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Recommendation of the Public Defender of Rights regarding the fulfilment of the right of foreigners to equal treatment

I.
An outline of the matter and the legal mode

The activities of the Public Defender of Rights show that in some legal relationships a foreigner, a citizen of a third country (i.e. not a citizen of the European Union, hereinafter only a "foreigner"), gets in an unequal status in comparison with a citizen of the Czech Republic (hereinafter only a "CR citizen") or a citizen of a Member State of the European Union (hereinafter only an "EU citizen"), although not always does this inequality seem to be legitimate or justified. In some cases, differential treatment occurs even between family members (foreigners) of a CR citizen and an EU citizen. Specifically, it involves relationships in the area of health care, education, right to vote and association.

In the area of health insurance, what seems to be problematic is that with the exception of employed foreigners, other categories of foreigners are excluded from the system of public health insurance during the first five years of residence.[1] As a result, they have to use commercial health insurance, which, however, covers a smaller extent of health care, and, moreover, they are not legally entitled to it and therefore insurance companies do not have a duty to insure foreigners. Apart from this, in practice, insurance companies often refuse to insure a foreigner who is ill or who has given birth to a child with a congenital defect or other serious illness. Further, commercial insurance companies refuse to conclude insurance contracts with persons above seventy years of age.[2] Therefore, selection of some sort takes places on the basis of age or health condition. Moreover, foreigners – family members of a CR citizen are differentiated from foreigners – family members of an EU citizen engaged in a gainful activity in the territory of the Czech Republic. A family member of a CR citizen resides in the territory of the Czech Republic for the period of two years on the basis of a permanent residence permit and during this period does not participate in the public health care system (i.e. has to depend on commercial insurance) while a family member of an EU citizen is entitled to full health care in the Czech Republic on the basis of Regulation (EC) No 883/2004 of the European Parliament and of the Council.

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[1] I.e. before the possibility to obtain a permanent residence permit after 5 years of residence within the provision of Sec. 68 of Act No. 326/1999 Coll., on the Residence of Aliens in the Territory of the Czech Republic. Prior to obtaining permanent residence, only foreigners employed by an employer seated or permanently residing in the territory of the Czech Republic are insured within Sec. 2 (1) (b) of Act No. 48/1997 Coll., on Public Health Insurance.

[2] Compare e.g. "Health insurance of foreigners," offered by VZP a.s. insurance company: http://www.pvzp.cz/cs/produkty/zdravotni-pojisteni-cizincu.html

In the area of education, the provision of Sec. 20 (5) of Act No. 561/2004 Coll., the Education Act, as amended (hereinafter only “the Education Act”) is problematic. It enables free preparation for the inclusion to basic education, including the teaching of the Czech language, adapted to children’s needs only for the children of EU citizens. For the children of foreigners with long-term or permanent residence in the territory of the Czech Republic, a similar service is not ensured, however. The question is whether there is a convincing reason for that.

Doubts exist also in connection with the factual[3] denial of both the active and the passive right to vote at municipal elections to foreigners residing permanently in the territory of the Czech Republic, which could put them in an unequal position compared to EU citizens.[4] Concerning the area of association of citizens, Act No. 83/1990 Coll., on Association of Citizens, as amended (hereinafter only “the Citizens Association Act”), extends the right to association merely to CR citizens.[5] Act No. 116/1985 Coll., on the Conditions for Activities of Organizations with an International Element, as amended (hereinafter only “the International Organization Activities Act”), is applied to associations established by foreigners; however, the law is not based on the principle of registration but permission, which could be perceived as a less favourable status.

