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War as a pretext to wave the rule of law goodbye? The case for an EU constitutional awakening

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Abstract

The war in Ukraine triggered significant changes at the European Union level. The speed at which the EU has achieved progress on sanctions, migration and defense is particularly impressive. But the Russian aggression against Ukraine has also served as a pretext for putting aside internal discussions about the rule of law, and provided additional political rationales for inaction against Member State governments responsible for the violation of European values, as well as triggered the deepening of double standards in several fields. Against this background, the paper argues that using this crisis as a justification for further inaction in the context of EU values is not a sustainable course of action. The Union must not delay further the need to act to halt the insidious erosion of democracy and the rule of law *within* its own borders both at the national and supranational level.

1 | THE EUROPEAN RESPONSE TO THE RUSSIAN AGGRESSION: SOME POSITIVE DEVELOPMENTS

Putin's invasion of Ukraine, and the European response to the war, dominate the headlines, and rightly so. The barbaric crimes perpetrated just across the EU's border brought radical changes within the EU. In Germany not only direct business relations with Putin à la Schröder have been publicly condemned,[1] but we also witnessed the definitive closure of the Nord Stream 2 project.[2] The controversial policy of "merkeling" seems to have been

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[1] See 'Empörung über SPD-Mann und Gaslobbyisten Schröder: "Eine Schande für Deutschland"', *Spiegel*, 4 April 2022. https://www.spiegel.de/politik/deutschland/gerhard-schroeder-und-wladimir-putin-heftige-kritik-am-spd-altkanzler-a-e0b7eb0e-e676-487b-a4e8-74fb468df9d4; M. Fischer, 'Schröder bei Putin in Moskau: Verwirrung und ein Bild von Gattin Soyeon', *Stern*, 10 March 2022. https://www.stern.de/politik/deutschland/gerhard-schroeder-bei-putin–verwirrung-um-angebliche-vermittlung-31692290.html; D. Neurerer, 'Gerhard Schröder bei Putin. Lob, Skepsis, Kritik: So reagiert die deutsche Politik auf Schröders Moskau-Reise', *Handelsblatt*, 11 March 2022. https://www.handelsblatt.com/politik/deutschland/gerhard-schroeder-bei-putin-lob-skepsis-kritik-so-reagiert-die-deutsche-politik-auf-schroeders-moskau-reise/28154342.html

[2] S. Marsh and M. Chambers, 'Germany freezes Nord Stream 2 gas project as Ukraine crisis deepens', *Reuters*, 22 February 2022. https://www.reuters.com/business/energy/germanys-scholz-halts-nord-stream-2-certification-2022-02-22/

abandoned.[3] Poland, Hungary and other former sceptics started accepting refugees[4] and direct support to the Ukrainian military is growing.[5]

But the war also triggered significant changes at the supranational level. What has been particularly impressive is the speed at which the EU—often described as a bureaucratic behemoth—has achieved rapid progress on sanctions,[6] migration[7] and defence,[8] showing its dexterity and political will in response to the aggression against Ukraine. Even more remarkably, Ukraine's plea to join the Union has been given very serious consideration in Brussels, and Commission President von der Leyen even travelled to Kyiv to transmit the first membership questionnaire to the Ukrainian President in person—an absolutely extraordinary move, given the war-time conditions,[9] as well as the lethargy that has characterised enlargements since the accession of Croatia.[10] The 'special procedure' for achieving membership advocated by President Zelensky could thus materialise in practice,[11] especially given the accommodating nature of Article 49 TEU,[12] all the voices of caution notwithstanding.[13]

Such swift progress across the board is astounding and, many would say, is as long overdue as it is, at times, half-hearted: Mr Schröder, who spent the first months of this war sitting on the Gazprom board, is not on any sanctions list,[14] albeit the European Parliament has just adopted a resolution to this end, eventually leading to his resignation in May 2022,[15] and governments voice open opposition to Ukrainian EU membership, however remote, using the Western Balkans as a pretext,[16] or are reviving the debate over multi-speed Europe rebranded as the creation of a broader 'European political community'.[17] One does not need to be reminded that the context of accession aspirations in the Balkans is markedly different, including the EU's own problematic track-record in the region.[18] Migration

[3]'The German verb "merkeln" means "to notoriously delay", or "to sit out", "wait and see". It almost made it to the Youth Word of the Year in 2015, in an annual competition organised by the German dictionary publisher Langenscheidt.

[4]Slovakia (410,000) and Romania (896,000). Data are from 11 May 2022. The updated numbers are available at https://data2.unhcr.org/en/situations/ukraine/location?secret=unhcrrestricted.

[5]Council of the EU, 'EU support to Ukraine: Council agrees on third tranche of support under the European Peace Facility for total €1.5 billion', *European Council*, 13 April 2022. https://www.consilium.europa.eu/en/press/press-releases/2022/04/13/eu-support-to-ukraine-council-agrees-on-third-tranche-of-support-under-the-european-peace-facility-for-total-1-5-billion/.

[6]D. Kochenov and R. Janse, 'Admitting Ukraine to the EU: Article 49 TEU is the "Special Procedure"', *Eulawlive*, 30 March 2022. https://eulawlive.com/op-ed-admitting-ukraine-to-the-eu-article-49-teu-is-the-special-procedure-by-dimitry-kochenov-and-ronald-janse/.

[7]D. Thym, 'Temporary Protection for Ukrainians', *VerfBlog*, 5 March 2022. https://verfassungsblog.de/temporary-protection-for-ukrainians/; S. Carrera, M. Ineli Ciger, L. Vosyliute and L. Brumat, 'The EU grants temporary protection for people fleeing war in Ukraine. Time to rethink unequal solidarity in EU asylum policy', (2022) 9 *CEPS Policy Insights*, https://www.ceps.eu/download/publication/?id=35838&pdf=CEPS-PI2022-09_ASILE_EU-grants-temporary-protection-for-people-fleeing-war-in-Ukraine-1.pdf

[8]A. Tyhuska, 'Made in Ukraine: The EU's Emerging Real(ist) Power', *Carnegie Europe*, 3 May 2022. https://carnegieeurope.eu/strategiceurope/87053.

