

EPHA Briefing: Human Rights, Fundamental Rights and Equal Treatment Legislation in Europe

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Executive summary

1. Human Rights Instruments

Human rights are those that are recognised and guaranteed by a number of international legal instruments. **Human rights create minimum standards**, but not comprehensive guidelines for life. Most human rights, as guaranteed by treaties, require strict legal interpretations as to what they do and do not cover. **The UN Charter** states that 'promoting and encouraging respect for human rights and fundamental freedoms' is one of the purposes of the United Nations. Since the adoption of **the UN Universal Declaration of Human Rights (UDHR)** in 1948, the UN Member States have cooperated on the creation of a range of human rights treaties.

2. Human Rights in Europe

Europe has a longstanding tradition of protecting human rights where different international organisations, such as **the Office for Democratic Institutions and Human Rights (ODIHR)** or the **Council of Europe** monitor the situation. The latter organisation is a political organisation set up to defend the principles of democracy, human rights and the rule of law. **The European Court of Human Rights (ECHR)** has particular importance since its judgements are legally binding and therefore often seen as more effective than the opinions of UN-style committees. **The European Social Charter** sets out social rights and establishes a supervisory mechanism, guaranteeing their respect by the States Parties.

3. Human Rights and Health

The enjoyment of the highest attainable standard of health as a fundamental right of every human being was enshrined in **WHO's Constitution**. **In the UN framework, the right to health is an inclusive right**, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe, drinkable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. **The Special Rapporteur** on the right to the enjoyment of the highest attainable standard of **physical and mental health** implements the mandate through different means and activities. **The WHO Health and Human Rights Publication Series** aim to clarify the relationship between human rights and specific health topics.

4. Fundamental Rights in Europe

Recognising the importance of Fundamental Rights, the first European Convention was convened to prepare and draft the **Charter of Fundamental Rights of the European Union**. Fundamental rights, as presented in this Charter, are more than just principles, they draw from several different legal sources, such as: **constitutional traditions** and **international obligations** common to Member States, the **primary law of the EU (the Treaties)**, the **European Convention for the Protection of Human Rights and Fundamental Freedoms**, the **Social Charters** adopted by the EU and the Council of Europe, and the **case law** of the **European Court of Justice (ECJ)** and the **European Court of Human Rights (ECHR)**. As regards the legal landscape in the EU, several **institutions (European Commission, European Parliament, European Ombudsman, Court of Justice of the European Union and the Fundamental Rights Agency)** are responsible for implementing these fundamental rights.

5. Equal treatment legislation in Europe

TFEU Article 19 provides the EU with a legal basis to combat all forms of discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation. The objective of **Directive 2000/43/EC** is to combat discrimination on the grounds of racial or ethnic origin, which is supplemented by **the Directive 2000/78/EC** on equal treatment in employment and occupation. **The new 'Article 19 Directive'** would ban discrimination on grounds of religion or belief, disability, age or sexual orientation in all areas of life within EU competence (including education, housing, and access to goods and services). However, in light of the positions of specific Member States, **the new directive will not be adopted during the 2009-2014 legislative period**.



Human Rights Instruments

What is meant by human rights?



Human rights are rights that are recognised and guaranteed by a number of international legal instruments. Human rights are granted to everyone regardless of status, sex, age, race or any other factor. Hence, human rights are often considered to be universal, meaning they are the same for every human being wherever they are in the world. However, some commentators hold that different cultures and tradition make it impossible to have the same rights all over the globe.

Enjoying rights also means having duties.

You cannot exercise your rights without due regard to other people's rights: Freedom of expression, for example, means that an individual has the right to express his or her opinion while fully respecting the human dignity of other people.

The scope of human rights - Human rights create minimum standards but not comprehensive guidelines for life. Most human rights, as guaranteed by treaties, require **strict legal interpretations** as to what they do and do not cover. Hence Committees and Courts have provided general comments and rulings on a number of different rights, setting out what they actually mean.

Human Rights Day – 10 December

The Universal Declaration of Human Rights (UDHR) was adopted on 10 December 1948.

The date has since served to mark Human Rights Day worldwide.

The High Commissioner for Human Rights, as the main UN rights official, and their office play a major role in coordinating efforts for the yearly observance of Human Rights Day.

Universal human rights instruments

The UN Charter states that 'promoting and encouraging respect for human rights and fundamental freedoms' is one of the purposes of the United Nations.¹ The first international document on human rights is **the 1948 UN Universal Declaration of Human Rights (UDHR)**², which sets out key human rights, such as **the right to life, freedom of expression and a fair trial**. Although not a legally binding document at the time, many of the rights contained in the UDHR are now considered part of customary international law.

The onset of the Cold War and the diverging world views of the East and the West influenced the next key step in the development of international human rights documents. Although originally planned to result in one legal covenant, the process of developing a major new treaty **separated civil and political rights from economic, social and cultural rights**. Hence, **in 1966 the International Covenant**

¹ <http://www.un.org/en/documents/charter/>

² <http://www.un.org/en/documents/udhr/>



on Civil and Political Rights (ICCPR)³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴ were signed. These two Covenants entered into force in 1976.

Specialised treaties

Since the adoption of the UDHR in 1948, the UN Member States have cooperated on the creation of a range of **human rights treaties**. **Seven core treaties** have been ratified by all 28 EU Member States:

protection against racial discrimination (International Covenant on the Elimination of Racial Discrimination, ICERD, 1965);

economic, social and cultural rights (International Covenant on Economic Social and Cultural Rights, ICESCR, 1966);

civil and political rights (International Covenant on Civil and Political Rights, ICCPR, 1966);

elimination of discrimination against women (Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, 1979);

protection against torture (CAT, 1984);

protection of children's rights (CRC, 1989).⁵

Convention on the rights of persons with disabilities

Human Rights Bodies

The Office of the High Commissioner for Human Rights (OHCHR)⁶ works to offer the best expertise and support to the different human rights monitoring mechanisms in the United Nations system: UN Charter-based bodies, including the Human Rights Council and bodies created under the international human rights treaties are made up of independent experts mandated to monitor State parties' compliance with their treaty obligations. Most of these bodies receive secretariat support from the Human Rights Council and Treaties Division of the Office of the High Commissioner for Human Rights (OHCHR).⁷

Charter-based bodies

[Human Rights Council](#)

[Universal Periodic Review](#)

[Commission on Human Rights](#) (replaced by the Human Rights Council)

[Special Procedures of the Human Rights Council](#)

[Human Rights Council Complaint Procedure](#)

Treaty-based bodies

There are ten human rights treaty bodies that monitor implementation of the core international human rights treaties:

[Human Rights Committee](#) (CCPR)

[Committee on Economic, Social and Cultural Rights](#) (CESCR)

[Committee on the Elimination of Racial Discrimination](#) (CERD)

[Committee on the Elimination of Discrimination against Women](#) (CEDAW)

[Committee against Torture](#) (CAT)

[Subcommittee on Prevention of Torture](#) (SPT)

[Committee on the Rights of the Child](#) (CRC)

[Committee on Migrant Workers](#) (CMW)

[Committee on the Rights of Persons with Disabilities](#) (CRPD)

[Committee on Enforced Disappearances](#) (CED)

³ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁴ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

⁵ http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf

⁶ <http://www.ohchr.org/EN/AboutUs/Pages/HighCommissioner.aspx>

⁷ <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>



The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD):

The Convention elaborates in detail the rights of persons with disabilities and sets out a code of implementation. Countries that join the Convention commit themselves to developing and carrying out policies, laws and administrative measures for securing the rights recognized in the Convention and to abolish laws, regulations, customs and practices that constitute discrimination (Article 4).

