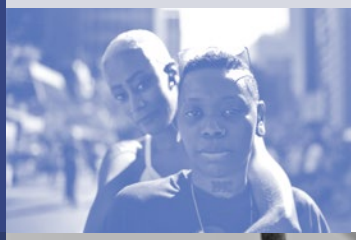
FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

FUNDAMENTAL RIGHTS REPORT — 2020



The year 2019 brought both progress and setbacks in terms of fundamental rights protection. FRA's Fundamental Rights Report 2020 reviews major developments in the field, identifying both achievements and remaining areas of concern. This publication presents FRA's opinions on the main developments in the thematic areas covered, and a synopsis of the evidence supporting these opinions. In so doing, it provides a compact but informative overview of the main fundamental rights challenges confronting the EU and its Member States.

FRA OPINIONS

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1 [FOCUS]

TEN YEARS ON: UNLOCKING THE CHARTER'S FULL POTENTIAL

The Charter of Fundamental Rights of the European Union has been legally binding for 10 years. At EU level, it has gained visibility and sparked a new fundamental rights culture. At national level, awareness and use of the Charter are limited. Courts increasingly use the Charter, showing the impact of this modern instrument. But its use by governments and parliaments remains low. For instance, there is little indication of anyone regularly scrutinising national legislation that transposes EU law for compatibility with the Charter. The Council of the EU called on Member States to regularly exchange their experiences with the Charter and strengthen relevant national bodies. However, it is not easy to pinpoint exactly when the Charter applies at national level. This is a key hurdle to its fuller use. Low awareness of its added value compared with existing, long-established legal sources is another serious obstacle. Legal practitioners who understand the Charter and can put it into practice at national and regional/local levels can help widen its use and improve its implementation. More specialised training of national actors on the use of the Charter is thus essential.

Article 51 of the EU Charter of Fundamental requires the EU and Member States to promote the application of the Charter's provisions, but little has been done at national level in this regard. The Council conclusions on the Charter, adopted in October 2019, call on the Member States to increase awareness of the Charter and enhance training for policymakers, civil servants and legal practitioners, as well as national human rights institutions, civil society organisations and other human rights defenders. All of these can help fulfil the Charter's potential.

The provision of Charter-relevant information could improve. So far, there is no consolidated overview of initiatives and practical experiences in implementing the Charter at national, regional and local levels. Nor is there a single entry point in Member States' administrations for collecting information that refers to relevant experiences and links relevant bodies and individuals with each other so that they can promote promising practices and exchange experiences at national level.

FRA OPINION 1.1

Following up on the 2019 Council conclusions on the Charter, EU Member States should consider launching initiatives and policies that aim to promote awareness and implementation of the Charter at national level. These should use the potential of all relevant national actors. The Charter-related initiatives and policies should be evidence based, building on regular assessments of the use and awareness of the Charter in each Member State. The evidence could be collected through structured multi-stakeholder dialogues on the use of the Charter at national and local levels.

The Member States could consider nominating 'Charter focal points' in their national administrations. Such focal points could facilitate coordination, information sharing and joint planning between national ministries. They could also serve as a link between the national administration and other bodies, including those with a human rights remit and civil society organisations, as well as between the EU and national levels. In addition, they could identify gaps in the system. The focal points could bundle relevant information on the use of the Charter and share these with national actors across all relevant sectors and, where appropriate, with the administrations of other Member States and the EU institutions.

FRA OPINION 1.2

EU Member States should consider strengthening their national procedural rules on legal scrutiny and impact assessments of bills to improve consistency with the Charter. Such procedures should explicitly refer to the Charter in a similar way as to constitutional human rights and, in some cases, to the European Convention on Human Rights (ECHR).

National legislators should pay particular attention to ensuring that legislation that transposes EU law fully complies with the Charter.

The European Commission could consider more opportunities for funding of statutory human rights institutions, such as National Human Rights Institutions, equality bodies or ombuds institutions, to assist them in developing expertise on the Charter's application at national level. This can facilitate their role in assisting Member States apply the Charter, including in law- and policymaking and when using European Structural and Investment Funds.

FRA OPINION 1.3

When revising the 2011-2020 European judicial training strategy, the EU should provide targeted and hands-on training on the application of the EU Charter of Fundamental Rights. Charter-related training opportunities should also be promoted in other EU policies and programmes to ensure that legal practitioners and civil servants, as well as experts working at national statutory human rights institutions, can also benefit from training schemes provided at EU and national levels.

EU Member States should offer their judges and other legal practitioners regular, targeted and needs-based training on the application of the Charter. National human rights institutions and their EU-level networks should be adequately resourced to train their staff on the application of the Charter.

The 2019 Charter conclusions of the Council encourage Member States to "ensure consistency with the Charter in their national procedural rules". National legislators have a responsibility to ensure consistency with the Charter when they incorporate EU legislation into national law. However, national procedural norms on impact assessments and legal scrutiny – in contrast to those used by the EU – rarely mention the Charter.

Many of the civil society organisations that cooperate with FRA in its Fundamental Rights Platform call for increased funding for Charter training, and for the EU to revamp its efforts to collect information on how Member States apply the Charter. Some also call for practical implementing guidelines that can help national bodies to implement EU law in compliance with the Charter.

FRA's research shows that National Human Rights Institutions (NHRIs) do not use the Charter's full potential. The Council conclusions adopted in 2019 underline their "crucial role in the protection and promotion of fundamental rights and in ensuring compliance with the Charter". This includes advising national lawmakers on upcoming law and policies in this regard. EU-level and national funding schemes can assist NHRIs and other bodies with a human rights remit in gaining expertise on the Charter.

Legal practitioners and public administration officials need specialised training to apply the Charter, a comparatively new instrument, effectively. For many legal practitioners who trained in the law many years ago, the Charter was not part of their educational curricula. The use of the Charter requires sound knowledge of the case law of the Court of Justice of the European Union (CJEU). Legal practitioners need to be familiar with it to understand when the Charter applies, whether a specific Charter provision is a right or a principle, and if it can apply between private parties (horizontal direct effect) in a given context.