[9]See 'Ukraine: EU chief offers Kyiv fast track to membership', *DW*, 8 April 2022. https://www.dw.com/en/ukraine-eu-chief-offers-kyiv-fast-track-to-membership/a-61409635.

[10]U. Ćemalović, 'Towards a New Strategy for EU Enlargement—Between the Wish for an Encouragement, the Reality of the Fatigue and the Threat of a Dead End', (2020) 4 *EU and Comparative Law Issues and Challenges Series*, 281.

[11]D. Kochenov and R. Janse, 'Admitting Ukraine to the EU: Article 49 TEU is the "Special Procedure"', *EU Law Live*, 30 March 2022. https://eulawlive.com/op-ed-admitting-ukraine-to-the-eu-article-49-teu-is-the-special-procedure-by-dimitry-kochenov-and-ronald-janse/; D. Kochenov, 'Take Down the Wall. And Make Russia Pay for It', *VerfBlog*, 21 March 2022. https://verfassungsblog.de/take-down-the-wall-and-make-russia-pay-for-it/.

[12]R. Janse, 'Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria during the Big Bang Enlargement' (2019) 17 *International Journal of Constitutional Law*, 43; D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2008).

[13]R. Petrov, 'Ukraine's Accession to the EU: Does the Peace Deal Matter?', *Eulawlive*, 4 May 2022. https://eulawlive.com/op-ed-ukraines-accession-to-the-eu-does-the-peace-deal-matter-by-roman-petrov/. It is crucial not to forget that the EU's pre-accession strategy did not manage to install a lasting democratic transformation, as attested precisely by the problems in Poland and Hungary.

[14]D. Kochenov, 'Sanctions for Abramovich, but Schröder Goes Scot-Free', *VerfBlog*, 11 March 2022. https://verfassungsblog.de/sanctions-for-abramovich-but-schroder-goes-scot-free/.

[15]European Parliament resolution of 19 May 2022 on the social and economic consequences for the EU of the Russian war in Ukraine – reinforcing the EU's capacity to act (2022/2653(RSP)). Laurenz Gherke, 'Former German Chancellor to Leave Rosneft', *Politico*, 20 May 2022. https://www.politico.eu/article/gerhard-schroder-to-leave-rosneft/.

[16]D.M. Herszenhorn, 'Netherlands' tight fist now chokes Ukraine's EU bid', *Politico*, 10 March 2022. https://www.politico.eu/article/netherlands-ukraine-eu-membership-zelenskyy-putin/.

[17]Speech by Emmanuel Macron at the closing ceremony of the Conference on the Future of Europe, Strasbourg, 9 May 2022. https://presidence-francaise.consilium.europa.eu/en/news/speech-by-emmanuel-macron-at-the-closing-ceremony-of-the-conference-on-the-future-of-europe/.

[18]E. Basheska, 'EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia', (2022) *Hague Journal on the Rule of Law*, https://link.springer.com/article/10.1007/s40803-022-00169-7.

responses have also been criticised,[19] as has the sanctions and military help, which, according to many in Ukraine, including the President,[20] stop short of going far enough: it is unquestionable that much more can be done, especially given that what EU Member States pay Russia for their energy supplies significantly surpasses the help Ukraine has been receiving.[21]

2 | WAR AS A PRETEXT TO SIDELINE EU VALUES: NEGATIVE DEVELOPMENTS

It is not in the external context, however, where the core problems for the Union lie. The EU has been much more of a slouch when it comes to its own issues *within*.[22] While plentiful tools are available to shape the reality of compliance with Article 2 TEU values,[23] the EU reflects the global de-democratisation trend. While the number of democracies is shrinking globally,[24] the EU is thus far not at all a safe haven. A similar picture is observable in the field of the Rule of Law. Indeed, in 2020 'more countries declined than improved in overall Rule of Law performance for a third year in a row, continuing a negative slide toward weakening and stagnating Rule of Law around the world'.[25] In the EU, Varieties of Democracy (V-Dem) reported significant drops in the rule of law indices over the period 2000–2018 in Hungary, Bulgaria and Poland.[26] According to its 2021 report, between 2010 and 2020, Poland turned from a liberal democracy to a mere electoral democracy, and Hungary from an electoral democracy to an electoral autocracy. Hungary, Poland and Slovenia show signs of substantial autocratisation.[27] While the trend could change for Slovenia with PM Janša's electoral loss, Hungary and Poland are not set to change course. Indeed, Hungary is shown in Freedom House's 2020 report as one of the countries with the most dramatic decline in freedom, and the country was even downgraded, relegated from the cluster of "free countries".[28]

[19]While Ukrainians are welcomed with open arms and now benefit from a special regime of protection, Afghanis and Iraqis in equally desperate situations are pushed back into the wintery forests in full knowledge of the European Commission, which is yet to start any case on this matter. A. Jolkina, 'Trapped in a Lawless Zone. Forgotten Refugees at the Latvia-Belarus Border', *VerfBlog*, 2 May 2020. https://verfassungsblog.de/trapped-in-a-lawless-zone/. Note the contrast with the European Court of Human Rights (ECtHR), whose interim measures—completely ignored by the Polish, Lithuanian and Latvian governments—distinguish it as the only true defender of human rights in Europe: D.V. Kochenov and B. Grabowska-Moroz, '*The EU's Face in Łukašenka's Mirror: Inhuman Treatment of Afghan Hostages at the Polish-Belarusian Border and the Promise of EU Values*', *VerfBlog, 28 August 2021*. https://verfassungsblog.de/the-eus-face-in-lukasenkas-mirror/. Add to this the mass deaths in the Mediterranean and strong support the Libyan thugs receive from the EU for catching innocent African migrants to imprison them indefinitely without charge to sell for ransom as Ian Urbina reported in the *New Yorker*, and the picture of EU-sponsored lawlessness at the border is complete. I. Urbina, 'The Secretive Prisons that Keep Migrants out of Europe', *The New Yorker*, 6 December 2021. https://www.newyorker.com/magazine/2021/12/06/the-secretive-libyan-prisons-that-keep-migrants-out-of-europe.

