



THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU

The European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as foreseen in Article 2 TEU. In order to make sure these values are respected, an EU mechanism exists to determine whether there is a serious breach, or a clear risk of a serious breach, by a Member State, and has been activated for the first time recently. The EU is also bound by its Charter of Fundamental Rights, which sets out those rights that must be respected both by the European Union and the Member States when implementing EU law. The EU is also committed to acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

FROM A JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS TO A CODIFICATION IN THE TREATIES

The European Communities (now the European Union) were originally created as an international organisation with an essentially economic scope of action. There was therefore no perceived need for explicit rules concerning respect for fundamental rights, which for a long time were not mentioned in the Treaties, and were anyway considered as guaranteed by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), to which the Member States were signatories.

However, once the Court of Justice of the European Union (CJEU) had affirmed the principles of direct effect ([1.2.1](#)) and of primacy of European law, certain national courts began to express concerns about the effects which such case law might have on the protection of constitutional values such as fundamental rights. If European law was to prevail even over domestic constitutional law, it would become possible for it to breach fundamental rights. To address this theoretical risk, in 1974 the German and Italian constitutional courts each adopted a judgment in which they asserted their power to review European law in order to ensure its consistency with constitutional rights (Solange I; Frontini). This led the CJEU to affirm through its case law the principle of respect for fundamental rights, by stating that the Treaties also protected those fundamental rights which result from the constitutional traditions common to the Member States as general principles of Community law (Stauder v City of Ulm, C-29/69; judgment in C-11/70).

With the progressive expansion of EU competences to policies having a direct impact on fundamental rights such as justice and home affairs (JHA) and then developed into a fully-fledged area of freedom, security and justice (AFSJ), the Treaties were changed



in order to firmly anchor the EU to the protection of fundamental rights. The Treaty of Maastricht included reference to the ECHR and the common constitutional traditions of Member States as general principles of EU law, while the Treaty of Amsterdam affirmed the European 'principles' upon which the EU is founded (in the Treaty of Lisbon, 'values' as listed in Article 2 TEU) and created a procedure to suspend the rights foreseen by the Treaties in cases of serious and persistent violations of fundamental rights by a Member State. The drafting of the Charter of Fundamental Rights and its entry into force together with the Treaty of Lisbon are the latest developments in this process of codification intended to ensure the protection of fundamental rights in the EU.

THE EU'S ACCESSION TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

As the ECHR is the leading instrument for the protection of fundamental rights in Europe, to which all Member States have acceded, EC accession to the ECHR appeared as a logical solution to the need to link the EC to fundamental rights obligations. The European Commission repeatedly proposed (in 1979, 1990 and 1993) the accession of the EC to the ECHR. Requested for an opinion on the matter, the Court of Justice found in 1996, in its opinion 2/94, that the Treaty did not foresee any competence for the EC to enact rules on human rights or to conclude international conventions in this field, making accession legally impossible. The Treaty of Lisbon remedied this situation by introducing Article 6(2), which provides that the EU shall accede to the ECHR. This means that the EU, as is already the case for its Member States, will become subject, as regards respect for fundamental rights, to review by a legal body external to itself, namely the European Court of Human Rights (ECtHR). Following accession, EU citizens, but also third country nationals present on EU territory, will be able to challenge legal acts adopted by the EU directly before the ECtHR on the basis of the provisions of the ECHR, in the same way as they may challenge legal acts adopted by EU Member States.

In 2010, right after the entry into force of the Lisbon Treaty, the EU opened negotiations with the Council of Europe on a draft Accession Agreement, which was finalised in April 2013. In July 2013, the Commission asked the CJEU to rule on the compatibility of this agreement with the Treaties. On 18 December 2014, the CJEU issued a negative opinion stating that the draft agreement was liable to adversely affect the specific characteristics and the autonomy of EU law (Opinion 2/13). Discussions on how to overcome the issues raised by the CJEU and proceed with negotiations are under way.

THE EU CHARTER OF FUNDAMENTAL RIGHTS

In parallel to the 'external' scrutiny mechanism foreseen by EC accession to the ECHR to ensure the conformity of legislation and policies with fundamental rights, an 'internal' scrutiny mechanism was needed at EC level to allow for a preliminary and autonomous judicial check by the CJEU. To do so, the existence of a bill of rights specific to the EU was necessary, and at the 1999 European Council in Cologne it was decided to convoke a Convention to draft a Charter of Fundamental Rights.



