Strengthening the Charter’s Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing

Dimitry Kochenov* & John Morijn**

This article discusses how the application of the EU Charter of Fundamental Rights contributes to the fight for the rule of law in the EU. After outlining the connections between the two, it focuses on two examples of how the Charter could and should play a more significant role in upholding the rule of law. As to Member State-level rule of law breakdowns, we demonstrate that the Charter has either been missing in the shadow of Article 19(1) of the Treaty on European Union or threatened to undermine the fight for the rule of law when the principle of judicial independence was reduced to Article 47 Charter standing alone. As to supranational level rule of law issues, where the Charter’s applicability under Article 51 CFR is uncontroversial, we show that it has nonetheless so far been applied to a problematically limited extent. This is particularly clear with regard to party-financing at EU-level. This file offers a case in point to show how taking the Charter seriously could make a significant difference in protecting the rule of law in the EU.

Keywords: Article 7 TEU, Charter of Fundamental Rights of the European Union, judicial independence, party financing, rule of law

1 INTRODUCTION

The EU faces democratic and rule of law backsliding in several Member States. Yet this so far finds no effective opposition on the ground in the politically

---

* Head of the Rule of Law Research Group at the Central European University Democracy Institute in Budapest and Professor of Global Citizenship and Values at CEU Department of Legal Studies in Vienna.

** Professor of Law and Politics in International Relations at the University of Groningen. The authors are grateful to Sarah Ganty and Emma Schulte for the help with this article, which covers developments as they stood in November 2020. An earlier version of this argument has been published in French as a chapter in A. Iliopoulou-Penot & L. Xenou (eds), La Charte des droits fondamentaux, source de renouveau constitutionnel européen? (Bruxelles: Bruylant 2020) and was also posted online as a RECONNECT Working Paper No. 11/2020 (Leuven). Email: johnmorijn@hotmail.com.

captured states. It has also faced a lethargic, if not counter-productive response from political EU Institutions. Therefore, it has fallen mostly to the European Court of Justice (Court) to step in. In a giant leap for the very essence of European constitutionalism it has mobilized the key values on which the Union and the Member States are built and embarked on the articulation of a comprehensive, coherent, and effective system of rule of law protection at all the levels of governance in Europe. In doing so the Court has used the values of EU law and the alliance between the national and supranational courts as a means of protection.

Strikingly, the Charter of Fundamental Rights of the EU (Charter, CFR), which one would have expected to play a central role, has played only a slight and ambiguous role in this process. Indeed, rule of law enforcement and the prevention of democratic backsliding in the EU and the judicial and policy application of the

---


legally binding Charter at EU and Member State level, although evidently connected at a theoretical level and obvious in their potential for synergy in upholding EU values, in practice have often felt like ships passing in the night. How sustainable is this situation? Could and should the Charter play a more significant role in the context of the on-going fight for protecting the rule of law? And if so, when and how? The purpose of this article is to analyse the failures and achievements of the Charter in the context of rule of law backsliding. To this end, it outlines the trajectory of institutional responses to the rule of law crisis at the Member State and EU level. The emphasis is on the surprisingly limited role that the Charter has played until recently.

On the one hand, in relation to dealing with Member State-level rule of law backsliding we argue that the Court has created some important openings in its recent case law on judicial independence. However, as primarily an instrument tailored to ensure effective rights protection, the Charter’s impact in this context is somewhat limited. Instances of Member State-level rule of law backsliding cannot, on many occasions, be effectively reconceptualized as rights violations. Even if the Charter unquestionably requires firmer consideration, it cannot be the only ingredient of effective judicial action. On the other hand, this article identifies some clear opportunities for the use of the Charter to defend the rule of law at the EU-level itself. A particular emphasis is put on party financing rules which should operate, we argue, in full compliance with the Charter’s provisions. The result will be a clearer and more coherent legal basis for limiting the funding of European political parties (EuPP) harbouring the Member State-level political forces responsible for the deterioration of the rule of law.

2 EU RULE OF LAW ENFORCEMENT AND THE CHARTER: HOW TWO INNOVATIONS MET YET REMAINED UNCONNECTED

When, on 1 December 2009, the Charter became legally binding as part of the entry into force of the Lisbon Treaty – and notwithstanding the earlier scholarly criticism – there was much anticipation that sooner rather than later it would make a real difference to human rights protection in the Union legal order. Besides the binding Charter, the post-Lisbon legal system boasted another important innovation. A systemic codification of the ‘values of the Union’ in what became

---


Article 2 TEU,\textsuperscript{8} now distinct from ‘principles’, showcased the Union’s ability to build on its history of embracing fundamental principles and their promotion, in particular, in the pre-accession context,\textsuperscript{9} as well as more generally in external relations.\textsuperscript{10} Wojciech Sadurski is absolutely right: the Union’s move to embrace Central and Eastern Europe resulted in a deep upgrade of the Union’s constitutionalism.\textsuperscript{11}

Combining the two innovations – the Charter and the codified ‘values’ – was not at all at the top of the scholarly agenda. Indeed, once one seriously spoke of the substance of the ‘values’ and principles, instead of looking at the Charter, all eyes turned to Article 7 TEU, revamped after the Austrian Freiheitliche Partei Österreichs (FPÖ) crisis\textsuperscript{12} and offering some political rather than strictly legal means to enforce the beautiful proclamations placed, as we have seen, seemingly outside of the scope of the acquis.\textsuperscript{13} This is to say – also outside the scope of the Charter. At the same time, frankly, very few seriously considered that Article 7 TEU proceedings on enforcing Member States’ rule of law commitments would ever require practical application at all:\textsuperscript{14} the possible rule of law and democracy problems were not considered as a serious issue in the post-enlargement euphoria.

