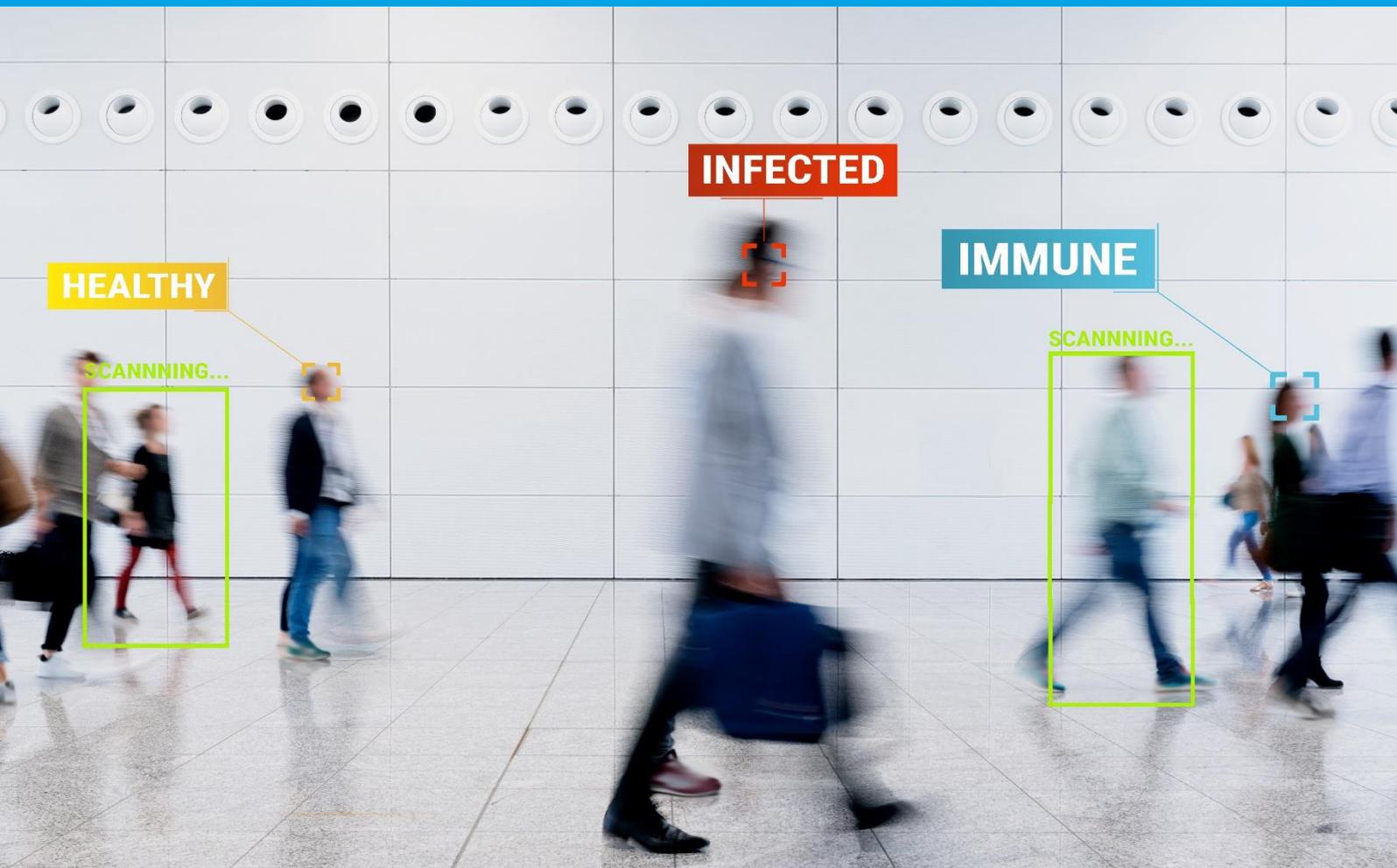


THE RULE OF LAW AND COVID-19 RELATED TECHNOLOGIES

Dr Julinda Beqiraj | Rowan Stennett | Nyasha Weinberg



Copyright: This working paper was developed by the Bingham Centre for the Rule of Law as part of the project “Rule of Law, Legitimacy and Effective COVID-19 Control Technologies” supported by the [TUM Institute for Ethics in Artificial Intelligence \(IEAI\)](#).

