# 14. The political dynamics of EU human rights law: scratching beneath the surface

*Marie-Pierre Granger*

## 1. INTRODUCTION

'Will illiberalism become an impetus for supranationalism?' ask Marks and Hooghe in a recent article revisiting European integration theories in the EU multiple crises context.[1] To answer this question, we must study the interactions between domestic factors, actors and contexts, and European integration in general. An investigation focused on the dynamics of the development of EU human rights law has, so far, largely been missing, when we leave aside older European integration theories focused on the pre-Maastricht period, and the more recent multidisciplinary works on the Rule of Law crisis.

It has become commonplace to describe the European human rights landscape as a crowded one. EU norms coexist with human rights guaranteed under the European Convention on Human Rights (ECHR) and fundamental rights protected by national constitutions and legislation.[2] Each of these overlapping yet distinctive human rights regimes have their own protection mechanisms and institutional guardians, respectively, the Court of Justice of the European Union (CJEU, or the Court),[3] the European Court of Human Rights (ECtHR), and national (constitutional or supreme) courts.

The EU human rights law scene is an equally populated place, in which academics and practitioners, from various origins and backgrounds, meet and mingle, to discuss progress and complexity. As an academic field, though, EU human rights is very much a legal dominion, which results in important questions pertaining to the – not strictly legal – dynamics of the field remaining on the sidelines. Relevant theoretical perspectives and methodological approaches, as developed in social and political sciences scholarship, have not yet been deployed to their full potential to make sense of the evolution of EU human rights law and evaluate its actual influence.

[1] L Hooghe and G Marks, 'Grand Theories of European Integration in the Twenty-First Century' (2019) 26(8) *Journal of European Public Policy* 1113, 1127.

[2] The acronym EU is used to cover both EU law, and the law of the three former European Communities.

[3] Formally, the CJEU is made up of the Court of Justice (formerly known as the European Court of Justice, or ECJ) and the General Court. In this chapter, in line with social science practice, the acronym CJEU is used more informally, to refer primarily to the Court of Justice.

The chapter starts with a brief and inevitably simplistic and selective presentation of the development of the EU human rights law regime, and its peculiar features, alongside a critical review of the main relevant streams of scholarship.[4] It then develops an argument calling for a more interdisciplinary research agenda, inspired by scholarship on European integration and legal mobilisation, in order to develop a more rounded understanding of the actors and processes that contribute to making what EU human rights law is today, and help anticipate its future evolution.

## 2. THE MAKING OF THE EU HUMAN RIGHTS LAW REGIME – THE PROGRESS NARRATIVE, LEGAL CRITICS, AND THE 'BENIGN NEGLECT' BY SOCIAL SCIENTISTS

The traditional narrative in EU human rights law has been one of progress. This positive framing is more and more challenged, as EU legal scholarship, under various influences, is becoming more critical, and as the field comes under more intense scrutiny from constitutional, human rights and social lawyers. Still, most legal studies focus on matters of legal standards and reasoning, or offer normative assessments, and few works investigate in a more systematic and targeted manner which political and social factors, actors and dynamics contribute to, or hinder, the development of EU human rights law and its application.

Most stories start with the silence of the founding Treaties on human rights.[5] For political and pragmatic reasons, the drafters left it to the (constitutional) authorities of the then six western Member States to ensure respect for fundamental rights and freedoms, subject to the supervision of the institutions of the Council of Europe, in particular the ECtHR. But this state of affairs became more difficult to sustain as the EU regulatory reach expanded and intensified. EU legal measures (Directives, Regulations and Decisions, and other *sui generis* acts) came to interfere more directly and intensely with the activities of private (economic) actors. This was the case not only in common policies such as agriculture, competition or commercial policy, but also in fields not directly falling within EU competences, but brought within the ambit of the EU legal supervision, as a result of an extensive interpretation of the Treaty's internal market provisions by the European Commission and the CJEU ('creeping competences').[6] This way, many aspects of national (including social) policies such as environment, health, education or housing came under the influence

[4] The review covers English language scholarship. I acknowledge that there have been very important contributions to the debate on the protection of fundamental rights, in national academic circles, but these are not reviewed here.

[5] For an exception, see G de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105(4) *American Journal of International Law* 649.

[6] S Weatherill, 'Competence Creep and Competence Control' (2004) 23(1) *Yearbook of European Law* 1.

of EU law. These market law-driven interferences caused some worries amongst social and human rights circles, and those inclined to preserve national policy autonomy, that were further exacerbated by the growing formal authority and status of EU law, produced by the combined effect of the CJEU's 'constitutional doctrines' of supremacy and direct effect and the transformation of the preliminary reference procedure (Article 267 Treaty on the Functioning of the European Union (TFEU)) into a decentralised compliance device.[7] This, indeed, enabled private actors (usually companies, but also some individuals), supported by lawyers, to act as private enforcers of EU law, and to challenge national policies which obstructed their business or life ambitions.

Reactions were, unsurprisingly, particularly virulent in constitutional law circles in Member States, like Germany and Italy, which were – for obvious historical reasons – more sensitive over fundamental freedoms, and had, in the post-war period, set up relatively robust constitutional instruments and mechanisms for their protection. Challenges came already in the late 1950s in the form of litigation by market operators before courts in those two countries, which referred to the CJEU questions for preliminary rulings contesting the applicability or validity of (then) Community acts, on the ground that they undermined their constitutional rights.[8] The CJEU at first refused to engage with the argument, concerned as it probably was about the preservation of the freshly minted principle of supremacy of Community law. Litigants and their lawyers persisted in challenging European instruments but opted for a different strategy, this time asking the CJEU whether, by any chance, EU law itself contained human rights guarantees similar to those protected by national constitutions.[9] The Court seized the opportunity, ruling that 'fundamental human rights were [indeed] enshrined in the general principles of Community law and protected by the Court'.[10] Interestingly, the Court's shift of approach came in a case (*Stauder*) which, unlike the previous ones, was not brought by market operators seeking to protect their business interests by resorting to fundamental rights objections, but by a social benefit recipient invoking his human dignity. That observation may go some way in explaining, or at least justifying, the transition. The Court from then went on to build a judicial catalogue of fundamental rights, drawing inspiration from national constitutional

---

[7] For seminal 'law-in-context perspectives' on these early constitutional developments, see E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75(1) *American Journal of International Law* 1; JHH Weiler, 'The Transformation of Europe' (1991) *Yale Law Journal* 2403; and H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Brill 1986).

[8] See Case 1/58 *Stork v High Authority* ECLI:EU:C:1959:4; Case 3640/59 *Geitling v High Authority* ECLI:EU:C:1957:4; Case 40/64 *Sgarlata v Commission* ECLI:EU:C:1965:36.

[9] Case 29/69 *Erich Stauder v Stadt Ulm* ECLI:EU:C:1969:57.

[10] See Case 29/69 *Erich Stauder v Stadt Ulm* ECLI:EU:C:1969:57, confirmed in Case C-44/79 *Liselotte Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290.

traditions[11] and international human rights instruments, and in particular the ECHR[12] (although made to fit and support the EU's special institutional scheme and policy purposes). The Court also assumed control over compliance with EU human rights by EU institutions, but also by Member States when they act as agents of the EU.[13]

The judicial incorporation of fundamental rights in the process of European integration consequently received political endorsement through formal Treaty recognition. The Maastricht Treaty (1992) explicitly recognised the existence of general principles for the protection of fundamental rights as part of the EU legal system (Article F). Addressing concerns raised by the prospect of EU enlargement to Central and Eastern European countries fresh out of authoritarian regimes, the Treaty of Amsterdam (1997) imposed respect for human rights as one of the accession conditions (the so-called Copenhagen criteria, now laid down in Article 49 Treaty on European Union (TEU)), as well as a sanction mechanism (Article 7 TEU) for Member States guilty of serious and persistent violations of core EU values, which include respect for fundamental rights (Article 2 TEU). The Nice Treaty reform process (1999–2000) oversaw the elaboration, through an innovative participatory and deliberative convention method, of the EU Charter for Fundamental Rights (CFR). The instrument codified the CJEU case law on general principles protecting fundamental rights and also included EU citizenship rights based on EU Treaty provisions, as well as a range of social rights (confusingly called 'principles'). It also introduced a few new rights, informed by technological and societal developments (such as data protection and guarantees on bioethics). Due to the opposition of some Member States, in particular the United Kingdom, concerned about the inclusion of social rights, the Charter was, at first, only solemnly proclaimed, without formal legal binding force. The latest round of Treaty reform, with the Treaty of Lisbon (2009), which retained most of the constitutional features, although without the name, of the ill-fated Treaty establishing a Constitution for Europe, further reinforced the EU commitment to human rights by granting the Charter primary status and binding legal authority and mandating EU accession to the ECHR (Article 6 TEU).

In addition to judicial and Treaty recognition, the EU has also contributed to fundamental rights protection through legislation.[14] The EU legislator does not have a general competence in human rights matters[15] but can rely on a number of Treaty

---

[11] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.

[12] Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* ECLI:EU:C:1975:114.

[13] Cases 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* ECLI:EU:C:1989:321; C-260/89 *Elliniki Radiophonia Tileorassi Anonimi Etairia* (ERT) ECLI:EU:C:1991:254; C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* ECLI:EU:C:1997:631.

[14] E Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51(1) *Common Market Law Review* 219.

[15] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:1996:140.

legal bases to lay down minimum human rights standards in specific areas.[16] The EU institutions have made extensive use of the Treaty's non-discrimination clauses to adopt legislation protecting fundamental rights. They relied on what is now Article 157 TFEU to pass gender equality legislation (for example, the Equal Pay Directive 1975).[17] Following the inclusion of a general non-discrimination legal basis (Article 19 TFEU) by the Amsterdam Treaty, the EU legislator adopted two important instruments, the Race and Framework Employment Directives (2000).[18] A decade ago, the Commission proposed a general, horizontal, non-discrimination Directive, which would protect individuals from discrimination on a broad range of grounds and in various socio-economic contexts (beyond employment). However, it faced political opposition in the Council and remains stuck in the legislative train, with little prospect of seeing the light of day any time soon.[19] The EU legislator also contributed to the realisation (although within set limits) of EU citizenship rights laid down in Articles 20 to 24 TFEU via the adoption of legislative measures, the main one being the EU Citizenship Rights (or Free Movement) Directive.[20]

In addition to dedicated legal bases, the EU legislator, spurred by the Commission's legal advisors, was also able to make use of certain internal market provisions to adopt protective measures, such as the 1995 Data Protection Directive[21] (before the introduction of a specific legislative competence through Article 16 TFEU, which then served as a basis for the adoption of the new General Data Protection Regulation).[22] More recently, the EU Commission harnessed a broad range of Treaty provisions to support its proposal for a Directive for the protection of whistleblowers, arguing that it would 'strengthen the proper functioning of the single market' as well

---

[16] The EU legislator was, in the past, largely the Council of Ministers, but nowadays consists of the Council and European Parliament co-deciding, on the basis of a proposal by the Commission (under the 'ordinary' legislative procedure).

[17] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

[18] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[19] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final.

