HUMAN RIGHTS AS AN EXAMPLE OF COOPERATIVE FEDERALISM? A CHRONOLOGY OF THE USE OF THE PRELIMINARY REFERENCE PROCEDURE IN HUMAN RIGHTS CASES BETWEEN 1957 AND 2023

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This article analyses the role of human rights in the preliminary reference procedure based on a systematic review of the use of fundamental rights in references for a preliminary ruling between 1957 and 2023. It shows that over 30% of preliminary references in the last five years have contained a human rights dimension, compared to only 17% of preliminary references across the span of the Court's docket. A progressive increase in the use of human rights can be observed across the case law. The CJEU can thus be considered a key regional human rights adjudicator not just normatively, i.e. in terms of the content and implications of its decisions, but also empirically, because of the volume and proportion of its human rights case law within the overall docket. This finding challenges the prevailing narrative that paints EU human rights as a key locus of conflict between courts at the domestic and EU levels. Instead, the case law patterns over time display a more harmonious and gradual approach towards the development of EU human rights, which corresponds to a dialogical and cooperative model of EU federalism, rather than a dualistic or strictly hierarchical one.

Keywords: Charter of Fundamental Rights of the EU; Human Rights; Preliminary Reference Procedure; Article 267 TFEU; CJEU; Cooperative Federalism

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I. INTRODUCTION

Is the Court of Justice of the EU (CJEU) a human rights court? If so, when did it become one? This article aims to address these questions empirically, by investigating the volume of the CJEU's human rights jurisprudence across time. Through a series of term-specific searches, it presents a set of

original data about the use of human rights in the preliminary reference procedure and traces the scale of human rights case law chronologically from the first fully documented case recorded on the Court's database on 20 March 1957[1] until 20 March 2023. At the same time, it makes key 'stops' at the constitutional turning points of EU integration in the field of human rights protection (the Maastricht, Nice, and Lisbon Treaties), thus highlighting the trajectory of human rights references across different eras of EU human rights integration. The data reveals a significant, and remarkably linear, change to the *scale* of the Court's engagement with human rights, from only 17.6% of preliminary references across the span of the Court's docket since 1957 to more than 30% of preliminary references in the last five years. The article contextualises this data by using as comparators the two other main litigation avenues at the EU level: actions for annulment[2] and actions for a declaration of a failure to fulfil obligations.[3]

What can this empirical account add to the long-standing debates about whether the EU is a human rights organisation[4] or, indeed, a federal constitutional polity properly-so-called?[5]

The primarily quantitative approach taken in this article may be perceived as an ill-suited attempt to answer by reference to numbers what are ultimately much deeper normative debates about the federalising character

[1] Case C-2/56 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v High Authority* EU:C:1957:4. NB: while three other cases appear to have been decided before this ruling, it was the first ruling I found on curia.europa.eu that showed full and searchable documentation.

[2] Article 263 TFEU.

[3] Article 260 TFEU.

[4] See Armin von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' (2000) 37:6 CML Rev 1307.

[5] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39:5 CML Rev 945; see also Gráinne de Búrca and Jo Aschenbrenner, 'The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights' (2003) 9 CJEL 355.

of human rights in EU integration.[6] But my intention in this article is not to reopen questions about whether the EU should be concerned with matters of human rights protection or how the CJEU ought to approach them, but to document whether and, if so, to what extent it actually does. In turn, obtaining such an overview of the CJEU's case law in this field is useful because it allows us to better understand and potentially challenge existing assumptions that, as Meuwese and Versteeg put it, have 'largely gone untested' in earlier scholarship.[7]

More specifically, important claims about the nature of human rights integration have so far been made based on key cases or constitutional developments, but have not yet systematically been mapped onto a large-scale or chronological account of human rights in EU law.[8] One of the key narratives in EU legal scholarship has been that human rights law is the key site of judicial conflict and contestation between domestic courts and the CJEU.[9] A data-driven account allows us to gain a more holistic picture of what EU human rights litigation has amounted to in terms of figures, and to set out in a more coherent way across time some of the formal, institutional characteristics of EU human rights litigation, such as 'how much of it is

[6] For a thorough analysis of the perceived objections empirical research methods in EU legal scholarship, see: Urška Šadl and Jakob v H Holtermann, 'The Foundations of Legal Empirical Studies of European Union Law: A Starter Kit' in Christoph Bexemek, Michael Potacs and Alexander Somek (eds), *Normativism and Anti-Normativism in Law*, Vienna Lectures on Legal Philosophy (Vol 2) (Hart 2020), 210 and 220-226.

[7] Anne Meuwese and Mila Versteeg, 'Quantitative Methods for Comparative Constitutional Law', in Maurice Adams and Jacco Bomhoff, (eds.), *Practice and Theory in Comparative Law* (Cambridge University Press 2012), 233. See also Šadl and Holtermann, ibid, 209.

[8] Šadl and Holtermann (n 6), 209-210.

[9] For an important recent analysis, see Ana Bobić, *The Jurisprudence of Conflict in the European Union* (Oxford University Press 2022), chapter 7; see also Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009).

there?'; 'how did it change over time?'; and 'which procedures and actors has it involved?'.

In this regard, the findings presented in this article contribute previously under-appreciated dimensions to scholarly debates about EU human rights integration:[10] firstly, the article confirms that human rights are a growing aspect of the CJEU docket, but shows that they nevertheless remain, even fourteen years after the introduction of a binding Charter, a secondary source of EU litigation. Further, the article confirms the overwhelming prominence of the preliminary reference procedure as the principal tool in the adjudication of EU human rights. This highlights the continued significance of private enforcement through legal means as a key driver of the EU human rights regime. Finally, the article shows that the contestation that we have assumed to be a defining characteristic of the interaction between domestic courts and the CJEU in the human rights context is not necessarily supported by the case law patterns of preliminary references overall. While there is undeniable contestation in some of the landmark case law in the field, as discussed in **Section IV**, the overarching patterns of preliminary references paint a different picture: that of a more gradual and cooperative interaction on human rights issues than we might have previously imagined. The present article thus provides evidence of a more dialogical approach to human rights than doctrinal accounts have so far offered and allows us to think in a more structured way about the Court of Justice's qualities as a regional human rights actor.

[10] Other quantitative empirical studies have considered the nature of the preliminary reference procedure, eg Tommaso Pavone and Daniel Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' 25 (2019) European Law Journal 352; earlier studies had also. included aspects of EU human rights law, eg, sex discrimination; Alec Stone Sweet, *The Judicial Construction of Europe*, (Oxford University Press 2004), chapter 4. However, no other study traces the breadth of the human rights acquis throughout the docket.

The article is set out as follows: **Section II** details the methodology that I have employed to collect my data. **Section III** sets out my key findings. **Section IV** interprets these findings, highlighting the abovementioned patterns. **Section V** concludes.

II. RESEARCH METHODOLOGY

1. Outline of Methodology

As mentioned at the outset, I approached my hypothesis through the research questions of whether the CJEU is and, if so, since when it has been, a human rights adjudicator. These questions were approached as an investigation into the volume and institutional makeup of the case law, i.e. whether and to what extent the CJEU is a forum for human rights complaints in the EU under the preliminary reference procedure (Article 267 TFEU) or an enforcer of rights through direct actions by individuals (Article 263 TFEU) or actions for a failure to fulfil obligations against Member States (Article 260 TFEU).

