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# Transnational Complicity in Democratic Backsliding

**Abstract:** Recent developments in Hungary and Poland have made democratic backsliding a major issue of concern within the European Union (EU). This article focuses on the secondary agents that facilitate democratic backsliding in Hungary and Poland: the European People's Party (EPP), which has continually protected the Hungarian Fidesz government from EU sanctions, and the Hungarian ruling party Fidesz, which repeatedly promised to block any EU-level sanctions against Poland in the Council. The article analyses these agents' behaviour as an instance of transnational complicity and passes a tentative judgment as to which of the two cases is normatively more problematic. The analysis has implications for possible countervailing responses to democratic backsliding within EU member states.

**Keywords:** Democratic backsliding; European Union; partisanship; complicity; transnationalism.

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## Introduction

After a landslide victory in 2010, the Hungarian Fidesz party under the leadership of Viktor Orbán embarked on a project that may be described in terms of 'disabling the constitution' and liberal democracy more generally (e.g. Bánkuti et al., 2012; Castillo-Ortiz, 2019). In 2015, Poland followed suit, when the nationalist and conservative Law and Justice party (PiS) won a narrow parliamentary majority and started implementing reforms that closely followed the Fidesz script.

These developments have made 'democratic backsliding' a major object of concern within the European Union (EU). Briefly, democratic backsliding may be defined as the 'state-led debilitation or elimination of any of the political institutions that sustain an existing democracy' (Bermeo, 2016: 5). Typically, this involves sustained attacks on constitutional courts, basic rights and media freedom, as well as attempts to limit the opposition's room for manoeuvre.

While much has been written about Hungary and Poland as individual country cases, comparatively little attention has been paid to the various *secondary agents* that facilitate the Polish and Hungarian governments' efforts to undermine democracy and the rule of law. By 'secondary agents,' I mean agents that are not the Polish or Hungarian government, but without whose help the Polish or Hungarian governments might have been more hesitant about, or even been prevented from, realising their illiberal constitutional projects.

To get a rough sense of the problem, consider one of the few studies that are concerned with secondary agents' role in democratic backsliding, namely

Kelemen's account of the transnational partisan politics of democratic backsliding (Kelemen, 2017). Kelemen shows that the EU's overall rather different reactions to Hungarian and Polish democratic backsliding – with Poland being sanctioned much faster and more robustly than Hungary – can be explained by the capacity of the respective governing parties' EU-level allies to block potential sanctions.

The key case Kelemen expounds on is that of the European People's Party (EPP) – the largest party in the European Parliament – and the Hungarian governing party Fidesz, which is a member of the EPP. He demonstrates that the EPP has in the past effectively used its electoral and structural power to protect its domestically successful member Fidesz from EU-level sanctions, notably from an Article 7-procedure. The hypothesis is that the EPP did this because Fidesz reliably delivers votes to the EPP.<sup>1</sup>

But the EPP-Fidesz case is not the only relevant case of this sort. Fidesz's chairman, the pugnacious Hungarian prime minister Viktor Orbán, repeatedly announced that he would block any Article 7-sanctions that the EU might propose against Poland and its PiS-led government. In so doing, he effectively signalled to EU bodies that any attempt to sanction Poland will be futile, thus also acting as a secondary agent that facilitates processes of democratic backsliding. In sum, the EPP protected Fidesz from sanctions, and Fidesz promised similar protection to the PiS.

This sort of behaviour, I suggest, is best understood as a form of complicity, and in this article, I call it *transnational complicity* in democratic backsliding. It is *complicity* in the ordinary sense of one agent contributing to another agent's wrongdoing – the wrongdoing in question being the 'state-led debilitation or elimination of any of the political institutions that sustain an existing democracy' (Bermeo, 2016: 5). It is *transnational* because it involves actors from different political spheres – national and supranational – acting together in a more or less coordinated fashion.

As such, transnational complicity in democratic backsliding constitutes a normatively distinctive phenomenon. It involves a form of wrongdoing rarely recorded or analysed in current debates on democratic backsliding, namely that some actors *help illiberal governments to systematically undermine democracy and the rule of law*. Taking this seriously as an issue of normative concern, I want in this article to examine transnational complicity in democratic backsliding as a particular *moral problem* of transnational politics in the EU.

<sup>1</sup> To be sure, things look a bit different now, not least because a majority of EPP MEPs voted in favour of initiating an Article 7-procedure against Hungary in September 2018. Yet it remains doubtful whether this will have any real impact given the well-known difficulties of completing the Article 7-procedure. It might well be that the EPP's behaviour remains an episode of 'virtue signalling,' rather than decisive action (Wolkenstein 2018).

The next section that follows details the two cases of transnational complicity I have already touched on: the EPP protecting Fidesz, and Fidesz protecting the PiS. The remainder of the article discusses in what sense these cases of complicity are instances of moral wrongdoing, and analyses the relevant normative differences between them. In closing, I discuss the implications of the analysis for debates on protecting democracy and the rule of law within the EU.

### **Two cases of transnational complicity**

As I have already indicated, the cases I am mainly interested in in this article are cases where actors make a secondary contribution to a primary wrongdoing. The primary wrongdoing in question is democratic backsliding within EU member states; the secondary contribution the indirect facilitation of the primary wrongdoing. As we shall see, the secondary contribution is itself a particular form of wrongdoing. Agents who contribute to a primary wrong are not mere bystanders without responsibility.

