European Law Open (2023), **2**, 616–635
doi:10.1017/elo.2023.30

CORE ANALYSIS

The role of fundamental rights in the environmental case law of the CJEU

Jasper Krommendijk and Dirk Sanderink

Radboud University, Nijmegen, The Netherlands
Corresponding author: Jasper Krommendijk; Email: j.krommendijk@jur.ru.nl

(Received 16 May 2022; revised 9 June 2023; accepted 12 July 2023; first published online 17 October 2023)

Abstract

There has been a turn to fundamental rights in environmental and climate cases before national and international courts in recent years. We know very little whether there has been such a turn in relation to European Union (EU) law before the Court of Justice of the European Union (CJEU). The CJEU occupies an increasingly relevant position in this nexus between environmental law and human rights because of strong and effective EU enforcement mechanisms, the abundance of specific EU secondary environmental law, the growing role of fundamental rights since 2009 and the self-standing provision on the environment in Article 37 of the Charter. An analysis of the case law, nonetheless, shows that Charter rights that can be used as 'swords' in the interest of environmental protection have so far played only a limited role. After explaining the absence of a rights turn, we argue that such a turn is warranted before the CJEU as well, also from a legal perspective. This article examines two potential avenues. The CJEU can derive positive obligations from relevant Charter provisions, including Articles 2 (right to life) and 7 (right to respect for private life and the home) of the Charter, or it can rely more extensively on Article 37 as a tool for interpreting primary and secondary EU law in an environmentally friendly way.

Keywords: environmental law; fundamental rights; Court of Justice of the European Union; climate change; European Convention on Human Rights

1. Introduction

Scholars have observed a 'turn to rights' in environmental and climate litigation and adjudication, especially since the landmark judgement of the Dutch Supreme Court in *Urgenda*.[1] There has been an increase of human rights inspired environmental and climate cases before national courts and international human rights courts and treaty bodies.[2] There has, however, been scant attention to the role of the Court of Justice of the European Union (CJEU) in relation to human rights and the environment. This is noteworthy, because the CJEU occupies a relevant position in this debate about the nexus between environmental law and human rights for four reasons. Firstly, the CJEU is a relatively powerful international court given the primacy of EU law and the existence of

[1]Human rights-based approaches to environmental 'law' date back to the emergence of international environmental law in the 1960s. Eg the 1972 Stockholm Declaration on the Human Environment; S Adelman and B Lewis, 'Rights-Based Approaches to Climate Change' 7 (2018) Transnational Environmental Law 9; J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation' 7 (2018) Transnational Environmental Law 37; A Boyle, 'Climate Change, the Paris Agreement and Human Rights' 67 (2018) International and Comparative Law Quarterly 759.

[2]J Krommendijk, 'Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation' 31 (2022) Review of European, Comparative & International Environmental Law 60–74; H Keller and C Heri, 'The Future Is Now: Climate Cases Before the ECtHR' 40 (2022) Nordic Journal of Human Rights 153.

well-established doctrines. The latter can be observed through strong enforcement mechanisms such as direct effect, state liability and non-contractual liability of the EU as well as the binding nature of CJEU judgements. Secondly, the CJEU is also an active environmental court because of the extensiveness of EU secondary law in the environmental law field. The CJEU has, for instance, dealt with cases related to greenhouse gas reduction and air and water quality.[3] Thirdly, the CJEU has in practice been functioning as a human rights court according to various scholars, especially after the Charter of Fundamental Rights became legally binding in 2009.[4] Fourthly, this Charter contains, contrary to other international human rights treaties such as the European Convention on Human Rights (ECHR), a specific provision related to the environment, albeit not formulated in terms of an individual right.[5] Article 37 of the Charter stipulates that 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

The foregoing four points warrant the question as to the role of fundamental rights, and more specifically the EU Charter of Fundamental Rights, in the environmental case law of the CJEU. Has the CJEU also made a turn to human rights like other (inter)national courts in environmental cases? In order to answer this question and find the relevant and required cases, a structured case law search of CJEU judgements in environmental cases with carefully selected search terms was performed.[6] In its discussion of the case law, this article focuses on the role of *substantive* human rights in the CJEU's environmental case law. This means that this article primarily engages with -in addition to Article 37- the following provisions: Article 2 (right to life), 7 (right to respect for private life and the home) and 17 (right to property).[7] Whilst other rights within the Charter, such as the rights of the child (Article 24 of the Charter), can potentially include environmental elements, the selected few are the most relevant provisions in environmental litigation and will therefore be the focus of this article. Moreover, this article will not focus on *procedural* (environmental) rights such as Articles 41, 42 and 47 or the Aarhus Convention because this has been done by others.[8] This article will also touch upon the role of the case law of the European Court of Human Rights (ECtHR) in relation to the Charter-equivalent provisions of Articles 2, 8 and Article 1 Protocol 1 to the ECHR, especially in the light of Article 52(3) of the Charter as well as the doctrine of positive obligations.

This article is divided in two parts. Section 2 discusses the current role of the Charter in the environmental case law of the CJEU. After presenting a general overview (Section 2A), explanations are provided for the absence of a turn to human rights in the case law of the CJEU (Section 2B). Section 3 starts with a short discussion of the criticism of human rights-based

[3]See in relation to EU targets for greenhouse gas reductions Case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2021:252; the Ambient Air Quality Directive 2008/50/EC in Case C-723/17, *Craeynest and Others*, ECLI:EU:C:2019:533; groundwater quality Case C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others*, ECLI:EU:C:2019:824.

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

[5]There have been attempts to amend the Treaties or the Charter. International environmental organisations proposed during the Intergovernmental Conference in 1997: 'Every citizen of the Union shall have the right to clean and healthy environment, access to the decision-making process, information, and justice, as part of a general right to human development'. In January 2022, French President Macron also suggested to amend the Charter along similar lines.

[6]Searched for 'charter fundamental rights' in cases with the subject-matter 'environment' between 1/12/2009 and 31/12/2022. This resulted in 144 cases of which 135 were decided at the moment of the search.

[7]Sanderink concluded that these provisions cover nearly all environment-related situations in the case law of the ECtHR. DGJ Sanderink, *Het EVRM en het materiële omgevingsrecht* (Wolters Kluwer 2015); See G Marin-Duran and E Morgera, 'Article 37' in S Peers, T Hervey, J Kenner and A Ward (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart 2021) 983, para 37.05.

[8]C Hilson, 'Substantive Environmental Rights in the EU: Doomed to Disappoint?' in S Bogojević and R Rayfuse (eds), *Environmental Rights in Europe and beyond* (Hart 2018) 87; See D Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' 6 (2015) Journal of Human Rights and the Environment 139.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

Table 1. Charter provisions explicitly mentioned in the environmental case law of the CJEU (1 December 2009 until 31 December 2022)

Charter Provision	Content	Nr. of Court of Justice cases	Nr. of General Court cases	Nr. of AG Opinions[9]
47	Right to an effective remedy and to a fair trial	15	11	24
17	Right to property	9	12	13
37	Environmental protection	5	5	17
16	Freedom to conduct a business	2	9	6
41	Right to good administration	1	7	5
20	Equality before the law	3	2	2
7	Respect for private life and the home	1	3	2
21	Non-discrimination	3	1	1
49	Principles of legality and proportionality of criminal offences and penalties	2	0	3
15	Freedom to choose an occupation and right to engage in work	2	1	0
42	Right of access to documents	0	0	3
6	Right to liberty and security	1	0	1
35	Health care	1	0	1
10	Freedom of thought, conscience and religion	0	1	1
11	Freedom of expression and information	0	1	1
2	The right to life	0	2	1
24	The rights of the child	1	0	0
3	Right to integrity of the person	0	0	1

approaches to environmental protection (Section 3A). We will subsequently examine the future potential of the Charter by focusing on the (potential) role of positive obligations in relation to Articles 2, 7 and 17 of the Charter (Section 3B). Next, specific attention will be paid to the (potential) role of the self-standing environmental provision Article 37 of the Charter (Section 3C). In doing so, we will show that the Charter has only played a limited role in environmental cases before the CJEU to date. This is attributed to the limited added value of the Charter in the light of EU secondary law about the protection of the environment as well as the limited engagement with the Charter by national courts and litigants who rely on the ECHR instead. We argue that the Charter can, nonetheless, have added value in environmental cases before the CJEU via the doctrine of positive obligations and as a useful interpretative tool via Article 37 of the Charter.

2. The Charter in the environmental case law of the CJEU

A. The role of Charter provisions in the environmental case law of the CJEU

A first glance of the results of the case law analysis shows that the Charter has had a relatively limited impact in the environmental case law of the CJEU. Table 1 shows the specific Charter provisions that figure in the case law of the CJEU, including the Opinions of Advocates General (AGs). This table leads to four observations.