To answer these questions, I employed keyword searches on the Court's official case law database (curia.europa.eu). The search terms were '"Charter of Fundamental Rights", "human right*"', where a comma denotes 'or' and an asterisk captures the multiple of the term 'right' =, ie both "human right" and "human rights". My search was conducted by selecting the relevant procedure from the Court's database (references for a preliminary ruling, including the urgent procedure), and I mapped all preliminary references mentioning the search terms on an annual basis from 20 March 1957[11] to 20 March 2023 by running individual searches for each year in this 66-year period. I repeated this search for the two procedures that I used as comparators for preliminary references (actions for annulment and actions for a failure to fulfil obligations). I then added a qualitative element to this approach by mapping my data based on 'constitutional time'. In doing so,

[11] i.e. the date of the first judgment fully recorded on curia.europa.eu.

my aim was to understand how key moments in EU human rights integration were reflected in the overall patterns of the Court's case law. To this end, I ran time-defined searches for four different intervals alongside my search of the full docket. These were:

- Full docket: 20 March 1957 – 20 March 2023
- Pre-Maastricht case law: 20 March 1957 – 31 December 1992
- Post-Maastricht case law: 1 January 1993 – 31 January 2003
- Nice case law (declaratory Charter): 1 February 2003 – 30 November 2009
- Lisbon case law (binding Charter): 1 December 2009 – 20 March 2023

My search was limited to cases before the "Court of Justice", thereby excluding the General Court.[12]

2. Justification of Methodology

Defining case law that bears relevance to human rights was a challenging aspect of my methodology. The keyword-search approach is an imperfect method,[13] but it was essential to use it here due to the high volume of cases in the CJEU's docket. In turn, before the data was collected, it was essential to ensure the accuracy of the contents of the search. To this end, I trialled several ways of searching for the presence of human rights in the Court's docket through pilot searches based on random years. These revealed that

[12] NB: my search includes cases that mentioned the search terms in the Opinion of the Advocate General.

[13] There have been 23,278 cases lodged before the Court of Justice between 20 March 1957 and 20 March 2023, under any procedure, as recorded on the curia.europa.eu case law database on 28 March 2023. For the challenges associated with constitutional design of large-scale studies, see Ran Hirschl, 'Case Selection and Research Design in Comparative Constitutional Studies', in Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 224, 267 ff.

search terms such as 'Charter', 'general principle*', and 'fundamental right*' would not lead to accurate overall results. The two former terms were over-inclusive, as they returned several results referring to the UN Charter and to general principles of EU law other than human rights. The term 'fundamental right*' was also misleading, being in some respects over-inclusive, as it was used to refer to rights-conferring provisions of the Treaties and not only to human rights, understood positively as the rights that were subsequently constitutionalised in the Charter. At the same time, it was under-inclusive with respect to the early case law, excluding cases such as *Stauder* and *Internationale Handelsgesellschaft*, where the terms 'human right' or references to the 'European Convention on Human Rights' were employed, as the term 'fundamental right' only became more consistently used in later judgments.[14] Other trialled terms, such as "fundamental freedom*" also resulted in an over-inclusion of matters covered by the Treaties that were not relevant to human rights and were, therefore, excluded from the final search to avoid the findings capturing irrelevant material. Finally, I considered searching for each of the provisions of the Charter and collating them. However, this method carried too significant a risk of manual error, as well as a substantive risk of under-inclusion for the pre-Charter years, where the terms used to refer to a particular right varied from the terms subsequently used in the Charter's text.

For these reasons, I ultimately chose to represent engagement with human rights in the Court's case law through mentions of the terms "Charter of Fundamental Rights" and "human right*", which cropped up consistently in the pilot results and were not substantively over-inclusive. This approach had the benefit of capturing both early engagement with human rights as general principles of EU law and reliance on fundamental rights subsequently, under the Charter. Still, given that the terms used in the pre-

[14] Case 29/69 *Stauder v Stadt Ulm* EU:C:1969:57, para 7; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114.

Charter case law were (unsurprisingly) more fluid and interchangeable than in the post-Charter years, the possibility of under-inclusion needs to be accounted for in my study. Pilot searches showed that the Court relied consistently on the Charter in its later judgments and, therefore, I expect that the post-Charter results paint an accurate picture of the Court's case law. However, my use of the term "human right*" as the relevant term means that the findings presented here are likely to be overly conservative when it comes to the Court's case law before the Charter. Having noted this limitation, a cursory manual review of the results of the pre-Maastricht case law confirmed that the term-based search did return expected results, with key early cases, such as *Stauder*, *Internationale Handelsgesellschaft*, *Defrenne*, *Hauer*, *Wachauf, Dekker*, and *Konstantinidis*[15] being returned in the dataset. Nevertheless, the data should be read with the caveat of potential under-inclusivity in the pre-Charter years in mind. Indeed, the fact that the dataset is more likely to be under-inclusive than over-inclusive is significant because it strengthens the overall conclusion of continuity and gradual build-up, rather than a radical shift, in human rights litigation at different phases of EU integration, as I go on to explain in the next section.

When it comes to the intervals I selected to account for potential turning points in EU human rights integration, my frame of reference (detailed in subsection 1 above) differs slightly from earlier accounts. Following Weiler's analysis in 'The Transformation of Europe', it would be common to break down the pre-Maastricht period into at least two halves.[16] The first half is the 'foundational period' between 1958 and the mid-70s, where the key normative pillars of EU law were laid down. In the second half, there is

[15] *Stauder* (n 14); *IHG* (n 14); Case 43/75 *Defrenne v Sabena (No 2)* EU:C:1976:56; Case 44/79 *Hauer v Land Rheinland-Pfalz* EU:C:1979:290; Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321; Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* EU:C:1990:383; Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* EU:C:1993:115.

[16] Joseph H H Weiler, 'The Transformation of Europe' (1991) 100:8 Yale Law Journal 2403–83, 2413 ff.

period of 'mutation of jurisdiction and competences' between 1973 and the mid-80s, where key judicial principles about EU jurisdiction and the CJEU's approach of incrementalism started to be refined.[17] In my account, I have consciously decided to represent the human rights case law before Maastricht as a unitary entity. Similarly, based on a broader view of EU integration, it might have been considered unjustifiable to include three periods in the post-Maastricht era, as I have done, but to leave other key developments in EU law, such as the Single European Act, Amsterdam Treaty, or failed Constitutional Treaty, seemingly unaccounted for. These departures from the classical account are, however, justified by the specificity of human rights integration to the EU's post-Maastricht framework and the particular significance of the Charter thereto.[18]

Human rights cases only started to appear – with the exception of *Stauder* – in the 1970s and, by their very nature, posed considerable jurisdictional challenges for the CJEU before their first formal inclusion in the Treaties in Article F TEU (Maastricht). I have thus selected to represent in my data periods that correspond to further integration in the field of human rights specifically, rather than in EU law, more generally.

The first period, between the first recorded case in 1957 until just before the entry into force of the Maastricht Treaty on 1 January 1993, represents human rights in their judicial iteration as general principles of EU law at a time when the Treaties still did not explicitly provide for their protection. The post-Maastricht dataset corresponds to the early period of political integration, with the first explicit mention of human rights being made in the Treaty on European Union, thus giving a clearer EU law basis for

[17] Ibid.