Likewise, developing modalities for Charter application to deal with EU value problems was never seriously considered as of urgent practical necessity. Indeed, EU legal scholars and practitioners almost without exception approached their

---

\textsuperscript{8} M. Klamert & D. Kochenov, Article 2, in Commentary on the EU Treaties and the Charter of Fundamental Rights (M. Kellerbauer, M. Klamert & J. Tomkin eds, OUP 2019); L. Pech, The Rule of Law as a Constitutional Principle, in Schröder ed., supra n. 1.


\textsuperscript{11} W. Sadurski, Constitutionalism and the Enlargement of Europe (OUP 2012).

\textsuperscript{12} W. Sadurski, Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider, 16 CJEL 385 (2010). Compare G. N. Toggenburg, La crisi austriaca: delicati equilibri in molte dimensioni, 2 DPCE 735 (2001); K. Lachmayer, Questioning the Basic Values – Austria and Jörg Haider, in The Enforcement of EU Law and Values (A. Jakab & D. Kochenov eds, OUP 2017).


object of study as a club-of-stable-liberal-democracies and based the development of their field on that assumption. The EU itself was seen as a ‘democracy’ and even ‘a republic’. For that reason a focus on the EU’s own possible role in defending and enforcing the rule of law, let alone the possible role in that for the Charter, was often seen as a somewhat obscure and vaguely alarmist obsession. The warnings sounded in the past – including Judge Pescatore’s concerns about the ability of the British, once in, to stall the development of the Union – were not taken to heart. In other words, just like Article 50 TEU on exiting the Union, Article 7 TEU was understood and expected to remain little more than part of the symbolic locking system of the Union legal order. The Charter’s relevance is this context was universally regarded as of no possible value at all and thus remained largely unclear. Adam Łazowski has rightly referred to the instrument as a ‘legal enigma’.

3 EU RULE OF LAW CRISIS AND THE CHARTER: A HESITANT AND PARTIAL CONNECTION

The rule of law is the essential element of EU law since the inception of the Union, only to get a gradual articulation in practice and in case-law to emerge as one of the formally recognized Union’s values with the Lisbon amendments of the Treaties. While the original understanding of the EU’s rule of law has been quite basic and circular, essentially as ‘bound by the law’ – the on-going

---


Aux nouveaux venus, […] il faut demander non seulement de définir leur position à l’égard des objectifs d’ores et déjà définis et consacrés par des engagements fermes. Il faut les interroger aussi sur leurs intentions en ce qui concerne les chances d’une évolution ultérieure vers l’union politique.

rule of law revolution\textsuperscript{23} is responsible for remaking the principle along the lines of a substantive understanding. Rule of law now requires not only that all of Union law itself be made and applied in strict accordance with the law – what has been formally recognized by the Court since \textit{Les Verts}.\textsuperscript{24} It means too that substantive guarantees of judicial independence,\textsuperscript{25} including strict irremovability standards,\textsuperscript{26} apply to the national and supranational judges.\textsuperscript{27} It signifies, in addition, that such substantive guarantees are policed, if necessary relatively harshly\textsuperscript{28} and with a rich palette of interim relief measures, which include \textit{ex ante} restitutions in institutional structures\textsuperscript{29} by EU law.\textsuperscript{30} Preliminary rulings from the judges fighting for their own independence play a crucial role in these developments.\textsuperscript{31} In the cases where the references themselves happen to be found inadmissible, the Court always underlines the fundamental indispensable nature of judicial dialogue in the EU and the imperative requirements of judicial independence, making such dialogue possible.\textsuperscript{32} The Union is learning its lessons.\textsuperscript{33}

All this allowed the Union to emerge in an entirely new light. Not as a would-be constitutional system\textsuperscript{34} based on the simple presumption of compliance

\textsuperscript{23} Pech & Kochenov, supra n. 4.


\textsuperscript{25} Case C-64/16 \textit{Associação Sindical dos Juízes Portugueses} v. Tribunal de Contas EU:C:2018:117 [2018] OJ C142/2; Pech & Platon, supra n. 5, at 1827; Adam & Van Elsuwege, supra n. 5, at 334.


\textsuperscript{27} This being said, the CJEU nodded approvingly in the direction of eventual double standards on these issues, which is particularly visible in the Sharpston cases in front of the Court of Justice as well as the General Court: D. Kochenov & G. Butler, Independence of the Court of Justice of the European Union: Unchecked Member States Power After the Sharpston Affair, 27 ELJ 2022 (forthcoming).

\textsuperscript{28} Case C-791/19 R, Order of the Court (Grand Chamber) in Commission v. Poland (Independence of the Disciplinary Chamber of the Supreme Court) EU:C:2020:277 (8 Apr. 2020).

\textsuperscript{29} Case C-619/18 R, Order of the Court (Grand Chamber) in Commission v. Poland (Independence of the Supreme Court) EU:C:2018:1021 (17 Dec. 2018).

