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Falling Nations

Introduction

The European Union (EU) is a supranational organization whose goal is the integration of the continent economically and to some extent politically. It began with the Treaty of Rome signed on March 25, 1957 by Belgium, Germany, France, Italy, Luxembourg, and the Netherlands to create an “ever-closer union,” with the desire to ensure economic and social progress.¹ Under this treaty, the EU was known as the European Economic Community or the European Communities because of the treaty’s economic focus until 1993 and the Maastricht Treaty, which changed the name of the region from the European Communities to the European Union in order to reflect the expansion of its focus beyond economic matters.²

Currently the EU is made up of 28 states and has developed with the overarching goal of creating peace through freedom, security, and justice.³ The institutions that have developed as the EU continues to grow are primarily responsible for overseeing EU policies and ensuring the

¹ Treaty of Rome, Preamble, Mar. 25, 1957; The Editors of Encyclopaedia Britannica, *Treaty of Rome: Europe 1957*, (last updated Mar. 18, 2019), <https://www.britannica.com/event/Treaty-of-Rome>.

² The Editors of Encyclopaedia Britannica, *supra* note 1; The Editors of Encyclopaedia Britannica, *Maastricht Treaty: Europe 1991*, (last updated Jan. 15, 2019), <https://www.britannica.com/event/Maastricht-Treaty>.

³ *EU in Brief*, Europa.EU, (Apr. 29, 2019), https://europa.eu/european-union/about-eu/eu-in-brief_en.

continued joint progress of member states as one voice. However, because the EU consists of different sovereign nations there is always potential for disagreement or discord, which can have the effect of decreasing the democratic consensus of the union and cause conflict or splintering in its common ideals.

The EU as an organization is founded on a series of treaties and is thus conceptually similar to the United Nations or NATO. However, in practice the EU has far more control and access to public policy.⁴ The political leaders who decide on the direction of the EU's agenda are the main decision makers, so those countries with a larger voice in this sphere control the outcome of the principles.⁵ Procedurally, all laws of the EU stem from treaties created by and between member countries and act as the constitution. The treaties define the roles and powers of both the countries and the EU institutions, and no treaty can be amended without the approval of all the member states.⁶ The Treaty of Lisbon signed on December 13, 2007 and made effective on December 1, 2009 amends the two prior governing treaties, the Treaty on European Union and Treaty on the Functioning of the European Union (formerly the Treaty establishing the European Community), and forms the constitutional basis of the EU.⁷ The goal of this treaty is to be "more efficient and responsive to the needs of a modern globalized society."⁸

⁴ *EU Facts Behind the Claims: Democracy*, FullFact, (April 25, 2016), <https://fullfact.org/europe/eu-facts-behind-claims-democracy/>.

⁵ *Id.*

⁶ *European Union Law: EU Treaties*, (last updated Mar. 4, 2019), <https://libguides.law.illinois.edu/EU/treaties>.

⁷ *Lisbon Treaty*, 2019, available at Thomson Reuters Practical Law, [https://uk.practicallaw.thomsonreuters.com/1-500-8458?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/1-500-8458?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

⁸ Rossana Deplano, *The Citizens of Democracy: Participation for Integration in the European Union After the Lisbon Treaty*, 19 No. 1 Hum. Rts. Brief 8 (2011).

Before the Treaty of Lisbon, democracy in the EU centered around individualized participation rather than “the collective dimension of European citizenship” as citizens were limited to petitioning the governing institutions or applying for individualized review with the ombudsman (an official appointed to investigate complaints against maladministration).⁹ Now there is increased transparency in the language, and the changes in reorganization of the prior treaties allow for “balance between intergovernmentalism and federalism.”¹⁰ The Lisbon Treaty also contains provisions to help encourage the creation of laws that take all of the states into consideration by giving each country the ability to challenge laws they think should be a sole concern of the states.¹¹

Despite the threat of disunification, the European Union has managed to remain a successful institution. But in today’s increasingly polarized climate there are heightened tensions surrounding the position of the EU over each sovereign entity, and issues of the past – like immigration – may have polarizing effects and become a factor of disintegration within the EU. Currently, France is one of the EU’s greatest success stories even through its own experiences with political and immigration crises that affect the EU. Poland and Hungary serve as two of the younger success stories, but in light of recent democratic backsliding they also create the need for an in-depth analysis to see how the European Union can continue to survive on its shared ideals.

⁹ *Id.*

¹⁰ Ingolf Pernice, *Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 Colum. J. Eur. L. 349 (2009); Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 Va. J. Int’l L. 919 (2010); and Matej Avbelj, *Treaty of Lisbon: An Ongoing Search for Structural Equilibrium*, 16 Colum. J. Eur. L. 521 (2010).

¹¹ *Democracy*, *supra* note 15; Hatton and Sonny, *supra* note 15.

The Depths of the Democratic Deficit

The EU's success is actually the result of successful bargaining. Essentially its governing process and acquiring of dedicated EU participants is based on countries desiring membership as a result of their economic and security needs. Once willing to make the necessary sacrifices in reforming their political and social practices, they also have the chance to become a part of the world stage in a meaningful way.¹² The common governance encourages the transfer of democratic norms, which serves to bind the countries together and their reliance on each other helps make the system work.¹³ The process is interesting because it suggests an elitism despite the fact that the EU's mission is working towards a better unified Europe. Achieving this transformative buy-in is what allows the EU to claim "successes" with countries like Estonia, Hungary, Latvia, Lithuania, and Poland.¹⁴ The ongoing democratic and political deterioration of some these "success" countries, however, suggests that the EU is losing its ability to convince these states that the EU is a necessary step to becoming successful or achieving certain goals. It seems that now domestic conditions within the country and how the citizens feel personally about their daily lives has a much greater impact on a country's willingness to follow EU policy than achieving the ideals of greater worldwide democracy. This falls in line with current world trends: while society still champions globalization and greater connection across jurisdictions, there is an increasing push to discover your roots and regain pride in the aspects of identity that make us unique.

