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### **ANONYMIZATION OF COURT DECISIONS: ARE RESTRICTIONS ON THE RIGHT TO INFORMATION IN "ACCORDANCE WITH THE LAW"?**

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#### **ABSTRACT**

In Lithuania rules for the anonymization of court decisions were introduced in 2005. These rules require automatic anonymization of all court decisions, which in the opinion of the authors violates the public interest to know and freedom of expression is unjustifiably restricted on behalf of the right to privacy. This issue covers two diametrically opposed human rights: the right to privacy and the right to information. The first question is how the balance between two equivalent rights could be reached. The second question is whether this

regulation is in accordance with the law as it is established in the national Constitution and revealed by the Constitutional Court of the Republic of Lithuania and developed by the jurisprudence of the European Court of Human Rights. The authors conclude that the legislator is not empowered to delegate to the Judicial Council issues which are a matter of legal regulation and suggest possible solutions evaluating practice of the Court of Justice of the European Union, the European Court of Human Rights, and selected EU countries.

**KEYWORDS**

Lithuania, anonymization, Judicial Council, separation of powers, European Court of Human Rights

## INTRODUCTION

Historically, the order to anonymize court decisions was first introduced in Lithuania in 2005, by the Resolution of the Judicial Council, providing the rules for public access to the court decisions.<sup>1</sup> It suffered several changes and from the 1st of January of 2016 the new version of the resolution is in force.<sup>2</sup> In accordance with the requirements of the Resolution the following data about physical persons is not publicly announced (it must be automatically removed): secrets (state, commercial, bank and etc.), identification codes, date and place of birth, living places, date of death, marriage and divorce; information allowing to identify movable and immovable property owned or managed by other legal background. In case the names and surnames of physical persons are provided in the procedural documents (which is the case in Lithuania), before announcing the documents publicly these should be changed into initials, i.e. first letters of names and surnames (example, John Smith to J.S.)<sup>3</sup>. The list of data is not final, as in accordance with the rules the court is empowered to remove any data by a motivated personal request of a person (subject of personal data), i.e. grounding the request by possible infringement of privacy right.<sup>4</sup> The established anonymization procedure was criticized by some scientists for the fact that, in the case of anonymization, society is not able to see a solution of the legal conflict in its concrete reality, and so restrictions to positive public control of the court decisions are provided.<sup>5</sup> The process of changing names to initials is treated as "the complete inversion of the reprimandishness of law – nobody should know the persons involved in the case, including the offender of law" and is explained by the "loss of the public/social dimension in the domain of sanctions" as they "became more personal and private".<sup>6</sup>

The goal of the analysed order is twofold: to inform society about interpretation and application of the law in Lithuanian courts and to ensure publicity, transparency, and openness of the courts,<sup>7</sup> i.e. to ensure the public's

<sup>1</sup> Resolution No. 13P-378 On the Publishing of Judicial Decisions, Judgments, Rulings on the Internet, Judicial Council (September 9, 2005) // [www.teismai.lt/data/public/uploads/2005/09/20050909-378.doc](http://www.teismai.lt/data/public/uploads/2005/09/20050909-378.doc).

<sup>2</sup> Resolution of the Judicial Council on the Publishing of Judicial Procedural Decisions and Decisions of Judges Disciplinary Matters, TAR (2015, no. 2015-19002).

<sup>3</sup> *Ibid.*, sec. 9.1-9.3; 11.

<sup>4</sup> *Ibid.*, sec. 18.

<sup>5</sup> Algimantas Šindeikis, "Teismų procesinių sprendimų nuasmeninimo konstitucingumo problemos" (Constitutional problems of depersonalizing judicial procedural decisions), *Jurisprudencija* 3 (117) (2009): 41.

<sup>6</sup> Tomas Berkmanas, "Doing Sanctions with Words: Legacy, Scope, Fairness and Future (?) of a Reprimand," *International Journal of Law, Language & Discourse* 6 (2016): 33.

<sup>7</sup> Resolution of the Judicial Council on the Publishing of Judicial Procedural Decisions and Decisions of Judges Disciplinary Matters, *supra* note 2, sec. 2.

right to freely receive and disseminate information which is part of the right to self-expression, protected both by international conventions (example, European Convention of Human Rights and main freedoms) and national constitutions (example, Constitution of the Republic of Lithuania). Both aspects are very important and crucial in a democratic society. The principle of legal certainty, which is "a sine qua non of constitutional democracy, makes the duty of the state [...] to ensure that legislature be clear, unambiguous, and predictable in terms of their operation [...] and that each legal institution work in a predictable manner."<sup>8</sup> While the principle of legal uniformity implies that court decisions adopted by different courts or diverse court chambers in cases of similar subject matter will carry identical legal interpretation.<sup>9</sup>

Publicity is either the instrument of social control and possible increase of trust in courts, which is still very low in Lithuania as our country in the context of other EU countries has very low indicators of confidence in legal institutions, i.e. confidence in the national legal system is one of the lowest among all EU countries,<sup>10</sup> whereas judge is one of the legal professions which is not trusted by the majority of society, as evidenced by the table provided below.

