

# Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations: A Rule of Law Analysis

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## Executive Summary

This Report provides Rule of Law criteria to assist MPs in their scrutiny of the newest coronavirus national lockdown Regulations for England.

The Regulations ought to be necessary and proportionate to restrict the transmission of coronavirus.

The Regulations satisfy the Rule of Law criteria that they are time-limited.

As part of the requirement to be proportionate, the Regulations ought to have a scientific basis, and if the science is not followed, there ought to be a clear reason advanced for this.

The Regulations need to have democratic legitimacy, and MPs may ask if the rushed process for making them and the lack of nuanced scrutiny undermine this legitimacy and their effectiveness.

MPs may wish to ask the Government how it plans to make these new Regulations easily accessible to citizens.

The Report concludes with scrutiny on points of detail where there are some minor technical deficiencies in the Regulations.



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## Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. Previous Reports have been on the EU (Withdrawal Agreement) Bill, the Terrorist Offenders (Restriction of Early Release) Bill, the UK Internal Market Bill as well as on various coronavirus laws.

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## Introduction

This Report analyses the Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020. These are the Regulations which give effect to the new English national lockdown.

The official guidance was published online on 31 October and updated on 1 November.<sup>1</sup>

The Prime Minister made a statement to the House of Commons on 2 November.<sup>2</sup>

On 4.10 pm on 3 November the Regulations were laid before Parliament. At some point that evening they were published online.

There is a motion to vote upon the Regulations in the House of Commons on 4 November.

They are due to come into force on 5 November.

The purpose of this Report is to provide members with Rule of Law criteria to assist in their deliberations on whether or not to vote for these Regulations. This Report cannot answer the difficult questions about the efficacy or justifiability of the Regulations, it limits itself to framing questions in the context of the Rule of Law. The Rule of Law requires that public health emergency legislation be:

- Necessary
- Proportionate
- Time-limited
- Scientifically sound
- Democratically legitimate
- Accessible

The Report concludes with some scrutiny of minor points of detail in the Regulations.

## Necessary

The Rule of Law requires that emergency measures can only be applied if they are necessary.

Emergency measures can often be draconian. This does not automatically make them unlawful, but the Rule of Law does require that the test of necessity is first passed. In the Venice Commission on the Rule of Law Checklist, under the heading of exceptions in emergency situations it states that emergency measures must be “limited to the extent strictly required by the exigencies of the situation”.<sup>3</sup> This mirrors the language on derogations from human rights in the International Covenant on Civil and Political Rights<sup>4</sup> and the European Convention on Human Rights.<sup>5</sup> In explaining this necessity test, the Siracusa Principles state

The principle of necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present or imminent danger and may not be imposed merely because of an apprehension of potential danger.<sup>6</sup>

This principle of necessity is reflected in UK domestic law. The emergency rule making power in the Civil Contingencies Act 2004 only applies if there is an emergency and the regulations are necessary. The power to make emergency regulations under the Public Health (Control of Disease) Act 1984 only applies if “by reason of urgency, it is necessary”.<sup>7</sup> These Regulations are made under the 1984 Act.

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<sup>1</sup> Available at <<https://www.gov.uk/guidance/new-national-restrictions-from-5-november>>.

<sup>2</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 24.

<sup>3</sup> Venice Commission on the Rule of Law, Rule of Law Checklist (2016), Benchmark A6.

<sup>4</sup> Article 4, ICCPR.

<sup>5</sup> Article 15 ECHR.

<sup>6</sup> Paragraph 54, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

<sup>7</sup> S. 45R Public Health (Control of Disease) Act 1984.

The principle of necessity was also referenced by Jeremy Hunt MP in the debate in the House of Commons on Monday 2 November when he said “I strongly support these painful measures, and the Prime Minister’s transparent reluctance to take away people’s liberties will reassure many people that they are absolutely necessary”.<sup>8</sup>

There is no doubt that we are in the middle of a public health emergency.

**The question for MPs under this Rule of Law criterion is – are these Regulations necessary, and is each provision in them necessary in order to restrict the transmission of the coronavirus?**

This question is easier to answer if the full facts are available to MPs. Sir Graham Brady MP called for the publication of “a full impact assessment, setting out the cost of the lockdown in terms of the jobs that will be lost, the businesses that will fail, the enormous toll on people’s mental health and other aspects of their health and the lives that will be lost as a result of lockdown, as well as those that we hope to save”.<sup>9</sup> This kind of information would assist MPs in their deliberations. According to the Explanatory Note appended to the Regulations, no impact assessment has been prepared.

## Proportionate

The Rule of Law requires that emergency measures must be proportionate to the nature of the emergency.