Table 1 offers an overview of the actors, their status and the type of wrongdoing they commit, in the two cases the article focuses on – Hungary and Poland. I have emboldened the things I will be concentrating on, namely the EPP and Fidesz's role as *complicit agents* in relation to Fidesz and the PiS, respectively. I will not discuss the primary wrongdoing of democratic backsliding in detail here, assuming readers are broadly familiar with the developments in Hungary and Poland. Anyone interested in these developments can turn to numerous reports from international organisations (e.g. European Parliament, 2013; Venice Commission, 2013; Venice Commission, 2016) and scholarly studies (e.g. Bozóki and Hegedüs, 2018; Karolewski and Benedikter, 2017; Krekó and Enyedi, 2018; Müller, 2013; Pech and Scheppele, 2017; Rupnik, 2016; Surowiec et al., 2020).

Before fleshing out in what sense exactly the EPP and Fidesz are complicit, two clarifications are in order. First, Fidesz appears in our cases both as a primary wrongdoer (because it is the primary agent responsible for democratic backsliding in Hungary) and as complicit agent (because it also facilitates democratic backsliding in Poland by supporting the PiS). I keep these two statuses separate for analytical reasons, and I shall remain agnostic as to whether anything normative follows from the fact that Fidesz possesses both of them. (My hunch is that it makes Fidesz more blameworthy as a wrongdoer.)

Second, note that the primary wrongdoing of democratic backsliding comes with another, 'adjacent,' wrong: when EU member states slide away from democracy and the rule of law, they also make the EU as a whole less democratic. This is so because the democratic legitimation of the EU depends in important

ways on the democratic legitimation of its individual member states.<sup>2</sup> By implication, complicit agents are not only complicit in democratic backsliding within individual member states, but also in undermining democracy in the EU more generally. Given space constraints, however, I will not discuss this here.

ACTOR	STATUS	WRONGDOING
Fidesz, PiS	Primary wrongdoer	(1) Democratic backsliding (Fidesz in Hungary, PiS in Poland); (2) indirectly making the EU as a whole less democratic
EPP, Fidesz	Complicit agent	(1) <b>Facilitating democratic backsliding (EPP in the case of Hungary, Fidesz in the case of Poland)</b> ; (2) facilitating the erosion of the EU's democratic credentials

Table 1: Main actors and forms of wrongdoing

With these clarifications in place, we are now in a position to look more closely at how exactly the EPP and Fidesz have been complicit in democratic backsliding. What are their secondary contributions to the primary wrong of eroding democracy and the rule of law? How do they become facilitators of democratic backsliding?

**Case 1: EPP protecting Fidesz**

Starting with the EPP case, we may say, with Daniel Kelemen, that ‘the EPP has played an indispensable role in shielding Viktor Orbán’s regime against EU sanctions as it has dismantled Hungarian democracy and installed a competitive authoritarian regime within the EU’ (Kelemen, 2020: 483). Here are two key examples.

First, in July 2013, when the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs issued a report criticizing the erosion of fundamental rights in Hungary – the so-called ‘Tavares report’ (European Parliament, 2013) – most EPP MEPs voted against it. EPP vice-chair Manfred Weber (a German CSU politician who was the EPP’s candidate for the Commission Presidency in 2019 and is currently Chairman of the EPP group in the European Parliament) dismissed it as a ‘wish list of the European leftist parties who aim to impose their own political agenda on Hungary’ (EPP Group, 2013).

<sup>2</sup> If, for example, one member state does not meet the same democratic standards as all the others, and that member state makes collective decisions with the other states in the European Council that apply to all EU citizens, those EU-wide decisions will as a result also be insufficiently democratic; they will be ‘contaminated’ by one state’s questionable democratic credentials (Möllers and Schneider, 2018: 10-12). For an analogous point that is justified along the lines of the principle of ‘all affected interests,’ see Müller (2015).

Second, in 2014 the Barroso Commission established the *Rule of Law Framework* to equip the EU with more adequate tools to counter democratic backsliding. The goal was to allow the EU to increase pressure on illiberal governments by issuing a series of warnings, prior to triggering the Article 7-procedure. In 2015, then, when the EP passed a resolution calling on the Commission to launch the Rule of Law Framework procedure against Hungary, only parties on the political left voted in favour, while the EPP voted against it, with its leadership publicly defending the Orbán government (Kelemen, 2017: 226). Ultimately, the Juncker Commission refused to launch the procedure.

These are not the only instances of EPP support for Fidesz that are worth highlighting.<sup>3</sup> Consider that former EPP leaders, such as Manfred Weber and Joseph Daul (the EPP's President from November 2013-November 2019), actively supported the Orbán government's re-election in 2014 and 2018. They also remained generally supportive of Orbán as Fidesz's autocratic practices – and the link with the EPP – gained more and more attention through 2017 and 2018. In April 2017, for example, after the Orbán regime launched its attack on the Central European University (CEU), the EPP issued a press release claiming that Orbán had broadly agreed to protect academic freedom, and that the ouster of the CEU be a 'red line' he wouldn't cross (EPP Group, 2017).

In 2018, the EPP's support for Orbán became an issue in the internal EPP primary to determine who would be the party's *Spitzenkandidat* for the 2019 European Parliament election, and many EPP members grew uncomfortable with Orbán's attacks on democratic values. In response, Manfred Weber, well-known for his close relationship with Orbán, announced that he would endorse the 'Sargentini Report' that calls for the triggering of Article 7 against Hungary (European Parliament, 2018a), hoping that this would raise his chances of securing the support of Orbán-sceptics within the party. Yet, against those within the EPP who proposed a vote to expel Fidesz if the Sargentini report passed (which it did), Weber and other EPP leaders declared a few days later that they would not be ejecting Fidesz after all (De la Baume et al., 2018). Instead, they,

agreed with Fidesz that it would voluntarily 'suspend' its membership pending an investigation by a committee of EPP 'wise men' – which would only report back only after the European Parliament elections. This so-called suspension was quickly revealed to be a ruse: Most importantly, it turned out that the suspension did not apply to Orbán's

3 Numerous studies disentangle the complex ways in which the EPP has supported Fidesz in the last decade. Meijers and Van der Veer show, for example, that 'in the Hungarian case MEPs from the EPP were less likely to emphasize the issue' of democratic backsliding in the European Parliament than members of other party groups (Meijers and Van der Veer, 2019: 851).