The Charter was solemnly proclaimed by Parliament, the Council and the Commission in Nice in 2000. After being amended, it was proclaimed again in 2007. However, only with the adoption of the Treaty of Lisbon on 1 December 2009 did the Charter come into direct effect, as provided by Article 6(1) TEU, thereby becoming a binding source of primary law.

The Charter, although based on the ECHR and other European and international instruments, was innovative in various ways, notably since it includes, among other issues, disability, age and sexual orientation as prohibited grounds of discrimination, as well as enshrining access to documents, data protection and good administration among the fundamental rights it affirms.

While the scope of application of the Charter is on one hand potentially very broad, as most of the rights it recognises are granted to 'everyone', regardless of nationality or status, on the other hand Article 51 limits its application to the EU institutions and bodies and, when they act to implement EU law, to the Member States. This provision serves to draw the boundary between the scope of the Charter and that of national constitutions and the ECHR.

THE ARTICLE 7 TEU MECHANISM

With the Amsterdam Treaty a new sanction mechanism was created to ensure that fundamental rights, as well as other European principles and values such as democracy and the rule of law, are respected by EU Member States beyond the legal limits posed by EU competences. This meant giving the EU the power to intervene in areas otherwise left to Member States, in situations of 'serious and persistent breach' of these values. A similar mechanism had been proposed by the EP for the first time in its 1984 draft EU treaty text. The Treaty of Nice added a preventive phase, in cases of 'clear risk of a serious breach' of EU values in a Member State. This procedure was aimed at ensuring that the protection of fundamental rights, as well as of democracy, the rule of law and of minorities' rights, as included among the Copenhagen criteria for accession of new Member States, remains valid also after accession, and for all Member States in the same way.

Article 7 TEU foresees a 'preventive phase' in its paragraph 1, empowering one third of Member States, the European Parliament and the Commission to initiate a procedure whereby the Council can determine by a 4/5 majority the existence of a 'clear risk of a serious breach' in a Member State of the EU values proclaimed in Article 2 TEU, which include respect for human rights, human dignity, freedom and equality and the rights of persons belonging to minorities. Before proceeding to such a determination, a hearing of the Member State in question shall take place, while the EP has to give its consent by a 2/3 majority of the votes cast and an absolute majority of its component members (Article 354(4) TFEU). The Council may also make recommendations to the Member State in question. This procedure, which is preventive, was recently activated by the Commission in relation to Poland, and by the European Parliament in relation to Hungary.

Article 7.2 and 7.3 TEU foresee, in case of the 'existence of a serious and persistent breach' of EU values, a 'sanctioning mechanism' that can be triggered by the



Commission or by one third of Member States (not the EP), after inviting the Member State in question to submit its observations. The European Council determines the existence of the breach by unanimity, after obtaining the EP's consent by the same majority as for the preventive mechanism. The European Council can decide to suspend certain membership rights, including voting rights in Council, of the Member State in question, this time acting by qualified majority. The Council can decide to modify or revoke the sanctions, again by qualified majority. The Member State concerned does not take part in the votes in the Council or the European Council.

In order to fill in the gap existing between the politically difficult activation of the Article 7 TEU procedures (used to address situations outside the remit of EU law) and infringement procedures with limited effect (used in specific situations falling within the scope of EU law), the Commission, in 2014, launched an 'EU Framework to strengthen the Rule of Law'. This framework is aimed at ensuring an effective and coherent protection of the rule of law, which is a prerequisite for ensuring respect for fundamental rights in situations of systemic threat to those rights. It precedes and complements Article 7 TEU and foresees three stages: Commission assessment, i.e. a structured dialogue between the Commission and the Member State, followed if need be by a Rule of Law Opinion; Commission Rule of Law recommendation; and follow-up by the Member State to the recommendation. This framework was recently applied for the first time to Poland.

OTHER EU INSTRUMENTS FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

The EU has other instruments at its disposal aimed at protecting fundamental rights.

When proposing a new legislative initiative, the Commission addresses its compatibility with fundamental rights by means of an impact assessment, an aspect which is subsequently examined also by the Council and the Parliament. The Commission furthermore publishes an annual report on the application of the Charter of Fundamental Rights, which is examined and debated by the Council, which adopts conclusions on it, and by Parliament, in the framework of its annual report on the situation of fundamental rights in the EU.

