

Background Paper

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The EU Charter of Fundamental Rights: What can it do?

► What is the Charter?

The [Charter of Fundamental Rights of the European Union](#) is a legally binding document that contains a list of human rights recognised by the EU. It could become a powerful tool available to influence policy makers or as a basis for litigation. Where EU institutions or bodies, and EU members under certain conditions, fail to comply with the Charter, individuals can make use of judicial and political mechanisms available to hold them to account. The Charter can also be used to pressure decision makers to bring policies and legislation under development in line with human rights standards. This document explains when and how the Charter can be used by advocates at EU and national level.

► When does the Charter come into play at EU level?

The Charter is an internal set of rules that is legally binding on the EU. This means that all the institutions and bodies of the EU must ensure that they do not violate the rights contained in the Charter when they take action, such as when creating EU law and policy. This applies to what the EU does both internally and in its external relations. The Charter comes into play at two stages: when EU legislation and policies are being negotiated, and when these laws and policies are being implemented by the EU or the member countries.

At the negotiating stage, the three key EU institutions involved in law and policy-making (the European Parliament, Council and Commission) have either specialised bodies or [procedures that help to ensure proposals are consistent with the Charter](#). The European Commission requires a significant proportion of legislation and policies to undergo an ‘impact assessment’, whereby the potential impact of proposals are analysed, [including any potential interference with human rights standards](#). Within the Commission, the [Directorate General for Justice](#) offers assistance on human rights to other Directorate Generals (or Departments) carrying out impact assessments.

Similarly, in the Council, all working parties preparing legislation or policies to be adopted must follow particular [guidelines to ensure compliance with the Charter](#), and can turn to a specialised body, the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), for assistance. In the European Parliament the [Committee on Civil Liberties, Justice and Home Affairs \(‘LIBE’ committee\)](#), made up of MEPs, is responsible for the protection of human rights inside the EU. Legislative proposals and policies put forward by the Commission that have a potential impact on fundamental rights inside the EU are generally dealt with by this committee, which can vote to amend the Commission’s proposals.

The [EU Strategic Framework and Action Plan on Human Rights and Democracy](#) commits the EU to promote respect for human rights in its relations with non-EU countries. The [Subcommittee on Human Rights \('DROI' committee\)](#) of the European Parliament and the Council's [Human Rights Working Group \(COHOM\)](#), chaired by the [European External Action Service](#), deal with human rights outside the EU. Although the Charter is not binding on countries outside the EU, the EU itself must ensure that it complies with the Charter when it acts, even when those actions have an impact outside its borders.

Each of the institutions also has a legal service which can be asked to provide advice on whether legislative and policy proposals are consistent with the EU treaties and the Charter before they are adopted. In the Commission, the legal service will always give its opinion on legislative proposals. However, these are not made publicly available.

After legislation or policies have been adopted, the Charter can be used by the Court of Justice of the EU (CJEU). If the EU has taken action that conflicts with the Charter, the CJEU can issue a judgment finding this to be contrary to EU law. It can then order that the legislation or policy be annulled – that is, it can declare that it no longer has legal force, or that the action in question must cease. There are limited opportunities for individuals to bring cases to the CJEU, as discussed below.

► When does the Charter come into play at national level?

Even though the Charter is primarily designed to prevent EU institutions from violating human rights, it can still be used at national level. This is because the EU itself does not usually implement legislation – this is done by local and national authorities, including national courts. When authorities at national level are implementing EU law, they must ensure that this is done consistently with the Charter. For example, EU asylum law (specifically, the ['Dublin II' Regulation](#)) establishes a system for transferring asylum seekers between EU countries. If an asylum seeker enters the EU in Greece, but then travels to the UK to make their asylum claim, the UK is allowed to transfer that person back to Greece to have his/her claim decided. However, if the asylum seeker is likely to be treated in an inhuman or degrading manner in Greece, the Charter would prevent him/her from being transferred. The Charter prohibits inhuman and degrading treatment, and when implementing EU asylum law the UK must ensure that it acts consistently with the Charter.

► How can the Charter be used by individuals or organisations?

The Charter can be used to influence the negotiating process, to ensure that any law and policy created is in line with human rights standards. It can also be used during litigation to complain that a law or policy that has already been created, or the way that this is implemented by the EU or a member country, breaches human rights standards. The above example on asylum law illustrates how the Charter can be used in litigation – and these were roughly the facts in the case of *N.S. v Secretary of State for the Home Department*. This case was brought before the UK courts where it was argued that the Charter should prevent the individuals, who were applying for asylum in the UK, from being returned to Greece. The court then paused the case and [requested the CJEU to give its opinion on the question](#). The CJEU stated that EU asylum legislation must be interpreted consistently with the Charter, and that this would prevent the UK from transferring these individuals back to Greece to have their asylum applications decided.