Judicial training seldom focuses on fundamental rights. Moreover, how much use practitioners make of the available training varies widely from Member State to Member State. FRA's research shows that human rights civil society organisations rarely offer or participate in training on the Charter. Fewer than half of the 25 national judicial training institutes that FRA consulted say that more Charter-relevant training was offered or more Charter awareness had been achieved over the last 10 years.

Exchanging experiences made with the application of the Charter is crucial for two reasons. First, people still have limited experience in using the Charter. They are still pioneers. Second, many cases where the Charter plays a role have a transnational dimension, for instance if they involve a European Arrest Warrant. This makes international exchanges of practices especially important.

The Council has recently committed the Council Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP) to conducting an annual dialogue on the Charter. That acknowledges the added value of such exchanges. The discussion would benefit from a solid evidence base.

FRA OPINION 1.4

The Council and the EU Member States should ensure regular updates of the newly introduced module on the e-justice platform that collects Charter-related experiences and activities. They should also raise awareness about this new tool among relevant national bodies, including National Human Rights Institutions, civil society actors, academia and professional associations. Evidence, such as that collected through the new platform, could form the basis for the new Charter exchange in the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP).

The EU institutions and the Member States should explore additional fora and opportunities for exchange to bring together judges, national parliaments and civil society across the EU. For example, national parliaments could use the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) as such a forum. Moreover, various networks could build on past experience and engage in regular Charter dialogues among the national judiciaries. These include the European Judicial Training Network (EJTN), the Judicial Network of the European Union (RJEU), and the Association of the Councils of State and Supreme Administrative Jurisdictions (ACA). Exchanges among relevant civil society organisations could be arranged through appropriate platforms. Non-judicial bodies could build on past examples and establish regular Charter exchanges through the European Network of Equality Bodies (Equinet) and the European Network of National Human Rights Institutions (ENNHRI). The results of such exchanges should be disseminated in the respective national languages to guarantee that the information reaches the relevant actors at national and local levels.

2

EQUALITY AND NON-DISCRIMINATION

The long-awaited adoption of the Equal Treatment Directive did not happen in 2019, leaving the EU's non-discrimination legal framework incomplete. However, the appointment of a new Commissioner for Equality and the adoption of new legal instruments linked to the European Pillar of Social Rights advanced the equality agenda. The effectiveness and independence of equality bodies, a key element of the equality policy framework, continued to raise concerns. The EU and Member States undertook initiatives to bolster the collection and use of equality data, including through discrimination testing. Meanwhile, national equality and non-discrimination policies brought about legislation and action plans. Some aim to improve the protection of particularly vulnerable groups. Others aim to better implement the prohibition of discrimination. The fundamental rights of lesbian, gay, bisexual, trans and intersex (LGBTI) persons advanced in several Member States. At the same time, there was a backlash against the basic right to non-discrimination in others.

FRA OPINION 2.1

The EU legislator should continue exploring all possible avenues to adopt the Equal Treatment Directive without further delay, in view of the persistent evidence of discrimination on grounds of religion or belief, disability, age and sexual orientation in areas such as education, social protection, and access to goods and services, including housing. This would ensure that EU legislation offers comprehensive protection against discrimination in these key areas of life.

Article 19 of the Treaty of the Functioning of the EU (TFEU) provides the basis for EU legislation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Until now, the Council of the EU has adopted legislation providing protection against discrimination on grounds of gender and of racial or ethnic origin in key areas of life. These include employment and occupation, education, social protection, and access to goods and services, including housing. By contrast, EU legislation protects against discrimination on grounds of religion or belief, disability, age and sexual orientation only in the area of employment. As a result, under EU law, some of the protected characteristics set out in Article 19 of the TFEU – sex and racial or ethnic origin – have more protection than others – religion or belief, age, disability and sexual orientation.

The European Commission proposed an Equal Treatment Directive (COM (2008) 426) in 2008. It would close this gap by extending protection against discrimination on grounds of religion or belief, age, disability and sexual orientation to the areas of education, social protection and access to goods and services.

The year 2019 saw renewed attempts to break the deadlock of negotiations in the Council on this crucial legal instrument. The European Commission proposed to move from a unanimity regime to a qualified majority regime by making use of the general *passerelle* clause under Article 48 (7) of the Treaty on the EU (TEU). The Finnish Presidency of the Council convened a ministers' policy debate to explore possible ways to move forward. The discussion revealed that many EU Member States favour adopting the directive as a way to fill in the gaps in EU legislation and ensure the right of everyone to be treated on an equal basis. However, by the end of the year the Council had still not attained the consensus it needed.

Discrimination and inequalities on different grounds remain realities in everyday life throughout the EU. Findings of FRA surveys, the Special Eurobarometer on Discrimination in the EU, and national studies based on discrimination testing published in 2019 confirm this. People who experience discrimination seldom report it to any authority, as FRA surveys also consistently show. This is even though all EU Member States have equality bodies, as the Racial Equality Directive (2000/43/EC) and several directives on gender equality mandate.

One of the core tasks of these equality bodies is to provide independent assistance to victims of discrimination in pursuing their complaints. When asked why they did not report discrimination, victims' most frequent answer is that they think nothing would change if they did. This suggests the existence of challenges for the effectiveness, independence and adequacy of human, financial and technical resources of equality bodies; these are also reflected in the country reports published in 2019 by the Council of Europe's European Commission against Racism and Intolerance (ECRI) within its fifth monitoring cycle.

Equality data are indispensable for informing evidence-based non-discrimination policies, monitoring trends and assessing the implementation of anti-discrimination legislation. Yet, as the EU High Level Group on Non-Discrimination, Equality and Diversity (HLG) acknowledges, EU Member States do not yet have a coordinated approach to equality data collection and use.

The HLG recognises other challenges common to Member States. They include an imbalance in the grounds of discrimination and areas of life for which data are collected, as well as insufficient consultations with relevant stakeholders when designing and implementing data collection. The *Guidelines on improving the collection and use of equality data* that the HLG adopted in 2018 offer concrete guidance on addressing these challenges at national level.

