continue to uphold its normative agenda. On the other hand, the new deal does appear to

²¹⁶ "EU leaders unlock historic €1.8 trillion budget deal" Euractiv December 10, 2020
<https://www.euractiv.com/section/economy-jobs/news/eu-leaders-unlock-historic-e1-8-trillion-budget-deal/>

²¹⁷ "E.U. Reaches Deal on Major Budget and Stimulus Package" *The New York Times* December 10, 2020
<https://www.nytimes.com/2020/12/10/world/europe/eu-deal-poland-hungary.html>

give some time for Poland and Hungary both to continue with business as usual, while the courts determine the constitutionality of the conditionality.

Second, there is ample evidence to believe that many citizens within the EU even among the violating member states want the rule of law checks to be tied to funding.²¹⁸ The procedural aspects of the deal made however make it difficult to discern whether the political will was just as strong. Pro- EU critics of the deal cite the procedural aspects of the deal as more of the same. The framework itself isn't triggered unless the courts rule on the matter. There is no doubt in the minds of critics that the courts will rule in EU's favor, however the lengthy judicial process in the ECJ give more time to autocrats to spend EU funds that would further entrench their positions in power. In Hungary elections are being held in spring 2022, a long time for the Orban regime to continue to make it near impossible for the opposition to put up a fair challenge. Further, those EU funds will be spent and allocated as the national member states see fit. This gives a lot of leeway for the national governments, something that places blame on the EU as a direct enabler of autocrats.

Third, the individual EU reports on the status of the rule of law which for all 27 member states were published as the negotiations were happening. "Ambition and high expectations led to strong reactions and even disappointment when the rule of law report was published on 30 September."²¹⁹ The reports featured what has been known in academic circles and what other publications have been documenting about Poland and Hungary: democratic backsliding under both administrations. Many were hoping for precise tools of safeguard, including taking away

²¹⁸ Denison Susi, Pawel Zerka "The transformative five: A new role for the frugal states after the EU recovery deal" <https://ecfr.eu/publication/the-transformative-five-a-new-role-for-the-frugal-states-after-the-eu-recovery-deal/> *European Council on Foreign Relations*, November 25, 2020

²¹⁹ Paradavi. Marta "The rule of law in Europe is not negotiable" *International Politics and Society* October 15, 2020
<https://www.ips-journal.eu/topics/european-union/the-rule-of-law-in-europe-is-not-negotiable-4727/>

funding, however the initial reports were informative in their scope and suggestions. Their intended effect in part was to drive debate about the overall status of the rule of law within Europe and its findings broadly suggest that the value itself remains a strong pillar in all EU member states, notwithstanding the crisis that it finds itself in. The lack of a coherent strategy at least at the time of the publishing of reports speaks to the complexity of the problem. As said in own concluding report “This first rule of law report is the foundation stone for a new and dynamic process, involving a continued dialogue with Member States, the European Parliament and national parliaments as well as other stakeholders at national and EU level. The Commission will now start preparing the 2021 rule of law report, drawing on experiences gained in the first year of the functioning of the European Rule of Law Mechanism, and carrying forward the momentum to make the rule of law more resilient in our democracies. Being better equipped will help all Europeans to take up the challenges of the unprecedented economic, climate and health crisis, in full respect for our common principles and values.”²²⁰

²²⁰ Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions . 2020 Rule of Law Report
<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580>

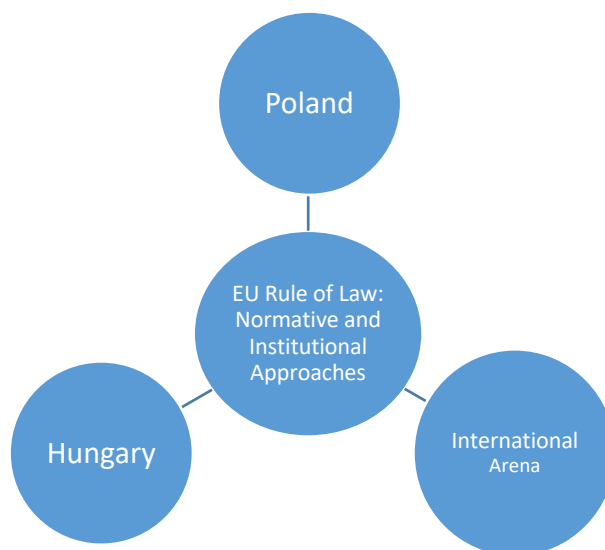


Figure 6.1 Illustration of EU Strategic Stakeholders

Measuring Compliance with the Rule of Law Requirements

Because the definitional aspects of rule of law were lacking for the majority of the Union's existence, the measurable data that exists is limited to a select number of years and follows the EU's efforts to establish itself as an exporter of certain democratic values. While the EU has done well to identify and assess particular countries' shortcomings prior to their EU ascension, the same application of standards has only now begun with their implementation. This interpretation seemingly taken by the EU top brass, has placed EU's foundational values as a moving target, whose meanings change with each circumstance and are assessed in light of the Union's priorities at the given time.²²¹ On the other hand, the EU does have a clear need to pinpoint measurable values that it wishes to promote. There are other indexes, and various

²²¹ The argument here is mostly concerning the EU's stances regarding its neighborhood policy. It follows that EU behaves this way internally as well, since their member states are not conditioned by restraints by ascension criteria, therefore allowing more freedom of interpretation of the charter. Leino-Sandberg, P., & Petrov, R. (2009). Between 'Common Values' and Competing Universals – The Promotion of the EU's Common Values through the European Neighbourhood Policy. *European Law Journal*, 2009 / Vol. 15(5), 654-671.

indicators that have been recently developed that could help expedite this move. While the EU itself has no clear way of quantifiably measuring a country's compliance with rule of law regulations, there are other available indexes from other organizations that provide thorough and quantifiable data on the state of rule of law. Of course, not having a proper measuring tool, does not mean that the EU lacks an understanding of the state of events in its own community. However, in order to be the normative power that it purports to be, then a comprehensive approach to leadership on upholding many of its foundational principles is required.