The special status of a citizen in the territory of a host country is given by a wide range of factors, among others by the so-called *pledge of loyalty*[6] to the country of citizenship. The theory of public international law states that the alien status is never completely identical with the legal status of a citizen of a state. The state has a duty to provide to foreigners only the so-called minimum standard of treatment, which can be described as the state’s respect for a foreigner as a human being. International law distinguishes several types of alien status, depending on the degree of integration of foreigners – the so-called special status, most-favoured status, and national status. However, not even the national status, which ensures the highest degree of integration, means assimilation of foreigners with citizens. At least in the category of rights and duties of citizens, citizens have a different status by definition.[7] Nevertheless, Act No. 198/2009 Coll., on Equal Treatment and Legal Means of Protection against Discrimination and on Amendments to some Laws (“the Anti-discrimination Act”) will not be used to assess whether a provision of another regulation is discriminatory, and therefore substantial part of the matter under scrutiny cannot be considered from the point of view of this act. Regulations regulating the mentioned areas, or their application, can be examined merely from the perspective of Article 3 of the Charter of Fundamental Rights and Freedoms (hereinafter only “the Charter”), European regulations or international treaties. As

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[3] In the provision of Sec. 17 of Act No. 128/2000 Coll., the Municipal Order, as amended, the passive and the active right of foreigners to vote is conditioned on permanent residence in the municipality and the recognition of the right to vote by an international treaty. A similar provision is contained in the provisions of Sec. 4 (1) and Sec. 5 (1) of Act No. 491/2001, on Elections to Municipal Councils, as amended. These provisions probably responded to our future entry in the EU; however, access of foreigners from third countries to the right to vote may be opened only by means of concluding international treaties.

[4] Their active and passive right to vote follows from Article 19 (1) of the Treaty establishing the European Community.

[5] C.f. the provision of Sec. 1 (1) of the Association Act: Citizens have the right to free association.

[6] Potočný, M., Ondřej, J. Mezinárodní právo veřejné – Zvláštní část. 5., doplněné a rozšířené vydání. Prague: C. H. Beck, 2006, p. 59

[7] See footnote No. 6, ibid, p. 60

regards Article 3 of the Charter, the provision has an *accessory* character; in order to conclude that a relevant regulation is in contradiction to that article, it is necessary to find conflict also with another right guaranteed by the Charter. Similar treatment can be also applied to Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter only "the Convention").

II.
Treatment of specific questions according to relevant areas

II. 1 The area of health care

With the exception of employed foreigners, other categories of foreigners (in particular spouses and minors residing in the territory on the basis of a visa/a long-term residence permit for the purpose of family reunification) are excluded from the system of public health insurance during the first five years, while the length of their stay in the territory of the Czech Republic is disregarded. The given situation can be also considered from the perspective of Article 3 (1) and (31) of the Charter. As regards the exclusion of foreigners from the public health insurance system, I have to note that although the Charter recognizes in Article 31 that everybody has the fundamental right to protection of his or her health (i.e. right to health care), the right to free medical care and participation in public health insurance is extended merely to citizens. While the right to health care is a fundamental human right, the right to participate in the health insurance system is not – according to the Charter's diction, it can be regarded only as the right of citizens. The above-mentioned facts show that a CR citizen cannot be a suitable comparator for assessing the position of a foreigner since he or she is not in a comparable situation. Therefore, we can compare only foreigners with different types of residence status; however, in that case a qualified discriminatory reason is absent since unequal treatment does not take place on the grounds of state citizenship but on the grounds of a different residence status. Of course, the state has the possibility to enable foreigners to participate in the public health insurance scheme but no obligation to distinguish between foreigners according to the length of stay arises from the Charter.

Despite that, the described condition is in contradiction with the Updated Concept of Integration of Foreigners in the Czech Republic[8] and an annual Government resolution regarding its implementation.[9] As soon as in 2005, the mentioned concept identified as one of the main obstacles in the area of socio-economic integration *"of citizens of third countries or their family members (in particular children) ... the impossibility to participate in the public system of health insurance".*[10]

[8] Approved by Resolution of the Government of the Czech Republic No. 126 of 8 February 2006 regarding the Concept of Integration of Foreigners in 2005 and contained in part III of document ref. No. 118/06. Additionally, by this resolution, the Government approved the Complex Proposal for Long-term Legislative and Practical Measures – proposed goals and measures for the first stage of the implementation of legislative and practical measures, contained in part III of document ref. No. 118/06.

[9] Most recently, compare Resolution of the Government of the Czech Republic No. 224 of 22 March 2010 regarding the Report on the Implementation of the Concept of Integration of Foreigners in 2009, IV. Procedure in the implementation of the Concept of Integration of Foreigners in 2010, item 5. Additional measures to support the integration of foreigners, c) Health insurance of foreigners.