In 2019, the HLG's Subgroup on Equality Data, led by FRA, published two additional tools. The compendium of practices on equality data provides inspiration for implementing the guidelines in practice. The diagnostic mapping tool can be used to identify data gaps and as a basis for developing an equality data hub. Some EU Member States are already applying both the guidelines and the complementary tools as a basis for improvements. Although the guidelines are for Member States, EU institutions and bodies can also apply them by analogy to strengthen diversity monitoring.

FRA OPINION 2.2

EU Member States should ensure that equality bodies can fulfil effectively the tasks assigned to them in the EU's non-discrimination legislation. This entails ensuring that equality bodies are independent and sufficiently resourced. When doing so, Member States should give due consideration to the European Commission's Recommendation on standards for equality bodies, as well as to ECRI's revised General Policy Recommendation No. 2.

FRA OPINION 2.3

EU Member States should step up efforts towards a coordinated approach to equality data collection in order to use equality data as basis for evidence-based policies in the area of equality and non-discrimination. They should rely on a comprehensive set of data collection tools, including surveys and discrimination testing, and develop strategies to adequately capture situations in which different grounds of discrimination intersect or act in combination. When doing so, EU Member States should give due consideration to the Guidelines on improving the collection and use of equality data adopted by the EU High Level Group on Non-Discrimination, Equality and Diversity. They could also make use of the mapping tool and the compendium of practices that complement them. EU institutions and bodies should consider applying these guidelines within their own structures.

The year also saw increasing use of discrimination testing to produce objective evidence of discrimination. This usefully complements other sources such as surveys on discrimination experiences. Furthermore, a number of EU Member States paid more attention to discrimination that results from a combination or intersection of more than one ground – multiple and intersectional discrimination.

FRA OPINION 2.4

EU Member States are encouraged to continue adopting and implementing specific measures to ensure that lesbian, gay, bisexual, trans and intersex (LGBTI) persons can fully enjoy their fundamental rights under EU and national law. Member States should take measures to address the harmful impact of homophobic and transphobic statements public authorities or officials make. Member States should consider available evidence on discrimination, including data of FRA's LGBTI Survey II, to identify and adequately address protection gaps. In particular, measures should be taken to ensure safety for young LGBTI people at school.

In February 2019, the European Parliament called on the European Commission to adopt a new strategic document to foster equality for LGBTI people in the coming years. It would follow up on the 2016-2019 *List of actions by the Commission to advance LGBTI equality*. In its 2020 work programme, the European Commission included a dedicated strategy to ensure the equality of LGBTI people across the EU.

In 2019, fundamental rights of LGBTI persons advanced in several Member States. In particular, same-sex couples gained more rights, and anti-discrimination laws expanded to explicitly cover gender identity or sexual characteristics.

However, in some Member States, parliaments rejected draft laws aimed at legal recognition of same-sex couples. In some others, the right to non-discrimination or freedom of assembly suffered a setback with respect to equality of LGBTI persons.

In 2019, FRA conducted its second LGBTI Survey. The results show that LGBTI persons continue to experience discrimination in many areas of life. On 18 December, the European Parliament adopted a resolution on public discrimination and hate speech against LGBTI people. The resolution takes stock of the current worrying trends observed throughout the EU. These include "attacks on LGBTI social centres in several Member States, homophobic statements and hate speech targeting LGBTI people, in particular in the context of elections; or legal instruments which might be applied to restrict media, education and other content in a manner that unduly restricts freedom of expression regarding LGBTI issues".

3

RACISM, XENOPHOBIA AND RELATED INTOLERANCE

Nineteen years after the adoption of the Racial Equality Directive and 11 years after the adoption of the Framework Decision on Racism and Xenophobia, several Member States had not correctly transposed and applied the relevant EU legislation. The European Court of Human Rights and national courts set standards on the limits of free speech and incitement to hatred and hate speech. At EU level, there were some policy developments regarding antisemitism in 2019, but very few developments addressed racism and xenophobia. Some Member States adopted policies to better address racism and to encourage people to report hate crime, but assessing their impact remained difficult. People with minority backgrounds and migrants continued to experience harassment, violence and ethnic and racial discrimination in different areas of life in the EU, according to survey and poll findings. Discriminatory ethnic profiling remaine a persistent challenge in 2019, research in a number of Member States showed.

Article 1 of the Framework Decision on Racism and Xenophobia (2008/913/JHA) outlines measures that Member States are to take to punish intentional racist and xenophobic conduct. Article 4 also requires courts to consider bias motivation an aggravating circumstance or take it into consideration in determining the penalties imposed on offenders. Recital 63 of the Victims' Rights Directive (2012/29/EU) affirms that, to encourage and facilitate reporting of crimes, practitioners need to be trained and measures to enable third-party reporting should be put in place. The implementation of EU law entails ensuring that victims and witnesses can report hate crime, and that police identify hate crime victims and record the racist motivation at the time of reporting.

By 2019, several Member States had not fully and correctly transposed the provisions of the Framework Decision, as reports by international monitoring bodies and civil society organisations show. The European Court of Human Rights and national courts set limits on using free speech to justify hostile speech and incitement to hatred. Some Member States adopted guidelines for criminal justice personnel on investigation and prosecution of hate crime. A number of them addressed under-reporting through third-party reporting and community engagement. Still, hate crime remains widely unreported and unrecorded, and national hate-crime data collection is insufficient, FRA's research and other studies consistently show.

FRA OPINION 3.1

EU Member States should fully and correctly transpose and apply the provisions of the Framework Decision on Combating Racism and Xenophobia. In addition, they should take the necessary measures to criminalise bias-motivated crime (hate crime), treating racist and xenophobic motivation as an aggravating circumstance.

EU Member States should put measures in place that encourage reporting of hate crime and facilitate directing the victim to support services. In addition, they should ensure that any alleged hate crime is effectively recorded, investigated, prosecuted and tried. This needs to be done in accordance with applicable national, EU, European and international human rights law.

