



OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

Newsletter n. 75

15 July 2019

Below are the main updates concerning case-law and acts relevant to the protection of fundamental rights, as published in the web site www.europeanrights.eu

For the acts of the **European Union** we have included:

- the "EU Annual Report on Human Rights and Democracy in the World 2018" by the Council of the European Union of 13 May 2019.
- the Court of Justice Annual Report 2018 of 1.04.2019.

For the **Council of Europe** we would like to highlight the following resolutions and recommendations:

of the **Parliamentary Assembly**:

- the Resolution 2299 and the Recommendation 2161 of 28.6.2019 "Pushback policies and practice in Council of Europe member States";
- the Resolution 2297 of 27.6.2019 "Shedding light on the murder of Boris Nemtsov";
- the Resolution 2295 and the Recommendation 2160 of 27.6.2019 "Stop violence against, and exploitation of, migrant children";
- the Resolution 2294 and the Recommendation 2159 of 27.6.2019 "Ending violence against children: a Council of Europe contribution to the Sustainable Development Goals";
- the Resolution 2293 of 26.6.2019 "Daphne Caruana Galizia's assassination and the rule of law in Malta and beyond: ensuring that the whole truth emerges";
- the Resolution 2292 of 26.6.2019 "Challenge, on substantive grounds, of the still unratified credentials of the parliamentary delegation of the Russian Federation";
- the Resolution 2291 and the Recommendation 2158 of 26.6.2019 "Ending coercion in mental health: the need for a human rights-based approach";
- the Resolution 2290 and the Recommendation 2157 of 26.6.2019 "Towards an ambitious Council of Europe agenda for gender equality";
- the Resolution 2289 of 26.6.2019 "The Istanbul Convention on violence against women: achievements and challenges";
- the Resolution 2286 of 24.5.2019 "Air pollution: a challenge for public health in Europe";
- the Resolution 2285 of 24.5.2019 "Sustainable urban development fostering social inclusion";
- the Resolution 2284 of 24.5.2019 "Addressing the health needs of adolescents in Europe";
- the Resolution 2283 of 24.5.2019 "Education and culture: new partnerships to recognise personal development and competences".

On 28 June 2019, the Council of Europe's Human Rights Commissioner, Dunja Mijatović, published the report on her visit to Poland from 11 to 15 March 2019.

For the **Court of Justice**, we added the decisions:

- 20.06.2019, C-72/18, *Ustariz Aróstegui*, on the principle of non-discrimination and the National law which grants an additional remuneration only to permanent public officials (teachers) and excludes fixed-term workers employed under an administrative contract;
- 20.06.2019, C-404/18, *Hakelbracht and others*, on equal treatment between men and women and on the rejection of a candidate due to her pregnancy;
- 18.06.2019, C-591/17, *Austria v. Germany*, on Germany's legislation prescribing an infrastructure use charge for passenger vehicles and on motor vehicle tax, and on the prohibition of discrimination on grounds of nationality and freedom to provide services;
- 13.06.2019, C-22/18, *TopFit and Biffi*, on the participation in the national championship of a Member State by an amateur athlete holding the nationality of another Member State, on the different treatment on the basis of nationality and on the restriction on free movement;
- 13.06.2019, C-317/18, *Correia Moreira*, on transfers of undertakings and safeguarding of employees' rights;
- 13.06.2019, C-646/17, *Moro*, on the right to information in criminal proceedings;
- 13.06.2019, C-664/17, *Ellinika Nafpigeia AE*, on safeguarding of employees' rights in the event of transfer of the undertaking;
- 06.06.2019, C-58/18, *Schyns*, on consumer protection in credit agreements;
- 05.06.2019, C-38/17, *GT*, on consumer protection in a loan agreement denominated in foreign currency;
- 27.05.2019, joined cases C-508/18 and C-82/19 PPU, *OG (Parquet de Lübeck)*, and case C-509/18, *PF*, all on European arrest warrant and the concept of "issuing judicial authority";
- 23.05.2019, C-52/18, *Füllä*, on consumer protection in the event of lack of conformity of the goods delivered;
- 23.05.2019, C-720/17, *Bilali*, on the revocation of subsidiary protection status;
- 21.05.2019, C-235/17, *European Commission v. Hungary*, on the right to property and the National legislation extinguishing, *ex lege* and without compensation, the rights of usufruct over agricultural and forestry land acquired by legal persons or by natural persons, who cannot demonstrate a close family tie with the owner of the land;
- 14.05.2019, C-55/18, *CCOO*, on the protection of the safety and health of workers and on the requirement to set up a system enabling the duration of time worked each day by each worker to be measured;
- 14.05.2019, joined cases C-391/16, C-77/17 and C-78/17, *M (Révocation du statut de réfugié)*, on the status of refugee and the refusal of the recognition or revocation of the status of refugee in case of danger for the security or for the community of the hosting member State.

