United or Divided We Stand? Perspectives on the EU's Challenges

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Norms as Incomplete Contracts:
Contesting Ambiguous Norms in a Post-Enlargement Europe

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As hundreds of thousands of refugees fled the turmoil of the civil war in Syria in the final weeks of summer in 2015, normative lines in the sand appeared between the old member states of the European Union (EU) and those states from Central and Eastern Europe (CEE) that have joined its ranks since 2004. The humanitarian crisis bled into a refugee crisis in which Western and CEE states found themselves fundamentally opposed: the former, spearheaded by Germany, advocated an equitable yet compulsory quota system that the latter derided and denounced. The media *en masse* contrasted the "'compassionate' west" against the "'selfish' east" (Zaborowski, 2015). The same refugees who were "shouted at and manhandled in Hungary" arrived to cheering crowds in Austria and Germany (Faiola, 2015). While German Chancellor Angela Merkel auditioned for the role of European heroine, politicians such as Viktor Orbán and Miloš Zeman cast themselves as villains by calling the humanitarian crisis a "tsunami" of Muslims that would "overrun" Christian Europe (Allegretti, 2015; Dearden, 2015).

This narrative pits Western norms versus Eastern naked self-interest. Whereas Western leaders supposedly behave as enlightened moralists, leaders of the new member states are seen as sacrificing common values on the altar of economic and political expediency. They deliberately flaunt EU values concerning human rights and human dignity. The newcomers are furthermore branded as hypocrites for betraying the European norm of solidarity that they so handsomely profited from by being allowed into the European Union (Hockenos, 2015).[1] During the accession process leaders of candidate states repeatedly announced that their 'return to Europe' was only natural since their countries shared the EU's values. Their position during the refugee crisis casts doubt on this common moral ground. As one commentator asks, "what did they think Europe stands for?" (Gross, 2015).

Although this question was meant rhetorically, this paper argues that the question should be a serious one. The study of norms in International Relations (IR) often departs from the unspoken assumption that the norm of interest is clear and well understood by all relevant parties. Like journalists covering the response of the EU to the Syrian refugee crisis, scholars then study whether political actors were either morally compelled or instrumentally motivated to contest international norms or to comply with them. This theoretical horserace between the logic of appropriateness and the logic of consequences has animated scholars for decades (March & Olsen, 1989, 1998).

Yet, I argue that it only makes sense to bet on either horse if we are certain that actors have a good understanding of what the norm asks of them. Norms, defined in the literature as "collective expectations for the proper behavior of actors with a given identity" (Katzenstein, 1996, p. 5), are abstract standards that need to be translated into concrete behavioral prescriptions.[2] While dominant approaches in the literature, rationalists and constructivists alike, implicitly expect this translation process to be

[1] Ian Manners (2002, p. 242) sees the norm of social solidarity as part of the "normative basis" of the European Union. Another EU norm that politicians and commentators alike often refer to in discussions of the Syrian refugee crisis is the respect for human rights and fundamental freedoms, including the right to asylum.

[2] Similarly, Finnemore (1996, p. 22) defines norms as "shared expectations about appropriate behavior held by a community of actors."

lossless, different actors might interpret the same norm differently. The Slovak government, for example, appeared to have a circumscribed understanding of the solidarity norm when it announced that it would only take in Christian, and not Muslim, refugees from Syria (Tharoor, 2015).[3] Others denounced this as a perversion of the same norm.[4] Scholars of norms, and compliance more generally, should not assume away this potential for the multiple meanings of norms, but ought to make it an integral part of their theoretical scaffolding and empirical explorations. Otherwise the risk of flawed findings and, worse, counterproductive policy-making recommendations is all too real.

The main theoretical contention in this paper is that ambiguity concerning the meaning of norms is an important source of norm contestation that takes precedence over those explanatory variables championed by proponents of leading IR approaches. Before actors can decide whether to comply for either material or ideational reasons they first need to ascertain precisely what the norm is asking them to do. For example, while it is clear that EU norms call for solidarity with Syrian refugees, it is far from clear what this solidarity looks like on the ground. The implication is that a clear understanding of a norm is a necessary but insufficient condition for norm compliance. Cost-benefit considerations and morality may well explain variation in compliance behavior but only if the norm's behavioral prescriptions are clearly determined. This requires a study into the translation process by which actors give practical meaning to abstract norms.