[20]M.D. Shear, 'Zelensky calls on NATO members to do more to help Ukraine's military', *The New York Times*, 24 February 2022. https://www.nytimes.com/2022/03/24/world/europe/ukraine-zelensky-nato-alliance.html.

[21]V. Pop and A. Bounds, 'Russian gas payment demands in "breach" of sanctions, EU warns', *Financial Times*, 28 April 2022. https://www.ft.com/content/aa0d294b-0982-4f94-a327-a93300444083.

[22]R.D. Kelemen, 'Appeasement, ad infinitum', (2022) 29 *Maastricht Journal of European and Comparative Law*, 177; C. Emmons and T. Pavone, 'The Rhetoric of Inaction: Failing to Fail Forward in the EU's Rule of Law Crisis', (2021) 28 *Journal of European Public*, 1611.

[23]A. von Bogdandy et al. (eds.), *Defending Checks and Balances in EU Member States* (Springer, 2021); A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017); C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); W. Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing, 2016); A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, 2015).

[24]Freedom House, 'Freedom in the World 2022: The Global Expansion of Authoritarian Rule', https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule.

[25]World Justice Project Rule of Law Index (2020), available at: https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

[26]Available at: https://www.v-dem.net/en/.

[27]Even though Slovenia, as opposed to Hungary and Poland, is still among the top countries according to V-Dem's Liberal Democracy Index. Varieties of Democracy, 'Democracy Report 2021: Autocratization Turns Viral', https://www.v-dem.net/democracy_reports.html.

[28]Freedom House, 'Freedom in the World 2020: A Leaderless Struggle for Democracy', https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf, 14.

This autocratisation within the EU, where it was supposed to be impossible[29] in a Union officially founded on 'democracy and the rule of law',[30] took place in broad daylight, with EU institutions being insufficiently responsive to democratic and rule of law decline.[31] There have been monitoring, benchmarking, disapproval; the EU voiced criticism, engaged in eye-rolling and eyebrow-raising, but no meaningful and dissuasive response has come from them, save for the Court of Justice: 'the last soldier standing',[32] amidst what Kelemen has amply characterised as the EU's 'authoritarian equilibrium'.[33] Yet, even the Court's revolutionary extension of the boundaries of the EU's competence and modalities of intervention has not produced any visible results in the field of the institution's key stated concern: the decline of EU values.[34] The EU itself, its Court included,[35] is far removed from the norm of compliance with the basic idea of the rule of law: erecting functional and effective obstacles to tempering power does not quite work.[36] Instead, it seems to be replaced at the supranational level with additional tools for the re-proclamation of the supremacy of EU law.[37] Indeed, not all the rule of law safeguards demanded by EU law of the national level apply supranationally, judicial independence included.[38] Seen from the Mediterranean, the picture is potentially grimmer still, as the EU has purposefully created a lawless zone with fundamental substantive obstacles to the basic enjoyment of fundamental rights by pouring huge resources into a system of torture and arbitrary detention of innocent people in third states, accompanied by generously arming violent militias and sharing FRONTEX intelligence, which has resulted in thousands of deaths and innumerable suffering in direct breach of the EU's Treaties, the Charter and secondary law. Of the basic, even most circular meaning of the rule of law as one has seen in *Les Verts*, in one example, there is no sight at all in this context.[39]

And the war at our doorstep, which could be a sobering wake-up call, has so far played exactly the opposite role.[40] The context of the Russian invasion of Ukraine has resulted in further deterioration of this already problematic situation, as it seems to provide additional political rationales for inaction, even if this leads to the dismissal of the very idea of uniform application of EU law, as happened with the right to claim asylum at the EU-Belarus border,

[29]L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', (2017) 19 *Cambridge Yearbook of European Legal Studies*, 3; D. Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?', in M. Adams, A. Meuwese and E. H. Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017), 419.

[30]L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', (2009) *Jean Monnet Working Papers No. 4/2009*, https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/.

[31]G. de Búrca, 'Poland and Hungary's EU membership: On not confronting authoritarian governments', (2022) *International Journal of Constitutional Law*, moac008. https://academic.oup.com/icon/advance-article-abstract/doi/10.1093/icon/moac008/6583499?redirectedFrom=fulltex#; D. Kochenov, A. Magen and L. Pech (eds.), 'The Great Rule of Law Debate in the EU', (2016) 54 *Journal of Common Market Studies*, 1043; O. Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law', (2019) 11 *The Hague Journal of the Rule of Law*, 133.; L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', (2021) 13 *Hague Journal on the Rule of Law*, 1.

[32]D. Kochenov and P. Bárd, 'The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU', (2020) 1 *European Yearbook of Constitutional Law*, 243; L. Pech and D.V. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the* Portuguese Judges *Case* (Swedish Institute for European Policy Studies, 2021).

[33]R.D. Kelemen, 'The European Union's Authoritarian Equilibrium', (2020) 27 *Journal of European Public Policy*, 481.

[34]D. Kochenov, '*De Facto* Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times', (2021) 40 *Polish Yearbook of International Law*, 197.

[35]The cherry on top of the de-democratisation and disregard of the rule of law pie has been the Court's own attempts to turn the rule of law in the EU into a tool to justify unchecked power by the Member States over this institution in a highly dubious context of the unlawful dismissal of a sitting member in direct violation of EU law, as analysed in detail in this special issue. See, in this issue, D. Kochenov and G. Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair', (2022) 27 (1–3) *European Law Journal*.

[36]M. Krygier, 'Tempering Power', in M. Adams et al. (eds.), *Bridging Idealism and Realism in Constitutionalism and Rule of Law* (Cambridge University Press, 2016); T. Bingham, *The Rule of Law* (Penguin, 2010).

[37]L. Azoulai, Editorial Comments, 'EU Law between Common Values and Collective Feelings', (2018) 55 *Common Market Law Review*, 1329, 1334; D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', (2015) 34 *Yearbook of European Law*, 88.