The most comprehensive quantifiable tool used in assessing the stability of the rule of law within countries has been Worldwide Governance Indicators (WGI) project. The utility of the WGI projects rests on the fact that it is an aggregate collection of up to six governance indicators one of which is the rule of law. Those six are interrelated and provide a holistic overview as to the state of governance for a given country. The six indicators are: Voice and Accountability, Political Stability and Absence of Violence, Government Effectiveness, Regulatory Quality, Rule of Law, Control of Corruption. While the WGI indicators are a reliable source of data, some scholars have questioned the "understanding" of the rule of law mechanisms as understood by the WGI differing in essence from the EU's own reading of rule of law.²²² Essentially, the WGI data mostly rely on perceptions of the public about trust in certain policymakers and the institutions to do their job fairly and consistently. The argument is that the EU has a much more nuanced view on the importance of rule of law that includes the normative standards it wishes to export. Despite this, it holds that there are ways of providing accurate measures on the state of rule of law whether they come from non-EU sources or within.

²²² Pech Laurent, Rule of law as a guiding principle of the European Union's external action <https://www.asser.nl/media/1632/cleer2012-3web.pdf> Cleer Working Papers 2012/3

The other widely used and available tool for assessing the stability of the rule of law in countries is the World Justice Project (WJP) Rule of Law Index. The index itself is a “quantitative assessment tool designed to offer a detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice.”²²³ The WJP index is useful as measuring in tool in so much that its understanding of the rule of law is closely aligned with how the EU perceives it to be. The emphasis on the substance of law and procedural practices bodes well for the EU’s own interpretation. The so called “thick” and “thin” conceptions are thus well balanced and provide for a EU-usable measure. The four broad interrelated principle are:²²⁴

- The government and its officials and agents are accountable under the law;
- The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property;
- The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;
- Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The European Union relies primarily on its own Eurobarometer surveys to document trends and gauge public opinion on wide spectrum of topics. These topics range from economic and political changes, as well as attitudes towards Europe and the European Union, and social identification of the respondents. The surveys are comprehensive in their nature and are a consistent source of information for both EU lawmakers as well as scholars studying the EU.

²²³ World Justice Project Accessed January 2, 2021
<https://worldjusticeproject.org>

²²⁴ World Justice Project Accessed January 2, 2021
<https://worldjusticeproject.org/about-us/overview/what-rule-law>

Access to the data is publicly accessible online and in several languages. The data itself is applicable in many study areas. For this particular study, there were no direct questions about rule of law however, since trust in EU institutions is a seminal part of rule of law, it logically follows that this would be a measure that reflects on the state of rule of law. To date a comprehensive index that is solely an undertaking by the EU has not been developed. There is a void that needs to be filled here if they EU wishes to present itself as a normative power and continue to advance its own values. The blueprint on some quantifiably measured data already exists out there in the form of other indexes that have been developed. Further, this reliance on outsider interpretations of its own constitutional meaning regarding rule of law does not bode well for advancing the norm. If the EU seeks a metric, then it must develop its own.

Both the WGI and WJP projects can be commended in the form of a quantifiable measure on whether states are adhering to minimum rule of law standards. The EU, following along the same path should devise a list of minimum legal requirements of its members in terms of law on the books as well as the law in practice. Thus far the existing frameworks for strengthening the rule of law have fallen short on some account to include the necessary legal preventive or punitive measures without referencing the EU's judicial system. Consequently, since the EU formal body is a political one and perhaps for its own good imposes certain limitations on what it can and cannot objectively achieve, the Council of Europe has been relatively more forthcoming in their evaluation of rule of law. In a report entitled 'Review of the Rule of Law situation: feasibility and methodology', it is suggested that a 'rule of law review' would be beneficial in strengthening the checks and balances required for a normative viewpoint of rule of law.²²⁵ It is

²²⁵ Council of Europe, Review of the rule of law situation: feasibility and methodology (prepared by Dr. Erik Wennerström in collaboration with the rule of law team at the Folke Bernadotte Academy and the Secretariat), DG-HL (2010) 21, 22 October 2010

further elaborated that the Council seeks to adopt a comprehensive reporting mechanisms that would be able to continually update all member states on the status of findings. Additionally, tying elements of the law as it is written and signed by each member state to their actual outcomes adds to the clarity of information. Thus the Council has been integral in interpreting the charter, from the acquis requirements to the outcomes of those requirements. “The difference between the notions “rule of law acquis” and “rule of law ends” is that while the rule of law acquis is the normative foundation for all standards and activities undertaken by the Council of Europe in relation to the rule of law, rule of law ends describes operationalized goals for measures or activities that aim to promote the rule of law acquis. A rule of law end may consequently be described more elaborately than the acquis (which although it develops, may not be re-phrased or modified for operational purposes) and can target one and not all elements of the acquis, and even be described dynamically (e.g. "the rule of law end for activity x is to improve judicial independence"; the acquis contains full judicial independence, not just its improvement).”²²⁶

²²⁶ Ibid.,

ACQUIS	ENDS (OUTCOMES)
<p>(1) the institutional framework and organization of state, including the separation of powers, the upholding of the law and ensuring security for all, the duty for the state to respect and apply the law, and the role of judiciary;</p> <p>(2) the principle of legality, including principles of lawfulness, legal certainty, and equality;</p> <p>(3) due process, including the right to a fair trial, access to court and remedies, and judicial review.</p>	<p>(1) the supremacy of law;</p> <p>(2) an independent judiciary;</p> <p>(3) a legal order guaranteeing the protection of human rights and fundamental freedoms;</p> <p>(4) access to justice.</p>

Figure 6.2 Illustration of *Acqui* Criteria and Outcomes

In following Nicole Zimmerman and Lisbeth Deitelhoff (2019) et al.²²⁷ in applying the theoretical framework on norm robustness, the breakdown regarding the application to Poland and Hungary is shown by appendix 1a. Taking into consideration that the quantifiable metric that exists out there suggest at least in measureable terms rule of law has been down-sliding since at least 2010 in our two case studies. This data is sourced mostly from perception of the public and