Both the point that norms are indeterminate and the argument that indeterminacy negatively affects the likelihood of compliance have been recognized before (e.g. Chayes & Chayes, 1993; Franck, 1988; Gregg, 2003). But this recognition has not led scholars to integrate ambiguity into their theoretical frameworks. Nor has it inspired them to devote empirical attention to the meaning of norms. Scholars of compliance often sidestep both concerns by focusing on relatively specific international treaties or EU directives.

[3] It is of course plausible that this represented political posturing rather than a genuine interpretation of the solidarity norm. The point here is merely illustrative: the same norm may have different meanings to different actors.
[4] What is more, the European Commission argued that the Slovak plan ran afoul of another fundamental European value, namely the norm of non-discrimination (Gotev, 2015).

I aim to correct for this theoretical neglect by proposing that international norms can be understood as *incomplete contracts* that are morally binding and make behavioral demands on political actors. Incompleteness refers to the fact that it would be both infeasible and politically costly for actors to specify how the norm requires them to behave in every situation imaginable. In order to fulfill their contractual obligations, actors therefore need to translate the norms into concrete actions. While indeterminacy is politically advantageous because it provides them with considerable flexibility, it also makes disagreement over the meaning of norms more likely. In short, norm contestation can ensue from attempts to specify the terms of the normative contract. This logic of incomplete contracting is a causal explanation of compliance behavior that is analytically separate and chronologically prior to existing rationalist and constructivist logics of action; all attempts at norm compliance first require actors to determine their obligations before they can decide whether to honor them.

The paper proceeds as follows. The first section defines the core terms of norms and norm contestation. Second, I argue that norms reflect incomplete contracts that may be so ambiguous as to generate contestation over the meaning and scope of application of a norm. Finally, I pay particular attention to the applicability of a constructivist theory of incomplete contracting to the fundamental rights of the European Union.

1. Conceptualizing Compliance and Contestation with International Norms

This section lays the conceptual groundwork for the theoretical argument. I first take care to define norms and set them apart from the related concepts of principles and rules. Next, I conceptualize norm contestation and elaborate on its different components.

1.1 Norms

Norms are commonly defined as "collective expectations for the proper behavior of actors with a given identity" (Katzenstein, 1996, p. 5).[5] There are three critical components to this definition. The collective component indicates that norms are inherently social constructs; to express it in the constructivist jargon, norms are *intersubjectively,* as opposed to individually, held by members of a community. Second, norms carry with them concrete behavioral expectations. This is what is referred to as the *regulative* effect of norms (Jepperson, Wendt, & Katzenstein, 1996).[6] Norms regulate behavior by foreclosing certain roads, while directing traffic in a specific direction. Finally, the definition of norms indicates that the behavioral expectations only pertain to actors with a specific identity. For example, Tannenwald (1999, p. 437) notes that states that identified as "civilized" were expected to place a moratorium on the use of nuclear weapons after World War II. Shared understandings thus vary across different identity groups.

It is useful to translate these abstract conceptual components into the language of the case at hand. The relevant identity group in this paper is the group of member states that make up the European Union. Although the EU expanded throughout its history, almost doubling its membership between 2004 and 2013, all members belong to the "community of values" that EU officials so often refer to. The values in question serve as norms with clear regulative effects. Member states are expected to, *inter alia*, uphold basic human rights; to respect the rule of law; and to facilitate the free movement of goods, capital, services and people within the EU's internal market.

1.2 Norm Compliance and Contestation

The dominant definition of compliance in International Relations suggests that compliance can refer to both norms and rules. Oran Young (1979, p. 104) says that compliance occurs "when the actual behavior of a given subject conforms to prescribed

[5] Similarly, Finnemore (1996, p. 22) defines norms as "shared expectations about appropriate behavior held by a community of actors."
[6] In this sense, norms perform the function of a "road map," meaning that they are "guiding behavior […] by stipulating causal patterns or by providing compelling ethical or moral motivations for action" (Goldstein & Keohane, 1993, p. 16).

behavior." Non-compliance then, logically, requires behavior that deviates from a rule or norm's prescriptions.

