



THE EU CHARTER OF FUNDAMENTAL RIGHTS

in Portugal

CHARTER COUNTRY-SHEET

“**[N]ational authorities** (judicial authorities, law enforcement bodies and administrations) are **key actors** in giving concrete effect to the rights and freedoms enshrined in the Charter”

European Parliament (2015), Resolution on the situation of fundamental rights in the European Union (2013-2014) 2014/2254(INI)), Strasbourg, 8 September 2015, recital P.

The Charter of Fundamental Rights of the European Union is the EU's bill of human rights. It contains 50 articles with substantive rights and principles, followed by four articles with general provisions. Member States have a duty to respect the rights and observe the principles of the Charter whenever they are acting within the scope of binding EU law. Where the Charter provisions are sufficiently precise and unconditional, they can have a direct effect at the national level – for instance in national courtrooms. Charter provisions that are 'principles' can only be invoked before a court if implemented by legislative or executive acts.

Member States have an explicit duty to promote the Charter's application. This country-sheet supports that effort by giving examples of the Charter's use and highlighting how it adds value.

The EU Charter as an obligation: when are Portuguese authorities required to apply it?

- ★ Given that EU law is predominantly implemented at national level, national judges, parliamentarians, government officials and legal practitioners are core 'Charter agents' on whom the EU system relies.
- ★ The EU Charter of Fundamental Rights primarily addresses the EU itself. It binds EU Member States "only when they are implementing Union law" (Article 51 of the Charter). However, a significant part of national law- and policymaking is directly or indirectly influenced by EU law. Wherever a legislative file, a judicial case or factual situation falls within the scope of binding EU law, the EU Charter applies and can be used by and invoked before national authorities.
- ★ It is not always easy to draw the borders of the Charter's field of application. The question of whether the Charter applies is central to the proper implementation of EU law. FRA's handbook on *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level* provides some guidance on this issue.



How is the Charter used in Portugal?

The Portuguese constitution

The Constitution of the Portuguese Republic

- ★ It was adopted on 2 April 1976.
- ★ It contains a preamble, four parts, 19 titles, 24 chapters and 296 articles. Part I includes a wide range of fundamental principles, rights and duties, which extend to three titles, six chapters, 68 articles and several items.

The constitution, the EU Charter and the ECHR

- ★ The Portuguese constitution does not include explicit references to the EU Charter or the **European Convention of Human Rights (ECHR)**. However, Article 8 of the Portuguese Constitution establishes a system of automatic and full reception of rules contained in international instruments to which Portugal is bound. As such, international rules are in force in the Portuguese legal system without the need to transpose it into equivalent legal provisions. In Article 7, the constitution establishes that “Portugal shall make every effort to reinforce the European identity and to strengthen the European states’ actions in favour of democracy, peace, economic progress and justice in the relations between peoples.”
- ★ In addition, in Article 8 (4), the constitution says that the provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law, in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.
- ★ Article 16 on the scope and interpretation of fundamental rights states that rights enshrined in the constitution shall not exclude rights laid down in international law and that the constitution and the laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights.

All EU Member States apply the EU Charter – but not always to its full potential. The Charter is sometimes referred to in the context of upcoming legislation or debates in parliaments. National authorities and courts also sometimes refer to the Charter in their decisions and rulings. Examples from Portugal include:

★ National legislation: respect for private and family life (Article 7) and the protection of personal data (Article 8)

In 2015, under Article 278 of the country’s constitution, the president sought an *ex ante* evaluation of the constitutionality of a provision in a parliamentary decree sent to him for promulgation. The decree – on Portugal’s information system – allowed certain officials from the Security Information Service and the Strategic Defence Information Service to access, in specific circumstances, banking and tax data, data on communication traffic, locality, and other information. The Constitutional Court (Case No. 773/15, judgment **No. 403/2015**) referred to Article 7 and Article 8 of the EU Charter, among other principles, and declared the provision unconstitutional.