[9]Article 3 (Right to the integrity of the person) and 48 (Presumption of innocence and right of defence) were mentioned once in an AG Opinion.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

Firstly, the table illustrates the dominance of procedural fundamental rights in the environmental case law of the CJEU, most notably Article 47 of the Charter. This underscores the attention in the literature for the further incorporation of the Aarhus Convention within EU Law ('Aarhus-isation' of EU law).[10]

Secondly, Table 1 indicates that 'shield cases' (still) dominate the case law, as has also been observed in the literature.[11] Articles 16, 17, 20 and 21 have primarily been used by companies as a 'shield' to protect their interests against government measures that were partly taken to protect the environment.[12] Such 'anti-environmental' cases do not necessarily reflect a 'turn to environmental rights' or the 'greening' of existing (international) human rights law.[13] By contrast, environmental 'sword' rights tend to refer to private individuals that invoke their rights to further environmental protection and/or counter environmental pollution. These provisions include Articles 2, 7, 35 and 37 of the Charter. Such Charter provisions that are used as 'swords' in the interests of environmental protection play a role in fewer cases than the 'shield' rights, as Table 1 shows as well.[14] An example of a 'shield case' is *Križan* that dealt with the alleged infringement of the right to property in Article 17 of the Charter of the operator of a landfill site as a result of the annulment by a court of a permit for infringing the Integrated Pollution and Prevention and Control Directive (2008/1/EC).[15] The Grand Chamber of the CJEU ruled that such an annulment does not constitute an unjustified interference and pointed to environmental protection as a legitimate interest. In *Standley*, UK farmers also challenged the Nitrates Directive (91/676/EEC) for infringements of their right to property, albeit unsuccessfully.[16] The CJEU decided that the right to property of the private corporations concerned must not take precedence over the general interest in environmental protection.

Thirdly and relatedly, the two provisions that lend themselves best to a 'greening' of the Charter, Articles 2 and 7 of the Charter, have only played a marginal role in the environmental case law of the CJEU.[17] These provisions can be used as a 'sword' to force the authorities to act against environmental harm or pollution causing interferences with these human rights, thereby providing a higher level of environmental protection. There have been two references to the right to life (Article 2 of the Charter) by AG Kokott in the air quality cases *Craeynest* and *JP*.[18] AG Kokott held in *Craeynest*: 'The rules on ambient air quality therefore put in concrete terms the Union's obligations to provide protection following from the fundamental right to life under Article 2(1) of the Charter and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU. Measures which may impair the effective application of Directive 2008/50 are thus comparable, in their significance, with the

[10]Hilson, 'Substantive Environmental Rights', 87; See Shelton, 'Legitimate and Necessary' 139.

[11]Eg in an action for annulment of a Regulation dealing with emissions from light passenger and commercial vehicles, the CJEU only mentioned Article 17 explicitly. Joined Cases C-177/19 P to C-179/19 P, *Allemagne – Ville de Paris and Others v Commission*, ECLI:EU:C:2022:10, para 47. See also about compensation for the damage caused to aquaculture by protected wild birds in a Natura 2000 area C-238/20, *Sātiņi-S*, ECLI:EU:C:2022:57.

[12]The majority of climate related cases before the CJEU concern challenges of the industry to the discretion of the Commission in relation to the renewable energy and emission trading scheme directives. S Bogojević, 'Human Rights of Minors and Future Generations: Global Trends and EU Environmental Law Particularities' 29 (2) (2020) Review of European, Comparative & International Environmental Law 191, 196.

[13]Boyle, 'Human Rights and the Environment' 613; J Krommendijk, 'Beyond Urgenda', 62–63..

[14]A similar conclusion has been raised in relation to the case law of the ECtHR, OW Pedersen, 'European Court of Human Rights and Environmental Rights' in JR May and E Daly (eds), *Human Rights and the Environment* (Edward Elgar 2016) 463.

[15]Case C-416/10, *Križan*, ECLI:EU:C:2013:8; Hilson, 'Substantive Environmental Rights'.

[16]Case C-293/97, *Standley*, ECLI:EU:C:1999:215, para 54.

[17]See also the unsuccessful reliance on Articles 2 and 7 in Case T-569/20, *Stichting Comité N 65 Ondergronds Helvoirt v European Commission*, ECLI:EU:T:2021:892, paras 89–96.

[18]Case C-723/17, *Craeynest and Others*, ECLI:EU:C:2019:168, Opinion of AG Kokott, para 53; Case C-61/21, *JP v Ministre de la Transition écologique*, ECLI:EU:C:2022:359, Opinion of AG Kokott, para 73; Article 2 CFR was also invoked by the parties in Case T-330/18, *Carvalho and Others v Parliament and Council*, ECLI:EU:T:2019:324.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

serious interference with fundamental rights on the basis of which the Court made the rules on the retention of call data subject to strict review.'[19] In contrast to the AG, the CJEU did not refer to Articles 2 and 37 of the Charter. It, nonetheless, referred to this paragraph in the Opinion of AG Kokott explicitly linking air quality with the fundamental right to life in Article 2 of the Charter.[20] In its judgement, the CJEU limited the margin of discretion of the authorities in the light of the considerable importance of environmental protection. It determined that the level of pollution at each measuring point is essential instead of an average of multiple points.[21] In the more recent case of *JP,* the CJEU reached a different conclusion than AG Kokott and decided that various air quality directives are not intended to confer upon individuals rights the violation of which gives rise to state liability and a right to compensation.[22] The CJEU was silent about the Charter and did not even implicitly refer to Kokott's engagement with the Charter.

Attention to Article 7 (right to respect for private life and the home) is also relatively limited both in quantitative as well as qualitative terms.[23] The only exception is *Commission v Austria*. Austria relied on Article 7 of the Charter to justify its interference with the free movement of goods flowing from the prohibition for lorries of over 7.5 tonnes to use a section of the A12 motorway in the Inn valley.[24] Austria claimed that Article 7 of the Charter (and Article 8 ECHR) obliged the authorities to protect citizens against harm to health and the quality of life as a result of air pollution. Even though the CJEU recognised that the environmental and health objectives could justify this inference, it eventually concluded that 'a measure so radical as a total traffic ban on a section of motorway constituting a vital route of communication' was disproportionate also because alternative and less restrictive measures, such as the introduction of a speed limit of 100 km/h, were not duly considered.

Fourthly, in many instances the AG engages with the Charter in a particular case while the CJEU remains silent, as in the earlier discussed air quality cases *Craeynest* and *JP*.[25] This is not surprising because of the more analytical or academic approach of AGs that naturally involves a broader perspective with reflections on alternative approaches.[26] This article does not suggest that engagement with the Charter is always desirable. Non-engagement is, for instance, justified when it is clear that the Charter is not applicable.[27] Likewise, there might not be a need to examine a Charter argument, if the case can already be decided on other grounds.[28]

In sum, the overview in this section shows that the CJEU hardly ever relies on the Charter to provide (a higher level of) protection against environmental harm and pollution. The next section

[19]Case C-723/17, *Craeynest and Others*, ECLI:EU:C:2019:168, Opinion of AG Kokott, para 53.

[20]Case C-723/17, *Craeynest and Others*, ECLI:EU:C:2019:533, paras 33 and 53; D Misonne, 'The Emergence of a Right to Clean Air: Transforming European Union Law through Litigation and Citizen Science' 30 (2021) RECIEL 1, 34.

[21]*Ibid*., para 67; U Taddei, 'Case C-723/17 *Craeynest*: New Developments for the Right to Clean Air in the EU' 32 (2020) Journal of Environmental Law 151, 158–9.

[22]Case C-61/21, *JP v Ministre de la Transition écologique*, ECLI:EU:C:2022:1015, para 56; For a critical discussion of this judgement, see J Krommendijk and H van Eijken, 'Does the Court of Justice clear the air. A Schutznorm in state liability after all? JP v Ministre de la Transition écologique', 10 January 2023, <https://eulawlive.com/op-ed-does-the-court-of-justice-clear-the-air-a-schutznorm-in-state-liability-after-all-jp-v-ministre-de-la-transition-ecologique-by-hanneke-van-eijken-and-jasper-krommendijk/> accessed 21 August 2023.

[23]The argument in relation to Article 7 was inadmissible or not addressed for insufficient argumentation by the parties in Case C-398/13 P, *Inuit Tapiriit Kanatami*, ECLI:EU:C:2015:535; Case T-526/10, *Inuit Tapiriit Kanatami*. ECLI:EU:T:2013:215; Case T-574/12, *PAN Europe and Stichting Natuur en Milieu v Commission*, ECLI:EU:T:2015:541; Case T-189/14, *Deza, a.s. v European Chemicals Agency*, ECLI:EU:T:2017:4, para 160.

[24]Case C-28/09, *Commission v Austria*, ECLI:EU:C:2011:854, paras 118–121.

[25]Eg Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:987; Case C-723/17, *Craeynest and Others*, ECLI:EU:C:2019:533.

[26]Another reason is that AGs write their Opinions independently and do not have to compromise as the CJEU does. J Krommendijk, 'The use of ECtHR case law by the Court of Justice after Lisbon: the view of Luxembourg Insiders' 22 (6) (2015) Maastricht Journal of European and Comparative Law 812–35, 818.

[27]Eg Case C-80/18, *UNESA*, ECLI:EU:C:2019:934.

[28]Eg Case T-847/14, *GHC Gerling*, ECLI:EU:T:2015:428.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

will provide explanations for this, while the rest of the article will discuss in more detail the potential of a 'positive obligations' doctrine in relation to Articles 2, 7 and 17 of the Charter (Section 3B) as well as the (potential) role of Article 37 of the Charter (Section 3C).

B. Explaining the limited role of the Charter in the environmental case law

The fact that the CJEU barely relies on the Charter to provide protection against environmental harm and pollution is perhaps not surprising for four reasons.

