

# The Latest Case-Law of the European Court of Human Rights, the Court of Justice of the European Union and U.S.A. Supreme Court

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### **Democracy, Fair Elections**

1. In a judgment of 30.05.2017, on fairness of the elections in Russia, the ECtHR stated that "the common principles of the European constitutional heritage, which form the basis of any genuinely democratic society, enshrine within themselves the right to vote in terms of the opportunity to cast a vote in universal, equal, free, secret and direct elections held at regular intervals", and that "free elections are to be seen as both an individual right and a positive obligation of the State". The Court concluded in a violation of Art. 3, Prot. 1 to the ECHR in respect of each applicant, in so far as they had made an arguable claim that the fairness of the elections was seriously compromised by the procedure in which the votes had been recounted. The Court found that, although the extent of recounting, unclear reasons for ordering it, lack of transparency and breaches of procedural guarantees in carrying it out, as well as the results whereby the ruling party gained votes by large margins, strongly supported the suspicion of unfairness, none of the avenues employed by the applicants afforded them a review which would have provided sufficient guarantees against arbitrariness (application 75947/11).

### **Human Dignity, Physical Integrity**

2. In a domestic violence case in which the wife had suffered physical violence by her husband, documented in forensic medical as well as in police reports (sustained injuries on three occasions, requiring medical care for periods ranging from two to five days to a maximum of nine to ten days), the ECtHR found a violation of Article 3 of the ECHR (ill-treatment) after having observed that, both at the investigation level and before the courts, the national authorities considered the domestic violence acts as being provoked, and thus regarded them as not being serious enough to fall within the scope of the criminal law, and that the only sanction imposed on the husband was a slightly increased administrative fine, although that measure did not have the deterrent effect necessary to be considered as a sufficient safeguard against further ill-treatment of the wife (BĂLȘAN v. ROMANIA, judgment of 23 May 2017).

3. Violation of article 3 of the European Convention on Human Rights (inhuman and degrading treatment) in the case of an inmate who was subject to the following conditions of detention: (a) his fellow prisoners in the same cell were allowed to smoke (exposure to passive smoking), (b) The toilet was located in the cell next to the bed and was enclosed by a single screen, (c) access to the promenade yard was limited to two times an hour per day (ECtHR, 16.5.2017, SYLLA, NOLLOMONT v. BELGIUM).

4. In a case of medical malpractice, where the doctors who had carried out a high risk operation had not been held criminally responsible for the handicap provoked to the patient, the European Court of Human Rights, in a judgment delivered on June 6,2017 (application 50772/11), held that the experts' report, established for the assessment of the medical wrongdoing, was insufficiently motivated, as the experts who established it, in order to absolve the impugned doctors of all wrongdoing, relied on the high risk character of the operation, a character which emerged from statistical data, without considering, which was nevertheless of paramount importance, whether or the doctors had, before the operation, done everything that was "lege artis" necessary to identify and control the risks inherent in the operation.

### **Equal Treatment, Non Discrimination**

5. In a case in which the Supreme Court of the United States decided that a gender based differential of unmarried men (physical-presence requirement in US of one year for the unmarried mothers and of ten years for the unmarried fathers in order to transfer their American nationality to their abroad born child) was in breach of the equal protection principle, and, as a consequence, she had further to decide either to extent (the privilege to children of unmarried fathers) or to nullify the privilege (and make applicable in all cases the ten years requirement), the Court refused to make a choice, considering that, in the present case, the choice between the two alternatives should be governed by the legislature's intent and, thus, she should give the opportunity to the legislative body (to US Congress) to rule on the matter, the administration being, in the interim, obliged to apply, only prospectively, a

provisional rule (a five years requirement) (*SESSIONS, ATTORNEY GENERAL v. MORALES SANTANA*, June 12, 2017).