[38]There seems to be no disagreement about its importance, but it does not apply in practice: K. Lenaerts, 'Our Judicial Independence and the Quest for National, Supranational and Transnational Justice', in G. Sevik, M.-J. Clifton, T. Haas, L. Lourenço and K. Schwiesow (eds.), *The Art of Judicial Reasoning*: Festschrift *in Honour of Carl Baudenbacher* (Springer, 2019), 155; but see, in this issue, D. Kochenov and G. Butler, above, n. 35.

[39]Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament*, EU:C:1986:166. For an analysis of this judgment and its importance as regards the rule of law as a constitutional principle of EU law, see K. Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in M. Poiares Maduro and L. Azoulai (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 304.

[40]P. Bárd, 'Die EU muss vehementer gegen Verletzungen der Rechtsstaatlichkeit vorgehen',*EurAktiv*, 23 March 2022. https://www.euractiv.de/section/europakompakt/opinion/die-eu-muss-vehementer-gegen-verletzungen-der-rechtsstaatlichkeit-vorgehen/.

"as opposed to the EU-Ukraine border".[41] While the focus is rightly on the war at the EU's borders, the looming humanitarian crisis and sanctions against Putin's regime, using this crisis as a justification for further inaction in the context of the deterioration of the rule of law and democracy in the EU is not a sustainable course of action. On the contrary, it endangers the future of the EU. The Union must not delay further the need to act to halt the insidious erosion of democracy and the rule of law *within* its own borders at both the national and supranational levels. Using the war as a "legitimate" reason for allowing the continued erosion of EU values could have devastating consequences for the Member States and the Union as a whole, including in the very context of dealing with the crisis in Ukraine. It is to forget that Hungary does not support many sanctions against Russia, thus hampering EU external action, now and possibly in the future, and Poland welcomes Ukrainian refugees in the name of Slavic brotherhood while, when it comes to non-Slavic asylum seekers, it does not have any qualms in contesting, with ethnical arguments repugnant to EU law and in particular Article 21 of the EU Charter of fundamental rights, EU relocation efforts based on the fundamental principles of the fair sharing of responsibility and solidarity among Member States (Article 80 TEU).[42] Both states have shown themselves to not be reliable partners in times of crisis and thus they are even more of a liability to meaningfully addressing those crises. The most astonishing and harmful departure from the basic values with a clear and implicit pretext of the broader context of the war in Ukraine has been demonstrated by the European Commission, among other institutions. President von der Leyen, overruling all the Commissioners in charge of the Rule of Law-related portfolios[43] and thus in an apparent breach of the collegiality principle, has single-handedly decided, on 1 June 2022, to start the process of releasing substantial COVID recovery funds to Poland in the absence of any significant reforms, and thus in direct violation of Article 2 TEU and the most significant CJEU case-law on the matter.[44] This move, amply described by Franz Meyer as 'Kapitulation'[45] caused a political scandal and outrage in the expert community.[46] The war context thus allowed the European Commission, seemingly, to turn away from the Rule of Law at the level of principle in direct breach of the Treaties, besides leaving billions of European taxpayers' euros with no credible oversight, in direct conflict with CJEU's explicit guidance.[47]

3 | EU AND MEMBER STATE COMPLICITY IN RULE OF LAW BACKSLIDING

It is no secret that EU institutions are complicit in accommodating autocrats. Their inaction has been amply documented.[48] The war in Ukraine has had the effect of rendering an already precarious situation still less sustainable. Prior to the war, the Council had already chosen to interpret the principle of the conferral of powers narrowly. In its view, only Article 7 TEU emerged as a sound legal basis for countering rule of law violations. Everything else is allegedly beyond the powers of the EU.[49] Both academics,[50] and more recently the CJEU in its judgment upholding

[41] See above, n. 20.

[42] Joined Cases C-643 & 646/15, *Slovak Republic and Hungary v. Council of the EU*, EU:C:2017:631, paras. 301–305.

[43] L. Bayer, 'Amid Commission Rebellion, von der Leyen Defends Polish Recovery Plan', *Politico*, 1 June 2022. https://www.politico.eu/article/amid-commission-rebellion-von-derleyen-defends-polish-recovery-cash-plan/.

[44] See, for a good summary and analysis of these events, J. Jaraczewski, 'Just a Feint?', *VerfBlog*, 1 June 2022. https://verfassungsblog.de/just-a-feint/.

[45] F.C. Meyer, 'Die Kapitulation', VerfBlog, 2 June 2022. https://verfassungsblog.de/diekapitulation/.

[46] Ibid.; M. Pronczuk, 'In Concession to Poland EU Opens Door to Frozen Funds', *New York Times*, 1 June 2022. https://www.nytimes.com/2022/06/01/world/europe/poland-euukraine-coronavirus.html; J. Rankin, 'EU Approves Poland Covid Recovery Fund despite Judicial Concern', *The Guardian*, 1 June 2022. https://www.theguardian.com/world/2022/jun/01/eu-poised-to-approve-poland-covidrecovery-fund-despite-judicial-concern; see also Laurent Pech's detailed twitter thread on the matter: https://twitter.com/ProfPech/status/1532740227017719809.

[47] Case C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98.

[48] See n. 31 above.

[49] Council of the European Union, Commission's Communication on a new EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties, Doc. 10,296/14, Brussels, 27 May 2014.