[20] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[21] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

as the 'correct implementation' of a vast array of Union policies.[23] The EU legislator, furthermore, mobilised Treaty provisions on police and judicial cooperation in criminal matters (Article 82(2) TFEU) to adopt a series of Directives on the protection of the procedural rights of victims and suspects of crimes.[24]

The progress narrative explicit or implicit in many legal accounts of the development of EU human rights law, and the heroic vision of the Court that accompanies it (succinctly reproduced above), long dominant, have lost ground over the last two decades. De Búrca, relying on archival research, forcefully exposed how the current system of fundamental rights protection in the EU actually falls short of the ambitious schemes laid down in immediate post-WWII European integration projects.[25] Starting in the 1990s, prominent EU and international human rights lawyers started calling more vigorously for the EU to take human rights 'seriously' and to develop a proper policy on the matter.[26] Williams has offered powerful critiques of the EU human rights regime, highlighting its many shortcomings and double standards (notably between external projection and internal compliance).[27] He portrayed the Court's case law on fundamental rights as conservative, primarily concerned with preserving the special nature of EU law and (market) integration objectives, and this despite the reinforced commitment to human rights principles and social justice

---

[23] Proposal for a Directive of the European Parliament and or the Council on the protection of persons reporting on breaches of Union law COM(2018) 218 final.

[24] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime; Directive 2010/64/EU of the European Parliament and of the Council of 22 May 2012 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons 1.

[25] G de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105(4) *American Journal of International Law* 649.

[26] For example, J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12(2) *Legal Studies* 227; JHH Weiler and NJS Lockhart, 'Taking Rights Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part 1' (1995) 32 *Common Market Law Review* 51; P Alston, and JHH Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy' (1998) 9(4) *European Journal of International Law* 658; A Von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37(6) *Common Market Law Review* 1307.

[27] AJ Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press 2004).

objectives in the Treaty, in particular since the adoption of the Treaty of Lisbon (Articles 2 and 3 TEU).[28]

Contrasting with the intense scrutiny the recent development of the EU human rights regime has received from legal academics, it has not caused much of a stir amongst social scientists. This is quite surprising, given the attention which other aspects of European legal integration or policy-making have generated in political sciences circles. In the 1980s and 1990s the 'constitutionalisation' of EU law and the accompanying judicialisation of EU governance piqued the interest of political scientists, in particular those endorsing neofunctionalist theories and new institutionalist perspectives.[29] Their work focused on the establishment and acceptance of the CJEU 'constitutional doctrines' by national (constitutional) courts, and few looked closely at the human rights dimension. This is all the more surprising given the strong presence of US-educated and -based scholars in the field,[30] and the role human rights review played in the evolution of the US federal system.[31] We are therefore left with little systematic understanding of which political and social dynamics drive the evolution of EU human rights law and what it implies for European integration and governance. The complexity of the field may be partly responsible for the relative lack of social sciences research into its dynamics.

## 3. THE COMPLEXITY OF THE EU HUMAN RIGHTS REGIME: A PLAYGROUND FOR LEGAL SCHOLARSHIP AND A CHALLENGE FOR EMPIRICAL SOCIAL SCIENCES RESEARCH

The complexity and intricacies of the EU human rights regime offer fertile ground for legal scholarship[32] but pose empirical challenges for political and social scientists.

---

[28] AJ Williams, 'Human Rights in the EU' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 249.

[29] For a review, see A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) *Living Reviews in EU Governance*, http://dx.doi.org/10.2139/ssrn.1583345, accessed 21 November 2019. For a critical appraisal of this constitutionalisation scholarship, and its misrepresentation of realities, see M Rasmussen and DB Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in EU Studies' (2019) 25 *European Law Journal* 251.

[30] The 'integration-through-law' project, which spurred this research agenda, was very much rooted in the US experience, see M Rasmussen and DB Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in EU Studies' (2019) 25 *European Law Journal* 251.

[31] See RD Kelemen, 'The EU Rights Revolution: Adversarial Legalism and European Integration' in T Börzel and R Cichowski (eds), *The State of the European Union*, *6: Law, Politics, and Society* (Oxford University Press 2003); see also comparative contributions in the special issue of the *European Journal of Law Reform* (2018) 2–3.

[32] For a recent collection bringing together key legal contributors, see S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017).

That state of affairs may explain why the field remains dominated by lawyers and legal questions.

EU legal practice and scholarship are co-constituting.[33] The practitioners that directly contribute to the making of EU human rights law (judges and Advocates General, *référendaires*, EU institutions' legal services and NGO lawyers) also feature amongst the regular commentators and contributors in academic journals. Therefore, EU human rights scholarship closely follows, as well as anticipates and seeks to influence, the elaboration, interpretation and application of EU human rights law itself. With that in mind, it comes as no surprise that legal academics' attention following the adoption of the EU Charter was, at first, directed towards examining the elaboration and content, as well as the impact, of this novel instrument, until the Lisbon Treaty settled the question of its legal status in 2009.[34] Then, it was the prospect of EU accession to the ECHR, laid down in the Lisbon Treaty, which piqued their interest, leading them to debate the conditions of accession,[35] and to engage in comparative studies which pointed to the commonalities and discrepancies between the two systems and their case law, in a way preparing the ground for accession.[36] Since the CJEU put the whole accession process on hold with its Opinion 2/13,[37] commentators have discussed the challenges imposed by the status quo.[38]

The spotlight of legal academia over the years has often been on the 'tense' yet productive interactions between the top human rights courts in Europe, namely the CJEU, the ECtHR and national constitutional or supreme courts. Often situating themselves within the descriptive or normative framework of constitutional pluralism,[39] scholars have commented critically on these courts' open or more covert disa-

---

[33] H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3(2) *European Law Journal* 165; M Rasmussen and DB Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in EU Studies' (2019) 25 *European Law Journal* 251.

[34] G de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26(2) *European Law Review* 126; R Bellamy and J Schönlau, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights' (2004) 11(3) *Constellations* 412; S Douglas-Scott, 'The EU Charter of Fundamental Rights as a Constitutional Document' (2004) 1 *European Human Rights Law Review* 37; AJ Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' (2002) 40(3) *JCMS: Journal of Common Market Studies* 471.

[35] For instance, JP Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48(4) *Common Market Law Review* 995 (Jacqué was the Director of the Council's Legal Service from 1992 to 2008).

[36] For an example see J Kokott and C Sobotta, 'The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3(4) *International Data Privacy Law* 222 (Kokott is now Advocate General at the CJEU).

[37] *Opinion pursuant to Article 218(11) TFEU* ECLI:EU:C:2014:2454.

[38] See M Kuijer, 'The Challenging Relationship Between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' (2018) *The International Journal of Human Rights* 1.

[39] See M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury 2012).

greements when it comes to applicable standards, or over which one has – or should have – authority in human rights matters in any given set of circumstances.[40] They have also drawn, here and there, important implications from the dynamics of these interactions for the process of European integration as a whole[41] but have generated limited systematic knowledge about the 'political underpinnings' of constitutional pluralism, without which any assessment of its value as a theoretical framework is problematic.[42]

Scholars, throughout the years, have analysed many of the substantive provisions of the Charter, their judicial interpretations and applications, and their relevance in addressing human rights problems in EU internal policies (immigration, counter-terrorism, non-discrimination, family law, environment, etc.), as well as in external ones (foreign and security policy, external trade, etc.).[43]

Alongside the Court, legal academics have tackled thorny institutional questions, including the impact of the United Kingdom and Polish opt-outs from the Charter (and more recently Brexit)[44] and the question of the direct effect of the Charter.[45]

---

[40] See contributions in K Dzehtsiarou, T Konstadinides, T Lock and N O'Meara (eds), *Human Rights Law in Europe – The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014). See also O de Schutter, 'The Two Europes of Human Rights: The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe (2007) 14 *Columbia Journal of European Law* 509; M de Visser, 'National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape' (2014) 15(1) *Human Rights Review* 39; D Thym, 'Separation versus Fusion – Or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' (2013) 9(3) *European Constitutional Law Review* 391; S Greer and A Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional" or "Institutional" Justice?' (2009) 15(4) *European Law Journal* 462; F Ippolito and S Velluti 'The Relationship Between the CJEU and the ECtHR: The Case of Asylum' (2008) 6 *Journal of Constitutional Law* 509; A Frese and H Palmer Olsen, 'Spelling It Out − Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR' (2019) 1 *Nordic Journal of International Law* 1; G de Búrca, 'Is EU Supranational Governance a Challenge to Liberal Constitutionalism? (2018) 85(2) *The University of Chicago Law Review* 337.

[41] For a review of part of the literature, see PJ Castillo Ortiz, 'National Higher Courts and European Integration: A Survey of Six Decades of Academic Inquiry' (2019) 18(4) *German Law Journal* 799; PJ Castillo Ortiz, *EU Treaties and the Judicial Politics of National Courts: A Law and Politics Approach* (Routledge 2015).

[42] N Walker, 'Constitutional Pluralism Revisited' (2016) 22(3) *European Law Journal* 333.

[43] See, for instance, contributions in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017).

[44] S Peers, 'The "Opt-out"' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12(2) *Human Rights Law Review* 375; A Yong, 'Forgetting Human Rights – the Brexit Debate' (2017) *European Human Rights Law Review* 469.

[45] See E Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21(5) *European Law Journal* 657.

A particularly challenging issue for both practitioners and academics has been the delimitation of the scope of application of the EU Charter (loosely defined in Article 51(1) CFR) and its relevance to assessing both EU and national measures. In addition to trying to elucidate the erratic and sometimes cryptic CJEU case law on the question, academics have debated the broader institutional and theoretical considerations which (should) inform this determination (primacy, federalism, subsidiarity, justice and so on).[46] The wealth of academic analyses has, unfortunately, contributed only little to dissipating the confusion and clarifying the types of situations in which the Charter applies, leaving many actors on the ground perplexed about the practical significance of the EU 'Bill of Rights'.[47] The intensity of the debate, and the unsettled state of affairs, highlights the delicate, contested and political nature of the Charter's application and identifies it as a particular pressure point of the system.

---

[46] On the Charter's application to EU measures in the complicated institutional context of the Euro crisis and EU-driven austerity measures, see R Repasi, 'Court of Justice Judicial Protection Against Austerity Measures in the Euro Area: *Ledra and Mallis*' (2017) 54(4) *Common Market Law Review* 1123; A Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What Is the Role of the EU Charter of Fundamental Rights?' (2017) 54(4) *Common Market Law Review* 991. On the application of the Charter to Member States' measures, see LFM Besselink, 'The Member States, the National Constitutions and the Scope of the Charter'(2001) 8(1) *Maastricht Journal of European and Comparative Law* 68; P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39(5) *Common Market Law Review* 945; A Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 *Common Market Law Review* 367; E Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in M Dougan and S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009); K Lenaerts and JA Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629; K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8(3) *European Constitutional Law Review* 375; A von Bogdandy, M Kottmann, C Antpohler and J Dickschen, 'Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 *Common Market Law Review* 489; D Thym, 'Separation versus Fusion – Or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' (2013) 9(3) *European Constitutional Law Review* 391; E Hancox, 'The Meaning of "Implementing" EU Law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50(5) *Common Market Law Review* 1411; D Sarmiento, 'Who's Afraid of the Charter; The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267; A Ward, 'Article 51 – Field of Application' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos 2014) 1456; M Dougan, 'Judicial Review of Member States' Action Under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52(5) *Common Market Law Review* 1201.