6. In a judgment published on July 5, 2017, the CJEU encountered the issue of compatibility with articles 15 (work, professional freedom) and 20 to 21 (equality, prohibition of discrimination) of the EU Charter on Fundamental Rights, of the adoption by EU legislation a mandatory age-limit for the exercise of the functions of operator on commercial aircraft. The applicant complaint that the age-limit to the particular year (65th) was scientifically arbitrary and that it was in contradiction with the failure to adopt the same limit with respect to non-commercial aircraft operators. The Court sought, within the limits of her standard of review, if the adopted age-limit served the legitimate objective of flight safety taking into consideration the principle of proportionality. As to the distinction between commercial and non-commercial aviation, the Court confined herself to the finding that the former are more complex and carry a larger number of individuals, thus involving higher risk. As to the choice of the 65th year of age, and not another, the Court ruled that, because of the scientific uncertainty on the issue, the EU legislator had not overpassed her margin of discretion by determining, upon inquiry and after balancing the conflicting interests, a limit corresponding to the age of international practice (preliminary ruling judgment, case C-190/16).

### **Freedom of Expression, Religious Freedom**

7. In a freedom of expression case, in which the three applicants had been charged with fines for holding static demonstrations in front of a secondary school (the first), a children's library (the second) and the city hall (the third) displaying banners which stated respectively "homosexuality is normal", "homosexuality is good" and "homosexuality is not a perversion", the European Court of Human Rights, in a judgment delivered on June 20, 2017, has found that the national legislation, incriminating public activities aiming at the promotion of homosexuality among minors, not only does not serve to advance, as it pretended to do, the protection of morals, but, on the contrary, it is reinforcing "stigma and prejudice", encouraging

"homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society" (BAYEV AND OTHERS v. RUSSIA, three applications joint in one case).

8. Reputation is protected, under Article 8 of the ECHR, as part of a person's private life. However, a person who takes part in a public discussion of general interest should tolerate some degree of aggressive language against her (even based on a misinterpretation of her statements), as the individual who formulates it is protected, under Article 10 of the ECHR, in her liberty of expression (ECtHR, 18.5.2017, PETRI v. ITALY).

9. In a judgment published on 23 May 2017, SARIGÜL v. TURKEY, the European Court of Human Rights found a violation of article 10 of the ECHR (freedom of expression) in the case of an inmate who has been denied the prison administration's refusal to transmit, as he requested, the manuscript of a novel to his lawyer, the court having considered that the prison administration had described this manuscript as "correspondence" and had applied the legal regime thereto, while the manuscript was an intellectual work subject to the protection afforded to freedom of expression, the rejection of transmission thus lacking a basis in the law.

10. In a judgment delivered on June 19, 2017, the US Supreme Court stated that a North Carolina statute, making it a felony for a registered sex offender to gain access to a number of websites, including Facebook and Twitter, impermissibly restricted lawful speech in violation of the First Amendment. According to the Court: (a) In one of the first cases the Court has taken to address the relationship between the First Amendment and the modern Internet, the Court must exercise extreme caution. (b) Like other inventions, the Internet and social media will be exploited by the criminal mind. However, the assertion of a valid governmental interest cannot be insulated from constitutional protections. (c) The impugned law bars access to what for many are the principal sources for knowing current events and, among others, checking ads for employment. (d) Even convicted criminals might receive legitimate

benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives. (e) Thus, the State has not met its burden to show that this sweeping law is necessary to serve its purpose of keeping convicted sex offenders away from vulnerable victims (PACKINGHAM v. NORTH CAROLINA).

11. The US Patent and Trademark Office denied to register the mark "THE SLANTS", under a law provision prohibiting the registration of trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." The US Supreme Court, in a judgment on this case delivered today (19.6.2017), held that the above mentioned disparagement clause violates the First Amendment's Free Speech Clause, as trademarks are private, not government speech. According to the justices of the Court: (a) holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine, for other systems of government registration (such as copyright) could easily be characterized in the same way, (b) in the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality and, thus, to permit viewpoint discrimination in this context is to permit Government censorship. (MATAL, INTERIM DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE v. TAM)

12. The comparison between two opposing Opinions in the TRINITY LUTHERAN CHURCH v. COME (June 26, 2017) US Supreme Court judgment - in which the issue was the constitutionality of the disqualification of a Church to apply for a grant for its preschool and daycare center - shows how crucial to the resolution of a case is the choice between one of the two first Amendment Clauses as basis to legal reasoning. Seven Justices of the Court have chosen the Free Exercise of Religion Clause: "The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified. ...[T]he state interest ... in achieving greater separation of church and State ... is limited by the Free Exercise Clause." Justices

Sotomayor and Ginsburg have chosen the Non Establishment of an Official Religion Clause: "The Church seeks state funds to improve the Learning Center's facilities, which, by the Church's own avowed description, are used to assist the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers ... The conclusion that the funding the Church seeks would impermissibly advance religion is inescapable".

