EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?

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I Introduction

A sharp increase in the number of jurisdictions constitutionalising environmental rights[1] has led to the assumption of a surfacing environmental rights revolution.[2] The Charter of Fundamental Rights of the European Union (Charter) codifies a 'high level of environmental protection' and 'improvement of the quality of the environment' as part of EU's corpus of fundamental rights protection,[3] and as such, hints to the possibility of the EU following a similar constitutionalising trend. I investigate this possibility here by examining the type of legal duties embedded in the Charter's environmental provisions, and their prospect of securing individual rights for the safeguard of the environment.

Considering environmental protection through a EU human rights perspective stands in sharp contrast to the initial debates and objectives underpinning the creation of a common market, now the EU-project. The original treaties establishing the EU legal order contained neither environmental stipulations nor any reference to human rights, as these issues were not considered pressing concerns in the creation of an economic treaty.[4] Environmental protection instead evolved from the case law of the Court of Justice of the European Union (CJEU),[5] and the EU's broad use of regulatory competence to create and maintain a common market to legislate also on environmental

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1 Ecuador is the first example, see E. Daly, 'The Ecuadorian Examplar: The First Ever Vindications of Constitutional Rights of Nature' (2012) 21 Review of European Community and International Environmental Law 63. In the EU, a number of Member States enshrine a positive environmental right in their constitutions, for a brief overview see N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 Nordic Journal of International Law 39, 40.

2 See D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012).

3 Article 37 of the Charter, see [2010] OJ C 83/389.

4 S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 645.

5 See for instance F. Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment ' (2006) 18 Journal of Environmental Law 185.

matters.[6] Over the course of Treaty amendments, the EU has developed considerable competences in the field of environmental law.[7] In the present constitutional arrangement, Title XX provides the legal basis for environmental policy, in addition to a number of Treaty provisions, including Article 3(3) Treaty of the European Union (TEU), which stipulates that the Union shall 'work for the sustainable development of Europe based on … a high level of protection and improvement of the quality of the environment.'[8] More importantly, environmental protection is codified in Article 37 of the now legally binding Charter, meaning that safeguarding the environment has obtained a human rights significance in the EU legal context.

There are, nevertheless, obvious drawbacks with Article 37. For instance, it enjoys the status of a principle, which, according to the Charter, means that it has limited judicial applicability. Following from this, as well as from its broad and ambiguous formulation, it is too vague to result in direct effect. As a result, it is of limited use to individuals and non-governmental organisations (NGOs) attempting to spur environmental action through courts.[9] Still it is the judicial application and interpretation of Article 37 that is the focus of this study. More precisely, this chapter shows that environmental protection consideration, and Article 37 more specifically, emerges in two specific contexts in CJEU case law: as justification for breach of other Charter rights, or as validation for environmental measures coupled with other Charter rights. This mapping exercise thus helps to illustrate how and to what extent Article 37 influences the interpretation and application of EU law as undertaken by the EU courts.

This chapter starts with a brief introduction to the emergence of environmental protection within a human rights framework, moving quickly to Article 37 and its structure and application by the CJEU, which is the main focus of this study. This is not to assume that Article 37 exists in a vacuum, independent from all human rights cultures

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[6] S. Bogojević, *Emissions Trading Schemes: Markets, States and Law* (Hart Publishing 2013) chapter 3.
[7] For an overview, see I. von Homeyer, 'The Evolution of EU Environmental Governance' in Joanne Scott (ed), *Environmental Protection: European Law and Governance* (Oxford University Press 2009) 1.
[8] Moreover, Article 21 TEU makes reference to the EU's external environmental competences, Article 11 TFEU sets out the integration principle, Title XXI extends the EU's influence to the energy sector and Article 114(3) obliges the Commission to consider environmental protection in its legislative proposals. For an overview see H. Vedder, 'Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 Journal of Environmental Law 285.
[9] For an overview, and example from climate change law, of how the judiciary could be used to further a particular environmental objective, and legal issues therewith, see S. Bogojević, 'EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture' (2013) 35 Law & Policy 184.

but that of the Charter. On the contrary, Article 37 draws inspiration from the Member States and their common constitutional traditions.[10] Moreover, Article 52(3) of the Charter stipulates that the Charter grants the 'same meaning and scope' as rights protected under the European Convention on Human Rights (Convention). This evidences the significant impact jurisprudence originating from the European Court of Human Rights (ECtHR) inevitably has on the CJEU's application of the Charter. Yet, to date, the EU courts rarely, if ever, link Article 37 to national constitutions, or the Convention. For this reason, this chapter focuses on Article 37, without further reference to the Convention, or the national constitutions providing constitutional environment rights. The final part of this chapter, nevertheless, points to the influence of international environmental law, and more precisely the Århus Convention,[11] on broadening standing opportunities for individual applicants and NGOs to access the judiciary on environmental matters.