The UNCRPD entered into force for the EU on 22 January 2011, which is the first core international human rights treaty to which the EU has become a party. The Convention recognises that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. Therefore, society has an obligation to adapt to facilitate the full participation of people with disabilities. People with disabilities are "individuals" with rights, not objects of charity.

Regional human rights instruments

There are also regional human rights instruments. The most well-known one is the European Convention on Human Rights and Fundamental Freedoms (ECHR)⁸, drawn up under the auspices of the Council of Europe in 1950 (see under title **2. Human Rights in Europe**), but other regional Conventions exist, such as the **American Convention on Human Rights**⁹ or the **African Charter of Human and People's Rights**¹⁰.

Distinction between political programmes and social rights

While **political programmes** are only the intentions of states and they cannot be enforced, **economic, social and cultural rights have a legal nature** therefore they are merely more than just political programmes. However, it is more difficult to put them in place: their enforceability is merely more progressive, dependent on means, rather so much on results. For instance, one cannot expect a country with very few resources to be able to have a high expenditure in the area of health, but if this country is instead devoting a lot of its budget to the military, then one can conclude that there might be violation of an economic and social right: the right to health.

Another example **is the right to the highest attainable standard of physical and mental health** in the **International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 12(2)(d)** includes 'the creation of conditions which would assure access to all medical services and medical attention in the event of sickness', but this does not mean you have the right to free healthcare services. So, human rights provide **minimum basic protection** rather than the standards that people might want. In addition, sometimes different rights may be **in conflict with each other**, which might make their enforcement even more complicated (e.g. the freedom of expression and the right to goodwill).

The enforcement and limits of human rights

Human rights are granted on paper, but none of us can enjoy them if individuals are not aware of their own rights. This is also the case if they are not implemented, monitored and protected. The various human rights instruments set out that state parties undertake to respect, protect and fulfil the rights of the treaty in question. Failure to do so may have legal as well as political repercussions. The enforcement mechanisms for human rights vary and have often been criticised for being weak and ineffective. Depending on the provisions of the treaty in question, courts and committees deal with breaches of human rights.

⁸ <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

⁹ http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

¹⁰ http://www.achpr.org/english/_info/charter_en.html



It is important, however, to be aware that most human rights instruments provide so called '**clawback clauses**', outlining conditions under which it may be acceptable to limit certain rights. Such restrictions are usually subject to being in the interest of **national security, public safety, order, health, or morals, or the protection of the rights and freedoms of other people**. In addition, derogations in times of public emergencies threatening the nation, may be permitted. **See the example Article 4.1 of the ICCPR¹¹**. Treaties establishing rights indicate which rights are 'non-derogable' (cannot be limited) and which rights may be 'derogated' and under what conditions.

International Covenant on Civil and Political Rights (ICCPR)

Article 4

1. In times of public emergency, where nations are seriously under threat, the States Parties to the present Covenant may take measures derogating them from their obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The way human rights are protected in the different national systems depends on the historical experience of each state. All states have **functioning court systems** which allow individuals to settle cases alleging rights violations. Apart from courts, many states have implemented additional independent mechanisms at the national level to offer guidance, assistance or even recourse. Such mechanisms are for instance:

- **Ombudspersons,**
- **Data Protection Authorities (DPAs),**
- **National equality bodies**
- **National Human Rights Institutes (NHRIs), or**
- **Local or regional authorities.**¹²

EU Framework to promote, protect and monitor the CRPD

As an example, under article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), the EU is obliged to establish a framework, including one or more independent mechanism, with responsibility for promoting, protecting and monitoring the implementation of the CRPD. Therefore, the following bodies have been selected as part of that framework:

European ombudsman

European Parliament, Secretariat of the Committee on Petitions (PETI)

European Commission

Fundamental Rights Agency

¹¹ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

¹² http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf page 17



Human Rights in Europe

European human rights instruments

Office for Democratic Institutions and Human Rights (ODIHR)

The **Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR)**¹³ is one of the world's principal regional human rights bodies. Based in Warsaw, Poland, ODIHR is active throughout Europe in its 56 Member States. Based on its mandate adopted in 1992 in Helsinki, the ODIHR promotes democratic elections, respect for human rights, tolerance and non-discrimination and the rule of law.

Council of Europe

The Council of Europe¹⁴ is a political organisation, founded in 1949, to defend the principles of democracy, human rights and the rule of law. Membership is open to all European states which undertake to abide by the Organisation's principles. At present the Council of Europe has 47 member states. All EU Member States are members of the Council of Europe. Over the last 60 years, the Council of Europe has played a significant role in expanding and improving the protection of fundamental rights in Europe.

European Court on Human Rights (ECHR)



Photo: European Court of Human Rights, Strasbourg
© Marcella Bona Source: Flickr

The European Court on Human Rights¹⁵ (ECHR) is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. In almost fifty years the Court has delivered more than 10,000 judgments. These are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas. The Court's case law makes the Convention a powerful living instrument for meeting new challenges and consolidating the rule of law and democracy in Europe. **Its judgements are legally binding and therefore often seen as more effective than the opinions of UN-style committees. The Case law of the European Court of Human Rights is available in the European Court of Human Rights Search Portal (HUDOC database).**¹⁶

¹³ <http://www.osce.org/odihr>

¹⁴ <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>

¹⁵ <http://www.echr.coe.int/Pages/home.aspx?p=court&c>

¹⁶ [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)



European Social Charter (ESC)

The European Social Charter sets out social rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the States Parties. Following its revision, **the 1996 revised European Social Charter**, which came into force in 1999, is gradually replacing the initial 1961 treaty.

The Charter guarantees several rights relevant for the public health community:

- Art 3** (the right to safe and healthy working conditions),
- Art 7** (the right of children and young persons to protection)
- Art 11** (the right to protection of health),
- Art 12** (the right to social security),
- Art 13** (the right to social and medical assistance),
- Art 14** (the right to benefit from social welfare services)
- Art 23** (Communications of copies) and
- Art 30** (derogations in time of war or public emergency).