\textsuperscript{30} For a significant break-through in interim relief, see most importantly, Case C-441/17 R, Order of the Court (Grand Chamber) in Commission v. Poland (Białowieża forest) EU:C:2017:877 (20 Nov. 2017). Compare P. Wemmerås, Saving a forest and the Rule of Law: Commission v. Poland, Case C-441/17 R, Commission v. Poland, Order of the Court (Grand Chamber) of 20 November 2017, 56 CMLRev 541 (2019).


\textsuperscript{33} Kochenov & Bárd, supra n. 5, at 243, 274.

\textsuperscript{34} See the diverging perspectives by P Lindseth (minority view) and JHH Weiler (majority view): P. L. Lindseth, Power and Legitimacy: Reconciling Europe and the Nation State (OUP 2010); J. H. H. Weiler,
with its stated Article 2 TEU values, especially the rule of law, the substance of which was, ultimately, for the Member States to determine. But as a fusion of aspirational value-proclamations with the possibility of their strict substantive enforcement, which was lacking both due to the perceived lack of competence and the perceived lack of clarity in terms of the substance of the values. Clarity is being articulated at both levels now. Add to this reinforced enforcement possibilities and the picture of the new constitutionalism in the EU is complete.

The rule of law crisis has required the judiciaries of the EU to step up, bringing inter-court dialogue to a vital new level and upgrading its substance. At the core of this dialogue are also the fundamental principles of EU law, even those not confined in their entirety to the EU’s scope of powers. In particular this includes the independence and irremovability of the judiciary – interpreted by the Court as an EU-law principle and a vital element of the rule of law, as opposed to merely issues of validity and the interpretation of EU law per se, however broadly conceived. Such an interpretation – a spectacular innovation reshaping the constitutional system of the Union as we speak – has given voice to vertical concerns related to the defence of the independence of the Member State judiciaries, as well as horizontal rule of law concerns, leading to a significant

The Constitution for Europe: ’Do the new Clothes Have an Emperor?’ and Other Essays on European Integration (CUP 1999).


37 Compare G. Palombella, Beyond Legality – Before Democracy: Rule of Law Caveats in the EU Two-Level System, in Closa & Kochenov eds, supra n. 1.

38 R. Janse, De renaissance van de Rechtsstaat (Open Universiteit 2018).


40 For more on the shift of Art. 2 TEU principles from ‘principles’ to ‘values’ without undermining the essence of the former, see Pech, supra n. 24.


42 For a criticism of the state of the dialogical rule of law in the EU, see e.g., D Kochenov, De Fato Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times, XI Polish Y. B. Int’l L. 197 (2021).

43 This allowed the national courts under threat to deploy the preliminary ruling procedure in an innovative way in order to guarantee the preservation of their own independence: S. Biernat & M. Kawczyńska, Though This Be Madness, Yet There’s Method In’t: Pitting the Polish Constitutional Tribunal Against the Luxembourg Court, VerfBlog (26 Oct. 2018), https://verfassungsblog.de/though-this-be-madness-yet-theres-method-int-the-application-of-the-prosecutor-general-to-the-polish-constitutional-tribunal-to-declare-the-preliminary-ruling-procedure-unconstit/ (accessed 6 Dec. 2021);
refinement of the principle of mutual recognition.\textsuperscript{44} This has allowed the Court to learn from its past mistakes in dealing with assaults on the rule of law.\textsuperscript{45} The presumption that the strict enforcement of the \textit{acquis} is sufficient to guarantee adherence to the EU’s values is clearly not valid any more.\textsuperscript{46} Together with the endowment of Article 19(1) TEU with a new significance, the on-going crisis of the rule of law has helped open a new chapter of European constitutionalism. We will discuss this in considerable detail below.

The Charter has initially played a very limited role in how these rule of law enforcement developments vis-à-vis Member States and the EU level itself have unfolded, and how responses have been shaped. Indeed, and remarkably, although a policy and an inter-institutional dialogue about it is nascent and has many promising aspects,\textsuperscript{47} reinforced Charter application was not made a central or even significant strategic component of confronting rule of law backsliding by the Commission or rule of law friendly Member States. If its invocation was at all attempted in parallel to the rule of law methods, for example in coordinated infringement proceedings, this was often criticized as too narrow, or too little too late.\textsuperscript{48} This situation started to change following the successful deployment of Article 47 CFR in the \textit{Portuguese Judges} case. Over the last three years a consistent pattern of co-application of Article 19(1) paragraph 2 TEU on the one hand and Article 47 CFR on the other has emerged, where the Charter supplied a substantive core in the context when the TEU provision ensured that the matters related to the independence of the national judiciaries and security of judges’ tenure remained firmly grounded within the scope of application of EU law. The same picture emerges from all the recent case-law of relevance, especially involving Poland.