¹² Joshua Gray, *The Challenges and Successes of EU Democracy Promotion Policies*, (November 24, 2015), <https://www.e-ir.info/2015/11/24/the-challenges-and-successes-of-eu-democracy-promotion-policies/>.

¹³ *Id.*

¹⁴ *Id.*

Backsliding then becomes an easy occurrence because the EU cannot force the participating countries to conform to the EU's ideals indefinitely.¹⁵ The ease of this rejection has become apparent in these democratic deficit examples because while the main strategy of the EU is offering common ideals and the opportunity to play on the world stage, if these countries decide to focus on a new direction and can reconcile with the relative decrease in access to the international sphere and economic benefits, there is very little keeping them in the EU.¹⁶ While the EU offers significant benefits, sometimes it is not enough if the individual countries feel neglected or inauthentic.

Maintaining democracy is an ongoing challenge as the world continues to integrate and the demands of citizens become more visible through the media and social networks.¹⁷ The current citizens of the EU have a disheartened democratic spirit, which means the EU has a fatal flaw in its system because its citizens see it as being removed from them, a telltale sign in government that a backlash may be on the horizon, as is clearly the case in Poland and Hungary.¹⁸ To increase support for its continued presence, the EU will have to take notice of areas of interest to the people, like equality, security, and corruption.¹⁹ It will also have to make a more conscious effort to include the member states' national governing bodies in decision-making that affects every nation individually.²⁰

The EU does have one directly elected body, the Parliament. But, its powers are weaker than all the other institutions because its only substantive power is the ability to propose

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Corrado Pirzio-Biroli, *Five Ways to Fix the EU's Democratic Deficit*, (March 28, 2018), <https://www.friendsofeurope.org/publication/five-ways-fix-eus-democratic-deficit>.

¹⁸ *Id.*; Democracy, *supra* note 15; and Hatton and Sonny, *supra* note 15.

¹⁹ Pirzio-Biroli, *supra* note 74.

²⁰ *Id.*

amendments to laws and adopt a position on them.²¹ Furthermore, so few citizens vote in the elections and those who do tend to take a nationalist perspective rather than considering what will effectively influence the EU, which skews the representation of Parliament in the same direction.²² Still, the body is at least firmly grounded within the democratic process.

In contrast, many feel that the EU Commission, which is filled by direct appointment, fails to meet the democratic standard and lacks legitimacy because it falls completely outside the democratic electoral process and it is only accountable to the EU Parliament.²³ This belief stems from the fact that the European Parliament has the final say on all candidates of the Commission. The EU Commission president is nominated by the European council and selected by the Parliament. The EU council subsequently nominates the other Commission members along with the president and the members are voted in by Parliament.²⁴ Though citizens of each country elected the Parliament, it is a common view that politicians often serve their own interests, which causes many to believe that the members of the Commission do not necessarily have the views of the people in mind.

Another glaring issue fueling the fire of the deficit is the EU's continued private sessions and refusal to make some of these records public, particularly within the European Council and the Council of Ministers.²⁵ This allows "the powerful actors in [the] system [to] push for further integration in order to increase efficiency without paying much attention to democratic legitimacy."²⁶ This in turn causes backlash because EU citizens believe failed transparency

²¹ Democracy, *supra* note 15; Hatton and Sonny, *supra* note 15.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *EU Facts Behind the Claims: Democracy*, *supra* note 21.

²⁶ Frank Schimmelfennig, *The Normative Origins of Democracy in the European Union: Toward a Transformationalist Theory of Democratization*, 2(2) *European Political Science Review*, 211-

suggests a lack of attention to their concerns and creates more separation from the government that is supposed to be working for them. While ongoing international support for the EU strengthens its legitimacy and promotion of its democratic norms, the EU still pays greater attention to the outside world and its core countries rather than to the bulk of its constituents.²⁷

The EU is made up of different political communities rather than a single democratic entity which naturally makes it more difficult to accomplish certain political aspirations.²⁸ So while the system is embedded in popular thinking and created through popular production it lacks a centralized power despite the presence of the EU. This is in part due to the presence of the many institutions that make up the EU, but the more damaging part of the system stems from its reliance on the participation of the member countries, which in the case of Poland and Hungary proves precarious.²⁹ Thus, “the weakness, domestication, and anti-integrationist orientation of EU-related protest politics points to deeper structural problems of EU democratization.”³⁰

The crux of this issue is that the different states do not consider themselves a “single political entity,” instead they are all party to the same societal and political beliefs. “Less than fifteen percent of the EU population identify themselves exclusively or primarily as Europeans, whereas around 40 percent have an exclusive national identity.”³¹ This allows for the possibility

233 (2010), (discussing a transformationalist theory of democratization), https://www.researchgate.net/profile/Frank_Schimmelfennig/publication/232005076_The_normative_origins_of_democracy_in_the_European_Union_Toward_a_transformationalist_theory_of_democratization/links/00b49520cd6609e9b6000000/The-normative-origins-of-democracy-in-the-European-Union-Toward-a-transformationalist-theory-of-democratization.pdf.

²⁷ *Models of EU Democracy Promotion: From Leverage to Governance, Democracy Promotion by Functional Cooperation*, *supra* note 20.

²⁸ Schimmelfennig, *supra* note 81, at 3-5.

²⁹ *Id.*

³⁰ *Id.* at 6.

