



## OBSERVATORY ON THE RESPECT FOR FUNDAMENTAL RIGHTS IN EUROPE

### **Newsletter n. 83**

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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](http://www.europeanrights.eu)

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

- the Joint Declaration of the Council of Europe and the European Commission of 29.9.2020 on EU accession to the ECHR;
- the Memorandum of Eurojust of 14.9.2020 "*Eurojust Memorandum on Battlefield Evidence*".

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

of the **Parliamentary Assembly**:

- the Resolution 2348 and the Recommendation 2188 of 23.10.2020, "The principles and guarantees of advocates";
- the Resolution 2347 of 23.10.2020, "New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards";
- the Resolution 2346 and the Recommendation 2187 of 22.10.2020, "Legal aspects of "autonomous" vehicles";
- the Resolution 2345 and the Recommendation 2186 of 22.10.2020, "Artificial intelligence and labour markets: friend or foe?";
- the Recommendation 2185 of 22.10.2020, "Artificial intelligence in health care: medical, legal and ethical challenges ahead";
- the Resolution 2344 and the Recommendation 2184 of 22.10.2020, "The brain-computer interface: new rights or new threats to fundamental freedoms?";
- the Resolution 2343 and the Recommendation 2183 of 22.10.2020, "Preventing discrimination caused by the use of artificial intelligence";
- the Resolution 2342 and the Recommendation 2182 of 22.10.2020, "Justice by algorithm – the role of artificial intelligence in policing and criminal justice systems";
- the Resolution 2341 and the Recommendation 2181 of 22.10.2020, "Need for democratic governance of artificial intelligence";
- the Resolution 2340 of 13.10.2020, "Humanitarian consequences of the Covid-19 pandemic for migrants and refugees";
- the Resolution 2339 of 13.10.2020, "Upholding human rights in times of crisis and pandemics: gender, equality and non-discrimination";
- the Resolution 2338 and the Recommendation 2180 of 13.10.2020, "The impact of the Covid-19 pandemic on human rights and the rule of law";

- the Resolution 2337 and the Recommendation 2179 of 13.10.2020, "Democracies facing the Covid-19 pandemic";
- the Resolution 2335 and the Recommendation 2177 of 12.10.2020, "Drug policy and human rights in Europe: a baseline study";
- the Resolution 2334 of 15.9.2020, "Towards an internet ombudsman institution";
- the Resolution 2333 and the Recommendation 2176 of 15.9.2020, "Ethics in science and technology: a new culture of public dialogue";
- the Resolution 2332 of 15.9.2020, "Setting minimum standards for electoral systems in order to offer the basis for free and fair elections".

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

- 29.10.2020, C-243/19, *Veselības ministrija*, on social security and on the difference in treatment based on religion;
- 21.10.2020, C-529/19, *Möbel Kraft GmbH & Co. KG v. ML*, on consumer protection;
- 14.10.2020, C-681/18, *KG (Missions successives dans le cadre du travail intérimaire)*, on appropriate measures to prevent misuse of temporary agency work;
- 08.10.2020, C-644/19, *Universitatea "Lucian Blaga" Sibiu and others*, on equal treatment in the matter of employment and occupation;
- 08.10.2020, C-641/19, *PE Digital*, on consumer protection;
- 08.10.2020, C-568/19, *Subdelegación del Gobierno en Toledo (Conséquences de l'arrêt Zaizoune)*, on common standards and procedures for returning illegally staying third-country nationals;
- 06.10.2020, joined cases C-511/18, C-512/18, C-520/18, *La Quadrature du net and others*, and C-623/17, *Privacy International*, on the processing of personal data in the electronic communications sector and on the protection of personal data;
- 06.10.2020, C-181/19, *Jobcenter Krefeld*, on migrant worker and on the children's right of residence;
- 01.10.2020, C-649/18, *A () and vente de médicaments en ligne*, on online sales of medicinal products for human use not subject to compulsory medical prescription and on the protection of public health;
- 01.10.2020, C-485/18, *Groupe Lactalis*, on the provision of food information to consumers;
- 30.09.2020, C-402/19, *CPAS de Seraing*, on social assistance guaranteed by a Member State to an illegally staying third-country national, parent of an adult child suffering from a serious illness;
- 30.09.2020, C-233/19, *CPAS de Liège*, on the automatic suspensory effect of the return of a third-country national suffering from a serious illness;
- 24.09.2020, C-223/19, *NK (Pensions d'entreprise de personnel cadre)*, on the indexation of the amount of pensions and on the prohibition of indirect discrimination on grounds of sex and age, on the right to property and on the right to an effective remedy;
- 24.09.2020, C-195/2020 PPU, *Generalbundesanwalt beim Bundesgerichtshof (Principe de spécialité)*, on the European Arrest Warrant and on special rule;
- 23.09.2020, C-777/18, *Vas Megyei Kormányhivatal (Soins de santé transfrontaliers)*, on cross-border healthcare and on freedom to provide services;
- 17.09.2020, C-806/18, *JZ (Peine de prison en cas d'interdiction d'entrée)*, on the return of illegally staying third-country nationals;
- 15.09.2020, joined cases C-807/18 and C-39/19, *Telenor Magyarország*, on open internet access and on the right to provide applications and services;
- 10.09.2020, C-738/19, *A (Sous-location d'un logement social)*, on unfair terms in consumer contracts;
- 10.09.2020, C-363/19, *Konsumentombudsmannen*, on food safety and health care;
- 09.09.2020, C-651/19, *Commissaire général aux réfugiés et aux apatrides (Rejet d'une demande ultérieure - Délai de recours)*, on international protection, diplomatic and consular protection and the right to an effective remedy;
- 08.09.2020, C-265/19, *Recorded Artists Actors Performers*, on copyright;

