

ANNOTATIE

## **Lăcătuş v. Zwitserland (EHRM, nr. 14065/15) – Begging as a human right?**

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*Annotatie bij Europees Hof voor de Rechten van de Mens, 19-01-2021, ECLI:CE:ECHR:2021:0119JUD001406515 (EHRC-2021-0048)*

1. A young woman of Roma background begs in the streets of Geneva and is repeatedly fined by the Geneva police for sitting down in the street and holding out a cup to collect small donations from the public. According to the criminal code applying to the Canton of Geneva, begging in public spaces is categorically prohibited.[1] In 2014 she was fined again, the little money she had was taken away from her and she was eventually held in custody for five days. These are the facts of the case which prompted the ECtHR to investigate the human rights of beggars and to question whether in this situation these rights were violated. According to the ECtHR - which dealt with the matter under Article 8 ECHR - this was the case. As it happened the Geneva criminal prohibition of begging did not allow for a sufficient balancing of the interests at stake. According to the ECtHR there is no reason to doubt that begging was one of the means of survival for the woman and being in a situation of manifest vulnerability, she had the right, inherent in human dignity, to be able to express her distress and to try to remedy her needs through begging.[2]

2. As far as we know, the present case is the first one before the ECtHR that directly addresses the right to beg. It is a bold judgement which raises a number of interesting questions. One of them deals with the repressive policy responses in at least some European states which can be referred to as “the criminalisation of poverty”.[3] When do these policies hit the boundaries of human rights standards when people resort to the streets for their survival? Another question is how this judgement contributes to the expanding jurisprudence of the ECtHR on the duties of states to protect people in situations of severe destitution. While the court has repeatedly

stressed that the Convention does not guarantee, as such, socio-economic rights, including the right to claim financial assistance from a State to maintain a certain level of living,[4] this does not mean to say that the ECHR may invoke certain government obligations in situations of extreme need.[5] In this way, the ECtHR has been creating a “safety net under the safety net”, to prevent people from totally falling into the abyss.[6] Has the ECtHR now included a right to beg as a new element of this sub-zero safety net? Below, after dealing with some of the highlights and peculiarities of the case, we will try to shed some light on these questions.

3. The applicant applied to the ECtHR, under Articles 8 (private life and family life), 10 (freedom of expression), and 14 ECHR (prohibition of discrimination). However, while the court addressed the issue in depth under Article 8, it did not deem it necessary to discuss the issues under the other two articles. While it is not unusual for the court to only consider cases under one article, there are a number of interesting questions relating to Articles 10 and 14 which were raised in opinions from judges Keller (concurring), Lemmens (in part concurring and partly dissenting, and Ravarani (partly concurring and partly dissenting). In particular, the judges raised some questions, such as whether the act of begging could be considered a form of communication or speech under article 10,[7] and whether differential treatment between Roma and others under law could be proven in this situation.[8] However, the majority of the ECtHR did not deem it necessary to answer these questions, as Article 8 was sufficient to reach an outcome.

4. In its assessment of the case, the ECtHR undertook a comparative review of begging laws in the member states of the Council of Europe. In its study of 38 members, the court found that in 9 states begging is not prohibited, and in the other 29 states begging is prohibited or restricted in a wide variety of ways, with 19 of those states having bans on begging at the national level. Generally speaking, most of the member states which had restrictions did not have blanket bans, but, for instance, prohibited specific forms of begging, or restricted begging to certain areas. However, 9 states did have less nuanced (“*interdictions moins nuances*”) prohibitions.[9] The court ultimately concluded that while there was no consensus among member states on the matter of begging laws, there is a tendency towards limiting the prohibition, and taking other measures to preserve public order.[10] This study and the resulting findings had a significant influence on the final decision, as the court concluded that the Genevan law was an outlier in its reach and severity, being of compelling nature, and leaving no discretion in the matter.

5. Switzerland, while acknowledging a limitation of article 8 rights, argued that the law had a legitimate purpose. Thus, the ECtHR undertook a proportionality test. The legitimate aims which the policy was pursuing were the preservation of public order, protecting the economic interests of the country, and protecting the rights and freedoms of others. The court found

that, in principle, begging, particularly in its more aggressive forms, could constitute a threat to public order, and that the aim of preventing the exploitation of vulnerable individuals was legitimate.[11] However, while the aims were in principle legitimate, the court found Article 11A of the Geneva Criminal Code to be too blunt, not allowing for any exceptions. While the protection of the public order is accepted by the court, other considerations which were adduced by the Swiss government were rejected. In particular the argument that the begging prohibition protected individuals from organised crime was doubted. According to the court this argument is too much geared towards a penalization of the victims rather than targeting the perpetrators of the crime.[12]

6. Finally, in considering the interests at stake, the court reached the conclusion that the applicant had the right to express her distress and beg for assistance, in accordance with the principle of human dignity.[13] The principal consideration addressed to this (consideration 107) could be seen as an indication that the court is willing to accept a subjective right to begging as a new human rights standard. But it can equally be argued that the right to begging is not generally recognised as such, but merely pronounced as a right which pertained to this particular case. Much of this decision hinged on the situation of extreme destitution that the applicant found herself in. However, in our view this second reading is not convincingly elaborated upon by the court. For example, by what standard did the court establish that the applicant's destitution was severe enough to generate this right to beg? If the threshold of severity of destitution is equally high as the one that is used by the ECtHR under Article 3 ECHR,[14] the right to beg would be virtually deprived of its useful effect. Indeed, as Judge Ravarani pointed out in his partly dissenting opinion, the ECtHR did not dispute the applicants' claim that she was trapped in a state of destitution and ignored potentially relevant considerations, such as the possible availability of a social safety net.[15] Clearly, there are still a number of unresolved issues in this respect. Does the right to begging depend on the possibility of access to minimum subsistence benefits? Is the legal status of needy persons relevant in this respect, for example as a minor or an irregular immigrant?