First, reliance on the Charter is often unnecessary from a substantive point of view, because citizens can rely on EU secondary law.[29] Bogojević compellingly showed the limited added value of Charter rights in large parts of EU environmental law, because of clear, precise and unconditional statutory obligations and specific limit values, such as in the Air Quality Directive or the Water Framework Directive.[30] The CJEU has construed the limit values in these directives as 'silent rights', namely provisions that are not formulated as fundamental rights as such but have been construed as creating rights. The CJEU determined, already in the beginning of the 1990s, in relation to two older air quality directives containing such values that the latter are intended to give rise to rights for individuals.[31] Because these limit values are imposed in order to protect human health, individuals must be in a position to assert their rights when these values are exceeded. In *Janecek,* the CJEU reiterated that individuals can rely on these values before national courts.[32] It subsequently positioned national courts as clear enforcers of these values in *ClientEarth* by requiring courts to order the authorities to draw up an air quality plan in case of non-compliance with the air quality standards.[33] It was only in the aforementioned *Craeynest* case that the AG linked air quality with the fundamental right to life in Article 2 of the Charter. Note that the CJEU seems to take a step back from the 'silent rights' idea in *JP* by determining that the air quality directives are not intended to confer rights upon individuals. Also in cases in which there were no such limit values in EU secondary law, the Charter is not relied on by the CJEU. This happens, for example, in cases dealing with environmental noise.[34] There has been a relatively substantial case law of the ECtHR in relation to noise pollution and the right to respect for private life and the home (Article 8 ECHR), including the well-known *Hatton* case on night flights at Heathrow airport.[35] A link with the Charter has, so far, not been made, except in a reference by a Polish court in case that was subsequently withdrawn.[36]

[29]Hilson, 'The Visibility of Environmental Rights', 1603.

[30]Bogojevic, 'Human Rights of Minors', 199; See Misonne, 'The Emergence of a Right to Clean Air'; M Peeters and M Eliantonio, 'On Regulatory Power, Compliance, and the Role of the Court of Justice in EU Environmental Law' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 475, 496. U Taddei, 'A Right to Clean Air in EU Law? Using Litigation to Progress from Procedural to Substantive Environmental Rights' 18 (2016) Environmental Law Review 1, 3.

[31]The Directive on a limit value for lead in the air (82/884/EEC) in Case C-59/89, *Commission v Germany*, ECLI:EU:C:1991:225, paras 18–19; The Directive (80/779/EEC) on air quality limit values and guide values for sulphur dioxide and suspended particulates in Case C-361/88, *Commission v Germany*, ECLI:EU:C:1991:224, paras 15–16.

[32]Case C-237/07, *Janecek*, ECLI:EU:C:2008:447.

[33]Case C-404/13, *ClientEarth*, ECLI:EU:C:2014:2382; Hilson, 'Substantive Environmental Rights'. The Judgements of the CJEU and the UK Supreme Court are silent about fundamental rights, while ClientEarth framed the issue in terms of a right to clean air in its publicity. Hilson, 'The Visibility of Environmental Rights', 1599.

[34]Directive 2002/49/EC on environmental noise and Directive 2002/30/EC on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports.

[35]*Hatton v the United Kingdom* App No 36022/97 (ECtHR, 8 July 2003); K Pouikli, 'Noise Pollution in Europe: Unpacking a Worryingly "Quiet" Regulatory and Policy Issue' 16 (2020) Journal for Environmental and Planning Law 3. See about positive obligations and protection against noise pollution also Section 3.B.

[36]The Polish court referred to Articles 7, 17 and 37 CFR in a case about a claim for compensation for a reduction in the value of a property and claim for the reimbursement of the costs of soundproofing a building close to an airport. Case C-452/21, *Przedsiebiorstwo Panstwowe X*, ECLI:EU:C:2022:803.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

Second, both the parties and national courts pay limited attention to the Charter in environmental cases.[37] Often, the referring court considers and relies on the Charter when the plaintiffs invoke the Charter.[38] The order for reference of the national court and the submissions of parties[39] are an important reason why the CJEU engages with Article 37 of the Charter, or not.[40] If national courts remain silent on the Charter and limit their questions to secondary EU law or Treaty provisions, the CJEU is also likely to forego Charter engagement. References to the Charter by the referring court do, however, not always lead to engagement with the Charter by the CJEU.[41] The limited rights framing by both the CJEU and national courts has a mutually reinforcing effect. In other words, when national courts do not frame their reference in terms of fundamental rights, the CJEU is also not very likely to do so. At the same time, the CJEU sets an example. When it hardly engages with fundamental rights, national courts will not do so either.[42] The latter is illustrated by the limited role of the Charter in Dutch environmental cases. This lack of attention contrasts with the relatively high impact of EU law and the Charter in Dutch legal practice and court judgements in general.[43] The limited role of the Charter in Dutch environmental law cases can partly be attributed to the still rather limited knowledge of environmental lawyers about the Charter, especially in comparison with the ECHR.[44] If they rely on fundamental rights, they prefer the ECHR, possibly because they are more familiar with it.[45] The experience in other Member States mirrors the Dutch situation of ECHR-preference coupled with a prominence of the national bill of rights.[46]

Third, questions about the exact scope of application have probably discouraged lawyers and courts from relying on the Charter, especially because the added value of the Charter *vis-à-vis* the ECHR is not immediately evident. An important limitation of the Charter is that it applies to Member States on the basis of Article 51 of the Charter 'only when they are implementing Union law'. It did not help that the CJEU ruled that the Charter did not apply in one of the first CJEU judgements about environmental law and the scope of application of the Charter (*Siragusa*).[47]

[37]F Lecomte, 'The Contours of Ecological Justice before EU Courts in the Light of Recent Case-Law' 21 (2021) ERA Forum 737.

[38]It is not entirely clear on the basis of the order for reference whether the applicants in the Polish case relied on the Charter themselves. Empirical legal research on reliance on the Charter by Dutch courts showed that the majority of Charter citations is to be attributed to the parties. J Krommendijk, 'Tien jaar bindend EU-Grondrechtenhandvest in de Nederlandse rechtspraktijk. Een inleidende schets van de status quo' in HCFJA de Waele, J Krommendijk and KM Zwaan (eds), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment* (Wolters Kluwer), 1–44.

[39]See the application in Case T-360/16, *Dimos Athinaion v European Commission*, ECLI:EU:T:2016:694.

[40]This holds true for two of the three cases in which the CJEU used Art. 37 CFR as an interpretative tool, namely Case C-900/19, *One Voice and Ligue pour la protection des oiseaux,* ECLI:EU:C:2021:211; Case C-24/19, *A. and others (Wind turbines at Aalter and Nevele)*, ECLI:EU:C:2020:503. In *Associazione Italia Nostra Onlus* the referring Italian court cast doubt upon the validity of the SEA Directive in the light of Article 37 CFR. Case C-444/15, *Associazione Italia Nostra Onlus*, ECLI:EU:C:2016:978.

[41]The CJEU did not engage with the references to the Charter by the referring Spanish court in a case challenging a Spanish tax on electricity production that did not differentiate between energy from renewable and energy from non-renewable sources. The Spanish court was quite firm in its order for reference and held that the 'polluter pays' principle in Article 191(2) TFEU and Articles 20 and 21 CFR on equality and non-discrimination preclude a tax that gives the same fiscal treatment to all electricity generation companies irrespective of whether they use renewable energy sources or not and without considering their impact on the natural world.Case C-220/19, *Promociones Oliva Park*, ECLI:EU:C:2021:163.

[42]Hilson, 'The Visibility of Environmental Rights', 1592.

[43]Krommendijk, 'Tien jaar bindend EU-Grondrechtenhandvest'.

[44]Ibid. This is also illustrated by the often insufficiently substantiated arguments based on the Charter allowing courts to dodge Charter issues easily (see, for example, Court of Appeal The Hague 6 October 2020, ECLI:NL:GHDHA:2020:1920, para 4.4).

[45]This ECHR dominance can partly be attributed to the peculiar Dutch legal order in which courts are prohibited to conduct a constitutional review of legislation but remain free to perform a review on the basis of international treaties such as the ECHR. J Gerards et al (red.), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven* (Kluwer 2015) 7.

[46]Eg M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020).

[47]The CJEU 'requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'. Case C-206/13, *Siragusa*, ECLI:EU:C:2014:126, para 24.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

Fourth, in addition to the aforementioned obstacles at the national level, it has also proven difficult for natural or legal persons and environmental or human rights NGOs to gain direct access to the CJEU via Article 263 TFEU.[48] The most explicit and recent case that illustrates this is the 'People's Climate Case' *Carvalho*.[49] This case was an evident attempt at invoking and 'turning' to rights. The applicants argued that the EU insufficiently reduces greenhouse gas emissions in violation of a wide variety of Charter rights (Articles 2, 3, 15, 16, 17, 20, 21 and 24). The CJEU relied on its well-established *Plaumann* case law in relation to the requirement of individual concern.[50] The (alleged) victims failed to show that 'the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[51] The CJEU added that the fact that the contested acts infringe fundamental rights is not sufficient in itself to establish such individual concern.[52] Hence, it did not accept the argument that the effects of climate change are unique to and different for each individual. It remains to be seen whether litigants might find their way more easily to the CJEU in the future following the broadening of rights for environmental NGOs to challenge EU acts on the basis of the amended EU Aarhus Regulation.[53] This Regulation slightly alleviates the earlier mentioned strict *locus standi* requirement for natural and legal persons in relation to Article 263 TFEU. In addition, eventual accession of the EU to the ECHR might also impact the CJEU's strict interpretation of individual concern, especially when the ECtHR concludes that the requirement breaches Article 6 and/or 13 ECHR.[54] Aside from direct access to the CJEU as a party, another more indirect route as an intervening party is also far from easy to take.[55] Likewise, a slightly different problem relates to the CJEU's approach towards direct effect of provisions of international (environmental) agreements such as Article 9(3) of the Aarhus Convention.[56]

In view of the foregoing, there are several reasons why it is not remarkable that the CJEU barely relies on the Charter to provide (a higher level of) protection against environmental harm and pollution. Nonetheless, this situation is not set in stone and could (and should) change as the next section will show.