[18] See Elizabeth Defeis, 'Human Rights, the European Union, and the Treaty Route: From Maastricht to Lisbon' (2017) 35:5 Fordham Journal of International Law 1207, although Defeis places a greater emphasis on the Amsterdam Treaty and a lesser one on the proclamation of the Charter through the Nice Treaty: 1207-1210.

ensuring respect for human rights.[19] The next key change was the proclamation of the Charter as a non-binding instrument in the Nice Treaty, which entered into force on 1 February 2003. While the Charter was not at the time binding on the Member States, it was already binding for the EU institutions (including the Court of Justice) and its gathering of EU human rights in a single instrument facilitated a more unified perception of these rights in EU law.[20] The final period I coded for was the attribution of binding effect to the Charter upon the entry into force of the Lisbon Treaty on 1 December 2009, until the end of the coded period (20 March 2023). This is the first period in which human rights have acquired a fully constitutionalised status in EU law, enjoying 'the same legal value as the Treaties' in line with Article 6(1) TEU under the Lisbon amendment. Given that these periods and, particularly, the Charter's entry into binding force represented key constitutional changes to the status of human rights in EU law, I expected that they would result in a discernible jump in the volume of human rights cases reaching the Court.

Of course, it must be noted that since each of these intervals contains a different number of years, the absolute figures are not comparable. It would be impossible to compare the 35-year period pre-Charter with the much smaller intervals covered in more recent years. To avoid confusion in this regard, I have chosen to represent the figures through statistical (percentile) models in my graphs. I have also provided the full annual breakdown of preliminary references as returned in my dataset (Figure 2b below), for reference.

[19] At the preamble and Article F TEU (Maastricht). This period also includes the change from Article F Maastricht to Article 6 TEU in the Amsterdam amendment, which did not otherwise alter human rights competence, despite arguably creating the impetus for the creation of the Charter: see further on this, Eleni Frantziou, 'The EU Charter of Fundamental Rights in EU Integration' in Laurence Gormley, Sacha Garben and Kai Purnhagen (eds), *Oxford Encyclopedia of EU Law* (Oxford University Press 2023).

[20] Eeckhout (n 5) 990; de Búrca (n 5) 372.

3. Margin of Error and other Limitations

Beyond the limitations inherent in the specific methodology that I employed, as detailed above, some further clarifications and qualifications need to be made about the scope of my findings.

First, it must be noted that there is a margin of error of between 0.01 and 0.04% in my data: this was discovered through reverse-sum testing of the findings of cumulative years and intervals, which resulted in slightly more results than my search of the full docket. This inconsistency stems from the fact that certain cases appeared more than once in the systematic and interval-based searches, when the search terms were used in case documents spanning more than one search period. As such, there are a few repetitions in the systematic chronology and interval-based findings, which explains why case results are slightly more numerous there. In order to ensure that my findings remain transparent to the reader, I have included the full docket figures as a self-standing search and have used those more accurate figures when referring to the full docket. However, it is essential for completeness to acknowledge this internal inconsistency in the data, which is most significant in the systematic (year-on-year) mapping of preliminary references (showing a 0.04% variation from the full docket search).

Second, it is essential to note that my data was verified as accurate to 20 March 2023 (the limit of my review period) based on the information available on the curia.europa.eu database upon my last visit to the site on 28 March 2023. Nevertheless, a margin of error is present in the case law database itself. For example, when conducting the exact same full docket search of all references on 30 October 2023 for the coded period (20 March 2057 – 20 March 2023), the search produced 23,540 case results, as opposed to the 23,278 total number of cases recorded on 28 March. This is likely to be due to the fact that the Curia database is constantly updated by the Court's research and documentation department, which means that the absolute numbers presented here are subject to a further margin of error of more than 1% overall (and likely higher for the final coded year). Still, there is no

reason to imagine that such updates would influence one procedure more than the others or that they significantly affect the overall conclusions about the makeup of the docket.

Third, an important limitation in my method, which I did not anticipate at the outset, was that it was not possible to filter mentions of human rights in Opinions of Advocates General. While I had initially hoped to provide different accounts for mentions in the preliminary reference request itself, mentions in the judgment, and mentions in the Opinion, the database consistently returned results that mentioned the terms in any of the case documents despite the specific exclusions being selected (these exclusions currently only work for legislation official document searches, and not for other text-based search terms). The results should thus be viewed as a holistic chronology of human rights mentions at any stage of the preliminary reference procedure (as well as, where relevant, the other two coded procedures). My plan in this article was to map engagement with human rights, but further study of the use of human rights in binding judgments could strengthen or refine some of the conclusions presented here.

Last, but not least, some broader qualifications should be made about the scope of the arguments that the data can support. It must be reiterated that the findings are not necessarily representative of the number of cases with a human rights *focus*: rather, both the findings and the conclusions subsequently drawn from them refer to cases with a human rights *dimension* (i.e., including cases of potentially minor relevance to human rights, despite employing relevant terms). Finally, insofar as the findings presented in Section III are quantitative, they can be separated from my own interpretation of their meaning (section IV) and can stand alone as an overarching guide for subsequent research into the nature and effects of the human rights case law.[21]

[21] The author is happy to provide copies of the original databank to facilitate further research.

III. FINDINGS

1. *Human Rights in the CJEU's full docket (20 March 1957-20 March 2023)*

The results relating to the full docket show the volume of the Court's case law that concerns human rights lodged in the coded period. The findings show that, of the 23,278 cases that have come before the Court of Justice under any procedure between 20 March 1957 and 20 March 2023, 2,932 cases related to human rights, based on the search terms (12.60%). This is a small, albeit not insignificant percentage of the EU case law. However, the figures are greater when looking at the three biggest procedures, which are in turn coded in greater detail in this research. For example, 17.60% of the cases coming before the Court through the preliminary reference procedure under Article 267 TFEU procedure (including the urgent procedure) had a human rights dimension. In total, this amounted to 1,886 cases out of 10,718 requests for a preliminary ruling in the Court's docket. Actions for annulment (Article 263 TFEU) displayed a slightly higher percentage of human rights litigation at 18.00% of cases under this procedure but were much fewer in absolute terms (687 cases out of a total of 3,817 in the docket).

By contrast, the cases coming before the Court under the Article 260 process (i.e. actions against Member States for failure to fulfil EU obligations) involved human rights to a considerably smaller extent (82 cases out of 3,974 in total), amounting to only 2.06% of the cases under this procedure.

Figures 1a and 1b visually represent the full docket findings. Figure 1a shows the prominence of the Art 267 process before the Court altogether. Figure 1b shows that the significance of preliminary references is overwhelming within the human rights cases identified in the docket. Together, preliminary references and actions for annulment accounted for 87% of all the human rights case law coming before the Court in the last sixty-six years.