Table 1. Citizens' Trust in Percentages<sup>11</sup>

	2005	2006	2007	2008	2009	2010	2011	2013	2015
Notaries	51	57	58	58	53	58	66	75	67
Advocates	33	43	40	41	31	31	41	54	36
Prosecutors	20	19	29	28	13	12	22	27	27
Judges	18	14	24	25	15	14	20	28	26
Bailiffs	6	15	15	17	12	14	19	23	17
Police officers	8	13	26	40	36	40	47	59	61

The goal is not an absolute one, as the necessity not to infringe the requirements of personal data protection which is part of right to privacy is stressed

<sup>8</sup> Eotvos Karoly Institute, "Publicity in the Administration of Justice and the Disclosure of the Court Decisions" (2009): 10 // [http://www.right2info.org/resources/publications/publications/EKINT%20-%20Publicity%20in%20the%20Administration%20of%20Justice\\_2009.pdf](http://www.right2info.org/resources/publications/publications/EKINT%20-%20Publicity%20in%20the%20Administration%20of%20Justice_2009.pdf).

<sup>9</sup> *Ibid.*

<sup>10</sup> Julija Kiršienė, "Trimatė teisininko profesijos krizės problema" (The crisis of legal profession as three-dimensional problem), *Jurisprudencija* 22(2) (2015); Aleksandras Dobryninas and Anna Drakšienė, eds., *Pasitikėjimo Lietuvos teisės sauga profiliai* (Trust in Lithuanian law enforcement profiles) (Vilnius: Vilniaus universiteto leidykla, 2012): 73.

<sup>11</sup> Data for 2005-2011 are taken from: Julija Kiršienė and Charles F. Szymanski, "Vertybinių nuostatų ugdymo, rengiant teisininkus universitete, galimybės" (A Value-Based Approach to Teaching Legal Ethics), *Jurisprudencija* 19 (4) (2012): 1328. Data for 2013 are taken from: "Apklausa parodė kaip ir kokių profesijų teisininkais pasitikima" (The survey showed what legal profession is trusted the most), *delfi.lt* (2013) // <http://www.delfi.lt/news/daily/law/apklausa-parode-kaip-ir-kokiu-profesiju-teisininkais-pasitikima.d?id=63581460>. Data for 2015 are taken from: "Visuomenė labiausiai pasitiki notarais, mažiausiai antstoliais" (Society trust most in notaries, least – in bailiffs), *delfi.lt* (2015) // <http://www.delfi.lt/news/daily/lithuania/visuomene-labiausiai-pasitiki-notarais-maziausiai-antstoliais.d?id=69835478>.

in the resolution,<sup>12</sup> which means that in this case confrontation of two equal rights (right to expression and privacy right) occurs. In such cases in accordance with jurisprudence of the European Court of Human Rights (hereinafter- ECHR), restriction to any of the rights should be evaluated from the rule of law and the democratic necessity angles<sup>13</sup>. One of the main criteria for deciding which human right should be given priority in a case in which they overlap is the criteria of public interest, defined as a society's right to be informed about the private right of an individual, if such information has some public interest.<sup>14</sup>

An earlier article<sup>15</sup> analyses existing regulation(s) on publishing judicial decisions (in criminal cases) in Lithuania and evaluates its compliance with the freedom to receive information. The article reviewed the international and supranational legal documents, decisions of the Court of Justice of European Union and the ECHR and scientific literature. The authors came to conclusion that in Lithuania the interest of privacy dominates over freedom of expression as anonymization of court decisions is an automatic one and the principle of proportionality is possibly infringed, especially if public persons are involved.<sup>16</sup> Accordingly, the authors proposed not to anonymise the personal data of public persons or when serious crimes are committed.

In this article the authors decided to find out in greater detail if the resolution enacted by the authority, the Judicial Council, is in accordance with the criteria "in accordance with the law" developed by the ECHR and the Constitutional Court of the Republic of Lithuania (hereinafter- CC or Constitutional Court interchangeably are used) when deciding if restrictions to a certain human right are in accordance with the established principles. It is of crucial importance as "the implementation of human rights and freedoms is directly linked with the opportunity of a human being to obtain information from various sources and make use of it. This is one of pluralistic democracy achievements ensuring the progress of society".<sup>17</sup>

In the second part of the article, anonymity of court decisions in supranational (the Court of Justice of the European Union – hereinafter in the text CJEU) and international (the ECHR) courts is revealed in order to find out if national rules

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<sup>12</sup> *Resolution of the Judicial Council on the Publishing of Judicial Procedural Decisions and Decisions of Judges Disciplinary Matters*, supra note 2, sec. 2.

<sup>13</sup> Steven Greer, "The exceptions to Articles 8 to 11 and of the European Convention on Human Rights," *Human Rights Files* 15 (1997): 7.

<sup>14</sup> Mindaugas Lankauskas, "Balansavimas tarp teisės į privatumą ir saviraiškos laisvės Europos žmogaus teisių teismo jurisprudencijoje" (Balancing the right to privacy from the freedom of expression according to the jurisprudence of the European Court of Human Rights), *Teisės problemos* 2 (56) (2007): 128.