Fidesz MEPs in the European Parliament, and that their seats would still count towards the EPP's tally (Kelemen, 2020: 488).

Now, one might say that the EPP did eventually shift its position from near-unconditional support to a more critical position. But note that the EPP's leaders' actions come with very few costs to the EPP.<sup>4</sup> Suspending Fidesz is relatively cost-free because the EPP could still profit from Fidesz's ability to win a great number of seats. And the endorsement of the Sargentini Report is unlikely to have serious consequences for the Orbán regime, due to the extreme difficulty of seeing through the Article 7-procedure (while helping the EPP to look much better in the eyes of critics).<sup>5</sup>

It seems that the only time that EPP leaders agreed that Fidesz crossed a 'red line' was when it attacked key EPP figure and Commission president Jean-Claude Juncker in February 2019, plastering the country with posters that essentially accused Juncker of conspiring with George Soros in order to flood Hungary with refugees. This prompted EPP member parties from ten states to request the expulsion of Fidesz from the group, and led Manfred Weber to send a letter on March 5 that sets out three new 'red lines' for Orbán, namely (1) the removal of the anti-Juncker posters; (2) a promise to refrain from such attacks in the future and apologise to EPP members; and (3) the 'clarification' of legal issues surrounding the CEU (Weber, 2019).

Yet these demands not only ignore all fundamental problems with democracy and the rule of law in Hungary; they also pretend away that the CEU had been forced to announce its coming relocation to Vienna already in 2018. In all, what Weber is asking for is that 'Orbán show loyalty and respect to the EPP' (Kelemen, 2019). This may be interpreted, if not as outright support for Fidesz, then as a clear commitment *not* to take decisive action against the Orbán government, again shielding the latter from being held responsible.

The most plausible explanation for why the EPP protects Fidesz from possible sanctions and refuses to restrain Fidesz itself is that it has something to *gain* from Orbán's party, namely mandates and loyal political support. In Kelemen's words, the 'Fidesz party delivers MEPs to the EPP bloc in the European

4 There are of course several small, mostly Northern European, EPP-member parties who press for the expulsion of Fidesz – the Swedish *Moderaterna* being one example. These parties are just not those who call the shots within the EPP group.

5 To get a flavour of how difficult it is, consider how the European Parliament itself describes the next steps following the vote: 'The proposal for a Council decision will now be sent to the EU member states. They may, acting by a majority of four fifths, determine the existence of a clear risk of a serious breach of the EU values in Hungary. The Council would first have to hear the views of the Hungarian authorities, and Parliament would need to give consent. The EU member states may also choose to address recommendations to Hungary to counter the risk. At a later stage, the European Council may determine, by unanimity and with the Parliament's consent, the existence in Hungary of a serious and persistent breach of the rule of law, democracy and fundamental rights. This could eventually lead to sanctions, such as the suspension of the voting rights in the Council' (European Parliament, 2018b). Also see Wolkenstein (2018).

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' (Kelemen, 2017: 226-227).

More particularly, Orbán's Fidesz party delivers twelve seats to the EPP in the European Parliament, where the EPP (after the elections of 2019) holds a total of 187 seats. This may not sound like much, but note that only the German Christian Democratic Union (CDU) and the Spanish *Partido Popular* deliver more seats (23 and 13, respectively). Furthermore, Fidesz votes quite reliably with the EPP, being an overall trustworthy partner. The following statement by the EPP's former president Joseph Daul, though slightly overstated, sums it up well: 'Fidesz, has *always voted in line with the EPP* in the European Parliament. Since I have been President of the group, I have *always been able to count on* [...] [Fidesz] to support our position' (cited in Barbière, 2015, emphasis mine).<sup>6</sup>

### ***Case 2: Fidesz protecting PiS***

In the second and arguably less complex case of transnational complicity in democratic backsliding, the first case's primary wrongdoer, the Hungarian Fidesz party, assumes the role of a complicit contributor to the illiberal political project of the Polish PiS party. What happened exactly?

The first thing to note is that, compared with its handling of Hungary's democratic backsliding, the EU's response to the illiberal developments in Poland has been quite robust: reacting to the ultra-conservative PiS-government's attacks on the independence of the country's high court, the Constitutional Tribunal, the European Commission triggered Article 7 in September 2017, just two years after the PiS-government was elected. This was an unprecedented move, indicative of the extent to which the PiS's 'judicial reforms' were seen as a threat to the rule of law – and of the fact that the PiS lacks high-profile partisan allies at the EU-level that could protect it from sanctions.

But the PiS does have at least one high-profile ally, namely the Hungarian prime minister Viktor Orbán, who repeatedly promised to protect the PiS. In December 2017, for example, he made abundantly clear that Hungary would not endorse an attempt to invoke the EU's Article 7 sanctioning process, making sure that the proposal is killed latest in the Council. 'We need to make it clear to the EU,' he said, 'that it is pointless even to start proceedings against Poland as there is no chance of seeing it through – because Hungary will be there and form an *insurmountable road block*' (Reuters, 2019, emphasis mine).

It is not difficult to interpret this as a complicit contribution to Poland's democratic backsliding: Fidesz gives the PiS a strong reason to ignore pressure

<sup>6</sup> The point is overstated inasmuch as Fidesz of course did not *always* vote with the majority line.

from the EU. As Scheppele notes, any non-compliance of the Polish government with the EU's demands can be explained by the fact that 'It can see ahead to the endgame. The Polish government knows that it will be impossible for Article 7 sanctions to be mustered against it even if there is a widespread political will to do so' (Scheppele, 2016). (This point is still valid now that an Article 7-procedure has initiated against Hungary, even if there is a normative case to be made that no country against which Article 7 has been invoked should be able to vote on the sanctions of another country in the Council.)