³¹ *Id.* at 6-7.

of splintering and destroying the system.³² Schimmelfennig states that mobilization for democracy is much easier if there is a strong collective identity.³³ This provides insight to the success of the democratic deficits in Poland and Hungary because their leaders were able to foster a sense of oneness amongst the people.³⁴ It suggests that EU constitutional and democratic conflicts between institutional actors stem from “the distribution of political rights and competences in the liberal EU community.”³⁵

Scholars began to recognize the decline in national power in the 1990s relative to the EU executive institutions. And this trend has increased since the mid-1980s as the governing treaties are being continually reformed and giving the EU more power.³⁶ Scholars believe that the voter turnout to EU elections is indicative of attitudes towards the system, and turnout has always been low. This negative attitude toward the system is due in part to the recognition of the European people that their “preferences on issues on the EU policy agenda at best have only an indirect influence on EU policy outcomes. In comparison, if the EU were a system with a genuine electoral contest to determine the make-up of ‘government’ at the European level, the outcome of this election would have a direct influence on what EU ‘leaders’ do, and whether they can continue to do these things or are forced to change the direction of policy.”³⁷

³² *Id.*

³³ *Id.* at 7-11.

³⁴ *Id.*

³⁵ *Id.* at 11.

³⁶ Andreas Follesdal and Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44(9) *JCMS Journal of Common Market Studies* 533-562 (2006) (discussing democratic polity)

https://www.researchgate.net/publication/4991696_Why_There_Is_a_Democratic_Deficit_in_the_EU_A_Response_to_Majone_and_Moravcsik.

³⁷ *Id.* at 536.

The distance that frustrates citizens is due to the lack of common understanding of how the EU works so they cannot identify with it or recognize it as a truly democratic system. This creates animosity towards the system that overshadows the positive work its doing and leaves it vulnerable to disarray as it is experiencing now.³⁸ A further problem is that EU policy is skewed towards the interests of capitalists and powerful member countries because they have the ability to organize and lobby at the EU level as opposed to the ordinary citizen or weaker country who can only have the resources to operate on a more national or diffuse level.³⁹ Because of this, some scholars feel that “the EU lacks democratic legitimacy not so much because it stifles political participation, but because its policies are biased against particular interests that are consensually recognized as legitimate.”⁴⁰

Although the EU has structures in place to allow for participation through elections and commentary, the issues leading to the deficit revolve around the fact that citizens see no outcome or effect as a result of their participation.⁴¹ Without support and active participation from its

³⁸ Follesdal and Hix, *supra* note 90.

³⁹ *Id.*

⁴⁰ Andrew Moravcsik, *Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39(2) *Government and Opposition* 336-363 (2004) (discussing an ethical critique of global governance), <https://www.cambridge.org/core/journals/government-and-opposition/article/is-there-a-democratic-deficit-in-world-politics-a-framework-for-analysis/1F89743B351981A9D449B44E7B1397D6>.

⁴¹ Pippa Norris, *Representation and the Democratic Deficit*, *European Journal of Political Research* 273-282 (1997) (discussing process, representation, and accountability), https://sites.hks.harvard.edu/fs/pnorris/Articles/Articles%20published%20in%20journals_files/Representation_Democratic_Deficit_1997.pdf; and Frank Schimmelfennig and Hanno Scholtz, *EU Democracy Promotion in the European Neighbourhood: Political Conditionality, Economic Development and Transnational Exchange*, (June 1, 2008), <http://journals.sagepub.com/doi/abs/10.1177/1465116508089085>.

citizens, the democratic structure and political control of the EU will continue to dissipate and potentially decrease in legitimacy as well.⁴²

Cause of Backsliding

The European Union's institutions exist as a supranational governing body to the individual sovereignty of 28 different countries. While each of these countries has a common stake in the well-being of the others, they each have individual interests, like those concerning immigration, that do not necessarily align. Because of this, dissatisfaction and civil unrest is becoming increasingly apparent within some of these countries and has led to democratic backsliding as the citizens and political parties try to recapture their sovereign identity. The beginnings of these democratic deficits are causing fissures in the EU's control.

The pillars of the EU democracy are equality, representation, and participation.⁴³ The idea behind them is to bring coordination to and establish a common mindset between member states in order to create a strong community by showing their resoluteness through their common connections. All the roles of the EU countries are under the various treaties and reiterated in the Treaty of Lisbon, which is supposed to unite and make similar their legal regimes.⁴⁴ Unfortunately, similarity between the regimes under leadership at the formation of the treaty does not guarantee their similarity into the future.

Aziz Huq, a University of Chicago law professor and accomplished scholar, wrote that "democracy is not a simple concept...it relies on drams of transparency, legality, impartiality, and

⁴² Claudio Castro Quintas, *Assessing the Democratic Deficit in the EU: towards a Participatory Approach*, 14(1) RIPS 63-82 (2015) (discussing citizens' perceptions of democracy) <file:///C:/Users/sport/Downloads/2418-11418-2-PB.pdf>.

⁴³ *Id.*; *The Maastricht and Amsterdam Treaties*, (2019), http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf; and *The Three Pillars*, (2019), <https://pages.uoregon.edu/euro410/eutoday/organizations.php?menu>.

⁴⁴ *Id.*

constraint...these are promoted by a range of different laws, norms, institutions, and individual loyalties. All of these rarely vanish all at once. Their evaporation is ineffable and easily missed.”⁴⁵ The concern is that democracy can diminish in a slow and uneven process. In recent cases, this has occurred when an entity becomes consumed with retaining its power rather than paying attention to its ideals. In regard to the instances of democratic backsliding within the EU, they seem to have been in part a reaction to the EU’s self-appointed role as a superseding governing body, rather than recognizing its role as the glue between independent sovereign bodies.

One major issue all EU countries encounter is changes to their immigration policies, which are traditionally seen as central to sovereignty: states have an absolute right to let people into their country. As an internationally recognized body and player, the EU has certain geopolitical positions that may differ from the positions each member state would carry individually.⁴⁶ Still, the EU prides itself on having a “forward-looking and comprehensive [] immigration policy based on solidarity.”⁴⁷ One way it achieves this is by allowing member states to dictate the amount of people let into their countries, particularly concerning immigrants entering for work, or what the EU refers to as regular immigration.⁴⁸ However, the EU determines the conditions that qualify an immigrant to enter or obtain legal residence in a

⁴⁵ Zack Beauchamp, *It Happened There: How Democracy died in Hungary*, Vox Media, Inc., (Sept. 13,2018), <https://www.vox.com/policy-and-politics/2018/9/13/17823488/hungary-democracy-authoritarianism-trump>.