In the context of the European Semester, issues connected to fundamental rights are monitored and can be the subject of country-specific recommendations. The areas concerned include justice systems (on the basis of the Justice Scoreboard), as well as disability, social rights and citizens' rights (in relation to protection from organised crime and corruption). Bulgaria and Romania are also subjected to the Cooperation and Verification Mechanism, which contains fundamental rights-related elements.

The Commission has furthermore recently proposed a Regulation on the protection of the Union budget in case of generalised deficiencies as regards the rule of law in the Member States, which links EU funds to respect for the rule of law. If adopted, this instrument will enable pressure to be put on Member States violating fundamental rights.

Infringement proceedings are an important instrument to sanction fundamental rights violations in the EU. They can be launched in cases of non-compliance of a national



law with EU law and fundamental rights as protected by it, in individual and specific cases (whereas Article 7 applies to situations which fall outside the scope of EU law and in which fundamental rights violations are systematic and persistent).

The EU Agency for Fundamental Rights (FRA), established in 2007 in Vienna, plays a major role in monitoring the situation of fundamental rights in the EU. The FRA is tasked with the collection, analysis, dissemination and evaluation of information and data related to fundamental rights. It also conducts research and scientific surveys, and publishes annual and thematic reports on fundamental rights.

ROLE OF THE EUROPEAN PARLIAMENT

Parliament has always supported the strengthening of respect for and protection of fundamental rights in the EU. Already in 1977, it adopted, together with the Council and the Commission, a Joint Declaration on Fundamental Rights, in which the three institutions committed to ensuring respect for fundamental rights in the exercise of their powers. In 1979, Parliament adopted a resolution advocating that the European Community accede to the ECHR.

The 1984 draft treaty establishing the European Union ([1.1.2](#)) specified that the Union must protect the dignity of the individual and recognise for everyone falling within its jurisdiction the fundamental rights and freedoms derived from the common principles of the national constitutions and the ECHR. It also envisaged accession of the Union to the ECHR. In a resolution of 12 April 1989, Parliament proclaimed its adoption of the Declaration of Fundamental Rights and Freedoms^[1].

Every year since 1993, Parliament has held a debate and adopted a resolution on the situation of fundamental rights in the EU, on the basis of a report produced by its Committee on Civil Liberties, Justice and Home Affairs. In addition, it has adopted several resolutions addressing specific issues concerning the protection of fundamental rights in the Member States.

Parliament has always supported the EU as regards equipping itself with its own bill of rights, and has called for the Charter of Fundamental Rights to be binding.

More recently, Parliament has made a number of suggestions to strengthen the protection of fundamental rights in the EU by proposing new mechanisms and procedures to fill the existing gaps. In various resolutions since 2012, Parliament has called for the creation of a Copenhagen commission, as well as of a European fundamental rights policy cycle, an early warning mechanism, a freezing procedure and the strengthening of the FRA. In its most recent text adopted on the subject, Parliament consolidated its former proposals and called for the establishment of an 'EU mechanism on democracy, the rule of law and fundamental rights', which would be based on a Union Pact taking the form of an interinstitutional agreement with the Commission and the Council. This would include an annual policy cycle based on a report drafted by the Commission and by an expert panel, followed by a parliamentary debate and accompanied by arrangements to address risks or breaches. Parliament also called for a new draft agreement for EU accession to the ECHR, and for Treaty changes such

[1]European Parliament resolution of 12 April 1989 adopting the Declaration of fundamental rights and freedoms, OJ No C 120, 16.05.1989, p. 51.



as the elimination of Article 51 of the Charter of Fundamental Rights, its conversion into a Union Bill of Rights, and the removal of the unanimity requirement for equality and non-discrimination^[2].

In 2018, Parliament adopted a resolution welcoming the Commission decision to activate Article 7(1) TEU in relation to Poland^[3], as well as a resolution launching the Article 7(1) TEU procedure in relation to Hungary, by submitting a reasoned proposal to the Council inviting it to determine whether there is a clear risk of a serious breach of the values referred to in Article 2 TEU, and to address appropriate recommendations to Hungary in this regard^[4].

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[2]European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights - OJ C 215, 19.6.2018, p. 162.

[3]European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland - Texts adopted, [P8_TA\(2018\)0055](#).

[4] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded - Texts adopted, P8_TA(2018)0340.