II Environmental Protection as a EU (Human) Right

Securing environmental protection is a core EU objective that finds expression in at least four distinct ways. First, it is reflected in the wide-ranging environmental competences that the EU enjoys.[12] Following Article 191 of the Treaty of the Functioning of the EU (TFEU), the EU's objectives in the field of the environment include preserving, protecting and improving the quality of the environment, as well as 'protecting human health.'[13] Although these goals are concerned with policy competences, as opposed to the protection of environmental *rights*,[14] they highlight the breadth of environmental measures that the EU is competent to carry out. Second, and based on these competences, the EU has indeed adopted a series of environmental laws judged to be

[10] Explanatory notes to the Charter stipulate that Article 37 draws inspiration from, *inter alia,* national constitutions, see [2007] OJ C 303/07.
[11] Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters 2161 UNTS 447; 38 ILM 517 (1999).
[12] Article 4(2)(e) TFEU indicates that the environment is a shared competence.
[13] Moreover, Article 191(1) TFEU states that EU's objective is to ensure the prudent and rational utilisation of natural resources, and promote measures at international level to deal with regional or worldwide environmental problems. In addition, Article 191(2) TFEU lays down a number of principles to guide lawmakers and the courts in applying and interpreting EU law, including precaution, prevention, rectification at source, and the polluter pays principle.
[14] R. O'Gorman, 'The Case for Enshrinking a Right to Environment within EU Law' (2013) 19 European Public Law 583, 587.

'among the world's strictest and most ambitious'.[15] This has resulted in the EU being crowned a leader and 'green giant', pursuing progressive environmental goals also internationally.[16] Third, the high profile of environmental protection in the EU is projected institutionally. More precisely, the Directorate-General for Environment (DG ENV), and the more recent, Climate Action (DG CLIMA), work exclusively on environmental, and climate change-specific issues, taking a lead on these topics at a global level.[17] It is important to mention also the CJEU here, as it frequently engages in balancing between environmental and economic objectives in the application of free movement provisions.[18] Cases such as *Danish Bottles*[19] and *Commission v Belgium (Walloon Waste)*[20] are now classic examples of instances where the CJEU justifies restrictions to trade on the grounds of environmental protection. The CJEU tends to defend its position by alluding to the protection of the environment as 'one of the Community's essential objectives'.[21] Fourth, and most importantly in the context of this chapter, a clear indication of EU's commitment to safeguarding the environment is Article 37, which protects the environment within a human rights framework. It is to this provision, and its key features, I now turn.

A) Article 37 of the Charter

Article 37 stands under the 'Solidarity' part of the Charter, and thus makes the point that the environment is a common concern.[22] Similarly to Article 3(3) TEU, it reads as follows: 'A high level of environmental protection and the improvement of the quality of

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15 D. Kelemen and D. Vogel, 'Trading Places: The Role of the United States and the European Union in International Environmental Politics' (2009) 43 Comparative Political Studies 427, 432.
16 N. Vig and M. Faure (eds), *Green Giants? Environmental Policies of the United States and the European Union* (MIT Press 2004), J. Vogler and H. Stephan, 'The European Union in Global Environmental Governance: Leadership in the Making? ' (2007) 7 International Environmental Agreements: Politics, Law and Economics 389, S. Bogojević, 'European Union Climate Change Law: Leadership ambitions in a Multilateral Regime' in Kevin Gray, R Tarasofsky and Cinnamon Carlarne (eds), *Oxford Handbook of International Climate Change Law* (Oxford University Press 2014).
17 For an overview of the role of the Commission in EU environmental matters, see E. Schön-Quinlivan, 'The European Commission' in Andrew Jordan and Camilla Adelle (eds), *Environmental Policy in the EU: Actors, Institutions and Processes* (Routledge 2013) 95.
18 For a comprehensive overview see N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014).
19 Case C-302/86 *Commission v Denmark (Danish Bottles)* [1988] ECR 4607.
20 Case C-2/90 *Commission v Belgium* [1992] ECR I-14431.
21 *Danish Bottles* (n 19).
22 K. Hectors, 'The Chartering of Environmental Protection: Exploring the Boundaries of Environmental Protection as Human Right' (June 2008) European Energy and Environmental Law Review 165, 167.

the environment must be integrated into the policies of the Union and assured in accordance with the principle of sustainable development.' As the Charter more generally, Article 37 only applies within the field of EU law. Two points are important to note here. First, and according to Article 51(1), the Charter addresses 'the institutions and bodies of the Union'. This means that it requires these to secure and integrate a high level of environmental protection and the improvement of the quality of the environment to all Union policies – subject to the principle of subsidiarity.[23] The Charter also applies to the Member States but 'only when they are implementing Union law.'[24] As Morgera and Marín-Durán explain, EU environmental law covers a broad spectrum of issues, and moreover, most environmental laws implemented in the national legal system have EU origin.[25] As a result, it is difficult to specify which EU instruments fall within the field of application of Article 37, which indicates that, in this regard, Article 37 may have a wide-reaching application. To understand its enforceability, and ways in which it is applied before the CJEU, two key features of Article 37 need first to be outlined: its backdrop in a clash between environmental protection and human rights, and its legal nature as a principle.

a) Environmental Protection and Human Rights: friends or foe?

Environmental protection and human rights have a complicated relationship.[26] A common view has been that environmental concerns are antithetical to human rights. Gearty gives a valuable account of the intrinsic clash between these two interests, traced back to the way in which human rights are framed as *human,* as opposed to any other right:[27]

> The subject of human rights is, as it declares for all to see in the way that it describes itself, a field that is concerned not only with humans but also with the rights that flow from being human, rather than from being anything else: not an animal (even a Great Ape) or a fish for example, and certainly not a tree or a habitat or a lake, no matter how (objectively) magnificent.

