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## Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union

This article argues for a radical recasting of the European Union democratic deficit debate. Critics have long argued that the EU suffers from a democratic deficit and that growing EU power undermines national democracy. But recent backsliding on democracy and the rule of law in Hungary and Poland reminds us that grave democratic deficits can also exist at the national level in member states and that the EU may have a role in addressing them. This article will place the EU's struggles with democratic deficits in its member states in comparative perspective, drawing on the experience of other democracies that have struggled with pockets of subnational authoritarianism. Comparative analysis suggests that considerations driven by partisan politics may allow local pockets of autocracy to persist within otherwise democratic political unions.

**Keywords:** European Union, democratic deficit, rule of law, autocracy, Hungary, Poland

THE EUROPEAN UNION (EU) HAS A DEMOCRATIC DEFICIT, BUT NOT THE ONE we thought it had. For years, many scholars of European integration have argued that the EU suffers from a democratic deficit, due to the lack of public engagement and political accountability at the EU level and the absence of a common public sphere or common *demos* characteristic of national democracies.<sup>1</sup> According to this view, the increasing transfer of authority from democratic national governments to an undemocratic EU constituted a threat to democracy across Europe. While EU-level politics certainly has democratic shortcomings, these have been grossly exaggerated in the literature,<sup>2</sup> and the heavy focus on them has distracted attention from the threats posed by democratic deficits at the national level in

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some EU member states. With some EU member states now sliding towards authoritarianism, we can look back with nostalgia on the days when scholars believed the greatest threats to democracy in Europe stemmed from the EU's own democratic shortcomings. Today, clearly, the greatest threats to democracy in Europe are found not at the EU level, but at the national level in the EU's nascent autocracies.

From its inception, the EU was conceived as a union of democracies, and it eventually made it explicit that states wishing to join the union would have to possess 'stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.<sup>3</sup> European leaders understood that national democracies would vary in profound ways, and they did not presume to impose a uniform model of democracy. Yet, member states did commit themselves in the EU treaties (Treaty on European Union (TEU),<sup>4</sup> Article 2) to uphold a set of core values, including democracy, pluralism and the rule of law, and they established a mechanism (TEU, Article 7) to sanction states that breached these democratic values in serious and persistent ways.<sup>5</sup> Recent episodes of 'democratic backsliding'<sup>6</sup> in Hungary, Poland, Romania, Bulgaria, Slovenia and other EU member states<sup>7</sup> have led many observers to conclude that these core democratic values were under threat. These developments remind us that the EU may have a vital role to play in defending democracy and the rule of law in member states where these values are endangered (Closa et al. 2014; Müller 2013a; Sedelmeier 2014).

This article argues for a radical recasting of the democratic deficit debate. Rather than focusing on exaggerated claims of how the EU's democratic shortcomings threaten national democracies, scholars should examine how and why profound democratic deficits at the national level – bordering on authoritarianism – emerge and persist within Europe's quasi-federal union that professes a commitment to democracy. Viewing the EU's democratic deficit from this perspective pushes us to ask a different set of questions from those emphasized in the traditional democratic deficit literature: How could it be that a union that sets democracy as an explicit condition for membership would tolerate the slide to autocracy of one or more of its member states? Why has the EU not done more to defend democracy at the national level? What explains differences in the EU's reaction to democratic backsliding in various cases, such as Romania, Hungary and Poland?

Approaching the democratic deficit question from this perspective not only raises new questions, it also opens us to the insights of a rich literature in comparative politics that explains the persistence of authoritarian enclaves within democratic unions. Many EU scholars have reacted with understandable dismay at the democratic backsliding experienced by some EU member states and at the EU's seeming inability to prevent it. Jan-Werner Müller sums up the troubling question many observers have in mind when he asks, 'Could there be a dictatorship in an EU member state?' (Müller 2013a: 138). While such a development would be deeply troubling, the comparative politics literature suggests we should hardly find it surprising. This literature highlights the fact that soft versions of authoritarianism can persist at the state level for years in polities that are democratic at the federal level. This literature explores the conditions under which state-level authoritarianism can survive within a broader democratic union and the conditions under which the overarching democratic regime is likely to intervene to defend democracy at the state level. This article demonstrates that the same factors that explain the survival of authoritarian enclaves in the comparative politics literature also shed light on the EU's reaction to democratic backsliding in EU member states – and why this reaction has differed in various cases.

Considerations relating to partisan politics provide the most powerful explanation of why the EU has tolerated democratic backsliding in Hungary since 2010, while also explaining the EU's somewhat more robust reaction to threats to democracy in Poland since 2015. The comparative literature also highlights the impact of a second, related factor – rentierism – in explaining why financial support from the EU can help sustain regimes even as they erode democracy and the rule of law – in effect subsidizing authoritarianism. One central claim advanced in this article is that there may be a linkage between recent increases in democracy at the EU level and the erosion of democracy in some member states: as EU-level politics become more democratic and partisan, with EU-level political parties in the European Parliament (hereafter *Europarties*) gaining greater power, incentives intensify for the leaders of *Europarties* to protect national autocrats who deliver votes to their coalition at the EU level. At the same time, EU-level party politics is not developed to a point where *Europarties* can intervene directly to support the democratic opposition to a local autocrat.

In other words, the EU is trapped in what I term an ‘authoritarian equilibrium’, with just enough partisan politics at the EU level to coddle local autocrats, but not enough to topple them. Thus, ironically, encouraging more partisan politics at the EU level in an effort to address the EU’s supposed democratic deficit may inadvertently help perpetuate autocracy at the national level.

The remainder of this article is divided into three sections. First, the theory section reviews comparative politics literature on subnational authoritarianism within federal democracies, focusing on why authoritarian enclaves at the state level persist, why democratization at the federal level can encourage their persistence, and the conditions under which the federal level is likely to intervene to defend democracy. It also argues that this theoretical perspective can explain the EU’s reaction to democratic backsliding by member governments and briefly discusses why alternative explanations are less convincing. The next section applies this analysis to the contemporary EU, focusing on case studies of the EU’s reaction to recent developments in Hungary and Poland. The final section concludes.