- 03.09.2020, C-719/18, *Vivendi*, on freedom and pluralism of the media and on freedom of establishment;
- 03.09.2020, joined cases C-503/19 and C-592/19, *Subdelegación del Gobierno en Barcelona (Résidents de longue durée)*, on the refusal to grant long-term resident status on the ground that the person concerned has previous convictions.

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

- 27.10.2020, *Kiliçdaroğlu v. Turkey* (n. 16558/18), on the sentence against the leader of the main opposition party Kemal Kiliçdaroğlu, in violation of the right to freedom of expression;
- 27.10.2020, *Reist v. Switzerland* (n. 39246/15), according to which the Court finds legitimate the individual protection measure of keeping a minor in an open institute, pending the amendment of the measure previously adopted;
- 27.10.2020, *M.A. v. Belgium* (n. 19656/18), on the removal of the applicant to Sudan in violation of the right not to be subjected to inhuman or degrading treatment and in violation of the right to an effective remedy;
- 20.10.2020, *Bădulescu v. Portugal* (n. 33729/18), according to which the overcrowding of the prison in Porto amounts to degrading treatment for the prisoners;
- 20.10.2020, *Kaboğlu and Oran v. Turkey (n° 2)* (n. 36944/07), according to which the criminal investigations against two university professors violated their right to freedom of expression;
- 20.10.2020, *B. v. Switzerland* (n. 78630/12), on the termination of a widower's pension, on grounds of sex, when his youngest child reached the age of majority: the Court found the violation of articles 8 and 14 of the Convention;
- 20.10.2020, *Felix Guțu v. Republic of Moldova* (n. 13112/07), on the applicant's dismissal for theft, in spite of an amnesty, that has violated his right to the presumption of innocence;
- 20.10.2020, *Perovy v. Russia* (n. 47429/09), according to which the Russian orthodox rite of blessing of a class does not violate the right of a student and of his parents;
- 15.10.2020, Grand Chamber judgment, *Muhammad and Muhammad v. Romania* (n. 80982/12), according to which Romanian authorities violated the Convention (article 1 of Protocol 7) imposing on the applicants serious restrictions during their expulsion;
- 13.10.2020, *Gafiuc v. Romania* (n. 59174/13), on the legitimacy of the withdrawal of a journalist accreditation to consult the *Securitate* archives;
- 13.10.2020, *Marin Yosifov v. Bulgaria* (n. 5113/11), on the violation of the right to liberty and security and of the right to the respect for private life in the case of search of a politician's office and of his detention;
- 13.10.2020, *Koychev v. Bulgaria* (n. 32495/15), on the violation of the right to the respect for private life of a biological father and on the rejection of the action for the recognition of paternity;
- 08.10.2020, *Ayoub and others v. France* (n. 77400/14, 34532/15, 34550/15), on the legitimacy of the dissolution of an extreme right-wing organisation;
- 08.10.2020, *Aghdgomelashvili and Japaridze v. Georgia* (n. 7224/11), on the violation of the prohibition of inhuman and degrading treatment and of the prohibition of discrimination during the police search of the premises of an LGBT organisation in Tbilisi;
- 06.10.2020, *Jecker v. Switzerland* (n. 35449/14), on the legitimacy of the obligation imposed on a journalist to give evidence and disclose the sources of her article on drug trafficking;
- 06.10.2020, *I.S. v. Switzerland* (n. 60202/15), on the legitimate extension of preventive detention despite the acquittal at first instance;
- 06.10.2020, *Laguna Guzman v. Spain* (n. 41462/17), on the violation of freedom of assembly and association in the case of a protestor left permanently injured after the police intervention to disperse a spontaneous gathering;