<sup>15</sup> Edita Gruodytė and Saulė Milčiuvienė, "Ar Lietuvoje taikomas teismų procesinių sprendimų nuasmeninimas nepažeidžia visuomenės informavimo principo?" (Does anonymization of judicial decisions in Lithuania comply with the principle of freedom to receive information), *Studijos šiuolaikinėje visuomenėje* 7 (1) (2016): 192.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of December 19, 1996*, Official Gazette (1996, no. 126-2962).

correspond to the regulation of mentioned institutions. The third aspect discussed in the last section of the article is how this question is solved in other EU member states.

## 1. IN ACCORDANCE WITH THE LAW

The expression "in accordance with the law" is treated by the ECHR as covering two aspects: the form and content of the legal act. In this article, evaluating its aim and extent, only the first aspect, the form of the legal act, is discussed. The form criteria are explained rather liberally and mostly they are left for the discretion of national authorities. As the ECHR states, "the phrase 'in accordance with the law' refers in the first place to national law, it is not, in principle, for the Court to examine the validity of secondary legislation",<sup>18</sup> and that the national authorities, notably the courts are empowered, to interpret and apply domestic law.<sup>19</sup> However the importance of the case law is stressed<sup>20</sup> as requiring that "the impugned measure should have some basis in domestic law,"<sup>21</sup> which the ECHR interprets in its substantive form and treats as covering both acts of lower rank than statutes and unwritten law.<sup>22</sup> It states that "in a sphere covered by the written law, the 'law' is the enactment in force as the competent courts have interpreted it in the light, if necessary, of any new practical developments."<sup>23</sup> In our case the Resolution of Judicial Council was not yet examined by national courts and it would be our task to find out if it is in accordance with national regulations.

### 1.1. IF THE FORM OF THE RESOLUTION IS IN ACCORDANCE WITH THE NATIONAL CONSTITUTION

In the jurisprudence of the Constitutional Court of the Republic of Lithuania (hereafter in the text – Constitutional Court or CC interchangeably) it is emphasized that everything that is linked with human rights and freedoms must be regulated by means of laws including the limits on the implementation of freedom of information and that from the standpoint of both the theory of law and the practice of legislation, certain priority matters of society must be regulated only by law. In a democratic society, the priority is given to a human being; therefore, everything that is related to fundamental human rights and freedoms is regulated by law.<sup>24</sup>

<sup>18</sup> *Campbell v. the United Kingdom*, The European Court of Human Rights (1992, no. 13590/88), par.37.

<sup>19</sup> *Kruslin v. France*, The European Court of Human Rights (1990, no. 11801/85), par.29.

<sup>20</sup> Example, "Settled case-law of this kind cannot be disregarded": *ibid.*

<sup>21</sup> *Huvig v. France*, The European Court of Human Rights (1990, no. 11105/84), par.27.

<sup>22</sup> *Kruslin v. France*, *supra* note 19, par. 29.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of September 19, 2005*, Official Gazette (2005, no. 113-4131).

This is grounded on the principle that the State is the major guarantor of human rights and freedoms (also the one which could violate these rights as it has power), which is possible to implement through separation of power principle.<sup>25</sup>

The principle of separation of powers and human rights and freedoms are the cornerstones of constitutional democracy.<sup>26</sup> The grounding aspects of this principle are established in the national constitution, providing that in Lithuania there is the classical model of 3 branches of power, where legislative powers are vested in *Seimas*, executive powers in government, and the judiciary is responsible for the implementation of justice.<sup>27</sup> In the jurisprudence of the Constitutional Court this principle is interpreted as the one meaning that "all branches of power are autonomous, independent, and capable of counterbalancing each other"<sup>28</sup>. Based on the separation of power principle, for our research it is very important to find out the legal status and functions of the judicial Council.

## 1.2. STATUS AND FUNCTIONS OF THE JUDICIAL COUNCIL

The legal basis for some special institution of judges with very limited and clearly defined functions is provided in the Constitution, stating that "a special institution of judges, as provided for by law, shall advise the President of the Republic on the appointment, promotion and transfer of judges, or their release from duties."<sup>29</sup> The establishment of such an institution is explained as one of the main guarantors of the principle of the actual independence of the judiciary.<sup>30</sup>

However, it is stressed that establishment of this kind of institution does not allow for the infringement of separation of power principle, and that this institution has limited powers as "any institution of judges may not be treated as an institution governing the whole judiciary ... and it may not be over-centralised in general."<sup>31</sup> The Constitutional Court also extends the possible powers of this special institution in comparison of the cited article of the Constitution, stating that "the fully-fledgedness and independence of the judicial power pre-supposes its self-regulation and self-governance, which includes, inter alia, the organisation of the work of courts and the activities of the professional corps of judges,"<sup>32</sup> which means that

<sup>25</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of December 19, 1996, supra* note 17.

<sup>26</sup> Ona Buišienė, "Valstybės valdžių ir valstybės institucijų sistemų konstituciniai pagrindai" (The Constitutional Grounds of the State Government and the State Institutions); in: Toma Birmontienė and Arūnas Baublys, eds., *Lietuvos Konstitucinė teisė* (Lithuanian Constitutional Law) (Vilnius: Mykolas Romeris universitetas, 2012).

<sup>27</sup> *Constitution of the Republic of Lithuania*, Lietuvos Aidas (1992, no. 33- 1014), art. 67, 94.

<sup>28</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of December 21, 1999*, Official Gazette (1999, no. 109-3192).

<sup>29</sup> *Constitution of the Republic of Lithuania, supra* note 27, art. 112, par. 5.

