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## NOTE

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From:	Presidency
To:	Committee of the Permanent Representatives / Council
Subject:	Fundamental Rights - Fundamental Rights challenges in 2020 and beyond

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## INTRODUCTION

The protection of citizens and their freedoms is one of the priorities of the Strategic Agenda 2019–2024. According to the agenda, Europe must be a place where people feel free and safe. The EU shall defend the fundamental rights and freedoms of its citizens, as recognised in the Treaties. According to Article 2 of the Treaty on European Union, the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The Council has an important role in taking forward the priorities of the New Strategic Agenda and the commitment of the Union in defending fundamental rights and freedoms.

In recent years, we have witnessed both progress and emerging challenges in the field of fundamental rights. In public debate, the rights are all too often presented as benefiting only certain groups or belonging to only a few while in fact they are highly present in our everyday lives, often taken for granted. In addition, the world around us is in a constant change, which requires us to adjust to new phenomena and look for new solutions to maintain the level of rights protection.

The EU Agency for Fundamental Rights (FRA) has the task to provide independent, evidence-based advice to Member States and EU institutions. The recent FRA reports show that challenges remain: for example, the need to communicate clearly to citizens about the benefits of fundamental and human rights to us all and the challenges posed by new technological developments and digitalisation.

In light of the above, the Ministers are invited to exchange views with the FRA Director on the topic of fundamental rights challenges in 2020 and beyond. In order to orientate the discussion, the Presidency has requested FRA to prepare a background note based on their research and data. The contribution by FRA is annexed to this note and provides the independent analysis of the Agency on the ‘Fundamental rights challenges in the area of justice in 2020 and beyond’. The Presidency invites the delegations to discuss in particular the following questions:

#### Questions for Ministers

1. How can we better deliver the message that fundamental and human rights belong to all and thereby foster citizens’ ownership of these rights?
2. How could we better prepare ourselves to the technological changes that are taking place, with particular emphasis on the opportunities and risks that digitalisation and the use of automated tools may create for the protection of fundamental rights?
3. Do you see any other major challenges for the fundamental rights that should be addressed in the forthcoming years at the EU level?

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Encl.: FRA Background Note on Fundamental rights challenges in the area of justice in 2020 and beyond

## **Fundamental rights challenges in the area of justice in 2020 and beyond**

The judicial system plays a central role in safeguarding democracy, fundamental rights and the rule of law. Societal developments across the EU – such as a declining consensus on shared values, the digital transformation or the more open manifestation of hatred – will put this role to the test. This paper identifies challenges to fundamental rights that fall within the mandates of Ministers of Justice. This paper highlights specific areas of concern for the years to come, drawing on findings and analysis of the EU Agency for Fundamental Rights (FRA). Each section contains an overview of how FRA can assist the EU and its Member States in addressing those challenges.

### **Communicating fundamental rights as a shared value of society**

Eurobarometer data show that trust in national institutions declined between spring 2018 and autumn 2018, with trust in the judiciary/judicial system declining from 53% to 51%.<sup>1</sup> Evidence collected by FRA also indicates that respect for fundamental rights and the rule of law can backslide.<sup>2</sup>

Decreasing acknowledgement of the value of human rights can manifest in reduced resources for bodies and structures set up to promote or defend human rights;<sup>3</sup> in shrinking space for civil society;<sup>4</sup> in attacks or pressure on journalists and other media actors;<sup>5</sup> or in discourses that portray human rights as favouring minorities over the general population. Such discourses are fuelled when authorities fail to communicate that human rights are for everyone and provide a basis for society to develop and flourish.

There is a risk that law- and policymakers become less willing to support and enforce human rights standards, due to an assumed lack of support for human rights within their constituencies. Safeguarding human rights is, however, not only a matter of international, EU and national law, but is of benefit to the national political system. A strong fundamental rights architecture, combined with a vibrant civil society standing up for human rights, guarantees that societies remain resilient against other threats, including hybrid threats, such as disinformation campaigns or electoral manipulations.