[48]L Krämer, 'Climate Change, Human Rights and Access to Justice' 16 (2019) Journal for European Environmental & Planning Law 21; G Winter, '*Armando Carvalho and others v. EU:* Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' 9 (2020) Transnational Environmental Law 1, 137; J Darpö, 'Pulling the Trigger. ENGO Standing Rights and the Enforcement of Environmental Obligations in EU Law' in S Bogojević and R Rayfuse (ed), *Environmental Rights in Europe and Beyond* (Hart 2018) 253–81.

[49]Case T-330/18, *Carvalho and Others v Parliament and Council*, ECLI:EU:T:2019:324; Case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2021:25; see earlier Case C-321/95 P, *Greenpeace v Commission*, ECLI:EU:C:1998:153.

[50]Case 25/62, *Plaumann* v *Commission*, ECLI:EU:C:1963:17.

[51]Case C-565/19 P, *Carvalho and Others v Parliament and Council*, ECLI:EU:C:2021:252, para 46.

[52]*Ibid.*, para 48.

[53]Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

[54]The Court of First Instance came to 'the inevitable conclusion' that the action for annulment 'can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.' T-177/01, *Jégo-Quéré v Commission* (2002) EU:T:2002:112; AG Jacobs in C-50/00 P, *Unión de Pequeños Agricultores v Council*, EU:C:2002:197; P Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' 36 (2013) Fordham International Law Journal 1130–1.

[55]J Krommendijk and K van der Pas, 'To intervene or not to intervene. Intervention before the court of justice of the european union in environmental and migration law' 26 (8) (2022) The International Journal of Human Rights, 1394–417.

[56]Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5, para 53.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

3. Tapping the untapped Charter potential?

The previous section showed the current absence of (the Charter of) fundamental rights in the environmental case law of the CJEU. This warrants the question *whether and how* rights should and could play a bigger role in the future. We start this section with a short discussion of the most important criticisms and limitations of human rights-based approaches to environmental protection, but eventually conclude that a rights-based approach before the CJEU is warranted, also from a legal perspective (Section 3A). The rest of this section discusses two avenues that might be pursued by the CJEU in the future in relation to substantive environmental 'sword' rights: positive obligations (Section 3B) and a more frequent and intense use of Article 37 of the Charter in interpreting primary and secondary EU law in an environmentally friendly way (Section 3C).

A. Is there a need for a rights turn?

It goes beyond the scope of this legal doctrinal article to address in-depth the more normative question if a stronger and explicit role of the Charter in environmental and climate litigation and adjudication is beneficial. There is a vast body of literature within (EU) environmental and human rights law that has critiqued the narrow and at times limiting focus of a human rights-based approach to environmental protection.[57] On the international level the turn to human rights is often only a second-best option for claimants, as there is no international judicial forum for environmental cases and as the 2015 Paris Agreement lacks enforcement and accountability mechanisms for individual claimants.[58] Environmental litigation before human rights courts still needs its own justification and legitimation, given the existence of open and broad human rights norms that fail to grant specific rights to individuals with regard to the environment.[59] Some scholars doubt human rights are apt or suitable for environmental and climate change litigation.[60] The legitimacy of a human rights approach has also been disputed because of the existence of open and broad human rights norms that fail to explicitly refer to the environment.[61] The limitations of the ECHR and the ECtHR have been documented extensively.[62]

It is important to shortly address the most important criticism or limitation of human rights, namely their anthropocentric nature. This makes human rights 'ill-suited' to protect the

[57]Some have also questioned at a deeper, more fundamental level human rights' 'intimacy with capitalism'. A Grear, 'Towards "Climate Justice"? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy' 5 (2014) Journal of Human Rights and the Environment 2, 103, 109; AD Fisher and M Lundberg, 'Human Rights' Legitimacy in the Face of the Global Ecological Crisis – Indigenous Peoples, Ecological Rights Claims and the Inter-American Human Rights System' 6 (2015) Journal of Human Rights and the Environment 2, 177; C Voigt and E Grant, 'Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes' 6 (2015) Journal of Human Rights and the Environment 2, 131.

[58]A Savaresi, 'Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation' 77 (2021) Questions of International Law, Zoom-in 1–3.

[59]B Peters, 'The European Court of Human Rights and the Environment' in S Mead, B Samson and E Sobenes (eds), *International Courts and Tribunals and the Protection of the Environment* (Asser Press 2022) 189–218.

[60]AE Boyle, 'Human Rights and the Environment: Where Next?' 23 (3) (2012) European Journal of International Law 613; C Voigt (ed.), *International Judicial Practice on the Environment. Questions of Legitimacy* (CUP 2019); MC Petersmann, 'Circumventing Sovereignty: Rethinking Climate Change from a Relational, Embodied and Unbounded Perspective' (2019) ESIL Conference Paper (unpublished); CV Giabardo, 'Climate Change Litigation, State Responsibility and the Role of Courts in the Global Regime: Towards a "Judicial Governance" of Climate Change?' in B Pozzo and V Jacometti (eds), *Environmental Loss and Damage in a Comparative Law Perspective* (Intersentia 2021) 393–406.

[61]I Leijten, 'Human Rights v. Insufficient Climate Action: The *Urgenda* Case' 37 (2019) Netherlands Quarterly of Human Rights 2, 112, 117; KF Kuh, 'The Legitimacy of Judicial Climate Engagement' 46 (2019) Ecology Law Quarterly 731.

[62]For a discussion of six limitations of the EC(t)HR, see Krommendijk, 'Beyond Urgenda'; Peters, 'The European Court of Human Rights and the Environment'; Pedersen, 'European Court of Human Rights'; N Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in HT Anker and BE Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia 2018) 99.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

environment as such.[63] Human rights only offer indirect protection of the environment, only *vis-à-vis* the rights of human beings.[64] Environmental degradation or a loss of biodiversity is, as such, not problematic from a human rights perspective as long as the rights of human beings remain unaffected.[65] This has led international human rights courts to discredit individual claims of alleged victims not personally and directly affected or not living in the 'zones of high environmental risk'.[66] A corresponding concern is that human rights have to date been ill-suited for *future* or potential risks, because of the requirements of 'serious, specific and imminent' or 'real and immediate' risks and dangers.[67] Another related limitation is the individual nature of human rights whereas environmental law is aimed at the collective well-being and public interest.[68] This line of criticism has led to a 'rights of nature' debate and movement, partly in response to the critique of human rights' anthropocentric nature and standing hurdles.[69] The anthropocentric and individual nature of human rights could imply that environmental interests that are not directly related to human concerns but to the well-being and flourishing of ecosystems – and which today tend to be advocated by way of a recognition of 'rights of nature' – might be better protected by way of an 'absence' of a rights turn.[70] A stringent interpretation and application of secondary EU environmental law, such as the Habitat Directive geared towards the protection of animal and plant species as such, might thus be sufficient (or arguably even more beneficial).

Human rights-based approaches to environmental protection could, nonetheless, have clear advantages in EU law, while also being logical from a more principled perspective. The latter is evident when one considers the foundational values of the EU as laid down in Article 2 TEU.[71] Respect for human rights is mentioned among the values common to EU Member States together with human dignity, freedom, democracy, equality and the rule of law, while the environment is not mentioned. Human Rights may contribute to more intense judicial scrutiny and promote the rule of law in the environmental area and hence lead to a higher level of environmental protection.[72] In Section 3C we will depict how Article 37 could lead to a more environmentally friendly interpretation of EU law when courts balance different rights and interests. Empirical research has also shown that the language of human rights is powerful and can be a useful trump card leading to (extra) publicity and public debate.[73]

[63]E Lambert, 'The Environment and Human Rights: Introductory Report to the High-Level Conference Environmental Protection and Human Rights (Report Prepared at the Request of the Steering Committee for Human Right 2020) 13–4; Boyle, 'Human Rights and the Environment', 628.

[64]*Atanasov v Bulgaria* App No 12853/03 (ECtHR, 2 December 2010) para 66.

[65]Lambert, 'The Environment and Human Rights', 13.

[66]*Kyrtatos v Greece* App No 41666/98 (ECtHR, 22 May 2003) para 52. *Cordella v Italy* App No 54414/13 and 54264/15 (ECtHR, 24 January 2019) para 102; S Behrman and A Kent, 'The Teitiota Case and the Limitation of the Human Rights Framework' 75 (2020) *QIL Zoom-in* 75, 25, 34–5.

[67]Eg *Fadayeva v Russia* App No 55723/00 (ECtHR, 9 June 2005) para 70; *Öneryildiz v Turkey* App No 48939/99 (ECtHR, 30 November 2004) paras 100–101; C Hilson, 'The Visibility of Environmental Rights', 1603.

[68]Voigt and Grant, 'Editorial', 134; C Schall, 'Public Interest Litigation Concerning Environmental Matters Before Human Rights Courts: A Promising Future Concept?' 20 (2008) Journal of Environmental Law 3, 417.