<sup>30</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of December 21, 1999, supra* note 28.

<sup>31</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of December 19, 1996, supra* note 17.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

besides a direct advisory function regarding the formation of a corpus of judges, it may solve issues related to the institution's everyday work and functions, which could be treated as some inner administration of the institution in accordance with the public administration doctrine.<sup>33</sup> This function of inner administration is reflected in the Law on the Courts where it is provided that "Self-governance of courts shall be, in accordance with the Constitution of the Republic of Lithuania and other statutes, the right and real power exercised by the judges and courts in deciding freely and independently, on their own responsibility, the issues pertaining to the activities of courts"<sup>34</sup>. On the basis of this short analysis it is obvious that the Judicial Council is empowered to express its opinion regarding its own body and to solve inner everyday issues related with their proper implementation of functions. Formation procedure of the Judicial Council is an additional aspect giving more clearance regarding its role and status.

The rules of establishment of the institution are provided in the law on Courts. The Judicial Council is formulated exceptionally for judges: three of them are included automatically by virtue of their office (the Chairpersons of the Supreme Court, of the Court of Appeal and of the Supreme Administrative Court) while the remaining twenty judges are elected by the General Meeting of Judges in accordance with the principles established by the legislator where aspect of territorial and level of the court are reflected.<sup>35</sup> Even though the legislator indicates that self-governance of courts is founded on the principle of participation of society<sup>36</sup> and that principle of self-governance in the bodies of self-governance is combined with the principle of public participation in the judicial activities of self-bodies,<sup>37</sup> the closeness of this institution is predefined by the jurisprudence of the Constitutional Court providing that otherwise independence of courts could be infringed upon.<sup>38</sup>

The Judicial Council is a self-governing body important for the formation of a corpus of judges and for ensuring of the guiding principle of independence of courts, and it is responsible for inner administration of the institution which is reflected by their rules of establishment.

The next, equally important aspect is whether this institution is empowered at least with some powers of legislation, even though this power is inconsistent with the separation of powers principle and with the implementation of justice.

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<sup>33</sup> Ieva Deviatnikovienė, *Administracinė teisė: kategorijos, apibrėžimai, užduotys* (Administrative Law: Categories, Definitions, Tasks) (Vilnius: Justitia, 2009), 20.

<sup>34</sup> *Law on Courts of the Republic of Lithuania*, Official Gazette (1994, no. 46-851).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, art. 10.

<sup>37</sup> *Ibid.*, art. 113.

<sup>38</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of May 9, 2006*, Official Gazette (2000, no. 51-1894).



### 1.3. IF THE JUDICIAL COUNCIL IS "EQUIPPED" WITH SOME LEGISLATIVE POWERS

Competence of the Judicial Council is defined in the Article 120 of The Law on Courts, enumerating twenty six concrete functions (example, form the Examination commission for the candidates to judges; approve the regulations of the Judicial Court of Honor; hear reports of the Judicial Ethics and Discipline Commission and etc.) which are not in any way related to our analysed issue. However, the list is not completed, as it is stated that the Judicial Council is either empowered "to decide other issues relating to court activities and relevant legislation"<sup>39</sup> which is one of the provisions indicated as grounding the power of the Judicial Council to enact the Resolution on the anonymization of Court decisions<sup>40</sup>. The additional legal norm which is indicated in the resolution of the Judicial Council allowing enactment of such kind of legal regulation is article 39 of the Law on Courts. In the first part of article titled "Official publication of Court decisions" it is provided that Final acts of courts, separate decisions and annual reviews of court practice of the Supreme Court and Supreme Administrative Court shall be published in the internet web site of the National Court Administration according to the procedure established by the Judicial Council except in the cases provided by law<sup>41</sup>. The only guideline indirectly related to anonymization of court decisions is the 3<sup>rd</sup> part of the art.39, providing that the mentioned documents "shall be published not infringing the requirements of personal data protection, state, civil service, commercial (trade), professional and other secrets protected by laws, also keeping to the restrictions and prohibitions established by law"<sup>42</sup>. However, no specific guidelines or rules are provided. In their previous research,<sup>43</sup> after making analysis of selected data protection issues, the authors came to the conclusion that data protection norms do not require absolute anonymization of court decisions, especially if it concerns the public person or certain categories of crimes.

Applying a systemic method this norm should be explained as the one allowing the Judicial Council to enact some acts of local importance for solving some actual questions important for successful implementation of the established procedure (as such examples could be enumeration of certain positions and number of persons necessary for such kind of work, some technical or financial issues, the actual distribution of tasks in the institution and etc.), not including questions

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<sup>39</sup> *Law on Courts of the Republic of Lithuania*, *supra* note 34, art. 120, sec. 23.

<sup>40</sup> *Resolution of the Judicial Council on the Publishing of Judicial Procedural Decisions and Decisions of Judges Disciplinary Matters*, *supra* note 2.

<sup>41</sup> *Law on Courts of the Republic of Lithuania*, *supra* note 34, art. 39.

<sup>42</sup> *Ibid.*, sec. 3.

<sup>43</sup> Edita Gruodytė and Saulė Milčiuvienė, *supra* note 15, 188–191.

related to the provision of limits to human rights. Such conclusion is evidential from the jurisprudence of the Constitutional Court.