The Fidesz-PiS alliance is of a different nature than the EPP-Fidesz alliance. It is not driven by EU-level electoral incentives, for the two parties are members of different party groups (the PiS is a member of the conservative and eurosceptic European Conservatives and Reformists [ECR] group while Fidesz is, as we saw, a member of the EPP). Rather, what binds them together is a joint commitment to what Orbán recently called a 'cultural counter-revolution' in Europe (Foy and Buckley, 2016). This 'counter-revolution' involves, most notably, strengthening national cultures and identities, and of course protecting these cultures and identities better against immigrants.

Putting the point in another way, the Fidesz-PiS alliance is not merely a power-maximising *Zweckgemeinschaft*, but a strongly ideology-driven association based on a shared political project. The avowed similarities between the two parties' visions are indeed striking: Jarosław Kaczyński, the ultra-conservative co-founder of PiS, famously remarked that '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). This was 18 months after Fidesz came into power in Hungary.

### **Conceptualising transnational complicity**

Having obtained a good sense of the two cases, we can proceed to subject them to normative scrutiny. A natural first step is to look more closely at the concept of *complicity*; for up until this point, I have only postulated that complicity is an adequate – indeed the most adequate – concept for understanding and evaluating the activities of the EPP (when it protects Fidesz from sanctions) and of Fidesz (when it promises protection to the PiS), but I have not argued the point in more detail.

Let us start then by explicating the notion of complicity. As I have already noted, at the most general level complicity may be understood in terms of one agent contributing to another agent's wrongdoing. There are two elements in this general and sketchy definition that must be clarified more: the complicit agent's *contribution*, on the one hand, and the notion of *wrongdoing*, on the other. Let us take them in turn.

First, I suggest to conceive a complicit agent's contribution, with Lepora and Goodin (2015: 41-42), in terms of her causally, or potentially causally, helping to bring about the primary wrongdoing, without her contributory actions constituting the principal wrongdoing itself. (As we shall see later, including not just causal but also *potentially causal* contributions matters for moral evaluation.) Second, this obviously presupposes a principal wrongdoing. Absent such wrongdoing, the notion of complicity makes little sense: simply put, one cannot be 'complicit' in something 'good,' but only in something 'bad.'<sup>7</sup>

Importantly, the badness of the principal wrongdoing is also what makes complicity bad (Lepora and Goodin, 2015: 103-104). This does not mean that the badness of complicity is directly proportional to the badness of the principal wrongdoing: such a claim would be spurious, since one can contribute in different degrees, and the extent to which one contributes would seem to matter for evaluating the contribution's 'badness.' The point is rather that the badness of the principal wrongdoing is a baseline indicator for how bad a complicit contribution may be.

Note that in the analysis of transnational complicity that follows, I will not deal with the question of the principal wrongdoing's relative badness. That is, I will take no stance on *how bad* the principal wrongdoing is compared with other forms of wrongdoing. This is, first, because determining the relative badness of democratic backsliding in a reliable fashion would require a discussion that takes us quite far away from the topic of the article (questions arise such as: what exactly should we compare democratic backsliding with, and how do we reliably determine the magnitude of its 'badness'?). Secondly and more pertinently, it seems to me that a discussion of relative badness is also unnecessary, since the issue of whether democratic backsliding is more or less bad relative to other forms of wrongdoing is irrelevant for the analysis of the article. It suffices to note that democratic backsliding is a form of wrongdoing.

This leads to another question that must be clarified before moving on: why is democratic backsliding a form of wrongdoing? I have so far just postulated that democratic backsliding is a 'wrong,' and relied on readers' intuitive agreement with this conjecture. But why exactly is it a wrong? The most straightforward answer, I suggest, is that Hungary and Poland violate their duty to obey EU law when they undermine democracy and the rule of law. That duty arises because both states have democratically ratified the EU treaties, thereby having accepted the treaties as (1) a framework for dealing with a specified range of issues and

<sup>7</sup> This is neatly captured in the *Oxford English Dictionary's* definition of complicity as 'the fact or condition of being involved with others in an activity that is unlawful or morally wrong' (*Oxford Dictionary of English* 2015).

(2) a source of normative demands on national institutional configurations.<sup>8</sup>

Of course, this is not the only answer that could be given to this question. It is probably possible to mount a more general case against democratic backsliding that shows that governments who undermine democracy and the rule of law engage in wrongdoing *irrespective of which treaties they may have signed*. This could be achieved by invoking a moral requirement that states ought to secure citizens' public and private autonomy through well-functioning democratic and legal institutions.<sup>9</sup> But though I am sympathetic to this line of reasoning, I simply lack the space to develop such an argument here. The more 'legalistic' (and possibly less controversial) argument from treaty-based obligations suffices for our purposes.

Now, it is specifically the obligation to organise national institutions in a particular way (2) that is violated by the Polish and Hungarian governments. To see where this obligation arises from, consider the well-known Article 2 TEU, which stipulates that the Union is 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.' This implies not least that, contrary to what major Fidesz- and PiS-officials often claim, the EU member states cannot simply organise their national judiciaries as they see fit, hiding behind appeals to 'national sovereignty' or the ostensible 'will of the people' when they 'fundamentally undermine the independence and impartiality of national courts' (Scheppelle and Pech, 2018).<sup>10</sup> Rather, they are obliged to keep these institutions intact (for extensive discussion, see Hillion, 2016).