Figure 1a: Proportion of cases per procedure overall:

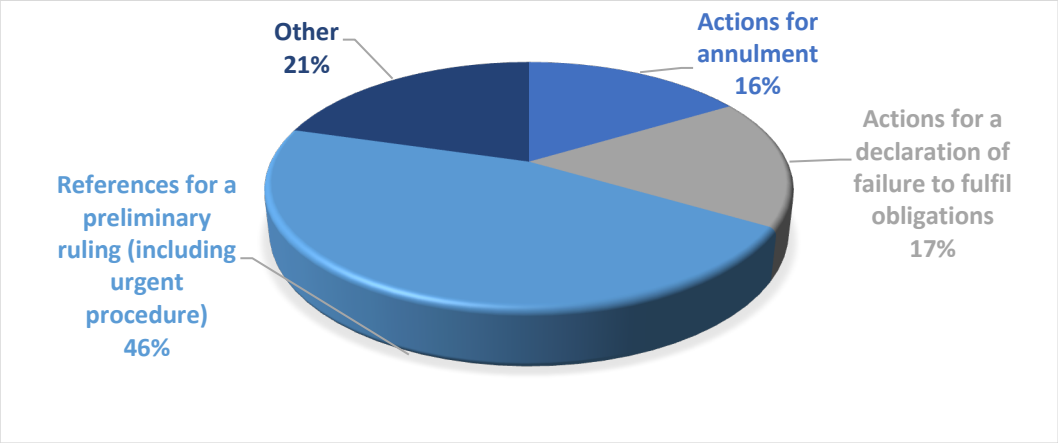
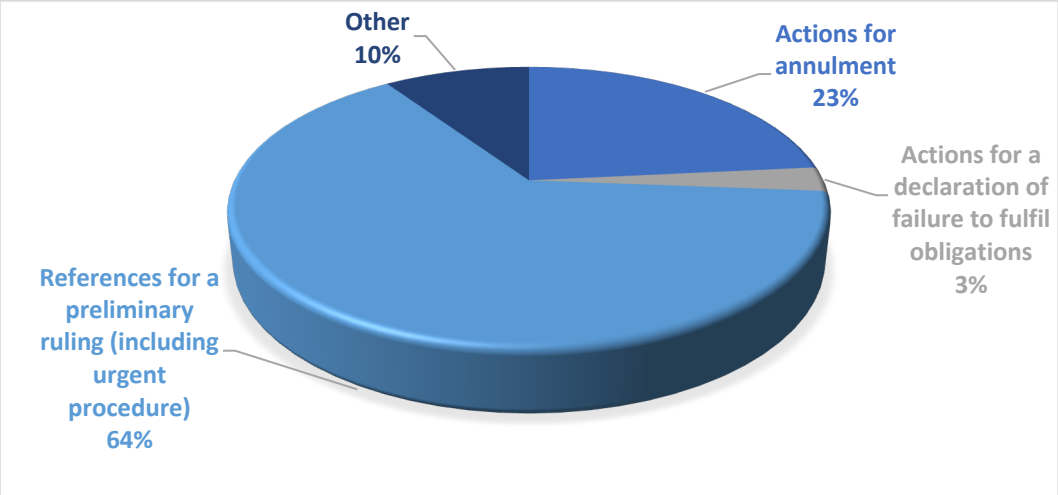


Figure 1b: Proportion of human rights cases per procedure:



While these figures are not contradictory, in the sense that the prominence of Article 267 in human rights cases is consonant with the overall prominence of Article 267 cases across the docket as well, they are remarkable in two ways. Firstly, they show that there is a much greater engagement with human rights through private or hybrid enforcement, via domestic litigation querying aspects of EU law or via direct challenges to EU measures. By contrast, there is a relative lack of public enforcement of EU human rights against Member States. In particular, and without taking into account other actions, the CJEU's human rights case law has clearly emerged predominantly through *bottom-up* litigation, through Article 267 and, to a lesser extent, Article 263, rather than *top-down* litigation, through the Article 260 procedure against Member States. This is an interesting feature of the docket, considering that human rights, albeit not in themselves a legislative competence, feed into several of the Union's key competences, such as external action, environmental protection, and employment regulation.

Secondly, the overwhelming significance of the preliminary reference procedure within the human rights case law is likely to have influenced the nature of the CJEU's engagement with human rights, potentially distinguishing it in some respects from that of other courts with a human rights competence. Since Article 267 is not in itself an adversarial process, human rights case law at the EU level has the opportunity to develop in a less hierarchical and more dialogical manner than in other regional contexts, such as under the Council of Europe system, where reparation for the victim(s) is a central feature of every application. This is compounded by the lack of public enforcement against Member States and by the fact that direct actions challenging EU measures are far fewer than preliminary rulings in absolute terms (despite having a similar percentage of human rights relevance), rendering EU human rights litigation highly reminiscent in practice of the docket of federal judiciaries.

Because of these features of the preliminary reference procedure and its prominence within the docket, it is useful to briefly look at the full chronology of human rights references under Article 267 in sub-section 2 below, before going on to contextualise them alongside the other two coded procedures by reference to key moments in EU integration in subsection 3.

2. The Chronology of Human Rights in the Preliminary Reference Procedure

As noted earlier, when looking chronologically at the evolution of the preliminary reference procedure since 20 March 1957, I had expected to find significant differences between different years. More precisely, I had expected to see a very stark increase in or shortly after years when an important constitutional change to the status of EU human rights had occurred, and especially since the Charter of Fundamental Rights entered into binding force under the Lisbon Treaty. However, the results of my research were more nuanced. The entry into binding force of the Charter undeniably did result in a greater number of mentions of human rights in EU litigation. But it did not necessarily have as significant an impact upon it as I had hypothesised. Figure 2a visually represents this pattern. Figure 2b lists the chronological data as a table, for ease of reference.

Figure 2a: Chronology of the use of human rights in the preliminary references (chart)

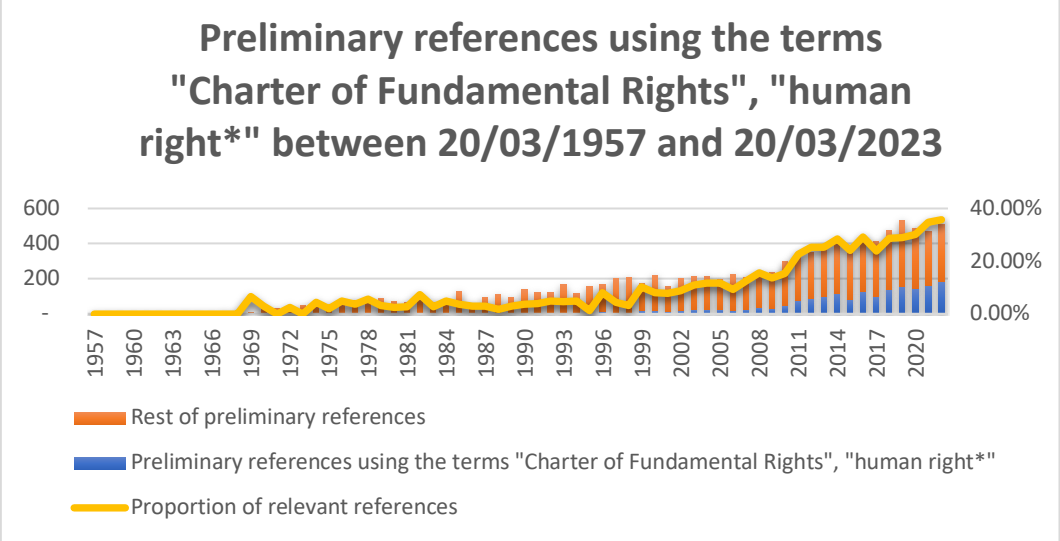


Figure 2b: Chronology of the use of human rights in the preliminary references (table)