In principle, this definition of compliance is helpful because it neither reduces compliance to implementation nor requires compliance to produce effective results (Simmons, 1998, pp. 77–8). It thus has ample scope to incorporate compliance with norms. In practice, however, it has led scholars to focus on *rules* to the neglect of *norms*. This reduces the multidimensional concept of norm compliance to the singular dimension of rule compliance. Von Stein (2012, p. 478, emphasis added), for example, explicitly adopts Young's definition, but, in so doing, alters it in a meaningful way: compliance is "the degree to which state behavior conforms to what *an agreement* prescribes or proscribes." Her decision to focus on written international law follows logically from this modified definition.[7] By delimiting her study to written agreements, however, Von Stein is unable to speak to other forms of norm compliance, such as expressing oneself appropriately in official rhetoric, upholding informal norms, and meeting the obligations of customary international law. Thus, even scholarship that is in many regards an exemplar of best practices is nonetheless representative of the tendency in the compliance literature to adopt a narrow focus on rules.

In order to remedy this neglect of the compliance process concerning the broader phenomenon of norms, I propose to take seriously norm contestation as an alternative to norm compliance. This enables me to overcome the behaviorist connotation that compliance has acquired due to the analytical preoccupation with legal rules (cf. Wiener, 2004, p. 200, 2008). Shifting the focus to norm contestation makes it easier to capture the multiple channels through which actors may either comply with or contest international norms. This also means that compliance and contestation are not dichotomous concepts; it is possible to contest a norm in certain regards, while respecting it in others. In addition, by highlighting norm contestation, the meaning of norms becomes a focal points

[7] Von Stein's justification for this focus on written international law supports my claim that the literature has been disproportionately preoccupied with rule compliance rather than norm compliance. Von Stein's (2012, p. 478) "motivation is chiefly practical: this is the focus of most compliance literature."

of the analysis. Moreover, by highlighting contestation rather than compliance, I am explicitly building on recent developments in critical constructivist scholarship.

I define norm contestation as follows:

I argue that norm contestation occurs when member-state representatives, acting either supranationally or domestically, question the meaning and/or applicability of a norm through behavior or rhetoric.

It is important to clarify these three different components, because they capture the multidimensional character of norm contestation that sets my approach apart from the wider compliance literature. First, norm contestation may take place in both the domestic and the international realm. It is thus possible that politicians from a new member state are compliant with EU norms at the supranational level, for example by expressing their support for ethnic and sexual minority rights, while criticizing these fundamental values in front of a national audience. This is a significant improvement upon the exclusive focus on the domestic level in existing studies of compliance after enlargement.

Second, norm contestation is not a dichotomous concept. It is instead better to think of norm contestation occurring along a continuum. Outright rejection and complete compliance mark the extremes of this continuum. However, actors may also accept a norm's general validity, while questioning its scope of application. Following legalization scholarship, they may also question the degree of obligation, precision or delegation of a norm (Goldstein, Kahler, Keohane, & Slaughter, 2000). The boundary between compliance and non-compliance is thus less clear-cut than conventional arguments assume.

Alternatively, actors may honor their commitments while expressing their disagreement with a norm. This gets at the third component of my definition of norm contestation: norms can be contested both behaviorally and verbally. This has the added benefit of capturing activity around a norm that does not concern the *acquis communautaire*. It

would be illogical to say that a country that has dutifully transposed, implemented and applied an EU directive concerning Roma rights, yet that consistently and vociferously criticizes the Roma in official statements, is in full compliance with a norm of non-discrimination concerning this minority group. This is, however, the approach that most scholars of compliance have taken. To remedy this, I propose a wider purview of norm contestation that also encompasses rhetoric.

The concept of norm contestation, in short, usefully indicates that compliance behavior is multidimensional in nature. A focus solely on written rules, as is conventional in the literature, risks arriving at a distorted picture of overall compliance. A comprehensive analysis of norm compliance requires that we take seriously the possibility that norm contestation can occur in different locations (domestic or supranational), can set different targets (validity or applicability) and can be expressed in different forms (through behavior or rhetoric).