© Bingham Centre copyright, May 2021.

Dr Julinda Beqiraj, Maurice Wohl Senior Fellow in European Law, Bingham Centre for the Rule of Law, BIICL.

Rowan Stennett, Bonavero Institute of Human Rights, University of Oxford, Bingham Centre Summer Fellow.

Nyasha Weinberg, consultant at the Bingham centre for the Rule of Law.

The document is available for free download from the website of the Bingham Centre for the Rule of Law ([here](#)).

About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham’s inspiring vision: a world in which every society is governed by the Rule of Law “in the interests of good government and peace at home and in the world at large.” The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

- We carry out independent, rigorous and high-quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policymaking, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

www.binghamcentre.biicl.org

Questions

- How is the Rule of Law relevant in the introduction of new technologies?
- What are the different conceptions of the Rule of Law?
- What are the core elements of a functional definition of the Rule of Law?
- What are the advantages and limits of using a Rule of Law lens when assessing the introduction of new technologies?

Contents

1. The Relevance of the Rule of Law for New Technologies	2
2. Definition(s) of the Rule of Law	3
2.1. The ‘Thin’ and ‘Thick’ Conceptions of the Rule of Law	3
2.2. A Functional Definition of the Rule of Law.....	5
(i) Legality	7
(ii) Legal Certainty	7
(iii) Prevention of Misuse of Powers.....	8
(iv) Non-discrimination, Equality Before the Law and Compliance with Human Rights	9
(v) Access to Justice.....	10
3. Assessing Technologies for Managing the Pandemic in the Light of Rule of Law Principles	11
4. Review: Advantages and Limits of Using a Rule of Law Lens When Assessing the Introduction of New Technologies	12
(i) What Does a Rule of Law Lens Bring?	12
(ii) Why Opt for a ‘Thick’ Definition?.....	12
(iii) Contextualizing the application of the Rule of Law elements	13

1. The Relevance of the Rule of Law for New Technologies

Inherent in the introduction of any new technology is the potential for conflicts. In relation to the introduction of technologies for the management of COVID-19, concerns have been voiced that technologies may not necessarily be in everybody's best interests. In particular, COVID-19 contact tracing apps, which should help identifying, through digital means, persons who may have been in contact with an infected individual have raised concerns about the negative impacts on fundamental freedoms, including freedom of association, and privacy. Contact tracing apps are just one example, but similar concerns may apply to other technological responses such as the use of surveillance cameras, facial recognition technologies etc.

Several frameworks for building contact tracing apps have been developed and numerous applications have been developed or proposed, with a main distinction being drawn between centralized and decentralised contact tracing approaches.¹ The first uploads the anonymised data (of smartphone owners being close to each other; or other tracking device) into a remote server where matches are made with other contacts, should a person start to develop COVID-19 symptoms. The second approach, instead, keeps the data on the phone, where the matches are made with people who may have contracted the virus. While both models have their supporters, the centralised model has prompted concerns about the likelihood of extended government powers over citizens, and negative impacts on their fundamental freedoms.²

In democratic nation states, by reducing arbitrary exercise of power, the Rule of Law is an essential precondition for government legitimacy, albeit not the only one. During a period of emergency, when the powers available to government shift to enable them to deal with that emergency, it is essential to look back to what good law is about and why the Rule of Law is so important. As John Locke put it, law should serve "not to abolish or restrain, but to fundamentally preserve and enlarge freedom."³

The Rule of Law, in the writings of John Locke and Friedrich von Hayek,⁴ among others, is bound up with theories about circumscribing the role of the sovereign in a modern State, and the position of the law in that process. Within this tradition, the Rule of Law rejects the use of arbitrary power, fundamentally constraining both individual and institutional behaviour. This type of approach implies that harms that we prevent through law during a non-emergency period, cannot suddenly be brought about just because we are facing a global pandemic. As emphasised by the European Court of Human Rights, "[even] in the framework of a state of emergency, the fundamental principle of the rule of law must prevail".⁵