Start	End	Human Rights References	Total References	Percentage of Human Rights References
20/03/1957	19/03/1958	0	0	0.00%
20/03/1958	19/03/1959	0	0	0.00%
20/03/1959	19/03/1960	0	0	0.00%
20/03/1960	19/03/1961	0	0	0.00%
20/03/1961	19/03/1962	0	1	0.00%
20/03/1962	19/03/1963	0	2	0.00%
20/03/1963	19/03/1964	0	3	0.00%
20/03/1964	19/03/1965	0	8	0.00%
20/03/1965	19/03/1966	0	5	0.00%
20/03/1966	19/03/1967	0	4	0.00%
20/03/1967	19/03/1968	0	15	0.00%
20/03/1968	19/03/1969	0	14	0.00%
20/03/1969	19/03/1970	1	15	6.67%
20/03/1970	19/03/1971	1	34	2.94%
20/03/1971	19/03/1972	0	29	0.00%
20/03/1972	19/03/1973	1	38	2.63%
20/03/1973	19/03/1974	0	53	0.00%
20/03/1974	19/03/1975	2	46	4.35%
20/03/1975	19/03/1976	1	48	2.08%
20/03/1976	19/03/1977	3	61	4.92%
20/03/1977	19/03/1978	3	81	3.70%
20/03/1978	19/03/1979	4	72	5.56%
20/03/1979	19/03/1980	3	92	3.26%
20/03/1980	19/03/1981	2	77	2.60%
20/03/1981	19/03/1982	2	71	2.82%
20/03/1982	19/03/1983	7	96	7.29%
20/03/1983	19/03/1984	2	74	2.70%
20/03/1984	19/03/1985	4	79	5.06%
20/03/1985	19/03/1986	5	131	3.82%
20/03/1986	19/03/1987	2	64	3.13%
20/03/1987	19/03/1988	3	100	3.00%
20/03/1988	19/03/1989	2	114	1.75%
20/03/1989	19/03/1990	3	102	2.94%
20/03/1990	19/03/1991	5	138	3.62%
20/03/1991	19/03/1992	5	128	3.91%
20/03/1992	19/03/1993	6	123	4.88%
20/03/1993	19/03/1994	8	169	4.73%
20/03/1994	19/03/1995	6	121	4.96%
20/03/1995	19/03/1996	2	160	1.25%
20/03/1996	19/03/1997	14	172	8.14%
20/03/1997	19/03/1998	9	207	4.35%
20/03/1998	19/03/1999	7	212	3.30%
20/03/1999	19/03/2000	18	177	10.17%
20/03/2000	19/03/2001	18	222	8.11%
20/03/2001	19/03/2002	12	154	7.79%
20/03/2002	19/03/2003	18	203	8.87%
20/03/2003	19/03/2004	24	216	11.11%
20/03/2004	19/03/2005	26	220	11.82%
20/03/2005	19/03/2006	24	204	11.76%
20/03/2006	19/03/2007	21	227	9.25%
20/03/2007	19/03/2008	27	215	12.56%
20/03/2008	19/03/2009	37	238	15.55%
20/03/2009	19/03/2010	33	241	13.69%
20/03/2010	19/03/2011	46	301	15.28%
20/03/2011	19/03/2012	78	343	22.74%
20/03/2012	19/03/2013	88	348	25.29%
20/03/2013	19/03/2014	100	394	25.38%
20/03/2014	19/03/2015	116	406	28.57%
20/03/2015	19/03/2016	84	347	24.21%
20/03/2016	19/03/2017	129	443	29.12%
20/03/2017	19/03/2018	99	415	23.86%
20/03/2018	19/03/2019	137	478	28.66%
20/03/2019	19/03/2020	155	536	28.92%
20/03/2020	19/03/2021	148	489	30.27%
20/03/2021	19/03/2022	164	473	34.67%
20/03/2022	20/03/2023	183	512	35.74%

As these figures highlight, a somewhat sharp change of approximately +7% is noticeable between 2010-2012, i.e. shortly after the binding Charter was introduced, but a more gradual, steady impact continues thereafter. A similar jump can be observed before the proclamation of the Charter in its non-binding dimension. Nevertheless, when viewed as part of a chronology spanning sixty-six years, these changes iron out relatively quickly, and do not lead to a drastic alteration of the wider trend followed by preliminary references, as shown by the line in Figure 2a. There is a mainly linear tendency in this figure, which can be contrasted with the findings in respect of other procedures, and most notably with actions for a failure to fulfil obligations. As discussed in greater depth in subsection 3 below, the latter procedure shows a very pronounced, exponential increase in litigation following the entry into force of the Charter. While it is clear that the Charter has had an impact on preliminary references, too, it is noteworthy that the picture here is not one of step-changes, but of a gradual growth of human rights mentions over time. This conclusion is strengthened when considering that my data is likely to be under-inclusive for the pre-Charter years, where the absence of a common EU-wide terminology for human rights means that the search terms may have excluded at least some relevant early case law (which could, in turn, have further strengthened the predominantly linear character of the progression identified above).

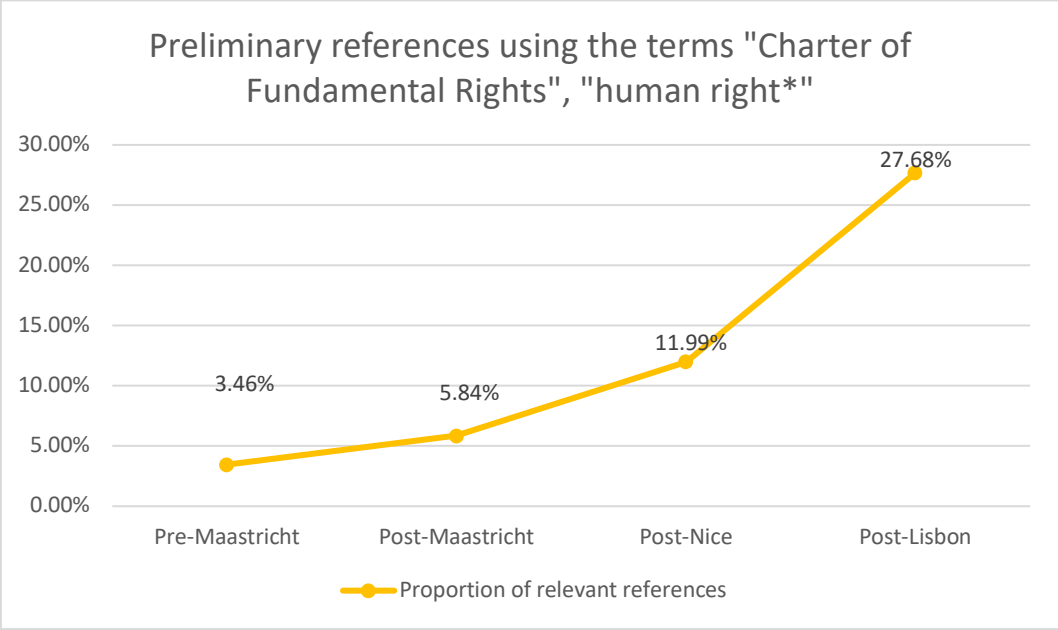
3. The Court's human rights case law at key intervals in EU integration

The patterns identified above are further nuanced by a more specific analysis of the case law before and after the key turning points in EU human rights integration. The interval changes for preliminary references are as follows: 3.46% of the pre-Maastricht case law contained a human rights dimension, rising to 5.84% between Maastricht and Nice, to 11.99% after Nice, and finally to 27.67% on average after Lisbon.