[47] To help with this, the Fundamental Rights Agency (FRA) recently published a more than 100-page guide on the application of the Charter. See FRA, *Handbook – Applying the Charter of Fundamental Rights of the European Union in Law and Policy Making at National Level* (2018) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf, accessed 21 November 2019.

Closely related to the discussion on the scope of the Charter are works which explore the boundaries of EU citizenship and its implications for the protection of fundamental rights. Many scholars celebrated when the Court started to disconnect EU citizenship from its original market roots and improved opportunities for non-market citizens to derive benefit from it.[48] Indeed, throughout the 1990s and until the 2008 economic crisis, the Court's case law gradually delivered more generous interpretations of the Treaty citizenship provisions, which allowed 'non-economically active' mobile EU citizens to benefit from the more protective EU rights regime.[49] The Court's relaxed interpretation of cross-border activities made it easier to activate EU citizenship provisions and applicable general principles or Charter provisions protecting fundamental rights.[50]

The CJEU decision in *Zambrano* (2012), which concerned the right to reside of Columbian parents of Belgian children (who had never left Belgium), and which seemed to sever the umbilical cord between EU citizenship and cross-border mobility, marked a high point.[51] It was quickly heralded as opening a new era in the evolution of both EU citizenship and EU human rights law, by expanding opportunities for claiming rights and challenging Member States' restrictive policies (notably in the field of immigration and social benefits), when the 'substance' of EU citizenship rights is at stake.[52] The decision raised hopes for the development of a more substantial concept of EU citizenship, less market-, and more human rights-, oriented.[53]

But academic enthusiasm was short-lived as the CJEU soon retreated and circumscribed the 'substance' of EU citizenship rights to a minimalist core consisting of a protection against expulsion from the EU territory as a whole.[54] It also limited the

---

[48] See FG Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13(5) *European Law Journal* 591; F Wollenschläger, 'A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17(1) *European Law Journal* 1.

[49] Starting with Case C-85/96 *María Martínez Sala v Freistaat Bayern* ECLI:EU:C:1998:217.

[50] A typical example is Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434.

[51] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* ECLI:EU:C:2011:124.

[52] See D Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2011) 18 *Columbia Journal of European Law* 55; D Kochenov, 'The Right to Have What Rights? EU Citizenship in Need of Clarification' (2013) 19(4) *European Law Journal* 502.

[53] MJ van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39(2) *Legal Issues of Economic Integration* 273–289; MP Granger, 'The Protection of Civil Rights and Liberties and the Transformation of Union Citizenship' in S Seubert, M Hoogenboom, T Knijn, S de Vries and F van Waarden (eds), *Moving Beyond Barriers: Prospects for EU Citizenship* (Edward Elgar Publishing 2018); A Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Bloomsbury 2019).

[54] Cases C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* ECLI:EU:C:2011:277; C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* ECLI:EU:C:2011:734. For a critical review of the post-*Zambrano* case law, see N Nic Shuibhne,

Charter's application to cases in which EU citizens' situation clearly fell under the scope of application of EU law by virtue of a specific 'connection' to EU law.[55] Many legal scholars deplore this resilience of market citizenship, which benefits primarily educated elites and leaves the others, particularly those most in need of protection, whether mobile across borders or 'staying behind', in delicate situations.[56] The CJEU case law, however, still shows a particular sensitivity to the fate of (EU) children and considers their best interests in EU citizenship cases, which can result in the granting of residency rights to third country national parent-carers of minor EU citizens.[57]

In the last decade, EU-led austerity measures following the Euro- and financial crisis have been subjected to intense criticism, in particular from left-leaning human rights, and labour and social law scholars.[58] More particularly, they have questioned their compatibility with the Solidarity chapter of the Charter, which contains primarily 'principles' (and not 'rights' as such), the justiciable nature of which is limited (Article 52 CFR).[59] Launched in part to address those criticisms, and the structural imbalances between market integration and social policy,[60] the EU Pillar of Social Rights, solemnly proclaimed with much noise in 2017, offers a 'soft-er' law approach

---

'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2013) 52(4) *Common Market Law Review* 889.

[55] Starting with Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* ECLI:EU:C:2014:2358.

[56] N Nic Shuibhne, 'The Right to Move and Reside: Disentangling the Dual Dynamics of Fundamental Rights in EU Citizenship Law' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017); E Spaventa, 'Earned Citizenship – Understanding Union Citizenship Through Its Scope' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 204; C O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53(4) *Common Market Law Review* 937; C Barnard, 'The Day the Clock Stopped: EU Citizenship and the Single Market' in P Koutrakos and L Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2011); D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) *Common Market Law Review* 17; MP Granger, 'The Civil Right to Free Movement – The Beating Heart of EU Citizenship?' in S de Vries, H de Waele, and MP Granger (eds), *Civil Rights and EU Citizenship. Challenges at the Crossroads of the European, National and Private Spheres* (Edward Elgar Publishing 2018) 152.

[57] See Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* ECLI:EU:C:2017:354.

[58] See special section of (2018) 14(1) *European Constitutional Law Review*, in particular C Kilpatrick, 'The Displacement of Social Europe: A Productive Lens of Inquiry' (2018) 14(1) *European Constitutional Law Review* 62. See also A Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' (2014) 15(6) *German Law Journal* 1145.

[59] Case C-176/12 *Association de médiation sociale*, ECLI:EU:C:2014:2.

[60] On this see, FW Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) 8(2) *Socio-economic Review* 211–250.

to building a 'Europe that protects'.[61] Its actual capacity to recalibrate the EU (human rights) regime towards social protection, as opposed to, or complementing, the current emphasis on market and liberal freedoms, without the adoption of hard-law instruments, still has to be tested.[62]

This inevitably selective overview of (primarily) legal scholarship on EU human rights law does not pretend to be comprehensive and certainly does not do justice to the diversity and quality of works published on the EU human rights law system. It does, however, give a flavour of the main questions and debates which have dominated legal publications on the subject and serves to highlight the need to bring in and harness complementary approaches, which pay more attention to the political and social roots of the development of EU human rights law.

Indeed, so far, perspectives which enquire about the non-legal dynamics of EU human rights law have remained marginal[63] and have focused on selected and partial aspects of the regime: the free movement of persons and EU citizenship,[64] non-discrimination law and policy,[65] asylum,[66] and EU external relations (including

---

[61] European Pillar of Social Rights (2017) https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en, accessed 21 November 2019.

[62] S Garben, 'The European Pillar of Social Rights: Effectively Addressing Displacement?' (2018) 14(1) *European Constitutional Law Review* 210–230.

[63] But there have been some attempts at explaining the institutionalising of human rights protection as part of a broader constitutionalisation process, see B Rittberger and F Schimmelfennig, 'Explaining the Constitutionalization of the European Union' (2006) 13(8) *Journal of European Public Policy* 1148.

[64] See the chapter by Blauberger and Heindlmaier in this volume. See also M Blauberger and S Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits Case Law' (2014) 1(3) *Research & Politics* 1; M Blauberger, A Heindlmaier, D Kramer, DS Martinsen, JS Thierry, A Schenk and B Werner, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25(10) *Journal of European Public Policy* 1422; SK Schmidt, M Blauberger and DS Martinsen, 'Free Movement and Equal Treatment in an Unequal Union' (2018) 25(10) *Journal of European Public Policy* 1391; S McMahon, *Immigration and Citizenship in an Enlarged European Union: The Political Dynamics of Intra-EU Mobility* (Springer 2015); M Saward, 'The Dynamics of European Citizenship: Enactment, Extension and Assertion' (2013) 11(1) *Comparative European Politics* 49–69; F Pennings and M Seeleib-Kaiser (eds), *EU Citizenship and Social Rights: Entitlements and Impediments to Accessing Welfare* (Edward Elgar Publishing 2018).

[65] See A Stone Sweet and K Stranz, 'Rights Adjudication and Constitutional Pluralism in Germany and Europe' (2012) 19(1) *Journal of European Public Policy* 92–108; D Anagnostou and S Millns, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System' (2013) 28(2) *Canadian Journal of Law & Society/La Revue Canadienne de Droit et Société* 115.

[66] See A Geddes, 'Lobbying for Migrant Inclusion in the European Union: New Opportunities for Transnational Advocacy? (2000) 7(4) *Journal of European Public Policy* 632; S Lavenex, 'Towards the Constitutionalization of Aliens' Rights in the European Union?' (2006) 13(8) *Journal of European Public Policy* 1284; C Kaunert and S Léonard, 'The

enlargement, trade, development and migration).[67] Unsurprisingly, these are areas in which explicit rights conferring Treaty provisions and EU legislation and policies exist. This, in itself, helps in circumscribing the scope of analysis and designing empirical enquiries.

In more recent years, 'Rule of Law backsliding' in some Central and Eastern European Member States (in particular Hungary and Poland), the rise of 'illiberal democracies', and the restrictions on fundamental freedoms which usually come with them (such as media freedom, freedom of expression, freedom of association, freedom of assembly, or right to a fair trial) have led political scientists and lawyers to join forces in exploring the (limited) potential of EU human rights instruments and remedies in addressing these threats to core EU values.[68] Despite this renewed interdisciplinary attention, there is much that we do not know about what drives the development of EU human rights law, and its impact on both EU and national law and policy.

---

Development of the EU Asylum Policy: Venue-shopping in Perspective' (2012) 19(9) *Journal of European Public Policy* 1396.

[67] This is a well-explored area, which studies a mix of law and policy instruments, and sometimes goes under the label of 'normative Europe', a term coined by I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *JCMS: Journal of Common Market Studies* 235–258. See also I Manners, 'The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective' (2009) 14(5) *European Foreign Affairs Review* 785–803; H Sjursen, 'The EU as a "Normative" Power: How Can This Be?' (2006) 13(2) *Journal of European Public Policy* 235; M Lerch and G Schwellnus, 'Normative by Nature? The Role of Coherence in Justifying the EU's External Human Rights Policy' (2006) 13(2) *Journal of European Public Policy* 304; U Sedelmeier, 'The EU's Role as a Promoter of Human Rights and Democracy: Enlargement Policy Practice and Role Formation' in O Elgström and M Smith (eds), *The European Union's Roles in International Politics: Concepts and Analysis* (Routledge 2006) 138; KE Smith, 'The EU, Human Rights and Relations with Third Countries: "Foreign Policy" with an Ethical Dimension?' (2001) *Ethics and Foreign Policy* 185; KE Smith, 'The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence' (2010) 17(2) *Journal of European Public Policy* 224.

[68] For an analysis of Rule of Law dynamics and the role played by supranational institutions, in particular the Court and the Commission, and the influence of domestic factors and actors (opposition, NGOs), within the framework of competing and complementing theories of European (dis)integration, see L Hooghe and G Marks, 'Grand Theories of European Integration in the Twenty-First Century' (2019) 26(8) *Journal of European Public Policy* 1113. See also A Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (2016) 94(3) *Public Administration* 685; M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU' (2017) 24(3) *Journal of European Public Policy* 321–336. For more legal perspectives, focused on substantive concerns and institutional mechanisms, see contributions in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) and in the special issue, L Pech and D Kochenov (eds), 'The Great Rule of Law Debate in the EU' (2016) 54(6) *JCMS: Journal of Common Market Studies* 1043.