[23] Article 51(1) of the Charter.
[24] Ibid.
[25] E. Morgera and G. Marín-Durán, 'Article 37' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 983, 985.
[26] Literature on environmental protection and human rights is vast, and the following is only one out of many examples thereof, D. Anton and D. Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011).
[27] C. Gearty, 'Do human rights help or hinder environmental protection?' (2010) 1 Journal of Human Rights and the Environment 7, 7.

Over and above this, environmental protection is often projected as competing with a particular human right; that is, the right to property. Coyle and Morrow explain that the reason for this is that the modern legal order reflects a view of property understood overwhelmingly in terms of subjective, rather than objective right, which, moreover, depicts 'environmental protection as instrumentally and prudentially desirable rather than morally necessary.'[28] Due to the right to compensation should a breach be proved, property rights are, similarly to environmental law, viewed narrowly, or mainly as 'inhibitors' to environmental action.[29] Clearly, these polarising views have conceptually distinct starting points not shared by all scholars.[30] Still, the general understanding is that a revised ontological foundation of property is required,[31] or at least the acknowledgment of the 'symbiotic' connection between property rights and environmental regulation[32] to move this debate forward.

And it is important to move this debate forward. One reason for this is that transforming the struggle for environmental protection and ecological wellbeing into a common struggle for human dignity would, as argued by Weston and Bollier, 'better capture responsible attention and heightened pressure in the search for enduring solutions.'[33] Along similar lines, a constitutionalised EU environmental right would enable the EU to increase the level of environmental protection across the Union.[34] The idea is thus is that a human rights perspective on environmental protection holds the

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[28] S. Coyle and K. Morrow, *Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing 2004) 157.
[29] Gearty (n 27) 9.
[30] Brubaker, for instance, argues that environmental protection can only be secured through the creation of private property rights in resources shared in common, see E. Brubaker, *Property Rights in the Defence of Nature* (Earthscan 1995). Moreover, the right to property, as codified in the Convention, is not necessarily seen as inhibiting environmental protection, or vice versa, see *Hatton v UK* (2003) 37 EHRR 28.
[31] K. Morrow, 'Rights and property paradigms: challenging the dominant construct hegemony' (2012) 3 Journal of Human Rights and the Environment 169, A. Grear, 'Human Bodies in material space: lived realities, eco-crisis and the search for transpormation' (2013) 4 Journal of Human Rights and the Environment 111.
[32] Scotford and Walsh offer a terrific account of ways in which environmental law defines property law in an English context through administrative systems, see E. Scotford and R. Walsh, 'The Symbiosis of Property and English Environmental Law - Property Rights in a Public Law Context' (2013) 76 Modern Law Review 1010.
[33] B. Weston and D. Bollier, 'Toward a recalibrated human right to a clean and healthy environment: making the conceptual transition' (2013) 4 Journal of Human Rights and the Environment 116, 123. Literature on the reasons why the environment ought to be covered by a human rights perspective is vast, see for instance A. Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613.
[34] O'Gorman (n 14) 599-604.

potential of increasing environmental standards, and ultimately reconciling human and environmental rights clashes.[35]

In recent decades, the legal doctrine has attempted to establish conceptual links between environmental and human rights claims, starting with the Stockholm Declaration in 1972, which stipulates that a clean environment is necessary to the enjoyment of basic human rights.[36] In the EU, the discussion about creating a particular bill of rights or, the Charter of fundamental rights, took stage in the Cologne European Council of 1999, leading to a legally binding Charter a decade later.[37] With regard to the protection of the environment, these initial discussions stressed the importance of fulfilling 'the commitments undertaken in Kyoto to reduce greenhouse gas emissions'.[38] Based on the need to act on climate change, it was proposed that the Charter stipulates the need to 'incorporate the requirements of the environment' (the integration principle) and 'sustainable development into other Community policies' (the principle of sustainable development).[39] As such, it was an international environmental law obligation, and ensuring compliance thereof, as opposed to a grassroots ecological movement that first put environmental protection on a human rights agenda in the EU.

Although the final version of Article 37 does not mention the objective of combatting climate change,[40] the integration principle and sustainable development form a substantial part of it. Indeed, as noted in the explanatory notes to the Charter, Article 37 is based *inter alia* on Articles 3(3) TEU and 11 TFEU, which outline sustainable development and the integration principle respectively as one of the core goals of the EU.[41] The symmetry between Article 37 and these principles raises the question whether Article 37 is simply a reaffirmation of already existing Treaty provisions, or if it indeed is of added legal value.

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35 Cf. L. Krämer, *EU Environmental Law* (7 edn, Sweet & Maxwell 2011) 449-450. Krämer set forward the argument that policy-orientated solutions are more effective in protecting the environment than human rights.

36 For an overview see ibid and Hectors (n 22).

37 For an overview of the history of the Charter, see <http://www.eucharter.org/home.php?page_id=65>.

38 Conclusions of Cologne European Council 3-4 June 1999, para. 29, available at <http://www.europarl.europa.eu/summits/kol1_en.htm>.