The fact that the UK court had to ask the CJEU for an opinion on the case shows that national courts are still not entirely clear about how to apply the Charter. But the decision of the CJEU

affirms that the Charter can apply in a national context. The only limitation to this is that the case in question must relate to how EU law is being applied by the country in question. If there is no EU law at issue, then the Charter is largely irrelevant. For example, in 2010 Hungary introduced controversial [reforms to media regulation](#) that raised serious questions about freedom of expression. However, it would be difficult to use the Charter in the national courts to complain about this legislation because even though EU law covers many forms of media transmissions between EU members, there is little EU law on media regulation inside EU countries. Where the Charter does not apply, litigants will have to rely on the national constitution or international human rights treaties, such as the European Convention on Human Rights.

Using the Charter before the CJEU directly is relatively difficult because the CJEU is not primarily designed as a human rights court to deal with individual complaints. The role of the CJEU is rather to judge whether the EU institutions themselves have failed to comply with EU law, or to offer guidance to national courts on how national authorities should interpret the meaning of EU law. This is reflected in the types of procedures through which an individual can get access to the CJEU.

The example of the *N.S.* case, given above, shows how the [‘preliminary reference’ procedure](#) works. This is the easiest means open to an individual of getting a case heard by the CJEU. Where an individual brings a case in the national courts and a question over the meaning of EU legislation arises, the national court may decide to refer a series of questions to the CJEU asking it to give its opinion. The CJEU may give its opinion on the meaning of EU legislation, and whether it is being correctly implemented by the national authorities. This includes the question of whether the government is complying with the Charter in the way that it is implementing EU law. As part of this procedure, the CJEU can also examine whether EU law itself is in conformity with the Charter. This makes the preliminary reference procedure an indirect way of attacking EU legislation itself, and not just the way that the legislation has been applied by national authorities. The case of [Association belge des Consommateurs Tests-Achats, ASBL et al. v. Conseil des ministres](#) is a recent example. This concerned a case in the Belgian courts where a consumer organisation argued that Belgian legislation implementing EU rules on insurance premiums discriminated against women. The Belgian court paused the case and requested the CJEU to clarify whether the EU rules were themselves compatible with the prohibition on discrimination in the Charter. The CJEU found that they were not and ordered that the offending provision in the EU legislation be annulled.

Beyond the preliminary reference procedure, it is very difficult to get access to the CJEU. While it is possible in theory to make a complaint directly to the CJEU that the EU itself has failed to comply with the Charter (through an [‘action for annulment’](#)), an individual or organisation can usually only do this if he/she/it is specifically named by a piece of legislation. An example of this is the case of [Kadi and Al Barakaat International Foundation v. Council and Commission](#) where an individual complained about legislation that placed him on a list of people suspected of involvement with terrorism. The European Commission also has the power to make a complaint against an EU country (through the [‘infringement procedure’](#)) before the CJEU. Although an individual or organisation can bring the government to the attention of the Commission, it is entirely within the Commission’s discretion on how to proceed. Where the Commission does decide to take action, most cases are settled through negotiations with the country in question without being taken before the CJEU.

It is easier, however, for an individual to make a complaint to one of several bodies set up by the EU to investigate certain kinds of wrongdoing. Individuals who believe that there has been a misuse or failure to safeguard their personal data by an EU institution or body can make a

complaint to the [European Data Protection Supervisor](#). The European Parliament's [Committee on Petitions](#) can act on a complaint about national authorities failing to implement EU law properly, including failure to respect the rights in the Charter. The European [Ombudsman](#) can investigate wrongdoing by an EU institution or body. Although anybody can make a complaint to the European Data Protection Supervisor, only residents or citizens of an EU country can make complaints to the Committee on Petitions or the Ombudsman. What these procedures have in common is that they do not deliver a legally binding outcome – rather, they are similar to mediation. They may be useful in creating political pressure as part of a wider campaign. A successful outcome might include persuading the Commission to take infringement proceedings, prompting the Parliament to adopt a resolution on the issue (though this is not legally binding), or creating pressure on a government to change their behaviour. Advocates should keep in mind, as noted above, that these bodies will usually only deal with complaints that fall within areas where the EU has the authority to act (or ‘competence’).

Individuals and organisations can also rely on the Charter when trying to influence law and policy making either at the national or EU levels. In practice, the systems put in place to ensure compliance with the Charter in the key institutions are not always effective. Civil society organisations play a very important role in lobbying all of the institutions to bring proposals into line with human rights standards. One reason for this is that there is simply insufficient expertise on human rights standards and how they apply to EU policies in the EU's institutions.

There is also scope for using the Charter to influence legislation and policy-making at national level, when national authorities are implementing EU law. Often national authorities will need to introduce national legislation to put EU rules into effect, and this can offer an opportunity to ensure that the interpretation given to EU rules by national legislation complies with the Charter.

► What is the relationship between the Charter and human rights treaties?