[69]RF Nash, *The Rights of Nature. A History of Environmental Ethics* (UWC Press 1989); DR Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (Ingram 2017); L Cano Pecharroman, 'Rights of Nature: Rivers that Can Stand in Court' 7 (2018) *Resources* 13.

[70]We thank one of the reviewers for advancing this argument.

[71]The CJEU held recently: 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.' C-156/21, *Hungary v EP and Council*, ECLI:EU:C:2022; 97, para 232.

[72]AE Boyle, 'Human Rights and the Environment', 2012 European Journal of International Law 613; Boyle, 'Climate Change', 765.

[73]J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' 10 (2019) WIREs Climate Change 3; E Grant, 'International Human Rights Courts and Environmental Human

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

A human-rights-based approach by the CJEU is also desirable from the perspective of consistency and a common understanding between the ECtHR and the CJEU.[74] The increasing litigation before the ECtHR seems to suggest that environmental and climate litigants actually look at the Strasbourg Court as a more viable forum for ruling on the relationship between environmental protection and human rights, also given the obstacles sketched in Section 2B.[75] This does, however, not absolve the CJEU from engaging with the Charter. Even prior to the EU's accession to the ECHR, ECHR rights constitute general principles of EU law on the basis of Article 6(3) TEU. In addition, Article 52(3) of the Charter determines that Charter rights corresponding to the ECHR shall have the same meaning and scope. This provision also stipulates that the ECHR only provides a minimum level of protection while the Charter has the potential to provide 'more extensive protection'. Current President of the CJEU Lenaerts stated in a public speech that the ECHR provides a 'minimum threshold for protection'.[76] It would thus be odd if the CJEU remains oblivious to a strong(er) rights turn in Strasbourg. This is even more so in relation to environmental protection under EU law where one would especially expect a higher level of protection. There is an abundance of secondary EU law in the environmental area as well as specific references in primary EU law to 'a high level of protection' as laid down in Article 191(2) TFEU and Article 3(3) TEU as well as Article 37 of the Charter.[77] In addition, EU law and the CJEU is also more concerned with the uniform application of EU law, while the ECtHR grants States a wide margin of appreciation in the complex factual and legal environmental context.[78] Two developments in particular could potentially raise the level of protection under the ECHR and, hence, compel a more solid human-rights-based approach of the CJEU. Firstly, the upcoming judgements in the pending climate cases.[79] Secondly, the recognition of a substantive and judicially enforceable right to a healthy environment in a new Additional Protocol to the ECHR that goes further than Article 37 of the Charter, discussed in Section C.[80]

In conclusion, this short sub-section showed that a human-rights-based approach to environmental protection is not always the best way to protect environmental interests. At the

Rights: Re-Imagining Adjudicative Paradigms' 6 (2015) Journal of Human Rights and the Environment 2, 156; D Gönenç, 'Conceptualizing Norm Fusion through Environmental Rights' 30 (2020) Environmental Politics 3, 442.

[74]J Callewaert, 'No More Common Understanding of Fundamental Rights' 22 (2022) *La revue des jurists de Sciences Po* 2; Former CJEU Judge Arestis held that the CJEU is 'very concerned with the consistency of its judgments' with the case-law ECtHR. George Arestis, 'Fundamental rights in the EU: three years after Lisbon, the Luxembourg perspective' College of Europe research papers 02/2013, 13.

[75]See especially the pending cases of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, first hearing on 29 March 2023; Carême v. France, no. 7189/21, first hearing on 29 March 2023; *Duarte Agostinho and Others v. Portugal and 32 Other States*, no. 39371/20; and *Greenpeace Nordic et al v Norway*, no. 34068/21.

[76]K Lenaerts, 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection' (Speech Given during the Solemn Hearing for the Opening of the Judicial Year 26 January 2018), <www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf> accessed 15 April 2022. The CJEU has explicitly held this in relation to Article 7 of the Charter. Case C-203/15, *Tele2 Sverige*, ECLI:EU:C:2016:970, para 129.

[77]Case C-341/95, *Gianni Bettati v Safety Hi-Tech Srl*, ECLI:EU:C:1998:353, paras 46–47.

[78]The national authorities are in the best position to weigh different conflicting considerations and set priorities on the basis of available resources. In *Hatton*, the ECtHR found the economic importance of night flights more important than the individuals' right to noise-free nights. *Hatton v the United Kingdom*, para 122; de Sadeleer, 'Enforcing EUCHR principles', 61; Lambert, 'The Environment and Human Rights', 13; see also *Fadayeva v Russia* App No 55723/00 (ECtHR, 9 June 2005) para 103; *Öneryildiz v Turkey* App No 48939/99 (ECtHR, 30 November 2004; M Fitzmaurice, 'Case Note. The European Court of Human Rights, Environmental Damage and the Applicability of Art 8 of the European Convention on Human Rights and Fundamental Freedoms' 13 (2010) Environmental Law Review 107, 109.

[79]See *supra* n 77.

[80]The ECHR currently lacks a self-standing provision on environmental protection. The Parliamentary Assembly of the Council of Europe (PACE) proposed a new protocol to the ECHR with a self-standing right to a healthy environment. https://pace.coe.int/en/news/8452/the-right-to-a-healthy-environment-pace-proposes-draft-of-a-new-protocol-to-the-european-convention-on-human-rights-> accessed 29 September 2021; See also UN General Assembly Resolution 76/300; Committee of Ministers Recommendation CM/Rec(2022)20; 'Reykyavík Declaration United Around Our Values', *Reykyavík Summit of the Council of Europe* 16–17 May 2023, pp. 6–7 and appendix V.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

same, a firmer human-rights-based approach by the CJEU could have particular advantages in the form of enhanced judicial scrutiny, while also being justified from a legal perspective, considering Article 2 TEU and Article 52(3) of the Charter.

B. The potential of positive obligations[81]

The previous section showed that the right to life (Article 2 of the Charter) and the right to respect for private life and the home (Article 7 of the Charter) have played a limited role in the case law of the CJEU to date. This is perhaps surprising because similar provisions in the Charter's equivalent, the ECHR, have figured more prominently in the environmental case law of the ECtHR. The 'rights turn' in Strasbourg predates more recent turns at the national level following *Urgenda*. The greening of existing ECHR rights already started in the 1990s with *Lopez-Ostra* and might be further developed in the climate cases that are currently pending before the Grand Chamber of the ECtHR.[82] This includes the right to life (Article 2 ECHR), the right to respect for private life and the home (Article 8 ECHR) and the right to property (Article 1 of Protocol 1 to the ECHR). The ECtHR derived positive obligations from Articles 2 and 8 of the ECHR and Article 1 of Protocol 1. In the light of Article 52(3) of the Charter the question arises as to whether the same or similar positive obligations flow from Articles 2, 7 and 17 of the Charter. This section addresses this question and focuses especially on the substantive positive obligations developed by the ECtHR. It shows the potential added value of such positive obligations in relation to environmental noise as a concrete example.

According to the ECtHR's case law several kinds of positive obligations that are relevant to environmental law flow from Articles 2 and 8 ECHR and Article 1 of Protocol 1. An important one is the positive obligation to put in place environmental regulations that protect the interests protected by those provisions from environmental risks.[83] In *Öneryildiz v Turkey*, a case about the operation of a rubbish tip that exploded due to the build-up of methane, the ECtHR held that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 ECHR entailed above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.[84] In *Tătar v Romania*, a case about environmental pollution by sodium cyanide and heavy metals as a result of the exploitation of a gold mine, the ECtHR also held that the positive obligations under Article 8 ECHR entailed a duty on the State to set up a legislative and administrative framework to effectively prevent damage to the environment and human health.[85] The ECtHR held that this obligation indisputably applied in the particular context of dangerous activities. According to the ECtHR special emphasis had to be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. It also held that those regulations had to govern the licensing, setting up, operation, security and supervision of the activity.[86] The authorities may also be under a positive obligation to enforce those environmental regulations, as those regulations serve little purpose if they are not duly

[81]This section is based in part on DGJ Sanderink and AGA Nijmeijer, 'De invloed van het EU-Handvest van de Grondrechten op het omgevingsrecht' in JH Gerards, HCFJA de Waele and KM Zwaan (eds), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven* (Wolters Kluwer 2015), 463–282.

[82]*Lopez-Ostra v Spain* App No 16798/90 (ECtHR, 9 December 1994). See *supra* n 77.

[83]See about this positive obligation Sanderink, *Het EVRM en het materiële omgevingsrecht, chapter 3*; KF Braig and S Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a *Hilfssheriff* in Combating Climate Change' 35 (2020) Journal of Environmental Law and Litigation 35, 261.

[84]*Öneryildiz v Turkey* App No 48939/99 (ECtHR, 30 November 2004) para 89.

[85]*Tătar v Romania* App No 67021/01 (ECtHR, 27 January 2009), para 88.