- 06.10.2020, *Karastelev and others v. Russia* (n. 16435/10), on the violation of the right of expression due to the deficiencies in the regulatory framework on anti-extremist legislation in Russia;
- 17.09.2020, *Kotilainen and others v. Finland* (n. 62439/12), on the lack of effective investigations and an effective preventive search in the case of a student, who killed many other students in his school;
- 17.09.2020, *Grubnyk v. Ukraine* (n. 58444/15), on the legitimacy of preventive detention of a person suspected of crimes of terrorism committed in Odessa in 2015;
- 17.09.2020, *Mirgadirov v. Azerbaijan and Turkey* (n. 62775/14), on the legitimacy of the prohibition imposed on a prisoner to receive and subscribe to socio-political newspapers or magazines;
- 10.09.2020, *G.L. v. Italy* (n. 59751/15), on the violation of the prohibition of discrimination and of the right to education for not having guaranteed statutory specialised learning support, as provided for by law, to an autistic pupil during her first two years of primary education;
- 03.09.2020, *Yardanavi v. Bulgaria* (n. 11157/11), on the violation of freedom of assembly and association following the criminal proceeding against the two applicants seeking to set up a political party on religious basis;

and the decisions:

- 01.10.2020, decision of inadmissibility, *Prina v. Romania* (n. 37697/13), on the principle of *ne bis in idem* only applicable to criminal proceedings concerning the same facts, according to article 4 of Protocol n. 7;
- 01.10.2020, decision of inadmissibility, *Mediani v. Italy* (n. 11036/14), on the length of the proceedings relating to the special appeal to the President of the Republic.

On 6.10.2020 the Court adopted a decision on the request for an interim measure lodged by Armenia against Turkey on 4.10.2020 concerning the conflict in Nagorno-Karabakh: the Court decided to apply the urgent measure and called upon both Countries involved to refrain from taking any measures which might entail breaches of the rights provided for by the Convention to the civilian population.

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

- the decision of the United States Court of Appeals for the Fifth Circuit of 13.10.2020, which confirmed the decision of the District Court on the constitutional illegitimacy of the *Texas Senate Bill 8*, where it introduced a medical additional procedure for interrupting pregnancy through the "dilatation and evacuation" method (D&E);
- the decision of the United States Court of Appeals for the Ninth Circuit of 2.9.2020, which recognized the unlawfulness of the bulk phone data collection program carried out by the National Security Agency and revealed in 2013 by Edward Snowden;
- the decision of the Inter-American Court of Human Rights of 1.9.2020, case *Fernández Prieto y Tumbeiro vs. Argentina*, on the arbitrary restrictions to freedom carried out by the police in the 90's against Carlos Alberto Fernández Prieto and Carlos Alejandro Tumbeiro, in violation of the right to personal freedom, to private life and to the right to an effective remedy; the decision of 31.8.2020, case *Acosta Martínez y otros vs. Argentina*, on the responsibility of the State for the unlawful, arbitrary and discriminatory deprivation of liberty – and the following death – of José Delfín Acosta Martínez, in 1996 and based on a legislation incompatible with the standards of the Convention; and the decision of 9.6.2020, case *Spoltore vs. Argentina*, on the violation of the right to a reasonable length of the proceeding and to an effective remedy in a proceeding for compensation deriving from occupational illness.

