



EPHA Briefing on human rights

Subject	Human Rights and Fundamental Rights
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What is meant by human rights?

Human rights are rights that are recognised and guaranteed by a number of international legal instruments. Unlike other rights - like for example consumer rights, where you have to be a consumer to enjoy them - 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. This issue is controversial, however, because some commentators hold that different cultures and tradition make it impossible to have the same rights all over the globe.

Rights and duties

Enjoying rights also means having duties. You cannot exercise your rights without due regard to other people's rights. The right to life, for example, means that an individual has the right to life but also a duty to respect other people's right to life.

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



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different rights, setting out what they actually mean¹.

A common misconception is that human rights are much wider than they actually are. The right to an adequate standard of living², for example, includes 'adequate food, clothing and housing', but this does not mean you have the right to gourmet food, designer labels and exclusive homes. Human rights provide minimum basic protection rather than the standards that people might want. In addition, sometimes different rights may be in conflict.

Respect, protect and fulfil

Human rights are granted on paper but none of us can enjoy them 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 (see 'enforcement of human rights' below).

It is important, however, to be aware that most human rights instruments provide so-called 'claw-back 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 permitted³. Treaties establishing rights indicate which rights are 'non-derogable' (cannot be limited) and which rights may be 'derogated' from and under what conditions.

The enforcement of human rights

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. In the case of treaties under the UN system, committees⁴ deliver opinions on alleged breaches.

The *European Convention on Human Rights (ECHR)*, on the other hand, has a court to adjudicate on human rights violations. The European Court of Human Rights in Strasbourg has produced an impressive body of case law⁵. The judgements are legally binding and therefore often seen as more effective than the opinions of UN style committees.

¹ See for example case-law from the ECHR <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> or general comments from the Human Rights Committee <http://www.ohchr.org/english/bodies/hrc/comments.htm>

² Article 11(1), ICESCR

³ See for example Article 4 of the ICCPR: <http://www.ohchr.org/english/bodies/hrc/index.htm>

⁴ ICCPR: <http://www.ohchr.org/english/bodies/hrc/index.htm>, ICESCR: <http://www.ohchr.org/english/bodies/cescr/index.htm>

⁵ European Court case law can be found at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>



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In order for a human rights violation case to be heard by either a committee or the European Court of Human Rights, the case has to comply with a set of strict admissibility criteria⁶. These usually include the exhaustion of local remedies and that the matter has not been ruled on in principle in another, similar case. Hence, the process of bringing cases of breaches of human rights before the international enforcement mechanisms is both time consuming and challenging.

A brief overview of the major human rights instruments

The human rights discourse is fairly new. The *UN Charter* states that '*promoting and encouraging respect for human rights and fundamental freedoms*' is one of the purposes of the United Nations.⁷ The first international document on human rights is the 1948 UN *Universal Declaration of Human Rights* (UDHR)⁸, 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 on Civil and Political Rights* (ICCPR)⁹ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)¹⁰ were signed. These two Covenants entered into force in 1976. (It should be noted that the ICESCR specifically covers the right to health).

In addition there are a range of more specialised treaties, including for example the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)¹¹ and the *Convention on the Rights of the Child* (CRC)¹². For a full list of international human rights instruments please see <http://www.ohchr.org/english/law/index.htm>.

There are also regional human rights instruments. The most well known one is the *European Convention on Human Rights and Fundamental Freedoms* (ECHR)¹³, drawn up under the auspices of

⁶ For an overview of the ICCPR and ICESCR complaints procedures see <http://www.ohchr.org/english/bodies/petitions/index.htm>. For the European Court see

<http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Notes+for+the+guidance+of+persons+wishing+to+apply+to+the+ECHR/>

⁷ <http://www.unhchr.ch/html/menu3/b/ch-chp1.htm>

⁸ <http://www.unhchr.ch/udhr/lang/eng.htm>

⁹ http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

¹⁰ http://www.unhchr.ch/html/menu3/b/a_icescr.htm

¹¹ <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>

¹² <http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>

¹³ <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>



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the Council of Europe in 1950. In addition, there is an *American Convention on Human Rights*¹⁴ and an *African Charter of Human and People's Rights*¹⁵.

Human rights in the EU

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*¹⁶. 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.

The *Charter of Fundamental Rights of the European Union*

The next question is why, in light of the international treaties that they had already signed up to, did the EU Member States create the *Charter of Fundamental Rights of the European Union*?

The answer lies in an opinion delivered by the European Court of Justice (ECJ) in 1996, that the European Communities as an entity could not accede to the European Convention on Human Rights, despite the fact that all Member States are parties to this treaty¹⁷. Therefore it was felt that the EU needed some kind of document to demonstrate its commitment to the fundamental values shared by all of its Member States. These are listed in the preamble of the *Charter* as '*human dignity, freedom, equality and solidarity*'.

What is the status of the *Charter of Fundamental Rights of the EU*?

The *Charter of Fundamental Rights of the European Union* is a 'solemn proclamation' made by the Presidents of the Commission, Council and European Parliament at the Nice Summit in 2000. It is not a legally binding document, at least not yet. The full Charter was integrated as Part II of the proposed new Constitutional Treaty and it will thus become law if the Constitution is eventually ratified.

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

Fundamental rights, as presented in the *European Charter*, are more than just human rights. The document draws on several different legal sources. It is seen as reaffirming:

- constitutional traditions and international obligations common to Member States
- the *Treaty of the European Union* (TEU)
- the *Community Treaties*
- the *European Convention for the Protection of Human Rights and Fundamental Freedoms*

¹⁴ http://www.achpr.org/english/_info/charter_en.html

¹⁵ http://www.achpr.org/english/_info/charter_en.html

¹⁶ <http://conventions.coe.int/treaty/en/treaties/html/035.htm>

¹⁷ Opinion 2/94 ECJ http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61994V0002&lg=EN



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- the *Social Charters* adopted by the Community and the Council of Europe
- case-law of the European Court of Justice and the European Court of Human Rights

Hence, what distinguishes fundamental rights from human rights is that they are derived from several different sources, of which human rights is only one. The document compiles for the first time a Charter of Rights based on a combination of national and international legal obligations, EU treaties and European case-law. 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.

The normative value of the *Charter of Fundamental Rights*

Having established that the *Charter* is not yet legally binding does not mean that it is an irrelevant piece of paper. The term 'soft law' is often used to describe documents which are not legally binding but nevertheless are generally expected to be respected or followed. It is often politically easier for states to agree to documents which will not be legally binding but at the same time make a statement about their own norms or expected behaviour. In the case of the *Charter* the fact that the EU saw the necessity for compiling all these rights into one document, using the terms 'rights' and 'charter', gives it a certain normative significance. Its rights may not be legally binding but policy makers and EU institutions may be held accountable by reference to their public commitment to the rights in the *Charter*. It may be politically embarrassing for governments to be perceived as disregarding the rights contained in the Charter because of their proclamation of the values of these rights.

The WHO Publication entitled “25 Questions and Answers on health and human rights” provides useful additional reading. <http://www.who.int/entity/hhr/NEW37871OMSOK.pdf>