⁴⁶ Peter Vermeersch, *EU Enlargement and Immigration Policy in Poland and Slovakia*, 38(1) *Communist and Post-Communist Studies* 71, 71-88 (2005) (discussing EU immigration policy in critical border areas), https://www.researchgate.net/publication/222562957_EU_enlargement_and_immigration_policy_in_Poland_and_Slovakia.

⁴⁷ Marion Schmid-Drüner, *Immigration Policy*, Europa.EU, (May 2019), <http://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy>.

⁴⁸ *Id.*

country.⁴⁹ Immigration specifically is a policy issue that touches a lot of different concerns, all of which were once traditionally in the sole control of each nation. However, with the current status of the EU, there is an underlying requirement of compliance.⁵⁰ As a result, though the EU often supports the actions of its members with regard to third-country nationals, EU law does not intentionally work to harmonize itself with national laws and regulations.⁵¹ Instead, the EU focuses on the political and socialization goals of those creating or influencing policy at the EU level and member states are expected to find a way meet these goals.

The development of integrated approaches to immigration, asylum, and general migration has been ongoing since the 1980s and has been a strong piece of the EU's ability to set a supranational agenda and influence legislation and policy.⁵² And due to people's natural nomadic tendencies, immigration has always been a hotly debated topic in Europe. In attempts to create peace and control over the migrant issues between countries, the EU began debating a new controversial treaty that would govern the movement of people around the EU. The treaty, known as the Schengen Agreement, was signed on June 14, 1985 with the intent of creating a cohesive Europe with no national borders known as the Schengen Area.⁵³

There are currently 26 states who have signed on to be a part of the Schengen Area, including four who are not members of the EU. Members of the EU who are not involved may have unresolved political issues that prevent them from joining, no desire to eliminate their

⁴⁹ *Id.*

⁵⁰ (Especially since the Treaty of Amsterdam (1997) and the Tampere European Council (1999)). Vermeersch, *supra* note 5 at 72.

⁵¹ Schmid-Drüner, *supra* note 6.

⁵² Vermeersch, *supra* note 5 at 73.

⁵³ *Schengen Agreement*, (last updated Oct. 18th, 2018), <https://www.schengenvisainfo.com/schengen-agreement/>).

border controls, or do not meet the conditions for application to the area.⁵⁴ Still, admittance to the EU comes with Schengen-related provisions including increasing border security and reforming judiciary or law enforcement systems in line with Schengen rules.⁵⁵ France and Germany were the first countries to lead constructive conversations about the free movement concept in June of 1984 when they brought the topic to the EU Council and set to work defining the conditions of the project.⁵⁶ However, the principles of the Schengen Agreement were not fully incorporated into the EU's legal framework until 1999 in the Treaty of Amsterdam, which helped define further roles of the EU Parliament.⁵⁷

As part of the agreement, several member countries wanted to facilitate guaranteed free movement for people within the countries that have signed on by removing all internal borders and instead having one eternal border.⁵⁸ This became a topic of debate because member states were divided on whether the free movement should apply only to EU citizens or include non-EU nationals as well. Instead of recognizing and addressing the sensitivity of this issue and its potential backlash, the EU pushed on, and the debate quickly culminated in the creation of a territory known as the Schengen Area without any internal border checks allowing any person to freely pass.⁵⁹ Every participating member of the Schengen Area follows one set of rules for border control, visas, and asylum requests around the external border. Members are also required

⁵⁴ *Id.*; and *The Schengen Area and Cooperation*, (last updated Mar. 8, 2009), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3AI33020>.

⁵⁵ Sean M. Topping, *Defying Schengen Through Internal Border Controls: Acts of National Risk-Taking or Violations of International Law at the Heart of Europe*, 48 *Geo. J. Int'l L.* 331 (2016).

⁵⁶ *Schengen Agreement*, *supra* note 51.

⁵⁷ *Id.*

⁵⁸ *The Schengen Area and Cooperation*, *supra* note 52. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3AI33020>.

⁵⁹ *Id.*

to cooperate and coordinate their police forces and judicial services in order to facilitate open lines of communication and maintain proper security.⁶⁰ The Schengen Area truly took effect on March 26, 1995 when France, Germany, Belgium, Luxemburg, Netherlands, Portugal, and Spain together decided to remove their internal national border checks.⁶¹

While the Schengen Area promotes unity throughout the participating EU member states and associated countries, it also carries a threat to national security.⁶² Lax or ineffective security check points can expose every involved country to unwanted individuals, and a large influx of refugees can test the limits of the security measures with regards to population control and ensuring that countries are equally sharing the burden of support.⁶³ If states “lose faith in the security of the external borders and the security within neighboring Member states, the crisis threatens to destabilize the Schengen [A]rea and further the disillusionment of relations between Member States.”⁶⁴ In anticipation of this, part of the common rules of the area allow member states to reinstate their border controls for a limited period of 30 days (or the foreseeable duration of the threat) in times of crisis if they can show that it “is a serious threat to public policy or internal security.”⁶⁵ In 2015, the Syrian refugee crisis tested that system. As hundreds of thousands of refugees poured into the Schengen Area, many participating states began to reinstate internal border controls in order to protect their nationals and social systems.⁶⁶ This reaction cast doubt on the effectiveness of the Schengen Area and the ability to ensure that

⁶⁰ *Id.*

⁶¹ *Schengen Agreement*, *supra* note 51.

⁶² Kaela McCabe, *Schengen Acquis: The Development of the Right to Free Movement of Persons Within the European Union Legal Framework and the Necessary Reforms to Adapt to Evolving Security Threats in the Region*, 7 *Creighton Int'l & Comp. L.J.* 107 (2016).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

countries could rely on a single border system.⁶⁷ Every sovereign has a duty to its people and in any situation where the people feel threatened countries will try to support their citizens before others.⁶⁸ Because refugee crises and immigration carry elements of the unknown, they are threatening and cause distrust and frustration. This particular migrant crisis revealed the precarious counterbalance between cooperation and national sovereignty that will always exist in the EU.