Simultaneously, the Charter’s application has acquired a paradoxical potential of facilitating counter-productive developments. In particular, in the context of the

\footnotesize{\begin{itemize}
\item Compare M. Broberg, \textit{Preliminary References as a Means of Enforcement of EU Law}, in Jakab & Kochenov eds, \textit{supra} n. 1.
\item D. Kochenov, \textit{Why the Promotion of the Acquis Is Not the Same as the Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy Instead of Just Promoting the Acquis – Some Lessons from the Fifth Enlargement}, 2 Hanse LR 171 (2006).
\item Morijn, \textit{Post-Lisbon Civil Rights Protection}, \textit{supra} n. 6; Morijn, \textit{Kissing Awoke a Sleeping Beauty?}, \textit{supra} n. 6.
\end{itemize}}
newly found competence to police national court systems’ adherence to the promise of Article 19(1)(2) TEU, establishing the ideal of a unified European judiciary, the Charter’s role has been far from straight-forward. Indeed, every characterization of a substantive rule of law problem as a problem, primarily, arising from a failure to ensure compliance with the Charter right guaranteed by Article 47 CFR tends, potentially, to significantly underestimate the negative effects of the backsliding on the ground. Looking at issues purely through the Charter lens falls short of offering the remedies even remotely similar to the one’s flowing from the characterization of the same problem as a violation of the rule of law as a principle. We have seen this in LM, for instance, among other cases, and will discuss in more detail below. In a nutshell, remedying the breach of rights of (a group of) individuals is entirely different from remedying the national system of the judiciary’s drifting away from adhering to a fundamental principle.

More generally, in substantive terms the Charter’s application in other contexts, perhaps with the exception of the Court’s rather recent and very significant development of the concept of ‘essential core’ of (some) Charter rights, has very largely continued a business-as-usual for human rights protection in the Union. According to the Fundamental Rights Agency, particularly the relatively narrow issue of unclear boundaries of Article 51 CFR seems to have a generalized chilling effect on trying to invoke it at all— the Court’s seemingly accommodating reading of the provision has thus changed almost nothing in the practice of the Charter’s application. Much more could be done, as András Jakab, among others, has abundantly demonstrated. The Charter’s application has often stumbled already at the context-specific and very rarely really unclear question of ‘when applicable in national practice?’, rather than starting from the more general and practically far more significant issue of ‘what is its substantive added value?’ It has been a bit like trying to promote enthusiasm for a new form of football and

49 See the literature in n. 4, supra, as well as M. Klamert & B. Schima, Article 19, in The Treaties and the Charter of Fundamental Rights – A Commentary 172 (M. Kellerbauer, M. Klamert & J. Tomkin eds, OUP 2019).
54 A. Jakab, The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law Against EU Member States, in Closa & Kochenov eds, supra n. 1.
everyone being totally obsessed with the (admittedly quite unclearly formulated) off-side rule. For this reason, one of the foremost authorities on its practical application recently wondered whether, after all, the Charter might have turned out to be little more than an ‘illusionary giant’.  

4 MEMBER STATE-LEVEL RULE OF LAW BACKSLIDING AND THE CHARTER: THE CASE OF JUDICIAL INDEPENDENCE

The problems arising from compliance with the promises of Article 2 TEU were entirely unforeseen and in any event fall fully outside the zone of the previously described shared self-perception in ‘a community based on the rule of law’. Academics, policymakers and, crucially, the Court have however quickly caught up with the issue of Member State-level ‘rule of law backsliding’. Protecting judicial independence has been a case in point in that respect. As we will identify and discuss below, a plethora of practices, patterns and proposals can by now be identified as to how to mobilize the Charter to confront that central problem. But they also show, clearly, that the potential for an added value of the Charter in the context of fighting for the rule of law is limited in several respects.

4.1 MEMBER STATE-LEVEL JUDICIAL INDEPENDENCE AND THE INHERENT LIMITATIONS OF THE CHARTER’S SCOPE

As a crucial element of the ongoing fight for the rule of law, the principle of the independence of the judiciary is derived at EU level directly from Article 19(1) TEU, and is regarded as a vital part of the value of the rule of law. Judicial independence thus emerged as a crucial connector between EU law and the enforcement of Article 2 TEU values outside the scope of the acquis sensu stricto. This explains the relative silence on the Charter as a trigger of EU’s intervention among those who are busy trying to deal with the ongoing rule of law concerns in practice. After all, Article 51 CFR still stands, all the literature on the need to move on from this competence block notwithstanding. In any event, we are
learning that 19(1) TEU is good enough.\textsuperscript{61} A range of tools from pecuniary\textsuperscript{62} to interim measures with backfiring force\textsuperscript{63} can now be deployed to freeze at least some of the attempts of backsliding governments to undermine the independence of their judiciaries even further. Article 47 CFR has been deployed on a number of occasions, but always in the context of 19(1) TEU. What ‘additional’, added value the Charter could offer here remains unclear. Rather, this specific development showcases the natural limitations of a purely and isolated rights-based approach to policing systemic rule of law issues.