### **Private and Family Life, Searches, Correspondence**

13. In a disable person's freedom of choice case, in which a mentally disable man of 21, whose intellectual capacity was of a child of 6 to 9, wanted to live with his foster parents in an isolated place in the north of the country although the authorities had decided for him to live in the south where his family lived and he had opportunities of education and work, the ECtHR declared that the right of choice of a mentally disable person as to where and with whom to live is protected as a fundamental right (Article 8 of the ECHR on the protection of private life) and that the margin of appreciation of national authorities is reduced where a member of a particularly vulnerable group is subjected to differential treatment on grounds that are not specifically linked to his relevant individual circumstances. The Court held that in this case there was no violation of Article 8 of the ECHR after having observed that the impugned decision was not based on a mere qualification of the applicant as a person with disability, but on the finding that his disability was of a kind that rendered him unable to understand the significance and the implications of the specific decision he wished to take for himself (*A.-M.V. v. FINLAND*, 23 of March 2017).

14. In a body search case, in which a convicted for the murder of his brother prisoner had been submitted regularly to intrusive in his body searches by the prison authorities, suspecting him of illegal trade inside the prison, the ECtHR held (judgment of the 1st of June 2017, application 9635/13) that, although the impugned searches did not amount to ill-treatment (article 3 of the Convention), as they have been carried out in respect of the law and the dignity of the prisoner, the facts of the

case characterize a violation of the prisoner's right of respect of his private life (article 8 of the Convention), as the national authorities were not able to justify each one of the impugned searches at the dates when they have been realized, and thus the interference in litigation to the applicant private life could not be qualified as necessary.

15. In a police powers case case, in which two policemen, legally searching a parolee-at-large dangerous criminal, entered without knocking at the door into a one-room residence (a shack) and, after one of them yelled "Gun!", fired against a resident who used his long gun (a BB rifle kept for use on rats) to stand up from the bed where he was sleeping with his spouse, the Supreme Court of the United States stated unanimously that, as far as the use of fire by the policemen was justified by the holding of a gun by the civilian and the surrounding circumstances, the policemen are covered by absolute immunity. The Court rejected the lower court's provocation-by-the-police theory, according to which, the unconstitutional act of the policemen to enter a residence without knocking at the door disrupted the legality of their action and divested them from their absolute immunity, putting them in the legal position to bear the burden of proof that the use of lethal force they have done was not excessive (COUNTY OF LOS ANGELES, CALIFORNIA, ET AL. v. MENDEZ ET AL, 30.05.2017).

16. In the case DÖMÖTÖR KIRÁLY v. Hungary, where the applicant complaint of authorities inaction during the demonstration of extreme elements in an area occupied by Roma, with threats against them due to stereotypical perceptions of their propension to crime, the ECtHR ruled (17.04.2017) the right of respect of private life of Roma who inhabited the area had been violated because of the feeling of fear provoked to them by the violent demonstration and the inaction of police authorities to identify and sanction the organizers.

17. In an environment protection case, in which the applicants complained that the State had failed to protect them from the air pollution as well as noise and

electromagnetic pollution emanating from a thermal power plant located in the immediate vicinity of their homes, the ECtHR held (13.7.2017) that, in the context of dangerous activities, States have the obligation under Article 8 of the ECHR (as pollution may prevent individuals from enjoying their homes affecting their private and family life adversely), to set in place regulations geared to the specific features of the activity in question, particularly with regard to the level of risk potentially involved; such regulations must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for those concerned to take measures to ensure the effective protection of the citizens whose lives might be endangered by the inherent risks. In the case at hand, the Court ruled that, whereas the plant had commenced its operations before the adoption of the relevant rules, the situation was further exacerbated by the Government's passive attitude in the face of the resultant air pollution, despite acknowledging the ecological discomfort suffered by the population (application 38342/05).