[50] L.F.M. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in A. Jakab and D.V. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); G. Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law* (European University Institute, 2017); B. Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in C. Closa and D.V. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); W Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', (2010) 16 *Columbia Journal of European Law*, 385.

the legality of the Conditionality Regulation, made clear that this was not the correct interpretation.[51] The European People's Party in the European Parliament had shielded the Hungarian Fidesz party for too long, until they eventually parted ways.[52] The Commission, which in principle is supposed to be the Guardian of the Treaties and enforce EU law, also tended to look away, showcasing a clear example, in the apt characterisation of Professor Pech, of the 'dereliction of duties' — and this is before the astonishing of June 1 action, which could be characterised as a frontal attack against the idea of the Rule of Law as such.[53] Indeed, the Commission did not only fail to initiate Article 7 TEU proceedings against Hungary (the European Parliament did so instead[54]); it failed to start infringement proceedings concerning the majority of the most significant value violations.[55] When it did, this was often too late, as expediting cases is still apparently a problem, important CJEU-initiated breakthroughs on this notwithstanding.[56] The infringements that were launched, most importantly, failed to take account of the complex *programmatic* nature of Hungarian and Polish governments' efforts to undermine Article 2 TEU values and thus went only after the individual brush-strokes on an immense panorama of concerted government-instigated violations, thus failing to see the big picture.[57] Whole systems of institutions were rotting away slowly in broad daylight and with the full knowledge of the well-informed Commission, who preferred, however, not to do its job. Rewarding the autocrats in power in Poland with billions of euros of Covid recovery fund for the destruction of the system of independent judiciary, for the fake 'courts' attacking the very basics of the European legal foundations, such as proclaming Article 6 ECHR or the principle of suremacy of EU law 'unconstitutional', for persecution of independent judges remaining faithful to EU law, von der Leyen Commission has reached an unfathomable new low in eagerly flushing Article 2 TEU values down the drain along with billions of EU money. The war came handy to wave the values goodbye, potentially steeply exacerbating the Rule of Law crisis and putting the Union's future as a democratic community of law in danger.

This is just the cherry on top of the pie of familiar stories of too little too late, which resulted in millions of Europeans living in countries which can hardly be characterised as robust democracies compliant with the rule of law, leaving the EU's very raison d'être undermined,[58] and other Member States contaminated via the ongoing policing of the strict application of mutual trust in the context of the EU legal system, turning the recent years into a parade moving from one low to the next.[59] The Commission launched infringement proceedings once constitutional courts were already captured, once independent, autonomous judges were removed from ordinary courts, and once new ones were appointed, with the main factor of selection being loyalty rather than merits.[60] Or take the *Lex CEU*

[51]Case C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98.
[52]Kelemen, above, n. 33.
[53]L. Pech, 'Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas', *RECONNECT Policy Brief*, January 2021. https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf, 9.
[54]European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).
[55]P. Bárd and B. Grabowska-Moroz (eds.), 'The strategies and mechanisms used by national authorities to systematically undermine the Rule of Law and possible EU responses: Work Package 8 – RECONNECT Deliverable 2' (2020), 51–59.
[56]P. Wennerås, 'Saving a forest and the rule of law: *Commission v Poland*', (2019) 56 *Common Market Law Review*, 541.
[57]K.L. Scheppele, D.V. Kochenov and B. Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', (2020) 39 *Yearbook of European Law*, 3.
[58]G. de Búrca, 'Europe's *raison d'être*', in D. Kochenov and F. Amtenbrink (eds.), *European Union's Shaping of the International Legal Order* (Cambridge University Press, 2013).
[59]C. Closa, 'Reinforcing of EU Monitoring of the Rule of Law', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); P. Bárd, 'Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust', (2021) 2 *Pravni zapisi*, 371, J. Krommendijk and G. de Vries, 'Do Luxembourg and Strasbourg Trust Each Other? The Interaction Between the Court of Justice and the European Court of Human Rights in Cases Concerning Mutual Trust', (2021) 4–5 *Journal européen des droits de l'homme – European Journal of Human Rights*, 319.
[60]A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', (2018) 19 *German Law Journal*, 1839; T.T. *Koncewicz*, 'Of Institutions, Democracy, Constitutional Self-Defence, and the Rule of Law', (2016) 53 *Common Market Law Review*, 1753; T.T. Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', (2018) 43 *Review of Central and East European Law*, 116.
[61]Case C-66/18, *Commission v. Hungary (Higher Education)*, EU:C:2020:792.
[62]P. Bárd, 'A Strong Judgment in a Moot Case: Lex CEU before the CJEU', *RECONNECT blog*, 12 November 2020. https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/.

case:[61] by the time the case was decided by the Court of Justice, it was essentially moot. The top ranked Central European University was forced to move out of Hungary and was already settled in Austria.[62]

The most useful actor defending EU values has been the CJEU,[63] but even Kirchberg has its limits. At least two issues with crucial implications for the critical assessment of the usual praise related to the CJEU's track-record in this field arise beyond even the failure of the Court to protect its own independence, which signalled a crucially important double standard in the operation of the rule of law in Europe.[64] These include: the questionable track-record of real-life change on the ground in the problematic Member States and the Court's push towards a meaning of a 'court or tribunal established by law', which is markedly different from the established Article 6 ECHR standard, thus potentially undermining the rule of law by offering a twice questionable approach, deficient both as conceptualised and as applied.

Indeed, there are no clear consequences on the ground flowing from all the revolutionary CJEU case-law on judicial independence for the state of independence of the Polish and Hungarian judiciaries.[65] The theoretical deficiency of the Court's approach is potentially even more important. The Court is unwilling to declare the obvious—that some captured states have captured courts with all judges being affected, destroying compliance with Article 6 ECHR. Puzzlingly, in criminal cooperation cases, the CJEU still insists that requested courts must check whether or not to cooperate with a requesting court in a captured state,[66] deploying a much-criticised test unusable in practice to the detriment of human rights protection, legal certainty and the rule of law.[67] Worse still, by starting to accept preliminary references from the judges who are tainted by questionable appointments,[68] the CJEU adopts an interpretation radically different from the ECtHR's reading of what constitutes a 'court or tribunal' under Article 6 ECHR.[69] The Court of Justice thus develops an unacceptable double standard of judicial independence in Europe through shying away from calling a spade a spade. It is beyond any doubt that, besides creating an unnecessary conflict with the ECtHR's solid approach, failing to call out fake judges undermines, rather than reinforces, the state of the Rule of Law and, most notably, judicial independence, in the European legal space.[70] The tragedy of looming illegality at Kirchberg itself, with disregard for primary law in the name of unchecked Member States' power, is only exacerbating this story: national-level rule of law problems are not unique, after all.[71] It goes without saying that the unfortunate collision path with Strasbourg, which the Court of Justice has chosen, only presages negative implications for the future of the Union as a rule of law-based democracy honouring human rights, except if dialogue between Kirchberg and Strasbourg and the EU accession to the ECtHR were to bear fruit.[72] The sacrifice of conceptual clarity and the lowering of the level of judicial independence and human rights protection, which come with the

[63]Pech and Kochenov, above, n. 32.