This is the principle that motivates our emphasis on the Rule of Law during this period of immense upheaval. The Rule of Law provides a perimeter of legitimacy of the restrictive measures taken in response to a crisis or in an emergency situation. Put differently, responses to public emergencies (including data driven responses in the context of health emergencies) are often introduced and/or implemented through laws and regulations, which should be in compliance with Rule of Law principles. Adherence to Rule of Law safeguards and other international principles, when adopting measures during an emergency, are expected to

¹ See, among others, European Parliament Briefing, 'National COVID-19 contact tracing apps', May 2020, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652711/IPOL_BRI\(2020\)652711_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652711/IPOL_BRI(2020)652711_EN.pdf)>.

² Orla Lynskey, and Michael Veale, Written evidence to the UK Parliament, 6 May 2020, <<https://committees.parliament.uk/writtenevidence/4090/html/>>.

³ John Locke, Two Treatises of Government, Second Treatise, Chapter 6 and Chapter 11

⁴ Friedrich Hayek, Law, Legislation and Liberty, 1973.

⁵ Piskin v. Turkey (no. 33399/18), 15 December 2020 (not final), para. 153. Citation from Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', European Law Journal, 7 January 2021, p. 5, <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12377>>.

strengthen public trust in institutions and consolidate the legitimacy of the measures. This should ultimately bolster their effectiveness through increased compliance.

2. Definition(s) of the Rule of Law

This section sets out the different conceptions of the Rule of Law and how it applies in to COVID-19-related technologies.

2.1. The ‘Thin’ and ‘Thick’ Conceptions of the Rule of Law

The Rule of Law is comprised of separate, desirable, components. The table below shows the Rule of Law components as identified by main theorists in the literature.⁶

Fuller	Raz	Finnis
<ul style="list-style-type: none"> • Generality of law • Promulgation • No retroactive laws • Clarity of laws • No contradictions in the laws • Laws do not require the impossible • Relative constancy of laws through time • Congruence between official action and declared rule 	<ul style="list-style-type: none"> • Laws are prospective, open, and clear • Laws are relatively stable • The making of particular laws is guided by open, stable, clear, and general rules • Independence of the judiciary must be guaranteed • Principles of natural justice must be observed • Courts have review powers over the implementation of the other principles • Courts are easily accessible • The discretion of the crime-preventing agencies is not allowed to pervert the law 	<ul style="list-style-type: none"> • Rules are prospective • Rules are possible to comply with • Rules are promulgated • Rules are clear • Rules are coherent with one another • Rules are sufficiently stable • The making of degrees is limited • Officials are accountable for compliance with the rules

In the Anglo-American tradition, the Rule of Law is an ideal which contains, at its core, a number of basic principles. Thin versions of the Rule of Law, from within this tradition, concern how any given law is made and applied. The ‘thin’ conception includes the requirement that States make clear laws, that they do so in a transparent manner, that the law is equally applied, and that States enable fair and impartial dispute resolution and access to justice.

⁶ Lon L Fuller, *The Morality of Law: Revised Edition*. Yale University Press, 1969. JSTOR, www.jstor.org/stable/j.ctt1cc2mds. Accessed 17 Mar. 2021; Joseph Raz, *The Rule of Law and its Virtue*, https://www.researchgate.net/publication/329711055_The_Rule_of_Law_and_its_Virtue, 1979, https://www.researchgate.net/publication/329711055_The_Rule_of_Law_and_its_Virtue; John Finnis, *Natural law and natural rights*, OUP, 1980.

In practical terms, this conception ensures that if an introduced technology engages a particular requirement in the existing corpus of law', the relevant law is applied to the governance of that technology. A prime example here would be privacy laws, or data protection laws being used in the governance of a data-dependent technology.