#### THEORY: ON THE PERSISTENCE OF AUTHORITARIAN ENCLAVES IN DEMOCRATIC POLITIES

The comparative politics literature on democratization demonstrates that it is common for authoritarian enclaves to persist at the subnational (i.e. state) level within regimes that become democratic at the national (i.e. federal) level (Benton 2012; Gervasoni 2010; Gibson 2005, 2012; Giraudy 2015). As Gibson puts it:

Subnational authoritarianism is a fact of life in most democracies in the developing and post-communist world. It was also a massive fact of U.S. political life until the unravelling of hegemonic party regimes in the South in the middle years of the twentieth century. A look at democratic countries around the world will thus reveal the unevenness of the territorial distribution of the practices and institutions of democracy within the nation-state. (Gibson 2005: 104)<sup>8</sup>

Likewise, as Gervasoni (2010: 302) notes, ‘From Brazil to India to Russia, countries often show remarkable heterogeneity in the degree to which their subnational units are democratic. During the 1990s several scholars highlighted the existence of subnational authoritarian enclaves within national-level democracies especially in large,

heterogeneous, third-wave federations' (see also Chavez 2003; Fox 1994; McMann 2006; O'Donnell 1993; Snyder 1999). In other words, not only are variations in the degree of democracy across subunits within states common, they are particularly common in large, heterogeneous federations. If such variations are common within national polities of this type, we should only expect them to be more common in the context of the large, supranational, quasi-federal and highly heterogeneous EU.

The literature on regime juxtaposition also points to what type of authoritarian enclaves are likely to emerge in the context of democratic federations. Because these regimes are embedded within a federal (or supranational) democracy, they are likely to be not particularly repressive, but rather hybrid regimes that scholars variously refer to as 'illiberal democracies', 'competitive authoritarianisms' and 'electoral authoritarianisms' (Gervasoni 2010: 314). The existence of federal democracy and the possibility of federal intervention give state leaders 'strong reasons to avoid blatantly authoritarian practices, which ... increase the likelihood of a federal intervention' (Gervasoni 2010: 314). Instead, leaders of these illiberal, semi-authoritarian states 'resort to subtle means to restrict democracy. Elections are held and ballots are counted fairly, but incumbents massively outspend challengers; the local media are formally independent but are bought off to bias coverage in favor of the ruling party; dissidents are not jailed, just excluded from coveted public jobs' (Gervasoni 2010: 314). The comparative politics literature on 'regime juxtaposition' does not simply highlight the existence of such authoritarian enclaves, it also explains why they persist and the conditions under which federal actors may intervene to promote democratization.

### *Why Authoritarianism Survives in Democratic Unions*

To understand why authoritarian enclaves can persist within democratic federations, we must first turn to party politics. Where authoritarian state leaders belong to partisan coalitions at the federal level, their co-partisans may be willing to block federal action against them. As Gibson (2005: 107) explains, 'Authoritarian provincial political elites, with their abundant supplies of voters and legislators, can be important members of national governing coalitions', and

'This increased their leverage and helped put concerns about the authoritarian nature of the local interlocutor on the back burner of the national party's agenda.' In short, democratic leaders at the federal or union level may overlook concerns about the authoritarian nature of rule in member states so long as the local authoritarian delivers needed votes to their coalition in the federal legislature. For this reason, perversely, increasing democratization at the federal level may help to entrench authoritarian rule at the state level. As Gibson (2005: 107) explains, 'with national democratization often came the consolidation of provincial authoritarianism. Democratic transitions, while transforming politics at the national level, create little pressure for subnational democratization. In fact, they often hinder it.' Thus, enhancing partisan, democratic politics at the federal level may end up perpetuating autocracy at the state level.

In addition to partisan politics, fiscal dynamics within multilevel polities may help perpetuate state-level authoritarianism. As Gervasoni (2010) explains, local authoritarians may use federal transfers to support clientelist systems that perpetuate their rule. Given the typical dynamics of fiscal transfers in federal systems, states with less developed economies will tend to be major recipients of federal transfers. Where authoritarian enclaves are located in such less developed states, these local authoritarian regimes will be able to rely substantially on federal funds, rather than on their own tax base, to finance their regime. As Gervasoni (2010: 303) puts it, 'These rentier subnational states, like their resource-based national counterparts, are likely to sustain less democratic regimes because incumbents can rely on their privileged fiscal position to restrict political competition and weaken institutional limitations on their power.' Even the best-intentioned federal fiscal transfer programmes may inadvertently sustain subnational autocracy, and federal democratic leaders may find themselves in the perverse position of funding subnational regimes that openly defy democratic norms.

### *When Does the Union Intervene?*

Just as federal partisan politics may help protect local authoritarians under some conditions, under other conditions it can help bring them down. As Gibson (2005: 108) emphasizes, in order to maintain their grip on power in the context of a democratic union, local

authoritarians will strive to maintain 'boundary control' by maximizing their influence over local politics and depriving the local opposition of access to allies and resources at the federal level. However, if the local opposition and federal allies are able to overcome this boundary control, they may be able to dislodge the local autocrat and restore pluralism in state politics. When federal parties who oppose the local authoritarian party intervene to support beleaguered local opposition parties, they may bring resources the opposition needs to break the local authoritarian's grip on power. And, as Giraudy (2010: 72) emphasizes, other strategic considerations may also come into play for national parties: for instance, federal leaders who had supported a local authoritarian may withdraw that support or demand reforms if the local autocrat's behaviour becomes so egregious that it imposes political and reputational costs on the national leaders.