[64]See, in this issue, Kochenov and Butler, above, n. 35.

[65]Kochenov, above, n. 34.

[66]P. Bárd and A. Bodnar, 'The End of an Era. The Polish Constitutional Court's Judgment on the Primacy of EU Law and Its Effects on Mutual Trust', (2021) 15 *CEPS Policy Insights*, https://www.ceps.eu/wp-content/uploads/2021/10/PI2021-15_The-end-of-an-era_The-Polish-Constitutional-Courts-judgment-on-the-primacy-of-EU-law-and-its-effects-on-mutual-trust.pdf. See also, in this issue, P. Bárd, 'In Courts We Trust, Or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law', (2022) 27 (1–3) *European Law Journal*.

[67]P. Bárd and J. Morijn, 'Luxembourg's Unworkable Test to Protect the Rule of Law in the EU (Part I)', *VerfBlog*, 18 April 2020. https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/; P. Bárd and J. Morijn, 'Domestic courts pushing for a workable test to protect the rule of law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM rulings (Part II)', *VerfBlog*, 19 April 2020. https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/.

[68]Case C-132/20 *Getin Noble Bank*, ECLI:EU:C:2022:235.

[69]The ECtHR has been quite intolerant of illegally appointed individuals on the bench, as seen in *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 6374/18, 1 December 2020, ECLI:CE:ECHR:2020:1201JUD002637418; *Xero Flor w Polsce sp. z o.o. v. Poland*, Application no. 4907/18, 7 May 2021, ECLI:CE:ECHR:2021:0507JUD000490718; *Grzęda v. Poland*, Application no. 43572/18, 15 March 2022. See also R. Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights – The Strasbourg Court and the Independence of the Judiciary', (2020) 26 *European Law Journal*, 48.

[70]Pech and Kochenov, above, n. 32, 183; L. Pech, 'Dealing With "Fake Judges" Under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in *Simpson and HG*', (2020) *RECONNECT Working Paper No. 8*, 1.

[71]See Kochenov and Butler, above, n. 35.

[72]As for the state of the negotiations, see 13th meeting of the CDDH ad hoc negotiation group ("46 + 1") on the accession of the European Union to the European Convention on Human Rights, Meeting Report, 46 + 1(2022)R13, 13 May 2022, https://rm.coe.int/cddh-46-1-2022-r13-fin-en/1680a6801c.

Kirchberg approach, does not bring any changes for the better on the ground in the backsliding Member States, while significantly undermining the Rule of Law legacy of President Lenaert's Court.

4 | THE EU'S TOOLBOX TO RESPOND "DISSUASIVELY" TO RULE OF LAW VIOLATIONS IN THE MEMBER STATES

Approaching the problems above from a purely legal perspective, it quickly becomes clear that the EU already has the tools that it needs to enforce its values. The core of these tools was well known and analysed in detail at the very start of the rule of law crisis period in the EU[73]—but to no avail.[74] What is missing, therefore, is the political will to deploy these tools in a timely and coordinated manner. The tools in question include, but are not limited to, the sanctioning prong of the so-called Article 7 TEU procedures, infringement actions, and rule of law financial conditionality: the Common Provisions Regulation, and most recently the Conditionality Regulation.

Article 7 TEU has never been a nuclear option,[75] its sanctioning prong has little chances to ever be voted in, whereas the preliminary warning prong incorporated into Article 7(1) TEU is not an enforcement tool, it is just a platform for dialogue. EU history shows that Article 7(1) TEU was only invoked when the sanctioning prong was already long overdue, hinting at the deployment of a wrong legal basis for action. Academic colleagues counted the numbers of new infringement cases introduced by the Commission and this number is shrinking.[76] Crucially, the unquestionably small number of infringements is especially worrying when it comes to rule of law violations, given the precarious situation on the ground in the Member States experiencing rule of law melt-down.[77] The number of cases would be even lower, in fact, if outright politicised cases having little to no bearing on the rule of law, which the Commission earmarked as having rule of law relevance, were removed from the total.[78] An often-voiced excuse for the Commission's passivity is that losing rule of law-related cases would have devastating effects the EU cannot afford.[79] Therefore the Commission follows an ultraconservative legal interpretation, lagging behind the CJEU case-law, and often fails to start infringements even when an express invitation to do so can be read into the Luxembourg jurisprudence.[80] The Commission's action has been marked by a lack of vision, failure to understand the problems on the ground, insufficient coordination between the different units responsible and a conspicuous inability to see the difference between winning a case on the one hand, and resolving the rule of law crisis on the other—and this is even before von der Leyen actually decided to shower PiS with money in response to the destruction of judicial independence in the country.[81]

[73]C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union', (2014) *RSCAS Working Paper no. 25* (EUI Florence).

[74]See, in this issue, Bárd, above, n. 61.

[75]D. Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU', (2017) 10 *EUI Working Paper LAW 2017/10*, https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW_2017_10.pdf.

[76]Emmons and Pavone, above, n. 22.

[77]The Polish case is scrutinised particularly well by Wojciech Sadurski: W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019).

[78]Actions attacking Member States for citizenship by investment on outright flawed legal grounds could supply clear examples, as not only the problem for the EU to solve, but also the legal basis to intervene is missing: D. Sarmiento and M. van den Brink, 'EU Competence and Investor Migration', in D. Kochenov and K. Surak (eds.), *Citizenship and Residence Sales* (Cambridge University Press, 2022); H.U. Jessurun d'Oliveira, 'Union Citizenship and Beyond', in N. Cambien, D. Kochenov and E. Muir (eds.), *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges* (Brill-Nijhoff, 2020); D. Kochenov, 'Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union', (2021) 25 *Studies in European Affairs*, 33. FRONTEX, national border guard services and the Libyan thugs funded from European's taxes kill more people every year than the number of those granted citizenship by investment in the EU, as Kristin Surak has counted: K. Surak, *Citizenship 4 Sale* (Harvard University Press, 2023, forthcoming).