The Charter guarantees **in Article 11¹⁷ the right to protection of health**, with a view to ensuring the effective exercise of the right to protection of health, the contracting parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:

- to remove as far as possible **the causes of ill health**;
- to provide advisory and educational facilities for the **promotion of health** and the encouragement of **individual responsibility** in matters of health;
- to **prevent** as far as possible **epidemic, endemic and other diseases**.

There are other rights included, which are particularly relevant for public health, such as **the right of children and young persons to protection (Article 7), the right to social security (Article 12), the right of the family to social, legal and economic protection, or the right to social and medical assistance (Article 13)**

The European Committee of Social Rights (ECSR)¹⁸ is an independent quasi-judicial body which interprets the rights enshrined in the European Social Charter.

Monitoring procedure: Every year the States Parties submit a report indicating how they implement the Charter in law and in practice. Each report concerns some of the accepted provisions of the Charter. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as “conclusions”, are published every year.

The most powerful legal tool of monitoring is the **collective complaints procedure¹⁹**. The Committee determines whether or not States Parties are in conformity with the Charter (Article 24 of the Charter, as amended by the 1991 Turin Protocol) both in law and practice. By the beginning of 2012, 12 EU Member States had become parties to the additional protocol to the ESC²⁰. Under this protocol, national and international organisations, such as trade unions, employers’ organisations and international NGOs may lodge complaints; individuals may not do so directly.

¹⁷ <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CL=ENG>

¹⁸ http://www.coe.int/t/dghl/monitoring/socialcharter/ecsr/ecsrdefault_EN.asp

¹⁹ http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/CollectiveComplaintsBrochure2013_en.pdf

²⁰ Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints CETS No. 158, 1995.



Potential for certain International Non-Governmental Organisations (INGOs) to lodge collective complaints

The following organisations are allowed to lodge a complaint

the **European Social Partners: European Trade Union Confederation (ETUC)** for employees, **Business Europe and International Organisation of Employers (OIE)** for employers; **certain international non-governmental organisations (INGOs)** holding participatory status with the Council of Europe **social partners at national level**

There are two steps to registering as an INGO, with an entitlement to lodge a collective complaint alleging violation of the European Social Charter:

The first step is to obtain participatory status from the Council of Europe which is granted to international NGOs which are particularly representative at the European level, that is to say, which federate national member organisations in a number of the 47 member states, and in the fields of their competence. Participatory status is granted once a year in December. As the procedure for the examination of applications takes several months, applications should be submitted by March in order to obtain the status in December of the same year.

The second step is to apply for entitlement to lodge a collective complaint procedure. Each application must be supported by detailed and accurate documentation aiming to show in particular that the INGO has access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions, etc., in order to draw up complaint files that meet basic requirements of reliability.

To this end, the INGO may refer to the following documents:

Constitution / Statute of the OING;
rules of procedure ;
composition of its **Administrative Council**;
composition of its **Executive Board**, if any;
latest **activity report**;
its **participation in meetings of INGO groupings of the Council of Europe** (meetings and dates);
any **other relevant document**.

Human rights and Health

All EU Member States are parties to the **European Convention on Human Rights and Fundamental Freedoms**. Candidate countries have to sign and ratify the Convention to be legible for accession to the Union. Most Member States are also parties to the **European Social Charter**. In addition, human rights are guaranteed by national legislation and international obligations. Member States are parties to a range of other international human rights treaties (see [4. Fundamental Rights in Europe](#)).
Human Rights and Health

The enjoyment of the highest attainable standard of health is a fundamental right of every human being enshrined in **WHO's Constitution**.²¹ As detailed before, the International Covenant on Civil and Political Rights (ICCPR) has declared the right to health.

²¹ <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf>



Right to health in the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 12

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
2. To achieve full realisation of this right, States Parties need to take the following steps to meet expectations of the current Covenant:
 - (a) The provision for the reduction of the still birth rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

The human right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Health as an inclusive right



World Health Organization

In the UN framework, the right to health is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe, drinkable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

Freedoms and entitlements

The right to health contains both freedoms and entitlements. **Freedoms** include the right to control one's health, including the right to be free from non-consensual medical treatment and experimentation. **Entitlements** include the right to a system of health protection (i.e. health care and the underlying determinants of health) that provides equality of opportunity for people to enjoy the highest attainable standard of health.

Specific elements

The right to health is a broad concept that can be broken down into more specific entitlements such as the rights to:

- **maternal, child and reproductive health;**
- **healthy workplace and natural environments;**
- **the prevention, treatment and control of diseases, including access to essential medicines;**
- **access to safe, drinkable water.**²²
- **right to privacy and confidentiality**
- **right to non-discrimination in access to health**

The Committee on Economic, Social and Cultural Rights in General Comment No. 14 also defined the obligations that States Parties have to fulfill in order to implement the right to health at the national level.²³

²² <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>

²³ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement>



Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Special Rapporteurs

Special Rapporteurs²⁴ are independent experts appointed by the Human Rights Council to examine and report back on a country situation or a specific human rights theme. Since 1979, special mechanisms have been created by the Commission on Human Rights, the UN human rights body, to examine specific country situations or themes from a human rights perspective. The United Nations Commission on Human Rights, replaced by the Human Rights Council in June 2006, has mandated experts to study particular human rights issues.

Special Rapporteur on Physical and Mental Health

The mandate of the Special Rapporteur on the right to of everyone to the enjoyment of the highest attainable standard of physical and mental health was originally established by the Commission on Human Rights in April 2002 by [resolution 2002/31](#).²⁵ Subsequent to the replacement of the Commission by the Human Rights Council in June 2006, the mandate was endorsed and extended by the Human Rights Council by its resolution 6/29 of 14 December 2007.

The Special Rapporteur implements the mandate through different means and activities, as assigned by the different resolutions related to the mandate:

The Special Rapporteur presents **annual reports** to the Human Rights Council and to the General Assembly on the activities and studies undertaken in the view of the implementation of the mandate (See Annual Reports²⁶);

He/She monitors **the situation of the right to health throughout the world**. He/she identifies general trends related to the right to health and undertakes country visits which provide the Special Rapporteur with a first hand experience of the situation in a specific country (See Country visits²⁷);

He/She communicates with States and other concerned parties with regard to alleged cases of **violations of the right to health** (See Individual complaints²⁸) and other issues related to his/her mandate;

He/She **promotes the full realisation of the right to health through dialogue** with relevant actors by participating in seminars, conferences and expert meetings.

