

EUROPEAN YEARBOOK ON HUMAN RIGHTS 2019

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Ludwig Boltzmann Institute
Human Rights

EUROPEAN YEARBOOK
ON HUMAN RIGHTS 2019

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European Yearbook on Human Rights 2019

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EDITORS' PREFACE

Dear readers,

The year 2018 has seen several human rights milestone events worldwide: at the international level the 70th anniversary of the Universal Declaration of Human Rights was widely celebrated, as was the 25th birthday of the Vienna Declaration and Programme of Action, the result of the World Conference on Human Rights in Vienna 1993. But also at the national, the Austrian level (the European Yearbook on Human Rights (EYHR) is edited by the three major human rights institutes in Austria) several human rights jubilees have shaped the academic human rights discourse in 2018: Austria ratified the European Convention on Human Rights in 1958 (60 years); the two Covenants on Civil and Political and Economic, Social and Cultural Rights in 1978 (40 years); and the UN Convention on the Rights of Persons with Disabilities in 2008 (10 years). But despite all these long-standing human rights commitments which the international community and states have celebrated in 2018, human rights are still a topic of concern and their violation remains widespread despite the effusive affirmations by world leaders to respect, protect and promote human rights. The EYHR 2019 thus aims to continue to contribute to the academic debate on human rights and to raise awareness for topical human rights issues in Europe and beyond.

The editorial team – composed of representatives of the European Training and Research Centre on Human Rights and Democracy of the University of Graz (UNI-ETC), the Ludwig Boltzmann Institute of Human Rights Vienna (BIM), the Austrian Human Rights Institute of the University of Salzburg and the Global Campus of Human Rights Venice – when selecting the contributions paid particular attention to the highest academic standard, gender balance and a concerted mix of contributions by well-established academics and ‘newcomers’ in the field of human rights research. As in the last years the EYHR 2019 remains structured around current human rights challenges the European institutions – i.e. the European Union (EU), the Council of Europe (CoE), and the Organization for Security and Co-operation in Europe (OSCE) – are currently facing. This year we introduced a new part dedicated to reports by special procedures of international organisations, reflecting the important work which is done in the field of monitoring human rights violations worldwide. Topical human rights issues beyond European borders are further addressed in the part ‘Others’. Finally, the EYHR 2019 concludes with seven book reviews of recent publications in fields relevant for human rights developments in Europe 2018.

With this edition we are again able to provide the reader with interesting, diverse and highly relevant contributions of highest academic quality and important first-hand information from inside the aforementioned institutions in the field of human rights 2018. Topics include all-time classics such as the right to freedom of expression or fair trial and tensions between security and the protection of human rights; attention is, however, also drawn to 'new' topics such as the rights of persons with disabilities or the rights of children to be heard in political processes, which are of increasing importance for all three organisations.

As mentioned, the EYHR 2019 takes off with the 'Topic of the Year', a contribution by Nils Muižnieks, the former Council of Europe High Commissioner for Human Rights who provides a very detailed, critical and personal account of the reactions of the CoE to the democratic backsliding in two CoE Member States, namely Poland and Hungary.

The subsequent part on human and fundamental rights issues in the EU is introduced by a contribution directly addressing one of the most decisive and policy-shaping developments at the EU level in the last two years, namely the Brexit. While whole books can be and are written on different issues related to the complicated separation of the UK from the EU, Colin Murray and Ben Warwick dedicate their contribution 'The Strange Case of Northern Ireland's Disappearing Rights in the EU-UK Withdrawal Negotiations', to the specific implications of the Brexit negotiations on the Northern Ireland question which not only has a huge impact on the political stability of the UK but also on the protection of fundamental and human rights in Northern Ireland.

