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The Added Value of the EU Charter of Fundamental Rights: at the Intersection of Legal Systems

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The Added Value of the EU Charter of Fundamental Rights: at the Intersection of Legal Systems

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Introduction

Twenty years after the adoption of the Charter of Fundamental Rights of the European Union ('the Charter'), awareness of it is still limited among practitioners, who tend to turn instead to the European Convention on Human Rights (ECHR) or their national constitution. At first glance it might seem that they are right, as the Charter's scope is limited and it may be perceived as an instrument for the codification of established law. This raises the question: What is the Charter's added value for the protection of fundamental rights?[2]

I firmly believe in the Charter's added value for two key reasons of a systemic nature, on which this paper will focus. But before examining them, it is necessary to define the scope of this research question.

Firstly, while the number of references made to a legal text by competent courts (particularly in light of the reasoning presented to the parties) can certainly serve as a yardstick for measuring a legal instrument's added value, this alone is not enough. The following analysis therefore deals more generally with how a large number of 'practitioners' or key players invoke fundamental rights law, with particular reference to political players in the context of decision-making processes. In this analysis, the law is not only conceived of as a means of defence to be relied upon in court, but also—and this is its primary function—as means of structuring a system of governance. The same, of course, holds true for fundamental rights law.[3]

Secondly, this paper situates the Charter at the intersection of two legal systems. On the one hand, the Charter contributes to structuring the legal order of the European Union (EU), whereas on the other, it contributes to protecting fundamental rights in Europe.

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[2] I am grateful to Emmanuelle BRIBOSIA, Cecilia RIZCALLAH and Sébastien VAN DROOGHENBROECK, editors of the Special Issue of *Cahiers de droit européen* in which a final version of this paper is forthcoming, and to Antoine BAILLEUX, the author of this stimulating research question, for their invitation to share my thoughts on this subject.

[3] See also: Philip ALSTON and Joseph WEILER, 'An "Ever Closer Union" in Need of a Human Rights Policy', *European Journal of International Law*, 1998, 658-72.

Thus, while the perspective of a practitioner using the Charter to formulate points of law at national level sheds light on one aspect of the Charter's added value, it is but part of the analysis of the overall picture.

It is essential to consider the national dimension in any reflection on the Charter's role in the EU's legal order and in the system for the protection of fundamental rights in Europe. Indeed, there is no question of the need to protect fundamental rights at national level, in day-to-day decision-making procedures and disputes. It is often lamented that the Charter is not used more at national level: in its last report, the EU Agency for Fundamental Rights (FRA) noted the Charter is little-used by governmental and parliamentary authorities. There are also notably few examples of systematic scrutiny of legislative instruments transposing obligations arising from EU law for compatibility with the Charter.[4] Furthermore, although the number of references to the Charter is increasing—particularly in the requests for preliminary rulings brought before the Court of Justice of the European Union (CJEU)[5]—it remains low,[6] and these references tend only to accompany a reference to a more-established, domestic law source.[7] This explains increased efforts on the part of the EU, and in particular the European Commission, to raise awareness of the Charter among practitioners and to strengthen the bodies responsible for promoting (certain aspects of) the Charter at national level.[8]

But does the above detract from the Charter's added value? That is not the angle I have taken in this paper, precisely because there are other lenses through which the Charter's added value can be analysed. I argue that the Charter's added value is above all systemic.

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[4] FRA, 'Fundamental Rights Report', 2020, p.5.
[5] Commission, '2018 Report on the Application of the Charter of Fundamental Rights of the European Union', 2019, p. 15.
[6] Approximately 11% of the requests for preliminary rulings referred to the CJEU between 2009 and 2019 referenced the Charter: FRA, 'Fundamental Rights Report', 2020, p. 9.
[7] On references to the Charter in the case law of the CJEU, see: Haris TAGARS, 'La valeur ajoutée de la charte des droits fondamentaux. Une tentative de bilan à l'approche du dixième anniversaire de son application', *Cahiers de droit européen,* 55/1 2019, 33-90, p. 58.
[8] For example: Morris LIPSON and Peter NOORLANDER, 'Feasibility Study for financial support for litigating cases relating to violations of democracy, rule of law and fundamental rights' (Commission, 29.6.2020); Commission Recommendation (EU) 2018/951 of 22 June 2018 on standards for equality bodies, OJ L 167, 4.7.2018, pp. 28-35. For a more comprehensive overview of ongoing initiatives, see: Commission, '2018 Report on the Application of the Charter of Fundamental Rights of the European Union', 2019, pp. 7-13.

Firstly, it is key to complementing the operation of the EU's legal order (I). Secondly, it is indicative of a slow, yet profound transformation of the balances in place at European level for the protection of fundamental rights (II).

I. The Charter's contribution to the development of the EU's legal order

At the institutional level, the Charter has undoubtedly increased the visibility and attention paid to fundamental rights. The resulting strengthening of the narrative on fundamental rights at EU level (A) has sparked new debate on several major, long-standing questions concerning the European integration process through law (B). In coming years, there promises to be a particularly interesting convergence of 'narratives'[9] on the protection and promotion of fundamental rights, on one hand, and on the dynamics of integration through law in the EU's legal order, on the other, as illustrated by the subject of judicial protection (C).

A. Strengthening of the narrative on fundamental rights

Since the Charter's entry into force, we have witnessed a significant ramping up of EU regulatory activity in sensitive areas including immigration, asylum and criminal procedure. In the context of recent crises of confidence, including the financial crisis and the COVID-19 pandemic, there can be significant symbolic value in having a point of reference for the protection of fundamental rights.[10] Likewise, the importance of the connection between EU citizenship, the EU's founding values and fundamental rights is often legitimately pointed out. Although as a legal expert I am not well-placed to 'judge' the strength of symbols within a political system, it is hard to imagine how the EU's action in all these areas would have been so far-reaching without a Charter of Fundamental Rights.[11]

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[9] I will return to this concept in point (B), *infra*.

[10] This paper does not discuss the issue—which is nonetheless extremely important—of whether, how, and to what extent the rights enshrined in the Charter have been effectively protected during times of crisis. See, for instance: Claire KILPATRICK and Bruno DE WITTE, 'Social Rights in Crisis in the Eurozone: the Role of Fundamental Rights' Challenges', Special Edition of *European Journal of Social Law*, (1) 2014.