The United Nations Human Right Council appointed **Mr Anand Grover as Special Rapporteur** on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health at its eighth session held in June 2008. Mr Anand Grover, a practicing lawyer in the Bombay High Court and the Supreme Court of India, took up his functions as Special Rapporteur on 1 August 2008.²⁹

Other specific rapporteurs relevant for public health

The activities and mandate of other rapporteurs may also have certain relevance for **public health**, such as the **Special Rapporteur on Right to Food**³⁰, on **Extreme Poverty and Human Rights**³¹, on **Adequate Housing**³² and on **children's rights**. The United Nations Commission on Human Rights decided to appoint **the Special Rapporteur on the sale of children, child prostitution and child pornography** in its [resolution 1990/68](#). This followed the adoption of the **New York Convention on the Rights of the Child**³³, mandating the Special Rapporteur to investigate the exploitation of children around the world and to submit reports to the General Assembly and the Commission on Human Rights, making recommendations for the protection of the rights of the children concerned.³⁴

²⁴ <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

²⁵ http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2002-31.doc

²⁶ <http://www.ohchr.org/EN/Issues/Health/Pages/AnnualReports.aspx>

²⁷ <http://www.ohchr.org/EN/Issues/Health/Pages/CountryVisits.aspx>

²⁸ <http://www.ohchr.org/EN/Issues/Health/Pages/IndividualComplaints.aspx>

²⁹ <http://www.ohchr.org/EN/Issues/Health/Pages/SRBio.aspx>

³⁰ <http://www.righttofood.org/>

³¹ <http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx>

³² <http://www.ohchr.org/en/issues/housing/pages/housingindex.aspx>

³³ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

³⁴ <http://www.ohchr.org/en/issues/children/pages/childrenindex.aspx>



WHO Health and Human Rights Publication Series

The **WHO Health and Human Rights Publication Series** aims to clarify the relationship between human rights and specific health topics.³⁵

"25 Questions and Answers on Health and Human Rights" lays the foundation for the rest of the series by suggesting answers to key questions which come to mind in exploring the linkages between health and human rights.³⁶

"WHO's Contribution to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Health and Freedom from Discrimination" considers the linkages between racial discrimination and health.³⁷

"The Right to Water" has been replaced by Factsheet No. 35 'Right to Water'. The Office of the High Commissioner for Human Rights (OHCHR), the United Nations Human Settlement Programme (UN-Habitat) and the WHO have issued a factsheet on the right to water. This factsheet starts by explaining what the right to water is, illustrates what it means for specific individuals and groups, and then elaborates upon state obligations with respect to the right. It concludes with an overview of national, regional and international accountability and monitoring mechanisms.³⁸

"International Migration, Health and Human Rights" draws attention to important human rights issues that migration poses for health policy-makers internationally, such as the health implications of forced migration as well as detaining and screening migrants at the borders.³⁹

"Human Rights, Health and Poverty Reduction Strategies" is intended to provide a tool for health policy-makers to design, implement and monitor a poverty reduction strategy through a human rights-based approach.⁴⁰

"The Right to Health" Cartoon has been developed in recognition of the fact that improving awareness and understanding of the right to health is an essential prerequisite to putting into action this right.⁴¹

"HIV Stand Up for Human Rights" cartoon launched by the United Nations Office for the High Commissioner for Human Rights (OHCHR), the United Nations Joint Programme for HIV/AIDS (UNAIDS) and the World Health Organization (WHO), is designed to empower young people to promote human rights in relation to HIV/AIDS, to raise awareness of the key linkages between HIV/AIDS and human rights, to demystify the disease and to combat the myths and taboos associated with HIV and AIDS.⁴²

New publication on "Human Rights and Gender Equality in Health Sector Strategies: How to Assess Policy Coherence" This tool, developed in collaboration between WHO, the Office of the High Commissioner for Human Rights (OHCHR) and the Swedish International Development Cooperation Agency (SIDA) is designed to support countries to strengthen national health strategies by applying human rights and gender equality commitments and obligations. The tool poses critical questions to identify gaps and opportunities in the review or reform of health sector strategies.⁴³

Guidelines on Human Rights Education for Health Workers

The OSCE has launched **two guidelines on human rights education for health workers and for human rights activists**. The new handbooks provide advice to programme designers and trainers on developing curricula, enhancing the teaching and learning experience, preparing trainers and evaluating the work done.

³⁵ <http://www.who.int/hhr/activities/publications/en/>

³⁶ <http://whqlibdoc.who.int/hq/2002/9241545690.pdf>

³⁷ http://www.who.int/entity/hhr/activities/q_and_a/en/Health_and_Freedom_from_Discrimination_English_699KB.pdf

³⁸ <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>

³⁹ <http://www.who.int/entity/hhr/activities/en/FINAL-Migrants-English-June04.pdf>

⁴⁰ http://whqlibdoc.who.int/hq/2008/WHO_HR_PUB_08.05_eng.pdf

⁴¹ http://www.who.int/entity/hhr/news/en/cartoon_health.pdf

⁴² http://whqlibdoc.who.int/publications/2010/9241591145_eng_small.pdf

⁴³ http://whqlibdoc.who.int/publications/2011/9789241564083_eng.pdf



These guidelines present approaches to be adopted when planning or implementing human rights education for health workers related to **six key structural areas**: the human rights-based approach to human rights education; core competencies; curricula; training and learning processes; evaluation; and professional development and support of trainers. The guidelines also offer a list of key resources to assist in planning and implementing human rights education for health workers.⁴⁴

Public health in the primary law of the EU

In order to understand the complex character of public health in the EU, we should bear in mind **the Health in All Policies (HIAP)** approach, and basic principles such as **subsidiarity** and **proportionality**.

Health in All Policies (HIAP)

TITLE XIV PUBLIC HEALTH – TFEU Article 168 (ex Article 152 TEC)

1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning and combating of serious cross-border threats to health. The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

Generally, public health policies belong to the EU Member States' competences, but the EU may contribute to these efforts within the limits of the Treaties by adopting binding measures seeking harmonisation and by co-ordinating Member States' actions. **Article 168⁴⁵ of the Treaty on the Functioning of the European Union (TFEU)** ensures that '1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.' This is the so-called **Health in All Policies [HIAP] approach**.⁴⁶ Therefore, the EU can act within the limits of the specific competences conferred upon it by the primary law of the EU.

What is Health in All Policies?

The European Portal for action on Health Inequalities - Health in All Policies (HiAP) is a policy strategy, which targets the key social determinants of health through integrated policy responses across relevant policy areas with the ultimate goal of supporting health equity. The HiAP approach is therefore closely related to concepts such as 'inter-sectoral action for health', 'healthy public policy' and the 'whole-of-government' approach.