While the UK struggles to end its relationship with the EU, the next contribution addresses how employers use the disabilities of employees to end working contracts quite quickly, often violating the principle of non-discrimination of persons with disabilities. David Gutiérrez Colominas in his contribution, 'Can Reasonable Accommodation Safeguard the Employment of People with Disabilities?', assesses how the duty to provide reasonable accommodation for people with disabilities which is enshrined in the UN Convention on the Rights of Persons with Disabilities and the relevant EU non-discrimination framework provides an additional layer of protection of persons with disabilities at the workplace.

National security and the prevention of terrorism have been on top of the agenda for several years. Human and fundamental rights were and are often undermined and annihilated in the attempts of states to protect national security. Questions related to the oft-perceived as necessary trade-off between human rights and state security are addressed in the subsequent two contributions. First, Vigilenca Abazi addresses in her contribution, 'Whistleblowing in Europe: A New Era of Legal Protections' the tension between the calls to protect the rights of whistleblowers and the interest of states to keep certain information internal and secret, and the progress which has been made at the level of the EU legal

framework to reconcile these two diverging interests. Second, Elspeth Guild and Elif Mendos Kuskonmaz in 'A Critical Take on Opinion 1/15: Is the Glass Half Full or Half Empty?' subsequently turns to human rights questions related to the retention and use of a vast amount of personal data and information about individuals in order to prevent terrorism by using the example of Passenger Name Records (PNR) and Opinion 1/15 by the Court of Justice of the European Union (CJEU), striking down a draft international agreement between the EU and Canada on the transfer of the PNR data due to its shortcomings in complying with the human right to privacy afforded under EU law.

The remaining two contributions in the EU part, turn beyond EU borders and address human rights violations that occur extraterritorially but find their roots in the legal or political position of the EU or its Member States. Most topically, Adel-Naim Reyhani exemplifies in his contribution 'Absolute Rightlessness *Sur Place* through Excessive Externalisation' how the famous notion of Hannah Arendt 'the right to have rights' is eroded in the cooperation by the EU with Libya on migration resulting in an absolute rightlessness of refugees *sur place* through obstructing any attempt to access legal status in the EU. Extraterritorial human rights violations and how they can be addressed within the EU also play the main role in the contribution by Axel Marx, Claire Bright, Nina Pineau and Jan Wouters on 'Corporate Accountability Mechanisms in EU Member States for Human Rights Abuses in Third Countries'. By mapping all the relevant judicial proceedings that have already been brought before the courts of EU Member States, the contribution provides a crucial overview on how national judicial mechanisms may contribute to address claims involving human rights violations in third countries and thereby increase chances in holding EU based companies accountable.

From the EU level, the EYHR, in its second part, turns to relevant human rights developments at the CoE level. As in previous years, this part begins with a review of the jurisprudence of the European Court of Human Rights (ECtHR) 2018 by Stefan Kieber.

The wide range of topics that have been addressed by the Court in 2018 is further reflected on by the contributions in the CoE part. It begins with Jeroen Temperman analysing and criticising in his contribution, 'Blasphemy and the European Court of Human Rights: A Small Step Forward, a Giant Leap Back' the developments the jurisprudence of the ECtHR in blasphemy and freedom of expression/religion cases has undergone in the course of the years starting from the *Handyside* case to most recent judgements such as *E.S. v Austria* and *Mariya Alekhina and Others v Russia [Pussy Riot]*.

While the ECtHR has already struggled in finding a coherent line of argumentation in the field of blasphemy, it struggled even more in the field of same-sex marriage due to the sensitivity of the topic in certain CoE Member States. Accordingly, Masuma Shahid in 'How Do European Courts Deal with the Sensitive Topic of Same-Sex Marriage? An Analysis of the Case Law of

the ECtHR and the CJEU in the “Catch 22”-Field of Equal Marriage Rights’ analyses and compares the approaches by the ECtHR and the CJEU and how their credibility, authority and legitimacy suffers while trying to reconcile the divergent views of Member States on equal marriage rights and in providing protection to LGBTIQ-persons suffering from human and fundamental rights violations.