EU Member States should make further efforts to systematically record data on hate crime, collect them and publish them annually. The data should be disaggregated at a minimum by bias motivation, type of crime, and sex and age of victim(s) and perpetrator(s), to enable them to develop effective, evidence-based legal and policy responses to this phenomenon. Any data should be collected in accordance with national legal frameworks and EU data protection legislation.

FRA OPINION 3.2

EU Member States should significantly improve the effectiveness of their measures and institutional arrangements for enforcing EU and national anti-discrimination legislation. In particular, Member States should ensure that sanctions are sufficiently effective, proportionate and dissuasive. This can reduce the barriers ethnic minorities and immigrants face when they try to access education, employment and services, including housing.

To combat potential bias towards persons who belong to minority ethnic groups, and to ensure equal access to and participation in the labour market, measures could include various elements. These include introducing name-blind recruitment policies; monitoring discriminatory practices; raising awareness and training on unconscious bias; supporting employers and social partners in combating discrimination and obstacles to labour market participation; and providing anti-discrimination training to employers in private companies and public services.

Article 21 of the Charter of Fundamental Rights prohibits any discrimination on the grounds of ethnic origin and race. Similarly, Article 3 of the Racial Equality Directive (2000/43/EC) prohibits any discrimination on ethnic or racial origin in access to education; employment; services, including housing; and social protection, including healthcare. Reports of the European Commission and of international human rights monitoring bodies show that Member States need to make more effort to implement the directive's provisions correctly. Members of minority ethnic groups, including those who are migrants, continue to face discrimination across the EU in all areas of life, as FRA's and other research findings show – most often when seeking employment and housing.

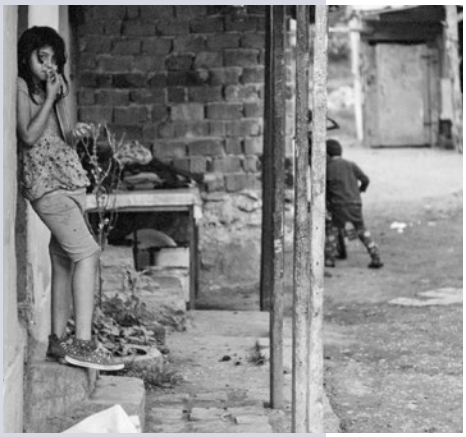
FRA OPINION 3.3

EU Member States should develop specific, practical and ready-to-use guidance to ensure that police officers do not conduct discriminatory ethnic profiling in the exercise of their duties. Such guidance should be issued by law enforcement authorities and included in standard operating procedures of the police, as well as in codes of conduct for police officers. Member States should systematically communicate such guidance to frontline law enforcement officers.

Research in a number of Member States shows the persistence of discriminatory ethnic profiling incidents by the police. Such profiling can undermine trust in law enforcement. It also contradicts the principles of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and other international standards, including those embodied in the ECHR and related jurisprudence of the ECtHR, as well as the EU Charter of Fundamental Rights and the Racial Equality Directive.

4

ROMA EQUALITY AND INCLUSION



The year 2019 marked 10 years since the Council of the EU adopted Conclusions on the inclusion of Roma, prepared at the first meeting of the EU Platform for Roma Inclusion. The document contained 10 common basic principles on Roma inclusion. Principle 4 calls for all Roma inclusion policies to "insert the Roma in the mainstream of society (mainstream educational institutions, mainstream jobs, and mainstream housing)" and overcome "partially or entirely segregated education or housing" where it still exists. But ten years of efforts at EU, international, national and local levels appear to have resulted in little tangible change, as evidenced in FRA's surveys and reports and the European Commission's 2019 *Report on the implementation of national Roma integration strategies*. Many Roma continue to live segregated lives. They face hostility from non-Roma neighbours and mistrust local and national politics that fail to take effective steps to tackle anti-Gypsyism.

The European Commission's *Guidance for Member States on the use of European Structural and Investment Funds in tackling educational and spatial segregation* requires that, in all housing and education operations, the desegregation principle should be considered as a first option. The note explicitly points out that construction of new educational facilities in spatially segregated neighbourhoods should be avoided.

There is little evidence of progress in tackling segregation in education since FRA's last survey in 2016. Roma students continue to be placed in separate classes or schools, in some cases segregated special schools, despite the existence of tool-kits, guides and manuals on educational desegregation that experts and civil society organisations have produced.

FRA OPINION 4.1

EU Member States should strengthen their efforts to eliminate school segregation, as required by the Racial Equality Directive, to prevent discrimination based on the grounds of racial or ethnic origin and fight anti-Gypsyism. In doing so, Member States could consider the use of different methods. For example, they could review the areas covered by school districts and transport Roma pupils to avoid their concentration in certain schools, while at the same providing necessary support to Roma students to improve their educational performance and promote their integration in mainstream classes.

FRA OPINION 4.2

EU Member States should strengthen the housing components of their national Roma integration strategies or integrated sets of policy measures, in order to ensure that all Roma live in non-segregated housing of an adequate standard. In this regard, Member States could consider adapting their national reform programmes in the European Semester to include measures to address severe housing deprivation among Roma. Moreover, EU Member States should ensure that they use the European Structural and Investment Funds effectively to tackle housing segregation and improve access to adequate housing.

Article 34 of the Charter specifically recognises and respects the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by EU law and national law to combat social exclusion and poverty. Moreover, international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights and the European Social Charter (Revised), require states to ensure housing of an adequate standard for everyone.

Despite that, many Roma continue to live in segregated settings, often in appalling conditions. When Roma live in houses or shacks without building permits, some local governments continue to evict them without respecting the safeguards under international human rights law, and leave them homeless.

Segregation on grounds of ethnic origin violates Article 21 of the EU Charter of Fundamental Rights on non-discrimination, as well as Article 3 on equal opportunities and Article 19 on housing of the European Pillar of Social Rights.