Although the EU has some competences in line with the Health in all Policies (HIAP) approach, it is important to note that **TFEU Article 36⁴⁷ allows Member States to adopt national legislation which goes beyond the limits set out by EU legislation**, if they consider that the protection of health and human lives requires such an action. However, such legislation containing prohibitions or restrictions shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

⁴⁴ <http://www.osce.org/odihr/105053>

⁴⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>

⁴⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>

⁴⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>



Principle of Subsidiarity and proportionality

Both principles are defined in **Article 5⁴⁸ of the Treaty on European Union**.

The principle of subsidiarity ensures that decisions are taken **as closely as possible to the citizen** and that constant checks are made to verify that action at Union level is justified in light of the possibilities available at national, regional or local level. Specifically, it is the principle whereby **the Union does not take action** (except in the areas that fall within its exclusive competence), **unless it is more effective than action taken at national, regional or local level**.⁴⁹

It is closely bound up with the **principle of proportionality**, which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaties. Similarly to the principle of subsidiarity, **the principle of proportionality** regulates the exercise of powers by the European Union. It seeks to set actions taken by the institutions of the Union within specified bounds. Under this rule, the involvement of the institutions must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued.⁵⁰

Fundamental Rights Agency – data about fundamental rights and health

The Fundamental Rights Agency (FRA – see in **4. Fundamental Rights in Europe**) plays an important role in data collection, which covers health related data as well. The FRA factsheet on multiple discrimination projects **'Inequalities and multiple discrimination in healthcare'** was issued on 20 February 2012. It sketches out the policy context and legal framework in the EU as regards multiple discrimination, as well as the project's objectives. These include: identifying barriers and experiences of discrimination that prevent access to healthcare services for people at a higher risk of exclusion; mapping policies in EU Member States to improve health services for such people; and determines ways in which health professionals can address the needs of such people⁵¹ The FRA report **'Inequalities and multiple discrimination in access to and quality of healthcare'** examines experiences of unequal treatment in more than one area of healthcare, providing evidence of discrimination or unfair treatment.⁵² This FRA research findings show that healthcare systems may create barriers in access to healthcare or provide healthcare of a different quality to people who share more than one protected trait, such as sex, disability and ethnicity.⁵³

⁴⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>

⁴⁹ http://europa.eu/legislation_summaries/glossary/subsidiarity_en.htm

⁵⁰ http://europa.eu/legislation_summaries/glossary/proportionality_en.htm

⁵¹ <http://fra.europa.eu/en/publication/2012/inequalities-and-multiple-discrimination-healthcare>

⁵² <http://fra.europa.eu/en/publication/2013/factsheet-inequalities-and-multiple-discrimination-access-and-quality-healthcare>

⁵³ http://fra.europa.eu/sites/default/files/factsheet-inequalities-discrimination-healthcare_en.pdf



Fundamental Rights in Europe



Signing of the Charter of Fundamental Rights of the European Union.
Source: European Commission

At a general level, Article 2 of the Treaty on the European Union (TEU) provides for the EU to be **“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”**. According to Article 7 of the TEU, the EU can determine that there is a **“clear risk of a serious breach by a Member State”** or even determine **“the existence of a serious and persistent breach”** of the values as stipulated in Article 2.⁵⁴

The Charter of Fundamental Rights of the European Union

Recognising the importance of Fundamental Rights, the first European Convention has been convened which prepared and drafted **the Charter of Fundamental Rights of the European Union**⁵⁵, which was proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the

European Commission. However, it only became legally binding after the Treaty of Lisbon came into force on 1 December 2009, except in those Member states (the United Kingdom, Poland and conditionally the Czech Republic) that opted-out.

The document for the first time includes a Charter of Rights based on a combination of national and international legal obligations, EU treaties and European case law. The Charter is a very modern codification and includes **“third generation” fundamental rights**, such as data protection, guarantees on bioethics and transparent administration. The Commission publishes an Annual Report on the Charter’s application to monitor the progress achieved.

The Charter lists the rights that the EU Institutions and Member States must respect when they develop and implement EU law and policy. The rights outlined in the Charter are divided into seven chapters, namely **(1) Dignity; (2) Freedoms; (3) Equality; (4) Solidarity; (5) Citizen’s rights; (6) Justice and (7) General provisions**.

Health is mentioned twice in Chapter IV. The first mention is **Article 31**⁵⁶ on fair and just working conditions, stating that “Every worker has the right to working conditions which respect his or her health, safety and dignity.”

The second mention is **Article 35 on healthcare**

“Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

What are fundamental rights and how are they different from human rights?

Fundamental rights, as presented in the European Charter, are more than just principles; they draw from several different legal sources, such as:

⁵⁴ http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_AnnualReport-2011_EN.pdf p18

⁵⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>

⁵⁶ <http://www.jusline.eu/index.php?cpid=f92f99b766343e040d46fcd6b03d3ee8&lawid=30&paid=32>



constitutional traditions and **international obligations** common to Member States
the **primary law of the EU (the Treaties)**
the **European Convention for the Protection of Human Rights and Fundamental Freedoms**
the **Social Charters** adopted by the Community and the Council of Europe
case law of the **European Court of Justice (ECJ)** and the **European Court of Human Rights (ECHR)**

Therefore, what distinguishes fundamental rights from human rights is that they are derived from several different sources, of which international human rights instruments are only one. In general, the EU uses the expression “human rights” in its external policies and “fundamental rights” in its internal policies. Therefore, all of these rights exist already in a variety of legal documents and in jurisprudence, but the Charter is the first time that they are all brought together in one document.

Enforcement of Fundamental Rights in the EU

According to EU law, the EU and its Member States, when acting in the scope of EU law, are bound by fundamental rights in three ways:

the **general principles of law** as developed by the CJEU;
the **fundamental rights** as listed and defined in the **Charter of Fundamental Rights of the European Union**;
the **fundamental rights** as guaranteed by the **Council of Europe’s ECHR**⁵⁷

As regards the legal landscape in the EU, the following **institutions** are responsible for implementing the Fundamental Rights:

European Commission
European Parliament
European Ombudsman
Court of Justice of the European Union
Fundamental Rights Agency

European Commission

In 2010 the Commission launched a **strategy to ensure the effective implementation of rights and freedoms enshrined in the Charter**.⁵⁸ This strategy aims to:

1. Guarantee that the EU is beyond reproach in upholding **fundamental rights**;
2. Improve information for citizens, and;
3. Monitor progress.⁵⁹

Moreover, the European Commission is obliged **to test its new pieces of legislation against Fundamental Rights**. This quality-check includes an analyses whether the new legislation has any impact or limitation on Fundamental Rights.⁶⁰

European Parliament

The European Parliament often carries out activities to promote fundamental rights. The European Parliament frequently urges other institutions and EU Member States to consider addressing particular fundamental rights challenges through policy and legislation. The latest example for this was the European Parliament resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012).⁶¹

European Ombudsman

The European Ombudsman may investigate complaints alleging maladministration in the institutions and bodies of the EU. **These may include alleged violations of fundamental rights**,⁶²

⁵⁷ http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf page 18

⁵⁸ [European Commission \(2010\).](http://ec.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf)

⁵⁹ <http://ec.europa.eu/justice/fundamental-rights/>

⁶⁰ http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf p 21-22

⁶¹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN>

⁶² <http://www.ombudsman.europa.eu/en/home.faces>



Court of Justice of the European Union

Since its inception in 1952, the mission of the [Court of Justice of the European Union](#) is to ensure **respect for the law in the interpretation and application of the Treaties**. Under this remit the Court of Justice of the European Union:

reviews the **legality of acts** of EU institutions;
ensures compliance by **Member States of their obligations** under the Treaties; and
interprets EU law at the request of national courts.