[11] See, in particular: Philip ALSTON and Joseph WEILER, 'An "Ever Closer Union" in Need of a Human Rights Policy', *European Journal of International Law,* 1998, 658-72; Hugues DUMONT and S. VAN

In this regard, and looking beyond the Charter's symbolic and political impact, it is worth highlighting that the CJEU itself is increasingly referring to the Charter.[12] In fact, the Charter was directly cited or referred to in the reasoning in 356 cases in 2018, compared to 27 in 2010.[13] In this context, the Charter has been used in several ways: firstly, as an instrument for checking the compatibility of legislative acts with fundamental rights, such as in the *Test-Achats*[14] case on the equal treatment of men and women in access to insurance services; secondly, in relation to the compatibility of international agreements with higher ranking norms of EU law, with the example of the draft agreement between Canada and the European Union on the transfer of air passenger name record data from the EU to Canada.[15] The Charter has also served as a means of ensuring an interpretation of acts under EU law that is compatible with fundamental rights, such as in relation to the family reunification of third-country nationals.[16] More recently, the European Commission has come to rely on the Charter when bringing actions before the CJEU against Member States for their failure to fulfil obligations under EU law, as illustrated by the *Commission v. Hungary* case concerning restrictions on the free movement of

DROOGHENBROEK, 'La contribution de la Charte des droits fondamentaux de l'Union européenne à la constitutionnalisation du droit de l'Union européenne' in Jean-Yves CHARLIER and Olivier DE SCHUTTER (eds.), *La Charte des droits fondamentaux de l'Union européenne. Son apport à la protection des droits de l'Homme en Europe*, Bruylant, Brussels, 2002, 61-96.

[12] For more comprehensive studies, see: Koen LENAERTS, *Cahiers de droit européen*, forthcoming, and Haris TAGARS, 'La valeur ajoutée de la charte des droits fondamentaux. Une tentative de bilan à l'approche du dixième anniversaire de son application', *Cahiers de droit européen,* 55/1 2019, 33-90.

[13] See the overview of developments over time: p.15 and Appendices I and II of the Commission's Report on the Application of the EU Charter of Fundamental Rights (file:///C:/Users/U0111456/AppData/Local/Temp/DSAL19001EN.pdf), the first of which focuses on CJEU case law for the year 2018, directly citing the Charter or mentioning it in its reasoning. Note that the number of cases referred to the Court is also increasing.

[14] Judgment of the Court of 1 March 2011, *Test-Achats,* C-236/09, EU:C:2011:100, paragraph 32. See also, for example, Judgment of the Court of 8 April 2014, *Digital Rights Ireland,* Joined Cases C-293/12 and C-594/12, EU:C:2014:238, paragraphs 65-69; Judgment of the Court of 9 November 2010, *Schecke,* Joined Cases C-92/09 and C-93/09, EU:C:2010:662, para. 86, and more generally, Antoine BAILLEUX and Hugues DUMONT, *Le pacte constitutionnel européen: Fondements du droit institutionnel de l'Union* (Larcier, Volume 1, 2015), points 1005-1011.

[15] Opinion of the Court of 26 July 2017, *Opinion 1/15 ('Transfer of Air Passenger Name Record data from the European Union to Canada'),* EU:C:2017:592. See also: Opinion of the Court of 30 April 2019, *Opinion 1/17 ('The CETA'),* EU:C:2019:341, paragraphs 162 *et seq*.

[16] Judgment of the Court of 27 June 2006, *European Parliament v Council of the European Union ('Family Reunification')*, C-540/03, EU:C:2006:429, paras. 58-59, 71 and, more recently, Judgment of the Court of 16 July 2020, *B. M. M. and Others v État belge*, Joined Cases C-133/19, C-136/19 and C-137/19, EU:C:2020:577.

capital for the financing of certain categories of civil society organisations, in breach of Articles 7, 8 and 12 of the Charter.[17]

Additionally, the Charter has become a point of reference for pre-assessing the validity of acts undergoing adoption as part of EU decision-making procedures. That is not to say that such prior assessment is always carried out in a satisfactory manner, and this is a matter on which Romain Tinière rightly warns us to be extremely vigilant.[18] However, as Mark Dawson points out[19], the Charter has undoubtedly taken on an important role upstream of decision-making by EU bodies. The Charter is referred to in the preambles to many EU acts, and the Commission has developed a strategy to make greater allowance for the Charter in its work.[20] Likewise, the Council has Charter guidelines for the adoption of EU internal acts.[21] The Council defines the mandate of the FRA, which is tasked with informing the work of EU bodies by establishing a multi-year framework.[22] The Parliament, for its part, occasionally reminds the Commission of the need to carry out impact assessments when preparing legislative acts, with a particular focus on fundamental rights impacts, such as the study commissioned by the Parliament on the

[17] Judgment of the Court of 18 June 2020, *Commission v Hungary (Transparency of Associations)*, C-78/18, EU:C:2020:476, paragraphs 110-134 and 139-142. See also, Judgment of 21 May 2019, *European Commission v Hungary (Usufruct over Agricultural Land)*, C-235/17, ECLI:EU:C:2019:432, paragraphs 123-129; and Judgment of the Court of 6 October 2020, *European Commission v Hungary (Higher Education),* C-66/18, ECLI:EU:C:2020:792, paragraphs 222-234 and 239-242.

[18] Romain TINIÈRE, 'Les droits fondamentaux dans les actes de droit dérivé de l'Union européenne: le discours sans la méthode', *RDLF,* 2013, www.rdlf.com.

[19] Mark DAWSON, *The Governance of EU Fundamental Rights*, CUP, 2017; see also, John MORIJN, 'Post-Lisbon civil rights protection by the EU's political institutions' in Sybe DE VRIES, Henri DE WAELE, and Marie-Pierre GRANGER (Editors), *Civil Rights and EU Citizenship: Challenges at the Crossroads of the European, National and Private Spheres*, Edward Elgar Publishing, 2018, Chapter 2.