The role of the Charter’s application in context of the rule of law backsliding deals mainly with Article 47 CFR expressing a right to an effective remedy and right to a fair trial. It requires an ‘independent and impartial tribunal ( … ) established by the law’ in order to guarantee those rights. In a broader sense however, the right to fair trial and effective remedy are designed as tools to protect other fundamental rights – e.g., privacy rights, freedom of speech or freedom of religion. Inbuilt limitation based on Article 51 CFR can undermine direct application of Article 47 CFR if the link with EU law is missing. The Portuguese Judges ruling however seemed to definitely strengthen the standard of judicial independence due to the application of Article 19 TEU, simultaneously resulting in a ‘marginalization’ of Article 47 CFR\textsuperscript{64} as it left just a ‘supportive’ role of this provision\textsuperscript{65} due to broader scope of principle expressed in Article 19 TEU.\textsuperscript{66} In the Independence of the Polish Supreme Court case Advocate General Tanchev found that as a result of amendments to the law on the Supreme Court, Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. He argued however that Article 47 CFR was not applicable in this case due to the limitation in Article 51 CFR.\textsuperscript{67} The Court disagreed and mentioned both

\textsuperscript{62} Especially when the backsliding Member States attempt to openly defy the Court: Case C-441/17 Commission v. Poland EU:C:2018:255 [2018] OJ C200/20.
\textsuperscript{64} Pech & Platon, supra n. 5, at 1836.
provisions, but the clear lead was given to Article 19(1) TEU. The substantive added value of applying Article 47 CFR as well remained somewhat unclear, however.

Article 47 CFR did play the primary role in the process of interpretation of the European Arrest Warrant system within the EU in the preliminary ruling in LM regarding the execution of the European Arrests Warrants requiring surrender to Poland, given the existence of a systemic threat to the rule of law in that country.\textsuperscript{68} Standards of judicial independence – as stated in Article 47 CFR – were employed as factors which might (potentially) introduce exemption to the principle of mutual trust among Member States.\textsuperscript{69} Furthermore, the Court underlined the ‘protective’ nature of the right to fair trial, not only with reference to other fundamental rights but also to common values expressed in Article 2 TEU.\textsuperscript{70}

The ruling has been criticized as limited only to standards of judicial independence without reference to a broader picture of rule of law backsliding, in which detailed analysis of a possible breach of the right to fair trial is impractical due to systemic shortcomings of the administration of justice in a given Member State.\textsuperscript{71} The Court confirmed – both in the Portuguese Judges and LM – that judicial independence and organization of the judiciary at national level are not purely exclusive competence of Member States.\textsuperscript{72} Furthermore, it is obvious that without independent courts there can be no mutual trust between Member States.\textsuperscript{73} The

\begin{itemize}
\item \textsuperscript{68} Case C-216/18 Minister for Justice and Equality v. LM EU:C:2018:586 [2018] OJ C328/22.
\item \textsuperscript{69} Bonelli & Claes, supra n. 65, at 622, 624.
\item \textsuperscript{70} Ciprian Vasile Radu, The EU’s Role in Policing Rule of Law: Reflections on Recent Polish Experience, 69(3) NILQ 347, 352 (73) – Art. 19 seems to be a cornerstone of mutual trust among Member States and among different judicial systems within the Member State. That is why ‘it is not realistically possible for the EU to rely on national courts, in the spirit of the Simmenthal formula when those courts have been subjugated to the executive power, as in the case in Poland and Hungary’.
\end{itemize}
threshold of the fair trial violation was set so high, however, that it might appear to be easier to postpone the surrender of a suspect in case of inhuman treatment than in case of breach of the principle fair trial. For that reason alone one would hope that this line of case law is still a work in progress.

It seems rather a statement of the obvious that when the separation of powers is being destroyed in one of the Member States and the independence of the courts is threatened, it is unreasonable to expect justice in individual cases from such a judiciary of such a Member State. This was exactly the assumption of the Irish judge drafting the preliminary questions in LM (or Celmer, in front of the Irish courts) case. Many hopes among prominent commentators related to the idea that the Court of Justice would come up with a direct and clear assessment of the concrete threats to the judiciary of the Member State in question – pretty much what it has done in Portuguese Judges – and rule on this basis: when the whole system is compromised, indeed, it is difficult to expect a just and truly independent verdict from one particular judge whom the person with respect to whom a European Arrest Warrant has been issued will be facing. In LM the Court of Justice thus got an ideal opportunity to clarify the relationship between, on the one hand, the principle of mutual trust as the key principle of EU law finding its reflection in the European Arrest Warrant system the existence of which has to be presumed as a matter of principle, following ECJ’s Opinion 2/13 – and, on the other, the imperative to safeguard the right to a fair trial as reflected in Article 47 CFR. The systemic nature of deficiencies faced by the judiciary under attack in Poland and highlighted by the referring court offered the ECJ an opportunity to go deeper into the meaning of judicial independence under EU law.

Even if LM was a case of big expectations in all of these regards, the majority of these promises did not materialize. This is partly due to the fact that, unlike in Portuguese Judges, the Court delegated the actual act of assessment to the national judge who sent the reference. The Court provided the national judge with an unworkable and largely illogical two-prong test, which puzzles plentiful national judges since that day. Moreover, the Court also obliged the judges handling EAW

---

75 Bárd & van Ballegooij, supra n. 50, at 353, 360–361.
76 But see T. Konstadímiðé, Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: LM, 56 CMLRev 743, 755 (2019): ‘As such, executing judges need to be careful in their individual assessment not to be prejudiced against Poland in all situations’.
78 The difference in approach exhibited by the Court in these two cases is underlined by Michał Krajewski: M. Krajewski, Who Is Afraid of the European Council? The Court of Justice’s Cautious Approach to the Independence of Domestic Judges, 14 EUConst 792, 793–794 (2018).
requests to engage in a kind of ‘dialogue’ with potentially non-independent colleagues in the judicries of the Member States experiencing attacks on the rule of law, ‘presupposing an unlikely scenario that a captured court will admit that it was captured’.\textsuperscript{79} The questionable nature of the very premiss behind such an approach has recently been highlighted by an Oberlandesgericht in Karlsruhe, who, having sent the questions to Poland, decided against honouring the EAW request \textit{without} waiting for the answers to come back, as Petra Bárd and one of us reported.\textsuperscript{80}

