



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

## Annual Judicial Seminar 2022 of the ECHR

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Recent decades have seen a steady rise in trends which undermine the fundamental values **that unite** all the Council of Europe member States. Some countries have even started to put in place a series of systemic, planned measures aimed at weakening the democratic system of human rights based on the rule of law.

Against this background we should highlight the role of the ECHR, which, firstly, **identifies** systemic human rights issues; secondly, acts as an early-warning system for threats to the rule of law and democracy; and thirdly, obliges member States to bring their legal systems and the means of implementing the law into line with the requirements of the Convention and the Court's case-law. In other words, the European Court of Human Rights and its case-law strike a balance between freedom and the law.

As the Court sees it, democracy is a fundamental characteristic of the European *ordre public* emerging from the Preamble to the Convention. The Preamble establishes a very clear link between democracy and the Convention and asserts that human rights and freedoms are best realised and maintained by an effective political democracy and by a common understanding of human rights. According to the Preamble, European countries share political traditions and ideas and have a common heritage of freedom and the rule of law. The Court has repeatedly noted that the Convention is aimed at preserving and promoting the values of a democratic society.

Constitutional-law theory and political science have asserted that the existence of a democracy depends on respect for **civil and political** rights and freedoms. That is what characterises countries as democracies.

In that regard democratic countries can be classified not just as fully democratic or minimally democratic; other labels might be assigned to "minimal" democracies, such as "hybrid regimes", "competitive authoritarianism", "semi-authoritarianism", and so on. **However, the crux of the problem is that the dynamics of modern global processes, including at pan-European level, disclose a situation in which a challenge to human rights and democracy is wrapped up in democratic packaging.** This means that anti-democratic democracies are starting to emerge. Illiberal democracies of any kind, which are by nature "semi-democracies", pose a challenge to democracy. These "formal democracies" undermine the substance of the democratic form in the organisation of State power.

Democracy as a concept views human rights and freedoms as an inherent attribute of the individual. States may restrict human rights and freedoms, on condition, firstly, that such restrictions are based on the law; secondly, that they pursue a legitimate aim; and thirdly, that they are necessary in a democratic society.

In these circumstances, the **COVID-19** pandemic has become a very serious challenge for the member States of the Council of Europe, as well as for the whole Convention system. However, the problem is not only that the pandemic carries objective difficulties for democracy and the rule of law. The stability of the old systems of checks and balances is being severely tested. In this regard, conferences **such as today's** are important to share lessons learned and understand where the old mechanisms work and where a new approach is needed.

But besides these there is another, more dangerous, tendency when the pandemic is seen not as a challenge to the established system of human rights protection but as an opportunity to set aside human rights in favour of the interests of the authorities and to follow the path of legal positivism, thus changing the whole concept of law and drifting from the rule of law towards legal positivism.

This is why, within the Seminar, three sub-themes have been highlighted for discussion: (I) Restrictions on human rights during the time of the pandemic; (II) Positive obligations on States during a pandemic; and (III) Proceedings before courts.

The first topic this morning concerns the measures which States have put in place, often in an emergency context, in order to prevent and stem the spread and effects of COVID-19. These have involved restrictions on individual human rights and freedoms on a scale that is unprecedented in modern times, ranging from nationwide restrictions on free movement and assembly to mass tracing and data collection, as well as the implementation of national vaccination and health pass systems.

The second topic concerns the duties which States owe to individuals within their jurisdiction in protecting their rights in the context of a pandemic. Most obviously, this relates to the protection of a population's life and health, both in terms of taking adequate protective measures against the spread of the virus and in ensuring access to treatment and healthcare. Particular regard is to be had to the protection of vulnerable groups and those who are under the supervision of the State, such as detainees.

The third topic concerns the challenges faced and adaptations made in proceedings before the courts during the pandemic. At the regional level, the Court has reacted to the exigencies of the public health crisis and the measures put in place in its host State by changing aspects of its practice and functioning. It has also received applications relating to domestic court proceedings which, among other things, have been delayed, suspended or adapted in the light of the crisis.

Few areas of life have remained untouched by the coronavirus (COVID-19) pandemic which has swept across Europe – and the rest of the globe – over the course of more than two years. It therefore stands to reason that the health crisis and the action taken by member States in an effort to tackle it are profoundly linked to questions relating to upholding human rights. The aim of this year's Judicial Seminar is to discuss some of the most pertinent questions, with a focus on identifying the challenges posed by the COVID-19 pandemic and the new perspectives gained. It is hoped that, ultimately, these lessons can serve as guidance to ensure that actors are more prepared and human rights are better insulated from further pandemic or health crisis situations.

**Let me conclude by thanking the members of this year's Organising Committee for the Judicial Seminar for their hard work and dedication to the cause: Judges Marko Bošnjak, María Elósegui, Ivana Jelić and Raffaele Sabato.**

**I wish you all a very interesting afternoon of discussions.**