At the opposite end of the spectrum is the “thick” Rule of Law, which moves beyond procedural safeguards to also consider the content of the law. In this view, the Rule of Law requires state compliance with international law, and adequate protection of fundamental human rights. Broader understandings of the Rule of Law, such as those expounded by the Council of Europe’s (CoE) Venice Commission (VC),⁷ the United Nations⁸ and Lord Bingham’s definition,⁹ proscribe arbitrary behaviour by governments and protect human rights, in addition to the formal aspects of the Rule of Law, as set out above.

The table below shows how the constituent parts of the Rule of Law vary according to whether the concept is defined in a ‘thin’ or ‘thick’ manner.

Thin	←—————→			Thick
Rule by law	Legality	Rights conception	Democratic conception	
Government action is justified by the law.	Government action is justified by the law.	Government action is justified by the law.	Government action is justified by the law.	
	Generality, formal equality, publicity, prospectivity, consistency, clarity, stability, congruence.	Generality, formal equality, publicity, prospectivity, consistency, clarity, stability, congruence.	Generality, formal equality, publicity, prospectivity, consistency, clarity, stability, congruence.	
	Independence of the judiciary, principles of natural justice, judicial review, access to the courts.	Independence of the judiciary, principles of natural justice, judicial review, access to the courts.	Independence of the judiciary, principles of natural justice, judicial review, access to the courts.	
	Justification, procedural principles, and reasonability.	Justification, procedural principles, and reasonability.	Justification, procedural principles, and reasonability.	
		Civil and political rights. Sometimes also economic, social and cultural rights.	Civil and political rights. Sometimes also economic, social and cultural rights.	
			Thin conception of democracy.	

Beyond the theoretical modulations of the meaning of the Rule of Law, the core elements that constitute the principle, such as stability, predictability, intelligibility of the laws, limitation of discretion and abuse of power, equality before the law, and access to justice are shared across

⁷ ‘Rule of Law Checklist’ adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

⁸ Report of the Secretary-General, ‘The rule of law and transitional justice in conflict and post-conflict societies’, 23 August 2004, S/2004/616, at para 6, available at <<http://undocs.org/en/S/2004/616>>.

⁹ Tom Bingham, *The Rule of Law*, Penguin Books, 2011, 84.

jurisdictions, despite the contextual specificities of each country, hence the universality of the Rule of Law.¹⁰ In the words of Judge Spano:¹¹

“(…) the rule of law is not a legal principle which is limited to Western liberal democracies. Quite the contrary, it is a norm and a foundational ideal that transcends borders, traditions and cultures. The rule of law constitutes a core feature of any truly democratic system of communal human life regulated by legally binding norms. (…) Recall in this regard that the United Nations' Universal Declaration of Human Rights, with its direct reference to the rule of law in its Preamble, which lies at the origins of the Convention, is itself a global instrument guiding all 192 Member States of the United Nations.”

Adding a Rule of Law frame to the analysis of COVID-19 related technology demands that governments provide legal justification for any measures that risk encroaching on rights, including privacy, free movement, and assembly, among others. The advantage of incorporating a thick Rule of Law perspective that encompasses human rights ensures that governments, and third parties can be held to account for decisions that risk circumscribing freedoms. It creates a space for questioning the rationale and justification for the introduction of technologies with potentially adverse effects on citizens.

A Rule of Law approach towards the appraisal of lockdown technologies is useful because the values that underpin the Rule of Law ensure that power is held to account. In any political community under pressure, such as the immense pressure created by lockdown, finding mechanisms to make power less arbitrary, unpredictable and coercive is essential.¹² It is during times of such instability that what Fuller calls the bond of reciprocity¹³ - the bond between the ruler and the ruled - becomes so important.

2.2. A Functional Definition of the Rule of Law

The Council of Europe, which is founded upon the Rule of Law,¹⁴ has provided guidance as to the content of the Rule of Law, both in the case law of the European Court of Human Rights,¹⁵ and in the activities of a number of its bodies and monitoring mechanisms. The work of the Venice Commission, an advisory body of the Council of Europe, is particularly relevant in clarifying and streamlining the meaning of the Rule of Law as a concept of universal validity.