FRA OPINION 4.3

EU Member States should improve their data collection methodologies and tools used to monitor progress on Roma inclusion in order to be able to collect equality data in the key thematic areas covered by the 2013 Council Recommendation on effective Roma integration measures in the Member States. The data should allow effective monitoring of desegregation efforts at national and local levels fully in line with the regulations on personal data protection.

Measures addressing segregation should be based on data disaggregated by ethnic origin. Such data are currently lacking in most EU Member States. Some Member States are reluctant to collect or acknowledge the need to collect data disaggregated by ethnic origin. Such data will be necessary for monitoring the proposed enabling conditions applicable to ERDF, ESF+ and the Cohesion Fund. One of the fulfilment criteria for the enabling condition 4, "A more social Europe by implementing the European Pillar of Social Rights", requires specifically that National Roma Integration Strategies include measures to prevent and eliminate segregation.

5

ASYLUM, VISAS, MIGRATION, BORDERS AND INTEGRATION

Respect for fundamental rights at borders remained one of the top human rights challenges in the EU. There were deaths at sea, threats against humanitarian rescue boats, and allegations of violence and informal pushbacks. In a handful of Member States, asylum applicants continued to face overcrowding and homelessness. The first five-year cycle of Schengen evaluations found fundamental rights gaps in return policies, but less so in border management. The EU adopted legislation providing the legal basis for making interoperable its large-scale information technology systems. The instruments that regulate these systems provide safeguards, but their effectiveness depends on how they are implemented. Meanwhile, immigration detention of children increased. Unaccompanied children who turn 18 still experienced gaps in rights and services, undermining their social inclusion.

Respecting fundamental rights at borders remains one of the top challenges in the EU. In 2019, allegations of violence and informal pushbacks persisted. Meanwhile, people died at sea while trying to reach the EU, and humanitarian rescue boats faced threats. Delays in disembarkation put at risk the safety and physical integrity of migrants and refugees rescued at sea. The EU's enhanced powers at borders bring more responsibility regarding fundamental rights. The EU legislature equipped Frontex with various internal tools to protect fundamental rights.

FRA OPINION 5.1

EU Member States should reinforce their preventive measures against any abusive behaviour by law-enforcement authorities. They should also effectively investigate all credible allegations of refoulement and violence by law-enforcement authorities at the borders, in particular those made by statutory national human rights bodies. They should cooperate with relevant international organisations and third countries to ensure safe, swift and predictable disembarkation for migrants and refugees rescued at sea, in a manner that complies with the principle of *non-refoulement*. The European Border and Coast Guard Agency should ensure the effective implementation of all fundamental rights provisions included in its new regulation.

FRA OPINION 5.2

To promote the right of the child to protection and care under international and EU law, the EU and its Member States should develop credible and effective systems that would make it unnecessary to detain children for asylum or return purposes. This is the case regardless of whether the children are in the EU alone or with their families.

While EU law does not prohibit the administrative detention of children in a migration context, there are strict requirements flowing from the Charter and the case law of the European Court of Human Rights (ECtHR). A child applying for asylum or who is in return procedures can be deprived of liberty only as an exceptional measure of last resort. In practice, however, immigration detention of children is often not an exceptional measure in the EU.

FRA OPINION 5.3

In Schengen evaluations, the European Commission should put more focus on the fundamental rights safeguards included in the Schengen Borders Code, including adherence to the principle of *non-refoulement*.

The Schengen evaluation and monitoring mechanism serves to monitor the implementation of the Schengen *acquis*, the body of EU law enacted to compensate for the absence of controls at internal borders. The first five-year cycle of Schengen evaluations identified gaps in the protection of fundamental rights in return policies, less so in border management.

FRA OPINION 5.4

The European Commission should make full use of the expertise of specialised human rights bodies and agencies at national and EU levels when operationalising large-scale IT systems and when assessing their impact on fundamental rights.

The EU and its Member States should build strong fundamental rights provisions into all technical specifications for the operation of large-scale IT systems and their interoperability, in particular as regards data protection and non-discrimination requirements. This is to ensure that the industry that provides such systems pays due attention to the need to comply with relevant international and EU legal provisions. Possible measures could include a binding requirement to involve data protection experts and human rights specialists in the teams that work on the development of the technology, in order to ensure fundamental rights compliance by design.

In the area of freedom, security and justice, the EU has set up three large-scale IT systems and has adopted legislation for setting up three more. Such IT systems help to manage migration, asylum, borders and police cooperation, and, ultimately, serve to strengthen internal security. The EU made its large-scale IT systems interoperable, and included relevant fundamental rights safeguards. However, the systems need to apply these safeguards in practice. Under the Interoperability Regulations, the Commission has to assess the impact of interoperability on fundamental rights and on the right to non-discrimination.

FRA OPINION 5.5

In the new Action Plan on Integration and Inclusion envisaged for 2020, the European Commission should underline the need to continue supporting unaccompanied children in their transition to adulthood. It should also encourage EU Member States to make full use of the possibilities offered by national law.

When unaccompanied children turn 18, they experience gaps in rights and services. This undermines their pathway to social inclusion. Many EU Member States have arrangements for targeted support for such persons even after they turn 18. However, in practice, very few children benefit from such support.

6

INFORMATION SOCIETY, PRIVACY AND DATA PROTECTION

The year 2019 was the first full year in which the General Data Protection Regulation (GDPR) applied. With a renewed and expanded mandate, data protection supervisory authorities led the enforcement process across the EU. They faced a heavy, and steadily increasing, workload. Civil society organisations specialised in data protection proved to be strong allies in implementing the GDPR. In parallel, the ever-increasing use of new technologies, such as artificial intelligence and facial recognition, continued to create fundamental rights challenges, including regarding privacy and data protection. As in previous years, the misuse of personal data and new technologies threatened both fundamental rights and democratic processes. Challenges with illegal online content and disinformation persisted, prompting national and international stakeholders to reconsider legal and technical avenues to tackle them effectively.