These results, visually represented in Figure 3.1, do somewhat sharpen the chronological analysis presented above, and result in a more pronounced

exponential curve. For example, when looking at this graph, it becomes more obvious that the Charter in its binding dimension had a discernible impact on human rights actions compared to other amendments. However, the graph also allows us to see that all relevant Treaty amendments made a difference to the volume of EU human rights litigation. In turn, if we consider the breadth of the change effectuated to EU law by the binding Charter, which added 54 human rights provisions having the status of Treaty law, the impact that the Charter had may be viewed as less explosive than expected.

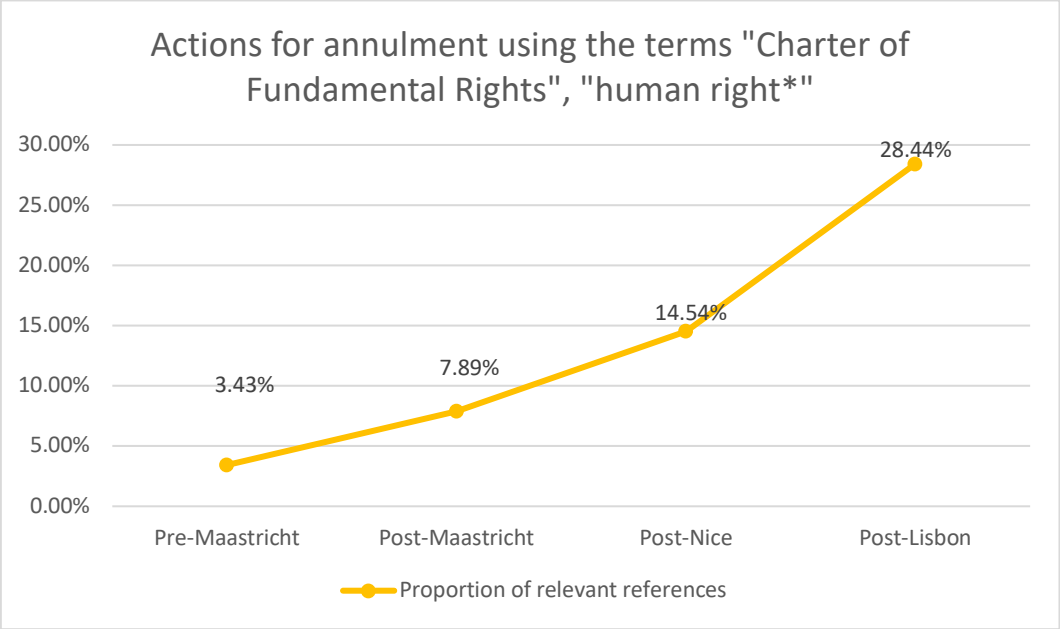
Figure 3.1: Changes to the use of human rights in preliminary references, defined by key eras in EU human rights integration



A similar pattern is present in respect of actions for annulment. These actions also increased significantly since the entry into force of the Charter, from 149 out of 1,9238 before 1 December 2009 (7.69%) to 540 out of 1,899 in the post-Charter docket (28.43%). However, the changes were less sharp

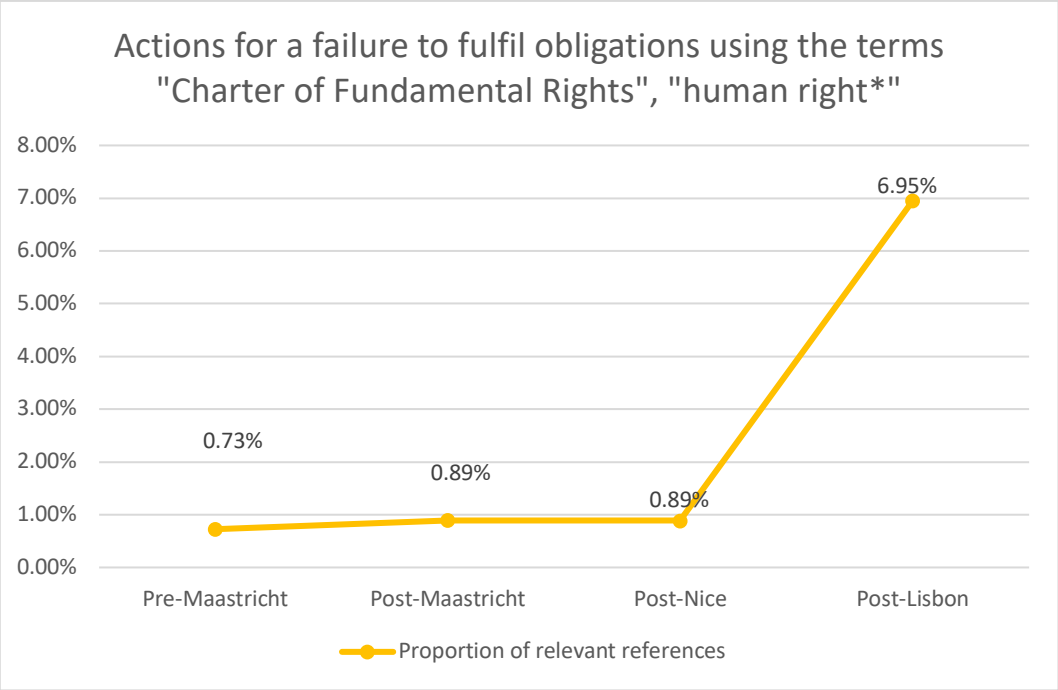
than for preliminary references and had an almost perfect pattern of doubling with each relevant amendment. Making up only 3.43% of the pre-Maastricht case law, human rights relevant actions for annulment grew to 7.89% between Maastricht and Nice, to 14.54% after Nice, and to 28.44% after Lisbon. Figure 3.2 represents these findings.

Figure 3.2: Changes to the use of human rights in actions for annulment, defined by key eras in EU human rights integration



A very sharp contrast to this picture is presented by actions for a failure to fulfil obligations, from almost nil references in the pre-Charter years, to a more significant – albeit still small – proportion of 6.95% of all actions for annulment following the post-Lisbon Charter. Crucially, there were no significant changes to the use of human rights in these actions at all prior to the Charter's entry into binding force, as further shown in Figure 3.3.