[79]RECONNECT Lecture with EU Commission Vice-President Věra Jourová: Towards a Stronger EU, 2 February 2021, https://www.youtube.com/watch?v=fR_fI4OvWB4, at 45:20.

[80]Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, ECLI:EU:C:2020:234. Pech and Kochenov, above, n. 32.

[81]For a detailed explanation of the key failures of the Commission's approach, see Scheppele et al., above, n. 52.

[82]I. Butler, *Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework: Conditionality of EU Funds and a Financial Instrument to Support NGOs* (Civil Liberties Union for Europe, 2018). https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3ldqCT-eB5iM9/view

[83]R.D. Kelemen and K.L. Scheppele, 'How to Stop Funding Autocracy in the EU', *VerfBlog*, 10 September 2018. https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/.

The events of 1 June 2022 have shown how hypothetical the power of the purse actually is when the purse is in the hands of the autocrats-enabler Commission. In any other circumstances cutting funds could be an efficient way to dissuade national governments from destroying Article 2 TEU values. As has been shown by Butler,[82] as well as Kelemen and Scheppele[83]—even without the recent 'generalised deficiencies' law—in line with Regulation (EU) No. 1303/2013 (Common Provisions Regulation), the Commission could suspend European Structural and Investment Funds where a Member State does not uphold the rule of law. But the Conditionality Regulation adopted in 2020 also has great potential to contain backsliding, especially judicial capture in conjunction with corruption. President von der Leyen decided not to listen to any of the Rule of Law experts on her Commission in single-handedly ditching this vital Rule of Law enforcement tool. Quite astonishingly, none of the "overruled" Commissioners resigned as a result, apparently standing by the move, their letters of protest notwithstanding.

Looking back, one can trace a series of unjustified compromises pleasing the autocrats, reminiscent of the general track-record of the EU institutions regarding rule of law backsliding. 1 June 2022 decision of the President of the Commission to wave the Rule of Law goodbye in an act of surprising 'Kapitulation' draws on rich prior precedent. During the German presidency of the Council of the EU, the text of the Conditionality Regulation was weakened in many respects. The European Council Conclusions of December 2020 incorporated a considerably watered-down version of the Commission proposal, giving in to the governments of Hungary and Poland.[84] Instead of the original version in which a supermajority was needed to block the Commission's decision to trigger the conditionality mechanism, the final version allows for a minority to block the decision. Furthermore, the focus shifted from the rule of law to the importance of the protection of the Union's financial interests in conjunction with the rule of law. Rule of law breaches will be sanctioned if they affect or seriously risk affecting the budget in a sufficiently direct way. The Conditionality Regulation thus runs the risk of becoming more of an anti-corruption tool than a rule of law enforcement tool. Despite all the concessions made, Hungary and Poland, the most likely candidates to be affected by the new rules, threatened to block the approval of the EU's seven-year budget, the Multiannual Financial Framework (MFF) and the Next Generation EU COVID-19 recovery fund (NGEU) if the Conditional Regulation was adopted in its original form.[85] As a political compromise, the final text of the Conditionality Regulation was agreed to be accompanied by guidelines to be drafted by the European Council on the way the Commission should apply the Regulation.

This again shows the EU's disregard for the rule of law, and subordination of its values to political compromises pleasing those who destroy the EU in broad daylight. A Regulation is binding and effective as it stands irrespective of any further interpretative measures. Moreover, the text of the Regulation itself does not mention any guidelines whatsoever and the Commission's recent efforts on the annual rule of law reports have been farcical, to say the least, as they fail to recognise the exceptional nature of the deterioration of the rule of law in the most problematic Member States.[86] The European Council does not have law-making powers, therefore the guidelines can only be interpreted as a step taken beyond the EU's powers. Moreover, the European Council cannot give instructions to the Commission; that goes beyond its mandate. As Alemanno and Chamon argue, this 'shows an unprecedented disregard for the rule of law'[87] at EU level, thus illustrating as well the multi-level spreading of rule of law violations.

[84]European Council Conclusions, 11 December 2021, EUCO 22/20, https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf.

[85]J. Valero, 'Hungary and Poland veto stimulus against pandemic', *Euractiv*, 17 November 2020. https://www.euractiv.com/section/economy-jobs/news/hungary-and-poland-veto-stimulus-against-pandemic/; D.M. Herszenhorn and L. Bayer, 'EU in crisis over Hungary and Poland's €1.8 T hold-up', *Politico*, 16 November 2020. https://www.politico.eu/article/eu-in-crisis-over-hungary-poland-budget-hold-up/.

[86]D.V. Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law', (2019) 11 *Hague Journal on the Rule of Law*, 423.

[87]A. Alemanno and M. Chamon, 'To Save the Rule of Law you Must Apparently Break It', *VerfBlog*, 11 December 2020. https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/. See also K.L. Scheppele, L. Pech, and S. Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law', *VerfBlog*, 13 December 2020. https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

[88]See the press release by the European Parliament, Rule of Law conditionality: Parliament wants investigations launched immediately, 8 July 2021, https://www.europarl.europa.eu/news/it/press-room/20210701IPR07512/rule-of-law-conditionality-parliament-wants-investigations-launched-immediately

But appeasing autocrats never works. Despite all the above compromises, Hungary and Poland, the two most likely candidates against whom the conditionality mechanism was going to be triggered first—and has indeed been triggered against Hungary in the meantime—challenged the regulation before the Court of Justice. The "compromise" incorporated officially into the European Council Conclusions considerably delayed the application of the Conditionality Regulation as desired by Hungary and Poland.[88] But again, this compromise was contrary to the law. Enforcement of an EU law is not dependent on an action for annulment; it is sufficient to invoke Article 278 TFEU, according to which actions before the CJEU do not have suspensory effect. The European Parliament even threatened the Commission to file an action for annulment according to Article 263 TFEU against the Commission, if the latter fails to fulfil its Treaty obligations,[89] and due to the Commission's reluctance to trigger the mechanism, this is what eventually happened: the European Parliament sued the Commission over its inaction.[90] Nevertheless, the Commission kept its promise made in violation of the rule of law, and waited for the CJEU to pass its judgment. Now we see that the ultimate goal was, essentially, to disregard the CJEU's decision entirely. Poland is likely to receive billions without undoing the harm done to its judiciary, and is thus unable by definition to ensure that the funds received are guaranteed by effective oversight mechanisms, what the CJEU deemed a must.