²²⁷ Deitelhoff Nicole, Lisbeth Zimmermann, Norms under Challenge: Unpacking the Dynamics of Norm Robustness, *Journal of Global Security Studies*, Volume 4, Issue 1, January 2019, Pages 2–17

there are various ways in which it is collected. However, knowing the nuances in the collection of their methodology is certainly important but the focus here will be mostly on how these perceptions affect the greater vision of the EU for itself. The values that it stands by and how they themselves are shaped and molded by these changes over the past decade. Also following along many of the metrics, it is worth noting that nearly all data comes from outside-EU sources which can to some extent may impact the ways in which EU proceeds going forward. The existing Barometer surveys are thorough, however they're lacking in specific rule of law substance, in other words a way of measuring the public's awareness on the importance of the value. Taking into consideration that rule of law is closely linked to trust in institutions such as courts system and perception of corruption these became the closest questions analyzed.

The four broad indicators for measuring robustness (concordance, third-party reactions to norm violation, compliance, and implementation) are applied to the case studies. Original authors find that types of contestation and structural factors of both challengers and norm defenders have strong effects on whether a norm remains robust or is in serious peril. A norm is labeled as strengthening when there is a rising number of legal ratifications and verbal sanctioning of violations by norm defenders. Below are condensed summaries of each criterion:²²⁸

Concordance: Concordance with the norm means an acceptance that said norms are generally legitimized in normative discourse and share a large percentage of support in public opinion polls. Evidence of this can be found in Eurobarometer surveys, legally binding commitments etc.

Third party reactions: Rhetorical reactions by top EU brass in sanctioning norm violators that seriously threaten the EU political landscape. This is an interesting metric because it can be

²²⁸ Ibid, 9

difficult to assess the facticity of EU norms because we do not have *a priori* measure but rather the severity of the responses to norm violators after a norm has been deemed to be challenged. Evidence of this is normally compiled through official government speeches, documents, interviews by key figures involved.

Compliance: level of behavior consistent with the norm in question, the degree to which the norm has been utilized in moments of crisis and stability, by high ranking officials, courts, and other gov't institutions. The emphasis here is on the level of compliance when the norm is challenged.

Implementation: of the norm at all levels (domestic, regional, international) inclusion in organizations, institutions, domestic law. Evidence of this can be found if certain civil society groups are outlawed or if new institutions are set up to combat corruption.

The empirical analysis should produce two main kinds of evidence. First, we expect to see a change in the rules. We can identify the changes in rules or laws and case laws when a new norm is developed or when an existing norm is under duress.²²⁹ This has occurred in the form of cementing what has already been said about the importance of rule law. The primacy of EU law over national law is separate and distinct debate however, certainly the EU in this case, the rule of law norm is threatened starting about 2010 when observers noted the constitutional changes in Hungary leading to further backsliding. Once the norm having been upended, or challenged in some ways, then the compelling evidence that would show development of change in the norm would consist of the following:

1. Enough member states that challenge the EU value system
2. Nature of argumentation, persuasive arguments by “violating” member states

²²⁹ Sandholtz, Wayne. 2008. “Dynamics of International Norm Change: Rules Against Wartime Plunder.” *European Journal of International Relations* 14 (1): 111.

3. Lack of oversight or defenders of the norm in light of challenge

Norm Context²³⁰

Prior to ascension into the EU, the series of reports on the status of economic as well as political reforms did not emphasize the kind of rhetoric and language, relatively, enough to claim that the existing norm (rule of law) was of high priority. Although the general prerogative of prospect member states was mainly economic, the same can be said of the EU side, the strong desire to implement the kind of meaningful checks and balances weren't prioritized. The political climate also was such that the EU was seeking to adopt new members "at all costs" fearing the newly-democratizing states falling to influence by other powers. Thus the economic benefits for both sides, and the threat of a political alternative in Europe pit the sides to reach an agreement on ascension. So in Hungary, the EU was pre-ascension already viewed with a degree of skepticism, resulting from perhaps a wariness of outsiders and their intentions. Although, the political elite and essentially all political parties were in favor of joining the EU, the public opinion polling was always split evenly on the issue. And further, the democratic ideals which the EU community was known for, weren't as important as the economic benefits of membership. This perceived imbalance was noted in the reports, however optimism that values will shift once membership was achieved prevailed. A similar outcome was observed in Poland, where there was significant pushback against membership, primarily on the basis of being a conservative religious society that is an imperfect fit with the EU's liberal values. Further, the agricultural sector, making a significant contribution to the Polish economy, required assurances that it would receive preferential treatment.

²³⁰ *ibid.*,111

Following along the lines of norm context, the strength of the norm within Western Europe proper has always had a deep historical association. The same kind of historical underpinnings fringely exist in Poland and Hungary. Further, the two countries having spent most of their recent statehood under occupation by foreign powers were already behind on the meaningfulness of the rule of law. Thus the liberal socio-democratic value system that existed in Western Europe was some decades ahead in being democracies. Once membership was complete, ruling parties within each country underwent scandals that effectively fragmented the liberal parties that ruled in 2004. Existing norms within each could not have been developed as fast as the EU was looking to move. Europe had already in 1999 sanctioned its first autocrat in Austria, something it thought would eradicate the kind of populism and disregard for institutions that it sees today. The electorate in Hungary did not have to wait long to choose its first populist, as the economic crisis of 2008 and the dramatic fall of the left in 2006 paved the way for Orbán who by this point had already assigned blame to the EU for economic situation in the country.