For the **European Court of Human Rights** we would like to highlight the judgments:

- 27.06.2019, *Cosmos Maritime Trading and Shipping Agency v. Ukraine* (n. 53427/09), on the lack of impartiality of Ukrainian courts and on the excessive length of the civil proceeding concerning the claims recognized in a bankruptcy proceeding against a Ukrainian company, also with regard the circumstance that the Commercial Court and the Court of Appeal where housed in a building owned by the said company;
- 25.06.2019, Grand Chamber Judgment, *Nicolae Virgiliu Tănase v. Romania* (n. 41720/13), on the lack of an effective investigation on the accident, in which the applicant suffered very serious injuries, which prevented him from obtaining any compensation: the Court decided to assess the application, despite it being a civil

matter, because it concerned the right to life, not finding, however, violations to the right to an effective remedy and to a fair trial;

- 25.06.2019, *Aktaş and Aslaniskender v. Turkey* (n. 18684/07 and 21101/07), on the illegitimate refusal to the change of the family name based on the only reason that the new name was not Turkish;
- 18.06.2019, *Chernega and others v. Ukraine* (n. 74768/10), which recognized, for some applicants, the violation of the right to a fair trial, for not having allowed them to be present at the hearing concerning administrative violations, and the violation of the right to freedom of assembly for the incapacity of the State to guarantee a pacific demonstration, in particular for the lack of clear rules on the duties and powers of police and private security;
- 18.06.2019, *Haddad v. Spain* (n. 16572/17), on the violation of the right to private and family life for having allowed pre-adoption foster care of a child, although the father had been acquitted from the charge of domestic violence and he had regained the custody of the other son;
- 18.06.2019, *Mehmet Reşit Arslan and Orhan Bingöl v. Turkey* (n. 47121/06 and others), on the impossibility, for prisoners, to use the personal computer and internet in order to finish their studies: the Court found the violation of the right to education (article 2 of Protocol 1);
- 13.06.2019, *Marcello Viola v. Italy (no. 2)* (n.77633/16), which found the violation of article 3 of the Convention with regard to the irreducible life sentence, which excludes the possibility to reduce the sanction for mafia crimes except from the case of collaboration of the convicted with judicial authorities;
- 11.06.2019, *Ozdil and others v. Moldova* (n. 42305/18), on the extra-judicial transfer of persons towards their Country of origin, in violation of the national and international legislation and articles 5 (right to freedom and security) and 8 (right to the respect for private and family life) of the Convention;
- 4.06.2019, *Yilmaz v. Turkey* (n. 36607/06), on the violation of the right to the respect for private and family life and to the right to a fair trial in a case in which the State denied the applicant a teaching post abroad, following police investigation into his private life and his wife's clothing, which was not respondent to the Islamic code;
- 4.06.2019, *Sigurur Einarsson and others v. Iceland* (n. 39757/15), which finds legitimate the lack of communication to the defence, by the public prosecutor's office, of a great amount of information – and of its digital version – collected in view of the selection of information relevant for the investigation;
- 4.06.2019, *Rola v. Slovenia* (n. 12096/14 and 39335/16), on the violation of article 1 of Protocol 1 (protection of property) in the case of the permanent revocation of the licence as liquidator in insolvency proceedings, following the conviction (with a suspended prison sentence) for violent behaviour;
- 29.05.2019, Grand Chamber Judgment, *Ilgar Mammadov v. Azerbaijan* (n. 15172/13), on the violation, by Azerbaijan, of the obligation to fulfil the decision of the Court imposing to release a political activist;
- 28.05.2019, *Clasens v. Belgium* (n. 26564/16), on the lack of a minimum service in order to guarantee prisoners' elementary rights during the strike of prison officers: the Court found the violation of the prohibition of inhuman and degrading treatments and of the right to an effective remedy;
- 28.05.2019, *Chaldayev v. Russia* (n. 33172/16), which found the violation of the right to the respect for private and family life with regard to the limits imposed to the duration and ways of visit of the family to a prisoner, and the violation of the prohibition of discrimination regarding the visit regime between detention centres and prisons for definitive prisoners;
- 23.05.2019, *Sine Tsaggarakis A.E.E. v. Greece* (n. 17257/13), on the permanent difference of interpretation of the law (concerning building permits for houses) by two sections of the Council of State, without any decision by the plenary session, with the result of not guaranteeing certainty of law and in violation of the right to a fair trial;
- 23.05.2019, *Doyle v. Ireland* (n. 51979/17), on a police interrogation carried out in absence of the lawyer, but counterbalanced by other important safeguards;