[10] For details, I refer to a press release of the Defender Nerovné postavení cizinců v ČR v přístupu k veřejnému zdravotnímu pojištění (Unequal status of foreigners in the Czech Republic regarding access to health insurance)

According to the Defender, the personal applicability of the system of public health insurance should be extended to include minors and spouses of foreigners residing in the territory of the Czech Republic on the basis of a visa for a stay longer than 90 days/a long-term residence permit for the purpose of family reunification. At the same time, after a certain period of stay, public health insurance should be accessible also to foreigners who have income from gainful activities in the territory of the Czech Republic within the Income Tax Act.

As regards the described paradox that family members of CR citizens (typically spouses) cannot take advantage of the public health insurance system for the first two years, or that a foreigner who is a family member of an EU citizen generally has a better status in the area of social insurance than a foreigner who is a family member of a CR citizen, the judgments of the Court of Justice of the European Union (hereinafter only "CJEU") allows this situation at a general level.[11] CJEU stated that the rights arising out of the Treaty on the Functioning of the European Union (hereinafter only "the Treaty") and executive regulations may not be sought in cases that are not interconnected with some of the situations regulated by EU law (i.e. free movement of workers) and whose elements are wholly internal to a Member State (the concept of a so-called "wholly internal situation"). The question is whether discrimination of foreigners – family members of a CR citizen – takes place when national law does not balance this paradox. I believe it does not. This status is provided to family members of an EU citizen directly by EU law on the basis of the rights of migrant workers, i.e. in a situation when an EU citizen took advantage of free movement of persons in the Community. From the point of view of comparison of these two categories of foreigners, it is fundamental that pursuant to EU law, family members of a CR citizen who took advantage of the free movement of persons and worked in the territory of another EU Member State had the same status in the territory of that state as family members of an EU citizen working in our territory.[12] With respect to that, discrimination does not occur, in my opinion.

As regards the paradox that foreigners – family members of an EU citizen working in the territory of the Czech Republic have a more favourable status than foreigners – family members of a CR citizen, it cannot be concluded that this is discrimination, although the situation is certainly not ideal. According to the Defender, the lawmaker should amend national regulations to bring the status of a family member of a CR citizen to the same level as that of a family member of an EU citizen.

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dated 11 March 2009, http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2009/nerovne-postaveni-cizincu-v-cr-v-pristupu-k-verejnemu-zdravotnimu-pojisteni/. Besides the Defender, the Government Council for Human Rights also perceives imperfections of the legal regulation in force related to the health care insurance of foreigners (compare the resolution of GCHR of 26 February 2009 regarding the inclusion of selected categories of foreigners temporarily residing in the Czech Republic in the system of public health care).

[11] See the judgment of CJEU of 5 June 1997, *Uecker and Jacquet*, C-64/96 and C-65/96, Recueil, ECR I-3171, item 23, and the above-mentioned judgment Garcia Avello, item 26.

[12] Likewise, a family of an EU citizen who did not take advantage of free movement of persons need not necessarily enjoy these privileges in the territory of the home country of the EU citizen (it depends, of course, on national legislation of a given country) – this was, after all, the case of the above-mentioned cases settled by CJEU.

Commercial insurance is governed by Act No. 37/2004 Coll., on Insurance Policies and on Amendments to Related Acts, as amended, hereinafter only “the Insurance Policy Act”), in a subsidiary manner also by Act No. 40/1964 Coll., the Civil Code, as amended (hereinafter only “the Civil Code”).[13] When deciding whether to conclude an insurance contract, an insurance company has quite a free hand, which results from the principle of the autonomy of will, or from the principle of contractual freedom, one of the basic principles that the Civil Code rests on. The principle of contractual freedom involves freedom to enter into a contract, freedom to choose a contractor and freedom to choose the content and the form of a contract. However, contractual freedom approached in this way must not get in violation of the principle of equal treatment. In the specific case, a foreigner under the age of 70 years will be a suitable comparator since age and not state citizenship is the distinctive reason, i.e. a prohibited discriminatory reason within the provision of Sec. 2 (3) of the Anti-discrimination Act. Insurance is a service *sui genesis*; if offered to the public, it can be considered factually under the Anti-discrimination Act (c.f. Sec. 1 (1) (j)). A specific principle of equality is contained also in the provision of Sec. 13a of the Insurance Policy Act,[14] which relates to rights and duties arising out of insurance, and is therefore oriented to the content of a contract and of an obligation; with respect to the principle of contractual freedom, it has an impact only on the freedom to choose the content and not on the freedom to enter into a contract or choose a contractor. Whether discrimination occurs during the conclusion of a contract and the selection of a contractor can be therefore assessed according to the Anti-discrimination Act.