*Implications for the European Union: The EU's Authoritarian Equilibrium*

While the literature on regime juxtaposition has primarily focused on countries such as Argentina, Mexico and the late nineteenth-century US (Gibson 2012), it has clear implications for the EU as well. This perspective sheds light both on why the EU might tolerate the rise of an electoral authoritarian regime in a member state and on the conditions under which the EU might intervene to defend democracy. In the EU, as in other multilevel polities, party politics is crucial for the survival of state-level authoritarian regimes, and party politics may – under certain conditions – help to dislodge them. In short, one would expect that where an authoritarian leader in an EU member state delivers votes to an EU-level political coalition – such as a party group in the European Parliament – its EU-level co-partisans will have incentives to tolerate its democratic backsliding and shield it from EU sanctions. To be sure, if a local authoritarian went too far – for instance by jailing opposition leaders or engaging in blatant human rights abuses – it could become an electoral liability for its co-partisans in Strasbourg and national capitals and lose their protection. As noted above, for this reason, local authoritarians tend to 'resort to subtle means to restrict democracy' (Gervasoni 2010: 314).

This perspective also points to a potential irony in EU politics: efforts to make EU-level politics *more democratic* may discourage the

EU from intervening if a member state becomes *less democratic*. Increasing the legislative power of the European Parliament and giving it more control over the selection of the Commission president<sup>9</sup> gives Europarties a greater incentive to tolerate democratic backsliding by governments that deliver votes to their coalitions in the European Parliament.

Pulling together these theoretical expectations suggests why the EU may now be trapped in an authoritarian equilibrium: at this early stage in the development of EU democracy, there is enough partisan politics at the EU level that Europarties are willing to defend local authoritarians who are members of their coalitions in the European Parliament (see also Sedelmeier 2014: 119 on this point). However, partisan politics at the EU level has not developed to the extent that Europarties provide direct material support to local opposition parties. Autocratic governments at the national level do not need to solicit much in the way of material support from their federal co-partisans. By dint of their control of the state and their ability to channel EU funding to favoured interests, they already control substantial material resources. It is enough for their federal co-partisans to defend their rule publicly and to shield them from intervention by federal institutions. By contrast, local oppositions – deprived of needed resources by the hegemonic party – need sympathetic federal parties to intervene in local politics by providing material support. However, in the contemporary EU context, such intervention would be viewed as illegitimate external meddling in a national democracy. Indeed, it is illegal for EU-level political parties or their foundations to fund national parties.<sup>10</sup> Tying this together, we can see, perversely, that the EU has developed just enough EU-level partisan politics to help protect local authoritarians, but not enough to support local democratic oppositions.

### *Alternative Explanations*

While the partisan dynamics discussed above provide the most powerful explanation of when and why the EU may tolerate democratic backsliding by member governments, partisan politics is certainly not the only factor that influences the EU's reactions. First, as legal scholars and theorists have rightly emphasized, the EU's failure to do more to combat democratic backsliding by governments can in part be attributed to the weaknesses of the legal tools it has available to



intervene (Blauberger and Kelemen 2016; Closa et al. 2014; Kochenov 2015; Kochenov and Pech 2016; Müller 2013a, 2013b; Scheppele 2015a).<sup>11</sup> To be sure, the success of the EU's intervention to protect the constitutional order in Romania was facilitated by the fact that Romania was still subject to a powerful oversight tool (the Cooperation and Verification Mechanism) that had been put in place in the context of its EU accession – a mechanism not available for states such as Hungary and Poland. But differences in available legal tools are ultimately not decisive: as we will see below, partisan politics best explains when the EU refuses to use the powerful tools it does have – Article 7 of the TEU and (since 2014) the Rule of Law Framework – such as in the case of Hungary.

Second, Sedelmeier (2014: 119) suggests that parties of the left, which are more 'normatively committed to liberal democratic principles' are more likely than parties of the right to support sanctioning national governments led by their partisan allies for democratic backsliding. As a result, in the EU, 'democratic backsliding is more likely to be punished in countries that are governed by parties of the left rather than the right' (Sedelmeier 2014: 119).<sup>12</sup> It is true that the Party of European Socialists (PES), the leading Europarty of the centre-left, was more critical of the attack on constitutional democracy by one of its affiliates, the Social Democrat Ponta in Romania (Perju 2015) than either the European People's Party (EPP) or European Conservatives and Reformists (ECR) have been by the actions of their affiliates, Orbán in Hungary and Kaczyński in Poland. Nevertheless, even the Romanian case demonstrates partisan bias at work, as the EPP led efforts to criticize and rein in Ponta while the PES was much more defensive of him (EurActiv 2012; Riegert 2012).

Finally, the specific tactics a national government uses in attacking the rule of law and democracy may influence the likelihood of EU intervention. The EU may be more willing to intervene in cases such as Poland and Romania, where a member government blatantly violates its own constitutional order, than in a case like Hungary, where government secures a parliamentary majority large enough to legally amend the constitution and thus to consolidate autocratic rule through methods that – at least formally – respect the rule of law.<sup>13</sup> Nevertheless, whatever the legal tools available to the EU, the stated normative commitments of the parties involved, or the tactics pursued by the national government, the account below will

demonstrate that partisan loyalties play a central role in explaining how the EU reacts to democratic backsliding at the national level.

#### APPLICATION: ADDRESSING EUROPE'S REAL DEMOCRATIC DEFICITS

The EU's reactions to democratic backsliding in Hungary and Poland provide a study in contrasts. Since 2010, the Fidesz government in Hungary led by Prime Minister Viktor Orbán has carried out a constitutional revolution that has eroded democracy and the rule of law, and consolidated power in an electoral authoritarian regime. The European Commission has brought legal challenges against some of the Orbán government's actions, and a handful of other EU actors have spoken out against the developments. But at the same time, leaders of the EPP – the leading Europarty in the European Parliament of which Orbán's Fidesz is a member – have defended Orbán and blocked robust EU intervention. On the whole, the EU has done little to defend democracy and the rule of law in Hungary. By contrast, after the Law & Justice Party (PiS) came to power in Poland late in 2015 and raised concerns with its attacks on the independence of the Constitutional Tribunal and the state-run media, the EU reacted much more quickly and aggressively – launching an inquiry based on the Rule of Law Framework, a step it had chosen not to take against Hungary. To be sure, sequencing – for instance, the fact that lessons from the Hungarian experience may have influenced reactions to developments in Poland – and the greater strategic significance of Poland compared with Hungary may have played some role in explaining these different reactions, and ultimately the EU may fail to curb the drift to authoritarianism in Poland as well. However, considerations relating to partisan politics outlined in the theoretical discussion above provide the most convincing explanation for the differences in the EU's responses to Hungary and Poland to date: in short, Poland's PiS has been targeted more heavily than Fidesz because it does not enjoy protection from powerful partisan allies at the EU level to the extent that Fidesz does. Analysing the EU's reactions to democratic backsliding in these cases illustrates the irony described above: making EU-level politics more partisan – which many critics believe must be done to address the supposed democratic deficit at the EU level – has created incentives for Europarties to defend national autocrats who belong to their