2. Translating Norms into Practice: The Logic of Incomplete Contracting

Conventional accounts in the study of compliance, while differing in the purported driving forces of compliance, are united in assuming that the object of compliance – that is, the rule or norm in question – is unambiguous. Such an approach requires that one important condition is met: actors must have a clear understanding of the norm that they are expected to comply with. It is nonsensical to attribute compliance behavior to cost-benefit calculations or moral convictions if a norm is ambiguous. The logic of consequences, for example, depicts actors as weighing the costs and benefits of *concrete* courses of action. Simply put, if compliance refers to the conformity between actual and prescribed behavior (Young, 1979, p. 104), the decision to comply requires an actor to know precisely what behavior the norm prescribes.

The point that norms must be understood before they can affect behavior may sound trivial but its implications are anything but. If we treat a norm as well understood when actors are actually uncertain about its meaning, we risk putting forward explanations of

cases that are fundamentally flawed. This may, in turn, translate into unhelpful or even counterproductive policy advice. For example, if we mistakenly claimed that material incentives motivated a state to shirk its obligations, when the state actually failed to comply because it was unsure what the norm required it to do, the recommendation to impose tougher sanctions would be misplaced. Instead, a more appropriate solution would be to shrink the norm's "zone of ambiguity" (Chayes & Chayes, 1993, p. 191).

I argue that norms resemble incomplete contracts. All EU member states are bound by a common set of values, but what behavior these values prescribe in practice is deliberately left ambiguous. Disagreement over the interpretation and application of the terms of the normative contract is a form of norm contestation. Moreover, this source of compliance comes prior to any extant logic of action; only once actors have a clear understanding of what the norm asks of them, do they begin to decide whether it would be lucrative or appropriate to follow through on this behavioral prescription. That is to say, they need to fill in the details of the contract by *translating* the general norm into case-specific and determinate prescriptions.

In developing this constructivist argument of norms as incomplete contracts I draw on a body of work that is not commonly applied to norms: incomplete contracting theory as it was developed in the field of new institutional economics and has been applied by rational-choice scholars within political science. In essence, norm contestation reflects disagreement over contractual obligations in the absence of authoritative dispute resolution mechanisms that clarify what the norm requires actors to do.

Incomplete contracts have their origins in the New Economics of Organization. Whereas complete contracts specify the parties' contractual obligations under every situation that they could conceivably cover, incomplete contracts arise out of the realization that agreements are unable to address all possible contingencies. Furthermore, even if this were possible, the transaction costs involved in writing up such an exhaustive contract would be prohibitive. Finally, actors might have a strategic incentive not to specify the finer details of the contract if they believe that their bargaining position will shortly

improve.[8] Yet, incompleteness makes it more probable that actors will disagree over their contractual obligations, while actors also find it difficult to credibly commit themselves to the contract. Consequently, they "rely on intervening decision-making and enforcement mechanisms," such as courts and private arbitration forums, in order to "minimize the probability that actors will breach their contractual obligations" (Doleys, 2000, p. 536).[9] Incomplete contracts thus allow parties to reap the benefits of cooperation while mitigating its costs.

The relevance of this literature to International Relations has not escaped scholars working within the rational-choice or neoliberal institutionalist tradition. It finds its most prominent articulation in principal-agent theory.[10] The central premise here consists of two parts: first, international institutions can allow self-interested states to cooperate, even under anarchical conditions (Keohane, 1984); and, second, states delegate monitoring and enforcement powers to international institutions in order to overcome the informational problems that often prevent or undermine positive-sum cooperation (Axelrod & Keohane, 1985; Martin, 1993). Simply put, international treaties are incomplete contracts that enable cooperation while international organizations help the state parties to credibly commit themselves by clarifying and enforcing their contractual obligations.[11] The incomplete-contracting argument has thus allowed scholars to explain why rational states would willingly curb their sovereignty by delegating powers to international organizations (Cooley & Spruyt, 2009; Gruber, 2000).