If a general rule is applied, according to which a contract shall not be concluded with a person older than 70 years, it can constitute direct discrimination in access to services due to age. Pursuant to the provision of Sec. 7 of the Anti-discrimination Act, however, differential treatment due to disability is not discrimination provided it is justified by a legitimate objective and the means of achieving the objective are proportionate and necessary. The outlined measure pursues a legitimate objective because it is apparent that from a certain point in time, growing age is linked with higher insurance risk; for that matter, this concept is also used in the mentioned provision of Sec. 13a of the Insurance Policy Act, which admits a difference of treatment due to age.[15] However, general exclusion of persons older than 70 years does not meet the condition of proportionality – a similar measure is thus not proportionate and necessary to achieve an objective, albeit legitimate. The provision of Sec. 13a explicitly stipulates measures that an insurance company may use to factor in growing risk, however, directly in the content of an obligation.[16] Therefore, the Insurance Policy Act presumes to a certain extent what measures, used to reflect a higher age of an insured person, are still proportionate; simultaneously, these measures represent a limit beyond which differentiation on the grounds of age can no longer be proportionate. If the lawmaker intended to enable non-conclusion of a contract with a person only due to the person’s age, this

[13] C.f. the provision of Sec. 1 (2) of the Insurance Policy Act.

[14] “The rights and obligations arising out of commercial insurance shall not be in contradiction to the principle of equal treatment”.

[15] The exception to equal treatment contained in the provision of Sec. 13a of the Insurance Policy Act can be perceived as an admissible form of differential treatment within the provision of Sec. 7 (4) of the Anti-discrimination Act.

[16] *“The use of age ... as the decisive factor in* ***determining the amount of insurance premium and calculating the insurance payment*** *... is not in contradiction to the principle of equal treatment ...”*

alternative would probably be also explicitly stipulated in the law. **A measure that prevents persons older than 70 years from concluding a commercial health insurance contract therefore represents direct discrimination in access to services offered to the public due to age.**[17]

If contractual conditions in general prevent the conclusion of a commercial health insurance contract only due to age, it is direct discrimination within the provision of Sec. 2 (2) of the Anti-discrimination Act. The Insurance Policy Act only enables to factor in the age when setting insurance premiums or calculating insurance payments. With growing insurance risk, which cannot be stopped at a higher age, an insurance company should therefore use these instruments.

II. 2 The area of education

The right to education is guaranteed by Article 33 of the Charter, which provides that everybody has the right to education, and by Article No. 2 of Protocol to the Convention, according to which nobody may be denied the right to education. In case of the provision of Sec. 20 (5) of the Education Act, the children of CR citizens will not be comparators with respect to the children of foreigners since they are not in a comparable situation – by definition, CR citizens do not have to be provided language instruction as preparation for their inclusion to basic education. Foreigners may be compared with EU citizens (i.e. children who are or may be at disadvantage with respect to the language compared to the children of CR citizens).

The mentioned provision of Sec. 20 (5) of the Education Act enables only the children of EU citizens to attend free preparation for their inclusion to basic education. I believe that preparation for the inclusion to basic education can be included in the content of the fundamental right to education. The Charter nevertheless does not specify that the provision of education should be free of charge – it guarantees the right to free education in basic and secondary schools as a fundamental right, and only to *citizens.* It is therefore up to the state to consider whether it will provide to some categories of foreigners (or to all foreigners) the possibility to prepare for the inclusion to basic education and whether this service will be *free* – however, it is not its duty to provide such specific service.[18] It might be said that certain unequal treatment of foreigners (or their children) occurs in comparison with EU citizens, but with respect to the mentioned facts, I believe that it cannot constitute discrimination within Article 3 of the Charter. Beyond what has been said, I would like to note that a certain privileged status of the children of an EU citizen follows already from Article 12 of Regulation No. 1612/68/ECC, according to which *"Member States shall encourage all efforts to enable ... children [of an EU citizen who has taken advantage of the free movement of workers] to attend these courses under the best possible conditions",* and further from Article 2 of Council Directive No.