The Venice Commission checklist references proportionality in derogations from normal rights.<sup>10</sup> Proportionality is part of the principles underpinning the International Covenant on Civil and Political Rights and the European Convention on Human Rights as well as the Siracusa Principles.

The European Court of Human Rights, in adjudicating upon influenza quarantine conditions stated that necessity implied proportionality, that restrictions should be ‘a temporary measure, to be discontinued as soon as circumstances permit’ and that restrictions which were of a long duration are particularly likely to be disproportionate.<sup>11</sup> In a separate case the Court ruled compulsory quarantine of a HIV patient unlawful because other, less severe methods should have been used – this is another example of proportionality, that the least oppressive measures necessary to achieve the objective should be used.<sup>12</sup>

Proportionality is part of the criteria for making regulations both under the Civil Contingencies Act 2004 and the Public Health (Control of Disease) Act 1984. In both cases that the High Court for England and Wales has heard on the lawfulness of existing coronavirus regulations, part of the reason for finding those regulations lawful was that they were proportionate.<sup>13</sup>

Sir Stephen Laws, former First Parliamentary Counsel for the UK has previously examined lockdown regulations, writing that

it is highly desirable that whatever means are adopted for emerging from the crisis should, as a matter of policy, seek to respect the freedoms and liberties of individuals to the maximum possible extent in the circumstances<sup>14</sup>

Proportionality means taking the least intrusive measures possible in order to achieve the policy aim of reducing the transmission of coronavirus.

The Prime Minister’s reason for not including a broader range of exemptions in the Regulations is “because once you unpick at one thing, alas, the effectiveness of the whole package is

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<sup>8</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 38.

<sup>9</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 35.

<sup>10</sup> Benchmark A6.

<sup>11</sup> *Kuimov v. Russia* no. 32147/04, 8 January 2009, see in particular paragraph 96.

<sup>12</sup> *Enhorn v. Sweden* (Application no. 56529/00) 25 January 2005 and see further the discussion of these principles in R Cormacain, “Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation” (2020) 8 *Theory and Practice of Legislation*

<sup>13</sup> *Hussain v. Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin), *Dolan* [2020] EWHC 1786 (Admin).

<sup>14</sup> S Laws “Legislating for the relaxation of the lockdown” (Policy Exchange 2020)

compromised”.<sup>15</sup> However, this goes against the principle of a proportionate and nuanced response. Under a proportionate response, measures are carefully crafted and balance the economic and social cost versus how far they contribute to the goal of reducing transmission rates. A blanket response may have the benefit of simplicity, but won’t necessarily be proportionate.

Take the example of golf, tennis and swimming: three activities where the risk of transmission is low. Golf and tennis can both be played outdoors and at a distance from other players. Jane Nickerson, Chief Executive of Swim England argued in an open letter to the Prime Minister that “Swimming pools are well managed, chlorinated, controlled environments where the risk of transmission can be successfully mitigated.”<sup>16</sup> In particular, swimming clubs have been running strict systems for their swimmers, even to the extent of enforcing social distancing in lanes.<sup>17</sup> Unlike premiership football which is allowed, none of these three are contact sports.

**The question for MPs under this Rule of Law criterion is – are these Regulations a proportionate response, and is each individual measure a proportionate response to the valid policy aim of restricting the spread of Covid-19?**

## Time-limited

The Rule of Law requires that emergency measures must be time-limited – they cannot last indefinitely.

This is another more specific aspect of the general principles of necessity and proportionality. The Venice Commission Checklist requires that emergency powers are limited in duration and the Siracusa Principles also require that the duration of emergency powers must be strictly limited in duration to what is necessary.

This principle has been fully accepted in UK legislation. The Coronavirus Act 2020 has a sunset clause as well as review clauses. All emergency legislation passed under the Civil Contingencies Act 2004 and the Public Health (Control of Disease) Act 1984 have automatic expiry clauses.

The Prime Minister stated on Monday, “let me stress that these restrictions are time limited. After four weeks, on Wednesday 2 December, they will expire”<sup>18</sup>. This is not quite the same as what Michael Gove MP said on the Andrew Marr show when he expressed his “fervent hope” and “assumption” that they would end on 2 December.<sup>19</sup>

Regulation 23 of these Regulations states that they expire 28 days after they are made.

**The Regulations satisfy the Rule of Law criterion that they are time-limited.**

The one additional complication here is that these Regulations revoke all the existing Regulations on the tiered system.<sup>20</sup> This will create a gap on 2 December 2020 when these Regulations expire automatically, but there is (at present) no tiered system of Regulations in place to replace them.