Unsurprisingly, this argument has proven particularly persuasive with respect to European integration, which is by all accounts the most extensive instantiation of international cooperation. Doleys (2000, pp. 539–40), for example, sees the Treaty of

[8] This is what Williamson (1985, p. 52) refers to as the hold-up problem.
[9] On private arbitration forums, see Mattli (2001).
[10] On the application of principal-agent theory to international organizations, see Hawkins, Lake, Nielson and Tierney (2006).
[11] Following Milgrom and Roberts (1992, p. 131), international treaties can be understood as general or framing agreements in which "the parties do not agree on detailed plans of action but on goals and objectives, on general provisions that are broadly applicable, on the criteria to be used in deciding what to do when unforeseen contingencies arise, on who has what power to act and the bounds limiting the range of actions that can be taken, and on dispute resolution mechanisms to be used if disagreements do occur."

Rome, which established the European Economic Community as the forerunner of the EU in 1958, as an incomplete contract that could only be made effective through the delegation of authority to supranational institutions such as the European Commission and the European Court of Justice (ECJ). The member states deliberately endowed these entities with the authority to interpret, monitor and enforce the treaty.[12] Garrett (1992, p. 558), for instance, sees the ECJ as a "mechanism through which the types of general agreements about the rules of the game supplied by the EC [European Community] treaties and internal market directives can be applied to the myriad interactions that constitute the EC economy."[13] This interpretive discretion, however, raises the possibility of "covert integration" when supranational bodies use the vagueness of EU rules to pursue their own preferences (Héritier, 2014).[14] In short, the notion of incomplete contracts is valuable in explaining the rationale behind, as well as the dynamics of, European integration.

Thus far, however, incomplete-contracting theory has only been applied in relation to treaty rules and EU directives. This is understandable given the overlap between rational-choice institutionalism within political science and institutionalist theory in economics (cf. Hall & Taylor, 1996, p. 936, fn. 1). But there are compelling reasons to extend its analytical purview to international norms. First, while treaties and directives are consistent with the common wisdom that contracts are both written and signed, contracts need not be institutionalized in this manner. That is to say, "a contract does not have to be formalised in writing, but can also be an informal agreement" (Héritier & Lehmkuhl, 2008, p. 5). Informal norms may therefore be contractual in nature. Second, many norms *are* in fact formalized in international treaties. The next subsection shows that this is indeed the case for the fundamental values of the EU, but it also applies to the treaties of other international organizations such as the Council of Europe and the Organization of

[12] For example, the treaty specifies that the ECJ's primary task is to "ensure that in the interpretation and application of this Treaty the law is observed" (European Economic Community, 1957, as cited in Doleys, 2000, pp. 540–41).
[13] Also see Garrett and Weingast (1993). In a similar vein, Pollack (1997, 2006) argues that one of the primary motives behind the delegation of state powers to supranational actors is their ability to interpret and enforce incomplete contracts.
[14] Principal-agent theory refers to this type of agency cost as shirking (see Pollack, 2003).

American States. If international treaties are incomplete contracts, and if norms are part of these treaties, it follows logically that incomplete-contracting theory applies to norms. Third, like contracts, norms create obligations. Actors commit themselves to a standard of appropriate behavior and are expected to uphold their commitment. Since the concept of contracts is agnostic to the content of contractual terms, nothing in its definition precludes it from governing moral issues. Finally, norms are inherently incomplete. They are abstract guidelines that need to be interpreted before they can be enacted.

In sum, many cooperative ventures in international politics are founded on incomplete contracts. While applications of this concept in IR have been predominantly rationalist in orientation, I argue that a constructivist theory of norms as incomplete contracts is equally plausible. Examples as varied as adoption papers and international human rights treaties remind us that contracts are neither established for solely instrumental reasons nor drafted in purely neutral language. The following subsection aims to show that the fundamental values of the European Union, enshrined as they are in official agreements, are particularly suitable candidates for a constructivist approach to incomplete contracting.

3. The Fundamental Values of the European Union as Incomplete Contracts

Article 2 of the Lisbon Treaty clearly spells out the normative foundations of the EU:

> "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 belong 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."
> (Union, 2010)

Although automatic compliance with these norms might be expected given their supposed foundational and shared background, I argue that the nature of these norms as incomplete contracts provides the basis for norm contestation. This claim rests on three

supporting arguments: first, the history of these fundamental values as a contractual constraint on the behavior of candidate countries; second, their ambiguous meaning; and, third, the weak position of supranational institutions with respect to the interpretation and enforcement of contractual obligations. Altogether, these arguments show that member states deliberately reduced the fundamental values to woolly concepts that are open to multiple interpretations and difficult to enforce.