- 21.05.2019, *G.K. v. Belgium* (n. 58302/10), on the violation of article 3 of Protocol 1 (right to free elections) in the Senate's decision to accept the congressman's resignation;
- 16.05.2019, *Halabi v. France* (n. 66554/14), which found the violation of the right to the respect for private life with regard to a home visit, concerning the control of the respect of planning rules, carried out without the agreement of the person occupying the house and with no authorization of the judge;
- 16.05.2019, *Tasev v. North Macedonia* (n. 9825/13), on the case of a citizen, born and residing in North Macedonia, to whom was denied the possibility to have his ethnicity entry – indicated as Bulgarian – in the electoral roll for judges changed: the Court found the violation of the right to private life;
- 7.05.2019, *Mityanin and Leonov v. Russia* (n. 11436/06 and 22912/06), according to which a precautionary detention carried out in absence of a judiciary decision amounts to violation of the right to freedom and security; instead the publication of an article with the photograph of the suspected person and with the charges does not amount to violation of the right to the respect of private and family life;
- 2.05.2019, *Pasquini v. San Marino* (n. 50956/16), according to which there was no violation of the right to a fair trial and to an impartial court in the proceedings before the Court concerning trusts and trust relationships, even though the Court was composed of two judges.

For the **extra-European area** we have included:

- the decision of the Trial Chamber VI of the International Criminal Court of 8.7.2019, case *The Prosecutor v. Bosco Ntaganda*, which sentenced the accused person of war crimes and crimes against humanity committed in the province of Ituri (Democratic Republic of Congo) in 2002-2003;
- the decision of the Supremo Tribunal Federal (Brazil) of 13.6.2019, according to which there has been a constitutional failure by the Parliament for not having issued a law criminalizing homophobic and transphobic acts: therefore the Court requested the inclusion of such acts in the criminal offences provided for by law n. 7.716/1989 (*Lei do Racismo*) until a specific law will be adopted in such matter;
- the decision of the Corte Constitucional del Ecuador of 12.6.2019, which pronounces itself in favour of the recognition, in the National legal system, of the marriage between persons of the same sex, implementing the Opinion OC24/17 "*Identidad de género, e igualdad y no discriminación a parejas del mismo sexo*" issued by the Inter-American Court of Human Rights on 24 November 2017;
- the decision of the High Court of Botswana of 11.6.2019, which abolished sections 164(a), 164(c), 165 of the Criminal Code, which provided for the criminalization of sexual acts in contrast the order of nature, as well as the crime of acts of gross indecency committed in private, pursuant to section 167, deemed in contrast with the right to freedom, dignity, privacy and non-discrimination, according to the Constitution of the State;
- the decision of the Court of Final Appeal of the Hong Kong Special Administrative Region of 6.6.2019, which recognized the right of a same-sex couple, who married abroad, to be granted tax and work benefits provided for by the law to spouses;
- the decision of the High Court of Kenya of 24.5.2019, which rejected the constitutional claim lodged against sections 162 and 165 of the Criminal Code, which sanction sexual acts in contrast with the order of nature and acts of gross indecency committed in public or private by two men;
- the order of the United States District Court Southern District of Mississippi of 24.5.2019, which suspends the execution of the *Senate Bill 2116*, a law prohibiting abortion as soon as the heartbeat of the foetus can be heard;
- the decision of the United States Court of Appeals for the Second Circuit of 22.5.2019, which reverted the decision of the District Court, which rejected the legal action against BNP Paribas S.A. for alleged conspiracy and collusion in the atrocity committed by the Sudanese regime, remanding the issue to the Court of first instance;

