



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

Seventh Annual Regional Rule of Law Forum for South East Europe

“The ECHR and the Pandemic – Rule of Law as the Lodestar of the Convention System”

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Introduction

It is a pleasure for me to be here with you for the 7th Regional Rule of Law Forum for South East Europe which is being held online due to the health crisis. The Forum brings together amongst others Judges of the European Court of Human Rights, supreme and constitutional courts, presidents of judicial councils, directors of judicial training academies and institutions, representatives of NGOs, and prominent legal experts from, I believe, seven countries within the region.

Despite the current health crisis, the organisers have managed to maintain this Forum as a hybrid meeting using information technology to allow the dialogue and conversation to continue within the judicial community on topical issues for the protection of human rights. One of the unexpected outcomes of the crisis is that we have all been forced to learn to communicate with each other in novel ways. This has occurred on a personal level with family and friends, as well as on a professional level. We are becoming more at ease with virtual meetings and seminars and as a result a number of restricted conferences and seminars have been opened up to greater numbers. This is a positive outcome of the crisis.

The chosen subject matter for this Forum is the pandemic itself and its relationship with the European Convention on Human Rights.

This topic is certainly an important one. Indeed, I have already participated in three online events on the effect of the pandemic on human rights. The first, in June, was a videoconference organised by the Greek chairmanship of the Committee of Ministers as a lessons learned discussion within the organisation. The second, in July, was a dialogue and sharing of experiences between the three regional human rights courts: the European Court of Human Rights, the African Court of Human and Peoples' Rights and the Inter-American Court of Human Rights on the impact of COVID-19 on human rights. The third, also in July, was organised by our Superior Courts Network on “Adapting justice systems to the COVID-19 pandemic and the potential impact on the right to a fair trial”. Sharing

national experience and good practice in responding to Covid-19 is essential for encouraging a more harmonised approach within the Council of Europe legal space.

The pandemic is a health crisis with serious human, social and economic consequences. To combat the pandemic, member States have taken a number of measures which have restricted human rights, sometimes introduced under a state of emergency, sometimes accompanied by a derogation or derogations from the obligations of the European Convention. Accordingly, the pandemic also poses challenges for human rights and the rule of law.

The panel discussions this morning and this afternoon will focus on particular Convention rights affected not just by the pandemic but by the States' response to the pandemic. It is crucial to maintain a framework of upholding human rights and the rule of law while responding to the pandemic.

A number of key human rights are likely to be affected by measures taken to combat the pandemic, such as the right of freedom of assembly and freedom of movement; freedom of expression; the right to private life as regards data protection and surveillance; as well as the right to education to name but a few. I would like to congratulate the organisers on their guide on the Convention in the time of the pandemic which provides comprehensive resource material for practitioners and courts.

I have decided to concentrate my intervention on a principle of law which is "*inherent in all the Articles of the Convention*" and "*inspires the whole Convention*". This principle, the rule of law, I have called the "lodestar" of the Convention system. It constitutes the legal and moral foundation of our work along with the fundamental principles of democracy and human dignity.

As I will develop later in my intervention, there are certain key legal rules or principles, which all derive from the rule of law, which we must bear in mind when assessing whether measures taken to respond to the pandemic have potentially conflicted with human rights norms.

But before embarking on the normative part of my contribution, I would like to begin by outlining how the Court itself is adapting its working methods to this unprecedented situation (I). Then I will make a general point about the nature and scope of the pandemic and its consequences on human rights (II) before elaborating on the way in which the pandemic impacts the rule of law (III).

I. How the Court is functioning during the pandemic

So, to my first part.

Restrictions on freedom of movement and assembly have inevitably had an impact on the work of all courts, including the European Court of Human Rights. Yet access to justice during the pandemic is also an important aspect of the right to a fair hearing under Article 6 which is a fundamental component of the rule of law. Article 6 foresees exceptions to the public nature of court proceedings on different grounds, including in the interest of public order in a democratic society and "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". However measures to prevent the spread of the pandemic have been taken into account in justifying the holding of online hearings so long as the public character of hearings is secured by using information technology.

The functioning of national judicial systems has also been severely disrupted. I would like to mention here the "Declaration on Lessons Learnt and Challenges Faced by the Judiciary During and After the Covid-19 Pandemic" which was adopted by the European Commission for the Efficiency of

Justice (CEPEJ) and sets out seven guiding principles. As far as the judiciary is concerned it underlines that the continuous functioning of the judiciary and of the services provided by justice professionals needs to be ensured based on European standards. Trust in justice must continue even at a time of crisis.

Several exceptional measures were taken by the Court during the French national lockdown period (16 March to 10 May 2020). Most importantly, the then President of the Court extended the six-month time-limit for the lodging of an application (under Article 35 of the European Convention on Human Rights) based on force majeure reasoning for three months until 15 June 2020 inclusive. The time-limits which had been allotted in pending proceedings, extended for a one-month period from 16 March, were also extended for a further two-month period from 16 April.

The European Court has been able to fulfil its public service mission during the French lockdown period by ensuring the continuity of its core activities, including the handling of urgent cases, and receiving and allocating applications to the relevant judicial formations. The Grand Chamber, Chambers, Committees and Single Judges continued to examine cases by way of a written procedure. More than 5,400 applications were processed. As a result of this activity the total stock of pending cases has remained stable.