The problem is that countries are being required to transfer their power to the EU and marginalize their domestic concerns creating massive backlash.⁶⁹ One of the reasons for Brexit was that British voters felt that they did not have an identifiable influence in the EU, yet the institution had a strong control over their daily lives.⁷⁰ They framed it as an accountability issue, one where the EU was not responding the wants and needs of its component nations, which caused them to want to leave in order to regain faith in the foundations of democracy.⁷¹

One of the major problems causing the democratic deficit of the EU is its inaccessibility to citizens. Many consider it too complicated to become involved with and there have been no efforts towards transparency or educational development to help them understand or feel like they can participate in the process.⁷² The program developed to overcome this is known as the Citizens Initiative. Though newly introduced in the Treaty of Lisbon, the initiative has legal basis

⁶⁷ *Id.*

⁶⁸ Topping, *supra* note 53.

⁶⁹ Vermeersch, *supra* note 5 at 73.

⁷⁰ Gary Younge, *The Shambles of Brexit Diverts Attention from the EU'S Democratic Deficit*, *The Guardian*, (Mar 9, 2018), <https://www.theguardian.com/commentisfree/2018/mar/09/brexit-eu-democratic-britain>.

⁷¹ *Id.*

⁷² *Democracy*, Europa.EU, (last visited April 29, 2019), https://ec.europa.eu/europeaid/sectors/human-rights-and-democratic-governance/democracy_en; and Lucy Hatton and Anna Sonny, *Democracy in the EU*, Civitas Institute for the Study of Civil Society, (June 2016), <https://www.civitas.org.uk/content/files/CIT5.-Dem.pdf>.

in both the Treaty on European Union and the Treaty on the Founding of the European Union, both precursors to and integrated into the Treaty of Lisbon.⁷³ The program aims to improve participation by providing a citizens' committee platform to increase direct access to the development of EU policies and law.⁷⁴ Once a collective of at least one million citizens supports a legislative proposal they are given access to the EU Commission on equal footing with the EU Parliament or the EU Council.⁷⁵ Unfortunately, the initiative has not been enough to rectify the situation as it faces many legal and technical obstacles in proposing and integrating citizens' thoughts and opinions.⁷⁶ This means that while there has been an attempt to encourage and give citizens the access they need, the logistics of providing these programs has not been effectively implemented, suggesting that the EU will continue to face suspicion from the general population.

Furthermore, the topic of immigration in the EU is becoming increasingly politicized, especially in conversations surrounding issues of citizenship and naturalization.⁷⁷ In the past, the integration of immigrants had not been an issue because states had free reign on the citizenship, naturalization, and integration of people within their own countries. However the superseding international immigration process of the EU has influenced immigration in a way that makes it more difficult for individual nations to exercise control because the EU makes common policies

⁷³ Treaty on European Union, Article 11(4), Dec. 13, 2007; and Treaty on the Functioning of the European Union, Article 24(1), Mar. 25, 1957.

⁷⁴ *Democracy*, Europa.EU, (last visited April 29, 2019), https://ec.europa.eu/europeaid/sectors/human-rights-and-democratic-governance/democracy_en; and Lucy Hatton and Anna Sonny, *Democracy in the EU*, Civitas Institute for the Study of Civil Society, (June 2016), <https://www.civitas.org.uk/content/files/CIT5.-Dem.pdf>.

⁷⁵ Deplano, *supra* note 8.

⁷⁶ Schmid-Drüner, *supra* note 6.

⁷⁷ Martin A. Schain, *The State Strikes Back: Immigration Policy in the European Union*, 20(1) *The European Journal of International Law* 97-101, 93-109 (2009) (discussing immigration in EU countries). <http://www.ejil.org/pdfs/20/1/1776.pdf>.

for every country to ensure peaceful and harmonious integration in the greater European area.⁷⁸ Now the EU policies on immigration are governed by its supranational politics in order to “secure” the process and ensure its efficiency and benefits for the entire community rather than being influenced by national offices.⁷⁹

Gold Standard

The idea of increasing democracy within the EU came from scholars and is supposed to harmonize the domestic and international sphere, using the principles of the individual states to bridge the actions and laws of the group.⁸⁰ This becomes difficult in the EU context because the EU is trying to unite 28 individual domestic and international countries with differing identities, whereas other democracies have a much more focused battle, because at the very least their citizens exist under at least one unified identity.

France is considered one of the EU’s shining examples of the continuing success of their system, particularly with attention to immigration. In the 1970s, France was one of the first EU countries that started to experience large influxes of permanent immigration, prompting attention to migrant populations, their intent to stay, and the need for integration policies.⁸¹ Germany followed close behind as the biggest recipient of asylum seekers, with other countries like Belgium, the Netherlands, and the UK also receiving large numbers of migrants. Following this,

⁷⁸ *Id.*

⁷⁹ *Id.* at 101-103.

⁸⁰ *Models of EU Democracy Promotion: From Leverage to Governance, Democracy Promotion by Functional Cooperation*, 10-24 (2015) (discussing the complex implications of changes to governing systems).

https://www.researchgate.net/publication/304876193_Models_of_EU_Democracy_Promotion_From_Leverage_to_Governance.