## Scientifically sound

There is an emerging principle that the Rule of Law requires that emergency measures must be scientifically sound, that is, have a basis in scientific evidence.

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<sup>15</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 33.

<sup>16</sup> Letter available at < <https://www.swimming.org/swimengland/add-name-letter-to-pm/>>

<sup>17</sup> See for example detailed Covid-19 policies of Hackney Aquatics available at < <https://www.hackneyaquaticsclub.org/covid-policies>>.

<sup>18</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 26.

<sup>19</sup> Interview available at < <https://www.bbc.co.uk/news/av/uk-politics-54769822>>.

<sup>20</sup> Regulation 25 revokes the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, the Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 and the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020.

There is not yet a consensus on this principle, but it is an extension of the principles of proportionality, rationality and the need for evidence-based legislation. It is not a requirement that legislation must automatically contain all recommendations made by the scientific community. That would lead to what some have called an 'autocratic technocracy'.<sup>21</sup> But from the reverse side, it would be against the Rule of Law for legislation to simply ignore the science. Instead, legislation must be scientifically literate, that is, the measures within it should take account of the scientific consensus and only deviate from that scientific consensus if there are very good reasons for doing so.

This principle has been reflected in the parliamentary debates on these Regulations. Dr Liam Fox MP saw the need "to determine that decisions across all parts of Government have been taken on the best available evidence"<sup>22</sup> Sir Ed Davey MP, leader of the Liberal Democrats stated that "we will hold this Government to account for failing to listen to the scientists".<sup>23</sup> Bob Blackman MP thanked the Prime Minister "in particular for laying out the scientific data on which this decision is based".<sup>24</sup> Greg Clark MP stated "It is important that Parliament should have the chance to scrutinise the scientific advice behind these recommendations".<sup>25</sup> This final quote highlights the importance of what Weinberg and Pagliari call the need for transparency and independence in the provision of scientific advice to Government.<sup>26</sup>

**The question for MPs under this Rule of Law criterion is – do these Regulations have a basis in the best scientific evidence? Do they follow the science, and if not, has a sound reason been advanced for not following the science?**

## Democratically legitimate

The Rule of Law requires that all legislation, including emergency legislation, has democratic legitimacy.

The Venice Commission Checklist requires that the process for enacting law is transparent, accountable, inclusive and democratic.<sup>27</sup>

Under the emergency procedures set out in the Public Health (Control of Disease) Act 1984, emergency regulations can be made and come into force straight away, without the need for any parliamentary vote. In recognition of the fact that this created a deficit in proper parliamentary scrutiny, the Government undertook to not make any new coronavirus regulations unless Parliament first had an opportunity to debate them. This stemmed from what was termed the 'Brady amendment' and was welcomed by the Bingham Centre in one of our previous Reports on coronavirus regulations.<sup>28</sup>

The Prime Minister made a statement to the House of Commons on Monday and there followed a debate. MPs will be allowed to vote on the Regulations on Wednesday, before they come into force on Thursday. This is a welcome improvement from the previous practice where Parliament was asked to vote on emergency Regulations weeks after they were made.

However, there are still two difficulties with this procedure from a Rule of Law perspective.

Firstly, the vote will be to simply accept or reject the Regulations. Unlike an Act of Parliament, there is no chance to consider or amend individual provisions. This makes the vote a very blunt tool for deciding laws which have a huge impact upon daily life in England. It forces MPs to either accept the entirety of the Regulations, or to reject them in their entirety. It places MPs who may agree with 95%

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<sup>21</sup> E Windholz 'Governing in a pandemic: from parliamentary sovereignty to autocratic technocracy' (2020) 8 Theory and Practice of Legislation 93.

<sup>22</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 29

<sup>23</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 30

<sup>24</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 34.

<sup>25</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 36.

<sup>26</sup> N. Weinberg and C. Pagliari, 'Covid-19 reveals the need to review the transparency and independence of scientific advice', U.K. Const. L. Blog (15th June 2020) (available at <https://ukconstitutionallaw.org/>)

<sup>27</sup> Benchmark A5.

<sup>28</sup> R Cormacain 'Parliamentary Scrutiny of Coronavirus Lockdown Regulations: A Rule of Law Analysis' 28 September 2020.

of the Regulations but who are fundamentally opposed to 5% in a very difficult position. It makes it impossible, for example, for MPs to fine tune the restrictions by introducing exceptions to make them more proportionate.

Secondly, the time between the Regulations being laid and the Regulations being debated is less than 24 hours. Publishing Regulations on a Tuesday evening for debate on a Wednesday morning does not give sufficient time for proper scrutiny.