Poland, perhaps the most skeptical of member states, emerged out of the economic crisis of 2008 rather unscathed, relatively, however the populist PiS emerged as a result of migrant crisis and similarly as in Hungary, the dramatic fall of the left. Poland on the one hand has an understanding of the rule of law that is more closely aligned with that of the EU. Polish society is overwhelmingly pro-EU but the divergence on specific issues such as refugee quotas and security concerns to the east have fallen on deaf ears in Brussels. Similarly, the corruption and scandals of the liberal pro-EU Civic Platform party in government caused another disconnect with Polish locals and perceived EU silence over the matter caused many to view the EU as a collaborator against rather than a protector of law and justice.

As part of normative change and supplanting of ideals, the arguments posed by Hungary and Poland have both not garnered many allies in the EU community. The outcomes as we are seeing them, are not resulting in more allies that support the position of the two member states. In theory, the modification of the norm occurs when the rules and procedures are challenged, argued and thus modified based on the outcomes of argumentation. There is very little evidence to suggest that Poland Hungary have been able to ally themselves with more member states. In fact, the Visegrad support group that was attempted ultimately failed when Czechia and Slovakia sided with EU on the rule of law matter. Further, other allies in Eastern Europe in the form of Romania and Bulgaria are also a slim possibility since swift actions by the EU in Romania have led to substantive changes in political outcomes. Bulgaria remains a puzzle albeit due to its own domestic problems with rule of law has largely steered clear of outright defying EU in the same manner as Hungary and Poland. The main argument put forth by Poland regarding its new laws on judges' retirement age, is that the previous laws on the books stem from Communist era and must be updated to reflect society of today. The creation of a "Constitutional Chamber" to oversee appointment of judges is supposed to objectively verify new judges. The European Court of Justice deemed this to be against EU law and questioned the independence of the Polish judiciary system. This was argued as an attack on Polish sovereignty by the Polish Deputy Minister. Very few states have been using Polish talking points, albeit the rather thorny issue of sovereignty is one that is universally sensitive.

On the more extreme end, the populist rhetoric coming out of Poland and Hungary calling the EU a "failed experiment" and "second Soviet Union,"²³¹ have also not galvanized

²³¹ "Hungary's Orban likens EU to former Soviet Union if rule of law criteria accepted" *Reuters*
<https://www.reuters.com/article/us-eu-budget-hungary/hungarys-orban-likens-eu-to-former-soviet-union-if-rule-of-law-criteria-accepted-idUSKBN27T0ZT>

support among more member states. Theoretically, nature of argumentation and the acceptable reasons for changing of existing norm matter but only so much as the public is able to buy in to them. Hungary and Poland are invoking system-agent problem that undergirds the EU. The often top-down approach from Brussels when it comes to critical issues whether finance regulation, or migration has some sympathizers and many critics. Literature on this topic is quite vast, and it continues to be of urgency to redress some of the ways Brussels deals with its member states, particularly Eastern core. The economic differences between the East and West are not likely to go away anytime soon, and what is likely is that those differences manifest in some other form of protest or pushback against further EU intrusion into domestic affairs. It may be that this issue continues to plague East-West relations which undoubtedly puts into question many of the same rule of law concerns of current times. Given the fragmentation and diversity of interests in the Eastern European states themselves, it is unlikely that a coalition of anti-EU rule breakers will form. In some ways, Poland and Hungary are on an island by themselves being stuck in an area where they're viewed as closer to the West than the East both culturally and economically. The remaining Eastern European states are could hold the key to whether significant norm changes occur. For now, it remains that the EU has by en large has confined the spread of illiberalism to only a few states.

Does a Divide Between East and West Exist?

Many academics when pressed to identify reasons if any for why there exists a divide between the East and West in Europe will point to the immediate socio-economic differences. Indeed, other less pronounced differences exist, the East European countries are plagued by the lack of a social contract, high social inequalities, and rampant corruption. The West has by in large enjoyed a longer period of stability under capitalism and democratic traditions. GDP per

capita, productivity, economic output, capitalization, savings, integration into European and global networks, business skills and routines are still huge.²³² Elemer Hankiss. Research Director of the Institute of Political Science at the Hungarian Academy of Sciences speaking at the Woodrow Wilson center in D.C. said this of the question:

“The shortest answer to the question posed by the title is, yes, it does. But this answer is only partially true. A truer answer, but still only partially true, is that it does and does not. And the real answer is, I think, that it does exist but is only one among the many dividing lines that crisscross Europe and it may not be the most important one—or at least its importance is rapidly decreasing. I emphasize this point because the reality or myth of the East-West divide has become part of the political game in Europe. It has become an argument against integration on both sides of the continent. Conservatives in the West repeat: "they are so different," while conservatives in the East echo: "we are so different.”²³³

Before embarking on a lengthy discussion of how and why East-West divide has become a commonly invoked phrase to point out differences among Europeans, some are also quick to point out that these differences are much less obvious as they are talked about. Talks of disintegration and in-cohesion are overblown they claim, with “unfamiliarity with the nature of East-West differences rather than the differences themselves,” are viewed as the problem.²³⁴ Thus they claim that the real source of tension between the East and West aren’t the immediate policy preferences nor are they the difference in value systems, but are the poor understandings

²³² Elemer Hankiss speaking on October 22, 2003, while in residence at the Wilson Center as a Public Policy Fellow. Woodrow Wilson Center Global Europe Program 281. The East-West Divide in Europe: Does it Exist? <https://www.wilsoncenter.org/publication/281-the-east-west-divide-europe-does-it-exist>

²³³ Elemer Hankiss speaking on October 22, 2003, while in residence at the Wilson Center as a Public Policy Fellow. Woodrow Wilson Center Global Europe Program 281. The East-West Divide in Europe: Does it Exist? <https://www.wilsoncenter.org/publication/281-the-east-west-divide-europe-does-it-exist>

²³⁴ Valasek Tomas, Why Can’t the EU’s West and East Work as One? *Carnegie Europe*, November 18, 2019 <https://carnegieeurope.eu/2019/11/08/why-can-t-eu-s-west-and-east-work-as-one-pub-80300>

of differences that exist. These misunderstandings have in part led to the current impasse that the EU-CEE find themselves in. Countries in CEE feel that their voices are not being heard in the greater EU picture, while the EU views CEE as not playing by the rules. There is tension on both sides but has become more visible with the actions of Poland and Hungary. If anything, there is renewed attention to the matter of differences, something that could aid in disengaging the web of misunderstandings.