The Court is therefore the judicial authority of the European Union. In collaboration with the courts of the Member States, it safeguards the uniform application and interpretation of Union law. The Court of Justice of the European Union, based in Luxembourg, is composed of three courts: the Court, the General Court (established in 1988) and the Civil Service Tribunal (established in 2004). Since they were created, the three courts have made about 15,000 judgements.



The CJEU is responsible for dealing with cases alleging a violation of the Charter of Fundamental Rights by the EU or by a Member State when it is implementing EU law. The CJEU is not primarily designed as a human rights court to deal with individual complaints. Its role is to judge whether the EU institutions themselves have failed to comply with EU law or to offer guidance to national courts on how to interpret the meaning of EU law. The Charter of Fundamental Rights is gaining prominence in this context. In 2011, the number of decisions quoting the Charter in its reasoning rose by more than 50 % compared to the previous year (up from 27 to 42).⁶³

The Fundamental Rights Agency (FRA) Case Law database⁶⁴ provides **a compilation of European Court of Justice (ECJ) case law** with direct references to the Charter of Fundamental Rights of the European Union.

The European Union Agency for Fundamental Rights (FRA)

The FRA was set up by the founding [Council Regulation \(EC\) No 168/2007](#) as **an independent EU Agency to monitor the promotion of Fundamental Rights** proclaimed in the Charter of the Fundamental Rights of the European Union. The FRA, based in Vienna, **disseminates objective, reliable and comparable data on the situation of fundamental rights in all EU countries within the scope of EU law**. It works closely with other bodies and institutions at national and European level.



The Agency aims to give EU institutions and EU countries assistance and expertise relating to fundamental rights when they implement EU law. The FRA provides the EU Institutions and Member States with independent, evidence-based advice on fundamental rights. The Agency plans its research on the basis of annual work programmes and within the thematic areas listed in its **Multiannual Frameworks**.

The main areas that the FRA covers include **discrimination (including on the ground of disability)**, access to justice, racism and xenophobia, data protection, the rights of victims of crime and the rights of the child. Its aim is to contribute towards ensuring full respect for fundamental rights across the EU.

The FRA mandate

The thematic areas of the agency's work are determined through a five-year multi-annual Framework (2013-2017). On 11 March 2013, the Justice and Home Affairs Council of the European Union, following a proposal of the European Commission and after consulting the European Parliament, adopted the agency's current Multi-annual Framework. The Framework is implemented as

⁶³ http://fra.europa.eu/sites/default/files/fra_uploads/2211-FRA-2012_Annual-Report-2011_EN.pdf page 20

⁶⁴ <http://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?homePage=yes>



a complement to the work of other EU bodies, the Council of Europe and other international organisations involved in the field of human rights. The [current Multi-annual Framework 2013-2017](#)⁶⁵ will expire on 31st December 2017 and will be replaced by a new Council Decision. The Agency's mandate covers **the following nine areas**:

- access to justice;
- victims of crime, including compensation to victims;
- information society and, in particular, respect for private life and protection of personal data;
- **Roma integration (new);**
- **judicial cooperation, except in criminal matters (new);**
- rights of the child;
- **discrimination based on** sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation **(new);**
- immigration and integration of migrants, visa and border control and asylum;
- racism, xenophobia and related intolerance.

The Fundamental Rights Platform (FRP)

The Fundamental Rights Platform (FRP) meeting is the flagship event of the FRA. In accordance with Article 11 TEU, which states that **“the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”**. The meeting brings together participants of the Fundamental Rights Platform (FRP) – the agency's network for cooperation with over 300 civil society organisations working on a variety of fundamental rights issues across the European Union at European, national or local level. It allows information exchange and the pooling of knowledge, thereby maintaining an open, transparent and regular dialogue between FRA and civil society organisations, and among civil society organisations themselves. The FRA gives an opportunity for participants to provide feedback and suggestions to **FRA's Annual Work Programme and annual report**.

EU Agency for Fundamental Rights (FRA) presents its annual report

On 18 June 2013, the European Union Agency for Fundamental Rights (FRA) published its **annual report** on challenges and achievements in the field of fundamental rights in 2012. The annual report provides in-depth evidence and analysis of fundamental rights developments in the European Union, its Member States and Croatia. **It looks at fundamental rights related developments** in

- asylum, immigration and integration;
- border control and visa policy;
- information society and data protection;
- the rights of the child and protection of children;
- equality and non discrimination;
- racism and ethnic discrimination;
- participation of EU citizens in the Union's democratic functioning;
- access to efficient and independent justice; and
- rights of crime victims.

This annual report focuses on how European values are being tested and what must be done to protect fundamental rights in this period of crisis. It also considers the impact on the rule of law, as well as what some EU Member States are doing to ensure trust in their justice systems.

Examples of issues in this year's report include:

The impact of budget cuts on education, healthcare and social services for vulnerable groups, such as **children**;

Roma continue to face discrimination and social exclusion, with many living in deep poverty and lacking access to healthcare and decent housing;⁶⁶

⁶⁵ <http://fra.europa.eu/en/about-fra/what-we-do/areas-of-work>

⁶⁶ <http://fra.europa.eu/en/press-release/2012/widespread-roma-exclusion-persists-find-new-surveys>



- The EU is driving forward efforts to reform **the EU's data protection framework**, the most far-reaching reform of EU data protection laws in 20 years;⁶⁷
- As 2012 was the Year of Active Ageing the EU also focused on the challenges and obstacles facing **older people**, including those with **disabilities**.⁶⁸

Equal treatment legislation in Europe

TFEU **article 19** provides the EU with a legal basis to combat all forms of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.⁶⁹

The aim of the Directive

The objective of this legislation is to combat discrimination on the grounds of racial or ethnic origin. Therefore, this Directive lays down minimum requirements for implementing the principle of equal treatment between people living in the EU. By discouraging discrimination, it should help to increase participation in economic and social life and reduce social exclusion. **It forbids all direct or indirect discrimination** based on race or ethnic origin, as well as harassment and any behaviour which makes one person discriminate against another.