First, lofty treaty language notwithstanding, the project of European unification historically did not cover the abovementioned normative ideals but was primarily rooted in the objective of market integration. Smismans (2010) convincingly debunks the fundamental rights narrative as a myth. He shows that it was only in the late 1970s, with the Joint Declaration on Fundamental Rights (1977), that fundamental rights became a *topos* of EU rhetoric (Smismans, 2010, p. 49). It was not until the Treaty of Maastricht (1993) and, especially, the Treaty of Amsterdam (1997) that the member states enshrined the discourse of fundamental values into binding documents. This is not to say that ideational factors were epiphenomenal to European integration (see Parsons, 2003), but only that those values that the EU now touts as 'fundamentally European' have a much younger lineage than official rhetoric claims.

Moreover, when analyzing accession negotiations with countries that had questionable normative credentials, it becomes clear that the motivations that member-state representatives had for invoking fundamental values belie their principled statements. With reference to General Franco's request for an association agreement between Spain and the EC, Thomas (2006) shows that fundamental rights became an accession criterion against the will of most member states; while several heads of state had "considerable sympathy for Madrid's pursuit of closer ties" (Thomas, 2006, p. 1196), normative pressure from the European Parliament and trade unionists forced the Council's hand. Fundamental rights thus had a dual binding role in this episode: norm advocates pressured existing member states into honoring their contractual obligations, while the Council in turn imposed the same normative clause upon the aspiring candidate country. This set an important precedent for future accession talks.

Eastern enlargement is a further illustration of grudging contractual compliance with fundamental values. The Copenhagen criteria, which were articulated at a European Council meeting in 1993, announced that candidate countries would only be granted membership if they upheld the EU's fundamental values. In a masterful account, Schimmelfennig (2001) shows that candidate countries, which had mainly instrumental incentives for acceding to the Union, used the European community values to rhetorically entrap hesitant member states into allowing them into the club. In other words, the aspiring member states were "able to shame their opponents into norm-conforming behavior and to modify the collective outcome that would have resulted from constellations of interests and power alone" (Schimmelfennig, 2001, p. 48). While the candidate countries were constrained by membership conditionality, they used the normative dimension of the conditionality package in order to ensure that the EU would hold up its end of the deal. Norms, in short, functioned as contractual constraints on actual and aspiring members alike.

Second, the fundamental values are inherently ambiguous. Neither official treaties nor the Charter of Fundamental Rights (CFR), which was signed in 2000, define the terms of the normative contract. The Charter does provide a much more detailed description of the scope of the EU's fundamental rights – for example, it declares rights such as the "freedom of the arts and sciences" (Article 13) and respect for "cultural, religious and linguistic diversity" (Article 22) – but it does not clarify how these rights are to be interpreted or applied (Union, 2000). The fundamental values thus clearly resemble incomplete contracts.

Finally, because of this incompleteness, the interpretation and enforcement of fundamental values depends on supranational institutions. These institutions, however, are relatively toothless. The European Court of Justice has been much meeker in its role of contractual overseer than its history of judicial activism might suggest (e.g. Burley & Mattli, 1993). While the ambiguity of fundamental values in theory allows for an expansive interpretation of the scope of EU law, in practice the Court has exercised self-