In its ruling of 26 October, 1995, the Constitutional Court clearly indicates that such issues as "the confirmation of human rights and freedoms, the determination of the contents thereof, the legal guarantees of their protection and defense, their permissible limitation, etc."<sup>44</sup> must be regulated exceptionally by the legislator enacting law.

Evaluating the power of government to enact certain secondary legislation and the limits the Constitutional Court indicated that the principle of the separation of powers should be taken into account and that sub-statutory acts could only particularize and specify legal norms but not regulate certain relations.<sup>45</sup> For example, in the Ruling of 1996<sup>46</sup> the Constitutional Court investigating if the legal norms establishing the list of state secrets (respective selection of information, the establishment of the content of the list, etc.) are directly related to restriction of human right to information, holds that there was infringement of the human rights principle as "being no precise criteria, formulated by law, as to which information is a state secret, the Government is virtually commissioned to regulate the relations which are a matter of legal regulation but not to particularize the law"<sup>47</sup>. In this Constitutional case, it was a provision in the Law on State Secrets and Their Protection indicating that the Government shall establish the procedure for drawing up and amending the list of the information which is considered a state secret. The Constitutional Court found out that because this delegation of power to the Government is directly related to the limitation on human rights (the right to information) this law "does not precisely enough define what information is held a state secret"<sup>48</sup>. In accordance with the indicated law the government was the subject which establishes which information becomes a state secret, which means that the actual limitations on the right to information are "established by sub-statutory act norm but not by law"<sup>49</sup>. In our case it is even worse as the Judicial Council is established for the implementation of justice, but not for the execution of certain legal acts (which function by Constitution is established to the executive branch). Ignoring this fact and going on the assumption that legislators infringing on the separation of powers principle delegated some legislative powers to the Judicial Council, we would define possible limits of such legislation in accordance with the constitutional jurisprudence.

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<sup>44</sup> *Ruling of the Constitutional Court of the Republic Lithuania of October 26, 1995, Official Gazette (1995, no. 89-2007).*

<sup>45</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of December 19, 1996, supra note 17.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

In the Ruling of September 25, 2005, the Constitutional Court even enumerated aspects related to the right of information, which cannot be delegated but must be defined by the legislator himself:

Under Paragraph 3 of Article 25 of the Constitution, the legislature must, by means of a law, define the content of the information the dissemination of which is either prohibited or limited, as well as the ways by means of which dissemination of certain information is prohibited, as well as other conditions of dissemination of corresponding information if this in any manner limits freedom of information. The legislature also must, by means of a law, establish: liability for disregard of the said prohibitions and limitations, including that for dissemination of information the dissemination of which is prohibited; the subjects that enjoy the powers to supervise the observance of the prohibitions and/or limitations, which are established by law, to disseminate certain information; the subjects that apply liability for disregard of the prohibitions and/or limitations, which are established by law, to disseminate certain information; efficient measures of judicial protection of freedom of information.<sup>50</sup>

From cited jurisprudence of CC it is evident that the main aspects, including the contents of information the dissemination of which is limited together with bodies empowered to control and prosecute infringements, should be defined by the legislator itself (i.e. cannot be delegated) while the enactment of secondary legislation is possible but only to a certain extent and such legislation should be in accordance with Constitution and be based on law (delegated power) and could not compete with laws in force.

The Constitutional Court provides some guidelines about when and what aspects could be regulated by secondary legislation, providing that:

The Constitution does not prevent regulation of certain relations linked with obtaining and dissemination of information, including the relations linked with supervision and control of the prohibitions, established by means of laws, to disseminate information and/or limitations on dissemination of information also by statutory legal act, inter alia, by government resolution ... but it needs to be emphasised that the Government, while regulating the aforesaid relations by means of its resolutions, cannot establish any such legal regulation which is not based on the Constitution and laws, or any such legal regulation which competes with that established by law.<sup>51</sup>

The conclusion is reached that article 39 in the Law on Courts does not satisfy the criterion of precision and the constitutional principle of protection of human rights is violated. "The formula 'established by the law' is entrenched in articles of

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<sup>50</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of September 19, 2005, supra note 24.*

<sup>51</sup> *Ibid.*

the Constitution, which means the constitutional requirement to regulate the relations indicated in the Constitution particularly by a law, and is an important guarantee of the protection of rights and freedoms of the person.”<sup>52</sup> The legislator itself should specify the content of the information the dissemination of which is either prohibited or limited, and liability and subjects responsible for control and prosecution of infringements as “the constitutional requirement to regulate corresponding relations by a law presupposes the duty of the legislator to establish the most important elements and main rules of the legal regulation in the law itself”.<sup>53</sup>

## 2. THE PUBLICATION AND ANONYMIZATION OF THE COURT DECISIONS BY THE CJEU AND THE ECHR

In the first part of the article we argue that legal regulation existing in Lithuania and requiring anonymization of all judgments: (1) is adopted by an improper entity (the Judicial Council), because the legal norms restricting fundamental human rights should be enacted by the legislative body. Consequently, such regulation infringes on two fundamental principles: (1) the separation of powers and ultra vires doctrine; (2) the interest to private life unreasonably predominates versus interests of access to information and openness of the courts, which leads to unbalanced protection of different human rights.