## 4. BRINGING (BACK) EUROPEAN INTEGRATION AND LEGAL MOBILISATION SCHOLARSHIP INTO THE STUDY OF EU HUMAN RIGHTS LAW

As highlighted above, the bulk of legal analyses of the EU human rights regime scrutinise only the tip of the iceberg. They centre on EU-level developments (Treaty reform, CJEU case law, and the adoption of EU legislation) and on the 'institutional dialogues' between the top European courts. They offer valuable insights into the underlying social and political dynamics of EU human rights law but in more of an anecdotal and casuistic manner; as such, they may give the wrong impression about its actual relevance.[69] This analytical deficit can be partly remedied by bringing (back) European integration theories and directing socio-legal mobilisation scholarship towards explaining the evolution and application of EU human rights law.

A number of studies have examined the role of particular institutions in the development and effective implementation of EU human rights law. They examine how the CJEU engages human rights,[70] of course, but also how national constitutional and supreme courts, and the ECtHR, approach EU human rights law, and interact with each other on the issue.[71] They also examine the relevance and influence of non-judicial institutional actors, in particular the European Commission,[72] the European Parliament,[73] or the Fundamental Rights Agency (FRA).[74] Yet, this

---

[69] FRA reports suggest that the Charter still plays a relatively marginal influence in national human rights litigation and policy-making. See, for instance, FRA, 'Fundamental Rights report' Chapter 2, 'EU Charter of fundamental rights and its use in Member States' (2019) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-frr-chapter-2-eu-charter_en.pdf, accessed 21 November 2019.

[70] For a critical analysis of the CJEU as a human rights court post Lisbon, see G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168.

[71] See references in note 40 above.

[72] See J Grugel and I Iusmen, 'The European Commission as Guardian Angel: The Challenges of Agenda-setting for Children's Rights' (2013) 20(1) *Journal of European Public Policy* 77; A Williams, 'Human Rights in the EU' in A Arnull, and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 249; I de Jesús Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission' (2012) *European Law Review* 37; A Hofmann, 'Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union' (2018) 40(6) *Journal of European Integration* 737.

[73] See, for instance, J Monar, 'The Rejection of the EU–US SWIFT Interim Agreement by the European Parliament: A Historic Vote and Its Implications' (2010) 15(2) *European Foreign Affairs Review* 143.

[74] See GN Toggenburg and J Grimheden, 'Upholding Shared Values in the EU: What Role for the EU Agency for Fundamental Rights?' (2016) 54(5) *JCMS: Journal of Common Market Studies* 1093; A Von Bogdandy and J Von Bernstorff, 'The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law' (2009) 46(4) *Common Market Law Review* 1035; P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the*

institutional focus means that we know little about the way other (domestic) policy actors, be they NGOs, or public authorities (or even companies),[75] engage with EU human rights law, and the EU Charter more particularly; when and why litigants and their lawyers turn to the EU system of fundamental rights protection; or when and why ordinary (lower instance) national courts rely on EU human rights law in their decision-making and reasoning.[76] In other words, we are quite ignorant about the root socio-political factors, actors and contexts that feed the evolution and application of EU human rights law.[77]

Much has been made, for instance, of the latest episode in the *Solange* saga, a sustained 'conversation' which began half a century ago between the CJEU and the German Constitutional Court (Bundesverfassungsgericht – BVerG) on fundamental rights and democratic principles in European integration.[78] In a recent case concerning anti-terrorism legislation, the BVerG, once again, challenged the CJEU on human rights issues.[79] The German judges were, in fact, responding to what they viewed as two problematic CJEU rulings. The first one (*Melloni*) concerned the right to a fair trial and the rights of the defence of a run-away Italian businessman prosecuted for bankruptcy fraud, convicted *in absentia*, and subject to a European Arrest Warrant. The CJEU, invoking the autonomy, effectiveness and supremacy of EU law, ruled that (lower) EU human rights standards would prevail over (more protective) national constitutional requirements in situations where national authorities implement EU law (and this despite Article 53 CFR, suggesting the application of higher human rights standards).[80] In the second case (*Åkerberg Fransson*), the CJEU reasserted control over the definition of the scope of application of EU fundamental rights over domestic measures in the wake of the Treaty-makers' (apparently) narrower delimitation of the scope of application of the Charter in Article 51(1) CFR, and controversially proposed a broad interpretation of the notion of national

---

*EU: The Contribution of the Fundamental Rights Agency* (Bloomsbury 2005). For an analysis of the relations between NGOs and the FRA, see M Thiel, 'European Civil Society and the EU Fundamental Rights Agency: Creating Legitimacy through Civil Society Inclusion?' (2014) 36(5) *Journal of European Integration* 435.

[75] After all, market actors (their lawyers?) were the first ones to call for the development of an EU framework for the protection of fundamental rights.

[76] For an attempt to develop a framework for analysing, more generally, national courts' engagement with EU law, see U Jaremba and JA Mayoral, 'The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms' (2019) 26(3) *Journal of European Public Policy* 386.

[77] See C Thornhill, 'The Formation of a European Constitution: An Approach from Historical-Political Sociology' (2012) 8 *International Journal of Law in Context* 354.

[78] For a review of earlier episodes and their influence on legal integration in Europe, see J Kokott, 'German Constitutional Jurisprudence and European Integration II' (1996) 2(3) *European Public Law* 413.

[79] Decision 1 BvR 1215/07, 24 April 2013.

[80] Case C-399/11 *Melloni* ECLI:EU:C:2013:107. For an analysis anticipating the challenge, see JB Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38(5) *Common Market Law Review* 1171.

measures 'implementing EU law', to potentially cover a wide set of circumstances somehow 'connected' to EU law (in this case, tax fraud procedures).[81] This decision brought a whole range of domestic measures within the remit of the Charter and CJEU supervision. The BVerG lost no time in expressing its disapproval. In an *obiter dictum* in the otherwise unrelated anti-terrorism case, and via academic conferences, Karlsruhe made clear that it firmly disagreed with the CJEU's expansive reading of Article 51(1) CFR and that it would watch out for *ultra vires* applications of the Charter by the CJEU.

These intensely scrutinised interactions between the CJEU and the BVerG, whilst of primary importance given the authority and influence of the courts involved, only tell part of the story. They sideline the fact that the CJEU was brought into the fray by the cunning Mr Melloni and his Spanish *abogado*, who explored every possible way to prevent him from serving his sentence back in an Italian jail and pointed to the discrepancies between Spanish and EU constitutional standards to that effect. In *Åkerberg Fransson* the Luxembourg judges did not, on their own initiative, expand the reach of the Charter just to stir up their Karlsruhe colleagues (or, incidentally, to safeguard the EU financial interests through the collection of VAT). They addressed a request by a Swedish court, itself responding to a Swedish fisherman who, after having already been fined for making false tax declarations, was in addition facing criminal charges for the same offence. As his prospects under Swedish law were grim, he turned to the EU Charter and its *non bis in idem* rule. It was Mr Melloni's determination to escape justice, and Mr Fransson's frustration with the Swedish system, which provided the CJEU the opportunity and context for enhancing the relevance and authority of the Charter.

This observation does not downplay the fact that a multitude of variables intervene in the CJEU decision-making process, and that legal reasoning, theoretical or doctrinal approaches,[82] and broader institutional and policy considerations, are all relevant.[83] Yet, it is hard to deny that, to some extent, the facts of a particular case,[84] and the framing of questions by litigants, their lawyers and those who support them, influence national courts' stand on the matter. It is, furthermore, safe to assume that

---

[81] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105, confirmed in Case C-206/13 *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126; further extended in Case C-390/12 *Robert Pfleger and Others* ECLI:EU:C:2014:281.

[82] See J Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon 1993).

[83] See DS Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015); O Larsson and D Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70(1) *International Organization* 377.

[84] For a similar claim and illustration in the context of EU citizenship case law, see G Davies, 'Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication' (2018) 25(10) *Journal of European Public Policy* 1442.

the type of cases and issues which are referred by national judges to the CJEU,[85] like the nature of human rights-related complaints that get to the Commission (in particular when they materialise in infringement actions), affect the direction of EU case law. Studies on patterns of ECHR litigation, for instance, suggest that who litigates what and why matters for ECtHR case law development.[86] Presumably, the same logic applies to human rights litigation before the CJEU. Studies which have explored the dynamics of related policies can, therefore, greatly inform our understanding of the evolution of the EU human rights regime.

First of all, we learn from classic European integration works, in particular those endorsing the neofunctionalist paradigm, that domestic litigants, and those that support them (NGOs, foundations and lawyers),[87] as well as lower courts,[88] have

---

[85] See J Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction Between National Courts and the European Court of Justice' (1996) 19(2) *West European Politics* 360; K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001); SA Nyikos, 'Strategic Interaction Among Courts Within the Preliminary Reference Process – Stage 1: National Court Pre-emptive Opinions' (2006) 45(4) *European Journal of Political Research* 527.

[86] LS McIntosh, 'Russian NGOs and the European Court of Human Rights: A Spectrum of Approaches to Litigation'(2014) 36 *Human Rights Quarterly* 844; G Cliquennois and B Champetier, 'The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War?' (2016) 22(1) *European Law Journal* 92.

[87] The literature on the subject is too extensive to list it all, but a few key contributions may be highlighted here. On the role of private litigants and national courts in the process of European integration, see AM Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47(1) *International Organization* 41; W Mattli and AM Slaughter, 'Law and Politics in the European Union: A Reply to Garrett' (1998) 49(1) *International Organization* 183; A Stone Sweet and T Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *American Political Science Review* 63. On the prominent role played by lawyers in European legal integration, see E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75(1) *American Journal of International Law* 1; R Cichowski, 'Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy' in A Stone Sweet, W Sandholtz and N Fligstein (eds), *The Institutionalization of Europe* (Oxford University Press 2001) 117; A Jettinghoff and H Schepel (eds), *In Lawyers' Circles: Lawyers and European Legal Integration* (Elsevier 2004); A Cohen and A Vauchez, 'The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited' (2011) 7 *Annual Review of Law and Social Science* 417; M Rasmussen, 'Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment' (2014) 12(2) *International Journal of Constitutional Law* 136.