Steve Baker MP argued “we could increase parliamentary scrutiny and the legitimacy of the lockdown by moving to using the Civil Contingencies Act 2004 instead of the Public Health Act 1984”.<sup>29</sup> Although there is no guarantee that one Act is better than the other in terms of enhancing scrutiny, the basic point, that there ought to be more scrutiny of these Regulations, is a valid one.

**The question for MPs under this Rule of Law criterion is – does the rushed process for making them and the lack of nuanced scrutiny undermine their legitimacy and therefore the likelihood of their being complied with?**

## Accessible

The Rule of Law requires that legislation be accessible.

Tom Bingham himself made this point in his book on The Rule of Law.<sup>30</sup> It is a point that is reiterated in the Venice Commission Checklist.<sup>31</sup>

If a citizen looks up the official government website on legislation, they will be directed to the page entitled “Coronavirus Legislation”.<sup>32</sup> If they know the difference between primary and secondary legislation (which presupposes a high degree of legal knowledge) then they will see the following list of secondary legislation on coronavirus legislation for England

- The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020 (S.I. 2020/684)
- The Health Protection (Coronavirus, Restrictions) (No. 3) (England) Regulations 2020 (S.I. 2020/750)
- The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 (S.I. 2020/568)
- The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 (S.I. 2020/791)
- The Health Protection (Coronavirus, Collection of Contact Details etc. and Related Requirements) Regulations 2020 (S.I. 2020/1005)
- The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 (S.I. 2020/1045)
- The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020 (S.I. 2020/1103)
- The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020 (S.I. 2020/1104)
- The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (S.I. 2020/1105)

There are many difficulties with accessing these new lockdown Regulations via this list. The first and most obvious difficulty is that the new Regulations are not listed on this page. A citizen concerned

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<sup>29</sup> Hansard House of Commons 2 November 2020 Vol 683 Col 44.

<sup>30</sup> Tom Bingham *The Rule of Law* (Penguin 2011)

<sup>31</sup> Benchmark B1.

<sup>32</sup> <https://www.legislation.gov.uk/coronavirus>

about the new lockdown rules would find it impossible to find them on the official legislation website, because they aren't there. This is mitigated to some extent by the guidance already being publicly available, but guidance is not the same as law. This will presumably be remedied at some stage over the next few days, but it undermines the Rule of Law that these new Regulations are simply not available to view.

The second difficulty is that there is no easy way for the citizen to know what the law is. Should they be looking at the No. 2 Regulations, the No. 3 or the No. 4? Or is this maybe the medium, high or very high Regulations? Without reading the detail of these long and complicated Regulations, there is no easy way for them to know what the law is.

This kind of inaccessibility of legislation undermines the Rule of Law.

**MPs may wish to ask the Government how it plans to make these new Regulations easily accessible to citizens.**

## Points of detail in the Regulations

In the very limited time available to examine these Regulations, it is difficult to effectively analyse them. However, the following points arise:

1. In regulation 2, the definition of “manager” is problematic. The definition is

“the manager”, in relation to a gathering, means the person responsible for the management of the premises in which the gathering takes place

However, it is clear from Part 3 that there can be both indoor gatherings and outdoor gatherings, and that an outdoor gathering can be on land which is open country. As such, the definition of manager doesn't work as open country is not “premises” and the gathering is not “in premises” but “on land”.

2. In regulation 6, under exception 9, it is permitted for a parent to leave home to accompany a child to an educational facility. However, there is no exception to allow a parent to leave home to pick a child up from an educational facility and return home again. Under the actual wording of these Regulations, the school pick-up run is unlawful.

3. Is Part 3 (which prohibits public gatherings) intended to cover proceedings in Parliament? If so, can it be said that proceedings in Parliament fall under exception 2 in regulation 11 as being reasonably necessary for work purposes?

4. In regulation 11, in exception 5, there is a reference to “vulnerable young people”. The context is attending a support group. If so, it is to be presumed that “vulnerable young people” refers to young people who may be emotionally vulnerable etc. However, this conflicts with the definition of “vulnerable” already set out in regulation 4. It is bad practice in legislation for the same word to have two different meanings.

5. In regulation 11, under exception 14, outdoor services to commemorate Remembrance Sunday may be held. The only indoor service in England may be held in Westminster Abbey. On the face of it, this would appear to discriminate against other religions who are not allowed an indoor religious service for Remembrance Sunday.

6. In regulation 11, under exception 14, Remembrance Sunday events require there to be gathering organiser or manager, and that person has to carry out a risk assessment and take all reasonable measures to limit the risk of transmission of coronavirus. These requirements may put off many volunteers from arranging Remembrance Sunday events.



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