39 Ibid, para. 30.

40 The need to combat climate change, however, is listed in Article 191(1) TFEU.

41 See n 10.

Deciding on this point is difficult, as clearly outlined by Morgera and Marín-Durán,[42] because the integration principle and sustainable development are vaguely formulated both in the Charter and the Treaty provisions, and rarely defined in practice.[43] For instance, it is unclear what exactly needs to be 'integrated' in EU policies to fulfil the integration principle, which measures ought to be carried out to comply with a 'high level of environmental protection', and what precisely 'sustainable development' demands.[44] Moreover, Lee argues that the fact that the integration principle is not tied to any particular policy area contributes to the lack of its application beyond environmental policy.[45] According to the explanatory notes to the Charter, Article 37 draws inspiration also from the Member States and their common constitutional traditions.[46] However, the heterogeneity of environmental protection in the national legal orders offers little assistance in interpreting the integration principle and sustainable development, or Article 37 more generally.[47] As a result, Article 37 is too vague to result in direct effect.[48] This means that despite EU's progressiveness in positioning environmental protection within a human rights framework, Article 37 is of limited legal significance to individual applicants, or NGOs attempting to pursue environmental protection before national courts and institutions.

b) Principle as opposed to a Right

Reading Article 37, there is no mention of environmental *rights*. Indeed, the Charter draws a distinction between rights and principles and environmental protection belongs to the latter. Two important implications follow therefrom. First, the Charter fails to establish an autonomous, substantive right to a high level of environmental protection. This means that Article 37 offers no individually justiciable right to environmental

42 On this point, see also J. Jans, 'Stop the Integration Principle?' (2011) 33 Fordham International Law Journal 1533.
43 Cf. H. Vedder, *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (Europa Law Publishing 2003).
44 E. Morgera and G. Marín-Durán, 'Article 37' (n 25) 983.
45 M. Lee, 'The environmental implications of the Lisbon Treaty' (2008) 10 Environmental Law Review 131, 134.
46 See n 10.
47 On this point, see M. Lombardo, 'The Charter of Fundamental Rights and the Environmental Policy Integration Principle' in Giacomo di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, vol 217-241 (Springer 2011) 217, 220.
48 Hectors (n 22) 168.

protection, or to an environment of 'any particular quality.'[49] Article 52(5) of the Charter offers further explanation on this point, stipulating that principles 'shall be judicially cognisable only in the interpretation' of national measures falling within the scope of EU law and EU secondary legislation, as well as in 'ruling on their legality.' Following from this, Article 37 can only be applied in the annulment of relevant EU acts, or as an interpretative tool[50] and, more importantly, when a EU measure exists.[51]

Second, distinguishing Article 37 from, for instance political rights found in the Charter, creates an uneasy distinction between various Charter provisions and their enforceability. For instance, the freedom of expression is a right that is 'fully justiciable', meaning that it allows any legal person to judicially enforce this right on a third party, including public authorities, without any further legislative implementation of the right.[52] Granting environmental protection such enforceability would undeniably give rise to numerous difficulties. To start with, environmental rights may refer to environmental procedural rights, the right *of* environment, or the right *to* environment – each creating a distinct legal framework through which to secure environmental protection.[53] Moreover, the definition of 'high level of environment protection' is tricky to pin down. Does it demand the protection level to be a clean, balanced, or safe environment, or a different type of protection? Any such right would also give rise to liability issues, which is a core reason why decision-makers may prove reluctant in introducing constitutional environmental rights.[54] This helps in part to explain why the fundamental right to environment is deemed 'one of the most controversial social rights.'[55] Still, and as highlighted by Groussot and Pech, the risk with the Charter's distinction between rights and principles is that it may not only undermine the concept of subjective rights, here

[49] E. Morgera and G. Marín-Durán, 'Article 37' (n 25) 984.
[50] Lombardo (n 47) 222.
[51] N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (n 1) 45.
[52] X. Groussot and L. Pech, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' (2010) 173 Foundation Robert Schuman Policy Paper 1, 7.
[53] O'Gorman (n 14) 584. The type of 'rights' that may be constructed in order protect the environment are many. For an overview, see A. Postiglione, 'Human rights and the environment' (2010) 14 International Journal of Human Rights 524, and for a suggestion of a new rights-approach in this regard, see F. Francioni, 'International human rights in an environmental horizon' (2010) 21 European Journal of International Law 41
[54] E. Daly and J. May, 'Constitutional Environmental Rights and Liabilities' (2012) 3 Environmental Liability 75.
[55] M. Sanchez-Galera, 'Fundamental Rights and Private Law in Europe: A Fundamental Right to Environment' (2008) 16 European Review of Private Law 759, 759.

environmental protection, but also 'the concept of human rights itself.'[56] Over and above the limitations of a principle-based approach to environmental protection, Article 37 fails to establish environmental rights of a procedural character.[57] Such rights exist in EU environmental secondary law,[58] as well as in international environmental law,[59] providing rights of participation in environmental decision-making, access to environmental information, and ability to access justice on environmental matters.[60] This suggests that existing EU environmental law provides a broader scope of environmental protection than Article 37.