groups. Finally, this analysis suggests that EU institutions are unlikely to control democratic backsliding using legal tools alone. Only if Europarties pay a political price for supporting local autocrats and decide to turn against them, or if they intervene forcefully to support the democratic opposition will the EU be able to help dislodge the autocrats in its midst.

## HUNGARY

### *Democratic Backsliding in Hungary*

In 2010, Viktor Orbán swept to power in Hungary. Benefiting from the electoral implosion of the scandal-plagued governing Socialist Party, Orbán's Fidesz party won 53 per cent of the vote, which in Hungary's disproportional electoral system translated into 68 per cent of the seats in the unicameral Hungarian parliament. Fidesz having more than two-thirds of the seats in parliament would prove crucial, as the Hungarian constitution provided that a two-thirds supermajority in parliament could amend the constitution. Orbán had solid pro-European credentials and had served previously as prime minister between 1998 and 2002 – a period in which democratic institutions continued to consolidate and Hungary progressed towards EU accession. Thus, before the election, few predicted that the new Orbán government might roll back democracy in Hungary or in other ways challenge the EU's core values.

But Orbán had apparently taken a lesson from his earlier, single-term, premiership. Returning to office in 2010, he was eager to consolidate his position and to assure that he and his Fidesz party would hold on to power for many years to come. With a two-thirds supermajority in parliament, Orbán had the authority to push through institutional reforms that consolidated his grip on power. Detailed accounts of Orbán's constitutional revolution and his roll-back of pluralist democracy in Hungary have been provided elsewhere (see, for instance, European Parliament 2013; Freedom House 2012, 2014, 2015; Parliamentary Assembly of the Council of Europe 2013; Scheppele 2013a, 2013b; Venice Commission 2011, 2013) and a full description of these developments is beyond the scope of this article. In brief, we can summarize the political transformation wrought by the Orbán regime as follows: the Orbán government first amended and then after a year in office completely

replaced the existing constitution. It did so through an expedited, closed process with no input from opposition parties. The constitutional changes were backed by the introduction of a series of so-called Cardinal Laws, laws which required two-thirds of votes in parliament to be adopted or amended, which would thus probably remain entrenched for many years to come.

The principal effect of the changes introduced through this whirlwind of constitutional and statutory change was to concentrate power in the Orbán government's hands. Through its new 2011 constitution (and subsequent amendments) and Cardinal Laws, the Orbán government has managed to eliminate previous constitutional checks and balances, asserting control over previously independent public bodies that might have checked the government's power such as the ombudsman for data protection, the National Election Commission and the National Media Board. His regime has worked to muzzle the press, inducing media self-censorship by introducing new regulations that threaten journalists with penalties if regulators deem their content is not 'balanced, accurate, thorough, objective and responsible'.<sup>14</sup> Likewise, the government has attacked civil society organizations that had been critical of it, most famously NGOs associated with a Norwegian funding body. To ensure that Fidesz would retain control of the government in the April 2014 parliamentary elections and beyond, the Orbán government overhauled Hungary's electoral system to favour Fidesz and otherwise manipulated advertising and campaigning rules to benefit itself, leading international election monitors to conclude that the 2014 elections were held under conditions that gave 'an undue advantage' to Fidesz (Deutsche Welle 2014).

One might wonder why the judiciary did not step in to resist this assault on democratic values, but in fact the independent judiciary itself was one of Orbán's first targets. When Orbán took office in 2010, Hungary had a powerful constitutional court with a strong reputation for independence. In 2010, the Orbán government changed the procedure for appointing judges to allow the governing majority to make appointments without consulting the opposition. Next, in 2011, when the new constitution was pushed through, it expanded the constitutional court from 11 to 15 judges, enabling Orbán to pack it with Fidesz loyalists. When the court nevertheless continued to declare some of the government's most egregious laws unconstitutional, the Orbán government responded by amending

the constitution in 2013 to further limit the court's power, nullifying more than 20 years of the court's previous case law, and further centralizing the control over the judiciary in the hands of the politically appointed head of Hungary's National Judicial Office, and granting constitutional status to a number of the laws the court had declared unconstitutional (thereby circumventing it).

### *The EU's Reaction to Democratic Backsliding in Hungary*

The democratic backsliding in Hungary described above all happened while Hungary remained a member of good standing in the EU, a union that professes a commitment to democracy and the rule of law and, at least in principle, requires its member states, to uphold these principles. Though Orbán always maintained that his regime was democratic, he openly rejected fundamental EU norms. Orbán declared in July 2014 that he intended to abandon *liberal* democracy in favour of building an 'illiberal state', citing China, Russia, Singapore and Turkey as role models (Simon 2014). He cultivated closer ties with Russian president Vladimir Putin, at the very moment when the EU was striving to maintain cohesion in the face of Russian aggression in Ukraine. He openly antagonized EU institutions and fellow EU governments in the context of the refugee crisis, rejected the refugee relocation scheme that was adopted by the European Council and took a series of emergency measures that critics complained violated the fundamental rights of asylum seekers. While taking these steps and rejecting any criticism from EU institutions as 'Soviet-style meddling' (Than 2013), Orbán's government was in fact highly dependent on fiscal transfers from Brussels: EU spending in Hungary amounted to more than 6 per cent of its gross national income, and more than 95 per cent of all public investments in Hungary were being co-financed by the EU (Kelemen 2015b).<sup>15</sup> Why, in the face of such blatant defiance of its fundamental values, did the EU fail to intervene and in fact continue to subsidize Hungary's slide into authoritarianism?