Figure 3.3: Changes to the use of human rights in actions for a failure to fulfil obligations, defined by key eras in EU human rights integration



The stark contrast presented by Figure 3.3 as the figure representing public (Commission-driven) enforcement of EU law, compared to both of the private enforcement procedures (Figures 3.1 and 3.2), is remarkable. On the one hand, it is of course true that the Lisbon Treaty was the first to render the Charter binding upon Member States. This might be viewed as in itself a sufficient reason for the marked increase in mentions of human rights in litigation against Member States. On the other hand, it was clear since the early 1990s that commitment to human rights was embedded in Member State action implementing (or derogating from) EU law.[22] Similarly, it was made plain during the Charter's drafting process that its codification of fundamental rights was intended neither to create new rights nor to expand

[22] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT)* EU:C:1991:254.

the Union's competence to police human rights in the Member States. Indeed, Article 51 of the Charter concerning the Charter's scope had been specifically redrafted ahead of the attribution of binding effect to the Charter to ensure that it was not interpreted as a new legal basis for EU action.[23] Thus, while the increase in mentions represented in figure 3.3 does not tell us whether reliance on the Charter has been successful, it does suggest an important *change* in the self-perception of the EU as an organisation with human rights competences. Crucially, considering that this pattern is less clear in both preliminary references and actions for annulment, it is suggestive of a greater impact of the Charter on non-judicial EU institutions than on courts.

IV. INTERPRETING THE FINDINGS: HUMAN RIGHTS AS AN EXAMPLE OF COOPERATIVE FEDERALISM

Having documented the presence of human rights in the language of the CJEU's jurisprudence over the years, in this section I aim to contextualise my findings by reference to existing literature and case law and invite further reflection about their meaning.

1. Is the CJEU is a human rights court? Since when?

First, it is necessary to answer the questions with which I set out: is the Court a human rights organisation and, if so, when did it become one? The CJEU clearly is, in one sense, a human rights court: the findings show that thousands of cases with a human rights relevance have been decided by the Court over the years, thus making clear its role as a significant actor in human rights litigation in Europe.

At the same time, my analysis has shown that CJEU case law remains quantitatively limited overall when viewed in the context of the Court's full docket. My search returned only 12.60% of human rights judgments in the

[23] Frantziou (n 199), para 6.

CJEU docket across different procedures over time. However, this figure does rise to 25.87% when looking at the case law after the entry into force of the Charter and, as noted in the earlier sections, it reaches well above 30% in more recent years within the preliminary reference procedure (the procedure that, in turn, occupies the vast majority of human rights references in absolute terms). This confirms that human rights are becoming an increasingly significant element of CJEU case law. But trying to pinpoint when that shift occurred – eg, by positing the Charter as its clear starting point – is not a simple task. Instead of radical changes, both the full chronology of preliminary rulings and the more focused analysis of 'constitutional turning points' showed consistent growth over the years. Despite being heavily supported by the binding Charter, this growth cannot – contrary to my own initial assumptions – unequivocally be considered the starting point of a more hands-on engagement with human rights in EU litigation.

Furthermore, the steady increase in human rights references is clear in both of the privately originating actions I researched: actions for annulment and the preliminary reference procedure. This suggests that, aside from the CJEU, a language of human rights has increasingly been used by and vis-à-vis individuals and national courts. The only area where the binding Charter made a stark difference was in actions for a failure to fulfil obligations. The almost exclusively Charter-generated jurisprudence against EU Member States raises an important question about how we can understand the different trajectory of human rights litigation within the EU legal order, and about what *kind* of human rights court the CJEU has been and might become in the future. The increase in mentions of human rights in actions for a failure to fulfil obligations suggests that there is a difference between procedures involving *interpretation* and procedures involving the *pronouncement of a violation* of EU obligations. The pronouncement of a violation may be seen as a characteristic of a dual or competitive federal model, where supranational institutions start to usurp traditionally local competences. However, the small scale of this pattern (under 7% of the

current case law) is not necessarily – or not yet – robust enough to be viewed as indicative of such a tendency. At the same time, the steady increase in actions seeking the interpretation of EU law through Article 263 and, particularly, the much more frequently litigated Article 267 TFEU, shows that there is a rising awareness of human rights within different facets of EU law and a concomitant expectation of respect and protection of these rights in its development. The preliminary reference procedure is an especially noteworthy aspect of these findings, as its inherently relational character (always involving domestic courts as well as the CJEU) invites a series of more specific conclusions about the relationship between judicial actors in the EU.

2. *Preliminary references and human rights: an unexpected example of cooperative federalism?*

While key cases in the context of actions for annulment, both before and after the Charter, have been viewed as landmarks of EU human rights law for improving accountability and more fully integrating human rights protection within EU legislation,[24] the established EU constitutional law narrative concerning preliminary references has been different. Under this procedure, human rights have tended to be seen, both in academic and in judicial accounts, as an area of irreconcilable conflict between domestic ccourts and the CJEU.[25]

[24] See, for a typical example of this, the *Kadi* litigation: Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities* EU:C:2008:461; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Kadi* EU:C:2013:518. For a critical analysis and assessment of the scope of the Court's engagement with human rights in this line of case law, see Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105:4 AJIL 649.

[25] For an in-depth overall analysis of these conflicts see Torres Pérez (n 9). More recently, Bobić (n 9); Dana Burchardt, 'Backlash against the Court of Justice of the

The findings from the above research invite a re-examination of this narrative.

On the one hand, when viewed through the lens of important cases at the EU level, both before and after the entry into force of the Charter, such as *Mangold*,[26] *Melloni*,[27] and *Dansk Industri*,[28] an understanding of human rights as a cause of deep disagreements and antagonism between the national and the EU level would appear to have strong support. In each of these cases, the Court of Justice developed, and imposed through the principle of primacy, a version of human rights that was different from that of its national constitutional counterparts and, as such, difficult for them to absorb in their own reasoning. In *Mangold*, the CJEU found that non-discrimination on grounds of age – a right only recognised in the Portuguese constitution at the time of its proclamation by the Court – enjoyed full protection in the EU legal order, giving it direct effect against states as well as private parties.[29] In *Melloni,* it restricted the concept of a fair trial under the Spanish constitution to a lower uniform standard, thereby limiting the protection against *in absentia* trials within the scope of EU law.[30] In *Dansk Industri*, it

EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) 21:S1 German Law Journal 1. On the cases detailed in my analysis, more specifically: Leonard Besselink, 'The Parameters of Constitutional Conflict after *Melloni*' (2014) 39:4 EL Rev 531, 545; Elena Gualco, '"Clash of Titans" 2.0. From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the Dansk Industri Case' (2017) 2:1 European Papers 223; Editorial comments, 'Horizontal Direct Effect – A Law of Diminishing Coherence?' (2006) 43:1 CML Rev 1; Editorial Comments, 'The scope of application of the general principles of Union Law: An ever expanding Union?' (2010) 47:6 CML Rev 1589.

[26] Case C-144/04 *Mangold v Helm* EU:C:2005:709.

[27] Case C-399/11 *Melloni v Ministerio Fiscal* EU:C:2013:107.

[28] Case C-441/14 *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen* EU:C:2016:278.

[29] *Mangold* (n 26) para 74.

[30] *Melloni* (n 27) para 60.

held that the principle of non-discrimination applied in spite of concerns over legal certainty and legitimate expectations, which also had a constitutional status.[31] In turn, these – and similar – decisions, attracted (in)famous responses at the domestic level, with extra-judicial calls to 'stop the European Court of Justice',[32] as well as highly confrontational rulings when the aforementioned CJEU decisions returned to the national level, in cases like *Honeywell*[33] and *Ajos*.[34] These clashes have been relatively widespread, as Martinico has highlighted, with more recent examples in Austria, France, and Italy.[35]

In light of this experience, it is clear that constitutional conflicts in the EU have remained rife in the field of human rights, leading logically to an understanding of this field as a lingering example of a competitive, early

[31] *Dansk Industri* (n 28) paras 33-35.