Looking at the issue in this way presupposes the legitimacy of EU law, understood, again, qua member states having an obligation to obey EU law. I submit that this is a reasonable presupposition, without it following that all aspects of EU law are unobjectionable. It is reasonable, firstly, because international treaties may be considered 'legitimate to the extent and exactly because they tend to require national legislative endorsement in some form or another' (Kumm, 2004: 924) – a condition satisfied here, for, as noted, both Hungary and Poland have ratified EU treaties.

Nor, secondly, are conditions met that could potentially weaken the duty to obey EU law, such as that 'unelected officials in conjunction with other actors

8 On a general account of the legitimacy of international law that justifies this way of looking at EU treaties, see Kumm (2004).

9 Something along these lines is done by Habermas (1992).

10 The plausibility of such appeals to the 'will of the people' is at any rate questionable. For when national governments implement institutional reforms that constrain the political autonomy of their citizens, as the Fidesz- and PiS-governments did, they cannot claim that their actions represent a democratic popular will. I thank one anonymous review for suggesting this additional argument.

[...] create new obligations, which, at the time the treaty was signed, were impossible to foresee' (Kumm, 2004: 924) – or, worse, that new obligations are created that turn out to undermine democracy or justice at the member state level (cf. Patberg, forthcoming). Certainly, no unforeseeable obligations have arisen in relation to the foundational values set out in Article 2 since Hungary and Poland ratified the treaties; and because they commit member states to respect human dignity, freedom, democracy, etc. – which entails, as noted, organising domestic institutions in a particular way – those values can hardly be said to undermine democracy and justice, either (cf. Habermas, 2011: 60-61).

One might accept the argument laid out so far, but still doubt that *complicity* as defined above captures the actions undertaken by the EPP (in relation to Fidesz) and Fidesz (in relation to the PiS) better than alternative concepts. To address this worry, let us run through several plausible alternative concepts and see what work they can do. We can proceed here by a process of elimination.

First, it would no doubt be spurious to suggest that what we have here is *full joint wrongdoing*, meaning two or more agents doing wrong together, without much division of labour.<sup>11</sup> For neither the EPP (in relation to Fidesz) nor Fidesz (in relation to the PiS) engage in democratic backsliding *together*: Fidesz and PiS are no doubt the 'principal wrongdoers,' being the agents who unilaterally orchestrate the reforms that erode democracy and the rule of law in their respective countries. The EPPs and Fidesz offer extra-state support, but they certainly do not contribute directly to these reforms.

What about *cooperation*, which ordinarily refers to two or more agents having a shared plan (here: a shared plan to do something wrong), and pursuing that plan together while dividing up labour?<sup>12</sup> This might at first seem a fitting concept, especially in the case of the Fidesz-PiS alliance, for as we saw, these two parties share the plan of starting a 'cultural counter-revolution' in Europe. But there are good reasons for thinking that this is not correct, having to do with the just-mentioned fact that PiS is the principal wrongdoer in the Poland case. The point is this: even though Fidesz avowedly endorses the general idea of rolling back liberal democracy, it is itself not committed to rolling back liberal democracy *in Poland*. In other words, while Fidesz and PiS's values and visions overlap, Fidesz cannot be said to share PiS's *particular* plan as far as democratic backsliding is concerned. To speak of cooperation, it would have to be shown that that particular plan is shared by all agents involved. (For the same reason,

11 This section draws heavily on the conceptual analysis in Lepora and Goodin (2015: 35-50).

12 The *OED*'s definition is helpful, here. Accordingly, cooperation is 'the action or process of working together to the same end' (*Oxford Dictionary of English*, 2015).

it should be clear that cooperation is the also wrong concept in the case of the EPP-Fidesz alliance.)

Could the transnational behaviour of the parties be called a *conspiracy*, a form of secretive joint action aimed at advancing shared, unlawful or harmful goals (i.e. agents agree to do wrong)? I think not. Although there is an element of secrecy involved in both cases, again the actors' goals do not seem to be shared in the narrower sense required for conspiracy. To repeat, a conspiracy is typically a secret plan by a group of agents to do something together, whereby 'together' implies having one and the same goal. But as I argued in the previous paragraph, there is no goal convergence in the relevant narrow sense here. At most, actors subscribe to a broader (and diffuse) political vision, as in the case of Fidesz and PiS. Thus, the conditions required for conspiracy do not obtain.

This leaves us with the admittedly broad but accurate notion of complicity, understood, to repeat, in terms of one agent's causal or potentially causal contribution to another agent's wrongdoing. As Lepora and Goodin usefully explain, complicity so understood can be further disaggregated into 'cousin' concepts such as *collaboration*, *connivance*, and *condoning*; so, our conceptual apparatus could in principle be made even more fine-grained. Useful though such disaggregation can be – Manfred Weber's above-mentioned dismissal of the Tavares report as 'wish list of the European leftist parties' may plausibly be categorised as *condoning* qua an agent's accepting and pardoning the morally or legally wrong behaviour of another agent – for the purposes of the present article it suffices to operate with a general concept of complicity.

What I want to do in the remainder of the article is to zoom in more closely and discuss the principal normative differences between our two cases of transnational partisan complicity. Assuming that they are both instances of moral wrongdoing themselves, are they equally normatively troubling, or do they differ in blameworthiness? Tackling this question is relevant not least if we think that democratic backsliding is a wrong that the EU should interfere with, for example through sanctions. For *if* we are able to identify more and less troubling instances of complicity, we also get a glimpse of which forms of complicity we should be most concerned about.

### **How to evaluate complicity**

How should we approach this task? How can the differences between different instances of complicity be evaluated? In criminal law and political theory, two things are typically considered crucial for assessing complicity: the (1) *intentions of agents* and the (2) complicit agent's *causal contribution* to the principal wrongdoing. These two categories can usefully be applied to cases of

partisan complicity in democratic backsliding, and I will adopt them in this section to offer a normative comparison of the two cases discussed above.