In this part of the article we argue that the existing rules of anonymization of court decisions in Lithuania lose their essence when national cases reach the international or supranational dimension.

Usually Lithuanian cases go to the ECHR in the following circumstances: (1) during a judicial procedure the national court refers to the CJEU for preliminary ruling; (2) after a final decision of the national court, the natural or legal person submits an application to the ECHR. We examine the anonymization rules of these two courts searching for answers as to how the protection of private life is secured in the CJEU and the ECHR. Is the anonymity of the decisions of the CJEU and the ECHR secured in the same manner as it is required in Lithuania?

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<sup>52</sup> Vytautas Sinkevičius, “The Law and the Substatutory Act in the Jurisprudence of the Constitutional Court”: 334; in: Egidijus Jarašiūnas and Egidijus Kūris, eds., *Constitutional Justice in Lithuania* (Vilnius: The Constitutional Court of the Republic of Lithuania, 2003).

<sup>53</sup> *Ruling of the Constitutional Court of the Republic of Lithuania of March 15, 2000*, Official Gazette (2000, No. 23-585).

## 2.1. ANONYMITY OF DECISIONS AT THE CJEU

The Rules of Procedure of the CJEU (the Rules) are adopted by the CJEU and approved by the Council. They regulate litigation procedure, including anonymization principles of the decisions of the CJEU. Unlike in Lithuania, in the CJEU usually the decision is anonymized only if all litigation procedure is not public. Thus the Rules directly connect the anonymity of all procedure with the anonymity of the published court decision.

Under the preliminary ruling procedure the national court has discretion to decide whether anonymity should be granted to the specific case. If the national court decides to give anonymity to the proceedings, the CJEU is obliged to respect that anonymity. However, if there is a request by a national court to render anonymity only to certain parties of the case, the CJEU itself decides whether it is necessary to give anonymity to these parties. Also, the CJEU is empowered to render anonymity to any person concerned in the case by its own motion or by the reasoned request of the party of the case.

However, the discretion of the CJEU is limited because under preliminary ruling procedure the CJEU contains information which is provided by the national court, including personal data. For this reason the national court itself decides which information to provide in references for preliminary ruling.

The CJEU gave around 28 preliminary rulings on the request of the Lithuanian Courts. How many of them are anonymous? The logical chain would lead to the conclusion that if the protection of privacy requires anonymizing all publicly available court decisions, then the preliminary ruling of the CJEU should be anonymous also. However, the Lithuanian Courts never asked the CJEU to grant anonymity to the case. For this reason none of preliminary rulings of the CJEU given by the request of the Lithuanian courts are anonymous.

The authors were unable to find what percentage of preliminary rulings of the CJEU are anonymous; however, the overview leads to the conclusion that anonymity of the preliminary ruling is an exception to the main rule. Anonymous preliminary rulings usually deal with private life issues such as changing of sex, ability to get widow pension for transsexual partner, etc.<sup>54</sup>

## 2.2. ANONYMITY OF DECISIONS IN THE ECHR

The Rules of Court are adopted by the Plenary Court. They regulate the litigation procedure, including the anonymity of published decisions of the ECHR. As

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<sup>54</sup> *P v S and Cornwall County Council*, The Court of Justice of the European Union (1996, C-13/94); *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, The Court of Justice of the European Union (2004, C-117/01).

in the CJEU usually the published decisions are anonymous only if anonymity is granted to all litigation procedures. In the ECHR the discretion to authorize anonymity belongs exceptionally to the Court. It can be granted according to the grounded request of the applicant or by the Court's own motion.

Lithuania as a party is in approximately 118 cases and only 5 of them are anonymous: (1) two cases concerning right to fair trial, and in both cases persons had psychiatric troubles; (2) two cases concerning family life, i.e. custody of child; (3) one case concerning private life, i.e. a transsexual person.

The analysis shows that the CJEU and the ECHR authorize anonymity to decisions only in exceptional cases. Another difference is that in the CJEU and in the ECHR the anonymization of court decisions is directly linked with the anonymity of all judicial procedure, but not only separately with the published court decisions. The differences explained above may lead (and have led) to situations when, in the same case, the decision of a Lithuanian court is anonymized and judgment of the ECHR or preliminary rulings of the CJEU are not.

### **3. POLICY REGARDING ANONYMIZATION OF COURT DECISIONS IN THE MEMBER STATES**

It is evident that legal regulation regarding the anonymization of court decisions established in Lithuania raises many questions as both the form and the content of regulation are questionable. However, the problems raised in the article are researched in the international and EU level and several studies are provided on publication of court decisions and privacy protection in the Member States.

In the Report on Access to Judicial Information<sup>55</sup> the conditions of access to the judicial information in 15 different countries are analysed and it was concluded that there are significant differences regarding legal regulation on publication and anonymization of court decisions among the analysed countries. It states that usually the data of a public person is not anonymized, but countries have their individual exceptions, which allow anonymizing the personal data of public person. However, even this common rule is very vague and differs in individual countries. A similar conclusion is reached in a second report,<sup>56</sup> summarizing that different traditions and legal regulations on the publication and anonymization of the published court decisions exist in the European Union. For example, in the

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<sup>55</sup> "Report on Access to Judicial Information. Open society," Justice initiatives (March 2009) // <http://www.right2info.org/resources/publications/publications/Access%20to%20Judicial%20Information%20Report%20R-G%203.09.DOC>

<sup>56</sup> Koen Versmissen, *Expert Report on Access to Court Decisions and Protection of Personal Data in the Former Yugoslav Republic of Macedonia* (Skopje: OSCE Mission to Skopje, 2011), 11.