control. By arguing that the EU's fundamental rights are rooted in the constitutions of the member states and the European Convention on Human Rights, it has narrowed its margin for interpretation considerably (Smismans, 2010, pp. 48–49). What is more, the ECJ has not attempted to articulate the common basis that can be found in national constitutions. As Smismans (2010, p. 49) cynically yet realistically suggests, this may be because "such a comparative exercise may not only be difficult but also disappointing," revealing greater cross-national variation than normative unity. Furthermore, although the Charter of Fundamental Rights reduces norm ambiguity, its utility as part of the ECJ's legal toolkit is limited. The Charter only became legally binding when the Lisbon Treaty entered into force in December 2009; before that, its importance was mostly symbolic. Even though the Charter now has legal force, it only binds the member states when they are implementing EU law. The member states have thus deliberately tethered the ECJ. Finally, the Court does have important powers of interpretation and enforcement with respect to the *acquis communautaire* (Tallberg, 2002). But the extent to which EU directives cover fundamental values, especially those minority rights that are central in this project, is limited. In short, in contrast to existing studies that emphasize the ECJ's role as the guarantor of contractual obligations (Garrett, 1992; Garrett & Weingast, 1993; Pollack, 1997), the Court has been relatively reserved when interpreting and enforcing fundamental values.

In turn, the European Commission's weakness in filling in the details of incomplete contracts is especially evident in comparison with the accession process. Through its monitoring reports, the Commission clarified to candidate countries what behavioral expectations flowed from the EU's fundamental values. These reports were the primary vehicle through which the EU specified the candidates' contractual obligations under the association agreements.

Several commentators have noted that the Commission's specifications deviated considerably from what it asked actual member states to do (e.g. Albi, 2009; De Witte, 2003). Double standards were especially apparent with respect to ethnic minority rights, which were absent from the *acquis* at the beginning of the membership negotiations and

which did not see member states conform to a single standard (Schwellnus, 2004, p. 322). As De Witte (2002, p. 139) notes, this issue area was "primarily an export product and not one for domestic consumption." Furthermore, "the measures of enforcement had no parallel within the Union, involving a sophisticated process of information collection, scrutiny and intervention" (Albi, 2009, p. 49). Active as it was in translating the normative contract into concrete behavioral demands in the run-up to enlargement, the Commission has receded into the background after expansion.

The Council of Ministers possesses the most potent mechanism for enforcing EU norms. The Treaty of Amsterdam, which was in large part drafted in preparation for eastward expansion, invested the Council with the power to suspend the voting rights of a member state that has been found in "serious and persistent breach" of the Union's fundamental values (Union, 1997). The option has, however, never been used. This partly reflects procedural complexities. But government leaders are also hesitant to set a precedent that could potentially backfire against their own countries in subsequent cases of norm breach. It is therefore unlikely that the EU's fundamental values will be enforced through the suspension of voting rights.

Short of this nuclear option, member states can also impose social sanctions upon a norm violator within their midst. This happened after the Austrian Freedom Party (*Freiheitliche Partei Österreichs,* or FPÖ) of Jörg Haider became part of the coalition government in 2000. The other member states collectively saw the FPÖ's xenophobic and far-right outlook as a violation of the Union's fundamental values. They therefore adopted a number of social sanctions, such as ceasing bilateral contacts with Austrian government representatives and withholding support for Austrian candidates for positions in international organizations (Merlingen, Mudde, & Sedelmeier, 2001, p. 60). Ultimately, however, this consensus quickly disintegrated as member states disagreed over how to classify the FPÖ and were wary of setting up "a normatively constraining framework which could limit their leeway in domestic politics" (Leconte, 2005, p. 637); the EU lost face, while the Austrian government was vindicated. The Haider affair thus shows that the Council can only enforce the normative contract if all member states, bar the alleged

transgressor, agree on how to interpret the fundamental value in question, on whether it has been breached, and on the appropriate remedy. Not only are these preconditions rarely met, but the Austrian case "left the EU governments with a big hangover" that will likely discourage concerted norm enforcement (Anon, 2006). The Council, in short, is well-equipped but ill-disposed to provide greater clarity to incomplete contracts.

Other actors, such as the European Parliament and the European Union Agency for Fundamental Rights, are active monitors of the status of fundamental rights in the member states. Ultimately, however, these institutions can only comment from the sidelines that parties are breaching their normative contract. They have no binding interpretive or enforcement authority of their own. At best, their resolutions and reports inform the actions of more powerful actors such as the Commission and the Council.