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

- **Belgium:** the decision of the *Cour constitutionnelle* n. 122/2020 of 24.9.2020, which rejected the annulment claim lodged against the law of 15 October 2018 on voluntary pregnancy interruption, also applying the jurisprudence of the Court of Strasbourg; the decision n. 117/2020 of 24.9.2020, which rejects the claim lodged against the law of 9 May 2018 amending the Consular Code, in the light of the norms of Directive (EU) 2015/637; the decision n. 114/2020 of 24.9.2020, partially amending the law of 18 September 2017 on the prevention of money laundering and of terrorist financing, which transposes Directive (EU) 2015/849, concerning the lawyer's professional secrecy; and the decision n. 113/2020 of 31.8.2020, which rejected the claim lodged against the law of 30 March 2018 on pensions in the public sector, recalling the European Social Charter and the First Additional Protocol to the ECHR;
- **Estonia:** the decision of the *Vabariigi Riigikohus* (Supreme Court) of 20.10.2020, on the constitutional legitimacy of the "Act on Amendments to the Funded Pensions Act and Other Associated Acts (mandatory funded pension reform)", which recalls the European Social Charter;
- **France:** the decision of the *Cour de cassation* n. 1994 of 28.10.2020, which finds legitimate the conviction of a demonstrator based on her refusal to undergo covid-19 test, also in the light of article 8 of the ECHR; the decision n. 620 of 21.10.2020, which, in the matter of consumer rights and of the possibility to revoke a purchase, recalls Directive 2008/48/EEC; the decision n. 616 of 21.10.2020, which, in the matter of responsibility for the production of defective products, recalls Directive 85/374/EEC; and the decision n. 777 of 30.9.2020, which, in a case of collective dismissals and of agreements to reduce the impact, recalls Directive 2002/14/EC on the right to information and of consultation of workers;
- **Germany:** the decision of the *Oberlandesgericht Karlsruhe* (Court of Appeal of Karlsruhe) of 9.9.2020, on freedom of expression in the use of the *Instagram* account by an "influencer", with regard to article 10 of the ECHR and to European competition and consumer legislation; the decision of the *Landgericht Dortmund* (Tribunal of the Region of Dortmund) of 30.9.2020, in the matter of European tendering, in particular of the train service, which recalls the Court of Justice; the decision of the *Verwaltungsgerichtshof Baden-Württemberg* (Administrative Tribunal of Baden-Württemberg) of 29.9.2020 on monitoring equipment and article 7 of the ECHR; the decision of the *Verwaltungsgericht Karlsruhe* (Administrative Tribunal of Karlsruhe) of 14.9.2020, according to which, in the present state of knowledge, the persons recognized as non vulnerable and who has the right to international protection, as well as an asylum seeker, continues to have rights in Italy, also taking into consideration the effects of COVID-19 pandemic, and will not be exposed to the serious risk of inhuman or degrading treatment, pursuant to article 4 of the EU Charter of Fundamental Rights or of article 3 of the ECHR; the two orders of the *Verwaltungsgericht Wiesbaden* (Administrative Tribunal of Wiesbaden) of 15.5.2020 and of 13.5.2020, which make a reference for a preliminary ruling to the Court of Justice on the compatibility of the norms of Directive (EU) 2016/681, on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime ("PNR Directive"), with articles 7, 8 and 47 of the EU Charter of Fundamental Rights; and the decision of the *Verwaltungsgericht Cottbus* (Administrative Tribunal of Cottbus) of 8.4.2020, on the hypothesis of suspension of a "Dublin" transfer, because of the coronavirus;
- **Great Britain:** the decision of the *United Kingdom Supreme Court* of 16.10.2020, in which the Court deems compatible with the prohibition of discrimination the policy of an organization connected with the Orthodox Jewish Church, which provides social housing services mostly in favour of persons belonging to such religious belief; the decision of the *England and Wales Court of Appeal* of 21.10.2020, in which the Court finds the illegitimacy of the so called "removal window policy" of the Secretary of State, because it exposes migrants to the risk of being expelled to countries where they could be victims of torture with no access to justice; the decision of 25.9.2020, which rejects the claim of some religious organizations, which challenged the legitimacy of the emergency protocol adopted by the national health service in order to guarantee all