[88] See, notably, AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in Its Social Context* (Hart 1998); KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001). For a review of that literature, see A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5(2) *Living Reviews in European Governance*, http://europeangovernance-livingreviews.org/Articles/lreg-2010-2. See also C Carrubba and M Gabel, 'International Courts: A Theoretical Assessment' (2017) 20 *Annual Review of Political Sciences* 555; RD

played a central part in the process of European legal integration ('constitutionalisation'), via the domestic mobilisation of EU law and referrals for preliminary ruling to the CJEU. Whilst the main narrative has been one of cooperation and support from litigants and national courts in the process of constitutionalising the EU, more recent studies point to patterns of domestic resistance and to the limited reach of EU constitutional doctrines.[89]

These works, whilst acknowledging the strong relevance of legal factors (in particular the strong structuring role of the judicial process and of precedent and legal reasoning),[90] also stress the importance of broader institutional and socio-political variables, such as institutional preferences, interactions between the EU political and legal decision-making processes, inter-judicial relations, and socialisation patterns, as elements that impact on integration-through-law and judicialised governance in the EU. To tease out more systematically the mechanisms and factors at play and go beyond qualitative case study analyses, scholars have developed strategies and processes for data collection on national courts' engagement with EU law.[91] Yet, so far, most theoretical premises have been derived from, and applied to, the development by the CJEU and reception by national courts of the constitutional doctrine of supremacy and direct effect, market integration (mutual recognition), and non-discrimination law. What is not clear, however, is whether a similar logic would apply to the particular case of the contemporary EU human rights law, operating in a context characterised by overlapping and competing regimes.

The EU governance literature, with its multi-level focus, would at first appear well suited to take up the task. Whilst it has generated important insights into the dynamics of compliance with EU law,[92] stressing the essential role played by the legal and political mobilisation of societal actors (including interest groups and NGOs), it has not closely studied the application and interpretation of EU law by national courts, including in cases involving fundamental rights.[93]

---

Kelemen and SK Schmidt, 'Introduction: The European Court of Justice and Legal Integration: Perpetual Momentum?' (2012) 19(1) *Journal of European Public Policy* 1.

[89] For a recent analysis revisiting and challenging the constitutionalisation story, see M Rasmussen and DS Martinsen, 'EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies' (2019) 25(3) *European Law Journal* 251.

[90] This feature has been particularly highlighted by scholars adopting new institutionalist approaches, and in particular historical institutionalism and the concept of path-dependencies. See, for instance, A Stone Sweet and TL Brunell, *The Judicial Construction of Europe* (Oxford University Press 2004).

[91] DC Hübner, 'The "National Decisions" Database (Dec. Nat): Introducing a Database on National Courts' Interactions with European Law' (2016) 17(2) *European Union Politics* 324. A search of the database with the EU Charter of Fundamental Rights as a keyword only generates 232 entries, www.aca-europe.eu/index.php/en/dec-nat-en.

[92] See Cardwell in this volume.

[93] For a similar observation, see L Conant, 'Compliance and What EU Member States Make of It' in M Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 1.

Socio-legal and political sciences studies of legal mobilisation (in the sense of who litigates EU law, when, why and to what effect) are particularly telling of the wide range of pressures which politics and society could exert on the evolution and impact of EU law. They have, however, essentially focused on the internal market, competition and non-discrimination fields.[94] In the last decade, a group of scholars have started to investigate more closely the motivations of societal and policy actors to mobilise EU law, in the judicial context as well as beyond. In doing so, they have identified important macro, meso and micro-level variables which impact on whether and how actors mobilise EU law, including before domestic courts.[95] Most of the works are focused on steering and implementing EU non-discrimination and environmental law, and the role played by NGOs in those fields.[96] These, however,

---

[94] See C Harlow and R Rawlings, *Pressure Through Law* (Routledge 1992); R Rawlings, 'The Eurolaw Game: Some Deductions from a Saga' (1993) 20(3) *Journal of Law and Society* 309; D Chalmers, 'The Positioning of EU Judicial Politics Within the United Kingdom' (2000) 23(4) *West European Politics* 169; D Chalmers and M Chaves, 'The Reference Points of EU Judicial Politics' (2012) 19(1) *Journal of European Public Policy* 25; L Conant, 'The Politics of Legal Integration' (2007) 45 *JCMS: Journal of Common Market Studies* 45; R Slepcevic, 'The Judicial Enforcement of EU Law Through National Courts: Possibilities and Limits' (2009) 16(3) *Journal of European Public Policy* 378; RD Kelemen, 'The EU Rights Revolution: Adversarial Legalism and European Integration' (2003) 6 *The State of the European Union* 221–234; RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011); M McCown, 'The European Parliament Before the Bench: ECJ Precedent and EP Litigation Strategies' (2003) 10(6) *Journal of European Public Policy* 974; P Bouwen and M McCown, 'Lobbying versus Litigation: Political and Legal Strategies of Interest Representation in the European Union (2007) 14(3) *Journal of European Public Policy* 422; M Prek and S Lefèvre, 'Competition Litigation Before the General Court: Quality If Not Quantity?' (2016) 53(1) *Common Market Law Review* 65; C Harding and A Gibbs, 'Why Go to Court in Europe? An Analysis of Cartel Appeals 1995–2004' (2005) 30(3) *European Law Review* 349; T Tridimas and G Gari, 'Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance (2001–2005)' (2010) 35(2) *European Law Review* 131; KJ Alter and J Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33(4) *Comparative Political Studies* 452; RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011); L Vanhala, 'Anti-discrimination Policy Actors and Their Use of Litigation Strategies: The Influence of Identity Politics' (2009) 16(5) *Journal of European Public Policy* 738; RA Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism' (2004) 38(3) *Law and Society Review* 489.

[95] For a synthetic presentation of these factors, see L Conant, A Hofmann, D Soennecken and L Vanhala, 'Mobilizing European Law' (2018) 25(9) *Journal of European Public Policy* 1376.

[96] See, for instance, on EU environmental policy, M Eliantonio, 'The Role of NGOs in Environmental Implementation Conflicts: "Stuck in the Middle" Between Infringement Proceedings and Preliminary Rulings? (2018) 40(6) *Journal of European Integration* 753; R Slepcevic, *Litigating for the Environment: EU Law, National Courts and Socio-legal Reality* (Springer 2010); A Hofmann, 'Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union' (2019) 28(2) *Environmental Politics*

concentrate on areas in which protective EU legislation has been adopted, and not on the mobilisation of the Charter across a broader range of policy areas.

Legal scholars with a feel for context, frustrated by the limited explanatory leverage and predictive value of analyses focused on legal instruments and reasoning to explain the evolution and impact of EU law, have also been calling for greater, and more sustained, attention to the domestic roots of EU case law.[97] More generally, a new generation of scholars, often working in the context of interdisciplinary projects, are calling for more bottom-up, 'public policy', approaches to the development of EU case law and its implementation.[98]

Those who have studied the development of EU sex equality policy have long recognised the instrumental role played by activist lawyer Elaine Vogel-Polsky in triggering groundbreaking legal change through the famous *Defrenne* litigation.[99] More recently, in data privacy circles, it is well known that law student turned 'legal entrepreneur' Mark Schrems,[100] and a number of active NGOs, have effectively

342; L Muñoz and D Moya, 'Creating Space for Supranational Law: Environmental Legal Mobilization and Spanish NGOs' in SM Sterett and LD Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar Publishing 2019). On non-discrimination, see KJ Alter and J Vargas, 'Explaining Variation in the Use of Litigation Strategies. European Community Law and British Gender Policy' (2000) 33(4) *Comparative Political Studies* 452; R Cichowski, *Litigation, Mobilization and Governance: The European Court and Transnational Activism* (Cambridge University Press 2006); R Cichowski, 'Women's Rights, the European Court, and Supranational Constitutionalism' (2004) 38(3) *Law and Society Review* 489; RA Cichowski, 'Legal Mobilization, Transnational Activism, and Gender Equality in the EU' (2013) 28(2) *Canadian Journal of Law and Society/La Revue Canadienne de Droit et Société* 209; M Dawson and E Muir, 'One for All and All for One? The Collective Enforcement of EU Law' (2014) 41(3) *Legal Issues of Economic Integration* 215; S Jacquot and T Vitale, 'Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilization by Roma and Women's Groups at the European Level' (2014) 21(4) *Journal of European Public Policy* 587. For a useful overview, see S Saurugger and F Terpan, *The Court of Justice of the European Union and the Politics of Law* (Macmillan 2016).

[97] R Slepcevic, 'The Judicial Enforcement of EU Law Through National Courts: Possibilities and Limits' (2009) 16(3) *Journal of European Public Policy* 378; GT Davies, 'Activism Relocated: The Self-restraint of the European Court of Justice in Its National Context (2012) 19(1) *Journal of European Public Policy* 76; MP Granger, 'National Applications of *Francovich* and the Construction of a European Administrative Jus Commune' (2007) 32(2) *European Law Review* 157; MP Granger, 'Francovich Liability Before National Courts: 25 Years On, Has Anything Changed?' in P Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar Publishing 2017); T Lock, 'Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 years after *Francovich*' (2012) 49(5) *Common Market Law Review* 1675.

[98] See E Mathieu, C Adam and M Hartlapp, 'From High Judges to Policy Stakeholders: A Public Policy Approach to the CJEU's Power' (2018) 40(6) *Journal of European Integration* 653.

[99] See R Cichowski, 'Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy' in A Stone Sweet, W Sandholtz and N Fligstein (eds), *The Institutionalization of Europe* (Oxford University Press 2001) 118.

[100] On the broader use of the concept of legal entrepreneurs in the context of European constitutionalization, see A Vauchez, 'The Making of the European Union's Constitutional

mobilised national and EU courts to strengthen the protection of personal data across Europe and beyond.[101] Yet, few studies to date are dedicated to the role played by legal entrepreneurs in shaping the development and enforcement of EU human rights law, even though we now know that they were the main force behind the development of the core EU constitutional doctrines.[102]

Practitioners involved in strategic litigation would quickly admit that legal argumentation, and in particular which human rights instrument is invoked, when and how, is closely related to the litigation venue, the remedies sought and the ultimate goal. Very likely, references to the EU Charter (in addition, or as opposed, to national constitutional provisions, and the ECHR) and engagement of the EU Commission and Court, are guided by strategic considerations and take into account whether EU standards, procedures and remedies are, in a given context, more favourable than what the 'national plus Strasbourg' offers. The FRA, in fact, promotes such strategic use of the Charter by exposing its 'comparative advantage' over other human rights instruments, stressing where it provides stronger standards or more effective remedies.[103]

Despite the extensive practical experience and knowledge at hand, the EU human rights law field has remained largely immune to socio-political investigations.[104] To my knowledge, there are no systematic analyses of the day-to-day engagement of societal actors with the Charter, and of the more routine Charter-based litigation before ordinary courts.[105] The FRA hosts an EU Charter case law database, but it is

---

Foundations: The Brokering Role of Legal Entrepreneurs and Networks' in W Kaiser, B Leucht and M Gehler (eds), *Transnational Networks in Regional Integration Governing Europe 1945–83* (Palgrave 2004) 108.

[101] See MP Granger and K Irion, 'The Right to Protection of Personal Data: The New Posterchild of European Union Citizenship?' in S de Vries, H de Waele, and MP Granger (eds), *Civil Rights and EU Citizenship. Challenges at the Crossroads of the European, National and Private Spheres* (Edward Elgar Publishing 2018) 279.

[102] M Rasmussen and DB Martinsen, 'EU Constitutionsation Revisited: Redressing a Central Assumption in EU Studies' (2019) 25 *European Law Journal* 251.

[103] See Fundamental Rights Agency, *Handbook: Applying the Charter of Fundamental Rights of the European Union in Law and Policy Making at National Level* (2018) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf, accessed 21 November 2019.