Netherlands the anonymization of published decisions is the rule and in the United Kingdom the anonymization of published decision is the exception.<sup>57</sup>

However, the most detailed analysis of the legal regulation on anonymization of the court decisions in the Member States was announced by the Council of the European Union in 2005,<sup>58</sup> where fifteen Member States participated in the research. In accordance with the data of the report, anonymization of the court decision is a rule in eleven out of fifteen Member States. This means that the anonymization of court decisions is an automatic one and does not need separate requests for anonymization of certain data. In four out of fifteen Member States the anonymization of the court decisions is an exception<sup>59</sup>.

Addressing the fact that legal regulation in individual Member States is different, the authors of the article decided to look to the situation of certain individual Member States and to analyse the type of legal acts that set the rules on anonymization and the content of rules on anonymization of the court decisions.

### 3.1. THE TYPE OF LEGAL ACTS WHICH SET THE RULES ON ANONYMIZATION OF PUBLISHED COURT DECISIONS

Usual practice is that legal acts setting the principles of anonymization of the court decisions are adopted by the legislative branch of the government (parliament). For example, in the Netherlands<sup>60</sup>, United Kingdom<sup>61</sup>, Hungary<sup>62</sup>, and Estonia<sup>63</sup> the rules of the publication of court decisions are based on the general rules regarding free access to government information and the protection of personal data. The more specific rules and explanation on anonymization and publication of the court decisions are further provided in various lower than law legal acts, which are issued by different branches of government: legislative, executive or judicial. For example, in Estonia<sup>64</sup> various legislative codes of the court procedure set specific rules on the publication and anonymization of court decisions. In Hungary<sup>65</sup> the Act on the Electronic Freedom of Information requires

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<sup>57</sup> *Ibid.*

<sup>58</sup> Council of the European Union, "Summary on a question-by-question basis from the answers given by the Member States to the questionnaire on case law" (2005) // <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014577%202005%20INIT>.

<sup>59</sup> Koen Versmissen, *supra* note 56.

<sup>60</sup> *Ibid.*, 11-14.

<sup>61</sup> *Ibid.*, 14-16.

<sup>62</sup> Eotvos Karoly Institute, *supra* note 8.

<sup>63</sup> "Support to the Kazakh authorities in improving the quality and efficiency of the Kazakh justice system. Report on the Accessibility to Judicial Decisions through Publication Standards," Joint Programme between the European Union and the Council of Europe (2015) // [https://www.coe.int/t/dghl/standardsetting/cdcj/co-operation\\_projects/criminal\\_justice\\_reform\\_kazakhstan/Press-Release-18-01-2016/EN\\_CoE%20%20Kazakhstan%20Report\\_11%2001%202016.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/co-operation_projects/criminal_justice_reform_kazakhstan/Press-Release-18-01-2016/EN_CoE%20%20Kazakhstan%20Report_11%2001%202016.pdf).

<sup>64</sup> *Ibid.*

<sup>65</sup> Eotvos Karoly Institute, *supra* note 8.

that court decisions should be published and anonymized. In the Netherlands the Judicial Council<sup>66</sup> issued the Anonymization Guideline. In Czech Republic<sup>67</sup> the Bureau Order of Supreme court sets the detail requirements of anonymization<sup>68</sup>. In Hungary the National Judicial Council adopted the code, which regulates procedure of publishing and anonymization of court decisions.<sup>69</sup> However, in Latvia<sup>70</sup> the Cabinet regulation, which is issued by executive branch of government, sets the rule on the anonymization of the court decisions.

### 3.2. THE CONTENT OF THE RULES ON ANONYMIZATION

Despite that the legal framework of the anonymization of court decisions is comparable in the various Member States, the content of the rules on anonymization of the court decisions is very diverse and difficult to compare. In some Member States the anonymization of the court decisions is a rule and only in the exceptional cases is the personal data disclosed. For example, in the Czech Republic (only general courts), the Netherlands, Hungary, Estonia (in civil procedure), and Latvia published court decisions are anonymized. In the United Kingdom, Malta, and Belgium, the anonymization of the court decisions is an exception to the rule.<sup>71</sup> Even in the latter states the court decisions could be anonymized if certain conditions such as national security and child interest are met. Also, the individual can request the anonymization of the published court decisions.

However, even in the Member States in which the decisions are anonymized, the rules on anonymization vary significantly. Member States anonymize different personal data. For example, in Estonia in civil procedure the court decisions are not fully anonymized. The personal identification code, date of birth, registry code and address of the data subject are not published. However, the names of the parties are usually published.<sup>72</sup> In the Czech Republic, the name, surname, address, date of birth, birth number, other sensitive data, secret information and trade secrets always are anonymized. In the Netherlands non-anonymization of published court decisions can be justified in the importance of the publicity of justice and the principle of free access to government information. Despite these differences there

<sup>66</sup> Koen Versmissen, *supra* note 56, 11-14.