Decreasing trust in public institutions, especially in the judiciary, can have a knock-on effect on trust between legal systems across borders. Maintaining high levels of trust is key to upholding the European area of freedom, security and justice, which is founded on

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<sup>1</sup> European Commission (2018), [Standard Eurobarometer 90](#).

<sup>2</sup> FRA (2017), [Between promise and delivery: 10 years of fundamental rights in the EU](#).

<sup>3</sup> FRA (Forthcoming, 2020), report on the situation of national human rights institutions in the EU.

<sup>4</sup> European Commission (2018), [2018 Annual Colloquium on Fundamental Rights – Democracy in the EU](#); FRA (2018), [Challenges facing civil society organisations working on human rights in the EU](#); FRA (2018), [Civil society space: views of organisations](#).

<sup>5</sup> European Commission (2016), [2016 Annual Colloquium on Fundamental Rights – Media Pluralism and Democracy](#); FRA (2016), [Violence, threats and pressures against journalists and other media actors in the European Union](#).

the premise that judicial procedures in Member States “meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of ... courts”.<sup>6</sup> In this context, the Court of Justice of the EU has stressed that the rights to effective judicial protection and to a fair trial are of “cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected”.<sup>7</sup> Non-judicial bodies also play an important role in fostering trust in institutions, raising public awareness of rights, and providing access to redress.<sup>8</sup>

- *FRA produced practical suggestions on how to communicate effectively on human rights.*<sup>9</sup>
- *FRA provides legal practitioners with tools to raise their awareness on the application of the Charter of Fundamental Rights at the national level.*<sup>10</sup>
- *Upcoming findings from FRA’s EU-wide Fundamental Rights Survey of 30,000 respondents will provide comparable data on people’s experiences and opinions concerning what fundamental rights mean in practice for them in their daily lives, including questions related to the field of justice. The results provide a unique dataset for the EU.*
- *An upcoming FRA report will map the situation of National Human Rights Institutions in the EU and provide advice on how to strengthen them.*
- *FRA will provide simplified access to the findings of about 60 international human rights monitoring mechanisms through its new EU Fundamental Rights Information System (EFRIS).*

### **Increasing reliance on artificial intelligence**

Digitalisation and artificial intelligence (AI) increasingly govern decisions and processes concerning everyday life. This raises fundamental rights concerns with respect to data protection, non-discrimination and good administration. The digital transformation may also result in increased use of AI in decision-making in judicial systems.

One important aspect to consider here is the quality of the data used in automated decision-making systems. “Individuals and society must [...] be confident that AI systems will not cause any unintentional harm. Such systems should perform in a safe, secure and reliable manner, and safeguards should be foreseen to prevent any unintended adverse impacts,” as the High-level Expert Group on AI, in which FRA participates, noted.<sup>11</sup> Users of AI-related technology therefore need to use data of the highest quality when developing tools for use in the judicial system. Algorithms based on poor data can

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<sup>6</sup> CJEU (2018), [Case C-216/18 PPU](#), judgement of 25 July 2018, para 58.

<sup>7</sup> CJEU (2018), [Case C-216/18](#), judgement of 24 June 2018, para 58.

<sup>8</sup> See, for example, European Commission (2018) [Commission Recommendation of 22.6.2018 on standards for equality bodies](#).

<sup>9</sup> See: FRA (2018), [10 keys to effectively communicating human rights](#).

<sup>10</sup> See: FRA (2018), [Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level - Guidance](#).

<sup>11</sup> Independent High-level Expert Group on Artificial Intelligence set up by the European Commission (2018), [Ethics guidelines for trustworthy AI](#).

negatively affect the right to an effective remedy and to a fair trial,<sup>12</sup> as FRA's report on this issue indicates.<sup>13</sup>

Little information is available to date on the extent to which judicial systems in Member States rely on algorithms in decision making.<sup>14</sup> The "use of big data as an aid for judges [, however], heralds the emergence of predictive justice[,] where big data analysis tools are intended to provide support for prosecution, sentencing or compensation policies or help to anticipate the effects of a judgement."<sup>15</sup> Any use of artificial intelligence in the judicial system will need to build in fundamental rights safeguards from the outset.