In sum, the discussion so far briefly outlines some core features of Article 37. It shows that Article 37 provides neither substantive nor procedural environmental protection, and as such, it adds limited legal value to private litigants pursuing environmental protection. These limitations clearly reflect a 'lack of consensus among the Member States'[61] to secure environmental rights via a human rights perspective, illustrated by couching Article 37 among 'principles' as opposed to rights in the Charter. Still, Article 37 may prove useful when the CJEU interprets and reviews EU law, which is scrutinised below.

III Litigating EU Environmental Human (Rights)

Commission's annual reports show a steady increase in judicial application of the Charter.[62] Unfortunately, Article 37 fails to contribute to this statistics, as it rarely emerges as a consideration in the relevant jurisprudence. Here I chart Article 37 on CJEU case law following the implementation of the Charter, which helps to show that

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56 Groussot and Pech (n 52).

57 On this note, see S. Douglas-Scott, 'Environmental Rights in the European Union - Participatory Democracy or Democratic Deficit?' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1996) 109, 109.

58 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13.

59 Århus Convention (n 11).

60 O'Gorman (n 14) 584.

61 Ibid 991.

62 See European Commission Reports from 2011, 2012 and 2013 available at: <http://ec.europa.eu/justice/fundamental-rights/files/charter_report_en.pdf>, < http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf> and COM(2014) 224 final. See also <http://ec.europa.eu/justice/newsroom/fundamental-rights/news/140414_en.htm>.

environmental protection consideration, and Article 37 more specifically, emerges in two specific contexts: as justification for the breach of other Charter rights, or as validation for environmental protection coupled with other Charter rights. This is illustrated next.

A) Environmental Protection as Justification for breach of Charter Rights

Environmental protection is most commonly included in judicial deliberations concerning the Charter as a possible justification for breach of EU's fundamental rights, and primarily the right to property, and the principle of equality and non-discrimination. The general rule concerning the right to property, as established by CJEU jurisprudence, is that it 'must be viewed in relation to its social function',[63] meaning that it is not an absolute right. More precisely, the exercise of property rights may be restricted 'provided that those restrictions in fact correspond to *objectives of general interest*'[64] – a category to which the EU courts includes the protection of the environment. According to CJEU case law, ecological concerns are thus capable of justifying restrictions on Article 17 of the Charter.[65]

Although property rights provide important mechanisms through which to protect property interests, including right to compensation, the CJEU often limits their application to give effect to environmental law, and primarily nature conservation. For instance, in *Cascina Tre Pini,* the CJEU found restrictions of the right to property based on nature conservation laws justified also when the site in question might be declassified as a conservation object.[66] Similarly, the freedom to conduct a business, as codified in Article 16 of the Charter, and the general principle of EU law to protect business secrets may justifiably be restricted, according to the CJEU, by environmental protection. Here, that included disclosing the name of waste producers in accordance with waste regulation.[67]

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[63] Case C-530/11 *Commission v UK* [2014] nyr, para. 70.
[64] Ibid (emphasis added). AG Kokott argued that environmental protection may justify restricting right to property, extending also to interim relief, see Opinion AG Kokott delivered on 12 September 2013. See also Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, para. 355.
[65] More precisely, the CJEU argues that protection of the environment constitutes a legitimate objective, 'capable of justifying a restriction on the use of the right to property.' Case C-416/10 *Križan* [2013] nyr, para. 114.
[66] Case C-301/12 *Cascina Tre Pini* [2014] nyr.
[67] Case C-1/11 *Interseroh Scrap and Metal Trading GmbH* [2012] nyr.

Balancing property rights and environmental protection, however, is a difficult act. Are hypothetical, as opposed to actual, interests in nature conservation able to establish just and proportionate restriction on the enjoyment of property rights? This question was raised in *Siragusa* – a preliminary reference from Italy – that concerned a property owner, who was required under landscape conservation law to restore a site to its former state following his works thereon.[68] The CJEU, however, ducked the question by finding the case inadmissible and outside the scope of EU law. It should, nevertheless, be mentioned that the CJEU has, in previous instances, held that property right holders may justifiably be subject to the condition that they implement any necessary environmental remedial measures.[69]

The second group of cases that justify breach of Charter rights on the basis of environmental protection concern the principles of equality and non-discrimination as codified in Articles 20 and 21 of the Charter. Similarly to the CJEU's application of the right to property, these stipulations are not absolute. According to the EU courts, the difference in treatment or, a breach of the principles of equality and non-discrimination, is justified if it is based 'on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.'[70]

The question whether environmental consideration could fulfil such criterion is raised in several cases. In *Industrie du bois de Vielsalm & Cie (IBV) SA*, for instance, the Walloon Region privileged sectors using cogeneration based on biomass,[71] and in cases concerning the EU Emissions Trading Scheme (EU ETS), specific industries have been favoured both by EU and national legislation specifying methods of allocation of emissions allowances[72] and determining the coverage of the EU ETS.[73] These rules give advantage to certain industry sectors but based on environmental motivation, and in such instances, the CJEU grants the legislator broad discretion.[74] Examples of the legislator seeking to establish a 'complex system',[75] such as the EU ETS, to deal with climate

[68] Case C-206/13 *Siragusa* [2014] nyr, para. 14.
[69] Case C-379/08 *Raffinerie Mediterranee (ERG) SpA and others* [2010] ECR I-02007.
[70] Ibid para. 47.
[71] Case C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA* [2013] nyr.
[72] C-566/11 *Iberdrola and Others* [2013] nyr.
[73] Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-09895.
[74] See for instance *Industrie du bois de Vielsalm* (n 71) para. 61.
[75] *Arcelor* (n 73) para. 57.

change, or where the legislator attempts to comply with international environmental law,[76] are particularly favourably judged by the CJEU.