A treaty is a legally binding agreement made between countries or international organisations. Although the term ‘fundamental rights’ is used by the European Union, there is in practice no difference between human rights and fundamental rights. The rights in the Charter are largely the same as those contained in other human rights treaties, like the [European Convention on Human Rights](#) or [United Nations human rights treaties](#). In practice, when the CJEU is dealing with internal EU human rights standards, it will interpret them in line with these treaties. It draws primarily on the European Convention and the case law of the European Court of Human Rights when interpreting the Charter. There are, however, some important differences between the Charter and existing human rights treaties.

First, the Charter does contain some rights that are not listed in the European Convention, such as the rights of the child. The appearance of this right in the Charter reflects the fact that all EU countries are bound by the [UN Convention on the Rights of the Child](#). The Charter also contains some more modern expressions of already well-established rights. For example, the right to private and family life, which is protected by the European Convention and the [UN's International Covenant on Civil and Political Rights](#), is also accepted to include the right to data protection. However, the Charter lists data protection as a separate right.

Second, although the Charter contains some economic and social rights, such as the right to health or housing, these are not protected to the same level as in other treaties, such as the [UN's International Covenant on Economic and Social Rights](#) or the [European Social Charter](#). Generally, the Charter recognises that these rights exist, and protects them against EU interference, but does not set a particular standard. This is in contrast, for example, to the UN's

International Covenant on Economic Social and Cultural Rights which puts an obligation on countries to meet particular international standards.

Third, there are some rights that exist under other human rights treaties that are simply not protected at all under the Charter, such as the rights of cultural, religious or linguistic minorities, protected under the UN's International Covenant on Civil and Political Rights. Where an advocate wishes to campaign on a right that is not contained in the Charter, it is still possible to try to rely on human rights treaties. There are certain issues that should be taken into account.

First, it may be possible to read a right into rights listed in the Charter. For example, Article 24 of the Charter recognises the rights of the child, but is much shorter than the rights listed in the UN Convention on the Rights of the Child. In this situation, it is possible to argue that any right listed in the UN Convention is implicitly included within Article 24 of the Charter.

Second, if the EU is a member of a particular treaty, then this treaty will be legally binding on the EU itself, as well as its members when they implement EU law. At the moment the EU is a member of the [UN Convention on the Rights of Persons with Disabilities](#), and it will also join the European Convention on Human Rights.

Third, if the treaty is one that all the member countries of the EU have joined, an argument can be made that the rights in this treaty form part of the [‘general principles’ of EU law](#) (explained below). To find out which treaties EU countries are members of UN human rights treaties, you can check [here](#), and for Council of Europe treaties [here](#).

► Where does the Charter come from?

The three predecessor organisations to the EU were established during the 1950s and became known collectively as the European Communities. These were dedicated to regulating the coal and steel industries and atomic energy production, and to creating an area of free trade. Because of this, human rights were not even mentioned in the original treaties. Rather, human rights were thought of as something to be dealt with by the [Council of Europe](#) – a separate international organisation, established at around the same time as the European Communities, specifically dedicated to promote democracy, the rule of law and human rights in Europe. It was under the Council of Europe that the European Convention on Human Rights (a human rights treaty that now covers 47 countries across Europe), and the European Court of Human Rights, were established. The Convention, however, was only legally binding on countries, and not the EU itself.

This originally left the EU without a set of rules to prevent it from acting in a way that violated human rights standards. Today we have the Charter, which puts legally binding limits on what the EU can do and how national authorities can interpret EU law. Before the Charter was created, the EU already had internal rules on human rights. These were developed during the 1960s when the CJEU established the rule that all action taken by EU institutions and bodies, and national authorities when they implement EU law, must not conflict with human rights standards. This significant shift in thinking came about because some national courts were refusing to apply EU law when it conflicted with rights protected by their national constitutions. By injecting human rights safeguards into EU law, the CJEU ensured that national courts would have no reason not to enforce EU law.

The human rights standards created by the CJEU formed part of the ‘general principles’ of EU law that the Court would identify on a case by case basis. To decide what these human rights

standards were, the Court would draw inspiration from national constitutions and human rights treaties, in particular the European Convention on Human Rights. In 1999 the EU decided to collect all the rights that the EU recognised into a single document – partly as a way of informing the public that their rights were protected under EU law. The Charter did not become legally binding until the end of 2009, when the reforms of the Treaty of Lisbon gave it this status.

Although a lot of noise has been made about the Charter and how it has revolutionised human rights protection in the EU, such claims are not particularly accurate because human rights were already protected by the CJEU through the general principles. Furthermore, all of the rights contained in the Charter already formed part of the general principles of EU law that the CJEU had been developing over the preceding forty years. Even if not all of them had been expressly recognised by the CJEU, the conditions for recognising a general principle are the same as the conditions used by the governments to decide which rights to include in the Charter – that they are either contained in national constitutions or international treaties that already bind the EU's member countries. The biggest change brought about by the Charter is one of visibility: it is no longer necessary to be a lawyer to work out the list of rights that the EU recognises because they are all clearly listed in one document. This greater visibility appears to have prompted the EU institutions to adopt their own internal procedures, to ensure that EU institutions make a conscious effort to check proposals for EU law and policy with the Charter before these are adopted.

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