[86]*Öneryildiz v Turkey* App No 48939/99 (ECtHR, 30 November 2004) para 90; *Tătar v Romania* App No 67021/01 (ECtHR, 27 January 2009), para 88.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

enforced.[87] Another example of a positive obligation relevant to environmental law is the obligation of the authorities under Article 8 ECHR to conduct appropriate investigations and studies before taking decisions about complex issues of environmental and economic policy. This ensures that the effects of activities on the environment and possible infringements of individuals' rights may be predicted and evaluated in advance so that a fair balance may accordingly be struck between the various conflicting interests at stake.[88] A last example is the positive obligation of the authorities to provide (access to) environmental information to members of the public.[89]

More than 12 years after the Charter entered into force, the doctrine of positive obligations under the Charter is still in its infancy.[90] To the knowledge of the authors, 2020 was the first year in which the CJEU ruled explicitly that positive obligations may arise from the Charter in a non-environmental case: *La Quadrature du Net*.[91] This case dealt with national legislation that required providers of electronic communications services to retain particular data about communications. The aims pursued by this legislation were, among other things, the investigation, detection and prosecution of criminal offences and the safeguarding of national security and public security. The question arose whether that legislation could be justified by a positive obligation under the Charter to protect people against criminal acts. The CJEU held that positive obligations of the public authorities may result from Article 7 of the Charter, requiring them to adopt legal measures to protect an individual's private and family life, home and communications. It also held that such obligations may arise from Articles 3 and 4 of the Charter, as regards the protection of an individual's physical and mental integrity and the prohibition of torture and inhuman and degrading treatment. In this connection the CJEU also referred to the ECtHR's case law about the positive obligations flowing from Articles 3 and 8 ECHR.[92]As far as we know, there is no case law of the CJEU which recognises a positive obligation under the Charter to put in place environmental regulations that protect the interests protected by the Charter from environmental risks.[93] The same goes for a positive obligation to take practical measures that protect those interests from environmental risks. It is however worth mentioning that AG Kokott considered in *Craeynest* that Directive 2008/50/EC on ambient air quality put in concrete terms the Union's obligations to protect the fundamental right to life under Article 2(1) of the Charter and the high level of environmental protection required under Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU. She based this on the assumption that exceedance of the limit values of that Directive leads to a large number of premature deaths.[94] Therefore, in her opinion (which we share) Article 2(1) of the Charter contains a positive obligation for the Union to adopt environmental regulations that protect the right to life against environmental risks like air pollution.

[87]Eg *Moreno Gómez v Spain* App No 4143/02 (ECtHR, 16 November 2004), para 61–2; *Bor v Hungary* App No 50474/08 (ECtHR, 18 June 2013), para 25–8.

[88]Eg *Taşkin and Others v Turkey* App No 46117/99 (ECtHR, 10 November 2004), para 119; *Hardy and Maile v UK* App No 31965/07 (ECtHR, 14 February 2012), para 220.

[89]Eg *Guerra and Others v Italy* App No 14967/89 (ECtHR, 19 February 1998), para 60; *Hardy and Maile v UK*, paras 245–6.

[90]See about the scope for the development of positive obligations under the Charter M Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017).

[91]Case C-511/18, *La Quadrature du Net and Others*, ECLI:EU:C:2020:791.

[92]Case C-511/18, *La Quadrature du Net and Others*, ECLI:EU:C:2020:791, paras 126–128 and 145.

[93]As we observed in section 2.A, Austria relied on Article 7 CFR to justify its interference with the free movement of goods flowing from the prohibition for lorries of over 7.5 tonnes to use a section of the A12 motorway in the Inn valley. Austria claimed that Article 7 CFR and Article 8 ECHR obliged the authorities to protect citizens against harm to health and the quality of life as a result of air pollution. Therefore, Austria argued that it adopted that prohibition to fulfil a positive obligation under, among other things, Article 7 CFR. However, the CJEU did not say anything about positive obligations, but accepted that the protection of the environment was a legitimate objective that could justify a restriction of the freedom of movement, provided that it was proportionate.

[94]Case C-723/17, *Craeynest and Others*, ECLI:EU:C:2019:168, Opinion of AG Kokott, para 53.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

It can be argued, in view of *La Quadrature du Net and Others* and Article 52(3) of the Charter, that the CJEU can derive positive obligations from Articles 2, 7 and 17 of the Charter. After all, pursuant to Article 52(3) of the Charter the meaning and scope of those rights protected by the Charter are (at least) the same as the meaning and scope of the rights protected by Articles 2 and 8 ECHR and Article 1 of Protocol 1.[95] Nevertheless, this is not beyond doubt. This can be illustrated with the positive obligation to put in place environmental regulations that limit noise exposure, for example, around airports, roads, industrial estates and bars. If Article 7 of the Charter contains the positive obligation to limit noise exposure, the question arises as to whether this positive obligation rests on the Union or the Member States.[96] The Union has the power to adopt regulations, directives and decisions for the protection of, among other things, the environment and human health pursuant to Articles 191 and 192 TFEU. If the Union fulfils this positive obligation to limit noise exposure, this results in the Union legislating in a policy area in which it has not legislated (to the same extent) before. After all, to date setting noise exposure limits has been a matter almost exclusively for the Member States.[97] That means that the powers of the Member States to legislate in this policy area as they see fit are limited considerably, although (pursuant to Article 193 TFEU) they retain the power to maintain or introduce more stringent protective measures. Positive obligations under the Charter are therefore capable of expanding Union law and limiting the autonomy of the Member States.[98]

The question arises as to whether this is compatible with the principle laid down in Article 51(2) of the Charter and Article 6(1) TEU. According to this principle the Charter does not extend the field of application of Union law beyond the powers of the Union, does not establish any new power or task for the Union and does not modify the powers and tasks as defined in the Treaties. At first sight, positive obligations under the Charter seem incompatible with this principle of attributed powers, as they are capable of expanding Union law and limiting the autonomy of the Member States. It follows from the official explanations relating to Article 51(2) of the Charter that this provision as well as Article 6(1) TEU are intended to confirm that the Charter cannot extend '*the competences and tasks which the Treaties confer on the Union*'.[99] In our opinion it is therefore clear that there can be no positive obligations under the Charter for the Union relating to policy areas with regard to which the Union does not have any powers or tasks pursuant to the Treaties. However, we are also of the opinion that Article 51(2) of the Charter and Article 6(1) TEU do not preclude positive obligations under the Charter for the Union relating to policy areas, if and in as far as the Union already has powers under the Treaties to legislate or perform other acts with regard to those areas. It is true that by legislating with regard to those subjects the Union expands (secondary) Union law, but by doing so the Union does not extend the competences which the Treaties confer on the Union. This opinion also seems to respect Article 52(3) of the Charter in the best way. As the rights guaranteed by the ECHR contain positive obligations, it would not sit well with Article 52(3) of the Charter, if the Charter did not contain similar positive obligations.

The question arises as to whether the principle of subsidiarity in Article 5(3) TEU (to which the official explanations relating to Article 51(2) of the Charter refer in rather vague terms) could

[95]See Case C-120/10, *European Air Transport*, ECLI:EU:C:2011:94, Opinion of AG Cruz Villalón, para 77–81.

[96]This example is based on the ECtHR's case law about positive obligations under Article 8 ECHR to protect people against noise pollution. Eg *Hatton v the United Kingdom*; *Moreno Gómez v Spain*; *Bor v Hungary*.

[97]It is true that Directive 2002/49/EC is about the assessment and management of environmental noise, but it does not lay down any limit values for different types of noise and activities. It is for the Member States to set such limit values. The same goes for Regulation (EU) 598/2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach.

[98]See more about the risk of 'competence creep' of the Union as a result of the general principles of Union law from which positive obligations may flow as well. S Prechal, 'Competence Creep and General Principles of Law' 3 (1) (2010) *Review of European Administrative Law* 5–22.

[99]See Official Journal of the European Union 2007, C 303/17.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

preclude positive obligations under the Charter. This question is especially relevant for policy areas in which the EU and the Member States have a shared competence within the meaning of Article 2(2) and Article 4 of the TFEU, such as the protection of the environment. In our opinion it is unlikely that the Charter itself imposes positive obligations on the Member States, if the Union has not yet adopted any regulations, directives or decisions in a particular area. After all, pursuant to Article 51(1) of the Charter the Charter is only binding on the Member States when they act within the scope of Union law.[100] It follows from the *Siragusa* judgement that the Member States do not act within the scope of Union law, merely because the Union has the power to adopt legislation with regard to a particular policy area.[101] Generally, the Member States will therefore only act in the scope of Union law, if the Union has in fact adopted specific regulations, directives and/or decisions relating to that subject.[102] For that reason, we are of the opinion that the principle of subsidiarity as laid down in Article 5(3) of the TEU cannot generally preclude the Charter from imposing positive obligations on the Union relating to policy areas with regard to which the Union and the Member States have shared competence. The Charter cannot generally impose similar positive obligations on the Member States that the Member States could fulfil in accordance with the principle of subsidiarity. Moreover, it is difficult for Member States to achieve a sufficient level of environmental protection at a national, regional or local level, because environmental problems are often cross-border problems and are therefore usually better dealt with at Union level. In our opinion, the Charter can therefore impose positive obligations on the Union to put in place environmental regulations that protect the interests protected by the Charter from environmental risks.

One remaining question concerns the added value of positive obligations. Several positive obligations established by the ECtHR in environmental cases are already part of EU environmental law. This includes, for example, the obligation to carry out an environmental impact assessment in certain situations and the right to access to environmental information.[103] This, however, does not prevent the CJEU from establishing more far-reaching positive obligations beyond the Strasbourg level, because 52(3) of the Charter allows for more extensive protection. Positive obligations under the Charter in the field of environmental law also have added value in policy areas in which the EU has not yet legislated or has so far only legislated in a limited way. In this connection this section discussed a potential role of substantive positive obligations that bear 'potential' to better limit environmental noise exposure. One could also think of reliance on such substantive positive obligations to extend the obligations in relation to industrial emissions beyond large industrial installations, for example.[104] Those positive obligations could also have added value in that they prevent the EU legislator from reversing the protection that is currently offered by EU secondary law.