[104] For the purpose of this chapter, I define this field narrowly around the study of the relevance of EU fundamental rights law (namely general principles and Charter), without always specific EU rights protection by EU Treaties and legislation.

[105] See attempts at comparative works in the context of EU-funded collaborative research projects such as *bEUcitizen*, www.uu.nl/en/research/beucitizen-european-citizenship-research or *FRAME*, www.fp7-frame.eu/, accessed 21 November 2019, and publications resulting from them. See also the comparative edited volume by L Burgorgue-Larsen (ed), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as apprehended by judges in Europe* (Pedone 2017). For a few specific country-focused studies, see A Jakab, 'Application of the EU Charter by National Courts in Purely Domestic Cases' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017); G de Búrca, 'The Domestic Impact of the

not systematically updated with decisions from national courts.[106] Even the cases which made it to Luxembourg invoking the Charter have not been subject to rigorous scrutiny to identify patterns or trends (across countries, policy areas, court levels, etc). The FRA identified that a significant number of preliminary references referring to the Charter concern the right to an effective remedy and a fair trial (which parallels the pattern of Strasbourg litigation on Article 6) but we know little beyond that.[107] Most published studies of EU human rights law make little of the fact that courts, both national and EU ones, and to some extent the Commission, are relatively passive and reactive institutions,[108] which respond to complaints and disputes brought to them by public and private parties. They also seem to forget that these, in turn, are influenced by a variety of institutional and contextual factors (including access to appropriate legal support).

Scholarship rooted in political sciences, active in investigating the constitutionalisation of the EU and the dynamics of policy-making in certain policy areas, has not – to my knowledge – sought to more systematically analyse the development of the EU system of protection of fundamental rights, its relevance for European (dis)integration,[109] and its impact on national law and policies (Europeanisation). As noted earlier, this may result less from a lack of interest per se, and more from methodological challenges, triggered by the complexity and unpredictability of the (case) law defining the scope of application of the Charter, which, as we saw, defies the analytical capacity of even the brightest legal minds. The diffused impact of the Charter across potentially all policy areas renders empirical study design difficult for the purpose of quantitative research and qualitative enquiries prone to selection bias.

The main point is that to understand the dynamics of the development and impact of EU human rights law, one cannot do away with analysing the activities and motivations of those who mobilise this law in their policy or political activities. The call for an enquiry into the domestic roots of EU human rights law has not fallen on deaf ears, but it needs to find ways of addressing empirical challenges. The concept of political and legal opportunities structure, applied in socio-legal analyses of specific

---

EU Charter of Fundamental Rights' (2009) 49 *Irish Jurist* 49; T de la Mare, 'The Use of EU Law in English Courts' (2012) 17(2) *Judicial Review* 111.

[106] Available at https://fra.europa.eu/en/case-law-database, accessed 21 November 2019.

[107] Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-frr-chapter-2-eu-charter_en.pdf, accessed 21 November 2019, 39.

[108] Although they can be proactive in setting incentives towards certain forms of litigation and argumentation, through their case law. For testimony, the famous 'come one, come all' approach of the CJEU towards national courts' references and its often pro (market) litigant interpretation and application of EU law, are well highlighted in neofunctionalist works on European integration.

[109] But see L Hooghe and G Marks, 'Grand Theories of European Integration in the Twenty-First Century' (2019) 26(8) *Journal of European Public Policy* 1113. For an argument that illiberalism creates pressure towards more supranationalism, see MP Granger, 'Federalization Through Rights: A Legal Opportunities Approach (2018) 2–3 *European Journal of Law Reform* 35 (for more on this, see the following section).

EU policy areas, can assist in mitigating some of the difficulties, and provide a useful and context-sensitive analytical device to study the engagement of societal and policy actors with EU human rights law.

## 5. THE EXPLANATORY POWER OF LEGAL OPPORTUNITIES AND ITS LIMITS IN THE CONTEXT OF THE RULE OF LAW CRISIS

Originally developed by the social movements literature to explain policy change, the opportunity structures framework has been adapted by socio-legal scholars to explore the dynamics of court-driven policy reform.[110] That makes it particularly well suited to explore the bottom-up dynamics of EU human rights law, which, despite some Treaty and legislative codification, is a court-driven phenomenon. After a brief exposition of the specific features of the articulation of the European human rights system and the current challenges posed by the 'Rule of Law crisis', central to assessing legal opportunities and their interaction dynamics, the section turns to legal opportunities as a useful analytical device. It reviews its application to studies of EU environmental and non-discrimination law[111] and elaborates on how it could be exploited to better understand the development of the EU system of fundamental rights protection.

For those not well versed in the intricacies of the EU Charter regime, it is essential, at this stage, to lay down a few basics. Where a situation can be 'characterised' as one in which a Member State is 'implementing EU law' (Article 51(1) CFR), or to use the CJEU expression, which falls 'within the scope of application of EU law',[112] then the applicable standards are those laid down in the Charter and general principles of EU law. In such a case, the enforcement of the EU Charter, like the rest of EU law, is entrusted to both a centralised mechanism led by the Commission, through the infringement procedure (Articles 258–260 TFEU), and a decentralised one relying on litigants bringing cases before national courts in which they invoke EU law to

---

[110] C Hilson, 'New Social Movement: The Role of Legal Opportunity' (2002) 9 *Journal of European Public Policy* 238.

[111] See R Cichowski, *The European Court and Civil Society* (Cambridge University Press 2007); RE Case and TE Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48(2) *JCMS: Journal of Common Market Studies* 221; L Vanhala, 'The Paradox of Legal Mobilization by the UK Environmental Movement' (2012) 47(3) *Law and Society Review* 523; on the visibility of EU environmental rights, see C Hilson, 'The Visibility of Environmental Rights in the EU Legal Order: Eurolegalism in Action?' (2018) 25(11) *Journal of European Public Policy* 1589.

[112] See Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105. See also Cases C-206/13 *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126; and C-390/12 *Robert Pfleger and Others* ECLI:EU:C:2014:281.

challenge incompatible domestic laws and policies and, where needed, ask national courts to seek clarifications (or confirmation) from the CJEU via a request for a preliminary ruling (Article 267 TFEU).[113]

When human rights violations occur outside the scope of application of EU law, then the applicable standards are national ones, subject to an overall commitment to respect human rights as a core EU value (Article 2 TEU) and the minimum requirements laid down in applicable international instruments, and in particular the ECHR (Article 6(3) TEU; Article 52(3) of the Charter). Complaints of violation of constitutional and ECHR rights are first addressed to national courts, with a possibility for individuals to 'go to Strasbourg' once domestic remedies have been exhausted.

EU institutions have only limited tools to ensure Member States live up to their human rights commitments in matters which are not otherwise 'covered' by EU law. The main formal mechanism is Article 7 TEU, which empowers the EU to intervene preventively in case of a 'clear risk of a serious breach' of Article 2 TEU values, and to impose sanctions, such as the withdrawal of voting rights, in case of a 'serious and persistent breach' of those values.[114] In human rights matters, it can only be triggered in the case of systemic deficiencies and is not designed for dealing with individual complaints. Moreover, the need for unanimity in the European Council to impose sanctions against a Member State set a high political threshold, which further reduces its effectiveness in dealing with serious rights violations.[115] The salience of the problem has become more pronounced over recent years as some Member States are turning into 'illiberal democracies', calling into question their commitments to Article 2 TEU values. In this context, the question of the EU's capacity to enforce fundamental rights against recalcitrant Member States has gained particular significance.

Like EU institutions, private actors, including civil society organisations which engage in human rights protection and promotion activities, search for the most effective ways to prevent and address fundamental rights violations. The incentive to look to the EU mounts when domestic restrictions on fundamental freedoms increase, due, for instance, to the securitisation of domestic policies following terrorist threats,[116]

---

[113] A Hofmann, 'Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union' (2018) 40(6) *Journal of European Integration* 737.

[114] See M Merlingen, C Mudde and U Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria' (2001) 39 *JCMS: Journal of Common Market Studies* 59; W Sadurski, 'Adding a Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider' (2009) 16 *Columbia Journal of European Law* 385.

[115] See L Besselink, 'The Bite, the Bark and the Howl – Article 7 TEU and the Rule of Law Initiative' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 128.

[116] In France, the state of emergency which was declared after the November 2015 terrorist attacks in Paris allowed the authorities to restrict the exercise of certain freedoms to safeguard public order (house arrest or searches without judicial mandate for instance). The state also requested a derogation from the application of the ECHR (under Article 15 ECHR). It was ended two years later, in November 2017, when many of the restrictive measures were incor-

or the desire of public authorities to tame social protests or political activism,[117] or to limit criticism by silencing the media.[118] More generally, authoritarian and illiberal trends in countries like Hungary and Poland result in reduced domestic political and legal opportunities, caused by a weakening of human rights guarantees together with limitations on judicial review mechanisms and threats on judicial independence.

In this context of deteriorating domestic options for human rights advocacy and litigation, we would expect frustrated actors to turn to the EU for help. As the EU faces difficulties in imposing political sanctions (under Article 7) against illiberal Member States, pressure is mounting on the CJEU and the Commission to find other ways of 'doing something' to ensure respect for human rights in Member States, and this despite the risks associated with increased judicial control over EU and national politics.[119]

The Commission, in 2014, developed a new informal 'Rule of Law Mechanism', to be deployed prior to the launch of an Article 7 procedure, and with a view to avoiding starting a formal sanction process, in case of threats to the Rule of Law (including systemic disregard of human rights) in a Member State.[120] This new tool was activated against Poland in 2016 over concerns related to judicial independence.[121] In addition, Members of the European Parliament, and its Committee on Civil Liberties, Justice and Home Affairs (LIBE) in particular, initiated enquiries, commissioned reports, and issued resolutions exposing breaches of EU values by Hungary and

---

porated into common law via a new law on internal security and the fight against terrorism, thus raising the spectre of challenges before the ECtHR. See K Raj, 'Fin de l'état d'urgence: La France en marche vers "une inquiétante nouvelle normalité"' (*Le Monde*, 31 October 2017).

[117] For example, the adoption in 2019 by the French Parliament of an anti-riot law (*loi anti-casseurs*), seen as targeting the *Gilets Jaunes* social movement, triggered worries in liberal and NGO circles. The opposition referred it to the Constitutional Council (*Conseil constitutionnel*), which invalidated its key provision (a one-month prohibition on demonstrating for 'individuals representing a particular threat for public order'). See M Rescan and JB Jacquin, 'Loi anticasseurs: l'article le plus critiqué censuré par le Conseil constitutionnel' (*Le Monde*, 4 April 2019). In Germany, judicial decisions applying tax regulations are restricted to the ability of not-for-profit organisations to engage in political activities (see F Schultz, 'German charities fight to stay "politically active" despite ATTAC ruling' (Euractiv, 5 April 2019).

[118] For a critical assessment of the state and evolution of media freedom by Freedom House, see S Repuci, *Freedom and the Media, A Downward Spiral* (2019) https://freedomhouse.org/report/freedom-media/freedom-media-2019, accessed 21 November 2019.

[119] M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU' (2017) 24(3) *Journal of European Public Policy* 321–336.