★ National courts: general reference to the EU Charter

In 2016, the potential of EU fundamental rights was also underlined by the Constitutional Court in Portugal (**Case 106/2016**): “[T]he specific rights conferred on citizens of the European Union and coming into force following the Treaty of Lisbon, take on the true nature of fundamental rights [...] the Charter has been granted the same legal status as the Treaties, therefore the infringement of it, whether by Member States or by the European Union, may be contested in court.”

★ Parliamentary debate: freedom of the arts and sciences (Article 13)

In 2017, the Charter was referred to in a **debate** on amendments to the Hungarian Act on National Higher Education, which caused concern, especially regarding its effects on the Central European University in Budapest. The law was criticised in the parliamentary debate for violating Article 13 of the Charter, which provides for freedom of academic and scientific research.

The Charter's added value

The Charter is a legally binding document. It includes civil and political rights as well as economic, social and cultural rights. Moreover, it benefits from the strength of EU law, which often has direct effect and, in principle and unlike international law, must be granted supremacy over national law. However, in many contexts it may not be possible to directly invoke the Charter – for instance, because the respective Charter provision is a principle and not a right and was not implemented by a legislative or executive act; or is otherwise not directly applicable; or does not apply at all because the case at hand falls outside the scope of EU law. In any case, the Charter increases the visibility of rights. It explicitly spells out rights and principles that are often not expressly laid out in other international human rights documents, such as the ECHR (as shown in Figure 1). Unlike the Council of Europe's European Social Charter, the EU Charter does not offer the possibility to be bound only by selected provisions; Member States are bound by all of its provisions.

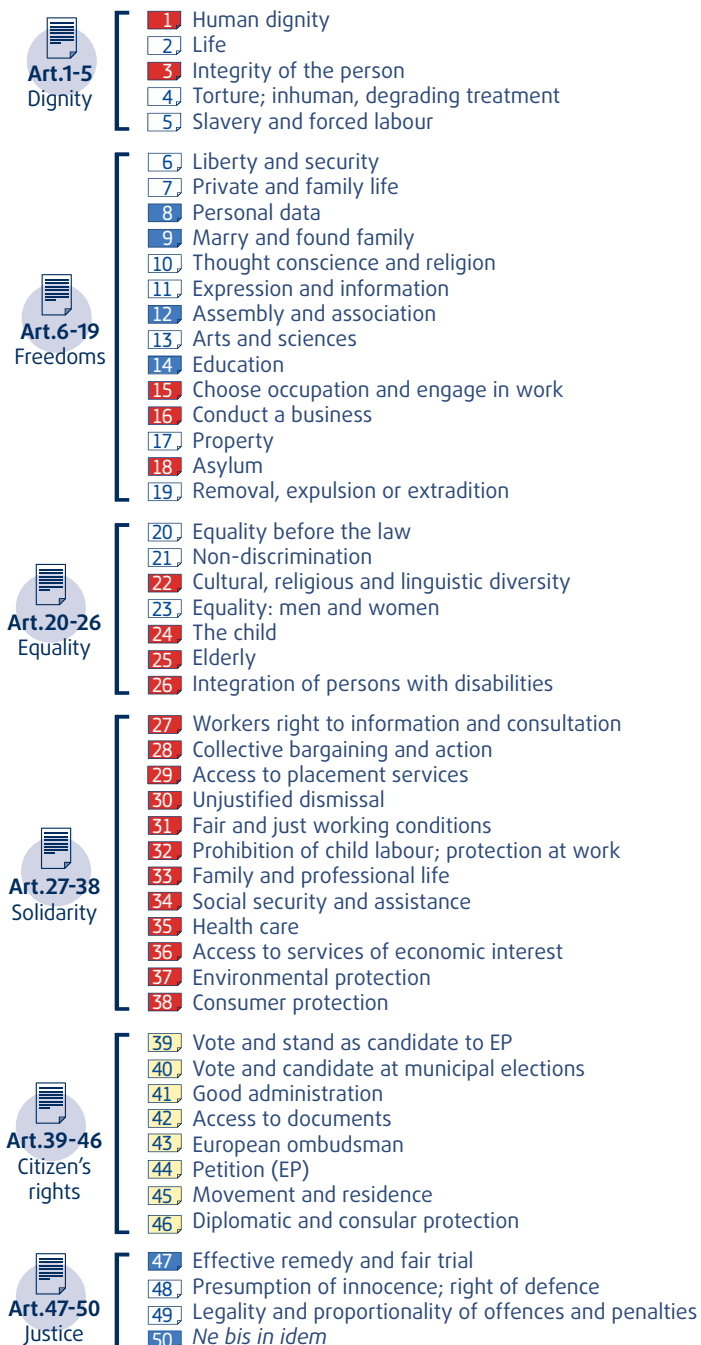
- No ECHR equivalent
- More extensive than ECHR
- Equivalent protection to ECHR
- EU context-specific