[100]Eg in 2013 the CJEU concluded in *Åkerberg Fransson* that the Charter is applicable in 'all situations governed by European Union law' *and* 'where national legislation falls within the scope of European Union law'. Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras 17–21.

[101]See *Siragusa*.

[102]See also national legislation that obstructs the exercise of one or more fundamental freedoms guaranteed by the TFEU comes within the scope of Union law. Eg Case C-390/12, *Pfleger and Others*, ECLI:EU:C:2014:281, paras 35–36. M Beijer, 'The Limited Scope for Accepting Positive Obligations Under EU Law: The Case of Humanitarian Visas for Refugees' 11 (2018) *Review of European Administrative Law* 37–48.

[103]See, for example, Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

[104]Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

C. The interpretative potential of Article 37 of the Charter

Table 1 showed that Article 37 of the Charter has received relatively frequent attention by the CJEU and especially AGs in comparison with other substantive 'sword' rights such as Articles 2 and 7 of the Charter. This section examines the potential role of Article 37 of the Charter in a future rights turn in the environmental case law of the CJEU. It does so after analysing how this provision has been used by the CJEU to date.

Article 37 of the Charter determines: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' The inclusion of this principle in the Charter is noteworthy, because the ECHR, for example, does not contain a self-standing provision on the environment. It should, however, be noted that Article 37 is not a 'right' but a 'principle' that is, according to Article 51(5) of the Charter, 'judicially cognisable only in the interpretation of . . . acts and in the ruling on their legality'.[105] What is more, Article 37 is based on existing primary EU law provisions: Article 3(3) TEU and Articles 11 and 191 TFEU. One could thus argue that Article 37 of the Charter adds very little given the abundant recognition of the importance of environmental protection in EU primary law.[106] At first sight, one would thus not immediately expect a considerable role of this Charter provision in the case law of the CJEU.[107] The case law until mid-2019 confirmed these expectations in the literature. Nonetheless, there has been a slight change since then. In three judgements, the Court of Justice engaged with Article 37 explicitly.[108] As will be discussed below, the role of Article 37 has also changed and become more important with a shift from a short reference to a more elaborate engagement whereby Article 37 of the Charter is used as an interpretative tool. Before discussing the (still) small number of CJEU judgements examining Article 37 of the Charter, this section will firstly examine AG Opinions that have spearheaded the slowly growing attention to Article 37 of the Charter.[109]

AGs were quick in pointing to Article 37 in their opinions. They have referred to the entry into force of the Charter with the Treaty of Lisbon and Article 37 of the Charter as an 'important development' and a reflection of the 'constitutional recognition' of environmental protection.[110] Most of the older AG Opinions concern short and passing references to Article 37 of the Charter

[105]For an extensive discussion of the role of principles in the sense of Article 51(5) CFR see J Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' 11 (2) (2015) European Constitutional Law Review 321–56; NM de Sadeleer, 'Principle of Subsidiarity and the EU Environmental Policy' 9 (2012) Journal of European Environmental and Planning Law 63, 73–4; J Verschuuren and W Scholtz, 'Contribution of the case law of the European Court of Human Rights to Sustainable Development in Europe' in W Scholtz and J Verschuuren (eds), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Elgar 2015) 363–85, 364.

[106]E Scotford, 'Environmental Rights and Principles in the EU Context: Investigating Article 37 of the Charter of Fundamental Rights' in S Bogojevic and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart 2018) 133–54.

[107]See Marin-Duran and Morgera, 'Article 37', para 37.51; K Hectors, 'The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as a Human Rights' 17 (2008) European Energy and Environmental Law Review 3, 165, 167–8; M Lombardo, 'The Charter of Fundamental Rights and the Environmental Policy Integration Principle' in G di Federico (ed), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument* (Springer 2011) 221.

[108]Case C-900/19, *One Voice and Ligue pour la protection des oiseaux*, ECLI:EU:C:2021:211; Case C-24/19, *A. and others (Wind turbines at Aalter and Nevele)*, ECLI:EU:C:2020:503. Case C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others*, ECLI:EU:C:2019:824. Surprisingly, in the two most recent CJEU engagements with Article 37 CFR, the Opinion of the AG was silent about this provision.

[109]Scotford, 'Environmental rights'.

[110]Respectively in Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:760, Opinion of AG Sharpston, para 68; Case C-120/10, *European Air Transport*, Opinion of AG Cruz Villalón, para 78; See Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, ECLI:EU:C:2014:2324, Opinion of AG Jääskinen, para 6; older references include Case C-277/02, *EU-Wood-Trading GmbH*, ECLI:EU:C:2004:547, Opinion of AG Léger, para 9; Case C-87/02, *Commission v Italy*, ECLI:EU:C:2004:13, Opinion of AG Colomer, para 36.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

that seem to add very little in substantive terms. It is perhaps not surprising that the CJEU consequently did not engage with the Charter the years following the entry into force of the Charter in December 2009.[111] AGs have in recent years used Article 37 of the Charter in a more elaborate and substantive way as 'an interpretative tool of secondary law' in line with suggestions for such a use in the legal doctrine.[112] AG Sharpston emphasised in *Commission v Malta* that the entry into force of Article 37 and 3(3) TFEU as 'guiding objective[s] of EU law' has implications for judicial review and thus the pre-Lisbon case law.[113] She referred to Article 37 of the Charter as 'an interpretative tool of secondary law' even though it is not clear what exact weight Article 37 of the Charter had in her analysis.[114] She subsequently found that the Maltese permission under the Bird Directive for the selective capture, keeping or other judicious use of certain birds in small numbers breached EU law. The CJEU also found a violation, albeit without reference to Article 37 of the Charter. AG Sharpston also invoked Article 37 of the Charter in *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*. She held: 'Such an interpretation of the notion of 'criteria, if any' would indeed have perverse consequences. A procedural system that virtually excluded the right of any environmental organisation to challenge administrative acts adopted on the basis of national provisions implementing the Water Framework Directive would be liable to seriously undermine the *effet utile* of the prohibition set out in Article 4 and, more generally, gravely jeopardise attaining the objective of a high level of environmental protection enshrined in Article 37 of the Charter.'[115] The CJEU noted the Opinion of AG Sharpston approvingly, albeit not so much in relation to Article 37 but primarily in relation to Article 9(3) of the Aarhus Convention.[116] In the *European Air Transport* case about airport noise, AG Cruz Villalon used Article 37 of the Charter in conjunction with Article 7 of the Charter and the case law of the ECtHR to 'provide further support' for the conclusion that Directive 2002/30 on noise-related operating restrictions at airports does not bring about maximum harmonisation: 'That would give rise to a kind of paralysis of State action against noise pollution, depriving States of any latitude in the exercise of their environmental, planning and health policies.'[117] The CJEU arrived at the same conclusion as the AG without recourse to the Charter and ruled that the Directive does not preclude Member States from adopting limits on maximum noise levels indirectly affecting civil aviation.[118]

After having discussed the developments as to the usage of Article 37 of the Charter in AG Opinions, we will next examine how the CJEU has referred to this provision. There are three modalities of engagement with Article 37 of the Charter that will be discussed: passing references, usage as an interpretative tool and justification of interferences with the four freedoms or other fundamental rights. As will be made clear, the CJEU has -just like AGs- recently started to use Article 37 of the Charter more explicitly as an interpretative tool.

First, the passing references. A few (older) judgements citing Article 37 of the Charter do not really engage with this provision substantively but rely on Article 191 TFEU instead. *Associazione*

[111]Case C-290/15, *D'Oultremont*, ECLI:EU:C:2016:561, Opinion of AG Kokott, para 71; Case C-106/14, *FCD and FMB*, ECLI:EU:C:2015:93, Opinion of AG Kokott, para 81.

[112]Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:760, Opinion of AG Sharpston, para 68; Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, ECLI:EU:C:2014:2324, Opinion of AG Jääskinen, para 6; c.f. Scotford, 'Environmental Rights'.

[113]Case C-557/15, *Commission* v *Malta*, ECLI:EU:C:2017:613, Opinion of AG Sharpston, paras 44 and 94.

[114]*Ibid*., para 44.

[115]Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:760, Opinion of AG Sharpston, para 76.

[116]Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:987, para 46.

[117]Case C-120/10, *European Air Transport*, ECLI:EU:C:2011:94, Opinion of AG Cruz Villalón, paras 3 and 81.