[120] European Commission, 'A new EU Framework to strengthen the Rule of Law' COM(2014) 158 final.

[121] See Z Szente, 'Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

Poland and called for stronger action against the recalcitrant Member States,[122] whilst the Council opted for a more cautious approach.[123] These 'soft' political interventions proved largely ineffective and EU institutions eventually took a 'harder' stance. The Commission launched an Article 7 procedure against Poland in December 2017, and the European Parliament voted in favour of the initiation of Article 7 sanctions against Hungary in September 2018.[124] The EU institutions have also been pushing through measures tying the grant of EU funds to respect for EU values.[125] Finally, the Commission, whilst not going as far as initiating systemic infringement actions called for by academics,[126] has nonetheless engaged in ingenious and creative interpretation of EU law to bring systemic threats to the Rule of Law and fundamental rights within its scope and begin infringement proceedings against those two countries.[127]

---

[122] European Parliament, 'Resolution of 7 September 2015 on the situation of fundamental rights in the European Union (2013–2014)', 2014/2254 (INI); European Parliament, 'Resolution of 10 June 2015 on the situation in Hungary' 2015/2700 (RSP); European Parliament, 'Resolution of 16 December 2015 on the situation in Hungary' 2015/2935 (RSP)); European Parliament, 'Report of 4 July 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' ('Sargentini Report') 2017/2131(INL).

[123] For an assessment of the robustness and effectiveness of these various 'Rule of Law' initiatives, see the contributions in the special issue on 'The Great Rule of Law Debate in the EU' (2016) 54(5) *JCMS: Journal of Common Market Studies* 1043.

[124] European Commission, 'Rule of Law: The Commission acts to defend judicial independence in Poland' (2017) http://europa.eu/rapid/press-release_IP-17-5367_en.htm, accessed 21 November 2019; European Parliament, 'Approval of 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); at the time of writing, Hungary is being grilled by the European Council on its respect for core values. The European Parliament complained about being excluded from the procedure. V Makszimov, 'MEPs shut out of Hungary Council hearing as rule of law situation worsens' (Euractiv, 22 November 2019).

[125] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' COM(2018) 324 final.

[126] KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 105. For a more general legal analysis of how to use the procedure to tackle systemic rule of law threats, see M Schmidt and P Bogdanowicz, 'The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU' (2018) 55(4) *Common Market Law Review* 1061.

[127] See also the Commission infringements against Hungary for the lex-CEU which forced the US-accredited university to move its degree programmes to Vienna (Case C-66/18 *Commission v Hungary (Law on Higher Education)* and for the lex-NGO, which restricts the activities of civil society organisations. The first one, pending before the Court at the time of writing, hangs on a violation of freedom of establishment and freedom of services and international trade law rules; the second, still at formal notice stage at the time of writing, is on violations of the free movement of capital rule, https://ec.europa.eu/commission/presscorner/detail/EN/IP_17_3663, accessed 21 November 2019.

The Commission and the Court, well aware of the essential role played by national courts in upholding the rule of law and fundamental rights in Member States, in addition to their general contribution to the development and enforcement of EU law, have leveraged EU provisions prohibiting age discrimination to bring infringement procedures against Hungary and Poland for attacks on judicial independence materialising in the forced early retirement of Supreme Court judges.[128] They have also harnessed Article 19(2) TEU, which requires Member States to provide effective remedies for the enforcement of EU law, and Article 47 CFR, which guarantees the right to a fair trial and effective remedies to tackle further threats to the courts.[129] The CJEU, moreover, enrolled national courts in other Member States in the horizontal monitoring of countries displaying systemic deficiencies. Indeed, in the context of cooperation in criminal and civil matters, it instructed them to abstain from transferring individuals to authorities in countries under suspicion (in particular those placed under an Article 7 procedure) if these do not offer sufficient fundamental rights guarantees to individuals, in particular the right to a fair trial.[130] The determination of the Commission and the Court to tackle attacks on judicial independence is revealing of the importance they attach to national litigation for the smooth development and enforcement of EU (human rights) law.[131]

Let us now turn to the concept of legal opportunities, and how it can help us make sense of the dynamics of engagement of EU human rights law. Legal opportunities include various elements, from substantive aspects, to procedural and institutional

---

[128] Cases C-286/12 *Commission v Hungary* (retirement age of judges) ECLI:EU:C:2012:687; C-619/18 *Commission v Poland* (independence of the Supreme Court) ECLI:EU:C:2019:531.

[129] Cases C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117; Joined Cases C-585/18, C-624/18 and C-625/18 *AK v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy* ECLI:EU:C:2019:982.

[130] Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198; C-216/18 PPU LM (deficiencies of the judicial system) ECLI:EU:C:2018:586. See A von Bogdandy and LD Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15(3) *European Constitutional Law Review* 391. In fact, the Court had already set a precedent for this when it instructed national courts not to transfer asylum seekers to countries that display systemic deficiencies in their asylum system, including where the basic human rights of asylum-seekers could not be guaranteed. See Case C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865.

[131] Disciplinary proceedings launched in Hungary against a criminal court judge for sending a preliminary reference to the CJEU testify to the risks posed to the EU legal order if national judges are prevented from referring cases to the CJEU and from applying EU law. Judgment no. Bt.838/2019 (for a commentary, see P Bard, 'Luxembourg as Last Resort – The Kúria's Judgment on the Illegality of a Preliminary Reference to the ECJ', 23 September 2019, https://verfassungsblog.de/luxemburg-as-the-last-resort/.

features, material conditions and institutional receptiveness.[132] The substantive dimension concerns essentially legal standards. In our case, the key variable is the degree of right protection afforded by EU and national law, respectively. Where the EU provides for a stronger protection for rights in general, or for a particular right, then individuals, activist lawyers and civil society actors who work to promote that right will be tempted to invoke EU law instead of, or alongside, national law, thereby reinforcing the influence and authority of the EU Charter and EU institutional control.[133] Conversely, where national (constitutional) law offers better protection, litigants are more likely to remain within the confines of the national legal system, therefore not producing much centralising pressure.[134] In the specific context of the EU human rights regime, we must add a key 'contingent' element: the interpretation of the scope of application of EU law, which determines whether the EU Charter applies or not and, thus, whether the norms of reference should be the EU or national ones, and whether EU institutions (notably the CJEU and the Commission) have ultimate jurisdiction to control Member States' respect for fundamental rights. As noted earlier, the CJEU, the Commission and national courts have adopted different and fluctuating interpretations on this.

The procedural and institutional dimensions relate mainly to the accessibility and suitability of the judicial systems at national and EU level. They include issues such as standing and other conditions of admissibility; the range of judicial or non-judicial remedies at hand, and the conditions under which these are granted; the capacity of the judicial system to process claims rapidly and effectively; the possibility of class actions and the legal capacity of NGOs to litigate human rights issues where individuals are unable or unwilling to litigate and many others.

The material dimension is about resources: not only financial means but also human and organisational ones. In order to see policy change through, litigants must engage in and sustain litigation over time.[135] Concerned individuals or NGOs fighting for human rights must garner organisational support for strategic litigation. They also need to have access to strong legal expertise, either in-house or through hired lawyers, which requires both financial resources, recruitment capacity and professional connections. Legal training and the organisation of the legal profession must

---

[132] C Hilson, 'New Social Movement: The Role of Legal Opportunity' (2002) 9 *Journal of European Public Policy* 238.

[133] For an illustration in the context of the promotion of LGBT rights through activation of EU citizenship free movement rules, see U Belavusau and D Kochenov, 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU' in K Slootmaeckers, H Touquet and P Vermeersch (eds), *The EU Enlargement and Gay Politics*: *The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave Macmillan 2016).

[134] Article 53 CFR suggests that Member States can offer higher standards. However, lower EU standards must prevail when the application of higher national standards would undermine the supremacy, effectiveness and autonomy of EU law. See Case C-202/04 *Stefano Macrino and Claudia Capodarte v Roberto Meloni* ECLI:EU:C:2013:107.

[135] M Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95.

also be 'fit for purpose'. Where human rights lawyers, or lawyers to whom victims of human rights violations or NGOs turn to for support, have little familiarity with EU law or the Charter, they are unlikely to spot an EU law case when they see one, and to mount Charter-based suits. The EU itself proposes awareness-raising activities and supports training programmes for lawyers to encourage Charter-based litigation.[136] Legal aid schemes, as well as *pro bono* programmes and other forms of support to public interest or human rights litigation, can also help aggrieved individuals, engaged citizens or NGOs who lack sufficient resources.[137]

Finally, the structural opportunities listed above are unlikely to trigger legal or policy change if institutional actors, and notably courts, at both EU and national levels, are not receptive to Charter-based arguments, or are reluctant to apply them against domestic political actors or to refer matters to the CJEU.

Legal opportunities at EU level for human rights litigation are constantly evolving but remain ambivalent, at times creating incentives for Charter-based litigation against Member States, and at other times sending more negative signals. This is true of substantive standards but even more so of institutional aspects.

Gradually, the CJEU has fleshed out what EU human rights standards are. Its case law goes neither for a maximalist nor for a minimalist protection, but for some kind of EU 'best fit'.[138] Broadly speaking, the Court seems to offer particularly generous interpretations of the right to family life (in particular in the immigration context),[139] the right to the protection of personal data,[140] the right to effective (domestic) rem-

---

[136] See, for example, Fundamental Rights Agency, *Handbook: Applying the Charter of Fundamental Rights of the European Union in Law and Policy Making at National Level* (2018) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf, accessed 21 November 2019.

[137] See the activities of the Public Interest Law Initiative (PILNET), available at www.pilnet.org/, accessed 21 November 2019. See also the recent Commission proposal to increase funding for civil society organisations defending the rule of law, human rights and democracy (Rights and Value Fund) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3923, and media freedom https://ec.europa.eu/digital-single-market/en/news/media-freedom-and-investigative-journalism-call-proposals, accessed 21 November 2019.

[138] For a relatively comprehensive study of general principles in the pre-Charter era, see T Tridimas, *The General Principles of EC Law* (Oxford University Press 1999).

[139] Notably through the combined effect of free movement, EU citizenship and fundamental rights rules, see, for example, Cases C-370/90, *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* ECLI:EU:C:1992:296; C-60/00, *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434; C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* ECLI:EU:C:2008:449; C-34/09, *Ruiz Zambrano* ECLI:EU:C:2011:124.

[140] See Cases C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317; C-293/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others* ECLI:EU:C:2014:238; C-362/14 *Maximillian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

edies,[141] and increasingly, the rights of the child,[142] in comparison to a number of national and international legal systems. The recently released FRA Handbook on applying the Charter, interestingly, offers a table which highlights where the Charter offers stronger guarantees than other regimes.[143]

A significant procedural limitation to Charter-based litigation against Member States is that individuals do not have direct access to EU courts to challenge national measures which infringe their Charter rights. They can only complain to the Commission, which may decide to follow up (or not) with infringement proceedings,[144] or alternatively, they can bring litigation before domestic courts and seek a reference for a preliminary ruling to the CJEU.

