



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



Presidency of Germany  
Council of Europe  
November 2020 – May 2021  
Présidence de l'Allemagne  
Conseil de l'Europe

## THE RULE OF LAW IN EUROPE - VISION AND CHALLENGES

Thursday, 15 April 2021

Seminar Room (Human Rights Building, Strasbourg) and KUDO  
Interpretation into English and French

### ABSTRACTS

**Stéphanie Dagon, Professor of Law, University of Geneva**

*Rule of Law and Health Crisis of Yesterday and Today: What Role for the ECHR?*

The unprecedented health crisis that has affected most states in the world since the outbreak of SARS-COV-2 has given rise to many discussions concerning the protection of human rights and public health. These discussions concern the legality, with regards to human rights standards, of the restrictions to individual activities in the name of the protection of public health. They also concern the contributions of the human rights approach to preparing states for future (health) crisis.

The ECHR has developed its case law over the years, and in particular in connection with the HIV / AIDS or tuberculosis pandemics, on the conditions of the legality of limitations to human rights in the name of the protection of public health. It has thus provided a very useful - albeit incomplete - framework for the adoption by states of public health measures aimed at containing and responding to the spread of infectious diseases. However, it has remained very cautious with regards to the positive obligations incumbent on States in terms of public health policy and the fight against epidemics.

The objective of this presentation is to analyze the reasons for this caution and to revisit them in light of the current COVID-19 pandemic.

**Hans Petter Graver, Professor of Law, University of Oslo**

*Can International Institutions deal with National Dismantling of the Rule of Law?  
Some Thoughts based on the Recent EUCJ Judgement in Case C 824/18*

The presentation will provide the judgement in Case C 824/18 on procedure for appointment to a position as judge at the Sąd Najwyższy (Supreme Court, Poland) and adoption of legislation declaring the discontinuance of pending cases by operation of law and precluding in the future any judicial remedy in such cases in the context of a struggle between national authorities and the EU institutions. Based on this, there will be a reflection on the possibility of protecting the rule of law against the will of the national authorities.

**Andrew Murray, Professor of Law, London School of Economics**

*The Rule of (Human) Law in the Digital Age*

Law is about agency - the human capacity to act independently and to make our own free choices. As Jeremy Webber observes, "Law is consciously created" and is the distillation of the collective agency of a society, group, or culture. The rule of law is the ultimate distillation of this principle: the clear spirit of human choice in the purest form. Law does not exist apart from its role and place in society and central to this is the role of courts and judges. Jeremy Waldron famously observed that "no one should have any penalty, stigma, or serious loss imposed upon him by government except as the upshot of procedures that involve a legally trained judicial officer, whose independence of other agencies of government is ensured". While we have taken great care to enshrine judicial independence from Government and other public bodies it is now at risk. The risk comes from Judicial Expert Systems, software designed to aid judges in the exercise of their role. These systems however risk the fabric of human agency and the rule of law. Complexity becomes numerical values and choices become mathematical processes. Human brains, less equipped for this form of decision-making, risk being replaced by algorithmic decision-making. Judicial agency diminishes as Machine Intelligence ascends and Waldron's principle of procedural Rule of Law risks diminution.

**Oreste Pollicino, Professor of Law, Bocconi University**

*Digital Private Powers Exercising Public Functions: How to deal with this Constitutional Paradox in the Digital Age?*

It is increasingly evident that, in the digital context, the principles underlying the rule of law are under stress. The presentation will start from one of the cornerstones of the principle of the rule of law and of constitutional law, how limiting the new forms of private power that compete with public powers, moving from the Trump's social media silencing in the United States to the Facebook's decision in Australia to ban news services and also to the complex system of enforcement of the right to be forgotten in Europe. How to deal with these constitutional short circuits? What common ground can be found by looking at the new perspectives of digital constitutionalism? These are the questions which the presentation will try to answer.

**Patricia Popelier, Professor of Law, University of Antwerp**

*The Role of Courts in Times of Crisis: A Matter of Trust, Legitimacy and Expertise*

Lockdown, quarantine, social distancing and facemask policies protect the right to life and health during the corona-crisis. They also drastically limit fundamental rights and freedoms and come with high social and economic costs. Governments have to use discretion to balance these rights and interests. Several scholars emphasized the essential role of courts in controlling governments in the fight against the pandemic. Courts worldwide have interfered with the governments' responses to the pandemic. Not all courts, however, actively scrutinize the government. Some have been criticized for deferring cases and neglecting their monitoring role. The central question for this presentation is therefore what room there is for the judicial scrutiny of health crisis measures. It is argued here that the reasons for deference – legitimacy and expertise obstacles – call for procedural rationality review in two stages. The room for legitimate judicial scrutiny is inversely proportional to the government's discretion defined in terms of public trust. This leaves little room for legitimate judicial scrutiny in a first phase, and more room in a second phase. Within the boundaries of legitimate judicial scrutiny, a procedural rationality check overcomes the expertise concern. The argument is based on a normative account and on empirical evidence. A case study provides anecdotal evidence for the assumption that the room for legitimate judicial interference widens in a second phase. A vignette-experiment gives empirical evidence for the assumption that the public expects the government to balance safety against fundamental rights and needs, which gives more room for legitimate judicial action.

**Kateřina Šimáčková, Judge of the Czech Constitutional Court**

*Dissenting Opinions in Constitutional Courts: A Means of Protecting Judicial Independence and Legitimising Decisions*

The presentation will provide an introduction of philosophical concepts justifying the need for dissenting opinions and an overview of arguments for and against separate opinions. Rules regulating separate opinions and a summary of conclusions and recommendations of the Venice Commission report on separate opinions will be discussed. Finally, selected current problems concerning separate opinions in Central and Eastern European countries will be addressed.