[118]Case C-120/10, *European Air Transport*, ECLI:EU:C:2011:556.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

Italia Nostra Onlus, dealing with strategic environmental assessments, is an illustration of a passing reference to Article 37 of the Charter.[119]

Second, in three more recent cases the CJEU relied on Article 37 of the Charter as an interpretative tool in line with the aforementioned recent approach of AGs. In *One Voice and Ligue pour la protection des oiseaux*, the CJEU used Article 37 of the Charter (and Article 191 TFEU) as a relevant 'contextual' provision to interpret the Birds Directive to arrive at an interpretation that is most beneficial from an animal welfare perspective, namely limited by-catches that occur only accidentally and briefly whereby the birds can be released without serious damage.[120] In the Case of *A. and others (Wind turbines at Aalter and Nevele),* the CJEU also cross-checked its interpretation of Directive 2001/42 so as to require an SEA for modifications of 'plans and programmes' that have significant environmental effects: 'Those foregoing considerations are consistent with the purpose and objectives of Directive 2001/42, which itself comes within the framework established by Article 37 of the Charter of Fundamental Rights of the European Union, according to which a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the European Union and ensured in accordance with the principle of sustainable development.'[121] The CJEU thus heeded the suggestion of the referring Belgian court in its order for reference that the scope of the directive may not be interpreted restrictively in the light of Article 37 of the Charter.[122] The third case, *Wasserleitungsverband Nördliches Burgenland,* dealt with the ability of natural or legal persons to rely on the EU Nitrates Directive before national courts in relation to interferences with groundwater quality. An Austrian administrative court dismissed the application of a water supplier, an individual and a municipality requesting measures to ensure that the groundwater contained less than 50 mg/l of nitrates for lack of subjective public-law rights and direct concern. The CJEU confirmed that the clear, precise and unconditional obligations in the EU Nitrates Directive could indeed be relied on *vis-à-vis* the competent national authorities. For that purpose, it looked at the wording, the context and the objectives and pointed to Article 37 of the Charter (as well as Article 191 TFEU and Article 3(3) TEU).[123]

Third, Article 37 of the Charter is sometimes used by the CJEU to highlight the importance of environmental protection as a justification for an interference with the four freedoms or other fundamental rights. The General Court pointed to Article 37 of the Charter in four cases about the emission allowance trading scheme.[124] The operators of installations challenged decisions of the Commission rejecting supplementary quotas for greenhouse gas emission allowances. They relied on conflicting fundamental rights including the right to property and the freedom to conduct a business and argued that the disproportionate infringements were not justified by an objective of general interest.[125] The General Court made a reference ('without any fanfare'[126]) to the objective of environmental protection as provided in Article 37 of the Charter and subsequently examined whether a fair balance had been struck and eventually rejected the arguments. The CJEU went a bit

[119]C.f. Marin-Duran and Morgera, 'Article 37', para 37.53. Case C-444/15, *Associazione Italia Nostra Onlus,* ECLI:EU:C:2016:978, para 25. Another short reference was made in Case C-128/17, *Poland v Parliament and Council*, ECLI:EU:C:2019:194, para 127–131.

[120]Case C-900/19, *One Voice and Ligue pour la protection des oiseaux*, ECLI:EU:C:2021:211, paras 60 and 65.

[121]Case C-24/19, *A. and others (Wind turbines at Aalter and Nevele)*, ECLI:EU:C:2020:503, para 44.

[122]Raad voor Vergunningsbetwistingen (Belgium), 4 December 2018, <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=219865&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1064150> accessed 15 April 2022, para 23.

[123]Case C-197/18, *Proceedings brought by Wasserleitungsverband Nördliches Burgenland and Others*, ECLI:EU:C:2019:824, para 49.

[124]Case T-614/13, *Romonta v Commission*, ECLI:EU:T:2014:835; Case T-630/13, *DK Recycling und Roheisen v Commission*, ECLI:EU:T:2014:833; Case T-631/13, *Raffinerie Heide v Commission*, ECLI:EU:T:2014:830; Case T-634/13, *Arctic Paper Mochenwangen v Commission*, ECLI:EU:T:2014:828.

[125]Case T-614/13, *Romonta v Commission*, ECLI:EU:T:2014:835, para 76.

[126]Scotford, 'Environmental Rights'.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

further in the infringement procedure against Austria for the breach of the free movement of goods by prohibiting lorries of over 7.5 tonnes from using a section of the A12 motorway in the Inn Valley. Austria used the protection of health and the environment as a public-interest ground to justify this restriction. The CJEU underlined the 'essential', 'transversal and fundamental' nature of this objective with reference to Article 37 of the Charter.[127]

In sum, the previous analysis shows that Article 37 has – to date – hardly served as a freestanding right or a standard for legal review, but primarily as an interpretative tool.[128] This latter role has slightly grown in recent years, even though this role still seems limited. It remains to be seen whether the CJEU follows this path in future cases. Because of the reference to Article 37 of the Charter in the European Climate Law, Article 37 of the Charter has the potential to support the greening of the environmental case law of the CJEU and other rights in the Charter.[129] Even though Article 37 of the Charter is formulated as a principle, it can – in combination with Articles 2 and 7 of the Charter and/or other environmental principles of EU law, such as the precautionary principle – pave the way for greater weight being attached to the environment when a fair balance needs to be struck.[130] It could also lead to a more intensive judicial review of national and EU measures.[131] It can thus help courts in deciding difficult cases with conflicting rights and interests whereby the obligation to provide a high level of environmental protection takes 'pre-eminence over other considerations'.[132] This potential role fits with the second and third modality discussed before. The CJEU could – in theory – even go further and use Article 37 of the Charter as more than merely an interpretative tool even on the basis of Article 52(5) of the Charter. It has been argued in the literature, on the basis of the rather limited case law of the CJEU, that the doctrine of *justiciabilité mediate* ('limited justiciability') allows for Charter principles to have *invocabilité d'exclusion* (an 'exclusionary effect'). This means that these principles can exclude the application of conflicting national or EU norms.[133] Article 37 of the Charter might also have reflexive effect beyond the scope of application of EU law. The Irish High Court, for example, considered Article 37 to be 'binding in contexts where the State is implementing EU law, but, even outside that sphere, can be considered as reflective of a basic democratic commitment to proper stewardship of the natural and built environment.'[134]

4. Conclusions

This article showed that the Charter has only played a limited role in the environmental case law of the CJEU so far. This goes especially for the substantive 'sword' rights such as Article 2 (right to life) and Article 7 (respect for private life and the home). This conclusion applies to a lesser extent to anti-environmental 'shield' rights such as Article 17 (right to property) and Article 16 (freedom

[127]Case C-28/09, *Commission v Austria,* ECLI:EU:C:2011:854, paras 120–1; Cf Case C-416/10, *Križan*, ECLI:EU:C:2012:218, Opinion of AG Kokott, para 185.

[128]C.f. Scotford, 'Environmental Rights'.

[129]Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), recital 6; C.f. Marin-Duran and Morgera, 'Article 37', para 37.52.

[130]C.f. Peeters and Eliantonio, *Research Handbook on EU Environmental Law*, 494; S Kingston, V Heyvart and A Cavoski, *European Environmental Law* (CUP 2017) 168.

[131]C.f. Taddei, 'Case C-723/17 *Craeynest*', 158; The CJEU generally conducts a limited review affording the authorities or legislator a wide margin of discretion. S Rötther-Wirtz, 'Case C-616/17 *Blaise and Others*: The Precautionary Principle and Its Role in Judicial Review – Glyphosate and the Regulatory Framework for Pesticides' 27 (2020) Maastricht Journal of European and Comparative Law 4, 529; R Löfstedt, 'The Precautionary Principle in the EU: Why a Formal Review Is Long Overdue' 16 (2014) Risk Management 137.

[132]Joined Cases C-204/12 to C-208/12, *Essent Belgium NV*, Opinion of AG Bot, para 96.

[133]C.f. Joined Cases C-229/11 and C-230/11, *Heimann*, ECLI:EU:C:2012:693, paras 22 and 23; K Lenaerts, 'Exploring the Limits', 399–401; Krommendijk, 'Principled Silence'.

[134]*O'Mahony Developments* (2015) IEHC 757 (27 November 2015), para 1.

https://doi.org/10.1017/elo.2023.30 Published online by Cambridge University Press

to conduct a business). The near absence of the role of substantive 'sword' rights in the environmental case law can be attributed to the fact that the invocation of the Charter is often not necessary, because EU secondary law contains many specific environmental obligations and rights. In addition, national courts and litigating parties often forego reliance on the Charter and instead rely on the ECHR because of the more developed case law of the ECtHR in the environmental law field. The CJEU is consequently not encouraged or forced to separately engage with the Charter. The CJEU has also recently precluded a rights turn by declaring the 'People's Climate Case' *Carvalho* inadmissible due to lack of standing. It also closed off the possibility of state liability in *JP* in relation to breaches of air quality directives by denying that these directives are intended to confer rights upon individuals.

We, nonetheless, consider that a rights turn in environmental cases before the CJEU is warranted and possible, even though human rights are not the best way to protect environmental interests in all circumstances. Article 52(3) of the Charter (and the future accession of the EU to the ECHR) require the CJEU to adopt at least the same level of protection as the ECHR and as we argued before an even higher level. The upcoming climate cases in Strasbourg in particular, as well as a possible separate right to a healthy environment, might spur the CJEU to a (more explicit) rights turn. We anticipate two possible avenues for the CJEU. We argued that the CJEU can derive positive obligations from relevant Charter provisions, including Articles 2 and 7 of the Charter, following the abundant case law of the ECtHR and Article 52(3) of the Charter. Another potential option is a greater role of Article 37 of the Charter. The CJEU has already relied on this provision as an interpretative tool in several recent cases. Despite the provision's open-textured and broad formulation as a Charter principle, it can be used by the CJEU to attach more weight to environmental protection when balancing interests protected by EU secondary law against other rights or freedoms.

Competing interests. The authors have no conflicts of interest to declare.

Cite this article: Krommendijk J. and Sanderink D (2023). The role of fundamental rights in the environmental case law of the CJEU. *European Law Open* **2**, 616–635. https://doi.org/10.1017/elo.2023.30