⁸¹ Christof Van Mol and Helga de Valk, *Migration and Immigrants in Europe: A Historical and Demographic Perspective*, Integration Processes and Policies in Europe, 31-55 (2016) (discussing the development of migration across Europe). https://link.springer.com/chapter/10.1007/978-3-319-21674-4_3.

there were political strides to restrict entrance into the EU and the 1992 Maastricht Treaty worked to ease intra-EU migration movement so countries could better share the influx.⁸²

Overtime, immigration controls have become much more politicized in order to – theoretically – take the perspectives of all affected parties into account. As one of the core EU countries, France has always had a hand in policy determination.⁸³ From the mid-1970s, France has created its immigration policy with a firm hold on its sovereignty. Its ideals of family migration benefits and regularization for non-French citizens became a model for the integrated EU policies.⁸⁴

However, while France is also subject to compliance with EU standards of migration and asylum, they also enjoy a bit a leeway in their integration of such issues.⁸⁵ During the 2015 migrant crisis affecting the entire European area, France had the luxury of letting their domestic politics be a guide through the process in order to find a balance between EU and its own preferences.⁸⁶ In reality though, “co-operation on the development of a more harmonized immigration policy has been very limited in Europe.”⁸⁷ Part of the issue is that there has been no attempt to establish a structure geared towards facilitating the harmonization or expansion of immigration policies between states. Instead decisions regarding the states and policies are made

⁸² *Id.*

⁸³ Eleonore Kofman, Madalina Rogoz and Florence Lévy, *Family Migration Policies in France*, (January 2010), file:///C:/Users/sport/Downloads/doc1_14977_276188113.pdf.

⁸⁴ *Id.*

⁸⁵ Bastein Remy, *Case Study: France, Its Immigration Policy and its Political Response to the 2015 Refugee Crisis*, ResearchGate, (December 2015), https://www.researchgate.net/publication/287644050_Case_study_France_its_immigration_policy_and_its_political_response_to_the_2015_refugee_crisis.

⁸⁶ *Id.*

⁸⁷ *Schain, supra* note 17.

with and through the support and control of the core EU decision makers and decision-making bodies.⁸⁸

Examples of Democratic Backsliding

Poland

Poland became an EU success story after the adoption of its current constitution in 1997 and its official transition from communism to democracy and acceptance into the EU in 2004.⁸⁹ Since that time, Poland, like other EU countries, has struggled with the relationship between being a sovereign and submitting to another source of control.

As with many other nations, Poland experienced migration challenges that serve as an example of the difficulties of balancing the EU and a sovereign government. In 2003, Poland was asked to align its migrant and asylum policies to those of the EU, issue visas for citizens of neighboring states, and create special visas for ethnic Poles who may not have had any prior ties to the country aside from lineage.⁹⁰ Though not extreme measures, these policies were required of Poland rather than created in concurrence with its interests, wants, and needs.

As the EU has grown, Poland has always been one of its border states, making the immigration policies of Poland of particular interest to the EU.⁹¹ In recent years this has caused the EU to ask Poland to tighten border security in order to fight illegal immigration, restrict conditions of entry, and consolidate asylum systems in accordance with EU policy.⁹²

⁸⁸ Schain, *supra* note 17.

⁸⁹ *How Poland's government is weakening democracy*, Economist, (July 25, 2017) <https://www.economist.com/the-economist-explains/2017/07/24/how-polands-government-is-weakening-democracy>.

⁹⁰ Poland, HWWI, (last visited April 29 2019) <http://focus-migration.hwwi.de/Poland.2810.0.html?&L=1>.

⁹¹ Vermeersch, *supra* note 5 at 71.

⁹² *Id.*

Unfortunately, the majority of these adjustments have little to do with domestic issues faced by Poland.⁹³

In the 1990s, Poland experienced its first immigration challenges under the policies of the EU. Poland created refugee centers for one thousand North African migrants being deported by the Swedish authorities. This was followed by efforts to create visa-free entry for Poland's citizens in Germany.⁹⁴ To institute that system, Poland signed a readmission agreement with Germany where Poland committed to readmitting "third-country nationals who had illegally entered the Schengen [A]rea from Poland."⁹⁵ Poland subsequently agreed to a series of other comparable bilateral agreements with its other neighboring countries.⁹⁶ While humanitarian and arguably beneficial for Poland's image, their adoption of each of these agreements and immigration strategies was a direct result of EU policy requirements to promote cooperation linked to core member state interests.⁹⁷ As a result Poland actually had little if any say on the details of these agreements.⁹⁸

Under the EU's quotas for asylum seekers and refugees during the 2015 migration crisis resulting from conflict in the Middle East, Poland was slated to take in seven thousand people.⁹⁹ Citing the fact that integration has failed in golden states like France because of "no-go" areas, Poland refused to admit their agreed upon quota of asylum seekers in order to avoid internal

⁹³ *Id.*

⁹⁴ *Id.* at 80.

⁹⁵ Vermeersch, *supra* note 5 at 80.

⁹⁶ *Id.*

⁹⁷ Vermeersch, *supra* note 5 at 86.

⁹⁸ *Id.*

⁹⁹ Roger Cohen, *How Democracy Became the Enemy*, NYTimes, (April 6, 2018), <https://www.nytimes.com/2018/04/06/opinion/sunday/orban-hungary-kaczynski-poland.html>.

social disputes.¹⁰⁰ Their decision was a reflection of both the leadership's and citizens' position of contempt for the EU's façade of solidarity, and their stance served to preserve their own ethnic identity both culturally and religiously.¹⁰¹

Unfortunately, the slow developing unrest associated with this position culminated when Jarosław Kaczyński, promising a reconstruction of Poland in the image of the Polish, came to power in 2015.¹⁰² His focus was not solely on helping Poles reclaim control of their own democratic destiny, but reshaping Poland according to his ideals. The changes in Polish democracy have continued with attacks on the judiciary that are essentially eroding all semblance of political independence.¹⁰³ All of which is being done under the guise of creating efficiency within the courts. The Kaczyński government has taken the initial collective support and transitioned into silencing its critics in order to give the illusion of continued support for their beliefs on how to better increase the sovereignty of Poland.¹⁰⁴ One of the most recent changes, forcing older judges to retire, is seen as a rollback of the independent judiciary and demonstrates their contempt for western principles of democracy because it suggests a transition to more politically impressionable courts as younger judges are trying to establish their careers through good graces rather than using wisdom to guide decision making.¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *How Poland's government is weakening democracy, supra note 31.*

¹⁰³ *Poland's democracy is being boiled to death while the world watches*, (July, 26, 2018), <https://www.euronews.com/2018/07/25/poland-s-democracy-is-being-boiled-to-death-while-the-world-watches-view>.