In sum, the EU's fundamental values illustrate that incomplete-contracting theory provides useful insights into the politics of international norms. Their history shows clearly that member states and candidate countries alike did not believe that the lack of a clear legal basis for fundamental rights negated the conviction that they were contractually obliged to abide by them. In this view, rhetorical entrapment is rooted in the implicit contractual nature of EU norms. At the same time, however, the details of the normative contract are incomplete. While incomplete contracts in international relations generally rely for their effectiveness on supranational mechanisms for dispute resolution, such institutions at the EU-level currently either do not possess or do not provide the requisite authority. This combination of contractual vagueness plus toothless interpreters and enforcers provides fertile ground for the contestation of norms. Because such contestation results from ambiguity rather than instrumental evasion or the absence of moral inclinations, existing theories are poorly positioned to account for it.

4. Conclusion

The Syrian refugee crisis exposed the normative fault lines on which the project of European integration has been constructed, with the primary crack appearing to be

running along the perimeter of the former Iron Curtain. Notwithstanding divides within each camp, the old and the new member states seemed at variance over the EU's norm of solidarity. Central and Eastern European leaders attracted the wrath of the international media and Western politicians by, *inter alia*, erecting fences and closing borders, ridiculing the victims of human rights abuse as economic opportunists, and welcoming Christian refugees only.

How can we understand this behavior of the new member states? Leading scholars of international norms and legal compliance suggest several plausible explanations. According to the logic of appropriateness, the newcomers simply have not internalized solidarity as a norm. They therefore do not share the West's moral impulse to intervene. The logic of consequences paints an entirely different picture according to which CEE countries decide against solidarity for instrumental reasons. For example, politicians may be wary of importing instability; balk against the economic costs that an influx of refugees would produce; and fear for negative electoral consequences. A third, and managerialist, view suggests that the new member states would like to provide assistance but are unable to do so because of capacity limitations. Importantly, these three explanations suggest different solutions via which EU actors and Western leaders could compel the East to show solidarity: genuine persuasion, material and social sanctions, and economic and technical assistance.

All of these arguments have been made, with greater or lesser force, in the debate on the EU's response to the refugee crisis. All are potentially sound. But all, too, proceed for the unspoken assumption that it is clear what the norm of solidarity requires EU actors to do. Actions such as the Slovenian government's decision to limit the number of migrants that are allowed into the country are then automatically attributed to immorality, instrumental amorality, or an overburdened government apparatus (Anon, 2015). But does the decision to take in 2,500 instead of 5,000 migrants really violate the norm of solidarity? Is disagreement over a mandatory quota system truly a form of norm non-compliance? In order to answer these questions, we need to first understand what the new member states believe the norm of solidarity means and how they translate it into practice. Only once

they have derived behavioral prescriptions from the norm, can the leaders of Central and Eastern European states begin to decide whether to follow or flaunt these prescriptions.

The Syrian refugee crisis thus illustrates the main theoretical contention of this paper: the ambiguity of norms as incomplete contracts constitutes a unique source of norm contestation. This factor will be particularly prominent in the absence of authoritative mechanisms for the resolution of disputes. As abstract standards of appropriateness, norms can accommodate multiple meanings that prove contradictory when they are applied on the ground. Furthermore, the indeterminate scope of norms such as 'solidarity' and 'minority rights' can also lead to disagreements. In such cases it makes little sense to speak of the violation of, or non-compliance with, norms. Instead, ambiguity leads to contestation of either the meaning or the scope of norms. Contracting parties often set up institutions to help them resolve such potential disagreements, but contestation will prevail where such institutions are weak.

In conclusion, I propose a constructivist theory of norms as incomplete contracts. Scholars have long recognized that ambiguity hinders compliance, but they have not understood how the assumption of a lack of ambiguity is crucial to the validity of other theoretical explanations, nor have they devoted much empirical attention to the meaning of norms. Future work should correct for this dual omission by studying how the EU's norms are understood and debated after Eastern enlargement. In the preliminary research that I have done on ethnic and sexual minority rights, I find that while there is consensus on and compliance with a core understanding of these norms, disagreements over their scope of application have resulted in vocal norm contestation. Concerning sexual minority rights, for example, actors are divided as to whether the norm covers issues such as blood donation or same-sex partnerships. Since supranational actors have been either unwilling or unable to clarify the details of the normative contract, such contestation is likely to persist into the future.

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