[17] Likewise, discrimination can be established in similar cases if insuring a person is **excluded in general** also on the basis of a reason other than age, provided this other reason is regarded as discriminatory by law (see Sec. 2 (3) of the Anti-discrimination Act).

[18] C.f..: *"The right not to be denied education does not constitute a duty of the state to create a general education system … or a special educational system."* In Hubálková, E. Evropská úmluva o lidských právech a Česká republika: judikatura a řízení před Evropským soudem pro lidská práva. Prague: Linde, 2003, p. 320.

77/486/EEC, on the education of the children of migrant workers, according to which Member States shall take appropriate measures to ensure that free tuition, in particular the teaching of the official language of the country adapted to the specific needs is offered to the children of migrant workers – EU citizens.[19] This privileged status, which is also reflected in the mentioned provision of Sec. 20 (5) of the Education Act, therefore rests on the free movement of persons within the EU, or on EU citizenship (which guarantees an EU citizen to move freely and reside within the territory of Member States).

Despite that, the described state is at variance with the Updated Concept of Integration of Foreigners in the Czech Republic (p. 28), which identified a major obstacle in the area of education consisting in the non-existence of *"a duty to ensure that free preparation is provided for pupils who are citizens of other than Member States of the European Union for their inclusion to basic education, including the teaching of the Czech language".* By Resolution regarding the Report on the implementation of the Concept of Integration of Foreigners No. 259/2008 (measure 1.2.1.), the Ministry of Education, Youth and Sports was given a task to take a legislative measure that would ensure that the teaching of Czech is offered in a systemic way also to children from third countries, with a deadline in June 2009. However, this task has not been accomplished yet.[20] Good knowledge of the Czech language is an important prerequisite for future education of children of foreigners. Consequently, adequate education is narrowly connected with the inclusion of foreigners into society, their successful entry into the labour market, their economic self-reliance, the prevention of crime, which foreigners could commit as a result of social exclusion, etc. Risks connected with insufficient inclusion of the children of foreigners into society can even increase in the next generations. Negative effects related to inadequate education and insufficient inclusion of individuals into society may eventually mean greater expenditures of the state in the future.[21]

At the same time, I am aware of a positive shift in connection with the development programme of the Ministry of Education, Youth and Sports for basic schools for 2010 (ref. No. 2676/2010-60), which serves to ensure that there are conditions for free preparation to include pupils – foreigners from third countries to basic education, including the teaching of the Czech language adapted to the needs of these pupils.

Despite the mentioned positive shift, which I appreciate, I believe that free preparation of pupils from third countries for their inclusion to basic education, including the teaching of the Czech language adapted to the needs of these pupils, should be guaranteed also by the Education Act.

[19] *"Member States shall, in accordance with their national circumstances and legal systems, take appropriate measures to ensure that free tuition to facilitate initial reception is offered in their territory to the children referred to in Article 1, including, in particular, the teaching - adapted to the specific needs of such children - of the official language or one of the official languages of the host State. Member States shall take the measures necessary for the training and further training of the teachers who are to provide this tuition".*

[20] C.f. Resolution regarding the Report on the implementation of the Concept of Integration of Foreigners in 2009 No. 224/2010, p. 27.

[21] C.f. for example Report on the implementation of the Concept of Integration of Foreigners in 2009, p. 32-33.