- *FRA has published contributions to inform the debate on the digital transformation, for example, as regards discrimination,<sup>16</sup> data quality<sup>17</sup> and facial recognition.<sup>18</sup>*
- *From 2020 onwards, FRA will be able to provide relevant authorities with expertise on the fundamental rights compliant use and development of AI-related technologies.*

### **Hatred thriving online**

Media content and political discourse in Member States, whether online or offline, display incitement to discrimination, hatred or violence against LGBT persons, members of ethnic or religious minorities, migrants and women more generally, as FRA's evidence shows.<sup>19</sup> Antisemitism is a case in point: 88% of Jewish respondents to FRA's survey feel that antisemitism online has increased over the past five years. In addition, 89% of Jewish respondents assessed that antisemitism is most problematic online or on social media.<sup>20</sup>

Growing reliance on social media and other online platforms as the main source of information enables the rapid spread of unverified statements that can incite hatred. Hate-filled content posted online can go viral almost instantly, making it difficult to challenge or remove. This can have a corrosive effect, as such content is amplified in echo chambers where alternative views are seldom, if ever, expressed. It reinforces a spiral of hate.

FRA's analysis shows that systems of checks and balances exist in Member States to assess whether statements made in the media or by political actors fall within the boundaries of the right to freedom of expression.<sup>21</sup> The European Court of Human Rights issued a number of judgements that can help prosecutors in determining what

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<sup>12</sup> Article 47, Right to an effective remedy and to a fair trial, Charter of Fundamental Rights of the EU.

<sup>13</sup> FRA (2019), [Data quality and artificial intelligence – mitigating bias and error to protect fundamental rights](#).

<sup>14</sup> European Commission for the Efficiency of Justice (CEPEJ) (2019), [European ethical Charter on the use of Artificial Intelligence in judicial systems and their environment](#).

<sup>15</sup> CEPEJ (2016), [Guidelines on how to drive change towards Cyberjustice](#).

<sup>16</sup> FRA (2018), [#BigData: Discrimination in data-supported decision making](#).

<sup>17</sup> FRA (2018), [Data quality and artificial intelligence – mitigating bias and error to protect fundamental rights](#).

<sup>18</sup> FRA (forthcoming), Fundamental rights implications of using facial recognition technology [Working title].

<sup>19</sup> FRA (2016), [Incitement in media content and political discourse in Member States of the European Union](#).

<sup>20</sup> FRA (2018), [Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU](#).

<sup>21</sup> FRA (2016), [Incitement in media content and political discourse in Member States of the European Union](#). See also: FRA (2018), [Database 2012-2017 on anti-Muslim hatred](#).

constitutes hate speech.<sup>22</sup> The anonymity of online users makes it difficult to identify perpetrators and bring them to justice, but this should not deter prosecutors. Another challenge to consider is that the extent of the liability of internet intermediaries<sup>23</sup> is not yet fully resolved.<sup>24</sup>

- *In its annual Fundamental Rights Report, FRA provides regular analysis of legal and policy developments in the fight against online hatred, which can foster exchanges of practices on measures to combat the phenomenon.*
- *FRA is exploring future possibilities for conducting research on online hatred targeting specific groups, which will be linked to FRA's current work on AI.*

### **Lack of trust in authorities among victims of hatred**

Specific population groups across the EU face acute challenges to their fundamental rights. However, official statistics only show the tip of the iceberg. EU-wide survey data collected by FRA indicate that, on average, only between 4% and 19% of victims of hatred report incidents they experience to any responsible authority or body. The most common reason for not reporting incidents is the perception that nothing would change as a result. This finding holds true for members of ethnic or religious minorities, migrants, LGBT persons, and for women victims of gender-based violence.<sup>25</sup>

FRA's surveys illustrate that victims often do not trust the judicial system and other mechanisms to provide them with an effective remedy. Many victims of hatred are not aware of their rights, and do not know where to report an incident. As a result, perpetrators can carry out their actions with relative impunity, with hate crime remaining invisible and unprosecuted.