¹⁰⁴ *Id.*

¹⁰⁵ *Democracy's Slow Fade in Central Europe*, WashingtonPost, (July 7, 2018) https://www.washingtonpost.com/opinions/democracys-slow-fade-in-central-europe/2018/07/07/d155d1e4-8099-11e8-b0ef-fffcabeff946_story.html?utm_term=.dac0ba983aca.

Since this time of “protection” for its citizens, the Polish government has made moves to control the media, further dismantle the independent judiciary, and neutralize unsympathetic NGOs and public criticism.¹⁰⁶ These new policies have been initiated despite public and international pressure and are specifically designed to eradicate Poland’s democratic systems.¹⁰⁷

Kaczyński was able to take control and implement these measures because he came into government at a time when Poles were dissatisfied with their relationship to the EU and Poland had a strong economy.¹⁰⁸ Since gaining control Kaczyński has been able to convince and gain the support of a subset of the population, which “legitimizes” the propaganda that is allowed to surface in the media.¹⁰⁹

The initial response of the European Commission, the main administrative institution of the EU, was to take Poland to court to remedy the democratic backsliding, specifically the appointment process for new judges and the retiring of old judges.¹¹⁰ Unfortunately, the irony of the measure may serve to continue to fuel one of the mechanisms causing these issues. A favorable decision for the European Commission allows them to achieve their goals of “protecting Poland’s independen[ce],” but also forces Poland to overturn its own laws.¹¹¹ This

¹⁰⁶ Sean Hanley and James Dawson, *Poland was Never as Democratic as it Looked*, ForeignPolicy, (January 3, 2017), <https://foreignpolicy.com/2017/01/03/poland-was-never-as-democratic-as-it-looked-law-and-justice-hungary-orban/>.
<https://foreignpolicy.com/2017/01/03/poland-was-never-as-democratic-as-it-looked-law-and-justice-hungary-orban/>.

¹⁰⁷ Kamil Marcinkiewicz and Mary Stegmaier, *Poland Appears to be Dismantling its Own Hard-Won Democracy*, WashingtonPost, (July 21, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/21/poland-appears-to-be-dismantling-its-own-hard-won-democracy/?utm_term=.3e791cd3ac5b.

¹⁰⁸ Marcinkiewicz and Stegmaier, *supra* note 48.

¹⁰⁹ *Id.*

¹¹⁰ Salvatore Babones, *Polish Democracy Is under Siege—by the European Union*, National Interest, (September 27, 2018), <https://nationalinterest.org/feature/polish-democracy-under-siege%E2%80%94european-union-32112>.

¹¹¹ *Id.*

further highlights the issue of the EU acting as a superior body to sovereign nations and potentially ignoring the desires of those citizens who support Kaczyński and Poland's "liberation." In one sense it subverts the political process or dream that democracy succeeds partially by letting the people of a country keep their own government in line by voting out the leadership they dislike.¹¹² Though there are questions of the feasibility of this in Poland (and Hungary) due to the authoritarian government control taking hold, removal of Kaczyński by a popular vote would be the type of social-political change democracy champions.

Hungary

In its democratic debut, between 1990-2010, Hungary was seen as one of the models of a young, stable democracy.¹¹³ However, the lack of attention to the individual needs of the country have left many Hungarians feeling dissatisfied with the practice of EU democracy even if not its ideals.¹¹⁴ The changes leading to their democratic backsliding began as creating an "ethnic understanding of the nation," which essentially involved excluding minorities and immigrants, and focusing on Hungarian nationals.¹¹⁵ It was a calculated resistance to the EU's attempts to implement a quota system essentially forcing member states to accept asylum seekers and migrants.¹¹⁶

¹¹² *Id.*

¹¹³ Beauchamp, *supra* note 4.

¹¹⁴ Richard Wike, *Hungary Dissatisfied with Democracy, but Not Its Ideals*, (April 7, 2010), <http://www.pewglobal.org/2010/04/07/hungary-dissatisfied-with-democracy-but-not-its-ideals/>.

¹¹⁵ Samuel Salzborn, *Hungary and the End of Democracy*, (August 15, 2018), <https://www.opendemocracy.net/can-europe-make-it/samuel-salzborn/hungary-and-end-of-democracy>.

¹¹⁶ *Hungarian PM sees Shift to Illiberal Christian Democracy in 2019 European Vote*, (July 28, 2018), <https://www.reuters.com/article/us-hungary-orban/hungarian-pm-sees-shift-to-illiberal-christian-democracy-in-2019-european-vote-idUSKBN1KI0BK>.

Hungary has never had a large immigrant population with only 5.2 percent of its people being foreign born.¹¹⁷ However, Hungary is one of the stops located on common migration routes from the Middle East and South Asia.¹¹⁸ As a result, during the mass migrations in 2015 because of conflicts in the Middle East, citizens saw the issue of immigration as a top priority for themselves and the EU. That year, Hungary received more asylum applications relative to its population than any other member state.¹¹⁹

This is essentially what gave Viktor Orbán his foothold. The EU's decision to encourage migration and ask border states to open their countries increased the feelings of uncertainty on how Hungary would be allowed to maintain its sovereignty and ensure its citizens specifically thrived.¹²⁰ Jumping on the rising public anxiety about regulating and containing migration, Orbán exacerbated the tension by suggesting a loss of Hungarian identity and culture as a result of the increased migration.¹²¹ Specifically, the EU had passed a mandatory migrant relocation plan and assigned refugee quotas to each country. Orbán challenged the decision in court and stepped up Hungary's border protection efforts.¹²² Through this he was able to gain public support by expressing his willingness to fight for Hungary's right to independence from the "open borders" approach.¹²³

¹¹⁷ Beauchamp, *supra* note 4.