B) Environmental Protection Coupled with other Charter Rights

Yet another way in which environmental protection appears in judicial deliberations at EU level is when the CJEU couples Article 37 with other Charter rights, and primarily with protection of health, and the right to effective judicial protection. An important point here is that the EU courts explicitly refer to Article 37, as opposed to the previous group of cases that focus on 'environmental consideration' more broadly.

Commission v Austria[77] is an important environmental law case illustrative of this categorisation. It is concerned with a selection of Austrian sectorial traffic prohibitions, which were enacted with the aim of improving air quality on a heavily used motorway, A12, between the Austrian-German frontiers. The Commission held that these prohibitions hinder the free circulation of goods, and, as such, are contrary to the Treaty.[78] Austria, on the other hand, argued that over and above secondary EU law on air pollution, it is under the obligation to secure and respect the private and family life of citizens, which, it claimed, includes acting on air pollution so as to protect citizens against harm to health and the quality of life.[79] Noteworthy is that Austria referred to the right to family life under Article 7 of the Charter and Article 8(2) of the Convention but refrained from mentioning Article 37.

The CJEU found the sectorial traffic prohibitions disproportionate to their aim and subsequently it concluded that Austria is in breach of the Treaty. More importantly, the CJEU made several important claims on the relationship between environmental protection, trade and the Charter. First, it confirmed that environmental considerations may justify hindrance to free movement provisions:[80]

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[76] Both in *Arcelor,* ibid, and *Industrie du boid de Vielsalm* (n 71) the national measures implemented EU environmental law that sought to comply with international environmental law, and primarily the Kyoto Protocol.
[77] Case C-28/09 *Commission v Austria* [2011] ECR I-13525. For an earlier, and related case originating from Austria, see Case C-112/00 *Schmidberger* [2003] ECR I-05659.
[78] And Article 34-35 TFEU more precisely, see *Commission v Austria*, ibid, paras. 54-77.
[79] Ibid para. 83.
[80] Ibid para. 119.

> It is settled case-law that national measures liable to obstruct intra-Community trade may be justified on one of the public-interest grounds set out in Article 30 EC, such as the protection of human health and life, or one of the overriding requirements relating inter alia to protection of the environment, provided that the measures in question are proportionate to the objective sought.

The CJEU further elucidated the link between environmental and health protection, stating that the latter is an inherent part of the former:

> Those objectives [environmental and health protection] are closely linked, in particular in connection with the fight against air pollution, the purpose of which is to limit the dangers to health connected with the deterioration of the environment. The objective of protection of health is therefore already incorporated, in principle, in the objective of protection of the environment

This is in line with earlier case law, such as *Mickelsson and Roos,* where the CJEU found protection of the environmental and protection of health and life of humans, animals and plants to be 'closely related objectives'.[81] This blurring of lines, or indeed intertwined nature of health and environment is an emerging phenomenon in CJEU case law. However, the court is clear in stating that the Charter *reaffirms* provisions on the environment and health already encompassed in the Treaty. As such, it explains that the Charter codifies, as opposed to adds legal value, to existing levels of environmental protection:[82]

> in accordance with Articles 6 EC and 152(1) EC, the requirements of environmental protection and public health must be taken into account in the definition and implementation of Community policies and activities…The transversal and fundamental nature of those objectives is also reaffirmed in Articles 37 and 35 respectively of the Charter.

The CJEU also couples Article 37 with other Charter provisions with the objective of securing judicial protection on environmental matters.[83] In *Edwards,* CJEU was asked to interpret an obligation to ensure that judicial costs in environmental proceedings are not 'prohibitively expensive'. AG Kokott referred to Article 47 of the Charter, pointing out that it expressly relates to the 'protection of *individual* rights.'[84] However, by coupling

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[81] Case C-142/05 *Mickelsson and Roos* [2009] ECR I-04273, para. 33.
[82] *Commission v Austria* (n 77) para. 121.
[83] Moreover, but without reference to Article 37, the CJEU has interpreted environmental protection in conjunction with the rights of effective judicial protection and effectiveness and equivalence against the national provision, see Case C-463/11 *L v M* [2013] nyr, para. 35, 38-39. See also, Opinion of AG Wathelet delivered on 19 December 2012 to this case, para. 70.
[84] AG Kokott, Opinion delivered on 18 October 2012, Case C-260/11 *Edwards* [2012] nyr, para. 39.

Article 47 with Article 37, AG Kokott broadened the scope of judicial protection in the EU legal order. More precisely, she argued:

> Legal protection in environmental matters, on the other hand, generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims under Article 191(2) TFEU and Article 37 of the Charter of Fundamental Rights.

