



## Resolution 2338 (2020)<sup>1</sup>

# The impact of the Covid-19 pandemic on human rights and the rule of law

Parliamentary Assembly

1. Although primarily a public health crisis, the Covid-19 pandemic is also an unprecedented challenge for human rights and the rule of law – both of which remain applicable even in times of national emergency. The positive obligations under the European Convention on Human Rights (ETS No. 5, the Convention) require States to take measures to protect the life and health of their populations. This imperative does not, however, give States a free hand to trample on rights, suppress freedoms, dismantle democracy or violate the rule of law. Even during a state of emergency, the Convention continues to set limits, thereby ensuring respect for common European fundamental standards.
2. States have taken a wide range of often broadly similar measures to limit the spread of Covid-19. These generally include severe restrictions on freedom of movement and assembly and closures of educational establishments and premises used for commercial, recreational, sports, cultural and religious purposes. Such measures interfere with the enjoyment of Convention rights, sometimes with serious personal consequences for the individuals concerned, but – despite their scope and impact – they do not necessarily violate those rights. Many Convention rights allow for limitations in order to accommodate the need to balance individual against public interests, including the protection of public health and safety. Interference with these rights is permissible under the Convention so long as it is lawful, necessary, proportionate to the public interest being pursued and non-discriminatory. The Parliamentary Assembly welcomes the timely and constructive interventions by the Commissioner for Human Rights of the Council of Europe on various situations relating to this issue.
3. Measures that restrict freedom of expression, access to information and media freedom are not readily justifiable. Information is essential to enable the public to understand the danger and take measures at a personal level to protect themselves. Restricting the public flow of information is detrimental to an effective public health response that attracts the informed and lasting support of the public based on trust in public institutions. Therefore, the Covid-19 pandemic – and other potential similar crises that may occur in the future – should not be taken as a pretext for the adoption of emergency legislation introducing restrictions on freedom of information that are discriminatory and go beyond what is lawful, necessary and proportionate. Journalists, whistle-blowers and human rights defenders are key assets in preventing further harm by disclosing bad practices in good time for corrective measures to be taken. Only deliberate dissemination of misinformation that may cause significant public harm should be controlled, on the basis of laws that are clearly and narrowly defined and non-discriminatory.
4. Whilst states of emergency or similar exceptional regimes may allow for a more rapid, flexible and effective response, they limit the application of normal checks and balances. They are thus potentially hazardous from the perspective of human rights, democracy and the rule of law. The Assembly therefore fully endorses the principles applicable to states of emergency that have been elaborated by the European Commission for Democracy through Law (Venice Commission).

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1. *Text adopted by the Standing Committee, acting on behalf of the Assembly, on 13 October 2020 (see [Doc. 15139](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Vladimir Vardanyan, and [Doc. 15158](#), opinion of the Committee on Culture, Science, Education and Media, rapporteur: Mr Bogusław Sonik).*

See also [Recommendation 2180 \(2020\)](#).



5. In this connection, the Assembly welcomes the fact that many member States have already brought their states of emergency to an end or have replaced them with less restrictive legal regimes and measures, once the public health situation allowed this. It also notes that several States have encountered difficulties in identifying a legal basis for the exceptional measures that they have had to introduce which meets the requirements of legality and constitutionality. There should not and need not be any tension between effectiveness and legality. All member States would benefit from a thorough review of the measures taken in response to the pandemic, in order to ensure that a clear and sufficient legal framework exists for the future.

6. The Assembly notes that an unprecedented number of States have exercised their right to derogate from their obligations under the Convention with respect to measures they have taken in response to the pandemic. It recalls its [Resolution 2209 \(2018\)](#) and [Recommendation 2125 \(2018\)](#), entitled “State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights”, in which it recognised that protracted states of emergency and derogations have the effect of normalising lower standards and habituating populations to greater interference with their rights. The aim of the proposals made in these texts was to support national authorities in understanding the legal complexities in this area and to encourage a more harmonised approach in future. The Assembly considers that recent experience underlines the need for this.

7. It is increasingly assumed that smartphone contact tracing applications (apps) will form part of many countries’ responses to the pandemic. The Assembly notes that a lack of public trust in such apps due to privacy-related concerns, resulting in low levels of installation or use, would seriously undermine their effectiveness. The Assembly recalls the Council of Europe’s modernised Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (CETS No. 223, Convention 108+), whose standards member States should seek to respect when enacting the primary legislation necessary to introduce and regulate contact tracing apps. It fully endorses the advice given by the Chairperson of the Consultative Committee of Convention 108 and the Council of Europe Data Protection Commissioner on how these standards should be applied in the context of the Covid-19 pandemic. As regards applications of artificial intelligence systems to data processing in this context, it welcomes Committee of Ministers Recommendation CM/Rec(2020)1 on the human rights impacts of algorithmic systems.

8. The Assembly notes that the functioning of national judicial systems has also been severely disrupted by the pandemic. It recalls the rights to liberty and security, a fair trial and an effective remedy, as protected by the Convention, and the importance of ensuring respect for constitutional principles. It underlines the need to prioritise cases according to their urgency, general importance and impact on individual rights and vulnerable groups. It therefore fully endorses the “Declaration on Lessons Learnt and Challenges Faced by the Judiciary During and After the Covid-19 Pandemic” adopted by the European Commission for the Efficiency of Justice (CEPEJ).