Scope of the Directive

The Directive applies to all persons and to all sectors of activity, regarding:

- **access to employment and to unpaid activities**, specifically during recruitment;
- **working conditions**, including concerning hierarchical promotion, pay and dismissals;
- access to **vocational training**;
- **involvement in workers' or employers' organisations**, and in any professional organisation;
- access to **social protection** and to **health care**;
- **education**;
- **social advantages**, access to goods and services, particularly housing.

The Directive does not cover differences of treatment based on nationality, or the conditions of entry and residence for citizens from third countries in the European Union (EU).

Derogations from the principle of equal treatment

In the field of employment, **a derogation may** be authorised where race or ethnic origin constitutes a fundamental professional requirement. This derogation must be justifiable by the nature of the activity and the conditions under which it is exercised. It must be legitimate and proportionate. Lastly, the directive does not oppose positive action, namely national measures aimed at preventing or compensating for disadvantages connected with race or ethnic origin.

Remedies and enforcement

Anyone who believes they are a victim of a failure to comply with the principle of equal treatment must be able to access **legal and/or administrative procedures**, even if the relationship in question has ended. Associations or other interested legal persons may also undertake judicial proceedings either on behalf of or in support of the complainant. **The burden of proof** falls on the party accused, who must prove that the principle of equal treatment has not been infringed. The complainant must be protected against any adverse treatment or adverse consequence as a reaction to the proceedings.

Social dialogue and civil dialogue

The social partners ensure the promotion of equal treatment, specifically by monitoring practices in the workplace, producing codes of conducts and concluding collective agreements. More generally, the Directive encourages the conclusion of agreements establishing non-discrimination rules in the fields

⁶⁷ <http://fra.europa.eu/en/opinion/2012/fra-opinion-proposed-eu-data-protection-reform-package>

⁶⁸ <http://fra.europa.eu/en/press-release/2013/eu-agency-fundamental-rights-fra-presents-its-annual-report>

⁶⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>



which fall within the scope of collective bargaining. **Civil dialogue** with the civil society organisations concerned is also encouraged.

Bodies for the promotion of the principle

Each Member State must establish at least one body dedicated to combating discrimination and responsible for helping victims and conducting independent studies. Last, but not least, Directive **2000/43/EC** is supplemented by **the Directive 2000/78/EC** on equal treatment in employment and occupation

The Directive **2000/78/EC** establishing a general framework for equal treatment in employment and occupation⁷⁰

The Member States ban discrimination in the field of employment and occupation. However, the scope of this prohibition, its content and enforceability vary from country to country. Hence this Directive is designed to lay down a general minimum standards framework in the following areas:

- conditions of **access to employed or self-employed activities**, including promotion;
- **vocational training**;
- **employment and working conditions** (including pay and dismissals);
- **membership of and involvement in an organisation** of employers or workers or any other organisation whose members carry on a particular profession.

In its scope, the Directive applies (in both the public and private sectors) to access to employment, self-employment and occupation; access to vocational training and guidance; employment and working conditions, including dismissals and pay, as well as membership of and involvement in trade unions, organisations of employers, and professional bodies.

The aim of the Directive

The underlying purpose of the Framework Directive is **to prohibit discrimination in the area of employment on the grounds of disability, age, sexual orientation and religion or belief**. The Framework Directive aims to realise this purpose by **laying down minimum requirements** that have to be implemented by Member States within a specified time frame. However, as set out in Article 8(1) of the Framework Directive, Member States are allowed, and should be actively encouraged, **to extend the principle of equal treatment** to areas of activity beyond employment (**a horizontal expansion**), as well as improve on the level and quality of the protection that it affords (**a vertical expansion**). In order to implement the principle of equal treatment, the Framework Directive relies primarily on the prohibition of any form of discrimination (direct or indirect). The prohibition of indirect forms of discrimination is clearly an essential tool for achieving equality of opportunity for any protected group.

Indirect discrimination

An example that is regularly used to illustrate indirect discrimination in the context of disability is a **job requirement for a driving licence**. Such a requirement (although apparently neutral) would **clearly place blind people at a particular disadvantage when compared to other persons and, as a result, constitute an indirect form of discrimination against them**. Nonetheless, this example can also be used to demonstrate that there will be occasions where indirect forms of discrimination can and should be allowed to continue because of the practical necessity in certain job situations. Non-discrimination laws typically take this situation into account by providing the respondent with an opportunity to objectively justify the provision, criterion or practice in question (the 'justification defence'). **The 'justification defence' Article 2(2)(b)(i)** means that the respondent where he/she is able to demonstrate that he/she has a "legitimate aim and [that] the means of achieving that aim are appropriate and necessary". **The duty to accommodate – Article 5** means that the protection afforded by the Framework Directive will be of no benefit to an individual that is unqualified for the job in question. As such, a rejection from a job for which an individual does not have the necessary qualifications will not constitute discrimination under this directive. A major difficulty for people with disabilities, however, is that employers often do not recognise the abilities of disabled people but see only the barriers that they encounter on a daily basis (both within and outside the employment context). By focusing on the disability rather than an individual's ability to perform the job, employers often

⁷⁰ <http://eur-lex.europa.eu/Notice.do?checktexts=checkbox&val=237068>



conclude that he/she is unsuitable for the post. This is clearly unfair. **The purpose of the duty to accommodate is not to provide 'special measures' to people with disabilities, but instead to remove barriers to their participation where it is equitable to do so.**

Additional protection afforded by the Framework Directive

In addition to the prohibition of 'direct' and 'indirect' forms of discrimination and the duty to provide reasonable accommodations, the Framework Directive also prohibits **'harassment'** as well as **'an instruction to discriminate'**. Both of these additional prohibitions are included within the concept of discrimination as defined in Article 2 of the Framework Directive. The Framework Directive also

demands that **Member States implement a number of changes to their national legal systems** (where necessary) to ensure that the protection afforded by the Framework Directive is most effective.

Important elements of the legal protection are

Reversal of the burden of proof. Member States must institute a reversal in the burden of proof as regards the identification of direct and indirect forms of discrimination.

Legal standing for interest groups. Member States must ensure that organisations (such as trade unions and NGOs) that are deemed by national law as having a "legitimate interest" in ensuring that the Framework Directive is complied with, are given legal standing to bring cases either on behalf of or in support of a complainant (provided that the complainant approves of such action).

Victimisation. Article 11 of the Framework Directive provides that Member States must ensure that employees are protected "against dismissal or other adverse treatment by the employer" (victimisation)

The directive acknowledges some **exceptions to the principle of equal treatment, which would prevent the application of the Directive**. Such exceptions necessary in a democratic society are e.g. protection of health, protection of the rights and freedoms of others. Thus, it is important that disability NGOs (together with NGOs representing the other 'protected grounds') seek to ensure that these exceptions under Article 2(5) are **interpreted as restrictively as possible**. Other key elements are: Genuine occupational requirements (Article 4), Positive action (Article 7).