To be sure, as legal scholars emphasize, the EU's limited toolkit of enforcement measures made it difficult for the EU to respond effectively. The European Commission did launch a series of infringement proceedings against Hungary before the European Court of Justice (ECJ), focusing on specific violations of EU directives and regulations by the Orbán government. This case-by-case approach

succeeded in pressuring the Orbán government to revise some of its most controversial measures, but infringement actions, with their focus on technical issues of compliance with EU law, missed the systemic nature of the Orbán regime's attacks on the rule of law and democratic pluralism. This case-by-case approach enabled the Orbán government to play legal games of cat and mouse with Brussels, making adjustments at the margins to avoid blatant disregard for EU law, while continuing with its drive to consolidate power. For instance, when Orbán's government lowered the retirement age of judges in a thinly veiled effort to purge the judiciary and open up space for the appointment of Fidesz party loyalists, the Commission had no legal basis to challenge this attack on judicial independence, so had to settle with the only legal tool it had available – bringing an infringement case claiming that the new retirement age policy violated EU rules on age discrimination.<sup>16</sup> In essence, the Commission won the battle but lost the war: the Commission won its age discrimination case before the ECJ, and the Hungarian government provided the prematurely retired judges financial compensation and offers of new judicial postings. However, the judges were not given their previous jobs back and most decided not to return to the bench (Scheppele 2015b: 118). More generally, pressure from EU enforcement actions has prompted Orbán to make only some tactical concessions; it has by no means halted his drive to consolidate power.

But the weakness of the EU's legal tools alone cannot explain why the EU has taken such a half-hearted response to the erosion of democracy and the rule of law in Hungary. Firstly, weaknesses in the EU's enforcement tools cannot explain the marked differences in how various EU leaders have reacted to developments in Hungary, with some calling for much more vigorous use of the EU's existing enforcement tools, and others opposing the use of such tools and even openly embracing Orbán's governance of Hungary. Secondly, we can see that even after March 2014, when the EU introduced an additional tool to address backsliding on core EU values – the so-called Rule of Law Framework<sup>17</sup> – EU leaders refused to invoke that tool against the Hungarian government. Finally, as discussed below, a focus on legal instruments cannot explain the substantial differences in the EU's halting, flaccid reaction to events in Hungary since 2010 and its more immediate, assertive reaction to similar developments in Poland since 2015.

Partisan politics provides the most powerful explanation of why the EU has been so ineffective in opposing Orbán's drive to consolidate power. To understand why the EU has not done more to defend democracy in Hungary, one must look first to the leadership of the EPP, the centre-right Europarty of which Orbán's Fidesz party is a member (Kelemen 2015a). In the interest of party loyalty and of maintaining their majority in the European Parliament, most EPP politicians have been willing to tolerate Orbán's violations of democratic values (De la Baume 2015; Kirchik 2013; Peter 2013). While some members of the EPP have favoured action against the Orbán government (Kirchik 2013), the majority of EPP members and the party leadership have repeatedly undermined the efforts of EU institutions to censure the Orbán regime. Consider for instance what happened in July 2013, when the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (the LIBE Committee) issued the 'Tavares Report' criticizing the erosion of fundamental rights in Hungary.<sup>18</sup> Though a majority of members of the European Parliament (MEPs) overall voted to endorse the report, most EPP MEPs voted against it, and EPP vice-chair Manfred Weber (a German Christian Social Union politician who has since become the EPP's chair) dismissed it as a politically motivated attack on the Orbán government by leftist parties (EPP Group 2013). In March 2014, EPP president Joseph Daul spoke at a Fidesz campaign rally in Budapest praising Orbán and endorsing his re-election bid (Kelemen 2015a). The EPP has placed Fidesz politicians in key leadership posts in the parliament where they can help deflect criticism of the Orbán regime. József Szájer, a close associate of Orbán's who played a key role in Hungary's controversial constitutional reforms, is a vice-chair of the EPP, while last year Fidesz MEP Kinga Gál was named vice-chair of the LIBE Committee which had previously criticized the Fidesz government so harshly.

Partisan politics were also at work in the European Commission's decision not to launch the Rule of Law Framework<sup>19</sup> against Hungary. The Barroso Commission established this framework in March 2014 in response to its frustration that the EU lacked adequate tools to check democratic backsliding in cases such as Hungary.<sup>20</sup> The framework was designed to enable the EU to ratchet up pressure on a government with an escalating series of warnings that it was on track to be subject to an Article 7 procedure, which could result in a loss of voting rights in the Council and other penalties. In June 2015,

when the European Parliament passed a resolution condemning Orbán's statements on the death penalty and his migration consultation and calling on the Commission to launch the Rule of Law Framework procedure against Hungary,<sup>21</sup> only parties of the left voted in favour and the EPP leadership publicly defended the Orbán government.<sup>22</sup> The Juncker Commission ultimately refused to launch the procedure against the Orbán government.<sup>23</sup> Certainly, the Commission did not admit that this was based on partisan considerations, but Commission president Jean-Claude Juncker and the majority of commissioners were EPP members who owed their dominance of the EU's executive to the support they enjoyed from the EPP group in the European Parliament. The partisan basis of EU leaders' positions on whether the EU should intervene in Hungary was laid bare on 16 December 2015 when the European Parliament again voted on a resolution calling on the European Commission to launch the Rule of Law Framework against Hungary: 187 EPP MEPs voted against the resolution while only six voted in favour (with three abstaining).<sup>24</sup> The resolution nevertheless managed to pass with the support of parties of the left, but the European Commission continued to refuse to launch the Rule of Law procedure.