Thus, AG Kokott used the communal nature of the environment to construct a broad interpretation of judicial protection. Moreover, AG Kokott portrayed environmental protection as a special case as 'the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations'.[85] Following from this, she could argue that prohibitive judicial costs must be prohibited. Although the CJEU did not follow the same analogy as AG Kokott, it stated that one of the key objectives of the EU legislature is to 'to ensure wide access to justice and to contribute to the improvement of environmental protection'.[86] This led the court to conclude that the national courts have the obligation to rule so as not to restrain the access to justice due to high litigation costs. Effect was thus given to a high standard of legal protection through double application of the Charter, or more precisely, by coupling Article 37 with other Charter provisions.

C) Reflections

The discussion so far highlights at least three important points. First, it illustrates the implications of codifying environmental protection as primarily an interpretative tool, as opposed to an autonomous right. The fact that Article 37 is rarely, if ever, used on its own, but instead coupled with other Charter rights, is one such consequence. The fact that the CJEU ties Article 37 *inter alia* to health protection, however, is neither surprising, nor a novelty. Besides the point that health and environmental protection are inevitably interlinked and similarly formulated in the Charter, the Commission is under the obligation following Article 114(3) TFEU to consider 'health, safety, environmental

[85] Ibid para. 62.
[86] Case C-260/11 *Edwards* [2012] nyr, para. 44.

protection' and take 'as a base a high level of protection' in approximating laws.[87] As such, these interests are traditionally coupled – both by the legislator, and the courts – within the EU legal order.[88] What is significant, nevertheless, is that this particular coupling underlines the anthropocentric feature of Article 37, meaning that it is a provision with limited independent environmental significance and meaning.

Here it is important to highlight that AG Colomber promotes a more extensive use of Article 37, despite the restrained wording of the Charter. Prior to the implementation of the Charter, AG Colomber argued that individual applicants could enforce Article 37 against regulatory omissions by the Member States:[89]

> Environmental protection currently occupies a prominent position among Community policies. Furthermore, the Member States also have a crucial responsibility in that area. Community citizens are entitled to demand fulfilment of that responsibility under Article 37 of the Charter of Fundamental Rights of the European Union.

The CJEU did not follow this line of judicial reasoning. Even in instances where a 'softer' interpretative view of environmental protection is applied and direct reference to Article 37 is made by, for instance, the Advocate Generals,[90] the CJEU rarely mentions Article 37, or develops any analysis regarding its application. This reaffirms the modest judicial use of Article 37 in European jurisprudence.

Second, analysing case law concerning the Charter shows that environmental protection is used as justification for the breach of other Charter rights, and primarily the right to property. This is in line with Article 52(5) of the Charter that stipulates that principles, such as Article 37, are judicially cognisable in ruling on the legality of implementing and EU law. It is also in line with recent ECtHR case law on the right to property under the Convention, which similarly allows restrictions to property rights

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87 Also, Article 191 TFEU mentions health protection as part of EU's environmental competences and objectives.

88 Another example is Case C-343/09 *Afton Chemical* [2010] ECR I-07027.

89 Opinion of AG Ruiz-Jarabo Colomer, delivered on 8 January 2004, Case C-87/02 *Commission v Italy* [2004] ECR I-05975 para. 36. CJEU did not make a similar point.

90 Opinion AG Kokott delivered on 17 November 2011 to Case C-567/10 *Inter-Environnement Bruxelles ASLB* [2012] nyr, para. 20. AG Kokott, in interpreting environmental secondary law and its provisions, argued that 'the general objective of European environmental policy, that is to say a high level of protection (Article 3(3) TEU, Article 37 of the Charter of Fundamental Rights of the European Union and Article 191(2) TFEU)…leads to any other interpretation.' AG Kokott similarly referred to Article 37 in Opinion delievered on 30 May 2013 to Case C-151/12 *Commission v Spain* [2013] nyr, para. 7. Neither of these cases saw CJEU comment on Article 37 in the judgment.

based on environmental considerations.[91] What is remarkable with the CJEU case law on this point, nevertheless, is that it does not explicitly refer to Article 37, but instead alludes more generally to 'environmental protection' as an overarching objective of the EU. This means that Article 37 is never listed as standing in direct conflict to any other rights or principles in the Charter, which may indicate an indirect application of the integration principle in the CJEU's reasoning.

As a final point, let us return to the initial question whether the EU has, through the implementation of the Charter and the inclusion of Article 37 therein, initiated an environmental rights revolution. Clearly, Article 37 is valuable in the way that it frames environmental protection as a human rights issue. Unfortunately, the specific formulation of Article 37, and the meaning given to it by the CJEU, makes it is a weak environmental provision, equipped with limited judicial impact. The hope for environmental protection is thus left to be secured elsewhere.

IV Who Litigates and Where?

In the absence of a constitutionalised environmental right, individual applicants and NGOs are left to rely on EU secondary law to access the courts on environmental grounds and secure environmental protection.[92] In this regard, the CJEU has interpreted national standing rules broadly in light of the Århus Convention. The Convention promotes environmental protection *inter alia* by providing a right to all members of the public inasmuch as they have 'a sufficient interest' or, alternatively, 'maintain impairment of a right' to challenge the legality of any decision, act, or omission relating to their request under the Convention for information.[93] The CJEU has interpreted recent case law relating to the Convention, and its implementation in EU law, in a way so as to impose requirements on the Member States to allow broad standing rights on environmental matters before the national courts.