Since the General Data Protection Regulation came into effect, the workload of data protection supervisory authorities has been unprecedented. The numbers of investigations and complaints have doubled in the majority of EU Member States. Contacts with public and private entities that process personal data have sometimes even tripled. In parallel, supervisory authorities had to organise awareness-raising and training activities, explaining data protection requirements to both individuals and data protection professionals.

Financial and human resources increased in 2019 for a number of data protection supervisory authorities, but several of these supervisors highlighted that they still do not suffice to cope with the workload. This could ultimately endanger the authorities' fulfilment of their mandate.

FRA OPINION 6.1

EU Member States should ensure that national data protection supervisory authorities receive sufficient resources to allow them to carry out their mandates effectively. EU Member States should support independent and objective reviews of the national data protection supervisory authorities' workload to assess whether current budgets and human resources permit them to cope with their mandates and tasks.

FRA OPINION 6.2

EU Member States should ensure adequate funding of qualified civil society organisations as key stakeholders in the application and enforcement of data protection rules. EU Member States are strongly encouraged to make use of the opening clause in Article 80 (2) of the GDPR in national laws, thereby allowing qualified civil society organisations to lodge complaints regarding data protection violations independently of a data subject's mandate.

The legal and technical expertise of qualified civil society organisations is essential to the application of the rights to data protection and to privacy. The right – established by Article 80 (1) of the GDPR – for data subjects to mandate a not-for-profit body, organisation or association to represent them is a welcomed step. However, few Member States have made use of Article 80 (2), which permits Member States to allow such bodies to launch legal proceedings without a mandate from data subjects.

Like that of supervisory authorities, civil society organisations' workload of investigations and complaints has considerably increased since the GDPR entered into force. However, they face additional challenges, because their resources are scarce. In addition, evidence of potential fundamental rights violations is difficult to obtain, given the technical complexity involved.

FRA OPINION 6.3

The EU and national legislators should ensure that future and ongoing EU regulatory frameworks and preparatory legislative work address and promote transparent and thorough fundamental rights impact assessments, whenever AI technologies are employed. To complement this, the oversight of independent supervisory bodies is essential to guarantee accountability, trustworthiness and fairness.

There is a race to innovate and develop Artificial Intelligence (AI) tools, and the EU is striving to lead this process. A number of EU Member States that employ AI in the security and socio-economic sectors have faced major challenges in making the technology transparent. Despite ongoing efforts to raise awareness of the ethical use of AI, Europeans remain unaware of the fundamental rights implications, such as to the right to privacy or non-discrimination, and how exactly the AI technology is being employed. For example, it is challenging to prove that discrimination has occurred when automated decision-making uses complex algorithms. Furthermore, profiling through automated data processing can potentially lead to social exclusion, which Member States consider as a major societal risk. A few judicial cases are already shaping and promoting changes to the policymaking and legislative processes. It is not well established how to safeguard fundamental rights and monitor compliance before actual violations occur.

Five years after the Court of Justice of the European Union (CJEU) invalidated the Data Retention Directive (2006/24/EC), there has been little progress at EU and Member State levels in terms of adapting existing rules to the requirements set out in the CJEU's jurisprudence. Most of the efforts by Member States focus on the requirements for law enforcement authorities to have lawful access to the data that service providers retain. However, with few exceptions, most Member States have kept a general data retention scheme that covers all subscribers and registered users, all means of electronic communication and all traffic data, and provides for no differentiation, limitation or exception depending on the objective. National courts are seeking further clarification from the CJEU of the criteria it laid down in previous cases, and a number of preliminary rulings about this are pending.

FRA OPINION 6.4

EU Member States should review national rules on retention of data by service providers in order to align it with the requirements of the case law of the Court of Justice of the European Union.

7

RIGHTS OF THE CHILD

Thirty years after the adoption of the UN Convention on the Rights of the Child, 2019 brought new policy developments at EU level. The new European Commission committed itself to adopting a new comprehensive strategy on children's rights. Its priorities included the establishment of an EU Child Guarantee. This is important because, despite a slight improvement, almost one in four children in Europe remained at risk of poverty or social exclusion. The risk is highest for children with migrant backgrounds or with less educated parents. By June 2019, Member States had to incorporate into national law the Procedural Safeguards Directive for children who are suspects or accused persons in criminal procedures. However, several Member States were still amending their national laws throughout the year. The European Commission initiated infringement procedures for lack of notification against seven Member States. The deadline to incorporate into national law the Audiovisual Media Services Directive, which aims to strengthen online safety, is in 2020. There was little progress in this regard. Meanwhile, although online sexual abuse was on the rise, the European Commission had to initiate infringement procedures against 23 Member States for failing to implement the Sexual Abuse Directive.

Almost one out of four children in the EU continue to live at risk of poverty or social exclusion. This raises concerns under Article 24 of the EU Charter of Fundamental Rights, which provides that "Children shall have the right to such protection and care as is necessary for their well-being", and the European Pillar of Social Rights, which lays down the right of children to be protected against poverty. In 2019, the European Parliament and the European Commission expressed a strong political commitment to fighting child poverty and establishing an EU Child Guarantee. To bring the guarantee into existence, this strong political commitment by all EU institutions, including the Council of the EU, and by the Member States, needs to continue.

The EU Child Guarantee is expected to ensure that every child living in poverty, particularly those in vulnerable situations, has access to adequate nutrition, decent housing, and free healthcare, education and early childhood education and care. This would contribute to delivering on the legal commitments of the EU and Member States in the area of the rights of the child. It would also help implement the major policy commitment of the 2030 Agenda for sustainable development to leave no one behind.

The European Parliament has underlined the importance of adequate funding at both EU and national levels to support a future Child Guarantee. It has proposed that Member States allocate at least € 5.9 billion of the European Social Fund Plus for the programming period 2021–2027 to support the Child Guarantee.