[20] Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (Brussels, 19.10.2010 COM(2010) 573 final); Commission, 'Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments' (Brussels, 6.5.2011 SEC(2011) 567 final); and Commission, Better Regulation Guidelines (Brussels, 7.7.2017 SWD (2017) 350).

[21] Council, 'Fundamental Rights Compatibility: Guidelines for Council Preparatory Bodies' (2015). The Charter is not explicitly referred to with regard to external relations: Council, 'Guidelines on Methodological Steps to be Taken to Check Fundamental Rights Compatibility at the Council Preparatory Bodies' (20.1.2015, 5377/15). See also: John MORIJN, 'Kissing Awake a Sleeping Beauty? The Charter in EU and National Policy Practice' in Vasiliki KOSTA, Nikos SKOUTARIS and Vassilis P. TZEVELEKOS (Editors), *The EU Accession to the ECHR,* Hart Publishing, 2005, Chapter 9.

[22] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53/1, 22.2.2007, Articles 2, 4 and 5. For a critical analysis of this process and its limitations, see: Alicia HINAREJOS, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis', *European Law Journal,* 2016, pp. 61-73.

request for a substitute impact assessment on the proposed Return Directive (recast).[23] Some EU agencies now also have officials, or even strategies, in place to ensure internal compliance with fundamental rights.[24] Although progress still needs to be made, the Charter has undoubtedly paved the way for positive developments.[25]

The Charter can also be considered the common denominator of a set of European governance instruments in the wider sense. For example, several financial instruments focus on the promotion of fundamental rights: as part of the preparations for the upcoming multi-year financial framework, the Commission has proposed several initiatives, including the 'Justice' and 'Rights and Values' programmes, to promote certain rights enshrined in the Charter, among other instruments.[26] The Commission also recently rejected applications made by a number of Polish towns under the 'Europe for Citizens' funding programme. The towns in question, which had requested twinning grants, had passed discriminatory resolutions, declaring themselves 'LGBT ideology-free zones.'[27] EU Equality Commissioner, Helena Dalli, tweeted: 'EU values and fundamental rights must be respected by Member States and public authorities.' Although she made no explicit reference to the Charter—and it would have been surprising for her to do so in a tweet—its presence in the background was manifest.[28]

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[23] Elise MUIR and Caterina MOLINARI, 'Analyse d'impact ciblée de la proposition de la Commission de refonte de la directive sur le retour – aspects juridiques, sociaux et relatifs aux droits fondamentaux' (February 2019).

[24] See, for instance, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019, p. 1-131, Articles 5(4), 80, 99(d), 109.

[25] For an illustration of progress that explicitly references the Charter, see, for instance: Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive, codified version, 2018, p. 303) new Articles 6, 28b (1)(b).

[26] The explanatory memorandum and preambles explicitly refer to the Charter: Proposal for a Regulation of the European Parliament and of the Council establishing the Justice programme (COM(2018)384 final; ongoing procedure as at 21.10.2020); Proposal for a Regulation of the European Parliament and of the Council establishing the Rights and Values programme (COM(2018)383 final/2; ongoing procedure as at 21.10.2020).

[27] *Agence Europe*, 29 July 2020.

[28] This demonstrates the implementation of Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the 'Europe for Citizens' programme for the period 2014-2020 (OJ L 115, 17.4.2014, p. 3-13.), which was adopted on the basis of Article 352 TFEU. Article 2 of the Regulation lays down its objectives, which are: 'to raise awareness of remembrance, the common history and values of the Union and the Union's aim, namely to promote peace, the values of the Union and the well-being of its peoples,' and 'to encourage the democratic and civic participation of citizens at Union level [...] promoting opportunities for

A compatibility review with the Charter may also be considered as an enabling condition for the award of EU funding in areas that are not necessarily related to the promotion of fundamental rights in a strict sense. This logic already is already applied to varying degrees in the EU's internal policies.[29] And the Commission is planning to extend this approach, 'By introducing an enabling condition to ensure the respect of the Charter of Fundamental Rights of the EU, this [proposed] Regulation will have a positive impact on the respect and protection of all fundamental rights in the managements of all seven funds.'[30]

B. Interactions with the intrinsic dynamics of the EU's legal system

My intention here is not to praise the EU for its protection of fundamental rights: the battle for greater protection of fundamental rights within the EU remains a highly topical issue. Moreover, each of the above developments, taken separately, would have been technically possible without the Charter. Indeed, in constitutional terms, EU law has long contained general principles of law and Treaty provisions which, like the Charter, can serve as points of reference for validity control, and as guidelines for interpretation. Moreover, the action of EU institutions in promoting fundamental rights still hinges on the existence of specific legal bases in the Treaties.

Yet, the Charter cannot be said to offer no added value. The above examples demonstrate that the Charter provides a common language for EU action on the protection of

societal and intercultural engagement [...]'. Article 11 also provides that the Commission 'shall ensure the coherence and complementarity between the Programme and instruments in other areas of Union action, especially [...] fundamental rights and freedoms, [...] combating discrimination.'

[29] Viorica VIȚĂ, 'Conditionalities in Cohesion Policy', *Research for the REGI Committee of the European Parliament*, 2018.

[30] Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund plus, the Cohesion Fund and the European Maritime Affairs and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border and Management and Visa Instrument (COM(2018)375 final; pending procedure at 21.10.2020), see section 3. On the substantive debate on conditionality for reasons indirectly related to the main purpose of funding, see: Viorica VIȚĂ, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality', *Cambridge Yearbook of European Legal Studies,* 2017, 116-143.

fundamental rights—a 'narrative dimension' with what Antoine Bailleux describes in another context as a 'formative' role.[31] The added value of this narrative at EU level, in quantitative terms, is that it serves as a link to a host of initiatives for the enhanced protection and promotion of fundamental rights. Whereas, in qualitative terms, the Charter acts as a common analytical tool—a role which cannot be fulfilled to the same extent by the general principles of law (which are by nature diffuse) or sparse Treaty provisions.