9. The Assembly notes that the situation of persons deprived of their liberty makes them particularly vulnerable to infection and the negative consequences of prolonged physical isolation. It recalls the prohibition on inhuman or degrading treatment or punishment under the Convention, which obliges states to take action to protect the health and safety of persons deprived of their liberty. It therefore fully endorses the “Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic” adopted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

10. The Assembly notes that the massive increases in public expenditure on procurement of medical and other pandemic-related goods, and on economic support and stimulus measures, create a particular risk of corruption. It therefore fully endorses the guidance on “Corruption Risks and Useful Legal References in the Context of COVID-19”, issued by the President of the Group of States against Corruption (GRECO).

11. All member States of the Council of Europe have been forced to take exceptional measures in response to the exceptional threat posed by the Covid-19 pandemic. On the whole, European democracies have proved themselves capable of responding effectively without betraying their fundamental values. Whether or not the measures taken have been successful from a public health perspective, they should be carefully monitored for compliance with Council of Europe standards and studied in order to learn lessons for the future. As an extreme stress-test, Covid-19 is an opportunity to reinforce national systems, so that if there is another pandemic, authorities can respond quickly and effectively, confident that they are respecting human rights and the rule of law.

12. The Assembly therefore calls upon member States of the Council of Europe to:
- 12.1. ensure that all measures restricting human rights that may be taken in response to a public health emergency are lawful, necessary, proportionate and non-discriminatory, and that they fully respect the principles applicable to states of emergency that have been elaborated by the Venice Commission;
  - 12.2. keep all restrictive measures under review in light of the evolution of the pandemic, to ensure that only those restrictions that are still necessary and proportionate remain in force;
  - 12.3. review the measures taken in response to the pandemic, in order to ensure that a clear and sufficient legal framework exists for the response to any future pandemic and, where necessary, submit any proposed reforms to the Venice Commission for opinion;
  - 12.4. take a cautious, progressive approach to emergency measures, adopting those that require derogation only as a last resort, when strictly required because other, less restrictive options prove inadequate;
  - 12.5. if a derogation is strictly required, ensure that the notification to the Secretary General includes full details of the declaration of the state of emergency, the derogating measures, the duration of the derogation (or its extension) and the Convention rights affected;
  - 12.6. fulfil their positive obligation to protect media freedom and the safety of journalists by using all necessary means to end physical and verbal attacks on media professionals;
  - 12.7. stop the practice of blocking websites and initiating criminal prosecution to intimidate and silence critics, on the pretext of fighting disinformation;
  - 12.8. ensure that all measures involving automated processing of personal data, including contact-tracing smartphone applications, fully respect the standards of Convention 108 (and, where relevant, Convention 108+), along with Committee of Ministers Recommendation CM/Rec(2020)1 as regards applications of artificial intelligence systems, taking full account of expert guidance given by bodies such as the Consultative Committee of Convention 108;
  - 12.9. where contact tracing may lead to compulsory self-isolation or quarantine, ensure that rapid testing for infection is available to the people concerned so that those not infected may be released from such restrictions as soon as possible, in accordance with the principle of proportionality;
  - 12.10. sign and ratify Convention 108+, if they have not already done so;
  - 12.11. ensure that any disruption to the judicial system does not lead to violations of the rights to liberty and security, a fair trial and an effective remedy, or of constitutional principles, including by:
    - 12.11.1. prioritising cases according to their urgency, general importance and impact on individual rights and vulnerable groups;
    - 12.11.2. promoting the introduction of technological solutions such as online services, remote hearings and videoconferencing;
    - 12.11.3. taking full account of the expert guidance given by bodies such as the CEPEJ;
  - 12.12. ensure that the health and safety of persons deprived of their liberty are protected and that they are not subjected to inhuman or degrading treatment or punishment, taking full account of the expert guidance given by bodies such as the CPT;
  - 12.13. ensure that the massive increases in public expenditure related to the pandemic and its aftermath are not accompanied by an increase in corruption, by fully applying the standards of the Criminal and Civil Law Conventions on Corruption (ETS Nos. 173 and 174) and taking full account of the expert guidance given by bodies such as GRECO;
  - 12.14. conduct a prompt, thorough and independent review of the national response to the Covid-19 pandemic, including its effectiveness and respect for human rights and the rule of law, with a view to ensuring that if there is another pandemic, the authorities can respond quickly and effectively, in accordance with Council of Europe standards.
13. The Assembly reiterates its invitation in [Resolution 2209 \(2018\)](#) to the Secretary General of the Council of Europe to consider how her office can play a more proactive role in relation to derogations, including by:
- 13.1. providing advice to any State party, when considering a derogation, on whether derogation is necessary and, if so, how to limit its scope;

13.2. opening an inquiry under Article 52 of the Convention in relation to any State that derogates from the Convention;

13.3. on the basis of information provided in response to such an inquiry, engaging in dialogue with the State concerned with a view to ensuring the compatibility of the state of emergency with Convention standards, whilst respecting the jurisdiction of the European Court of Human Rights.