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91 N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (n 1) offers a good overview of the ECtHR case law on the inclusion of environmental considerations in applying for instance right to property and right to life.

92 See ibid, S. Bogojević, 'CJEU, can you hear me? Access to Justice in Environmental Matters' (2013) 16 Europarättslig Tidskrift 728.

93 Article 9(1)-(2) Århus Convention (n 11).

This approach is clearly illustrated in the so-called *Slovak Brown Bear* case,[94] in which the Slovak Supreme Administrative Court asked the CJEU whether Article 9(3) of the Convention – that is, enabling all members of the public to have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment – is directly applicable, or has direct effect. The CJEU replied in the negative but added that the national courts should interpret national procedural laws so as to give environmental NGOs standing – even when there is no such explicit provision:[95]

> it is for the referring court to interpret, *to the fullest extent possible*, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Århus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation…to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law

This case has had significant impact on several national legal systems in the EU. Sweden, for instance, amended both substantive and procedural national laws following this judgment so as to comply with EU law and guarantee environmental NGOs access to national courts.[96] This is highly controversial considering that the Convention does not in fact confer any rights of standing.[97]

Similarly, in *Djurgården*, the CJEU precluded Swedish authorities to impose a minimum number of members in order to grant *locus standi* to environmental NGOs. It argued:[98]

> national rules must not be liable to nullify provisions which provide that parties who have sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring action before the competent courts.

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[94] Case C-240/09 Lesoochranarske zokupenie VLK v Ministerstvo zivotneho prostredia Slovenskej republiky [2011] ECR I-1285, para. 30-31. ('Slovak Brown Bear')
[95] Ibid para. 51 (empahsis added).
[96] Y. Epstein and J. Darpö, 'The Wild Has no Words: Environmental NGOs Empowered to Speak for the Protected Species as Swedish Courts Apply EU and International Environmental Law' (2013) 10 Journal of European Environmental and Planning Law 250, 255-256.
[97] C. Poncelet, 'Access to Justice in Environmental Matters - Does the European Union Comply with its Obligations?' (2012) 24 Journal of Environmental Law 287, 290.
[98] Case C-263/08 Djurgården-Lilla Värtans [2009] ECR I-9967, para. 45.

The CJEU thus, restricts Member States from rendering access to justice for environmental NGOs to national courts 'simply imaginary' – although it recognises that Member States may impose certain standing tests.[99] In an equally forceful Opinion to this case, AG Sharpston, argues that 'any restriction whose effect is to hinder rather than to facilitate access to administrative and judicial procedures for environmental organisations must…evidently, be rejected'.[100] This argument is based on recognising the importance of NGOs in protecting the environment. She explains that the provisions on access to justice in environmental matters are based on the idea that nature belongs to us all, and preventing environmental damage is our collective responsibility:[101]

> not just the responsibility of individuals or isolated interests…The individual is protected by acting in a group and the group is collectively strengthened by its individual members. Both the individual and the general interest are thus better protected; and the benefits for all concerned outweigh the disadvantages. This is why both measures accord an important role to non-governmental organisations promoting environmental protection.

Arguably this case law is only concerned with procedural safeguards, which the national authorities still need to implement and abide by. A recent study on the implementation of the Convention in the Member States, however, explains that this jurisprudence – requiring Member States to interpret national procedural and substantive law so as to give effect to standing for environmental NGOs – has played a pivotal role in developing standing provisions in many European countries.[102] This shows that despite the bleak picture of the judicial applicability of Article 37, individual applicants and environmental NGOs may still enjoy procedural environmental rights stemming from secondary environmental law, enforceable primarily before national courts.

IV Conclusion

[99] B. Müller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law' (2011) 23 Journal of Environmental Law 505.
[100] Opinion AG Sharpston delivered on 2 July 2009 to Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967, para 74.
[101] Ibid para. 59.
[102] J. Darpö, 'Effective Justice? Report of the Study on the Implementation of Articles 9(3) of the Århus Convention in Seventeen of the Member States of the European Union' in Jan Jans, Richard Macrory and A-M Molina (eds), *National Courts and EU Environmental Law* (Europa Law Publishing 2013) 169.

Article 37 is an intriguing Charter provision. On the one hand, it boldly includes environmental protection within a human rights framework and in that sense adds innovation to the Charter by including, in the same instrument, social rights along with the more traditional civil and political rights. In this way, and as put by Douglas-Scott, the Charter presents the indivisibility of human rights.[103] Upon closer examination, however, it is apparent that Article 37 is a weakened version of European environmental protection:[104] it offers no substantive, or procedural environmental rights, making it of limited use for individual applicants, and serves mainly as an interpretative tool in reviewing acts. As such, it is of no surprise that there is limited interest in the judicial application of Article 37, or that when it is used; it is in conjunction with other Charter provisions. Ultimately, Article 37 is analogues to 'a plus one' at parties. It may be invited, but only in the company of someone else, never on its own.

[103] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (n 4) 651.
[104] Hectors (n 22) 168.