II. 3 The area of the right to vote and to freedom of association

The Anti-discrimination Act cannot be used in the area of the right to vote either; the Charter needs to be applied again. The concept contained in Article 21 of the Charter guarantees the passive and the active right to vote only to citizens,[22] which means that it is not possible to deduce discrimination within Article 3 (1) of the Charter. Of course, the provision of Article 21 does not prevent the state to extend, as it deems appropriate (e.g. on the basis of an international treaty) the right to vote also to foreigners, as was the case in the provision of Sec. 17 of Act No. 128/2000 Coll., the Municipal Order, as amended. The fact that this provision benefits de facto only EU citizens does not mean, however, that it constitutes discrimination due to state citizenship on the part of the state within the Charter.[23] Although it is not a case of discrimination, it would be probably appropriate to consider changing the regulation of the right of foreigners to vote at the local level since the current regulation conditioning the right to vote on the conclusion of an international treaty does not really modify the status of a foreigner (albeit a long-term resident) in principle (the right to vote is not awarded).[24] The Updated Concept of Integration of Foreigners in the Czech Republic (p. 29) also found the nonexistence of the "*right of foreigners with long-term permits to vote at municipal and regional elections*" one of the main obstacles "*in the area of political integration*".

On the other hand, the right to freedom of association is guaranteed to everybody, not just to a citizen, according to Article 20 of the Charter. Likewise, the Convention for the Protection of Human Rights and Fundamental Freedoms in Article 11, the International Covenant on Civil and Political Rights in Article 22 or the Charter of Fundamental Rights of the European Union in Article 12 stipulate that the right to freedom of association is guaranteed for everybody. Additionally, according to Article 11 of Council Directive 2003/109/EC, long-term residents shall enjoy equal treatment with nationals as regards freedom of association and affiliation. On the other hand, the Citizens Association Act stipulates in the provision of Sec. 1 that citizens shall have the right to freedom of association.

The Defender, of course, cannot substitute the functions of the Constitutional Court, which is the only body authorized to consider the compliance of regulations or their application with the constitutional order. I believe, however, that the Citizens Association Act will need to be interpreted in the light of Article 42 (3) of the Charter, according to which, if an existing regulation uses the term "citizen", it shall mean *every individual* if it concerns fundamental rights and freedoms. From this point of view, the Ministry of Interior should also register associations proposed to be established by persons other than citizens, if other statutory conditions are met. If it were not so, foreigners would be able to associate factually only on the basis of the

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[22] As does, for example, the International Covenant on Civil and Political Rights.

[23] However, e.g. according to Article 6 of the Convention of the Council of Europe on the participation of foreigners in public life, parties to the convention undertake to extend the active and the passive right to vote to foreigners (residents). However, the Convention has not been ratified yet.

[24] In this respect, it can be referred to principle No. 8 of the Concept of Integration of Foreigners (annex No. 1 to Government Resolution of 7 July No. 689): *"The government policy in the area of integration ... of foreigners ... involves the creation of socio-economic, organizational and administrative conditions for active support of the integration of foreigners. In particular with respect to ensuring their personal participation in the integration process and also in social life at the local level..."*

International Organization Activities Act. However, the right to association is guaranteed for all and, within Article 20 in connection with Article 1 and Article 3 (1) of the Charter, under the same conditions; nevertheless, the International Organization Activities Act makes the establishment of an organization dependent on the issuance of a permit, and thus foreigners get in an unequal position compared to CR citizens. In my opinion, such interpretation could be incompatible with the mentioned articles of the Charter[25] and, simultaneously, it does not take into consideration the mentioned provisions contained in Article 42 (3) of the Charter. **As a result, on the basis of the given reasons, I believe that such application could constitute unequal treatment and discrimination on the grounds of state citizenship within Article 1, Article 3 (1) and Article 20 of the Charter.**

The provision of Sec. 1 (1) of the Citizens Association Act, according to which only citizens have the right to freedom of association based on this law, should be interpreted in compliance with the Charter and European regulations (namely with Council Directive No. 2003/109/EC and the Charter of Fundamental Rights of the European Union). With respect to the fact that the right to freedom of association is guaranteed for all by the Charter, it would be appropriate to proceed in the application of the Citizens Association Act according to Article 42 (3) of the Charter, which says: ***"Whenever legal enactments in force employ the term "citizen", this shall be understood to refer to every individual if it concerns the fundamental rights and basic freedoms that this Charter extends to everybody irrespective of his citizenship".***

RNDr. Jitka S e i t l o v á
Deputy Public Defender of Rights

[25] C.f. for example Article 22 of the International Covenant on Civil and Political Rights: *"Everyone shall have the right to freedom of association with others. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others".*