4.2 Member State-level Judicial Independence and the Inherent Limitations of the Rights-Based Approach in a Rule of Law Backsliding Context

In the context of the limitations of the Charter’s scope, it is fully understandable why the Charter approach embraced by the Court has mostly consisted in the additional deployment of Article 47 CFR alongside Article 19(1) TEU. This is because there are limitations that are linked not to the Charter’s scope but to its substance in the context of dealing with backsliding. Rather than a positive development, however, we view this as potentially dangerous. Opting for a rights-based approach with a focus on fair trial could amount to nothing less but the failure of the Court to put an emphasis on where the problem lies – the systematic nature of the rule of law backsliding more generally.

Approached from this perspective, the view of giving precedence to Article 47 CFR is very difficult to uphold. It narrows down and downgrades the Court’s function as the guarantor of justice in the context of the European legal order. Moreover, it undermines the crucial importance of Article 19(1) TEU, to say nothing of the principle of the rule of law as such. That principle is only meaningful, when it can be properly generalizable within the context of the totality of a given legal system. In addition, as one of us explained writing together with Petra Bárd in the context of the analysis of the LM case, where the Court, confronted with a problem of assessing the execution of a European Arrest Warrant emanating from Poland after the capture of the national judiciary has already started, the narrow view of the Court’s domain failed to solve the substance of the issue at hand:

The ECJ however constructed the case as a possible violation of a fundamental right, namely the right to a fair trial as protected by Article 47 EU Charter, which presupposes that

\textsuperscript{79} Kochenov & Bárd, supra n. 5, at 243, 274.

tribunals are independent and impartial. The ECJ ruled that the two-step test in Aranyosi needs to be followed by the executing judicial authority when making decisions on surrenders. The second prong however makes the suspension of surrender almost impossible. It seems to be a disproportionate burden on the individual to show how a systemic breach if the rule of law affects his or her case individually (footnotes omitted, emphasis added). It is unquestionable that the norms enshrined in Article 47 CFR and Article 19(1) TEU fundamentally differ in nature – and LM appears not to take proper notice of this: a right is not a principle and vice versa.

This mistake will not appear new to careful observers of rule of law–related case-law of the Court. It is exactly what has occurred in Commission v. Hungary (judicial retirement age), where the Court, opting for non-discrimination on the basis of age, sacrificed proper consideration of the rule of law context. The Commission thus won a Pyrrhic victory and the integrity of the Hungarian judiciary was undermined. It took another case based on identical facts but coming from Poland, for the Court to upgrade its understanding of the actual issues involved. In other words: Article 47 CFR may be useful as an add-on to Article 19 TEU in these types of analyses, as it underlines the logical point that a broader systematic problem logically will have an impact in each individual case to be considered. But this also directly explains why the reasoning cannot work the other way around: just stressing the human rights impact of a systematic problem automatically legally mischaracterizes the problem as it disregards the wider systematic nature at hand.

Reasoning by analogy, one might expect ‘another’ LM, where the Court would realize that honouring an Arrest Warrant produced by the national system of the judiciary, which is not independent as the Court’s own case-law analysed in the previous sections strongly suggests, is a violation of the rule of law no matter whether the suspect can make the impossible possible and connect the breach of

81 Kochenov & Bárd, supra n. 5, at 243, 274.
82 See also M. Leloup, An Uncertain First Step in the Field of Judicial Self-Government, 16(1) EUConst 19 (2020).
the rule of law in that particular case with a violation of a very concrete right guaranteed by the Charter around which the whole idea of LM test evolves.

5 EU-LEVEL CHARTER POTENTIAL AT THE INTERSECTION WITH THE RULE OF LAW: THE EXAMPLE OF PARTY FINANCING

It is important to stress that the EU institutions have acted on rule of law backsliding not only vis-à-vis Member States ex Article 7 TEU and infringement actions. They have attempted the same vis-à-vis the knock-on effects that the same problems in the same Members have had on the EU political setting itself. This aspect has so far quite often escaped attention. But it is crucial to draw this into the picture. Importantly, EU action in the axis of the EU level itself was modelled on Article 7 TEU in important ways. Yet, it has been highly uneven and problematic. Also, it has largely ignored the Charter even if, according to Article 51 CFR, there is really no doubt that all action by EU institutions and at EU level itself is to be fully compliant with it. As a result the extent of the problem of illiberalism and rule of law backsliding for the EU, and the ways it is now deeply entrenched in complicated ways within the operation of EU institutions, is often underestimated.