My goal is to employ categories that are widely accepted as central to assessing the normative status of complicit actions in order to illuminate the main differences between the EPP's and Fidesz's complicity in democratic backsliding. The choice of conceptual instruments is necessarily selective: additional categories could very possibly be included, but doing so would require more argument than I can offer here without moving too far away from the article's primary topic.

Let us then look more closely at (1) and (2). In criminal law theory, the intentions of agents (1) are commonly thought to be the core component of the *mens rea* condition: in order for a complicit agent to be accountable for their actions, that agent must *intentionally* contribute to the wrongdoing of others (Baker, 2017; Kutz, 2000; Pauer-Studer, 2018). In the case of group agents like political parties, the relationship of individual persons to the actions of the group may be characterised, with Kutz, as one of 'inclusive authorship,' meaning that the individual partisan can say, '*we* did it', about the actions of her party, relying on a teleological relation between her participatory intention and the joint outcome (Kutz, 2000: 105-106). In this sense, individuals can be held accountable for the actions of a group agent they constitute, and the group agent can also be held accountable *qua* group agent.

Some scholars – most prominently Lepora and Goodin – have plausibly suggested that the *extent of overlap* between the complicit agent's purposes in performing the contributory act and the principal wrongdoer's purposes likewise matters for evaluating acts of complicity. It matters not least because it makes a great difference, morally, whether or not a complicit agent actually *approves* of the wrongdoing or not.

This is true on both deontological and consequentialist conceptions of wrongdoing (Lepora and Goodin, 2015: 108-109).<sup>13</sup> Deontologically, taking a pro-attitude towards the principal wrongdoing while contributing to it as accomplice makes acts of complicity more blameworthy because approving of wrongdoing is in and of itself blameworthy. From a consequentialist perspective, on the other hand, approval of the wrongdoing is morally blameworthy because it suggests the complicit agent is likely to contribute to bad outcomes not only in the present but also in the future. Thus, morally speaking, the complicit agent's

13 I follow Lepora and Goodin here in their view that a persuasive account of complicity must track concerns of what they call 'folk morality' which is 'more relaxed' about the relationship between deontological and consequentialist arguments than mainstream analytic philosophy, acknowledging that both have their place (Lepora and Goodin, 2015: 89-94).

pro-attitudes to the principal wrongdoing can be seen as an aggravating factor. They make acts of complicity more blameworthy.

Moving now to (2), it is generally assumed that acts of complicity must make a causal, or potentially causal, contribution to the principal wrongdoing in order to be considered blameworthy (Moore, 2007). I say causal, *or potentially causal*, contribution because causality need not be understood only in counterfactual terms (Gardner, 2007: 72-75; Lepora and Goodin, 2015: 61-62; Zakaras, 2018: 197). That is to say, in order for a complicit contribution to be blameworthy, it need not be the *one* thing that makes the principal wrongdoer succeed in committing the primary wrong. What is sometimes called ‘redundant’ causation (Tuck, 2008) suffices, morally: even if a complicit contribution that is not causally essential in the sense that the wrongdoing would not have occurred without the contribution, ‘it does [...] make a difference to the overall incidence of wrongdoing’ (Gardner, 2007: 72).

To understand why this is so, recall the deontological and consequentialist arguments rehearsed above. Both explain why even *potentially* causal contributions in the sense I just described can be morally blameworthy. From the deontological view that emphasises the ultimate importance of intentions, the matter is clear-cut: because the complicit agent *intended* to contribute to the wrongdoing, she is blameworthy irrespective of the causal effect of her contribution.

From the consequentialist view the issue is on its face less clear-cut, but potentially causal contributions can be blameworthy on this view too. The reason is simple. If consequentialism is to be action-guiding – which morality is supposed to – then it must assess actions on the basis of *what consequences might reasonably have been expected at the time of the action*, not on the basis of what actually resulted in the end. This means it must count even redundant contributions to wrongdoing as blameworthy, since for any wrongdoing that actually occurs, ‘a redundant cause is a necessary condition of its occurrence, along some (but not all) of the possible causal paths by which it might have occurred’ (Zakaras, 2018: 198).

### **Application**

With these reflections on the normative analysis of complicity in place, we can now turn to the comparative assessment of our cases. Which case of partisan complicity in democratic backsliding is more blameworthy, morally?

It is useful to begin by noting that there is no relevant difference between the cases as far as the *intentions* of the complicit agents are concerned: both the EPP and Fidesz acted intentionally (and knowingly) in contributing to the respective

wrongdoing of Fidesz and the PiS. So, the question of responsibility is readily settled. When we turn to causality, on the other hand, things are much less straightforward. Here a significant difference between the two cases emerges.

Consider first the EPP-Fidesz case. It seems certain that the EPP's structured and long-standing supranational support for Fidesz has made an important causal – and definitely not merely *potentially* causal – contribution to the occurrence of the principal wrongdoing in question. After all, and as I have noted above, the EPP's persisting protective behaviour has been crucial in enabling Orbán's government to rebuild the Hungarian state without external interference.<sup>14</sup>

Contrast this with the Fidesz-PiS case. The causal connection is much less evident, here. For Fidesz has thus far merely *promised* to protect the PiS: it has repeatedly announced to block sanctions against Poland as a measure of last resort, once the decision is brought before the Council – but it has not actually acted upon this promise, not least because the Council decision is still outstanding.

Of course, insofar as we assess the blameworthiness of actions on the basis of what consequences might reasonably have been expected at the time of the action, not on the basis of what actually resulted in the end, it seems plausible to say that Fidesz's 'promised protection' is also morally blameworthy. For it is arguably not difficult to imagine Fidesz eventually fulfilling its promise. At the same time, the causal link is undeniably much weaker relative to the EPP-Fidesz case.

