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HUMAN RIGHTS

Analysis: “*Lacatus v. Switzerland*: a great judgment at the heart of human dignity” by Sébastien Van Drooghenbroeck

The *Lacatus v. Switzerland* case (application no. [14065/15](#)) concerned whether it is compatible with Article 8 of the European Convention on Human Rights (ECHR), to impose an order for the applicant to pay a fine of 500 Swiss francs (approximately 464 euros), for begging in public in Geneva, and to place her in detention for five days for failure to pay the fine. The applicant, who is illiterate and comes from an extremely poor family, belongs to the Roma community.

In its judgement of 19 January 2020, the European Court of Human Rights (ECtHR) affirmed that human dignity, which ‘underlies the spirit of the Convention’ (§ 56, own translation), is ‘seriously compromised if the person concerned does not have sufficient means of subsistence’ (§ 56, own translation) and that ‘the right to turn to others for help is at the very essence of the rights protected by Article 8 of the Convention’ (§ 59, own translation). These are strong premises for a strong conclusion: the criminal conviction of the applicant, who is of Roma origin, for begging in public in Geneva, violates the aforementioned Article 8 ECHR.

This judgment – probably one of the ‘key cases’ of the new year – must be approved without reservation. It combines, more or less explicitly, several of the most fruitful and admirable principles and orientations of the Law of the Convention and the ECtHR’s case law.

The first principle, anchored since *Demir & Baykara*: the Convention cannot be interpreted in a *vacuum*. On the contrary, it is fuelled by its normative environment, *hard or soft*, of international, regional or national origin. In support of its reasoning, the *Lacatus* judgment thus mobilises a particularly rich and diversified cocktail of external sources, including the case law of the Inter-American Commission on Human Rights and the African Commission on Human Rights (§§ 48-49), *soft law* instruments of the United Nations and the Council of Europe and diverse positions taken by their respective expert bodies (§§ 32-47) and, *last but not least*, decisions of certain high national courts (§§ 27 to 31). Particular attention is notably paid to several judgments of the Belgian Council of State (§ 56), and of the Swiss Federal Tribunal itself (§ 53), which had established the link between begging and personal liberty.

The second principle: the real or supposed hostility of part of the population towards a certain group of people can never serve as a valid justification for the limitation of the rights of the latter. This principle, which the ECtHR had already mobilised, in particular, with regard to homophobic feelings existing in the army (*Smith & Grady v. United Kingdom*, § 97) or in a part of the public opinion (*Alekseyev v. Russia*, § 81), is forcefully recalled by the *Lacatus* judgment to counter the justification based on the intolerance lent to the population with regard to begging (§ 78), and the correlative risk of 'diminishing the tourist attractiveness' of the City of Geneva (§ 79). According to the ECtHR, 'the motivation to make poverty less visible in a city and to attract investment is not legitimate in the light of human rights' (§ 113, own translation).

The third principle: proportionality. *Don't use a sledgehammer to crack a nut*. The ECtHR is prepared to concede that the right to beg is not absolute, and may be limited in certain circumstances (§ 97). An absolute prohibition, however, goes beyond what is necessary and, by not allowing any balancing of interests (§ 102), results in inflicting harm without concrete and sufficient reason on persons who, like the applicant, are particularly vulnerable (§ 107). While it is undoubtedly legitimate to want to fight against human trafficking networks, the punishment of their victims is, from the point of view of the ECtHR, completely inappropriate (§ 112), and therefore unjustified. This is even more so when the sanction is, as in the present case, of criminal nature. Indeed, the *Lacatus* judgment is an implicit but clear reminder of the subsidiarity of recourse to the criminal weapon: it must remain the *ultima ratio*. Other courses of action must be preferred and, in any event, sought (§ 112).

This is a very good judgment, in my view, and 'a very strong signal', in the words of Judge Lemmens (concurring). But it could have been even stronger.

Having concluded there was a violation of Article 8, the majority considers that it is not necessary for it to rule on the other complaints raised by the application, namely the violation of Article 10 (freedom of expression) of the Convention (§ 120) and Article 14 of the Convention combined with Article 8 (equality and non-discrimination) (§ 123). Such 'judicial minimalism', in the words of *Cass R. Sunstein*, is not unusual in the ECtHR's practice. This pragmatism is, however, regrettable in the present case. As the ECtHR often points out, its judgments 'serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties' (*Jeronovics v. Latvia*, § 109). In the present case, and in the light of comparative law (§§ 27 and 30), there were good arguments to maintain that 'begging is the ultimate means of communicating one's indigence by words or gestures', in the words of Judge Keller (concurring, own translation). According to Judges Lemmens (concurring) and Ravanari (partly concurring, partly dissenting), it would also have been worth considering whether the prohibition of begging implies, because of its effects, an 'indirect discrimination' against members of the Roma minority. Various positions taken by bodies of the Council of Europe and the United Nations were along these lines (§§ 46-49). Finally, and still according to the Belgian judge, the question of the violation of Article 3 (prohibition of degrading treatment) could – ex officio (*Radomilja and others v. Croatia*, §§ 114-115) – have been raised. According to the European Court of Human Rights, one cannot exclude 'the possibility that the responsibility of the State [might] be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity' (*A.S. v. Switzerland*, § 30). Who owes the most, owes the least: if the State can be forced to provide a person with the means necessary to live in dignity (positive obligation), he cannot *a fortiori* deprive him or her of the right to seek these means by himself or herself (negative obligation).

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