Violations of EU fundamental rights by Member States can be tackled through the EU infringement procedure, which can lead to financial penalties being imposed on the recalcitrant Member State (Articles 258–260 TFEU). Victims of human rights violations, and NGOs, can complain to the Commission. The Commission has discretion in launching infringement proceedings. For strategic reasons and due to resource constraints, the Commission does not pursue every single violation and selects which cases it investigates.[145] As noted earlier, the Commission has deployed some creativity to bring what were broader threats to the rule of law and civil rights within the scope of application of EU law. Yet, where it cannot argue a direct violation of EU treaties or legislation, the Commission has been cautious in bringing up the Charter. It has, so far, refrained from starting infringement proceedings against a Member State solely based on a violation of the Charter (or in combination with Article 20 TFEU on EU citizenship or Articles 2 and 7 TEU).[146]

Where the Commission decides not to act upon complaints, private parties can travel the indirect route, which consists in bringing litigation against a Member State before domestic courts and asking for a preliminary reference to the CJEU. In fact, when the Commission declines to act, it normally points complainants to national judicial remedies. Although designed to ensure the uniform interpretation of EU law, the procedure has long been widely used to challenge domestic measures which are

---

[141] Article 19(1) TEU; Cases C-222/86 *Unectef v Heylens and Others* ECLI:EU:C:1987:442; C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* ECLI:EU:C:2007:163; C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschlan* ECLI:EU:C:2010:811.

[142] Case C-133/15 *Chávez-Vílchez and Others* ECLI:EU:C:2017:354.

[143] Fundamental Rights Agency, *Handbook: Applying the Charter of Fundamental Rights of the European Union in Law and Policy Making at National Level* (2018) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf, accessed 21 November 2019.

[144] They may also petition the European Parliament, which can pressurise the Commission to act.

[145] European Commission, *Annual Report on the Application of EU Law 2016* COM(2017) 370 final, 4.

[146] As suggested by Jakab, 'Application of the EU Charter by National Courts in Purely Domestic Cases' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017).

not in line with EU law.[147] However, parties before domestic courts cannot 'request' a preliminary ruling, they can only 'ask' the national courts to submit such a request to the CJEU. National courts have discretion as to whether to refer or not, except for courts against which there is no appeal, which have a duty to refer. But these are released from their duty when the interpretation of EU law is sufficiently clear (the so-called *acte clair* doctrine), a possibility which they sometimes abuse to avoid involving the CJEU.[148] In any case, except in emergency procedures, it takes an average of 15 months to get a preliminary ruling,[149] during which time the principal (national) procedure is pending. This delay may well put off potential litigants, and deter national courts from granting it when asked for.

Moreover, as with infringement actions, the possibility to direct Charter-based claims against Member States to the CJEU via preliminary ruling proceedings is constrained by the restrictive terms of Article 51(1) of the Charter. Comparative studies reveal that national courts do not all have the same understanding of the scope of application of the Charter and therefore of when to refer questions concerning its interpretation and application.[150] This results in variations in the preliminary references rates related to the Charter across countries and policy areas.

Appealing to the CJEU via the preliminary reference procedure, or a complaint to the Commission, can thus offer remedies which are potentially more effective than those available under domestic law (in particular in countries which do not possess effective constitutional review mechanisms), and render an appeal to EU norms and institutions attractive. This, in turn, enhances the authority of EU law and the potential economic and political leverage of EU institutions. Moreover, unlike applications to the ECtHR, there is no need to exhaust domestic remedies before asking for a preliminary reference to the CJEU.

Taking advantage of EU legal opportunities does not come at a prohibitive cost. Complaining to the Commission takes few resources, although some knowledge of EU (human rights) law is useful to make a strong argument in favour of intervention. When the Commission is willing to act, it can mobilise its own resources to develop

---

[147] M Broberg, 'Preliminary References as a Means for Enforcing EU Law' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

[148] For example, the German Constitutional Court refused to refer a question to the CJEU in the anti-terror database case in which it challenged the CJEU's wide interpretation of the scope of application of the Charter (1 BvR 1215/07). The French Supreme Administrative Court also refused to refer questions concerning the confidentiality of asylum applications, and the compatibility of French measures with Articles 8 and 18 of the EU Charter of Fundamental Rights (CE No 394686, ECLI:FR:CECHR:2017:394686:20170130).

[149] Court of Justice of the European Union, *Judicial Activity Annual Report 2016*, https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf, accessed 21 November 2019, 100.

[150] See L Burgorgue-Larsen (ed), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as Apprehended by Judges in Europe* (Pedone 2017).

the case. The costs of litigating before domestic courts are aligned with those applicable in the country in which litigation is started, augmented by the need for one additional procedural step (preliminary reference), costs resulting from time delays, and access to legal professionals with expertise in EU (human rights) law, which in some countries can be challenging for less resourceful or connected individuals or organisations.

The receptiveness of the Court to Charter-based claims against Member States, in particular when these are on the 'edge' of EU competence, is another strong determinant of its attractiveness as a human rights litigation venue. The Luxembourg judges do not appear to have yet fully endorsed their 'new' (post-Charter) human rights mandate.[151] The unpredictability of the Court's position on the scope of application of the Charter, as well as its minimalist interpretation of certain standards, limits incentives to involve the Charter and the CJEU in human rights litigation against Member States. In Spaventa's words, 'the Court has placed the fundamental rights ball back in the national courtyard, potentially at the expense of the protection of citizens' fundamental rights'.[152] The Rule of Law cases, outlined above, nonetheless suggest that in 'extreme circumstances' the Luxembourg judges are willing to find ways around this, to address systemic human rights violations.

In a recent contribution, I developed and applied a conceptual framework for studying variations in the scope and pace of rights-based federalisation in the EU, based on interactions between legal opportunities at EU and national levels.[153] In brief, it argues that the weaker the legal opportunities for fundamental rights protection are at domestic level, the greater the incentive to invoke 'federal' instruments and mechanisms (in this case, the Charter and EU procedures and remedies), thus exerting centripetal force towards a greater centralisation and supranationalisation of human rights protection. And vice versa, when domestic systems offer strong(er) rights protection, the pressure goes in the opposite direction, against centralisation, and is even conducive to a (re)nationalisation of human rights protection. These dynamics exert an influence on both the development and implementation of EU human rights law.

With Salát, we proceeded to test this hypothesis, contrasting the Hungarian and French experience. We examined variations in reliance on the EU Charter, before and after its coming into force in December 2009, in the light of opposite trajectories. Hungary is used as a case of weakening legal opportunities for the judicial protection of fundamental rights since the coming into power of the Fidesz government in 2010, with a constitutional reform restricting judicial review possibilities and fundamental

---

[151] G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168.

[152] E Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures' (2016) *Study for the European Parliament PETI Committee* PE 556.930, 22.

[153] MP Granger, 'Federalization through Rights – A Legal Opportunities Approach' (2018) 2–3 *European Journal of Law Reform* 35.

rights guarantees, and extensive court-packing. France represents a case of relative improvement of domestic legal opportunities for human rights ligation, with the 2008 constitutional reform and coming into force in 2010 of the *Question prioritaire de constitutionalité* (QPC) procedure, which reinforced judicial review based on national constitutional law and mechanisms. The findings are interesting and indeed show variations in terms of references to the Charter which support the hypothesis.[154]

## 6. CONCLUSIONS

Despite being a busy field, EU human rights law still has a few blind spots. Most attention is focused on the surface, in particular on the activities of EU Treaty-makers and political institutions, and the 'high-level' inter-institutional dialogue between Europe's top human rights courts (the CJEU, ECtHR and national supreme and constitutional courts). At the same time, as scholars, we know very little about more bottom-up processes which steer its development. European integration studies offer analytical tools to (re)investigate the role of domestic actors, in particular civil society and opposition groups, in triggering EU-level change in the context of human rights protection. Recent empirical political sciences works and historical research have already helped unearth the role played by dedicated Euro-lawyers in the constitutionalisation of Europe, which has cast a different light on this foundational myth.[155] Scholars across disciplines must continue to join forces to carry out further enquiries on the construction and application of EU human rights law, and the role of different, and competing, legal communities. Moreover, legal academics can learn from existing socio-legal studies of EU non-discrimination and environmental law, and pay closer attention to the motivations of domestic policy actors, in particular human rights advocacy and litigation groups and legal entrepreneurs, but also corporate actors, public bodies, local authorities and governmental actors, to invoke (or not) the EU Charter and other EU human rights norms and engage EU procedures and remedies. As briefly exposed in this chapter, the concept of opportunity structures provides a useful yet flexible analytical framework for investigating these dynamics.

Save for a few rights for which the EU provides better standards and remedies, and for which the CJEU displays greater receptiveness, EU legal opportunities for human rights litigation remain limited and therefore do not, for the time being, create a strong centralising pull, except in countries in which domestic rights protection norms and mechanisms are under particular stress. The attractiveness of the EU legal framework is, therefore, all relative, and must be compared to, and contrasted with, national legal opportunities. EU legal opportunities for rights litigation may not cur-

---

[154] MP Granger and O Salát, 'What Drives EU Human Rights Law and Policy: Testing a Legal Opportunities Explanation on post-2010 France and Germany', paper presented at the ECPR Standing Group on the European Union Conference (Paris, 13–15 June 2018).

[155] M Rasmussen and DB Martinsen, 'EU Constitutionsation Revisited: Redressing a Central Assumption in EU Studies' (2019) 25 *European Law Journal* 251.

rently be a panacea, but as political options (for example, exclusion from the policy process, curbing of protest, restrictions on political activism, etc) and legal frameworks for the protection of human rights seriously deteriorate in some countries, or at least in some policy areas (immigration, asylum, women's rights), and there are particular deficiencies in almost every Member State, EU human rights law may still hold some appeal, at least for desperate litigants and NGOs defending specific human rights causes (or resourceful individuals, like Mr Melloni …). Moreover, Rule of Law backsliding and systemic deficiencies in human rights protection in countries such as Hungary and Poland put pressure on EU institutions to do something, and to this they may respond by opening the gates more widely to human rights claims, even where the EU law connections are weak. This would have implications for the future development of EU human rights law, and European integration more generally. To end on a 'close to home' example: the Commission's attempt to address threats to academic freedom posed by the adoption by the Hungarian Parliament of an amendment to the Higher Education Law, which prevents the Central European University (CEU) from continuing to offer US-accredited degrees in Budapest and forced it to relocate to Vienna (Austria), relies primarily on a violation of the EU international trade obligations, which serves as the hook to invoke the relevant Charter provisions. However, it puts the Commission and the Court into the shoes of World Trade Organization law enforcers, something which they have so far been reluctant to do. Using indirect routes to address human rights violation therefore comes with (un-) intended consequences.[156]

[156] For a summary of the hearing, and arguments invoked, see E Stopionni, 'L'audience dans l'affaire Commission contre Hongrie sur la loi CEU – le détour par le droit de l'OMC pour protéger la liberté académique' (*Blog Droit Européen*, 7 July 2019) https://blogdroiteuropeen.com/2019/07/01/laudience-dans-laffaire-commission-c-hongrie-c-66-18-sur-la-loi-ceu-le-detour-par-le-droit-de-lomc-pour-proteger-la-liberte-academique-par-edoardo-stopp/, accessed 21 November 2019.