If we left things here, the most plausible conclusion would be that the EPP's complicit contribution to democratic backsliding in Hungary is ultimately more blameworthy than Fidesz's contribution to democratic backsliding in Poland. This argument would turn on the EPP's more substantial causal contribution: whereas Orbán's promise to frustrate collective efforts by the EU to impose sanctions on Poland has at most had the effect of signalling to political opponents a determination to support the PiS-regime, by shielding Orbán and his party from sanctions the EPP has over time sustained democratic backsliding in Hungary.

Yet this reasoning is incomplete. It overlooks the importance of factoring into the equation the extent of overlap between the complicit agent's purposes in performing the contributory act and the principal wrongdoer's purposes also matters for evaluating acts of complicity.

<sup>14</sup> While those EU-level party groups that are 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' (Kelemen, 2017: 227).

Once we do that, I suggest, the balance tilts. Consider again the differences between the cases. If the persistently mentioned explanation that the EPP has predominantly electoral-instrumental reasons to protect Fidesz is correct, then it would seem that there is very little reason to assume an overlap of purposes. The EPP performs its contributory actions because Fidesz delivers votes to the EPP group and remains loyal to the leadership line, while Fidesz's avowed purpose is to realise the project of establishing an 'illiberal democracy' in Hungary (Müller, 2015: 142).

To be sure, there may well be some within the EPP who also endorse this larger political-constitutional project, especially within its Central and Eastern European member delegations, and in that sense, there might also be some overlap of purposes. But these individuals are arguably not in the driving seat and never have been; and as we saw, opposition to Fidesz is steadily growing within the EPP. Thus, it would be absurd to say that purposes overlap to any relevant degree.

Things look quite different when we consider the overlap of purposes between Fidesz and PiS in our second case. There is certainly a considerable overlap between the purposes that made Fidesz promise protection to the PiS, on the one hand, and the PiS's own purposes, on the other. This is of course not to say that their purposes are identical: as I argued, they do not seek *jointly* to commit acts that lead to democratic backsliding in their respective countries.

Yet, insofar as the two parties are generally committed to a similar political vision – a conservative 'cultural counter-revolution' – their purposes overlap to a much greater extent than the purposes of the EPP and Fidesz do if the argument laid out above is accepted. Orbán may not be committed to the idea of jointly advancing the erosion of liberal democracy and the rule of law in Poland, together with his ally Kaczyński, but he is certainly also not 'merely' motivated by electoral reasons (like the EPP) that differ categorically from the goal of furthering democratic backsliding. That would anyways make little sense, since Fidesz and PiS are not organised in the same EU-level party group. Rather, it seems Orbán and his party are driven by the ambition to promote particular ideas about the organisation of state and society, ideas he shares in common with the PiS and its key figures (and that are at odds with the predominant understanding of democracy and the rule of law in the EU).

In light of all this, I believe the correct outcome is that *Fidesz's protective support for the PiS is ultimately morally more blameworthy than the EPP's (electorally motivated) support for Fidesz*, due to the pro-attitudes towards democratic backsliding in Poland (and more generally) that Fidesz holds. To see

this, recall again the consequentialist argument for why pro-attitudes toward the primary wrongdoing are so problematic: according to that line of reasoning, the EPP can namely be assumed to be less prone to contribute to future instances of similar wrongdoing than Fidesz (in its role as complicit agent) because there is scarce overlap between its purposes and the aim of democratic backsliding.

Real-world developments bear out this expectation: the EPP has demonstrated that it is at least occasionally willing to turn against the Orbán regime, issuing warning signals that not any behaviour will be tolerated. And internal pressure to expel Fidesz completely is mounting. In April 2020, the leaders of 13 EPP-member parties signed a letter calling for the expulsion of Fidesz from the EPP. Signatories include the Swedish *Moderaterna*'s Ulf Kristersson, Rutger Ploum from the Dutch *Christen-Democratisch Appèl* (CDA), and Kyriakos Mitsotakis of Greece's *Nea Dimokratia*.

Orbán, meanwhile, has been defiant in his endorsement of illiberal democracy. To cite one recent example, in early July 2020, Orbán appeared together with the Slovenian Prime Minister Janez Janša and Serbian President Aleksandar Vučić (whose party, the Serbian Progressive Party, is an associate member of the EPP) in a virtual event called 'Europe uncensored.' Also, with an eye to Poland, he remarked on this occasion, 'We Central Europeans should ask the Westerners: "Please don't tell us how we have to live our lives"' (Bayer, 2020).

To be clear, the point I am trying to advance is emphatically not that the EPP did not act in morally blameworthy ways. The EPP no doubt engaged in wrongdoing, and it should be held to account accordingly. But when push comes to shove, the kinds of attitude agents hold when contributing to wrongdoing matter a great deal, morally: the absence of pro-attitudes towards the primary wrongdoing opens the door to potential future self-correction, the presence of pro-attitudes makes such self-correction unlikely.

If one accepts that, it seems to me that one must also accept that Fidesz's overlap of purposes with the PiS makes its complicity in democratic backsliding more blameworthy, relative to the EPP's complicit acts that were motivated primarily by electoral goals.

## **Conclusion**

The analysis carried out in the previous section suggests that there are good reasons to think that the case of Fidesz being complicit in the PiS's attack on democracy and the rule of law is morally more troubling than the EPP's complicity in Fidesz's illiberal political project, though this does not imply that the EPP's complicity is morally innocuous or benign. As the overview in Table 2 shows, the difference is small and hinges on one, albeit important, evaluative

criterion.