Conclusion

Having analysed the scope and operation of the Framework Directive, two principal limitations should be noted.

First, the directive does not contain any requirement to establish an independent enforcement body to oversee its operation, such as the United Kingdom's Disability Rights Commission. However, there are 'equality bodies' in all EU Member states which are gathered in a Brussels-based organisation called Equinet, which can play an essential role in assessing particular problems that could arise in the implementation of the directive, provide recommendations for the resolution of those problems, educate those involved at a national level with the directive, and take cases up on behalf of those whose rights have been infringed.

The second, and most important, limitation is that the protection afforded by the Framework Directive is restricted to the context of employment.⁷¹

Implementation of the EU anti-discrimination law (Directives 2000/43/EC and 2000/78/EC)

According to **a comparative study**, the degree of implementation varies greatly between countries.

The initial date of transposition expired on 2003. In 2011, all EU Member States have taken measures to transpose the Directive and as part of the EU acquis, **EU candidate countries** (Former Yugoslav Republic of Macedonia (FYROM), Iceland, Montenegro, Turkey) have had to align with this piece of legislation too. All EU Member States have included the **general principles of equal treatment** or specific grounds on discrimination either in their constitution (except the UK which has no written constitution) and/or in their national anti-discrimination legislation.

⁷¹ <http://disability-studies.leeds.ac.uk/files/library/richard-whittle-european-Directive.pdf>



A number of Member States such as Belgium, Bulgaria, Cyprus, Hungary, Poland, Romania, Spain and Sweden chose **not to restrict new anti-discrimination laws** on the basis laid out in the two Directives (Directive **2000/43/EC** and **Directive 2000/78/EC**) and have opted for a broader list of prohibited grounds (such as nationality, which is explicitly not included in the scope of the Directives, health condition, colour, language, marital status).

Concerning the **candidate countries**, age and sexual orientation are not explicitly mentioned in the legislation in Turkey and the new Anti-Discrimination Act in FYROM includes extra grounds not provided for in the Directives,

An analysis of implementation of the Directive to date shows:

- **Racial or ethnic origin** - some countries have taken the view that including the terms 'race' or 'racial origin' in anti-discrimination legislation reinforces the perception that humans can be distinguished according to race. All states, except Poland and Turkey, have set up such an equality body competent for racial / ethnic discrimination.
- **Religion or belief**: no Member State has a definition fixed in the law with regard to religion or belief. Some states have provided exceptions that go beyond the strict terms of the Directive (Hungary and Croatia). France, Portugal and Sweden did not adopt any exception clause for employers with an ethos based on religion or belief. There has been a gradual increase in case law as a result of the adoption of directives causing controversy over dress code and religious symbol requirements (Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Sweden and the United Kingdom)
- **Disability**: a key concept in the area of disability discrimination is "reasonable accommodation" and there is a duty imposed on employers to provide for this. Outside the field of employment, this duty is not absolute. Some countries have legal provisions that approximate to the reasonable accommodations duty: Austria, Bulgaria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Spain, Sweden, the United Kingdom. The concept of reasonable accommodation duty has not been included in national legislation in Italy, Poland and Turkey.
- **Sexual orientation**. All EU Member States are obliged to prohibit discrimination in employment on the grounds of sexual orientation. All but one of the 28 Member States has an equality body working to enforce this.
- **Age** is generally assumed to be an objective characteristic with natural meaning and hence it is not defined in national legislation.
- **Multiple discrimination** is a relatively new phenomenon in European equal treatment and anti-discrimination debates. In Europe, the tendency is to endorse a **'one-ground' approach**. The preamble of **the new Equal Treatment Directive** makes a first explicit reference to multiple discrimination, as an important issue to be addressed by all member states ⁷²

Towards a new Equal Treatment Directive⁷³

The European Commission put forward its proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM (2008)426 of July 2, 2008). The new 'Article 19 Directive' would ban discrimination on the grounds of religion or belief, disability, age or sexual orientation in all areas of life within EU competence (including education, housing, and access to goods and services) but since then EU member states have not been able to come to an agreement. The existing EU legislation provides legal protection in respect of racial or ethnic discrimination (2000/43/EC) and in employment and occupation (2000/78/EC) but not in other areas.

In its 2012 annual report, the EU Agency for Fundamental Rights states that the economic crisis has increased marginalisation and poverty with a detrimental effect on the full enjoyment of rights, including access to goods and services, housing, health and education. **A strong legal framework protecting Europeans against discrimination would stop the vicious cycle of social exclusion and poverty.** If the directive had been adopted earlier, it could have mitigated the effects of the crisis in a number of areas. The fact that no significant progress has been

⁷² http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf

⁷³ http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/em0008_en.htm



made in negotiations on this proposed legislation during the last five years is symptomatic of the ongoing difficulties of the European Union to deliver progress on human rights.⁷⁴

In their open letter on 22 April 2013⁷⁵, **Social Platform, Amnesty International** and the **Open Society Foundations** called on the Council to maintain an open, transparent and regular dialogue with civil society (Art 11, TEU) on the negotiations of the Article 19 Equal Treatment Directive. The Directive was discussed at the [Fundamental Rights Platform meeting](#) in Vienna on 25 April 2013 under the title 'fostering anti-discrimination policies in the EU', with representatives of the main EU Institutions (European Commission, European Parliament, Council of the European Union) taking part.

However, in light of the positions of specific Member States, **the new Directive will not be adopted during the 2009-2014 legislative period**. In the context of the crisis (financial crisis, and crisis of the EU) mobilising civil society was not enough to prompt the Council to speed up negotiations and to reach an agreement. On April 22 2013, Social Platform, Amnesty and OSI sent a joint letter to the Chair of the Working Party on Social Questions calling on the Council to maintain an open, transparent and regular dialogue with civil society (Art 11, TEU) on the negotiations regarding the Article 19 Equal Treatment Directive.

⁷⁴ http://fra.europa.eu/sites/default/files/annual-report-2012-focus_en.pdf

⁷⁵ http://cms.horus.be/files/99907/MediaArchive/MembersRoom/Fundamental_Rights_WG/20130422_letter_Art19_ChairO'Brien.pdf

About EPHA

EPHA is a change agent – Europe's leading NGO advocating for better health. We are a dynamic member-led organisation, made up of public health NGOs, patient groups, health professionals, and disease groups working together to improve health and strengthen the voice of public health in Europe. EPHA is a member of, among others, the Social Platform, the Health and Environment Alliance (HEAL), and the Better Regulation Watchdog.

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