- *In the absence of EU-wide surveys, FRA provides unique, comparative evidence across different population groups on the extent and nature of people's experiences of crime, including data on the rate and reasons for non-reporting among victims of crime.*
- *FRA provides assistance and expertise in the design of crime and victimisation surveys, targeting both specific population groups and the general population.*
- *FRA, in cooperation with the OSCE Office for Democratic Institutions and Human Rights (ODIHR), provides assistance to Member States on how to improve hate crime recording and encourage reporting among victims.*

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<sup>22</sup> European Court of Human Rights (2019), [Factsheet – Hate speech](#).

<sup>23</sup> Council of Europe (2019), [Internet intermediaries](#).

<sup>24</sup> European Commission (2019), [Illegal content on online platforms](#). See also the evolving jurisprudence of the European Court of Human Rights, notably: *Delfi AS v. Estonia*, 2015; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu ZRT v. Hungary*, 2016; *Magyar Jeti ZRT v. Hungary*, 2018

<sup>25</sup> See findings from FRA's comparative, EU-wide surveys: FRA (2018), [Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU](#); FRA (2017), [Second European Union Minorities and Discrimination Survey - Main results](#); FRA (2014), [EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Main results](#); FRA (2014), [Violence against women: an EU-wide survey. Main results report](#).

- *Forthcoming findings from FRA's Fundamental Rights Survey will produce EU-wide data on the general population's experiences of different types of crime – from online crime through to violent crime – and whether they reported incidents to the police.*

### **Respecting the dignity of victims of violent crime**

Comparative research conducted by FRA shows that legal proceedings tend to centre on prosecutors and defendants.<sup>26</sup> Where this is the case, proceedings can deny victims their right to an effective remedy, by relegating them to the role of witnesses and denying them the possibility to act as parties to the proceedings. FRA's analysis further reveals that victims of violent crime would like to see sanctions that rehabilitate served to offenders. That is, sanctions shaped to help offenders understand that what they did was wrong and that would lead them to change their behaviour.

- *FRA provides expertise on how to address barriers to access to justice for victims of violent crime, drawing on comparative legal analysis and fieldwork on the experiences of victims and practitioners.*
- *FRA publishes socio-legal studies to inform developments in access to justice, including as regards victim support services,<sup>27</sup> the European Arrest Warrant,<sup>28</sup> or criminal detention conditions.<sup>29</sup>*
- *In 2020, FRA will begin work on equal access to criminal justice for all victims of crimes.*

### **Further FRA resources**

Legal professionals and law- and policymakers can draw on numerous FRA resources to support their work, for example including:

- The [annual report](#) on the situation of fundamental rights in the EU;
- Handbooks for legal practitioners on case law of the Court of Justice of the European Union and of the European Court of Human Rights in different areas, including [access to justice](#);
- A [database](#) compiling case law of the Court of Justice of the European Union and of the European Court of Human Rights that references the Charter of Fundamental Rights.
- [Charterpedia](#), an online tool providing information on references on the Charter of fundamental rights.
- [Opinions and conclusions](#) on specific thematic topics.
- [EU-wide surveys](#) and accompanying [data visualisation](#) tools.

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<sup>26</sup> See FRA's four-part series of reports on justice for victims of violent crime, released in 2019: Part 1: [Victims' rights as standards of criminal justice](#); Part 2: [Proceedings that do justice](#); Part 3: [Sanctions that do justice](#); Part 4: [Women as victims of partner violence](#).

<sup>27</sup> FRA (2018), [Database 2012-2017 on anti-Muslim hatred](#); FRA (2015), [Victims of crime in the EU: the extent and nature of support for victims](#); FRA (2014), [Mapping victims' rights and support in the EU](#).

<sup>28</sup> FRA (2019), [Rights in practice: access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings](#). This report will be published on 27 September 2019.

<sup>29</sup> FRA (2019, forthcoming), [Criminal detention conditions in the EU: rules and reality](#). FRA (2016), [Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#).