### **Property Rights**

18. In a case involving the claiming of property in a Greek island beach area, the ECtHR in a ruling published on 29.6.2017, considered that, despite the decision of the Greek justice recognizing the property in favor of a Holy Monastery, as acquired by the Monastery's usucapion from 1882 until 1915 and thereafter protected by the special protection status of any state owned land, the applicants, who occupied the area for almost 100 years, having cultivated the ground, build on it and founded a taverna, and additionally paid the real estate taxes for it, had acquired a property right on it, certainly not foreseen in Greek legislation, but protected under article 1 of the additional protocol to the European Convention on Human Rights, so that the deprivation of this right from to the detriment of applicants,- while the objection against the Monastery of abuse of right because of claiming the land after almost a century of indifference) could be accepted by the Greek justice - constituted a specific and disproportionate burden (COSMAS v. Greece).

19. In its judgment in case *MELO TADEU v. PORTUGAL* (application 27785/10), the ECtHR held that the tax administration had infringed the property rights of the applicant because, despite her acquittal of the criminal charge of not having fulfilled her pretended tax obligations as de facto manager of a company, the tax authority has maintained the seizure of her personal assets based on her above capacity - de facto manager of the company - although the criminal court had ruled in her favor that she was not.

20. In case *VASKRSIĆ v. SLOVENIA*, where the home of the applicant had been put at auction because of his debts the ECtHR ruled (25.04.2017) that the applicant had suffered an infringement of his property rights, because the house where he was living was sold at auction by a court without considering previously the existence of alternatives, less burdensome to the applicant, especially in view of the amount due which was particularly low.

21. In its ruling on the case *BOLJEVIĆ v. CROATIA* (application 43492/11), the ECtHR ruled the property rights of the applicant had been violated because of the confiscation imposed to him by the administration as a sanction on the ground that the applicant had imported the confiscated money in the country without declaring them and was unable to justify their legitimate origin.

22. In *MURR v. WISCONSIN*, decided June 23, 2017, US Supreme Court Justices GINSBURG, BREYER, SOTOMAYOR, and KAGAN joined Justice's KENNEDY Opinion, in which he stated: "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny ..." In this case, in order to protect environment, two separately constructible, adjacent lots of land, were unified by State regulation in one parcel, in which the construction of only one residence was allowed. The question was whether, as a consequence of the regulation, the government had in substance taken the property of the affected landowners (members of the same family), their initial two lots of land not being any more separately constructible. The majority considered that, as the value of the

unified land parcel was almost the same as the value of the two separated lots - should they being considered as constructible -, there was no regulatory taking of property. The dissenting Justices (without Justice GORSUCH) considered that the basis to assess the question of property taking should be the affected property in its initial status (each lot of land separately, now without real economic value) and not the parcel of land artificially created by the impugned State regulation

23. In a judgment published on July 4, 2017, the ECtHR upholds national legislation which imposes the automatic confiscation of a camion transporting goods in violation of tax law, even if the owner of the camion is different from the owner of the goods and no wrong-doing is imputable to him. According to the Court, the deprivation of property foreseen in this case by the national legislation does not amount to a violation of the right to peaceful enjoyment of possessions, because the impugned measure, taken to combat tax fraud, was not disproportionate, as the owner of the camion (a) by hiring his vehicle to a transporter, assumes the risk of an illegal use of it, and (b) maintains the right to be reimbursed for his damages by the person who had hired his camion. In any case, according to the Court, the measure, even if tough, was justified because, otherwise, it would be easy for big tax cheaters to bypass tax-fraud responsibility by always removing the charges to the precarious holder of the camion (*SERVICE BENZ COM S.R.L. v. ROMANIA*, application 58045/11)

### **Right to a Good Administration**

24. Precisions concerning the rights of a European Union subject to a disciplinary procedure conducted against him by an Institution of the Union: (a) No provision or general principle of law implies, in an absolute way, that, in the course of an administrative procedure, the person concerned is assisted by his council during the consultation of the file. (b) The right of access to the file does not imply, in an absolute way, the possibility of obtaining the communication of its parts or of a copy thereof. (c) Section 47, para. 2, of the European Union Charter on Fundamental Rights, has no general and abstract principle that the parties must have, in all cases,

the power to attend the interviews conducted or to receive communication of all the documents taken into account, involving other persons. (d) There is no general obligation on the part of the Institutions of the European Union to inform the recipients of their actions of the remedies available, nor an obligation to indicate the applicable time limits within which the remedies may be exercised (General Court of the European Union, 15 June 2017, Case T-302/16).