Finally, though the inner deliberations of the Council are secretive, we can still detect the influence of partisan politics on the reactions of national governments represented there to developments in Hungary. The only leaders who have called for EU action to address developments in Hungary, concerning democratic backsliding and/or policies toward refugees, have been social democrats or liberals: for instance, Luxembourg's social democratic foreign minister called for Hungary to be suspended from the EU (Kroet 2016). While Germany's Christian Democratic Chancellor Angela Merkel offered some oblique criticism of Orbán's concept of 'illiberal democracy' (Zeit Online 2015), neither her government nor any EPP-led government has explicitly denounced Orbán's government or called for EU action regarding democratic backsliding in Hungary.

The EPP's ongoing embrace of Orbán can be understood well through the lens provided by comparative politics theories of sub-national authoritarianism. As that literature emphasizes, partisan politics is crucial: Orbán's Fidesz party delivers MEPs to the EPP bloc in the European Parliament, and in exchange for his ongoing participation in their party group, they turn a blind eye to his misdeeds and offer occasional words of support that help him maintain power domestically.



Meanwhile, other political parties at the EU level (those not aligned with Orbán) have few tools at their disposal with which to support the weak, fragmented opposition in Hungary that is struggling in the context of a single-party dominated electoral authoritarian system. As noted above, it is illegal for EU-level political parties or their party foundations to fund national parties<sup>25</sup> – and even if it were not illegal it might be perceived as illegitimate meddling in domestic political affairs. Thus, at least with respect to Hungary, the EU seems to be trapped in an authoritarian equilibrium, with just enough partisan politics that the EPP can provide Orbán with a patina of legitimacy and protection from external intervention, but not enough partisan politics that other EU-level parties can funnel resources or other support to the struggling democratic opposition. Moreover, in keeping with scholarship on the role of rentierism in supporting local authoritarians, the Orbán regime relies heavily on financial transfers from Brussels to finance his regime even as he thumbs his nose at the EU's democratic values.

## POLAND

### *Democratic Backsliding in Poland*

In the October 2015 Polish parliamentary elections, the ultra-conservative, nationalist-populist PiS won a plurality (just under 38 per cent) of the vote, which translated into an absolute majority (51 per cent) of the seats in the Sejm (the Polish parliament). Beata Szydło, who had led the electoral campaign as the new, more moderate face of the party, became prime minister, but in fact PiS remained firmly under the grip of its ultra-conservative co-founder and former prime minister, Jarosław Kaczyński (Foy 2016). Kaczyński had previously expressed admiration for Viktor Orbán's style of governance and pledged to follow his example, stating in 2011, 'Viktor Orbán gave us an example of how we can win. The day will come when we will succeed, and we will have Budapest in Warsaw' (Buckley and Foy 2016).

Shortly after taking office, the new PiS government launched attacks on the independence of Poland's high court (the Constitutional Tribunal) and its public media, closely following the 'script' Fidesz had deployed in Hungary (Buckley and Foy 2016; Kelemen 2016; Ost 2016). The PiS assault on the Constitutional Tribunal has

provoked a constitutional crisis that persists at the time of this writing. In short, the PiS-affiliated President Andrzej Duda and the PiS-controlled parliament have defied the authority of the Constitutional Tribunal, attempted to pack it with loyalist judges and passed legislation designed to further weaken it. (For more detailed accounts, see Cienski 2016b; Kelemen 2016; Kisilowski 2015.) President Duda has refused to swear in three judges appointed by the previous government whom the Constitutional Tribunal ruled he must swear in.<sup>26</sup> Meanwhile, the parliament has appointed (and Duda has sworn in) a rival set of PiS-affiliated ‘replacement judges’, whom the Tribunal has refused to allow to take up their seats. In late December 2015, the parliament passed a law designed to control and weaken the Tribunal, requiring, among other provisions, that at least 13 of its 15 judges be present to hear most cases, that a two-thirds majority is necessary for a ruling and that the Tribunal must rule on cases in the order they arrive (without any ability to prioritize cases by importance). In March 2016, the Constitutional Tribunal struck down these reforms as unconstitutional, but the PiS government maintains that the court has no authority to rule on the law and refuses to recognize its judgement (Cienski 2016b, 2016c; Gera 2016). Later that month, the Council of Europe’s Venice Commission, its advisory group on constitutional matters, released a report on a report condemning the PiS government’s reforms of the Constitutional Tribunal as a threat to ‘not only the rule of law, but also the functioning of the democratic system’ (Cienski 2016b, 2016d; Venice Commission 2016). Kaczyński has made no secret of the motivations behind the PiS’s attack on the Tribunal: at a December 2015 rally he denounced the Tribunal as a ‘band of cronies’ that sought to block PiS from pursuing its policy agenda (Agence France Presse 2015).

PiS sought to assert political control over public media as well. The PiS parliament passed and President Duda signed into law new legislation that strips the independent Public Broadcasting Council of authority over public media and instead gives the treasury minister authority to hire and fire the management of public television and radio broadcasters – an arrangement the Council of Europe described as ‘unacceptable in a genuine democracy’ (Rankin 2016a). With the adoption of the new rules in January 2016, the managers and supervisory board members of Poland’s public broadcasters were fired with immediate effect – with the PiS moving to replace them with party loyalists (*Guardian* 2016).

Clearly, the PiS's attacks on judicial independence and media freedom closely resemble actions taken by the Orbán government. And yet the EU has responded more forcefully to developments in Poland over the past year than it has over the entire five years of Orbán's constitutional revolution. While the European Commission has refused to deploy the Rule of Law Framework procedure against Hungary since it was created in 2014, it launched the procedure against the Polish government in January 2016, less than two months after PiS had launched its attacks on the judiciary and the media (De la Baume 2016; Rankin 2016a). In June 2016, the Commission issued a formal Rule of Law opinion and by late July it triggered stage two of the framework, issuing a 'Rule of Law Recommendation' and calling on Poland to take remedial actions within three months or face the threat that the Article 7 procedure would be launched against it (European Commission 2016; Kelemen 2016; Rankin 2016b). While the outcome of the inquiry remains uncertain, the very fact that the Commission launched it presents a stark contrast with the Hungarian case, where the Commission has declined to act as forcefully.