The 2011 Venice Commission 'Report on the Rule of Law' proposed a functional non-exhaustive ('thick') definition of the concept,¹⁶ drawing on the definition proposed by British Judge, Lord Bingham.¹⁷ In 2010, Lord Bingham had grasped the essence of the principle to be 'that all

¹⁰ On the Rule of Law as a universal principle see Joseph Raz, 'The Law's Own Virtue', (2019) 39(1) Oxford Journal of Legal Studies, p. 4.

¹¹ Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', European Law Journal, 7 January 2021, p. 5, <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12377>>.

¹² In Krygier's teleological account of the Rule of Law there are three modes of exercising power that make people vulnerable to arbitrary treatment. Power is arbitrary when it is uncontrolled, unpredictable and/or unrespectful. Martin Krygier, 'The Rule of Law and State Legitimacy' in Martin Krygier, Legitimacy (Oxford University Press 2019)

<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198825265.001.0001/oso-9780198825265-chapter-7>

¹³ Lon L Fuller, The Morality of Law: Revised Edition. Yale University Press, 1969. JSTOR, www.jstor.org/stable/j.ctt1cc2mds. Accessed 17 Mar. 2021.

¹⁴ Statute of the Council of Europe, London, 5.V.1949, <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680935bd0>.

¹⁵ For a summary see L. Pech and J. Grogan, 'Meaning and Scope of the EU Rule of Law', RECONNECT deliverable 7.2, p. 28-35. The Bingham Centre contributed Section 3 on the Council of Europe legal framework.

¹⁶ Venice Commission, 'Report on the Rule of Law' CDL-AD(2011)003rev-e, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e).

¹⁷ Tom Bingham, The Rule of Law (Penguin Books 2011) 84.

persons and authorities within the state, whether public or private should be bound by and entitled to the benefit of the laws publicly made, taking effect (generally) in the future and publicly administrated in the courts'.¹⁸ The Venice Commission's report identified a consensus on six necessary elements of the Rule of Law. These were further distilled into five, in the Venice Commission's 2016 'Rule of Law Checklist', making clear that respect for human rights informs the other elements: 'The Rule of Law would just be an empty shell without permitting access to human rights. Vice-versa, the protection and promotion of human rights are realised only through respect for the Rule of Law'.¹⁹

The Checklist, developed with the help of the Bingham Centre for the Rule of Law, was adopted in March 2016. Each of the five Rule of Law elements in the Checklist is accompanied with practical benchmarks which are intended to serve as a useful tool for assessing adherence to the Rule of Law within a state in a manner that is 'objective, thorough, transparent and equal'.²⁰

	Lord Bingham's definition	VC report definition	VC Checklist definition
(1)	Law not discretion	Legality (transparent, accountable, and democratic process for enacting law)	Legality
(2)	Accessibility of laws	Legal certainty	Legal certainty
(3)	Reasonable exercise of power for the purposes which it was conferred	Prohibition of arbitrariness	Prevention of abuse (misuse) of powers
(4)	Equality before the law	Non-discrimination and equality before the law	Equality before the law and non-discrimination
(5)	Accessible dispute resolution	Access to justice before independent and impartial courts, including judicial review of administrative acts	Access to justice
(6)	Protection of human rights	Respect for human rights	
(7)	Fair trial		
(8)	The Rule of Law in the international legal order		

The strength of the functional approach to the Rule of Law adopted by the Venice Commission is proved by the wide acknowledgement, use of and adherence to this approach by the 47 Members of the Council of Europe and 15 other States, as well as by different Council of Europe and EU institutions, which substantiate the claim that 'there is now a consensus on the core meaning of the rule of law and the elements contained within it'.²¹

The elements of the Venice Commission definition, as analysed in more detail below, offer a useful paradigm for the appraisal of new technologies, especially if these are introduced during a time of emergency. The consensus over the formulation of the core Rule of Law elements, however, does exclude the need to contextualise their application, so as to take the social and cultural backgrounds into account.

¹⁸ Ibid., p. 8.

¹⁹ 'Rule of Law Checklist' adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

²⁰ See A Drzemczewski, 'The Council of Europe and the Rule of Law: Introductory Remarks regarding the Rule of Law Checklist Established by the Venice Commission' (2018) 37 Human Rights Law Journal 179.