The Charter contributes to the development of the EU's legal system by providing a common framework on which to build a fundamental rights narrative. However, this common framework is not without its pitfalls. The Charter has sparked new debate on major, long-standing questions surrounding EU law: the *how* and the *why* of the European integration process. And this is precisely because it embodies the emergence of an EU narrative on fundamental rights. How can a coherent discourse on EU issues be articulated within a 'constitutional charter' that is not inherently designed to protect and promote fundamental rights?

The tension underlying this issue explains the renewed debate on these major, long-standing questions regarding EU law. In recent years, we have seen a growing number of case law developments and commentaries relating to the definition and conditions for 'direct effect', particularly with regard to Charter provisions.[32] And the same can be said for questions relating to the scope of EU law for triggering judicial review in matters concerning the protection of EU fundamental rights.[33] The main questions raised on this

[31] In the more specific context of 'judicial' narratives, see: Antoine BAILLEUX, 'Enjeux, jalons et esquisse d'une recherche sur les récits judiciaires de l'Europe' in Antoine BAILLEUX, Elsa BERNARD, Sophie JACQUOT (Editors), *Les récits judiciaires de l'Europe : Concepts et typologie,* Larcier, 2019, pp. 3-4.
[32] Judgment of the Court of 17 April 2018, *Egenberger,* C-414/16, ECLI:EU:C:2018:257; Judgment of the Court of 6 November 2018, *Max-Planck*, C684/16-, ECLI:EU:C:2018:874. Compare, for example, the approaches proposed by Sacha PRECHAL (Judge-Rapporteur in the Max-Planck case), 'Horizontal direct effect of the Charter of Fundamental Rights of the EU', *Revista de Derecho Comunitario Europeo,* 2020, 407-426 and Elise MUIR, 'The Horizontal Effects of Charter Rights given expression to in EU Legislation, from Mangold to Bauer', *Review of European Administrative Law,* 185-215.
[33] For a relatively recent overview of the status of CJEU case law on this matter, see: Judgment of the Court of 19 November 2019, *TSN and AKT,* Joined Cases C-609/17 and C-610/17, ECLI:EU:C:2019:981, paragraphs 45-55.

subject concern the relationship between national measures which exceed the minimum harmonisation threshold, and the scope of application of EU law.[34]

Another aspect relates to the scope of EU law for bringing infringement proceedings for violation of the Charter. The CJEU recently upheld that an action for failure to fulfil obligations can be brought for the infringement of a right contained in the Charter, both where such an infringement falls within the scope of EU law by virtue of a parallel infringement of one of the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union (TFEU) and justified by an overriding reason of public interest recognised under EU law[35], and where Member States are fulfilling obligations arising from an international agreement, such as the General Agreement on Trade in Services.[36] Furthermore, the CJEU assesses the infringement of the EU law provision bringing the situation within the scope of EU law separately from the infringement of the fundamental right.[37]

C. Judicial protection at the intersection of narratives

In the coming years, Article 47 of the Charter, on the right to an effective remedy, will perhaps merit our greatest attention. In 2018, the provisions of the Charter's Justice Article topped the CJEU's case law reference list, reflecting a trend that has been playing out over several years.[38] Moreover, Article 47 is the most frequently-mentioned Charter

[34] See, in particular: Eleanor Spaventa, 'Should we 'harmonize' fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system', *Common Market Law Review,* 2018, 997-1023.
[35] Judgment of the Court of 18 June 2020, *Commission v Hungary (Transparency of Associations)*, C-78/18, ECLI:EU:C:2020:476, paragraph 101.
[36] Judgment of the Court of 6 October 2020, *European Commission v Hungary (Higher Education),* C-66/18, ECLI:EU:C:2020:792, paragraphs 71 and 213.
[37] For further details on this point: Opinion of Advocate General Campos Sánchez-Bordona, delivered on 14 January 2020, *European Commission v Hungary (Transparency of Associations),* C -78/18, ECLI:EU:C:2020:1 paragraphs 74-81; Compare with Opinion of Advocate General Henrik SAUGMANDSGAARD ØE, delivered on 29 November 2018, *European Commission v Hungary (Usufruct over Agricultural Land)*, C-235/17, ECLI:EU:C:2018:971, paragraphs 64-112. These nuances are explored by Matteo BONELLI in 'The "NGOs case": on how to use the Charter of Fundamental Rights in infringement actions', *European Law Review*, forthcoming.
[38] Commission, '2018 Report on the Application of the Charter of Fundamental Rights of the European Union', 2019, p. 15.

provision in the context of questions referred for preliminary rulings.[39] Yet, in addition to these quantitative points, Article 47 of the Charter lies at the intersection of the narrative on the protection of fundamental rights within the EU and the narrative on European integration through law.[40]

This facet of the Charter relates to the remedies which are necessary to ensure effective judicial protection in the areas covered by EU law at national level; it thus echoes Article 19(1), para. 2, Treaty on European Union (TEU). As the Court points out:

> The first subparagraph of Article 47 states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy in compliance with the conditions laid down in this Article. The obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU to provide the necessary remedies to ensure effective legal protection in the fields covered by EU law, corresponds to that right.[41]

The impact of the convergence of a fundamental right, on the one hand, and the dynamics of European integration through law, on the other, is already highly visible in the CJEU's recent case law on the rule of law.[42]

Yet even beyond this recent line of cases, it will be very interesting to see how the convergence of narratives plays out through the various EU policies in which access to

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[39] Commission, '2018 Report on the Application of the Charter of Fundamental Rights of the European Union', 2019, p.17.

[40] For an overview of the impact of this convergence of narratives, see: Mariolina ELIANTONIO and Elise MUIR (Editors), 'The Principle of Effectiveness: under Strain?', *Review of European Administrative Law,* 2019, Special Issue.

[41] Judgment of the Court of 6 October 2020, *État luxembourgeois v B and Others*, Joined Cases C-245/19 and C-246/19, ECLI:EU:C:2020:795, paragraph 47. In paragraph 54, the Court adds that 'the right to an effective remedy may be invoked on the basis of Article 47 of the Charter alone, without there being a need for the content thereof to be made more specific by other provisions of EU law or by provisions of the domestic law of the Member States', provided however that this falls within the scope of EU law by virtue of another instrument of Union law (paragraph 46).