- women, through mail shipping, the access to abortion pills during the lockdown due to covid-19; and the decision of 15.9.2020, in the matter of discrimination on grounds of age and the provision of the same pension age for men and women; the decision of the England and Wales High Court of 29.7.2020, on the requirements of an effective investigation following a terrorist attack, according to articles 2 and 3 of the ECHR; and the decision of 21.8.2020, on the detention conditions in an expulsion centre for migrants; the decision of the Scottish Court of Session of 16.9.2020 in the matter of privacy; and the decision of the England and Wales Court of protection of 16.8.2020, in which the Court deems that forced feeding provided for in the treatment centre, where the patient is hospitalized, does not coincide with her best interest;
- **Ireland:** the decision of the Supreme Court of 28.9.2020, in the matter of right to defence (proceeding *in absentia*) in a decision concerning the execution of the European arrest warrant; and the decision of the High Court of 11.9.2020, on the balance between the protection of journalistic sources and proceeding necessities, which recalls the jurisprudence of the Court of Strasbourg;
  - **Italy:** the decisions of the Corte di cassazione n. 29238/2020 of 8.10.2020, in the matter of review of the *res iudicata*, according to which article 46 of the ECHR does not extend the binding force of a decision of the Court of Strasbourg beyond the cases specifically decided; n. 28112/2020 of 25.9.2020, on *ne bis in idem*, in the light of the jurisprudence of the Court of Strasbourg between penitentiary and criminal sanctions; n. 29128/2020 of 17.9.2020, in the matter of defamation, which recalls the jurisprudence of the Court of Strasbourg on article 10 of the ECHR; n. 28857/2020 of 7.9.2020, on the incompatibility of the judge for having made statements on the facts of the proceeding, in the light of article 6 of the ECHR; n. 27959/2020 of 7.9.2020, which finds legitimate, according to article 6 of the ECHR, the reading of the statements made during the investigation phase by a person, who then became unable to make them again; and n. 16804/2020 of 7.8.2020, which confirms the annulment of the registration in the civil status register of the sentence for the dissolution of the marriage issued by a Palestinian religious court, by request of the husband, in the light of unilateral repudiation, deemed in violation of the principle of equality between spouses also in the light of article 14 of the ECHR;
  - **Spain:** the decision of the Tribunal Constitucional of 19.10.2020, in the matter of extradition and respect for procedural rights and guarantees, which recalls articles 5 of the ECHR and 6 of the EU Charter of Fundamental Rights and the jurisprudence of the Courts of Strasbourg and Luxembourg; and the order of 10.9.2020, which rejected the claim lodged by Oriol Junqueras Vies and Raül Romeva Rueda against the sentence issued by the Supreme Court on 14 October 2019 for the crimes of sedition and embezzlement, with regard to the events of Autumn 2017 concerning the referendum for the autonomy of Catalonia; and the two orders of the Tribunal Supremo of 23.10.2020, which rejected the claims lodged against the orders of 10 January 2020 and of 4 March 2020 of the same court, which confirmed the national and international arrest warrants issued against Carles Puigdemont i Casamajó, Clara Ponsatí i Obiols, Lluís Puig i Gordi and Antoni Comín i Oliveres and requested the European Parliament the suspension of Parliamentary immunity (Puigdemont and Comín);
  - **The Netherlands:** the two decisions of the Rechtbank Amsterdam (District Court of Amsterdam) of 3.9.2020 and of 31.7.2020, in the matter of independence of Polish courts and non-execution of European arrest warrants issued by such courts, which make a reference for a preliminary ruling to the Court of Justice on the interpretation of the Framework Decision 2002/584/JHA concerning the European arrest warrant and article 47 of the EU Charter of Fundamental Rights.

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

**Articles:**

[Fabrizio Cafaggi](#), "Remedies and sanctions in consumer protection: implementation of the new deal"

[Nicola Colaianni](#) "President Macron and freedom of blasphemy"

[Chiara Favilli](#) "European pact on migration and asylum: "there is something new, something ancient, actually"

[Maria Vittoria La Rosa](#) "Authorizations, sovereignty, digital platforms"

[Antonio Ruggeri](#) "Protocol 16: *funere mersit acerbo?*"

### **Notes and comments:**

[Alessandro Andronio](#) "Comment to the decision, 22 October 2020, *Faller and Steinmetz v. Croatia*

[Elena Boghetic](#) "E.U. Court of Justice, Second Section, 24 October 2020, *JH v. KG*"

[Matilde Brancaccio](#) "European Court of Human Rights, First Section, 8 October 2020, *Bajčić v. Croatia*, (application n. 67334/13) in the matter of *ne bis in idem*"

[Corrado Caruso](#) "Granital reloaded or a «specification» in the vein of continuity"

[Laura Castaldi](#) "Safeguard of European Union law and external effectiveness of the *res iudicata*: beyond the decision in the case *Olimpiclub?*"

[Rossella Catena](#) "European Court of Human Rights, Third section, 6 October 2020, *Jecker v. Switzerland*"

[Giorgio Costantino](#), [Antonio Carratta](#), [Giuseppe Ruffini](#) "External limits and jurisdiction: the contrast between the Joint Sections and the Constitutional Court before the EU Court. Notes to the order of the Joint Sections of the Court of Cassation n. 19598 of 18 September 2020,"

[Stefano Giordano](#) "The reasonable caution of the ECtHR: between predictability and accessibility of the norm. Some considerations on the opinion of the Court (CEDH 150) of 29.05.2020"

[Giuseppe Tropea](#) "The European Golem and the «reasons regarding jurisdiction » (Note to the order of the Joint Sections of the Court of Cassation n. 19598 of 18 September 2020)"

### **Documents:**

[Report of the Joint Committee on Human Rights of the United Kingdom Parliament](#) "The Government's response to COVID-19: human rights implications", of 21 September 2020

[The "Global Biodiversity Outlook 5"](#) of the United Nation Convention on Biological Diversity (CBD), of 15 September 2020

[Report by the World Wildlife Fund \(WWF\) and the Zoological Society of London \(ZLS\)](#) "Living Planet Report 2020 – Bending the curve of biodiversity loss", of 10 September 2020