The first myth that exists out there about the East-West relationship centers around the presence of two opposing factions. As argued by Stefan Lahne²³⁵, the CEE countries are not a single bloc but themselves are very diverse just as much as the rest of the EU. Countries with CEE have differing aspirations to each other, interests often collide and economic disparities are evident. Apart from their common history as parts of the Soviet empire and relatively lower standards of living, CEE states have opposing views on foreign policy issues as well. Russia for example is seen as a threat in Poland but that is not the case in Hungary or Slovakia. Each country's voting differs in the EU Parliament depending on how the issue at hand affects them directly. Scholars have found that clustering around certain issues such as migration and worker mobility being the most common points of convergence for CEE states. Other than that, voting patterns suggest a divergent pattern of voting for CEE member states. The other myth that is that views on immigration when put into context can be explained by the different historical experience with migration by the CEE member states. Unlike the West, the Communist East did not enjoy much migration or contact with faraway lands as did colonial powers of the West. This reality makes the East a slow starter but also fears of others are rooted in what some have described as an identity crisis. Rapid aging of these countries' populations, their low birth rates,

²³⁵ Lehne Stefan, Europe's East-West Divide: Myth or Reality? *Carnegie Europe*, April 11, 2019 <https://carnegieeurope.eu/2019/11/08/why-can-t-eu-s-west-and-east-work-as-one-pub-80300>

and the massive emigration to the West have created anxiety and thus feelings of despair. Thus domestic politicians have used these sentiments to create an anti-immigrant hysteria which fits the narrative that the traditional nation is under threat due to these other myriad of reasons. The timing of the migration couldn't be worse, but its restrictiveness by the CEE member states is rooted in other lingering problems of nation-disappearance. Another myth that exists concerns the treatment of newcomers particularly since the 2004 enlargement. Some view this issue as the driver of current EU problems, done too early and without serious checks and balances on incoming states. Even in Germany, 46 percent of respondents in a recent poll said the 2004 enlargement was a mistake.²³⁶ If there is not an east-west divide then certainly there is a core-periphery problem. The CEE states are much less populated with smaller economies than those Western. Germany and France for example make up a sizeable chunk of influence in the EU Parliament and have economies that when combined outnumber all of CEE member states. Poland is the only country that has the size in terms of population and economy to sit at the table with the "big" players Germany and France.

"There is thus no systematic discrimination of the post-Communist member states. However, from time to time, the EU's core powers behave in an insensitive manner. A case in point was the Versailles summit of France, Germany, Italy, and Spain in June 2017 that endorsed a two-speed Europe and prompted considerable irritation in the East. A lot of resentment was also caused by the decision to relocate the London-based EU agencies after Brexit to two wealthy Western European cities, Paris and Amsterdam, despite of a number of candidacies from CEE countries, which do not yet host any such agencies."²³⁷

²³⁶ Ibid, 1

²³⁷ Lehne., 5

European Common Identity - Not Certain

Despite the two-pronged normative and institutional approach, critics argue that damage to the rule of law in Hungary and Poland is so widespread and irreversible that EU must take decisive and timely action. However, the recent rule of law conditionality tying EU funding to annual assessments on status of rule of law provides some optimism even if small. Positions taken by the EU proper point to piecemeal progress on strengthening rule of law. This in itself speaks to the changing nature of the way EU conducts business with its Eastern member counterparts, treading lightly and patiently.

Normative literature emphasizes the fluidity of norms due to gaps between general rules and specific situations.²³⁸ The interaction that ensues as a result of some triggering action causes modifying affects to the norm. EU continues to respond but in a way that maintains a balance between “thick” or “thin” adoption of its own charter. EU’s relationship with its rule of law breakers has been characterized by an “interests versus values” debate. This familiar framing somewhat distorts the interplay between interests and values, as this complex relationship requires both for one to effective. Thus EU norms are arguably never abandoned, albeit they may lose primacy over a strategic interest, norms have a continuity that cannot be broken by one-off events. As illiberalism has swept Europe, no one in the world would call it a bastion of authoritarianism because the norm that Europe is a pioneer of democracy and guarantor of human rights is already affirmed strongly in the minds of the rest of the world.

The EU takes its values seriously, but those values are not just driven by benevolent intent, there are clear interests that guide EU policy. At the forefront the maintaining of these interests relies on cohesion at home, thus the aligning of domestic values with those that EU

²³⁸ Sandholtz, Wayne. 2008. “Dynamics of International Norm Change: Rules Against Wartime Plunder.” *European Journal of International Relations* 14 (1): 121.

touts abroad. Discourse on norms has long made the switch from viewing commitment to certain norms as a “moral duty” to a commitment based on interests. This has significant implications on EU’s own developmental strategy and approach to member states. One major theme throughout this research concerns the EU primacy of own short term interests over interests of individual member states. The position of the EU on many of the pressing issues in its member states, like the EU’s silence on the perceived mistreatment of ethnic Hungarians living outside Hungary’s borders in other EU states as well as the handling of the migration crisis created a spark needed for permanent entrenchment of Fidesz as the “savior” of Hungary. These kind of crises are perhaps a thing of the past and the future of the Fidesz as well as PiS in Poland will ultimately fall into the hands of the electorate of their countries. Presidential elections in Hungary are slated for spring of 2022 while Poland’s are not until 2025. Nonetheless, voters in each state will decide the importance of rule of law or will vote based on some other issue. There is political will domestically to strengthen the EU relationship and repair the damage done over the last several years. With the EU making its stances at times superfluous, defending ideals sometimes appears as a lukewarm and common-practice, perhaps rendering its practice ineffective. This problem can be a good one to have as it essentially means the EU has many defenders who push the narrative about the ideal Europe.