[42] For an overview, see: Aida TORRES PÉREZ, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence', *Maastricht Journal of European and Comparative Law,* 27 (2020), pp. 105-119. For a recent, critical overview of the current case law on the issue, see: Opinion of Advocate General Michal BOBEK delivered on 23 September 2020, *AX v Statul Român — Ministerul Finanţelor Publice,* C-397/19, ECLI:EU:C:2020:747.

justice is crucial due to the vulnerability of those concerned. Access to justice is a prerequisite for exercising multiple rights, and Article 47 of the Charter offers a broader scope of protection in this area than the ECHR.[43] Furthermore, the integrating power of EU law can extend the scope of this right within the Member States.

This was particularly well illustrated recently, in the area of migration. The *Torubarov* case concerned the effects of interpreting Article 47 of the Charter in conjunction with the principle of sincere cooperation, within the meaning of Article 7, para. 3, TEU. It was held that a national court hearing an appeal against a decision refusing international protection is required to depart from that decision if it does not comply with the national court's previous judgment, and to substitute this decision with its own decision on the application for international protection by the person concerned.[44] This was further illustrated by the *Országos* case, in which the principle of primacy of EU law was associated with Article 47 of the Charter to require the referring court, where it finds that applicants in the main proceedings have been detained, to exercise its jurisdiction to examine the lawfulness of such detention.[45]

II. The Charter's contribution to transforming the European system for the protection of fundamental rights

Thus, the Charter underpins the strengthening of the narrative of EU bodies on the issue of fundamental rights. In addition to the dynamics this creates and the questions it raises with respect to the EU's legal order, which were discussed in the previous section, part of the Charter's added value is that it demonstrates the richness and growing significance of the EU's contribution to the system for the protection of fundamental rights in Europe. The EU's growing importance in this area not only stems from the Charter, but also from

[43] 'Explanation on Article 47 — Right to an effective remedy and to a fair trial', *Explanations (*) relating to the Charter of Fundamental Rights*, OJ C 303, 14.12.2007, pp. 17-35.
[44] See, for instance, Judgment of the Court of 29 July 2019, *Torubarov,* C-556/17, ECLI:EU:C:2019:626, paragraph 74; the association with the primacy of EU law is also made in a subsequent judgment: Judgment of the Court of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* Joined Cases, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, paragraph 146.
[45] Judgment of the Court of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* Joined Cases, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, paragraph 291.

the increasing number of EU instruments designed to protect fundamental rights (A). And it is perhaps the interaction of these instruments with the Charter that has led to the greatest developments in the protection of fundamental rights, both within the EU's legal order (B) and beyond (C).

A. One of various instruments for the protection of fundamental rights

Twenty years after the Charter's proclamation, and 10 years after it becoming an integral and binding part of EU primary law, we risk adopting an approach whereby any discussion on the protection of fundamental rights is conducted exclusively in terms of the Charter. While the Charter provides a common framework for the narrative on fundamental rights at EU level, the fact remains that it is but one of a number of instruments.

It is not necessary for us to re-examine the historical and constitutional importance of the general principles of EU law in detail here.[46] However, it should be stressed that these principles are still highly relevant today. In quantitative terms, for certain fundamental rights, the CJEU continues to reason to a large extent on the basis of general principle, rather than by referring to the Charter. A case in point is the principle of equal treatment.[47] In functional terms, the general principles still allow the coupling of the requirements of the supreme principles of Member States' constitutional orders with the requirements of EU law. For example, in the *Taricco II* case, the CJEU accepted a request from the Italian Constitutional Court (*Corte costituzionale della Repubblica Italiana*) to clarify the scope of its judgment in the *Taricco I* case, due to the friction this had created with respect to Italy's constitutional order.[48] The CJEU responded by referencing a

[46] Judgment of the Court of 12 November 1969, *Stauder,* Case 29/69, EU:C:1969:57, paragraph 7; Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft, Case* 11/70, EU:C:1970:114, paragraph 4; Judgment of the Court of 14 May 1974, *Nold,* Case 4/73, EU:C:1974:51, paragraph 13. For an overall analysis, see: Takis TRIDIMAS, *The General Principles of EU Law* (OUP, 2nd Edition, 2006).
[47] See, for instance: Elise MUIR, 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', *German Law Journal*, 2019, 817-839, p. 829 *et seq.*
[48]- Judgment of the Court of 5 December 2017, *M.A.S. and M.B. ('Taricco II'),* C-42/17, EU:C:2017:936, point 20(3), in particular points 51, 53 and 59.

number of different instruments, including the constitutional traditions common to the Member States, one of which was the Italian approach giving rise to the dispute.[49]

The provisions of the TFEU sometimes also offer significant protection of rights which are now deemed 'fundamental'. A clear example of this is Article 157, para. 1, TFEU on the principle of equal pay without discrimination based on sex.[50] It is also possible to interpret the Treaty's provisions on freedom of movement as an expression of the fundamental right to freedom of enterprise. In particular, the link between the freedom of establishment, guaranteed under Article 49, TFEU, and the freedom to conduct business, guaranteed under Article 16 of the Charter, was greatly emphasised in the *AGET Iraklis* case.[51]

Several international law instruments also hold particular significance in EU law. This is irrefutably the case of the ECHR[52], which is the subject of countless judgments and academic works.[53] But it is also the case for other instruments. The CJEU also pays special attention to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), concluded by Council Decision in 2009.[54] As Delia Ferri explains, the CJEU

[49] Points 20(3), 51 and 53. On the centrality of the constitutional traditions common to the Member States in the exchange between both courts, see: Nicoletta Perlo, 'Dualisme adieu? La nouvelle configuration des rapports entre les ordres italien et de l'Union en matière de droits fondamentaux', *Revue Trimestrielle de Droit Européen,* 2020 p.195. See the questions referred for a preliminary ruling by the Italian Constitutional Court in the pending *DB v Commissione Nazionale per le Società e la Borsa ('Consob')* case*,* C-481/19.

[50] Judgment of the Court of 8 April 1978, *Defrenne,* Case 43/75, EU:C:1976:56, paragraph 39. This Article and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, were recently the subject of a successful infringement action against Poland: Judgment of the Court of 5 November 2019, *Commission v Republic of Poland,* C-92/18, EU:C:2019:924, paragraph 84.