Note: The figure is based on the Explanations on the Charter and a textual comparison of the two documents in order to show how the Charter increases the visibility of entitlements (some of the rights not explicitly contained in the ECHR are covered by the case law, which however is less visible to a non-expert).

Source: FRA, 2018

Figure 1: What rights are covered? Comparing the Charter and the ECHR

Charter articles and text of the ECHR: differences and equivalence in coverage



Given the breadth of rights explicitly covered by the Charter, it can help to increase the visibility of rights at national level. Moreover, national courts do sometimes use the Charter to interpret or further develop national law, even outside the scope of EU law.

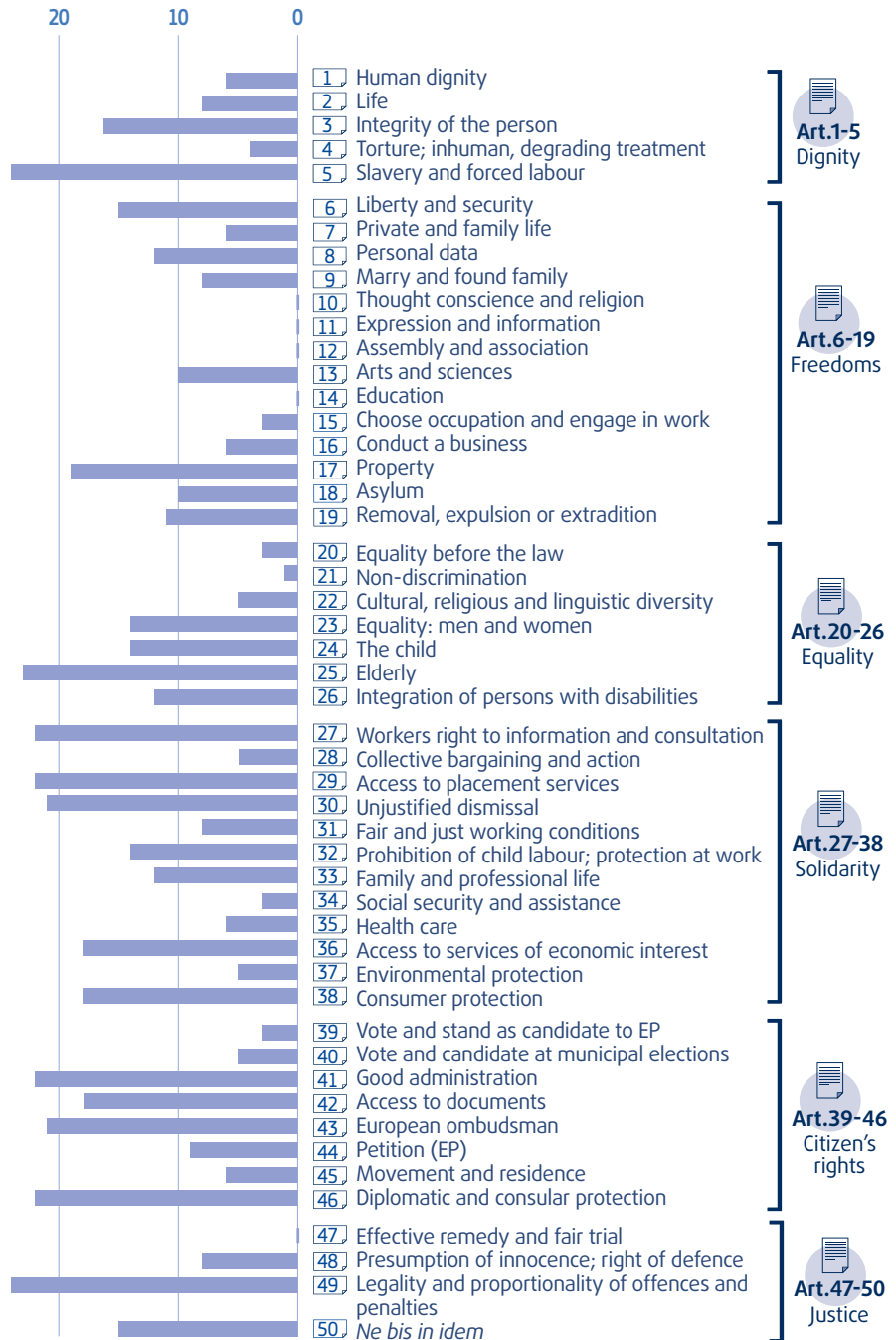
When comparing the Charter with the constitutions of EU Member States, it becomes evident that the text of the Charter is often more explicit about certain rights.