7. Coming back to the first question raised in the introduction to this case note: when do repressive policies hit the boundaries of human rights standards when people resort to the street for their survival? It is now clear that the answer to this question is embodied in the proportionality test: are sanctions necessary, do they take into account all of the individual circumstances, are less stringent measures feasible to reach the same goal, etc.? This may all sound very familiar to a lawyer, but may not be so easy to apply in practice. In the Netherlands, for example, vagrancy and begging were prohibited in Article 432 of the penal code, until this was abolished as from 1 October 2000. However, it is still possible for local municipalities to enact bylaws to prohibit loitering in public spaces, public drinking, begging

etc. Indeed, municipalities are reported to increasingly make use of this possibility. Just to illustrate this: in the city of Groningen in the period between 2004 and 2013 the police registered more than 400 begging offences, leading to fines up to a maximum € 390 or by failure to pay a maximum of 12 days imprisonment.[16] Whether or not Groningen has acted in line with Article 8 ECHR depends on many aspects: the nature of the local rules, the enforcement of these rules by the police, the imposition of the sanctions in each individual case and the broader context of other policy measures to maintain public order in the city center. This is hard to establish. But of course, what matters is that the present case of *Lăcătuș* has provided individual right holders with a legal remedy to complain against measures taken against them.

8. With regard to the second question dealing with the right to beg as an element of the “safety net under the safety net” established by the ECtHR, we would like to stress the paradoxical nature of such a right. A need to beg can be seen as a symptom of a failing welfare state, which is not providing an adequate social safety net which is available to all. At best, the right to begging is a substitute right that comes as a response to a failure to realise a proper minimum income protection floor. Yet, the recognition of a right to beg helps to counterbalance the tendency of criminalising poverty. We agree with the comments made by the Zurich based post-doctoral researcher Corina Heri about the *Lăcătuș* case.[17] She considers the criminalisation of begging and homelessness to be a particularly ill-suited and disproportionate response that seeks to erase visible deprivation from the public sphere without resolving it. Efforts to crack down on behaviour seen as undesirable, including begging, sleeping in public, and prostitution, are today commonplace. It is important that the ECtHR has proved itself critical of such practices. Nonetheless, the promotion of social assistance as a human right standard should remain a priority. Arguably, this is the terrain of socio-economic fundamental rights. At best, with the gradual development of minimum requirements of states relating to extreme poverty, the ECtHR can provide some damage repair.

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[1] Article 11A of the Geneva Criminal Code.

[2] Consideration 107.

[3] Cf, inter alia Jones, S. (Ed.) 2013. *Mean streets: A report on the criminalisation of*

*homelessness in Europe*. Fondation Abbé Pierre; FEANTSA; Housing Rights Watch (ed.), FEANTSA, 2019. UN Guiding Principles on Extreme Poverty and Human Rights, A/HRC/21/39, para 66(c).

[4] See for example *Pancenko v. Latvia*, ECtHR 28 October 1999 (dec.), appl. no. 40772/98, ECLI:CE:ECHR:1999:1028DECOO4077298, as reiterated more recently in *Hunde v. the Netherlands*, ECtHR 5 July 2016 (dec.), appl. no. 17931/16, ECLI:CE:ECHR:2016:0705DECOO1793116.

[5] See for example *Hunde v. the Netherlands*, ECtHR 28 July 2016 (dec.), appl. no. 17931/16, ECLI:CE:ECHR:2016:0705DECOO1793116 in which the ECtHR accepts that Article 3 may require States to take action in situations of the most extreme poverty. For a more recent example see *N.H. and Others v. France*, ECtHR 2 July 2020, appl. no. 28820/13, ECLI:CE:ECHR:2020:0702JUDO02882013.

[6] Vonk, G. and Olivier, M., 2019. The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa). *European Journal of Social Security*, 21(3), p.225

[7] Opinion of Judge Lemmens, para 2

[8] Opinion of Judge Lemmens, para 2

[9] Consideration 22

[10] Consideration 105

[11] Consideration 97

[12] Consideration 112

[13] Consideration 107

[14] Cf. Slingenbergh, C.H. *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*, 2014 Oxford: Hart Publishing, Chapter 11. Leijten, I., 2018. *Core socio-economic rights and the European Court of Human Rights*. Cambridge University Press, pg. 228

[15] Opinion of Judge Ravarani, considerations 5-6.

[16] Bandsma, K., 2014. "Is Begging a Crime? A Case from the Netherlands" in Vonk, G.J. and Tollenaar, A.(eds), 2014. *Homelessness and the law: Constitution, criminal law and human*

*rights*”, Wolf Legal Publishers.

[17] Heri, C., 2021. “Beg your Pardon!: Criminalisation of Poverty and the Human right to Beg in *Lăcătuș v. Switzerland*”, Strasbourg Observers, available at:

<https://strasbourgobservers.com/2021/02/10/beg-your-pardon-criminalisation-of-poverty-and-the-human-right-to-beg-in-lacatus-v-switzerland/>