[51] Judgment of the Court of 21 December 2016, *AGET Iraklis,* C-201/15, ECLI:EU:C:2016:972, and in particular paragraphs 65-66 and 90.

[52] Article 6(2) TEU; Opinion of the Court of 18 December 2014, Opinion 2/13 ('Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms'), ECLI:EU:C:2014:2454.

[53] See, in particular: Judgment of the Court of 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary,* C-222/84, ECLI:EU:C:1986:206, paragraph 18; Judgment of 18 June 1991, *ERT v DEP and Sotirios Kouvelas,* C-260/89, ECLI:EU:C:1991:254, paragraphs 41-45; Denys SIMON, 'Des influences réciproques entre CJCE et CEDH : « Je t'aime, moi non plus »', *Pouvoirs* 96/1, 2001, 31-49; Kanstantzin DZEHTSIAROU, Theodore KONSTADINIDES, Tobias LOCK, Noreen O'MEARA, *Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge, Abingdon, 2016.

[54] Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ L 23/35, 27.1.2010.

relies more heavily on the CRPD than on the Charter for protecting people with disabilities.[55] In the coming years we could also imagine other instruments, such as the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence,[56] to exert a greater influence on EU law.[57]

Finally, in addition to the instruments of governance in the wider sense, which have already been mentioned[58], there are a number of EU legislative instruments laying down fundamental rights, such as non-discrimination directives, directives on the granting of international protection and refugee status, and directives on procedural safeguards in criminal matters.[59] These instruments foster a common understanding of the content of the right, its impact on relations between individuals and public authorities, and as the case may be—particularly with regard to non-discrimination—relations between individuals.[60] Moreover, these instruments may establish procedural mechanisms for the enhanced protection of the right in question, such as an adjustment of the burden of proof or even the requirement to designate bodies specialising in the protection of that right.[61]

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[55] Delia FERRI, 'The Unorthodox Relationship between the Charter of Fundamental Rights, the UN Convention on the Rights of Persons with Disabilities and Secondary Rights in the Court of Justice Case Law on Disability Discrimination', *European Constitutional Law Review*, Published online by Cambridge University Press: 28 September 2020.

[56] Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence (COM(2016)111); see also: Request for an opinion submitted by the European Parliament pursuant to Article 218(11) TFEU, *Opinion 1/19* (ongoing procedure 21.10.2020).

[57] Sacha PRECHAL, 'The European Union's Accession to the Istanbul Convention', in Koen LENAERTS, Jean-Claude BONICHOT, Heikki KANNINEN, Caroline NAÔMÉ, Pekka POHJANKOSKI (Editors), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas*, pp. 289-291.

[58] Paragraph I.A, *supra*.

[59] See, in particular: Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1-10. 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 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 ,OJ L 294, 6.11.2013, pp. 1-12 .

[60] See, for instance: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.07.2000, pp. 22-26, Article 3(1).

[61] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36, Articles 19 and 20. Note that in the area of equal pay for men and women, the adjustment of the burden of proof is inherited from earlier case law developments: Judgment of the Court of 27 October 1993, *Enderby,* C-127/92, ECLI:EU:C:1993:859, paragraph 14.

B. Interactions promoting the protection of fundamental rights within the EU

The fact that the Charter is but one of multiple sources for the protection of fundamental rights does not detract from its importance: it acts a link between the various instruments for the governance of fundamental rights at EU level. Aside from this important role in the EU's legal system, the Charter's added value stems from its interaction with other instruments for the protection of fundamental rights. In this sense, it embodies a transformation in the European system for the protection of fundamental rights. It highlights the more active, influential role of key players in EU law, whose role is no longer confined to the obligation to respect fundamental rights, but has now expanded to include the possibility of forging, disseminating and protecting the certain fundamental rights.

The association between the Charter and the EU-derived rights instruments which articulate it significantly expands the scope of EU law, and its policy instruments, for protecting fundamental rights. For example, the CJEU noted that Directive 2012/13, on the right to information in criminal proceedings, and Directive 2013/48, on the right of access to a lawyer[62], share the purpose of establishing the minimum rules on certain rights of suspects and accused persons in criminal proceedings. It held:

> They are based to that end on the rights set out, inter alia, in Articles 6, 47 and 48 of the Charter and seek to promote those rights with regard to suspects or accused persons in criminal proceedings.[63]

The interaction between the Charter, an EU legislative act, and an international agreement to which the EU is a party—both instruments which are themselves dedicated to the protection of fundamental rights—may also result in the extension of the scope of EU law for the protection of fundamental rights. This is what occurred in the *Milkova* case.[64] Directive 2000/78 establishes a general framework for equal treatment in

[62] See note 59, *supra*.
[63] Judgment of the Court of 19 September 2019, *Criminal proceedings against EP,* C-467/18, ECLI:EU:C:2019:765, paragraphs 36-37.
[64] Judgment of the Court of 9 March 2017, *Milkova,* C-406/15, EU:C:2017:198.

employment and occupation. Article 7(2) of this Directive authorises Member States to adopt specific domestic measures with the aim of eliminating or reducing *de facto* inequalities affecting persons with disabilities that may exist in their social life and particularly in their working life, and achieving substantive and non-formal equality through the reduction of those inequalities. This interpretation is supported by the CRPD. According to the CJEU, it follows that the legislation of a Member State which grants employees with certain disabilities special *ex ante* protection in the event of dismissal, pursues one of the objectives covered by EU law and thus falls within its scope.[65] The CJEU therefore held that the national court must determine whether such national legislation—to the extent it does not grant the same protection to civil servants with the same disabilities—is compatible with the principle of equal treatment enshrined in Articles 20 and 21 of the Charter.