FRA OPINION 7.1

The EU legislature should ensure that a future EU Child Guarantee is resourced adequately through EU funds and becomes a specific investment priority for the programming period 2021-2027. The EU institutions should consider adopting a recommendation for the EU Child Guarantee to provide the necessary guidance for its effective implementation. This should include a roadmap and concrete policy measures with reference to legal and policy commitments. The European Semester should review regular progress reports in respect to that recommendation and feed relevant information into its country-specific recommendations, especially as EU funds will be used to support implementation.

FRA OPINION 7.2

EU Member States should transpose the Procedural Safeguards Directive to ensure the effective application of procedural safeguards for children who are suspects or accused persons in criminal proceedings. They should facilitate its implementation by assisting legal practitioners involved in criminal proceedings through professional guidance and training. The European Commission could further support EU Member States – for example, through the provision of further legislative guidance and by facilitating the exchange of practical experiences among Member States. EU Member States and the European Commission should assess and consider children's own experiences of, and perspectives on, how effectively those procedural safeguards are put in place.

EU Member States had to incorporate the Procedural Safeguards Directive (2016/800/EU) into national law by 11 June 2019. The directive guarantees procedural safeguards for children who are suspects or accused persons in criminal proceedings. It includes the right of defence and the presumption of innocence, as established in Article 48 of the EU Charter of Fundamental Rights, and the best interests of the child as a primary consideration, as established in Article 24 of the Charter. Its preamble calls for considering the Council of Europe Guidelines on child-friendly justice.

However, by the deadline, only 13 Member States had notified complete incorporation. The European Commission initiated infringement procedures against seven Member States for lack of notification.

FRA OPINION 7.3

EU Member States, in cooperation with service providers and relevant civil society actors, should identify and develop appropriate measures to provide clear information on the GDPR's application to children to balance the duty to protect children with the need to provide children with access to the internet. To ensure children's protection, the European Commission should facilitate an agreement among Member States and service providers on standard age-verification tools.

Article 24 of the EU Charter of Fundamental Rights proclaims the right of children to be protected and also to be heard. These rights are often at stake in the online world.

The GDPR specifies that, for children under 16, the holder of parental responsibility shall give consent or authorise the processing of their personal data in relation to information society services offered directly to children. However, Member States may provide for a lower age for consent, as long as this is not below 13 years. Member States have set different age limits, ranging from 13 to 16 years. The European Commission's Multistakeholder Expert Group on the application of the GDPR has noted that there is a lack of guidance regarding age limits for consent and age-verification tools.

FRA OPINION 7.4

EU Member States should initiate or continue the process of transposing the Audiovisual Media Services Directive. They should do so in close consultation with service providers and relevant civil society actors. They should also pay particular attention to addressing child sexual abuse online, especially the sharing of child pornography, as required by Article 28b of the directive.

EU Member States should make every effort towards the correct transposition of the Sexual Abuse Directive, and ensure legislation and adequate policy measures. These should aim to successfully prevent crimes of sexual abuse, protect the victims in an age-appropriate way, and prosecute the offenders for committing any form of sexual abuse via the internet.

The incorporation of the revised Audiovisual Media Services Directive (Directive (EU) 2018/1808) into national law, due in September 2020, saw little progress. The directive regulates children's access to all audiovisual media, including, for example, video-sharing platforms such as YouTube or Instagram. It also requires Member States to take appropriate measures against child pornography.

Meanwhile, child sexual abuse online has been on the rise. In 2019, the European Commission initiated infringement procedures against 23 EU Member States for failing to implement the Sexual Abuse Directive (2011/93/EU).

8

ACCESS TO JUSTICE

EU institutions in 2019 pushed to improve victims' access to compensation and justice. The Council of the EU called for a new strategy on victims' rights. This both acknowledges that gaps in victim protection remain and signals Member States' commitment to enforcing victims' rights. The Council called on FRA and other EU agencies to support Member States in this effort. Some Member States continued to oppose the Istanbul Convention in 2019. This triggered a particularly strong response by the European Parliament. It asked the Court of Justice of the European Union to address various aspects of the appropriate legal basis for the EU to accede to the convention. Meanwhile, challenges to the independence of courts continued. They underlined the need for more effectively coordinated efforts to uphold the rule of law. The European Commission issued a blueprint for action, proposing the so-called 'rule of law cycle'.

Nearly half of the EU Member States adopted or saw the entry into force of legislation to better implement the Victims' Rights Directive (2012/29/EU) in 2019. However, there were no notable developments concerning the rights of victims to participate in proceedings.

Several Member States closed a big gap in guaranteeing victims' rights by providing victim support services to all categories of crime victims for the first time. Other Member States took steps to protect victims during proceedings and prevent secondary victimisation.

The EU Council adopted conclusions on victims' rights on 3 December 2019. These use, in part, evidence of FRA's 2019 reports on justice for victims of violent crime. The conclusions recognise that measures to improve victims' access to justice and to compensation are required. They also call on the European Commission to draw up an EU strategy for 2020-2024 on the future of victims' rights.

FRA OPINION 8.1

EU Member States are encouraged to continue their efforts to effectively implement victims' rights in practice. They should pay particular attention to introducing measures to ensure that victims can access compensation during criminal proceedings and that they receive adequate compensation as victims of violent crime for the damage they suffered because of the offence. EU Member States should also step up their efforts to ensure that victims have an appropriate role in relevant judicial proceedings.

FRA OPINION 8.2

The EU and all EU Member States that have not yet done so are encouraged to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). FRA encourages Member States to address gaps in national legislation concerning the protection of women who are victims of violence.

Ireland ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) in 2019, bringing to 21 the total number of EU Member States that had ratified the convention by the end of 2019. Several Member States took measures to criminalise all non-consensual sexual acts as laid down in Article 36 of the Istanbul Convention, instead of limiting criminal offences such as rape to situations involving force or physical violence.

The EU strove to ensure the ratification of the convention by both the EU and all Member States, amid some Member States' vocal opposition to the convention despite having signed it.