¹¹⁸ Beauchamp, *supra* note 4; and Gabor Halmai, *Hungary's Anti-European Immigration Laws*, (April 11, 2015), <http://www.iwm.at/transit-online/hungarys-anti-european-immigration-laws/>.

¹¹⁹ William Galston, *Backsliding in Budapest: How Hungary explains Europe's retreat from democracy*, (May 17, 2018), <https://newrepublic.com/article/148273/backsliding-budapest>.

¹²⁰ Beauchamp, *supra* note 4.

¹²¹ Beauchamp, *supra* note 4; and Halmai, *supra* note 58.

¹²² Galston, *supra* note 59; and Dalibor Rohac, *Hungary and Poland Aren't Democratic. They're Authoritarian.*, (February 5, 2018), <https://foreignpolicy.com/2018/02/05/hungary-and-poland-arent-democratic-theyre-authoritarian/>.

¹²³ Beauchamp, *supra* note 4 (championed by then German Chancellor Angela Merkel).

In more drastic turn of events, Orbán began restricting democratic participation within the country.¹²⁴ And unfortunately Hungarian citizens saw this as a positive step as it follows the misguided rhetoric that Hungary is regaining control of itself. The initial perceptions within the country saw the changes as a reasonable way to counter EU control. But the increasing changes associated with journalism restrictions, government control of media outlets, and removing the independent judiciary began elevating the idea of an authoritarian regime and undermined essential democratic freedoms.¹²⁵

Orbán's goal was to create a national narrative of victimhood and cast himself as the hero by putting Hungarian citizens' will over the democratic balancing of the EU (and that of Hungary itself).¹²⁶ The powerful community support against the EU's dictation of how Hungary as a nation should run by dictating their "sovereign" choices like immigration policies is what has led the citizens of the country to support Orbán's plan to reclaim Hungary and likely unwittingly his subsequent dictatorship.¹²⁷

A Way Forward

One glaring concern is the speed with which Poland and Hungary were able to decline from their model democratic status.¹²⁸ This suggests that democracy as defined by the Western world never really took deep hold in European countries like these two.¹²⁹

There is no doubt that the 1990s onward has witnessed the transformative power of the European Union and its ability to reconstruct the different government structures of several post-

¹²⁴ Salzborn, *supra* note 55.

¹²⁵ Beauchamp, *supra* note 4; and Cohen, *supra* note 40.

¹²⁶ Cohen, *supra* note 40.

¹²⁷ Salzborn, *supra*, note 55.

¹²⁸ Hanley and Dawson, *supra* note 47.

¹²⁹ *Id.*

Communist states.¹³⁰ However, it is also clear that the EU's ability to persuade these countries to implement the nonnegotiable requirements of democratic elections, minority rights, and market economies relied heavily on the potential economic and political costs of being excluded rather than actual buy-in to the principles.¹³¹ Because of this, there was no indication that these countries were or are actually embracing "the norms underpinning liberal democratic institutions," creating huge vulnerabilities in the system.¹³² Essentially the EU bet that the power of its institutions would supersede the individual countries desires.¹³³ Still it does not appear that the issue is a failure of the inherent construction of the EU institutions, but a superseding support for identity.¹³⁴

In response to both Poland and Hungary, the EU has initiated its disciplinary process, Article 7, which is designed to prevent member states from breaching what the EU considers to be its core values.¹³⁵ The process was invoked against both countries in fear of their reversion of democratic institutions and ideals that member states are supposed to emulate. The ultimate consequence of this would be a suspension of Poland and Hungary's voting rights in the EU.¹³⁶

The more likely way to solve this is for the EU to gain the support of the citizens of each country. Currently, the EU lacks the support of the general public because it largely ignores the interests of the noncore countries. However, with the public on its side, the EU can garner

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Sheena McKenzie, *European Parliament Votes to Punish Hungary for Erosion of Democracy*, (September 12, 2018), <https://www-m.cnn.com/2018/09/12/europe/hungary-orban-eu-vote-intl/index.html?r=https%3A%2F%2Fwww.google.com%2F>.

¹³⁶ *Id.*; and Treaty on European Union, Article 7(2), Dec. 13, 2007.

support for maintaining cohesive laws like those of immigration and foster an environment where their ideals of cooperation and a common mindset can continue.

Some scholars believe the change the EU needs to make is a more transparent decision making process so citizens can feel more involved or understanding of the policy directions in addition to other features like ex post reviews and scrutiny of private actors and rules to protect minority interests.¹³⁷ While it cannot be feasibly expected that the EU conform policy to the whims of all of its citizens – partly because of the differences in opinion across Europe, and the theoretical belief that citizens lack the well-groomed pedigree and corresponding expertise assumed of governmental leaders – it should display some indication of attention to their concerns.

The ultimate source of the EU's current crisis with this deficit is a crisis of trust.¹³⁸ Citizens do not consider the EU to be strong piece of their identity because they do not understand it beyond its basic role. This causes suspicion of its inner workings and discontent in the decisions that come from it. "This pattern will continue until the average EU citizen will be able to intervene directly in the policy-making processes of the EU in a more significant way."¹³⁹ To overcome this deficit of democracy, the EU will need to create "an institutional revolution to give European democracy a second life," which means that "an effective civic European Identity is required."¹⁴⁰ "The feeling of belonging to a common community is an essential requisite for encouraging greater participation of European citizens in the system, as this affection will make people feel that their opinions are taken into account to a greater degree."¹⁴¹

¹³⁷ Follesdal and Hix, *supra* note 90.

¹³⁸ Quintas, *supra* note 96.

¹³⁹ *Id.* at 64.

¹⁴⁰ *Id.* at 68.

¹⁴¹ *Id.*

Success in this endeavor will require citizens across the member states to agree and believe that they are involved in the structure. That will lead to increasing willingness to participate and support all of the EU's functions, and hopefully put the EU on the right path.¹⁴²

¹⁴² Quintas, *supra* note 96.