The interaction between the Charter and EU legislative acts dedicated to the protection of fundamental rights may also bring about the enhanced protection of fundamental rights in relations between individuals. In a series of cases concerning non-discrimination on grounds of religion or belief, and the fundamental right to paid annual leave, the protection of a right acquired under an EU legislative act has been granted horizontal direct effect through the Charter provision protecting the same right. The legislative acts in question were: Directive 2000/78 establishing a general framework for equal treatment in employment and occupation[66] and Directive 2003/88 concerning certain aspects of the organisation of working time.[67] The corresponding Charter provisions were: Articles 21 on non-discrimination, and 31(2) on paid annual leave. The precise relationship between the content of the legislative instrument and the Charter provision remains unclear in the Court's case law.[68] However, to date, examples of the horizontal

[65] Paragraphs 47-50. The Court reached this conclusion even though the national legislation at issue in the main proceedings establishes a difference in treatment on grounds of a criterion—contractual status—which is not inextricably linked to disability within the meaning of the combined provisions of Article 1 and Article 2(2)(a) of Directive 2000/78 (paragraph 42).
[66] Judgment of the Court of 17 April 2018, *Egenberger,* C-414/16, ECLI:EU:C:2018:257.
[67] Judgment of the Court of 6 November 2018, *Max-Planck*, C684/16, ECLI:EU:C:2018:874.
[68] Similar case law had arisen from the interaction of the general principle of equal treatment and Directive 2000/78, see in particular: Judgment of the Court of 19 January 2010, *Kücükdeveci,* C-555/07, ECLI:EU:C:2010:21. This case law has been extended to the Charter on the basis of the above-mentioned *Egenberger* case. With regard to working time, the Court had never acknowledged the existence of a general

direct effect of a Charter provision are characterised by the coexistence of a legislative provision protecting the same fundamental right, which brings the situation within the scope of EU law.

C. Interactions promoting the protection of fundamental rights beyond the EU

The above examples illustrate how instruments of EU law designed to protect fundamental rights can interact with the Charter to enhance the protection of these rights within the EU's legal order. We can also glimpse interactions with other instruments which suggest these observations can be extended beyond the scope of EU law, both within the Member States and at Council of Europe level.

At national level, there have already been several instances of the highest domestic courts invoking the Charter, in a variety of contexts, as an instrument for constitutional review in the field of fundamental rights.[69] In particular, the First Senate of the German Federal Constitutional Court (*Bundesverfassungsgericht*) recently stated its intention to base its approach to constitutional review on the leeway in design afforded by EU law to Member States for this purpose.[70] The fundamental rights guaranteed under the German Constitution will remain the primary standard of review, where EU law affords Member States a certain leeway in this respect.[71] However, there are exceptions—notably where the EU legislative act establishes a standard of protection of the fundamental right which restricts a Member State's margin of discretion.[72] As the German Constitutional Court

principle of entitlement to paid annual leave before directly referencing Article 31(2) of the Charter to confirm its horizontal scope in the abovementioned *Max-Planck* case. See the multiple references to the 'particularly important principle of Community social law' associated with every worker's entitlement to paid annual leave, in particular in: Judgment of the Court of 26 June 2001, *BECTU*, C-173/99, ECLI:EU:C:2001:356, paragraph 43.

[69] For a brief overview see FRA, 'Fundamental Rights Report', 2020, pp. 10-12; and for a more in-depth discussion, see: Michal BOBEK, Jeremias ADAMS-PRASSL (Editors), *The EU Charter of Fundamental Rights in the Member States* (Hart, forthcoming).

[70] German Federal Constitutional Court, Judgment of 6 November 2019 - 1BvR16/13— *Right to be Forgotten I*, paragraph 49. For a more comprehensive analysis, see in particular: Special Issue of the *German Law Journal*, *Right to be Forgotten BVerfG Judgment*, 2020, 21/1; Lucia Serena Rossi, 'A "new course" of the Bundesverfassungsgericht in the context of constitutional complaints: the balancing of conflicting rights and the application of Union law', EU Law Analysis Blog, 16.4.2020.

[71] German Federal Constitutional Court, Judgment of 6 November 2019 - 1BvR16/13 — *Right to be Forgotten I,* paragraphs 50 and 55.

[72] *Ibid,* paragraph 68.

noted: 'In this regard, the relation between ordinary legislation and fundamental rights is less static under EU law than is the case under the German Constitution.'[73] Alternatively, where EU law fully harmonises a fundamental right, the German Constitutional Court undertakes to review the compliance of domestic implementing legislation in light of the Charter.[74]

A second recent example of the perviousness of domestic constitutional law to the standards laid down in EU law is the case concerning the Italian legal system. In a 2019 judgment, the Italian Constitutional Court deemed it appropriate to deliver its own assessment, 'in light of domestic constitutional provisions, of provisions which, while remaining subject to regulation by European law, touch on principles and fundamental rights enshrined in the Italian Constitution.'[75] The balancing of the rights and obligations in question had to be assessed in light of EU legal principles[76], since according to the Constitutional Court, this enables 'the fundamental rights guaranteed by European law, and in particular by the [Charter], [to] be interpreted in harmony with the constitutional traditions common to the Member States.'[77]

The introduction of the Charter as a point of reference for constitutional courts in certain areas of EU law is not without consequences. On the one hand, it enables Member States' courts to express their opinion on the Charter, in particular through preliminary rulings. And on the other hand, it means the Charter can be used beyond the scope of the EU.[78] On this latter point, it should be stressed that Member States' highest judicial authorities are anxious to guarantee equality in the protection of fundamental rights, and may seek

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[73] *Ibid,* paragraph 53.
[74] German Federal Constitutional Court, Judgment of 6 November 2019 - 1BvR276/17 — *Right to be Forgotten II,* paragraph 53.
[75] Italian Constitutional Court, Judgment 20/2019, official English version https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_20_2019_EN.pdf. For a more detailed analysis, see Nicoletta Perlo, 'Dualisme adieu? La nouvelle configuration des rapports entre les ordres italien et de l'Union en matière de droits fondamentaux', *Revue Trimestrielle de Droit Européen,* 2020 p.195.
[76] *Ibid,* Point 3.1. official English version.
[77] *Ibid,* Point 2.3. official English version.
[78] Likewise: Daniel THYM, 'Friendly Takeover, or: the Power of the "First Word". The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review', *European Constitutional Law Review*, Published online by Cambridge University Press, 9 July 2020, pp. 18 and 22.