- the decision of the *Inter-American Court of Human Rights* of 13.5.2019, case *Arrom Suhurt and others vs. Paraguay*, which excludes the responsibility of the State with regard to the charges of forced disappearance and torture of two leaders of the political movement "Patria Libre"; and the decision of 10.5.2019, case *Martínez Coronado vs. Guatemala*, which found the State responsible for the violation of the right to life regarding Manuel Martínez Coronado, sentenced to death applying the criteria of the "particular danger", according to article 132, paragraph 2, of the Criminal Code (paragraph considered then in contrast with the Convention by the Inter-American Court in the case *Fermín Ramírez vs. Guatemala* and subsequently repealed by the Constitutional Court of Guatemala), and of the right to an effective remedy.

As far as **case law of national courts** is concerned, the following decisions must be highlighted:

- **Belgium:** the decision of the *Cour constitutionnelle* n. 99/2019 of 19.6.2019, which annulled article 3 of the law of 25 June 2017, where it did not provide the possibility for non-binary people to modify their act of birth with regard to sex, in order to make the document corresponding to their intimately perceived gender identity; the decision n. 95/2019 of 6.6.2019, in the matter of filiation and attribution of the surname to the son, which recalls article 8 of the ECHR and the jurisprudence of the Court of Strasbourg; the decision n. 94/2019 of 6.6.2019, which, in the matter of constitutional legitimacy of articles 1 and 2 of the law of 8 June 1972 on the organization of harbour job, makes a reference for a preliminary ruling to the Court of Justice on the interpretation of article 49 of the TFEU (right of establishment), in combination with articles 56 TFEU (freedom to provide services) and 15 (freedom to choose an occupation and right to engage in work) and 16 (freedom to conduct a business) of the EU Charter of Fundamental Rights; the decision n. 90/2019 of 28.5.2019, in the matter of release on bail, which holds the illegitimacy of article 20, paragraphs 2, 3 and 4, of the law of 19 December 2003 on the European arrest warrant, also recalling the jurisprudence of the Courts of Strasbourg and Luxembourg; and the decision n. 67/2019 of 16.5.2019, on the competence of the court of appeal to raise *ex officio* public order reasons, which recalls the jurisprudence of the Court of Strasbourg;
- **Estonia:** the order of the *Vabariigi Riigikohus* (Supreme Court) of 21.6.2019, which, applying the jurisprudence of the Courts of Strasbourg and Luxembourg and recalling Directive 2004/38/EU, holds the constitutional illegitimacy of the "Aliens Act", where it did not allow to grant temporary permits of residence to foreign nationals on grounds of family reunification with Estonian nationals, in the event of civil union between persons of the same sex;
- **France:** the decision of the *Cour de cassation* n. 560/2019 of 13.6.2019, in the matter of control of borders within the Schengen area on grounds of public order, which recalls EU legislation and the jurisprudence of the Court of Justice; the decision n. 526/2019 of 5.6.2019, which, in the matter of unfair terms and consumer rights recalls the EU Directives and the jurisprudence of the Court of Justice; and the decision n. 644/2019 of 10.5.2019, in the matter of freedom of expression, which examines the jurisprudence of the Court of Strasbourg;
- **Germany:** the order of the *Bundesverfassungsgericht* (Federal Constitutional Court) of 23.5.2019, which, in financial matters, recalls Directive 2010/24/EU; the decision of the *Oberverwaltungsgericht Nordrhein-Westfalen* (Administrative Court of Appeal of North Rhine-Westphalia) of 13.5.2019, on the claim for asylum, which recalls EU and international legislation; and the decision of the *Verwaltungsgericht Cottbus* (Administrative Court of Cottbus) of 7.5.2019, which, with regard to the transfer of an asylum claimant towards Italy, finds the systemic impossibility to access subsidiary protection;
- **Hungary:** the decision of the *Magyar Köztársaság Alkotmánybírósága* (Constitutional Court) n. 3/2019 of 25.2.2019, which rejected the claim lodged against Section 353/A of the Criminal Code, which provides for the crime of facilitating and supporting illegal immigration, also recalling Directive 2002/90/EC defining the facilitation of