[32] Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice,' EU Observer, 10 September 2008, <https://euobserver.com/opinion/26714> accessed 14 March 2023.

[33] *Honeywell* – BVerfGE 126, 286 (Az: 2 BvR 2661/06); analysed in Christoph Möllers, 'German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*' (2011) 7:1 EuConst 161; and Mehrdad Payandeh, 'Constitutional Review of EU Law after *Honeywell*: Contextualising the Relationship between the German Constitutional Court and the European Court of Justice' (2011) 48:1 CML Rev 9.

[34] Danish Supreme Court, judgment of 6 December 2016, no. 15/2014, *DI acting for Ajos A/S v. The estate left by A*; analysed in Rask Madsen, Mikael Olsen, Henrik Palmer, and Urška Šadl, 'Competing supremacies and clashing institutional rationalities: the Danish supreme court's decision in the Ajos case and the national limits of judicial cooperation' (2017) 23 European Law Journal 140.

[35] Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath (2019) 15 EuConst 731; see also Daniele Gallo, 'Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure' (2019) 25 European Law Journal 434.

federal model to be distinguished from a broader tendency towards a cooperative federal constitutionalism between the Union and the Member States.[36]

On the other hand, while a numerical study such as the present one cannot serve fully to *explain* these conflicts (nor does it suggest that they are unimportant), it allows us to question their generalisability. The unknown, hidden, and perhaps not-very-interesting cases, which make up the bulk of any court's docket, become the central feature of a possible counter-claim: the idea of deep or irreconcilable conflict is incompatible with the overall patterns of the case law presented in the data concerning Article 267. Whereas constitutional conflicts may remain present in EU human rights law, the gradual increase in human rights mentions in preliminary references suggests a more complicated position of contestation, but not of outright defiance. This position could be viewed as much more akin to Schütze's analysis of the gradual emergence of a cooperative federal relationship between domestic and EU authorities (in this case, national and EU courts).[37]

Two reasons based on the data on the preliminary reference procedure that I have presented above suggest that this is the case: first, references have been consistently growing over time, which indicates at least a degree of acceptance between national courts and the CJEU. A narrative of strong antagonism or dualism could be expected to result in a patchier overall pattern of references, including clearer drops in human rights litigation, e.g., following CJEU rulings viewed as problematic. At these times, domestic courts may choose not to refer cases, despite their right and, for higher courts, obligation to do so under EU law.[38] There is no such evidence within the chronology presented above. Second, the fact that there has been a steady, year-on-year increase in human rights litigation, which has become

[36] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009).

[37] Ibid, 265-284.

[38] Case C-224/01 *Köbler v Republik Österreich* EU:C:2003:513, paras 118 ff.

faster since the entry into binding force of the Charter, suggests that a body of litigants and lawyers are becoming more aware of EU human rights, and actively seek their protection through the preliminary reference procedure. While this is a rather obvious observation when looking at the dataset, it can serve to soften academic critiques of the qualities of EU human rights integration as purely symbolic and lacking in democratic participation.[39] Even acknowledging that the aforementioned patterns only show *expert* awareness of EU human rights law, the consistent increase of human rights mentions in the Article 267 process over time indicates that human rights are becoming a valued element of EU law, despite their parallel, and often clearer, protection at the national level. This supports the perspective of a more diffuse, multi-focal model of human rights integration, rather than a strictly dualistic one.

What does (or might) this challenge to the conflict narrative change in our understanding of human rights in the EU legal order? While one ought to be careful about drawing conclusions from the data without a more in-depth, qualitative case sampling that could build detail into the present dataset, the following suggestions can be made for further reflection and academic investigation. First, the very use of the language of human rights in EU litigation is important. Since the CJEU and national courts are necessary interlocutors within the preliminary reference procedure, the increase in the human rights case law witnessed over time could be associated with greater openness to mutual understanding on human rights issues by judicial actors both at the national and at the EU level. After all, rational actors usually avoid the pointless exercise of addressing themselves to others

[39] E.g., Jo Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9:1 ELJ 45, 58 ff.; Julio Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 Maastricht Journal of European and Comparative Law 65, 74.

in a language that they do not, at least partly, understand.[40] Second, taken a step further, these findings appear to confirm with some evidentiary force a thesis propounded in different iterations by von Bogdandy and Lenaerts, namely that human rights are not necessarily or merely a cause of contestation in EU law, but also an area where basic agreement on minimum guarantees is likely, even in the face of occasional conflict.[41] Indeed, as Ana Bobìc has observed by examining post-Charter case law, there is evidence of domestic courts embracing the Charter as a benchmark for their own human rights review, with the German Constitutional Court in its *Right to Be Forgotten II* ruling being counted as one of several examples of this tendency.[42] Coupled with the existence of a healthy body of preliminary references, this competition for the interpretation of EU human rights need not be viewed as a sign of an impending rights revolution by domestic courts. Rather, it could be understood as an inherent feature of a *de facto* federal judicial architecture.

V. Conclusion

EU human rights law does not (yet?) amount to a quantitatively sufficient part of the CJEU docket to posit human rights as the Court's main function. However, with a steady increase in cases with human rights dimensions, and approximately a third of the cases now coming before the Court using

[40] As famously and succinctly explained by Jacques Derrida in 'Force of Law: The "Mystical Foundation of Authority"' in David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld (eds), *Deconstruction and the possibility of justice* (Routledge 1992) 3.

[41] Armin Von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, and Maja Smrkolj, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49:2 CML Rev 489; Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 German Law Journal 779.

[42] German Bundesverfassungsgericht, Case 1 BvR 276/17 *Right to Be Forgotten II*, Decision of 6 November 2019; Bobić (n 9), chapter 7, section 4.1.1.2.

human rights language in some form, it is clear that human rights are becoming a prominent feature of EU litigation. This article has been able to evaluate, for the first time through a legal lens, the trajectory of human rights litigation before the Court and, particularly, the trajectory of references for a preliminary ruling with a human rights relevance. Through a full systematic chronology of references for a preliminary ruling mentioning human rights, as well as an analysis of the presence of human rights within all three main EU actions in key eras of EU integration between 1957 and 2023, it demonstrated the spread and progression of human rights in EU case law over the years.

This approach has yielded surprising results. The remarkably steady increase of preliminary references with a human rights relevance over the years challenges the core narrative about the relationship between domestic courts and the CJEU in this field as one of contestation and dualism. It suggests that a more cooperative and gradual model of incorporation of human rights within EU law has been at play instead. While the dataset does not in itself permit an assessment of the Court's engagement with human rights through the ground-breaking rulings that may be handed down from time to time, it allows logical links and comparisons between different eras of EU integration to be drawn, as well as between the different institutions and actors involved in EU human rights protection. In uncovering these links or patterns, the article suggested that EU human rights law already enjoys a considerable degree of acceptance by the principal addressees of the EU human rights system: individuals falling within the scope of EU law and national courts, which remain the principal forum within which human right arguments are deployed. In turn, the scale and key patterns of the CJEU's human rights docket generally align with what might be expected of a process of gradual federalisation of EU human rights law. They can thus be used to question or even displace a view of EU human rights as a site of irreconcilable conflict and exceptionalism and to place human rights more confidently within a narrative of incremental federal integration.