The goal of an ever closer Union is certainly not lost, but it is on pause. The project itself continues on unabated by the nationalisms that have swept it and the world. There is a renewed effort that deals with the challenge of specificity of tangible rules and interests with that of the ideal vision of Europe. The crisis is ultimately an identity one, where some of the usual ways of doing business in Brussels are up for readjustment. As the members of the east gain more political influence and political courage to stand up to the rules pushed by Brussels, we are likely

to endure more crisis moments. The areas where the EU has complete competence or majority competence are going to be likely up for debate as member states seek greater shared responsibilities and even power distribution. EU has already displayed some signs of reversing its former positions such as the recent negotiations on the rule of law. Within the most recent passed legislation in which the EU won the ability to withhold EU funding for countries convicted of violating rule of law (ignoring EU courts) there used to exist an unanimity clause that required all member states to agree to sanctioning of a violator state. This has now been discarded and EU now requires a qualified majority of 15 member states and at least 65% of the EU population is needed for the Commission to sanction violators. A small victory perhaps for the EU as it can now sanction by majority, while small states once again lose out on the privilege of equally distributed power.

CHAPTER VII

CONCLUSIONS AND IMPLICATIONS

Given the continuing calamity of events in the European Union, it is tempting to conclude that the way forward is to cast a winner in the ongoing struggle for the rule of law. What is most likely a foregone conclusion is a grand bargain of sorts, one that maintains the calamity to a manageable level while at the same time building on rule of law as more than just an understood moral value but one articulated and reinforced by interest-based institutional backing. To that end what I have demonstrated in this study is precisely the kind of tension that is faced by the EU in its relations East. Advanced pluralism almost always begets identity crises and reevaluation of once firmly-embedded principles. It is an ongoing dilemma that has struck the EU and one that will require the kind of two pronged posturing (normative and institutional) in order to maintain a single EU.

The case studies of Poland and Hungary support the key claims here associated with normative change. I have tried to answer questions regarding EU's self-understanding given the rule of law impasse and assess the robustness of the norm (rule of law) given challenges mounted against it. Within this are also supplementary questions regarding norm spread in our case study countries and EU's learned experience going forward in its articulation of ideas and norms with prospect states. Going back to the initial goal of the study, I find that the EU is indeed re-identifying its own understandings, seeking to rearticulate principles at the bedrock of its foundation. This by no means suggests that this isn't a constant state of being but rather has been in intensified form as of late as challengers mount pressure on these ideals. To this end the ontological question of EU's self-understanding is best understood as a constant reifying and "on

the go” process torn between identifying as a supranational polity or a post-modern state. This obscure duality has in part contributed to its crisis from within and its relative lack options to deal with norm violators within.

Next, I will answer the additional questions from study in their sequence. First, national versus outsider perspectives factor heavily in both Poland and Hungary as a contextual understanding about the direction of the two countries. In this way, recurring themes are analyzed that shed light on the EU-Poland-Hungary relationship and its problems. Within this are differing historical experiences by both countries whom have been on receiving end of ideological and material battles fought by outside empires. These experiences have instilled certain values with Poland largely presenting as conservative and Hungary as largely homogenous. The other fast-moving and more recent themes concern the primacy of EU over its national member states. Here we see some more common characteristics that undergird a typical agent-structure problem. Hungary laments the (mis)treatment of ethnic Hungarians living outside of Hungary in fellow EU states while Poland has security interests to the East that largely fall of deaf ears in Brussels. Further both Poland and Hungary were largely against migration quotas pushed by Brussels in the early stages of migration crisis which placated their domestic interests at the expense of the EU relationship. And finally a recurring theme across both countries concerns domestic politics of each. The dramatic fall of the left and a fragmented opposition has largely cemented current parties in power whom push the limits of EU’s unanimity on many issues.

The questions posed about EU’s learned experience as a result of ongoing struggle with its eastern members will be discussed next. While there is widely believed notion that the EU has pumped the breaks on enlargement as recently stated by French President Emmanuel Macron,

there is reason to believe this is due to a need to overhaul the ascension process prospect states use to join. As stated before, the rather archaic nature that underpinned the 2004 expansion where some key reforms were overlooked at the prospect of swift expansion and bringing post-communist states into the EU fold. It is likely that the EU has in some ways already started this process, with negotiations with prospect member states being stalled due to more stringent requirements and lack of political will. The consequence of being a larger, plural EU are coming to a head likely will require a re-examination of its unanimity requirement on some key aspects such as new members.

Contribution to the Literature

The EU is a flagship example of political integration emerging as a result of shared interests and a community coalesced around liberal values. Any threats to its dissolution have wide ranging consequences and anyone interested in research pertaining to the future of the EU or integration process at large will find utility in this work. This research is timely given the current enlargement impasse and problems within that could lead to a rollback and a redefined EU that would have geopolitical consequences. Existing literature that is sounding the alarm on why the EU requires restructuring has not systemically examined the impact of contestations on the rule of law nor the extent to which the strengthening or weakening of this norm is critical to survival of the EU. I intend to fill this gap and strengthen existing analysis on EU's integration particularly on its maintenance of pluralism.

Consequently, the literature on norms is vast, with some arguing their relevance to political decision-making, others their effectiveness. It is to the latter that this literature contributes. Much of the seminal works on norms focus on norm defenders as the primary drivers or sustainers of a certain norm. However, the mechanisms that we use to evaluate these

norms defenders are often understudied or underdeveloped. Additionally, there is little that the existing literature offers when it comes to explaining counter-norm spread. This research contributes to the existing norm literature in two important ways. First, existing theories exercise deep ambiguity in how they are practiced and ultimately suffer from endogenous micro-political level of analysis which in the immediate post-Cold war era of reconfiguration of the international system went largely underestimated and understudied. Further the available indices at the time providing policymakers and scholars with relevant reform processes were not developed as they are currently. Poland and Hungary benefited from the EU's desire to enlarge eastwardly and many of its shortcomings when it came to political reforms went unnoticed in the early years. The immediate goal is thus to re-open debates on norm diffusion literature in light of EU populism crisis and broader decline of democracy. Second, as demonstrated by this study, norms can remain robust even while parallel, albeit differing understandings of said norm are present. In Hungary and Poland there is a moderately strong belief in the institutions of the country, and a reverence for rule of law. Despite this, the contestation of the norm at the perception level warrants its articulation and meaning beyond the superficial. Thus, I show here that more work needs to be done to merge differing norm interpretations and breaking the gridlock which poses problems for data collection and analysis.