The protection of the rights of persons with disabilities is also a topic in the CoE part and Delia Ferri and Andrea Broderick in ‘The European Court of Human Rights and the Human Rights Model of Disability: Convergence, Fragmentation and Future Perspectives’ analyse the most recent and contentious case law of the ECtHR on disability, and discuss the emerging and future perspectives regarding the influence of the UN Convention on the Rights of Persons with Disabilities on the Strasbourg Court’s jurisprudence.

While the rights of persons with disabilities are a fairly new topic to be found in the jurisprudence of the ECtHR, the right to a fair trial is an all-time classic and Article 6 ECHR the most heavily litigated provision of the Convention. Still, the case law of the Court and its recent jurisprudence in the field of fair criminal proceedings continue to provide food for thought and criticism as is shown by Ryan Goss in his contribution, ‘The Undermining of Article 6 ECHR’.

The right to a nationality has become an increasingly debated topic considering that the number of stateless persons has seen a constant growth in the last years. Agnieszka Szklanna dedicates her contribution, ‘The Right to a Nationality in Recent Case Law of the European Court of Human Rights and Council of Europe Bodies’ Work’ to the recent and growing case law of the ECtHR in this field and also sheds light on the approaches adopted by other CoE’s bodies increasingly engaging in the field of statelessness and the right to a nationality.

In the last edition of the EYHR the relevance of the OSCE in the field of human rights was questioned due to its struggles in the human dimension area. However, this year’s contributions to the OSCE part prove that the OSCE still plays a crucial and important role in this field, especially in some core areas such as the protection of journalists and the observation of democratic elections.

Accordingly, the OSCE part starts with a very detailed and insightful account of events within the OSCE leading to the adoption of the OSCE Ministerial Council Decision on Safety of Journalists in December 2018. Andrei Richter and Deniz Yazici in their contribution on the ‘Pioneer Decision on Safety of Journalists in the Preceding Context’ allow the reader to participate in the difficult process of finding consensus among OSCE states on the protection of journalists and provide them with valuable insights in this regard.

Subsequently, Svetlana Chetaikina and Vasil Vashchanka in their contribution ‘If I Could I Would? International Electoral Standards and the Recommendations of Election Observers’ turn to one of the core areas of competences of the OSCE in the field of the human dimension. While the role of the OSCE in the field

of election monitoring is unchallenged, the standards used when drafting recommendations require, according to the authors, some further adaptations in order to ensure the credibility of the OSCE in the field of election monitoring.

As has been mentioned above, the rights of persons with disabilities became a major concern for all three human rights organisations in Europe in recent years. In line with the contributions in the EU and CoE parts, Anete Erdmane in her contribution on 'The Right to Political Participation of Persons with Disabilities' analyses how the right of persons with disabilities to political participation became increasingly strengthened recently and how organisations like the OSCE contributed to this process.

The last contribution in the OSCE part is the contribution by Anita Danka on the 'The Right of Children to Be Heard through Peaceful Protests'. In light of the recent 'Fridays for Future' mostly driven by young people and the controversies about it, Danka's contribution is highly relevant in placing the peaceful protest by children in the context of children's rights to freedom of assembly and freedom of expression.

As has already been pointed out, following the part on human rights developments within the three major human rights institutions a new part on 'Reports from the Field' has been introduced. It specifically aims to raise the awareness for reports by special procedures of international organisations and make their work in the field of monitoring human rights known to a wider public.

The Moscow Mechanism by the OSCE has been used only eight times since its introduction in 1992 and aims to seek clarification on situations of alleged human rights violations in an OSCE state through fact-finding missions by experts. Wolfgang Benedek was appointed as rapporteur for the situation of LGTBI persons in Chechnya. In his contribution he explains how the Moscow mechanism works, what difficulties he faced when drafting the report on the rights and protection of LGTBI persons in Chechnya and what conclusion he has drawn from the information he gathered in this regard.

