



Covid-19: When is a rule not a rule?

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There has been some confusion over the extent of the Government's legal powers in the Covid-19 lockdown, and the precise status of a "rule". There is a difference between regulation and legislation. [Voermans](#) argues that legislation is the constitutionally authoritative form in which law is made by the state. Regulation is much broader and means any public intervention in a market or in society. Legislation means [banning](#) smoking in enclosed public spaces. Regulation includes the NHS website [encouraging](#) us to stop smoking. [Naundorf and Radaelli](#) writing on regulatory evaluation set out some of the wide variety of regulatory mechanisms. These include command and control regulation (i.e. legislation), self-regulation, deregulation, voluntary programmes, negotiated regulation, education and training campaigns (including 'nudging'), information, economic and market-based instruments, and free markets.

In practical terms, there are a lot of things the Government tells me I ought to do: eat 5 portions of fruit and veg a day, fly less, help my kids with their homework, pay tax on time, dispose of rubbish correctly etc. It uses a whole host of regulatory techniques to do this, following the sequence above: ad campaigns at my GP surgery, an aviation tax, peer pressure via school teachers, using behavioural insights to tell me that most people do pay their tax on time, prosecuting fly-tipping. There is nothing wrong with any of this, the Government is entirely free to adopt any method to carry out its democratically mandated program.

The difficulty arises when there is a blurring of the boundaries between what the law says I must do, and what the Government says I ought to do. One central tenet of the Rule of Law is that we are ruled in accordance with the law, not in accordance with the utterances of an authority figure. This was the point that Thomas Paine made in [Common Sense](#) when he said that in America there was no king, but that the law was king. (A point that Donald Trump doesn't appreciate when he claims [absolute power](#)). This blurring of the boundaries has happened repeatedly during the Covid-19 crisis.

The Government's coronavirus [homepage](#) begins with "what you need to do". This includes staying 2 metres away from other people. You can then "read more about what you can and cannot do". Following the link leads to the [Coronavirus FAQs](#): you "should" only leave the house for one form of exercise a day, and you "must" stay at least 2 metres away from people who aren't in your household. The webpage concludes with a warning of what happens "if I break the rules".

The difficulty is that what is being represented as rules are not rules, but guidance. The actual [rule](#) (regulation 6(2)(b) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020) states that a person may leave the house to take exercise (although the rule in Wales does limit this to once a day, regulation 8(2)(b) Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020). The actual rules do not include a 2 metre limit. If a provision is important, it should be included in the rules. The [Bingham Centre Report on Delegated Powers](#) points out that the Joint Committee on Statutory Instruments has said that statutory instruments should be sufficiently clear, precise, and certain to ensure that guidance need not be relied on to interpret them.

The Coronavirus FAQs are a jumble of rules and guidance, sometimes requesting, sometimes ordering, but with the underlying message that they represent legal obligation. The [Bingham Centre Report on Delegated Powers](#) notes that guidance is not

legislation and should not include matters that should properly be included in legislation. More broadly, according to [Sandhurst](#) "Government has promulgated exaggerated and misleading claims as to their [i.e. the rules] meaning and effect". This confusion extends to the police, with examples such as officers mistakenly instructing people that they can't sit in their own front [garden](#). Witness Lord Sumption's [statement](#) that "The police have no power to enforce ministers' preferences but only legal regulations, which don't go anything like as far as the government's guidance". Thankfully, there is now legally accurate [guidance](#), issued by the National Police Chief's Council and the College of Policing which much more faithfully replicates what the actual law is.

Does any of this actually matter, or is it just legal pedantry? Regardless of whether it is law or guidance, only a fool would risk lives by going against medical advice. There is little merit in proving a legal point and ending up catching a dangerous virus. However, it absolutely matters that we respect the Rule of Law, not the Rule of Guidance. Trust in official sources is vital during this pandemic, and trust requires the Government to clearly state what are legally enforceable rules and what is sensible guidance.

URL: <https://binghamcentre.biicl.org/comments/88/covid-19-when-is-a-rule-not-a-rule>