The other goal of the research is to contribute to literature on EU's normative power, which in recent years has been fiercely contested. Scholars from various schools (realist power based explanations as well as liberal institutionalist) have contributed to this debate however most existing analysis concerns the EU's immediate and distant neighborhood, overlooking norm conditions within the EU itself. This research studies norms inside the EU whereas previous literature has measured EU's normative power in relation to its policies in the neighborhood.

Additionally, critical scholars have contributed to the field as well with norm contestation seen as the future wave of scholarship. This research adds to this literature as well due to its focus away from traditionally studied third and second world countries by focusing exclusively on Europe, the nerve center of political norm origination.

Limitations of the Study

The one major limitation to this study concerns the fact that we cannot derive at a fully satisfactory quantification of norm robustness. In other words, we assume norms have no ideal “endpoint,” rather they are constantly strengthened or weakened, reinforced or challenged. The goalposts then become how to study their change and determine whether there is indeed a transformation mounted and whether that is ultimately reifying or retracting previous understandings of the norm. In my findings here there is enough evidence to determine a transformation occurring, with more evidence to support its strengthening than the opposite. Again, since there is not an end point to derive at, we can only infer trends at the moment of the study. The reason

Some other limitations concerned other more general problems in data collection. Since this is an EU specific problem one would expect to rely on EU available metrics and data when it comes to issues on rule of law. There were not any direct indices on rule of law that came from EU sources, rather the indices used came from global-wide collecting organizations like Freedom House, the Economist etc. This may be an issue for EU-specific scholars who may seek data sources from closer EU- focused institutions. The fact that no such known indices exist also presents avenues for future collection of such data from EU centered institutions. Further, from the available EU data, when it came to public opinion polling the closest available questions relating to the rule of law were used since there were none that addressed the term directly. So,

as an example citizens' feedback on their trust in institutions such as the court system was used to justify their overall opinion on rule of law.

Lastly, the interpretive problems surrounding some of the evidence of norm strengthening and weakening. These problems mostly manifest in ways that present a dichotomy between the ideal and reality. On the one hand defenders of the EU seek greater and much more punitive measures intended to preserve the rule of law as it is written. The actions of the EU on the normative and institutional end seem to be of not much value unless they are able to bring immediate and radical stop to the crisis. Conversely, maintaining the EU's heterogeneity is not a simple task and thus the steps undertaken display the kind of problems faced by policymakers alike. There is no easy solution and presenting the case as such presents as a challenge to the spirit of democracy and values of the EU. Member states have interests and the EU accommodates those interests within the grand homogeneity of its own principles. It cannot and should not appear to be a "bully" to the interests of its member states whom maintain their sovereignty and are on a perceived collision course with EU principles. The overall message of the EU has mostly operated on this logic, working cautiously to affirm its positions while respecting the diversity of opinions elsewhere.

Recommendations for Future Work

In conclusion, scholarship can build on the kind of research presented here in several different ways. What other explanations can be studied to help best determine the extent of damage done to the overall EU identity, if we assume such? Or perhaps how to deal with the kind of challenges that emerge in increasingly pluralistic societies? Apart from what was discussed in this work, there are several avenues for further study that present themselves.

Firstly, recent work on “expanding” labels on democracies can help provide ways in which we can situate contradictions that may occur in democracies.²³⁹ Overviews of this literature generally fall on axis that includes terms such as illiberal democracy, defective democracy, managed democracy, semi-dictatorships, electoral authoritarianism, and competitive authoritarian regimes etc. This is especially helpful as Europe in some ways is a trailblazer in this regard, with many regimes that do not fully constitute a Western ideal. What this allows for is a separation from the literature of the 1990s that ²⁴⁰largely focused on how countries cope with the transitions to liberal democracies, to now where those studies have moved in the direction of studying the ongoing hybridology of these largely stable systems. Has the EU as a policymaking institution made such a transition in its relations with the East? It is a question worthy of future study. This work and future work can help shed light on this question.

Second, the importance of the rule of law remains seminal for a couple of reasons. One, it is connected to all other aspects of EU principles (media freedoms, judicial independence, human rights etc). Second, it is important because its premise is that these EU principles are sovereign over national norms and laws. This creates a problem when assessing the strength of belief in the rule of law in a given country. States that generally have a widely accepted norm about respect for the rule of law but at the same time show high degrees of skepticism and perceive institutional corruption will likely extend those same beliefs to a supranational polity ie. the EU. Thus the future of rule of law remains closely linked to the behaviors of the agents acting within the structure. This presents a dilemma to finding ultimate solutions when a problem does arise, bottom up or top-down socializing. Future studies can help illuminate the interplay of

²³⁹ Andrea Cassani, “Hybrid What? Partial Consensus and Persistent Divergences in the Analysis of Hybrid Regimes,” *International Political Science Review* 35, no. 5 (01, 2014): 542–58.

²⁴⁰ Thomas Carothers, “The End of the Transition Paradigm,” *Journal of Democracy* 13, no. 1 (02 2002): 5–21;

actors to determine best socializing practices and in particular states with recent communist past. In particular, the main guardians of EU law, European Court of Justice and European court of Human Rights deserve special attention, one not necessarily provided here.

Third, the study is limited in its case study selections due to the order of perceived greatest impact on EU institutions. Future studies can expand case selection and add to the overall analysis on what the EU faces going forward in terms of its self-understanding. This may bring insight into the performance of EU institutions in general and provide avenues for new policies that can break the deadlocks of pluralism.