The second report included in the EYHR 2019, is the report by the current UN Independent Expert on Foreign Debt and Human Rights, Juan Pablo Bohoslavsky on his mission to Ukraine. In his contribution he asks, 'A Human Rights Approach to Deal with Economic and Corruption Issues in Ukraine' and presents the major findings of his report which has been presented to the UN Human Rights Council in December 2018.

Next, the Yearbook turns to current human rights issues beyond European borders. As has been already mentioned, the year 2018 saw the 70th anniversary of the Universal Declaration of Human Rights. Due to its importance and the role the UDHR still plays in the field of human rights, we, the editors, decided to include a contribution exclusively dedicated to it. Julia Kapelańska-Pregowska analyses in her contribution on 'The Legal Authority and Recognition of the

Universal Declaration of Human Rights: Conceptions, Developments and Practice' the practical importance of the UDHR and its current legal weight in the field of human rights.

The effective protection of human rights requires as a precondition that people actually are aware of and know about the human rights they actually have. Thus, Barbara Santibanez in her contribution 'Teaching Human Rights at School: A Survey of Persisting Challenges to the Practice' underlines the importance of human rights education in schools, especially in times of increasing radicalisation of young people and assesses critically how well-established concepts of human rights education are reflected in human rights education policies and practices.

Even though the so called 'migration crisis' that kept European politics hostage in the last four years has been mitigated in terms of numbers of newly arriving people, migration remains one of the decisive topics at the national and also the European level. While the security paradigm still dominates the political discourse about migration, the human rights implications European and national policies have on migration remain severe. Francesca Cimino's contribution 'Human Rights Implications for Vulnerable Migrants in Light of the EU and Italian Migration Policies' addresses these human rights implications of European policies on particularly vulnerable persons such as victims of human trafficking in Italy.

From Italy, Mikhail Antonov in his contribution turns to Russia and asks: 'The Russian Constitutional Court as a Mediating Link Between Russian and European Law?' He describes how the role of the Russian Constitutional Court has changed over the years due to a changing self-perception of the Court which has also been influenced by wider political developments in Russia and beyond.

The editorial team would like to acknowledge the crucial financial support of the Global Campus on Human Rights to this publication. Furthermore, many thanks go to Reinmar Nindler, who was in charge of the book reviews and to Manuela Rusz, who took care of the formatting and harmonisation of the contributions. Without their precious help, the EYHR 2019 would not have been possible in the same form. Finally, particular thanks go to Tom Scheirs and Rebecca Moffat from Intersentia for the excellent cooperation on publishing this volume.

We hope that reading this Yearbook, which is unique in its focus and vocation, will not only help to better understand the rich landscape of the European regional human rights system but will also stimulate discussions and critical thinking about human rights developments.

Graz, Salzburg, Venice, Vienna – June 2019
Philip Czech, Lisa Heschl, Karin Lukas,
Manfred Nowak, Gerd Oberleitner

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LIST OF ABBREVIATIONS

ACtHPR	African Court on Human and Peoples' Rights
AFPS	Association France Palestine Solidarité
API	Advanced Passenger Information
ASEAN	Association of Southeast Asian Nations
ATS	Alien Tort Statute
CAS	Court of Arbitration for Sport
CAT	UN Committee against Torture
CBSA	Canada Border Service Agency
CCPR	Human Rights Committee
CDCJ	European Committee on Legal Co-operation
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEEP	European Centre of Employers and Enterprises providing Public Services
CEPEJ	European Commission for the Efficiency of Justice
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CEU	Central European University
CFR/CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CJ-S-NA	Group of Specialists on Nationality
CM	Committee of Ministers
CNDT-CI	National Coordination of Toxic Waste Victims of Côte d'Ivoire
CoE	Council of Europe
CPD	Continuing Professional Development
CPSU	(formerly) Communist Party of the Soviet Union
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child