<sup>67</sup> "Support to the Kazakh authorities in improving the quality and efficiency of the Kazakh justice system. Report on the Accessibility to Judicial Decisions through Publication Standards," *supra* note 63.

<sup>68</sup> *Ibid.*

<sup>69</sup> Eotvos Karoly Institute, *supra* note 8.

<sup>70</sup> "Noteikumi par tiesu informācijas publicēšanu mājaslapā internetā un tiesu nolēmumu apstrādi pirms to izsniegšanas" (Rules of court publication of information on the Internet homepage and judicial decisions on treatment prior to their issue) // <http://likumi.lv/doc.php?id=187832>.

<sup>71</sup> Koen Versmissen, *supra* note 56.

<sup>72</sup> "Support to the Kazakh authorities in improving the quality and efficiency of the Kazakh justice system. Report on the Accessibility to Judicial Decisions through Publication Standards," *supra* note 63.



is one common feature: while dealing with the case, the court has the right to decide which information additionally should be anonymized.

Even in the same Member State the anonymization rules can be different depending on which court issued the decision. Different rules can be applied to the final instance courts and lower courts, to the general and administrative courts. Also different rules are applied depending on the procedure which governs the case: criminal, civil or administrative. However, one common trend which is different in Lithuania should be indicated. Privacy of the persons who are acting on behalf of the state is less protected than privacy of the private ones. For this reason, the private data of the persons who are public persons is not anonymized. Following the same principle, usually the decisions of administrative courts are not anonymized in contrast to the general courts' decisions.

The analysis confirmed the above-mentioned findings that the Member States have different rules on publication and anonymization of the court decisions. In some countries the rules of publication and anonymization of court decisions are set by the legislative body and in other countries the rules are set by executive body or the Council of the Courts. Anonymization rules also vary substantially – from the full anonymizations of published court decisions to publication of all court decisions without any anonymization.

However, despite substantial differences some common trends exist. In all countries the right to access to information and the right to privacy are protected regardless of the type of legislation, which sets the rules of anonymization and publication of court decisions. As a rule, in all Members States sensitive personal data is anonymized, for example: data of minors, and family cases. Also the data can be anonymized by the request of the parties or by the courts own motion. Usually the courts do not anonymize the data of public agencies or data of the public persons.

Comparing the legal regulation on the anonymization of the court decisions in Lithuania there are some significant deviations from common trends. First, analysing the legal framework of the anonymization of court decisions it is obvious that Lithuania lacks basic principles of anonymization on a legislative level.

Comparing the content of rules on anonymization of the court decisions the distinctive feature of the Lithuanian rules is their inflexibility and simplicity. The regulation simply declares that all court decisions before publication should be anonymized. Such one-sided regulation fails to balance various legal interests and give absolute safeguard to protection of private life; however such regulation ignores the right of access to information. The rules make no distinction between public and private persons, general competence courts and administrative courts.

## CONCLUSIONS AND RECOMMENDATIONS

The expression "in accordance with the law" is treated by the ECHR as covering two aspects: the form and contents of the legal act. The criteria of the form, which is discussed in the article, is explained rather liberally by the ECHR and mostly is left for the discretion of national authorities, and as the ECHR states, the national authorities, notably the courts, are empowered to interpret and apply domestic law.

The following analyses lead to the conclusion that the Judicial Council, which enacted the rules for the anonymization of court decisions, is not and could not be empowered to decide issues related to the restriction of human rights, because only parliament can enact law which limits human rights. In the jurisprudence of the Constitutional Court of the Republic of Lithuania it is clearly established that sub-statutory acts could only particularize and specify legal norms but could not regulate certain relations. Only the legislator itself (in the Lithuanian case: the *Seimas*) is empowered to regulate issues such as the content of information the dissemination of which is prohibited or limited, the ways by means of which such dissemination is prohibited, and other conditions of dissemination of corresponding information if this in any manner limits freedom of information. This follows from the nature of human rights and from the separation of powers principle.

Article 39 of the Law on Courts does specify which human right and to what extent the acts of the Judicial Council can limit. For this reason article 39 of the Law on Courts does not satisfy the criteria of precision and the constitutional principle of protection of human rights is violated as only the legislator itself is empowered to establish the most important elements and main rules of legal regulation in the law itself. The Judicial Council is a self-governing body (consisting exceptionally from judges) important for the formation of a corpus of judges responsible for the inner administration of institution and ensuring the principle of independence of courts, but not the one providing the limits for the right to information.

In the CJEU and the ECHR the anonymity to the decisions is authorized only in exceptional cases and is directly linked with the anonymity of all judicial procedure, which means that in such cases anonymization of the Court decision in Lithuania is questionable. The anonymization of court decisions in the EU Member States also differ significantly both regarding the legal basis and the content of the anonymization; however, decisions against public persons usually are not anonymized.

The authors suggest that the legislator itself should provide clear and specific criteria regarding anonymization of court decisions in Lithuania, whereas the

Judicial Council is responsible only for implementation procedure and particularization of legal norms. The legislator should provide clear criteria which should be taken into account while deciding whether to grant anonymity in a certain case. We argue that public persons should not be granted anonymization and more powers to decide which decisions should (or should not) be anonymized should be left to the judge in a concrete case.

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