- unauthorised entry, transit and residence; and the decision n. 2/2019 of 25.2.2019, which, with regard to the European Commission's letter of formal notice concerning the compatibility of article XIV of the Constitution on asylum (as amended by the "Act VI" of 2018) with the norms of Directive 2011/95/EU ("Qualification Directive"), judges, upon request of the Government, on the relation between the State Constitution and the European Union law and on the power of interpretation of constitutional norms;
- **Ireland:** the decision of the *Supreme Court* of 31.5.2019, on the right to access the reasons of the authorities' decision to deny the naturalization of the claimant, which recalls the EU Charter of Fundamental Rights and the jurisprudence of the Court of Justice; another decision of 31.5.2019, which rejected the claim lodged by Facebook, in the proceeding "The Data Protection Commissioner vs Facebook Ireland Limited and Maximillian Schrems", aiming at examining the reasons which lead the High Court to make a reference for a preliminary ruling (still pending) to the Court of Justice with regard to the validity of the European Commission's decisions on the standard contractual clauses for data transfers between EU and non-EU countries; the decision of 28.5.2019, which quashed the order of the High Court concerning the constitutional illegitimacy of section 9(1)(b) of the "Offences Against the State (Amendment) Act 1998", on the obligation to cooperate with the authorities in case of knowledge of proof concerning the commission of a serious crime, recalling articles 6 and 8 of the ECHR and the jurisprudence of the Court of Strasbourg; and the decision of 27.5.2019, on the illegitimacy of the detention, in virtue of an order of expulsion of a Pakistani national, who requested a residence permit as relative dependent on a EU citizen, which recalls the EU legislation relevant in such matter and the jurisprudence of the Court of Justice;
 - **Italy:** the decision of the *Corte costituzionale* n. 141/2019 of 7.6.2019, which, in the matter of sexual freedom and aiding and abetting of prostitution, compares several solutions adopted in many European legal systems and in non-EU Countries; the decision n. 114/2019 of 20.5.2019, in the matter of capacity to donate of the disabled person assisted by a so-called "*amministratore di sostegno*", which recalls the UN Convention on the Rights of Persons with Disabilities and article 26 of the EU Charter of Rights; the decision n. 112/2019 of 10.5.2019, which, in the matter of insider trading and confiscation, finds the illegitimacy of some national norms also for contrast with the ECHR and the EU Charter of Fundamental Rights; and the preliminary referral order to the Court of Justice n. 117/2019 of 10.5.2019, on the "right to silence" in Consob's (Italian Companies and Exchange Commission) proceedings, also with regard to the norms of the EU Charter of Fundamental Rights; the order of the *Corte di cassazione* n. 16164/2019 of 17.6.2019, which raises question of constitutional legitimacy of the national norm in the matter of baby bonus for contrast with articles 20, 21, 24 and 34 of the EU Charter of Fundamental Rights; and the order n. 12998/2019 of 18.5.2019, which in the event of anticipated appointment of the so called "*amministratore di sostegno*" for a person unfit to plead, establishes that such appointment may also provide for the refusal of certain medical treatments, also in the light of articles 2, 3 and 32 of the EU Charter of Fundamental Rights; and the decision of the *Corte di appello di Milano* of 14.5.2019, which deems discriminatory the criteria of assignment of the baby bonus, recalling the jurisprudence of the Court of Strasbourg on article 14 of the ECHR;
 - **Lithuania:** the decision of the *Konstitucinis Teismas* (Constitutional Court) of 15.2.2019, in the matter of referendum, which recalls the guidelines of the Venice Commission in such matter and the jurisprudence of the Court of Strasbourg;
 - **Luxembourg:** the decision of the *Cour administrative* of 14.3.2019, which, in the matter of administrative cooperation in the tax field and of Exchange of information between member States, makes a reference for a preliminary ruling to the Court of Justice on the interpretation of articles 7, 8, 47 and 52 of the EU Charter of Fundamental Rights within the process of implementation of Directive 2011/16/EU;
 - **Portugal:** the decision of the *Tribunal Constitucional* of 4.6.2019, which held the constitutional illegitimacy of Law Decree n. 19/2011, as amended by Law Decree 38/2012, where it provided for the imposition of a tax to slaughterhouses in order to finance the system of collection of carcasses of animals died inside the companies