On 16 February 2022, the CJEU dismissed the Hungarian and Polish claims on all accounts,[91] and on 2 March the guidelines were adopted.[92] Since the Court of Justice made it unequivocally clear that the Conditionality Regulation is valid, and now that the legally dubious, but politically important, guidelines are there, the Commission is running out of excuses not to trigger the mechanism.

The EU has all the tools necessary to reverse, or at least stop, rule of law backsliding, or at the very minimum put an end to the absurdity of financially contributing to illiberal regimes built in violation of EU values. It now has to have the political will to do so.

5 | CONCLUSION: A WARNING AND A CALL

Even before ditching EU values altogether on 1 June 2022, von der Leyen's Commission gradually found more and more excuses to prevent the application of the Conditionality Regulation even after the related judgment had been rendered and the guidelines had been adopted. Allegedly, the Commission had fears of giving the semblance that it interfered with the 3 April 2022 Hungarian elections, and Commission President von der Leyen declared to hold back on triggering the mechanism in face of Poland taking up the vast majority of Ukrainian refugees.[93] That it was also pushing back Afghani children to their death into a wintery forest at its border with Belarus—the country that it

[89]European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP)), point 8.

[90]European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)); European Parliament resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)); European Parliament, 'Parliament prepares legal proceedings against Commission over rule of law mechanism', 20 October 2021, https://the-president.europarl.europa.eu/en/newsroom/parliament-prepares-legal-proceedings-against-commission-over-rule-of-law-mechanism; Letter of the President of the European Parliament to the Parliament's legal service dated 20 October 2021, https://the-president.europarl.europa.eu/files/live/sites/president/files/pdf/Letter%20Conditionality%20Regulation%2020-20-21/Letter%20Sassoli-Drexler_Conditionality%20Regulation.pdf.

[91]Case C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98.

[92]Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final.

[93]E. Krukowska and S. Bodoni, 'Ukraine War Adds to EU Doubts Over Pursuing Poland, Hungary', *Bloomberg*, 14 March 2022. https://www.bloomberg.com/news/articles/2022-03-14/eu-to-hold-back-on-rule-of-law-budget-fight-amid-war-in-ukraine?srnd=premium-europe&fbclid=IwAR1vQd4jFflThgZHJw2IY3fNz_BW6aizOgOqo7IIwIqeAgiFVdL6CNvp42Q

[94]G. Baranowska, 'A Tale of Two Borders: Poland's continued illegal actions at its border with Belarus', *VerfBlog*, 10 March 2022. https://verfassungsblog.de/a-tale-of-two-borders/.

[95]D. Hegedüs and D. Levine, 'Hungary monitors not enough to stop first "rigged" election in EU', *euobserver*, 16 February 2022. https://euobserver.com/opinion/154355.

[96]V. Makszimov, 'Commission to trigger mechanism that could see Hungary lose EU funds', *Euractiv*, 5 April 2022. https://www.euractiv.com/section/politics/news/commission-to-trigger-mechanism-that-could-see-hungary-lose-eu-funds/

had previously invaded—has not been mentioned.[94] Finally, after Prime Minister Orbán and his Fidesz party won a landslide victory for the fourth time in a row—unquestionably helped by the Commission's failure to activate the available rule of law protection mechanisms and by the unlawful compromises surrounding the Conditionality Regulation—and for the third time in an unfair election,[95] the Commission announced the triggering of the conditionality mechanism.[96] The Commission went for a narrow focus and thematised the irregularities in public procurement, the high-level corruption, and the non-cooperation with the European Anti-Fraud Office. But it failed to tackle court capture, an issue closely related to the violation of the financial interests of the EU. As for Poland, the Commission has been letting it off the hook until 1 June 2022, when the decision was taken to shower the enemies of EU's values and principles with money regardless, as if Polish people's solidarity with refugees could make up for the government's mischiefs in destroying judicial independence.[97]

If there is anything the current crisis has taught us, it is that lengthy dialogues and compromises only work with regimes that are constitutional democracies. Doing the same with non-democracies is a category error, which will only result in giving in to and entrenching autocracies and kleptocracies. Issues of insufficient political responsibility of the Commission in the current context equally arise, as well as the wanting good practice of collegiality allowing all portfolio holders to be overruled by the President of the College on the direct subject-matter of their expertise and in an apparent conflict with the CJEU case-law. Add to this the deficiencies stemming from the Member States continuous apparent skepticism about the basic significance of Article 2 TEU values, as well as the CJEU's double-standard mishaps, and the warrisome picture is more or less complete. The war in Ukraine has exacerbated the long-lasting structural deficiencies the EU's political approach to the Rule of Law has suffered from for years. It is time to wake up not to forget entirely what the Union is for.

It seems unquestionable that in the shadow of Putin's aggression in Ukraine, we should re-evaluate what matters. The EU must walk the talk and live up to its promises to play a pioneering role when it comes to values, and at the very minimum stop financing such regimes from EU taxpayers' money, even though it has traditionally been doing exactly the opposite. The tools are there; they only need to be used. This goes, among others, for the Conditionality Regulation, which should have been triggered more than a year ago, and political compromises in violation of the rule of law should not have delayed its use. Now that the CJEU made it unequivocally clear that the law is valid, and now that the legally dubious, but politically important, guidelines are there, the decision of President von der Leyen to ignore EU values altogether is not merely puzzling, but truly incomprehensible. Although purportedly "value-based", should one take Article 2 TEU on face value, the *acquis* of the Union has only started to grow value roots[98]—and the ongoing rule of law crisis has played a crucial role in intensifying this process. Short-termism and lack of vision hinders the renewed development of European constitutionalism. Undoing the promise of the law in force is capable of undermining the Union's potential to grow into a value-based organisation not only in name, but also in fact.

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