CRD	Citizenship Rights Directive
CRPD	Convention on the Rights of Persons with Disabilities
CSCE	Conference on Security and Co-operation in Europe
CSDP	Common Security and Defence Policy
CTA	Common Travel Area
DPOs	disabled people's organizations
DTM	Displacement Tracking Matrix
DUP	Democratic Unionist Party
EASO	European Asylum Support Office
EAW	European Arrest Warrant
EC	European Community
ECCHR	European Center for Constitutional and Human Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECN	European Convention on Nationality
EComHR	European Commission of Human Rights
ECRIS-TCN	European Criminal Record Information System
ECtHR	European Court of Human Rights
EEAS	External Action Service
EEC	European Economic Community
EES	Entry/Exit System
EHRC	European Human Rights Cases
EJIL	European Journal of International Law
EP	European Parliament
ETIAS	European Travel Information and Authorisation System
ETUC	European Trade Union Confederation
EU	European Union
EU MS	European Union Member States
EUBAM	EU Border Assistance Mission in Libya
EUD	European Union of the Deaf
FIDH	International Federation on Human Rights
FNASS	National Federation of Sportspersons' Associations and Unions
FRA	European Union Agency for Fundamental Rights
GA	General Assembly
GDP	Global Detention Project

GDP	gross domestic product
GFA	Good Friday/Belfast Agreement
GIHRL	general international human rights law
GNA	Government of National Accord
GSP	Generalised Scheme of Preferences
HCJ	High Council of the Judiciary
HCNM	High Commissioner on National Minorities
HDC	Human Dimension Committee
HDP	Halkların Demokratik Partisi
HIV	Human Immunodeficiency Virus
HR	human rights
HRC	UN Human Rights Council
HRE	Human Rights Education
HRW	Human Rights Watch
IACtHR	Inter-American Court of Human Rights
IAI	Istituto Affari Internazionali
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMPD	International Centre for Migration Policy Development
ICT	Information and Communication Technology
IDP	Internally Displaced Person
IFJ	International Federation of Journalists
IJRL	International Journal of Refugee Law
IMF	International Monetary Fund
IOM	International Organisation for Migration
IPSN	Identification of Persons with Special Needs
ITE	Initial Teacher Education
ITU	International Telecommunication Union
LGBT	Lesbian, Gay, Bisexual, Transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersex
LJIL	Leiden Journal of International Law
LNA	Libyan National Army
M5S	Movimento 5 Stelle
MC	Ministerial Council

MCEL	Maastricht Centre for European Law
MNEs	many multinational enterprises
MoU	Memorandum of Understanding
MPs	members of parliament
MPEPIL	Max Planck Encyclopedia of Public International Law
MSM	men that had sexual relations with other men
NCN	Polish National Science Center
NGO	Non-Governmental Organisation
NJO	National Judicial Office
NSA	US National Security Agency
OAS	Organization of American States
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe
OSI	Other Supplementary Information
PACE	Parliamentary Assembly of the Council of Europe
PC	Permanent Council
PCIJ	Permanent Court of International Justice
PNR	Passenger Name Records
RF	Russian Federation
RF CC	Russian Federation Constitutional Court
RF SC	Russian Federation Supreme Court
RFOM	Representative on the Freedom of the Media
RSFSR	Russian Soviet Federal Socialist Republic
SANA	Security Assessment in North Africa
SAR	Search and Rescue
SC	Security Council
SDG	Sustainable Development Goals
SRFY	Socialist Federal Republic of Yugoslavia
SG	Secretary General
SSI	Special Service Information
T&L	Tate & Lyle
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

TVPA	Torture Victim Protection Act of 1991
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN HR	United Nations Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Committee on the Rights of Persons with Disabilities
UNDP	United Nations Development Programme
UNDHRET	United Nations Declaration on Human Rights Education and Training
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	UN Office on Drugs and Crime
UNSMIL	United Nations Support Mission in Libya
UPIAS	Union of Physically Impaired People Against Segregation
US(A)	United States (of America)
VC	Venice Commission
VIS	Visa Information System
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WOMEN	UN Entity for Gender Equality and the Empowerment of Women
WTO	World Trade Organization

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