The most important attempt to act to stem rule of law backsliding at EU level have been adaptations to the Regulation on the statute and funding of EuPP and European Political Foundations. It was attempted to strengthen existing rules that lay down the requirement that EU-funding to EuPP can only be issued on the condition that in their programme and actions basic EU values (Article 2 TEU) are complied with. To this effect Regulation 1141/2014, later further amended by

---

88 A European political party is a political alliance of member political parties from at least 25% of EU Member States (Art. 3(b) Regulation 1141/2014). Its purpose is to develop a common European political agenda. A European political foundation is a think tank related to it. An EuPP is distinct from, yet linked to political groups in the EP. A political group, according to the EP Rules of Procedure (the latest version of Feb. 2019 can be found here, http://www.europarl.europa.eu/sides/getDoc.do?subRef=-/-EP/-TEXTS/PROV/20190305/TOC/DOC+XMLV0/-/EN&language=EN) (accessed 6 Dec. 2021), is a group of at least twenty-five Members of European Parliament from at least 25% of EU Member States. The purpose of such cooperation is access to political influence by dividing speaking times and files. EuPP and political groups are separate but connected. Most EuPP belong to political groups in their entirety. Some political groups are home to more than one EuPP. It is possible for populists not to be part of an EuPP but still to be part of a political group (non-affiliated). It is equally possible to be part of an EuPP but not of a political group (non-aligned).
Regulation 2018/673 introduced a registration obligation for EuPP with an independent Agency for European Political Parties and Foundation (APPF). Part of the requirement is a written pledge of allegiance to Article 2 TEU. In addition, a procedure was set up to verify continuing compliance after the moment of registration. This can be triggered by the Commission, Council and the Parliament itself. The Parliament has adopted internal Rules of Procedure (RoP) how to trigger this procedure. More recently Parliament also approved an amendment. It made establishment criteria for political groups more stringent, by including a requirement of a statement of political affinity (in contrast to current rules, that state joint affinity needs no evaluation). This was clearly meant to ensure that ‘illiberals’ would be less likely to be successful in forming alliances while not entirely agreeing on an agenda amongst each other.

Although most attention in the negotiations was on how the verification would work, presumably for reason that there was fear that that could feed back into Article 7 TEU could be applied vis-à-vis specific Member States, what is remarkable is that the registration requirement itself has ended up serving as a major hurdle. Many EuPP have not registered since these rules came into force, thereby foregoing EU-funding. Those who have not registered are almost entirely in the right-wing ‘illiberals’ corner. The implications of the rules suggest that perhaps the requirement to be seen to endorse Article 2 TEU was itself judged politically too damaging by EuPP consisting of illiberal politicians. In this sense, arguably, the rules have been helpful in addressing (potential) rule of law backsliding at EU level, albeit in unexpected and unintended ways.

There are highly problematic aspects as well, however. The RoP requirement of support by at least three different political groups to trigger a verification request with Article 2 TEU values almost certainly serves to protect ‘illiberals’ who sit inside mainstream EuPP. In fact, even if this was largely ignored because of a focus on Hungarian Fidesz, that only recently left the European People’s Party, all mainstream EuPP have some such illiberal forces. It is therefore unlikely they would act against other mainstream EuPP. Quite simply because this would certainly cause fingers to point the other way too, and why expose their own

---

89 For extensive analysis, see Morijn, supra n. 87, at 617.
90 EP Rules of Procedure, rule 223a(2), stating the possibility of verification under the Regulation can be triggered by the EP only at the request of 25% of its members representing at least three political groups.
92 The Socialists & Democrats harbour the Maltese and Romanian governing parties, Member States that were both scolded for Rule of Law related problems by majority adopted European Parliament (2014-19) resolutions. ALDE harbours the Czech ANO ruling party, which also faced majority back European Parliament (2014-19) scrutiny. Polish PiS sits in the ECR, where it cooperates with quite a few politicians that are not themselves to be categorized as illiberals but apparently have no problems to rub elbows, and base part of their own power and influence on closely cooperation with them.
‘bad apples’. Indeed, picking principle over power is apparently not yet sufficiently politically attractive (or, put the other way: not acting on principle is not yet sufficiently politically damaging). In this way the EU legislator may have actually entrenched the problem rather than effectively acting against the backsliding. It has come up with a solution that only hits part of the ‘illiberals’ in Parliament without a real justification for why (the baddest of bad apples are unaffected by this legislation).

It is striking that the Charter played virtually no corrective or steering role in developing these rules. There is one exception. Freedom of assembly was mentioned in the Regulation to ensure that the APPF would take that into account when assessing value compliance by EuPP. Remarkably, this mentioning of the Charter actually serves to limit the scope of the rule of law based limitation of access to the political arena, not as an additional justification for that measure to prevent rule of law backsliding. This was likely in part because the measures themselves, as discussed above, were formulated in a ham-handed way and were likely to have a politically uneven effect. Is this purely Charter fetishism, or could a Charter based analysis of this type of regulation to the effect of restricting access to the political arena by political actors aiming to undermine Article 2 TEU values with a view to preventing backsliding actually make for a more fine-grained analysis? We suggest it would.

