Foreword

This book reveals a living epistemic community – one that came into being during the lifespan of the EC funded training project Active Charter Training Through Interaction of National Experiences (ACTIONES) and has been actively nourished ever since. This legal epistemic community engages intensely across the boundaries of practice and of academia, and has at its core the representatives of the original 17 partners to the project but it reaches much wider in terms of scope and relevance. The editors of this volume are to be congratulated for their systematic efforts to keep this community alive and kicking. Two years after the project ended, they organised a meeting in November 2019 with the contributors to this book, agreeing the overall approach of the book, the terminology to be followed and the research questions to be answered. The book has been constructed in an insightful manner in order to stimulate debate and dialogue across the boundaries of practice (lawyers, judges, officials) at European and national level and academia with every chapter written by an academic having a ‘comment’ chapter by a practitioner (and occasionally vice versa).

The idea has been from the very beginning to stimulate exchanges but also learning as to what the provisions of the EU Charter can and should mean in the real world of courts and litigants. The papers underlying the chapters in this book (some 25 in all including the comments) were nascent only 18 months ago. How much has changed in the wider context in this still short space of time. The COVID-19 public health crisis still now in its second wave at the beginning of May 2021 with no certainty as to its definitive or likely end. The crisis not only caused almost inevitable delays in the production process of the book but more fundamentally revealed and intensified already existing trends on a number of themes hugely central to this book. Events – crises in particular – can gloss over legal and technical problems when the need is great or perceived to be so. As we now hopefully emerge from this crisis, this book is very timely in identifying a number of gaps and issues for the future that the serious underlying work reflected in this book can underpin in a context where the centrality of the importance of the EU Charter cannot be underplayed. The editors are to be warmly congratulated for the long path they have trodden together on this theme of judicial interactions in and around the Charter of Fundamental Rights from conception to adolescence to what is now most
likely a vigorous young adulthood in terms of the salience and centrality of this topic in European law and in legal practice.

The editors’ introduction to the book positions the topic in a much broader field of enquiry. They deliberately and convincingly choose the umbrella term of ‘judicial interactions’ rather than the narrower judicial dialogue to include vertical and horizontal exchanges of various types. This inclusive approach enables specifically the analysis, in their words, of ‘the multi-dimensional impact of a wide array of judicial interaction techniques such as the preliminary reference procedure, consistent interpretation, comparative reasoning, mutual recognition and disapplication, between courts from various jurisdictions, with various specialisations, at various levels in the judicial hierarchy’. The specific issue to explore across the rich content of the many chapters is whether such interactions have in fact, in a coherent and coordinated manner, contributed to the safeguarding of human rights through the medium of the EU Charter in the various legal orders.

While progress is evident and positive points noted, it seems more in the line of the EU Charter having an incremental and indirect effect on national constitutional case law rather than a revolutionary one. Where Member States do not comply with the values enshrined in Article 2 Treaty on European Union in general, and the fundamental rights protection standards of the Charter in particular, there are gaps in the protection of fundamental rights, especially in Member States (Halmai). Sensitive political aspects of judicial interactions in particular at the horizontal levels are never far from the mind with topics such as judicial independence under the spotlight, as in the contributions of Podstawa and Gwizdak. Even with Brexit there is some optimism from both the judiciary (McCloskey) and commentator (Coutts) that one way or another the provisions of the EU Charter will continue to resonate and be applied, albeit perhaps indirectly, to ensure effective legal protection across a host of roles, including as a source of legislative and judicial inspiration as well as in the context of transnational forms of judicial cooperation that are retained in some form and with new ways of participating.

In terms of substance, Part II of the book focuses on a selection of legal areas where the EU Charter is particularly prominent or salient, in particular in the areas of migration and asylum, non-discrimination and consumer protection. Time has not stood still since the academic meeting in 2019 and the drafting of these chapters and if anything the relevance of the topic is ever more acute and urgent given developments in the meantime, in particular relating to the pandemic. The topic of the book as a whole and the importance of having a living and active epistemic community have got a considerable boost in COVID times in a manner that is likely to impact the specifics of the judicial cooperation and further interactions that are the thrust of this book.
Digitalisation is partly through relying on private actors and pushing out the boundaries of the public-private divide and this leads to possible de-politicisation/de-legalisation in a context of Europeanisation. It was already there but COVID-19 makes it crystal clear in a manner that was less structurally visible before. The broader topic of judicial interaction lends itself quite naturally to expanded frontiers, especially in the context of digitalisation, and topics such as the digitalisation of evidence in the context of criminal law proceedings, European Production Orders and European Preservation Orders indicate new boundaries for judicial interactions in Europe where the need to ensure fundamental rights protection is essential. It is fascinating moreover to discover in this specialised area of criminal law the extent to which direct public-private avenues of law enforcement cooperation including the judiciary are being envisaged in European regulations. This reflects a more fundamental paradigm shift away from the more traditional international law instruments enabling law enforcement cooperation, in particular the treaty based Mutual Legal Assistance (MLA) mechanisms and the general principle of non-interference in another State’s affairs.

The main idea behind the proposal by the Commission to facilitate cross-border access to electronic evidence is that certificates of judicial orders will be transmitted directly to the legal representatives of online service providers. The intention is to reduce response times in comparison to the more traditional state to state instruments; service providers will be obliged to respond within ten days or, in urgent cases, within six hours. The proposal comes in reaction to the perceived acute need to provide law enforcement and judicial authorities with modern instruments tailored to the new digital realities for obtaining cross-border access to data.

The proposal for a European Production Order and the European Preservation Order both allow the judicial authority of a Member State, the issuing State, to directly ‘order’ (note the recalibration from ‘assistance’) a provider offering the service in the EU to hand over or store the electronic evidence. They imply an extraordinary simplification of the procedure, with a significant reduction in deadlines for delivery of the evidence. But the most interesting general point is the obligation placed on the service provider irrespective of where they are and independent of the authority of another State and its legal system. Such extraterritorial or even de-territorialised criminal enforcement challenges long-established notions of international law and of the protection of individual rights and certainly leads to the risk of de-legalisation and the inability to ensure the effective protection of fundamental rights.

It is in my view not exaggerated to speak of a potentially tectonic shift in the way that judicial cooperation is being envisaged in these new European draft instruments for legislation given that the Commission conceives of mutual recognition as taking place not by any second judicial authority, but by the
The practice of judicial interaction in the field of fundamental rights

private service provider. Article 82(1) ensures mutual recognition of judicial decisions by which a judicial authority in the issuing State addresses a legal person in another Member State and even imposes obligations on it, without prior intervention of a judicial authority in that other Member State. Critically, legal representatives must comply with orders regardless of where the crime took place, where the provider is established, or where the evidence is stored, and irrespective of the nationality or residence of the target. The European Production or Preservation Order can lead to the intervention of a judicial authority of the executing State when necessary to enforce the decision. It is too early to say how exactly this will work in practice but it does seem like a very radical change to the existing system of judicial interactions, even as broadly framed in this book.

As this latter example shows the stage is set for interesting years ahead in terms of the manner in which judicial cooperation will take place, how and with whom. The frontiers are shifting through not only the new technological realities but also the envisaged actors including not only non-judicial public actors but also, more radically, completely private actors who are assigned tasks and functions within the emerging system of governance. This throws up a host of potential risks from the perspective of the effective protection of fundamental rights for the affected individuals and calls for sustained vigilance by joined-up epistemic communities as to how this may and should pan out in practice. This book represents the end of the beginning and reveals in a timely and salient fashion the need to carry this topic actively forward in new and creative ways.

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