FRA OPINION 8.3

The EU and its Member States are encouraged to further strengthen their efforts and collaboration to maintain and reinforce the independence of judiciaries, an essential component of the rule of law. The efforts concerning the new 'rule of law cycle' proposal could include improved guidance to EU Member States to recognise and tackle any possible rule of law issues. In addition, the EU Member States concerned should take prompt action to fully comply with the relevant judgments of the Court of Justice of the European Union and act on recommendations such as those the European Commission issues in its rule of law procedure.

An independent judiciary is the cornerstone of the rule of law and of access to justice (see Article 19 of the TEU, Article 67 (4) of the TFEU and Article 47 of the EU Charter of Fundamental Rights). Challenges in the area of justice grew in several Member States, particularly regarding judicial independence. This prompted the European Commission to issue a blueprint for action to strengthen the rule of law. It proposed the 'rule of law cycle'. This will involve both the European Parliament and Council of the EU, and will apply to all EU Member States, focusing particularly on those countries where risks are identified.

9

DEVELOPMENTS IN THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

A decade on from the November 2009 Council Decision on the conclusion, by the European Community, of the UN Convention on the Rights of Persons with Disabilities (CRPD), 2019 saw several major developments. These will shape the second decade of the convention's implementation by the EU and its Member States. The first ever designated European Commissioner for Equality, who is in charge of CRPD implementation, was appointed. The European Accessibility Act, which introduced common accessibility requirements for select products and services, was adopted. The European Parliament and the Council of the EU came to a preliminary agreement on language on disability and accessibility regarding the European Structural and Investment Funds. An evaluation of the 2010–2020 disability strategy began. It will feed into a future EU disability strategy. Meanwhile, Member States took steps to ensure inclusive education and equal employment for people with disabilities. A number of Member States also took action towards ensuring a built environment accessible to all. Changes to national electoral laws gave people with disabilities significantly more opportunities to participate in European elections, although accessibility remained a problem.

FRA OPINION 9.1

The EU Disability Strategy for the post-2020 period should address all the recommendations arising from the concluding observations of the CRPD Committee adopted in 2015.

More specifically, the post-2020 EU Disability Strategy should ensure that:

- CRPD provisions are mainstreamed in all relevant areas of EU law, policies and programmes, including the use of new technologies;
- persons with disabilities, their representative organisations and relevant civil society organisations are appropriately engaged in the implementation and monitoring of the new strategy;
- properly coordinated disability focal points are designated in all EU institutions, bodies and agencies;
- relevant data collected by Member States are disaggregated in a way that allows monitoring the CRPD implementation.

The European Disability Strategy 2010–2020 achieved most of its aims and there is added value in having such a strategy, most participants in the 2019 evaluation of the strategy – conducted on behalf of the Commission – felt. They also highlighted concrete outcomes of the strategy, such as the European Accessibility Act. This shows the importance of having a policy document of this kind to guide action at the EU level.

FRA OPINION 9.2

The EU and its Member States should ensure that the rights of persons with disabilities enshrined in the CRPD and the EU Charter of Fundamental Rights are fully respected in the disbursement of European Structural and Investment Funds (ESIF). This will maximise the potential of EU funds to support independent living. In this regard, the EU should adopt the new enabling conditions establishing the effective implementation of the EU Charter of Fundamental Rights and the CRPD, as laid down in the Common Provisions Regulation proposed by the European Commission for the Multiannual Financial Framework 2021–2027. To enable effective monitoring of the funds and their outcomes, the EU and its Member States should take steps to include disabled persons' organisations and the statutory national human rights bodies in ESIF-monitoring committees. Allocating human resources and adequate funding to these organisations and bodies, and earmarking EU resources for that purpose, will bolster the efficiency of the proposed enabling conditions.

The European Structural and Investment Funds (ESIF) play an important role in a wide range of policy areas, including supporting national efforts to achieve independent living. The provisional agreement between the European Parliament and the Council regarding the proposed regulations for the 2021–2027 funding period includes important fundamental rights guarantees, in particular as regards the proposed enabling conditions and a stronger role for monitoring committees. Civil society, including disabled persons' organisations and national human rights bodies, can play an important role in the effective monitoring of the use of the funds.

FRA OPINION 9.3

EU Member States that have not yet become party to the Optional Protocol to the CRPD should consider completing the necessary steps to secure its ratification to achieve full and EU-wide ratification of its Optional Protocol. The EU should also consider taking rapid steps to accede to the Optional Protocol.

Six Member States and the EU have not ratified the Optional Protocol to the CRPD. It allows individuals to bring complaints to the CRPD Committee, and allows the committee to initiate confidential inquiries upon receipt of "reliable information indicating grave or systematic violations" of the convention (Article 6).

The year 2019 brought both progress and setbacks in terms of fundamental rights protection. FRA's *Fundamental Rights Report 2020* reviews major developments in the EU between January and December 2019, and outlines FRA's opinions thereon. Noting both achievements and remaining areas of concern, it provides insights into the main issues shaping fundamental rights debates across the EU.

This year's focus looks at current applications of the EU Charter of Fundamental Rights. The remaining chapters discuss equality and non-discrimination; racism, xenophobia and related intolerance; Roma integration; asylum and migration; information society, privacy and data protection; rights of the child; access to justice; and developments in the implementation of the Convention on the Rights of Persons with Disabilities.

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FURTHER INFORMATION

For the full FRA Fundamental Rights Report 2020 – see https://fra.europa.eu/en/publication/2020/fundamental-rights-report-2020

See also related FRA publications:

- FRA (2020), Fundamental Rights Report 2020 – FRA opinions, Luxembourg, Publications Office, https://fra.europa.eu/en/publication/2020/fundamental-rights-report-2020-fra-opinions (available in all 24 official EU languages)
- FRA (2020), Ten years on: unlocking the Charter's full potential, Luxembourg, Publications Office, https://fra.europa.eu/en/publication/2020/frr-focus-ten-years-charter (available in English and French)

Previous FRA Annual reports on the fundamental rights challenges and achievements in the European Union remain available on FRA's website (available in English, French and German).

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EU Charter of Fundamental Rights

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