to extend the scope of a solution found under the Charter to strictly domestic situations in order to guarantee equal treatment.[79] These authorities may also be susceptible to invoking other fundamental rights in domestic law to avoid inconsistencies with solutions found under the Charter.[80]

Moreover, the scope of EU law is not systematically employed to restrict the use of the Charter by national authorities; this tends to depend in particular on the role of the competent national body. For example, the legislative section of the Belgian Council of State (*Conseil d'État*), which issues opinions prior to the adoption of a legislative act, sometimes makes use of the Charter outside the scope of EU law.[81] Indeed, it is not uncommon—and might even seem like a matter of course—for Member States' highest courts to use external sources to inform their interpretation of fundamental rights.[82] The FRA notes that in most cases where national courts refer to the Charter, questions about whether and why it is applicable are not even raised.[83]

We can also see that the Charter, and the instruments of EU law that refer to it, might exert an influence on the case law of the European Court of Human Rights (ECtHR) interpreting the ECHR. Indeed, it seems unlikely that the ECtHR could be indifferent to the existence of a text—such as the Charter—which is the fruit of the gathering of a Convention and a large-scale ratification process, and is frequently interpreted in conjunction with the EU legislative acts that articulate the fundamental rights in question in 27 European states. In recent years, the compatibility of EU law with the ECHR has

[79] See in particular: Sarah LAMBRECHT, 'Belgium: The EU Charter in a Tradition of Openness' dans Michal BOBEK, Jeremias ADAMS-PRASSL (Editors), *The EU Charter of Fundamental Rights in the Member States* (Hart, forthcoming), p. 91.
[80] See, by analogy: Dominik HANF, '"Reverse Discrimination" in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?', *Maastricht Journal for European and Comparative Law*, 2011, Volume: 18 issue: 1-2, pp. 29-61, 51-55. See also the abovementioned paper by Daniel THYM, p. 22.
[81] Sarah LAMBRECHT, 'Belgium: The EU Charter in a Tradition of Openness' in Michal BOBEK, Jeremias ADAMS-PRASSL (Editors), *The EU Charter of Fundamental Rights in the Member States* (Hart, forthcoming), p. 94.
[82] Maartje DE VISSER, 'National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape', Human Rights Review, 2014, 39-51, 43-44.
[83] FRA, '2018 Report on the Application of the Charter of Fundamental Rights of the European Union', 2019, p. 17.

been the subject of much attention, following friction in areas such as mutual trust.[84] Yet, there are also indications of a countertrend—with constructive references to the Charter being made by members of the ECtHR.[85]

This point is illustrated by the partial dissent of Judge Bianku, supported by Judge Vučinić, in the recent *Ilias and Ahmed v. Hungary* case.[86] Their dissent concerned the applicability of Article 5, ECHR on the rights to liberty and security, in the case of two applicants who had spent 23 days in the Rözske transit zone at the border between Hungary and Serbia. While Article 5 was not applicable in the Court's majority opinion, the following dissenting comments were made on the point relating to EU law:

> (…) the majority's approach in the present case is contrary to Article 28 (Detention) of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, and to Article 8 (Detention) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (revised). These texts, both of which are applicable in Hungary, provide that Member States cannot place a person in detention on the sole grounds that he or she is an asylum-seeker. The Court of Justice of the European Union ('CJEU') interpreted the provisions in question in its judgment delivered on 15 March 2017 in the case of *Al Chodor and Others* (C-528/15). It stated the following:
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> '… the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely

[84] See, in particular: Mattias WENDEL, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM', *European Constitutional Law Review,* 2019, 15(1), 17-47.
[85] For a more complete and analytical overview see: Síofra O'LEARY, 'The EU Charter ten years on: a view from Strasbourg' in Michal BOBEK, Jeremias ADAMS-PRASSL (Editors), *The EU Charter of Fundamental Rights in the Member States* (Hart, forthcoming).
[86] Judgment of the European Court of Human Rights (Grand Chamber) of 21 November 2019, *Ilias and Ahmed v Hungary,* Application no. 47287/15, ECLI:CE:ECHR:2019:1121JUD004728715.

> the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.'
>
> *The CJEU reached that conclusion on the basis of Article 6 of the Charter of Fundamental Rights of the European Union. I find it difficult, nay impossible, to reach a different conclusion on the basis of Article 5 of the Convention.* In December 2015 the European Commission brought infringement proceedings before the CJEU against Hungary relating to its asylum legislation, and the Commission has on several occasions decided to renew the proceedings, also extending it to the issue of the detention of asylum-seekers in the transit zones [Italics added].

The ECtHR's analysis of this case brings to the forefront the importance of the standards of protection laid down in EU law. This type of dispute arises in areas where EU law is relevant, such as in the area of migration. But the interpretation of the Convention itself can then be used far beyond the scope of EU law. In this regard, the specific issue of asylum application and applicant processing at the external borders of the EU looks set to be particularly interesting. In reaction to the *Ilias and Ahmed v. Hungary* case by the ECtHR, and on the subject of defining 'detention', Advocate General Priit Pikamäe recently issued an opinion calling for EU law to be given an interpretation resulting in a higher level of protection than the solution adopted by the ECtHR. This view was supported by an encouraging—albeit less explicit—judgment handed down a few weeks earlier by the CJEU in the *Országos* case.[87]

Conclusion

The aim here is not to regress to a form of centrism that would position the Charter at the core of all developments in the field of fundamental rights—the point is far more nuanced. The Charter clearly interacts with a multitude of other sources for the protection of

[87] Opinion of Advocate General Priit PIKAMÄE delivered on 25 June 2020, Case C-808/18, *European Commission v Hungary,* paragraphs 130-131, see also Judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* Joined Cases C924/19 PPU and C925/19 PPU, EU:C:2020:367, paragraphs 216-222.

fundamental rights at European level. Within the EU's legal order, it acts as a link in many institutional players' narratives on fundamental rights, and plays a part in the intrinsic dynamics of the EU's legal system. This explains why the Charter is the subject of intense debate on the current limits of the EU's legal order, and why its use in conjunction with other instruments for the protection of fundamental rights embodies the EU's growing influence at European level in this area. Indeed, the Charter's added value lies at the intersection between the EU's legal system and the protection of fundamental rights at European level.