Fourth, as a practical recommendation, supporters of a stricter EU position in dealing with its own illiberal regimes may want to avoid the kind of hardline uncompromising positions when it comes to polities with complex domestic affairs. What I try to highlight in this work is that the ideal Europe perhaps possible only in its most homogenous form requires accommodation of different opinions. Thus the slow moving and cautious approach to the alternate. The ideal Europe as was imagined perhaps thirty years ago might be less adequate in the future as the region's regimes continue to develop and mould a more heterogeneous Europe.

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APPENDIX 1A

CONDENSED SUMMARIES OF EACH CRITERION

	HUNGARY	POLAND
Public Opinion Surveys (Support for norm) Measured in trust in institutions like ECJ	Eurobarometer: ²⁴¹ WGI Indicators: ²⁴² Year 2019: 52% 0.49 Year 2018: 45% 0.55 Year 2017: n/a 0.53 Year 2016: n/a 0.42 Year 2015: n/a 0.40 Year 2014: n/a 0.50 Year 2013: 57% 0.58 Year 2012: 56% 0.62 Year 2011: 52% 0.76 Year 2010: 61% 0.78	Eurobarometer: WGI Indicators: Year 2019: 45% 0.45 Year 2018: 41% 0.43 Year 2017: n/a 0.47 Year 2016: n/a 0.64 Year 2015: n/a 0.80 Year 2014: n/a 0.84 Year 2013: 59% 0.82 Year 2012: 63% 0.78 Year 2011: 54% 0.77 Year 2010: 57% 0.68
Government official statements and documents, key figures	<ul style="list-style-type: none"> -Weekly address to the nation by Viktor Orban -Statements to the press on rule of law negotiations by Orban -Statements on George Soros, media outlets, EU reports, and the 	<ul style="list-style-type: none"> -In 2011, Jarosław Kaczyński published "Report on the State of the Republic of Poland" -Sebastian Kaleta, deputy justice minister of Poland, letter rebuking EU court decisions -Polish Prime Minister Mateusz Morawiecki statement on rule of law - Justice Minister Zbigniew Ziobro statement on rule of law
Behavior (in) consistent with the norm, compliance when questioned	<ul style="list-style-type: none"> -9 total constitutional amendments all of which have been populist in their nature and origin, opposing EU values primarily over migration and national sovereignty, but also on gender issues. -Presidential decrees during emergency measures that were detrimental to political opponents and beneficial to allies - Law on foreign branch campuses Central European University denied right to operate in Hungary 	<ul style="list-style-type: none"> - Four rulings against Poland in ECJ regarding treatment of judges, Poland acts in accordance with the ruling of the EJC, and suspends the 65-year retirement age in 2019 -February 2020 - The President signs legislation restricting judges from political engagement ("muzzle law") into law. This effectively introduced consequence for judges in violation.
Implementation of the norm at the organizational level	2020 EU budget agreement, that sanctions rule of law violations. Requires qualified majority of 15 member states and at least 65% of the EU population is needed for the Commission to sanction violators	2020 EU budget agreement, that sanctions rule of law violations. Requires qualified majority of 15 member states and at least 65% of the EU population is needed for the Commission to sanction violators

²⁴¹ Answers are in format as written below. Percentage of respondents who affirmatively responded to "tend to trust". The Question asked of the respondents to answer "if you tend to trust it or tend not to trust it? The European Court of Justice"

Possible Answers:

Tend to trust

Tend not to trust

DK - Don't know

<https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/index#>

²⁴² Governance Score (-2.5 to +2.5) estimate of governance measured on a scale from approximately -2.5 to 2.5.

Higher values correspond to better governance. Worldwide Governance Project compiles data from several indexes to arrive at a cumulative average score

APPENDIX 1B

CONDENSED SUMMARY OF EU WIDE INSTITUTIONAL PROPOSALS

	EU-WIDE DATA
Public Opinion Surveys (Support for norm) Measured in trust in institutions like ECJ	<p>Eurobarometer:</p> <p>Year 2019: 46%</p> <p>Year 2018: 48%</p> <p>Year 2017: n/a</p> <p>Year 2016: n/a</p> <p>Year 2015: n/a</p> <p>Year 2014: n/a</p> <p>Year 2013: 48%</p> <p>Year 2012: 49%</p> <p>Year 2011: 46%</p> <p>Year 2010: 50%</p>
Government official statements and documents, key figures	<ul style="list-style-type: none"> -Article 225 of the Treaty on the Functioning of the European Union, – Article 2, and Articles 6,7 and 11 TEU, – having regard to the articles of the TFEU relating to the respect for, and the promotion and protection of, democracy, the rule of law and fundamental rights in the Union, including Articles 70, 258, 259, 260, 263 and 265 thereof, – Charter of Fundamental Rights of the European Union (the Charter), – Council of Europe’s European Social Charter, in particular Article E thereof, – Copenhagen criteria, and the <i>acquis</i> criteria in particular Chapters 23 and 24 thereof, – European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), - resolution adopted by the European Parliament on 3 July 2013, - Venice Commission of the Council of Europe, - Justice and Home Affairs Council conclusions of 6 June 2013 – the case law of the European Court of Human Rights, - pre-accession criteria
Behavior consistent with the norm, compliance when questioned	<ul style="list-style-type: none"> - letter of 6 March 2013 from the Ministers of Foreign Affairs of Germany, Denmark, Finland and the Netherlands to the Commission President, -Commission Communication of 11 March 2014 entitled ‘A new EU Framework to strengthen the Rule of Law’ -2016 EU Justice Scoreboard and the Commission Report of 15 July 2016 entitled ‘Monitoring the application of European Union law 2015 Annual Report’ -Public statements by current and former Commission Presidents, Foreign Ministers of other member states, EU Parliament members
Implementation of the norm at the organizational level	<ul style="list-style-type: none"> - Rule of Law Framework of 2014 - Article 7 Proceedings - 2020 European Commission’s Enhanced Rule of Law Mechanism

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