As an international court, a significant achievement was the organisation of Grand Chamber hearings, which took place by videoconference and which the outside world was able to watch online. This was a major technical challenge for us. We held three online hearings in June and one this week and will hold another one next week. In this way, the Court has been able to continue to carry out its mission. We were also able to ensure the public nature of these hearings through their webcasting. I know that we had very many viewers (nearly 4,000 views for one of them) and we received very positive feedback, particularly from the national courts, who inquired about our functioning during this exceptional situation.

(II) The pandemic and its effect on human rights

Let me now turn to my second part.

I would suggest that the pandemic has underlined the importance of economic, social and cultural rights, as well as core civil and political ones. It has reminded us of the need for solidarity in our communities; of the importance of social safety nets and a well-resourced healthcare system. We have realised that the younger generation needs stable and secure employment and opportunities for the future. We have all appreciated the cleaner air and reduction in pollution in our cities during lockdown periods; a clean environment seems more pressing than ever. The pandemic has brought peoples back to first principles, and to the realisation of the importance of family life, but it has also shone a spotlight on domestic violence.

While the pandemic has triggered a public health crisis, it also clearly represents a great challenge for human rights and the rule of law. It has put pressure on Council of Europe member States to fulfil their positive obligations to protect life and health. These obligations arise primarily under Articles 2 (Right to life), 3 (Protection from inhuman and degrading treatment) and 8 (Right to respect for

private and family life). There exists, consequently, the risk of the pandemic being used as a pretext for abusing public power, imposing measures on the populace which, although intuitively persuasive in the face of an unprecedented threat to human life and well-being, is upon a closer look, a disproportionate overreach which threatens the fundamentals of democratic life, societies governed by the rule of law and the protection of human rights. Balance is key.

III. The rule of law

This brings me then to my final part.

While there is no abstract definition of the rule of law in the Court's case-law, the Court has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake, the principle of the possibility of a remedy before an independent and impartial court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State. All will be dealt with by my colleagues on the Court in their interventions here today.

As we are here principally in a forum for dialogue among Judges, and other Convention actors, I have distilled four general and fundamental rule of law principles which may be derived from our case-law. I hope that these principles will provide judges with a roadmap for the resolution of Convention-based challenges to measures taken in response to the pandemic.

Firstly, the public interest, whilst undoubtably important, cannot be an absolute trump card for national authorities in the fight against the pandemic. The Convention requires proportionality, a balance to be struck between the public interest and the autonomy of the person. The responsibility for striking that balance is at the outset for the national authorities. In short, the Convention requires all national authorities, the legislative, executive and judicial branches, to engage with the principle of proportionality in good faith. As I have repeatedly stated after beginning my mandate, the Convention does not tolerate extremes.

Secondly, the principle of legality, based on the primordial principle of the rule of law that permeates the Convention, will become ever more salient when lockdowns, restrictions on freedom of movement and other such measures are imposed. The principle of legality requires that measures taken at national level are accessible and foreseeable. This precludes vague and overbroad rules that run the risk of unpredictability and arbitrariness in their enforcement.

Thirdly, rules adopted at national level as a basis for pandemic-related measures restricting individual rights must not afford excessive discretion to the executive. During states of emergency, countries often introduce shifts in the distribution of powers to deal with the crisis at hand. In a true democracy, the executive must not be the sole arbiter of what rules are applicable. The democratically-elected legislator must be reactive and up to the task of engaging with the difficult balancing of interests required in this field. There must be built-in review mechanisms, such as

parliamentary and judicial scrutiny. Shifts in redistribution of power should be proportionate and temporary.¹

Fourthly, the adoption of emergency laws or declarations deviating in general from Convention guarantees must be strictly tailored to meet the exigencies of the situation. As the Court has stated, even in a state of emergency the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.² I note that the Venice Commission has identified a list of “principles governing the state of emergency” that the Commission considers should be applied in order to ensure compliance with Council of Europe standards. All emergency measures must have a sufficient legal basis. Emergency laws should not become the new normal. Between March and April 2020, 10 States notified the Council of Europe of their intention to derogate from their obligations under the ECHR to respond to the pandemic.

Conclusion

Dear Judges, dear participants and colleagues, allow me to conclude.

We have seen that the challenge for member States is to balance on the one hand a necessary response to threats to public health and on the other proportionate measures which uphold fundamental freedoms and democratic decision-making. Finding the right balance is key but may not always be easy.

As domestic judges you will certainly be called upon to assess the measures taken by your State in response to the pandemic and their effect on fundamental rights and freedoms. They may be emergency measures or measures taken within a state of emergency. They may have been taken within the context of a derogation of one or more Articles to the European Convention. In attempting to respond quickly to the changing dynamics of the sanitary situation, the core rule of law principles I have outlined earlier may have been overlooked, disregarded or even flouted. The pressure on governments to act and to act quickly is great.

As judges at the domestic level your role, when challenges are brought to the courts, will be to assess the facts of each case and to apply the core rule of law principles as based on the Strasbourg Court’s case-law. As judges at the European level, our role will be to clarify those principles and to assess whether your domestic scrutiny has been in conformity with what the Convention requires.

The European Convention on Human Rights continues to set limits, thereby ensuring that respect for democracy, human rights and the rule of law remains intact as we fight the pandemic together.

I will end there as I very much look forward to hearing the interventions of the other speakers.

Thank you very much.

¹ European Commission for Democracy through Law (Venice Commission), Interim Report on measures taken in the EU Member States as a result of the COVID-19 crisis and their impact on democracy, the rule of law and fundamental rights, 8 October 2020.

² *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 210 20 March 2018