(SIRCA) introduced to execute the norms provided for by the Regulations (EC) n. 1069/2009 and (EU) n. 142/2011;

- **Spain:** the decision of the *Tribunal Constitucional* of 17.6.2019, on the claimant's right to access the documentation on the investigation in order to be able to appeal against the decision concerning the detention on remand, which recalls the norms of Directive 2012/13/EU and of the ECHR and the jurisprudence of the Court of Strasbourg; the decision of 22.5.2019, which holds the constitutional illegitimacy of article 58 bis of *Ley Orgánica 5/1985* with regard to the process of personal data by political parties in electoral activities, recalling the EU legislation relevant in such matter, the norms of the EU Charter of Fundamental Rights, of the ECHR and of the jurisprudence of the Courts of Strasbourg and Luxembourg; the decision of 9.5.2019, in the matter of non-contentious jurisdiction and protection of the minor, which recalls article 24 of the EU Charter of Fundamental Rights and the jurisprudence of the Court of Strasbourg; and the decision of 6.5.2019, which, also recalling the jurisprudence of the Court of Strasbourg, judges on a proceeding for mobbing at work in the public sector, recognizing a violation of the moral integrity of the person.

For what concerns **comments**, we have included the following texts:

Articles:

[Roberto Conti](#) "The Italian Court of Cassation and the role of Guido Raimondi in the dialogue with the ECHR"

[Interview by Roberto Conti](#) with Antonio D'Aloia, Giacomo D'Amico and Giorgio Repetto "Which future for the end of life after the decision n. 2017/2018 of the Constitutional Court? Choosing the theme and the answers"

[Sergio Galleano](#) "Further insights of the EUCJ in the matter of transfer of the undertaking: the decisions in the cases Plesser and Correria Moreria"

Notes and comments:

[Giuseppe Bronzini](#) "Fighting for Europe in order to be able to have hope in Europe"

[Francesco Buffa, Salvatore Centonze](#) "Consequences of the criminal conviction of the refugee, according to the decision of the EUCJ of 14 May 2019"

[Roberto Conti](#) "The advisory opinion of the ECHR (post-Prot. 16) in the matter of surrogacy rights"

[Pier Virgilio Dastoli](#) "For a European democratic constitution: a project, a method, an agenda"

[Marianosa Guglielmi](#) "Justice in Europe"

[Franco Ippolito](#) "For the relaunch of the European project"

[Roberto Rivero](#) "Basic income: assistance to poverty or criminal government of poor people?"

[Andrea Venegoni](#) "Comment to the decision in the case Bjarni Armannsson v. Iceland on the *ne bis in idem* of the Court of Strasbourg"

Documents:

[Publication by MEDEL](#) (Magistrats Européens pour la Démocratie et les Libertés) "Letters from Turkish judges" (in 12 languages), of 23 May 2019

[XV report of the association Antigone](#) on detention conditions "Prison according to the Constitution", of 16 May 2019

[MEDEL](#) (Magistrats Européens pour la Démocratie et les Libertés) "Contribution to the Report on judicial independence and impartiality in the Council of Europe Member states", of May 2019