What then explains the difference in the EU's reaction in the two cases? To some extent, the greater size and strategic importance of Poland may have played a role, leading some in the Commission to conclude that they could not afford to allow the country to slide into autocracy.<sup>27</sup> Also, the Polish case differed from the Hungarian in one important respect: while the Orbán government had the legislative supermajority it needed to amend its country's constitution, the requirements for constitutional amendment in Poland were more demanding and the PiS government has been unable to push through constitutional amendments. This meant that the Orbán government could render any of its actions 'constitutional' simply by amending the constitution, where the PiS has blatantly to disregard the rule of law and defy its own Constitutional Tribunal to achieve its aims. While these factors have probably played a role in the EU's disparate reactions in the two cases, party politics provides an even more powerful explanation.

A crucial reason that the EU has responded less quickly and less forcefully in the Hungarian case than in the Polish one is that Fidesz enjoys the protection of the powerful centre-right EPP group whereas the PiS does not (Zalan 2015). The EPP group is the largest faction in the European Parliament, is well represented in the Commission, and governments led by EPP member play a leading role in the European Council. By contrast, PiS belongs to the far smaller eurosceptic party

group – the ECR. The ECR has a marginal influence on law-making in the European Parliament and only two ECR-led governments are represented in the Council – those of Poland's PiS and the UK's Conservative Party. When the European Parliament voted in March 2016 to endorse a resolution (European Parliament 2016) concerning the threat to the rule of law in Poland, it passed overwhelmingly (514 for, 142 against and 30 abstentions).<sup>28</sup> As EU pressure intensified, PiS sought support from the one powerful member of its party group, the British Conservatives (Cienski 2016a), but its allies failed to dissuade the Commission from acting against it.<sup>29</sup> If we consider a counterfactual scenario where PiS had been a member of the EPP, it is difficult to imagine that the European Parliament or Commission would have acted as quickly or emphatically against it as they have.

It remains to be seen how far the EU will be willing to go in confronting democratic backsliding by the PiS. Though the Commission took an unprecedented step by launching an inquiry based on the Rule of Law Framework, the Commission may ultimately balk at attempting to trigger disciplinary action by the European Council under Treaty Article 7. One key reason is that imposing sanctions on a government under Article 7 first requires other governments to agree unanimously that a 'serious and persistent breach' of the EU's values exists in that country. Hungary has already announced that it would use its veto to block any sanctions against Poland (Cienski and De la Baume 2016). Though they belong to different party groups, Hungary's Fidesz and Poland's PiS share a common interest in preventing the EU from acting against governments engaged in democratic backsliding and both would surely act to protect one another from EU intervention. Thus, whatever challenges the EU faces in confronting a single case of democratic backsliding, once two or more member states slide towards autocracy the task becomes exponentially more difficult.<sup>30</sup>

## CONCLUSION

In recent years, democracy and the rule of law have come under serious threat in a handful of EU member states, above all Hungary and Poland. These developments have turned the democratic deficit debate on its head. Whereas most earlier scholarship on the democratic deficit focused on shortcomings of EU-level politics, today we must ask whether the EU can address the democratic deficits of its member states.

This article has drawn on the comparative politics literature on subnational authoritarianism to shed light on the EU's current travails in addressing democratic backsliding in some member states. The lessons from the comparative politics literature are sobering and have clear implications for the EU. Firstly, we should not be surprised to see local pockets of autocracy within a democratic federation like the EU; indeed, this is quite common in large, diverse federal democracies. Secondly, while various legal mechanisms may be helpful in constraining the most egregious behaviour of local autocrats in a democratic federation, they are unlikely on their own to break their grip on power. Thirdly, partisan political considerations often lead federal parties to shield local autocrats who deliver votes and seats to their coalitions at the federal level. Ironically, the drive to enhance EU democracy by strengthening the European Parliament may increase incentives for European leaders to tolerate national autocrats who can deliver votes to their coalitions. Fourthly and finally, the experience of other federal-type democracies suggests that the federal-level government is only likely to help break the local autocrat's grip on power at the state level either if the autocrat's allies at the federal level begin to see their association with the autocrat as a political liability and pressure him or her to change course (Gervasoni 2010: 314; Giraudy 2010) or if the local opposition can secure material support from political allies at the federal level (Gibson 2005, 2012). Direct support for domestic parties by Europarties remains illegal, so there is little prospect of robust intervention to support local democratic opposition parties in the contemporary EU. Meanwhile, few leaders in the European Parliament – and no national leaders in the European Council – have to date been willing to break with their party groups and publicly denounce their autocratic co-partisans in Budapest or Warsaw. Thus, notwithstanding all the EU has done to promote democracy over the years, the union now finds itself mired in an authoritarian equilibrium, with enough partisan politics to help perpetuate local autocrats, but not enough to dislodge them.

## NOTES

<sup>1</sup> A full review of this voluminous literature is beyond the scope of this article. For perhaps the leading article asserting the existence of a democratic deficit at the EU level, see Føllesdal and Hix (2006). On the debate over the lack of a common public

sphere and *demos*, see Grimm (1995), Habermas (1995), Nicolaidis (2013) and Weiler (1995).