For let us briefly revisit the facts presented earlier and apply a rudimentary Charter test to illustrate the point. As shown above regulation of access to the political arena is now achieved by a combination of a Regulation (adopted by the Union legislator) and the RoP (adopted by Parliament itself, by simple majority). Arguably, as a matter of Article 52(1) Charter there can be debate about whether RoP formation requirements of the Parliament’s political groups, that clearly form a restriction of Article 12(2) Charter, possibly in combination with Articles 11 and 39 Charter, fulfil the requirement of being ‘provided by law’. After all, the Court


94 See for more extensive analysis, Morijn, supra n. 87, at 617.


has itself highlighted the close relationship of political groups with EuPP, which are regulated with a more stringent procedure, i.e., an ordinary legislative procedure (involving a proposal by the Commission and subsequent discussion by the co-legislators, the Council and the European Parliament). It seems a relatively straightforward observation from the perspective of the rule of law and democracy that a simple majority of a parliament should not be allowed to regulate itself which colleague political actors have access to power, without all the safeguards and input of other perspectives that a normal legislative procedure would guarantee, nor that such an arrangement could have a direct impact on the scope and effect of Union legislation adopted by the ordinary legislative procedure.

If the currently applicable set of measures would at all clear the hurdle of ‘provided by law’ (which, as will be evident from the previous discussion, we doubt), it could still be seriously wondered whether another crucial aspect of Article 52(1) Charter would actually be satisfied. As was illustrated, the combination of the Regulation and the RoP as currently crafted has a very uneven effect politically – it hits some ‘illiberals’, but very likely not others (i.e., the most significant troublemakers in the current Article 7 TEU proceedings). This raises serious questions about whether the rules constitute a restriction of the same Charter rights that is proportional and tailored to the aim it is intended to achieve.

This in turn raises the Charter analysis induced policy question: is it possible to redesign the rules of access to funding in such a way that it actually hits all political actors aiming to act contrary to Article 2 TEU values? Would it, for example, help to limit the number of Member States where Members of European Parliament should originate from (currently 25%) and/or lower the number of MEPs required to form a political group? We do not know. But these are the types of questions one weeds out if a Charter analysis is undertaken in the first place when EU-level files with a direct bearing on rule of law related files are negotiated at the EU-level. They seem worthwhile delving into in this case. They also illustrate just how interlinked questions of rule of law and the Charter are. But also to what extent this is still a highly underdeveloped practice, including at the EU-level itself. It is a good example of how efforts to promote application of the Charter and to protect the rule of law at EU law have thus far been very largely unconnected. This should change quickly.

6 CONCLUSION

The EU’s rule of law backsliding problem threatens the Union’s very existence. Illiberal tendencies in an increasing number of Member States are worrying enough. But it is equally troubling that those stating their commitment to defend liberalism in the EU continue to be constantly on the back-foot and show little
sign of getting their act together. It can no longer be papered over that they have different views of the nature, extent, and urgency of the rule of law threat, and view the problem too narrowly by singling out problems at Member State levels without acknowledging the parallel and substantive linked mirror problem at the EU level—therefore ignoring how EU level legislation and practice effectively sustains, helps entrench and sometimes deepens the problems. There is currently nothing close to a comprehensive strategy to defend liberal democracy at both Member States and EU level and act against rule of law backsliding. The by now discredited but surprisingly persistent self-perception of the EU as a club-of-stable-liberal-democracies is increasingly getting in the way of decisive targeted action by the EU to defend itself.

The Charter has only played either a virtually invisible or a paradoxically negative role in dealing with rule of law problems in the Member States. What we call ‘invisible’ is the strictly supporting role—through the deployment of Article 47 CFR next to Article 19(1) TEU in the Commission’s action against the clamping of the independence of the judiciary in the Member States experiencing democratic and rule of law backsliding. This role is invisible since the actual added value of Article 47 CFR next to Article 19(2) TEU is far from clear. The Charter here is clearly not indispensable, and that is likely all there is to it. Worse still, the Charter can also play a negative role if it takes the place of broader, more systematic rule of law approach. This is what happened in LM. The Court adopted a right-based approach to a situation where a clear and far-reaching violation of the principle of the rule of law was actually at stake. Conflating the breach of principle with a violation of the right has a potential to bring about long-lasting negative consequences in the context of the fight for the rule of law in the EU.

The potential of the Charter is not limited to these two pessimistic scenarios outlined, however. There is a world to win in applying it more forcefully, particularly at the often underexplored EU-level where there is no doubt whatsoever that the Charter is fully binding. Yet, the current practice in rule of law relevant EU-level legislation is remarkably bleak. As we explain by way of just one example, deploying the Charter in the context of party financing could have had far-reaching positive consequences in the fight for the rule of law in the EU. This should be acted upon in any subsequent changes.

It is easy to think of other uses at Member State and EU-level alike that could be highly consequential. For example: if the worry in Hungary and Poland is with the capture of the media, and if one agrees that even the most timid definition of EU citizens’ active right to vote for European Parliament and local elections (Article 17(2)(b) of the Treaty on the Functioning of the European Union, and Articles 11 and 39(1) CFR) will logically necessitate free and independent media at Member State level in the same way that independent and impartial courts at
Member State level are required in a liberal democracy, it is quite clear that there are many more Union law areas than just Article 19 TEU that could be ‘weaponized’ to defend the rule of law in tandem with applying the Charter. It is urgent to systematically catalogue and act upon these to put up a better and much more comprehensive defence for the rule of law in the EU. In that way, the Charter is of high relevance to the on-going fight for the rule of law in the EU. Dismissing the instrument outright – or reducing it to a uniquely supporting role for a better deployment of Article 19(1) TEU – would be a mistake. The Charter, when used wisely, has all what it takes to become an effective instrument of values’ protection in EU law. Then it can be a weapon to help protect the rule of law.