ACTOR	INTENTIONALITY	CAUSALITY/POTENTIAL CAUSALITY	OVERLAP OF PURPOSES
EPP-Fidesz	Y	Y	N
Fidesz-PiS	Y	Y	Y

Table 2: Summary of normative analysis

In these final paragraphs, I want to reflect on the analysis’s implications for debates on how to counteract democratic backsliding in the EU. The adequate protection of democracy and the rule of law within EU member states has been debated for some time now, with many scholars agreeing that the EU should be more proactive in interfering with illiberal developments in countries like Hungary and Poland (Von Bogdandy et al. 2016; Jakab and Kochenov, 2017; Kochenov, 2014; Möllers and Schneider, 2018; Müller, 2015; Sedelmeier, 2014). Does a normative account of transnational complicity bring anything new to the table in relation to these discussions?

The first and most general thing the article’s analysis adds to existing debates on preventing or counteracting trends of democratic backsliding is that it raises awareness for the relevance of transnational practices of complicity. More specifically, while most existing accounts – even those that problematise the transnational partisan alliances Fidesz and PiS are embedded in (Kelemen, 2017; Scheppele, 2016) – focus only on the principal wrongdoing committed by the Hungarian and Polish governments, the present article foregrounds the importance of ‘secondary’ wrongdoing that contributes to the principal wrong.

This change of perspective then opens the door to asking what, if anything, could be done to counteract these complicit contributions? This is a difficult question given that, generally speaking, legal interventions or prohibitive measures that target partisan political activity ‘may undermine what they are supposed to protect: a free and egalitarian political process that is based on open political competition, pluralism and a free public discourse’ (Von Achenbach, 2018) Can a case for restraining the EPP and Fidesz, such that they are prevented from complicitous activity, nonetheless be made?

In the specific case of the EU, it is certainly possible to think of good arguments for why coercive interference with partisan political processes is permissible (Wagrandl, 2018). Recall, most notably, the argument I mentioned in the first section – that the complicit behaviour of the EPP and Fidesz not only contributes to the erosion of liberal democracy in Hungary and Poland, but also diminishes

the ‘democraticness’ of the EU as a whole.<sup>15</sup> Seen in this light, interference with parties’ complicit behaviour is required for the EU’s existential survival as a democratic polity. As Scheppele et al. (2018) put it, ‘If the EU fails to defend its common values, the EU won’t merely fail as a normative project, it will cease to function.’

A helpful way of looking at this is to say, borrowing a term coined by comparative politics scholar Juan Linz (1978: 28-45), that the EPP and Fidesz act ‘semi-loyally’ vis-à-vis the political system of the EU.<sup>16</sup> They are rightfully legal political actors who are willing to ‘encourage, tolerate, cover-up, treat leniently, excuse or justify’ illegitimate actions taken by other political actors when those actors are politically like-minded (note how this chimes with the above analysis) (Linz, 1978: 32-33).<sup>17</sup> Given that semi-loyalty of this sort often leads to democratic decay, it might be said, there are good reasons to try to prevent it as it arises.

One may add to this that the conception of democracy on which the EU is based, as reflected in the values enshrined in Article 2 TEU, is a form of liberal constitutional democracy that is generally marked by a tendency towards ‘delegating power to unelected institutions’ that are ‘tasked not just with defending individual rights, but with defending democracy as a whole’ (Müller, 2015: 151-152). From this, it may be inferred that mechanisms of militant democracy that restrain political parties when they appear to undermine (however indirectly) democracy and the rule of law are fully consistent with how liberal democracy is and has historically been interpreted within the EU. This is not to ascribe normativity to a contingent historical interpretation of liberal democracy, but rather to emphasise that a particular model of liberal democracy had become ‘hegemonic’ and that that model in one way or another also underpinned the treaties which member states ratified.

If my argument that *ideology-driven complicity* is morally worse than *vote-maximising complicity* (to frame the distinction baldly) is sound, moreover, one may contemplate prioritising interference with these former instances of complicity. The reasoning would be fundamentally consequentialist, namely that an overlap of purposes between principal wrongdoer and complicit agent makes the latter especially prone to contribute to future instances of similar

15 One anonymous reviewer has rightly noted that the EPP’s complicit contribution to democratic backsliding in Hungary also strengthens Fidesz as a party, and thus increases its capacity to contribute to democratic backsliding in Poland.

16 I thank Hanspeter Kriesi for suggesting the term.

17 This is especially true in relation to the EPP, which unlike Fidesz is not simultaneously a complicit agent *and* a principal wrongdoer, but *only* a complicit agent.

wrongdoing. In practice, this would mean prioritising restraining Fidesz (not only as primary wrongdoer in democratic backsliding in Hungary but also) as complicit contributor to democratic backsliding in Poland.<sup>18</sup>

If and how this could be realised within the current legal framework of the EU, and whether the potential trade-offs with respect to open democratic procedures are worth accepting or could be avoided, are issues that I cannot discuss in detail here. I hope, however, to be able to pursue these questions in a different article. For now, I conclude that a normative analysis of transnational complicity offers a new, and potentially productive, angle on debates around democratic backsliding in the EU. It can re-orient our concerns to different sets of democracy-undermining practices, and possibly even justify new modes of interference.<sup>19</sup>

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18 Although there may be some good arguments for coercive interference with European political parties or their individual member parties in case they make a complicit contribution to democratic backsliding in individual member states, it is much less clear how interference might look in practice. Currently, the European Parliament (or a group of citizens) can lodge with the Authority for European Political Parties and European Political Foundations a request to verify European political parties' compliance with Article 2-values (this mechanism is based on EU Regulation 1141/2014 on the Statute and Funding of European Political Parties and European Political Foundations as recently amended by Regulation 2018/673). The harshest sanction would be de-registration as European political party, which also means that the party loses its funding.

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