- <sup>2</sup> Critiques of the EU's democratic deficit are often exaggerated because the EU is held up for comparison against an unrealistic ideal rather than real existing democracies. As Zweifel (2002) noted, the EU compares favourably to leading federations on many major measures of democracy.
- <sup>3</sup> This is one of the so-called 'Copenhagen Criteria' for EU membership. See [http://ec.europa.eu/enlargement/policy/conditions-membership/index\\_en.htm](http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm).
- <sup>4</sup> For the text of the Treaty, see <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=en>.
- <sup>5</sup> Article 7 of the Treaty on European Union, the first version of which was introduced in the 1997 Treaty of Amsterdam, provides that the EU may suspend the voting rights of a state deemed by the European Council to be in serious and persistent breach of values enshrined in Article 2 of the Treaty – namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. See Closa et al. (2014) and Sadursky (2010).
- <sup>6</sup> Bermeo (2016: 5) succinctly defines democratic backsliding as 'the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy'.
- <sup>7</sup> This article does not offer a detailed review of the deterioration of democracy and the rule of law in various EU member states. While existing studies have not detected a pervasive pattern of backsliding across new (or old) EU member states, they have identified a number of threatening cases. Early studies (see for instance Levitz and Pop-Eleches 2010; Pridham 2008; Spendzharova and Vachudova 2012) tended to find a slowdown in democratic reforms rather than backsliding, whereas more recent studies (see for instance Bugarič 2015, Sedelmeier 2014, Von Bogdandy and Sonnevend 2015) detect clear instances of backsliding in Hungary, Romania and Slovenia.
- <sup>8</sup> Gibson (2005) terms this coexistence of contrasting regime types at the national and subnational level 'regime juxtaposition'.
- <sup>9</sup> For a review of the EP's efforts to increase its control gradually over the selection of the Commission president and to increase voter participation through the *Spitzenkandidat* process, see Kelemen (2014).
- <sup>10</sup> See Article 7 of Regulation (EC) No. 2004/2003 of the European Parliament and of the Council of 4 November 2003.
- <sup>11</sup> For instance, this scholarship has emphasized that routine infringement procedures for violations of EU law cannot address the systemic character of democratic backsliding while the Article 7 'nuclear option' procedure is nearly impossible to deploy because it requires unanimous agreement amongst member states (Blauberger and Kelemen 2016). See, for instance, Scheppele (2015a) for an innovative proposal for a new legal instrument that would strengthen the EU's hand in combatting democratic backsliding.
- <sup>12</sup> Considering a different context, the experience of the US reminds us that parties of the left sometimes do protect local autocrats – as the national Democratic Party supported the anti-democratic practices of its co-partisans in the 'Solid South' for decades.

- <sup>13</sup> I thank Kim Scheppele and an anonymous reviewer for emphasizing this point to me.
- <sup>14</sup> Article 83(1c) and 83(1m) of Act CLXXXV.
- <sup>15</sup> See [http://ec.europa.eu/budget/mycountry/HU/index\\_en.cfm](http://ec.europa.eu/budget/mycountry/HU/index_en.cfm) for budget information.
- <sup>16</sup> Case C-286/12, *European Commission v Hungary*; See the Commission's press release IP/12/24 of 17 January 2012.
- <sup>17</sup> Communication from the Commission to the European Parliament and the Council, 'A New EU Framework to Strengthen the Rule of Law', 3 November 2014, COM (2014) 158 final.
- <sup>18</sup> See the Tavares Report (European Parliament 2013), prepared by the Parliament's Committee on Civil Liberties, Justice and Home Affairs and endorsed by the plenary in July 2014.
- <sup>19</sup> Communication from the Commission to the European Parliament and the Council, 'A New EU Framework to Strengthen the Rule of Law', 19 March 2014, COM (2014) 158 final/2.
- <sup>20</sup> One EPP member who clearly had taken a tough line on the Orbán government was Justice Commissioner Viviane Reding. Under her leadership, from 2010 to 2014 the Commission launched a series of legal enforcement actions (so-called infringement procedures) targeting specific actions the Orbán government took as part of its effort to undermine the rule of law and democratic values. This approach alone proved inadequate to resist Orbán's drive to roll back democracy, yet at the same time both she and Commission President Barroso argued that the more threatening Article 7 procedure was in practice a 'nuclear option' (Barroso 2012) and 'almost impossible to use' (Reding 2013). Therefore, they pushed for the establishment of a new framework specifically designed to address emerging threats to the rule of law.
- <sup>21</sup> See [www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey](http://www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey).
- <sup>22</sup> See 'Hungary: EPP Group Firmly Opposed to Death Penalty, Rule of Law Applies to All Member States', EPP press release, 10 June 2015, at [www.eppgroup.eu/press-release/Hungary%3A-EPP-Group-firmly-opposed-to-death-penalty](http://www.eppgroup.eu/press-release/Hungary%3A-EPP-Group-firmly-opposed-to-death-penalty).
- <sup>23</sup> The Commission insisted that though the situation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and fundamental rights (European Parliament 2015).
- <sup>24</sup> See EuParl.net (2015). For data on EPP voting by party group affiliation, see [www.votewatch.edu](http://www.votewatch.edu).
- <sup>25</sup> See above, note 12.
- <sup>26</sup> The crisis was sparked by an illegal move by the previous government, led by the Civic Platform Party, which had sought to pack the Constitutional Court with its preferred judges before leaving office. The outgoing government had the authority to appoint replacements for three Constitutional Court judges who retired in November before it left office, but in addition it also sought to appoint replacements for two judges who were set to retire in December, by which point

- the new government would be in office. On 3 December, the Constitutional Court struck out the latter two appointments, but held that the three judges appointed in November should take their seats on the Court. The government has refused to publish or implement the ruling. See Kelemen (2016).
- <sup>27</sup> However, one might argue, equally, that the greater size and strategic significance of Poland should have made it less likely that the EU would challenge the PiS government. Critics often suggest that the EU takes a laxer approach to enforcing EU norms when large, powerful governments violate them than when small, weak ones do.
- <sup>28</sup> Notably Fidesz broke ranks with its EPP group in order to support the PiS government in this vote. For results of the roll-call vote see: [www.votewatch.eu/en/term8-situation-in-poland-motion-for-resolution-vote-resolution.html](http://www.votewatch.eu/en/term8-situation-in-poland-motion-for-resolution-vote-resolution.html).
- <sup>29</sup> With Brexit now on the horizon, PiS is likely to become even more isolated as it will lose its most powerful ally in the ECR group.
- <sup>30</sup> See Scheppele (2016), however, for discussion of an approach that might circumvent such a veto.

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