### **Judicial Review, Fair Process**

25. In a judgment delivered on the 22.05.2017, five out of eight judges of the Court explained that, when the Court acts in reviewing judgments of lower federal jurisdictions, the Court's reviewing powers are the following: (a) The Court retains full power to correct a lower court's errors of law. (b) The lower court's findings of facts are subject to review only for clear error. (c) Under that standard, the Supreme Court may not reverse just because she "would have decided the matter differently." (d) The Supreme Court has the power to review the full record of the case, even the documents established before the judicial proceedings. (e) The Court will not take it upon herself to weigh the trial evidence as if she were the first to hear it, even if other interpretations of that evidence were permissible. (f) A lower court's factual finding, assessed by the Supreme Court as "plausible in light of the full record", is respected by the Supreme Court. (g) In assessing a finding's plausibility, the Court gives singular deference to a trial court's judgments about the credibility of witnesses. COOPER, GOVERNOR OF NORTH CAROLINA, ET AL. v. HARRIS ET AL.

26. The European Court of Human Rights condemned Spain in a judgment of June 13, 2017 (application 41427/14), because its Supreme Court, after reclassifying the facts criminally imputed to the applicants, ruled on the subjective circumstances of the crime, having concluded that there was a guilty intention on their part, without taking their testimony. According to the ECtHR, where the reasoning of a court is based on subjective elements (such as, in this case, the existence of a rebellious will), it is impossible to proceed to the legal assessment of the accused persons' conduct

without first attempting to prove the reality of their behaviour, which necessarily implies the verification of the accused persons' intention with respect to the facts imputed to them.

27. In a judgment on a preliminary ruling request concerning a case in which the issue was the rules applicable for establishing the link between the administration of a vaccine against hepatitis B and the occurrence of multiple sclerosis, the CJEU held (21.6.2017) that the effectiveness of the system of liability for defective products, introduced by EU rules, may be undermined when national evidentiary rules either (a) set a high evidentiary standard which admits only proof based on scientific research, especially in situations where, as in the present case, scientific research neither confirms nor rules out a causal link, or (b) set a low evidentiary standard which admits, where a certain type of evidence is presented, an automatic presumption of there being a link between the defect and the occurrence of the damage. According to the Court, in the present case, the national judge should allocate responsibility to the producer, only after duly taking into consideration all the circumstances of the case, including all the evidence put forward by the producer challenging the evidence provided by the victim, and only if she arrives at the conclusion that the administration of the vaccine is the most plausible explanation of the occurrence of the disease (C-621/15)

28. In a police infiltration case in which the accused person pretended that he has been victim of police provocation - and not simply infiltration - asking to have access to the police secret file of the case in order to demonstrate his innocence, the ECtHR uphold national legislation which covers the police infiltration file by professional secrecy, provided that the elements included in it are not used during the criminal procedure against the accused person, who thus has to bring to the courts by himself a prima facie evidence that he had committed the act for which he is accused, under police provocation (VAN WESENBECK v. BELGIUM, 23.5.2017).

29. In BRAVO-FERNANDEZ (29.11.2016) the U.S. Supreme Court held: (a) "In criminal prosecutions, as in civil litigation, the issue-preclusion principle means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit". (b) "Claim preclusion is essential to the Constitution's prohibition against successive criminal prosecutions", known as "the Double Jeopardy Clause". The Supreme Court reminded that she had first interpreted the Double Jeopardy Clause to incorporate the principle of issue preclusion in *Ashe v. Swenson*. *Ashe* involved a robbery of six poker players by a group of masked men. *Ashe* was charged with robbing one of the players, but a jury acquitted him "due to insufficient evidence." The State then tried *Ashe* again, this time for robbing another of the poker players and secured a conviction. The Supreme Court held that the second prosecution violated the Clause because the sole issue in dispute in the first trial was whether *Ashe* had been one of the robbers, the jury's acquittal verdict precluded the State from trying to convince a different jury of that very same fact in a second trial.