In Portugal, only very few rights appear not to be fully mirrored in national constitutional law – for instance, diplomatic and consular protection (Article 46).

The absence of certain rights from a constitutional text by no means implies that they are not protected by the legal order. However, explicit guarantees in a constitutional text make these rights more visible and so also more accessible. In this sense, the Charter can strengthen less well-known rights.

Figure 2: Does the Charter add to the visibility of rights? Comparing the Charter and national constitutions

Number of EU Member States that do not have equivalent/explicit provisions for this Article in their constitutional texts



Note: The figure is based on a textual comparison of the Charter and written constitutional law of the EU Member States (excluding the United Kingdom) in order to show under which provisions the Charter is most likely to increase the visibility of entitlements. EU-specific entitlements (the Charter provisions that are in Figure 1 marked in pale yellow) were considered as reflected in national constitutions if a comparable provision could be identified (for instance a constitutional provision concerning a national Ombudsperson).

Source: FRA, 2018

The EU Charter of Fundamental Rights: *a young instrument*

- ★ A European Convention drafted the Charter. The Convention was composed of 15 representatives of the then 15 EU Member States, 46 parliamentarians (16 members of the European Parliament and 30 members of national parliaments), and one European Commission representative. The Convention also consulted civil society.
- ★ The European Parliament, the European Commission and the Council of the EU solemnly proclaimed the Charter in December 2000.
- ★ With the entry into force of the Lisbon Treaty on 1 December 2009, the Charter became legally binding. It is a relatively new legal instrument that is increasingly used at national level.

Further information

- ★ **The EU Charter**, available on EUR-Lex.
- ★ The **Explanations relating to the Charter of fundamental rights**, by the Presidium of the European Convention.
- ★ **Charterpedia** – a FRA webspace bringing together Charter-related information, including national case law.
- ★ **EU Charter app** – a FRA app to access EU Charter rights anytime, anywhere, as well as national and CJEU case law using the Charter.
- ★ FRA (2018), **Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level**, Luxembourg, Publications Office.
- ★ FRA (2018), Opinion 4/2018, **Challenges and opportunities for the implementation of the Charter of Fundamental Rights**.
- ★ **Thematic FRA-CoE/ECtHR handbooks on European law**: Non-discrimination (2018), Asylum (2014), Data protection (2018), Children's rights (2015), and Access to justice (2016).
- ★ FRA's annual *Fundamental Rights Report* contains a **specific chapter** dedicated to the use of the Charter at national level.
- ★ European Commission, **Annual reports on the application of the EU Charter of Fundamental Rights**.

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© FRA, 2019
ISBN 978-92-9474-168-4
DOI:10.2811/749006
TK-04-18-622-EN-N



Publications Office