²¹ Venice Commission, 'Report on the Rule of Law' CDL-AD(2011)003rev-e, para 35.

(i) Legality

The legality principle requires that State action is carried out in accordance with transparent and democratically enacted laws, not mere discretion. It also requires that the process for enacting laws is transparent, democratic, and subject to scrutiny. Not only States, but also hybrid or private parties are subject to the Rule of Law when performing public tasks.

When applied in practice, the legality principle requires a legal basis for action, but not necessarily the enactment of new laws. The existing legal basis on which States usually introduce new healthcare technologies may be sufficient. Therefore, the opportunity for scrutiny and democratic participation will depend on a number of factors, such as whether new laws are introduced or based on existing legislation; the form of law-making through which the measures are introduced (e.g., executive decree or primary legislation); or the extent of collaboration with private parties. The essence of the legality principle is that proper scrutiny and accountability should not be bypassed by outsourcing to private parties.

As earlier noted, a Rule of Law approach towards the appraisal of new technologies is useful because it ensures that power is held to account, and thus enhances legitimacy. This will occur for instance through scrutiny mechanisms, including ex-ante mechanisms, exposing the absence of a legal basis, lack of compliance with procedural rules for law-making, or lack of democratic accountability. However, in practice, ensuring the appropriate level of scrutiny amid a public emergency might be a challenging task.

The Principle in Practice

The **Indian** CT app *Aarogya Setu* was introduced as mandatory for Government and private sector employees. The app has been defined as “utterly illegal” and has been criticized for being mandated without a proper legal basis and in a discretionary manner.

The Indian Constitution requires that violations or restrictions of rights be established in the law, and the introduction of the app by the government has raised concerns over a trend of ‘rule by executive decree’, during the pandemic.

Source: Gautam Bhatia, [The Mandatory Imposition of the Aarogya Setu App Has No Legal or Constitutional Basis](#), 4 May 2020; [Mandating Use Of Aarogya Setu App 'Illegal', Justice B N Srikrishna Raises Concerns Over Controversial App](#), 12 May 2020.

South Korea, instead, is a good example, where almost all measures introduced have been supported by a legal basis and positive law. Moreover, it is worth noting that South Korea did not trigger its emergency law.

Source: A comprehensive survey of authority, powers and control measures related to COVID-19 in South Korea has been carried out by the Centre for Artificial Intelligence and Data Governance ([CAIDG](#)) and will be soon available [here](#).

(ii) Legal Certainty

As a component of the Rule of Law, legal certainty requires accessible, intelligible, clear, predictable and prospective laws, as far as this is possible. In the criminal law sector, the legal certainty principle involves compliance with the no punishment without law (*nulla poena sine lege*) principle.

When applied in practice, the principle has prompted calls for an explicit (new) clear legal basis for Contact Tracing (CT) apps, rather than relying on and using existing legislation. A clear legal basis would ensure that powers exercised are not uncontrolled or unpredictable. In the UK, for instance, when considering the introduction of the new app (which nevertheless did not take place) it has been put forward that “*Government assurances about intended privacy protections for any data collected do not carry any weight unless the Government is prepared to enshrine*

these protections in legislation. A Bill would provide necessary legal clarity and certainty as to how data gathered could be used, stored and disposed of. It would also increase confidence in the app, increase uptake, and improve efficacy.”²²

Penalties for misuse or non-use of apps have been introduced and enforced in some cases (e.g., United Arab Emirates),²³ being provided for in the legislation. Appropriateness of penalties can nevertheless, in principle, be challenged for compliance with human rights.

Compliance with the legal certainty principle, however, rests on a delicate equilibrium. On the one hand, in emergencies, we see more

rapid State action where responses can rely on existing legislation. To ensure this, States need to legislate at a level of generality which leaves room for their approach to evolve and be adjusted rapidly, without making the law excessively vague and unclear. On the other hand, a new legal basis may provide certainty, but the risks are that it could be overly specific and become rapidly outdated, or that it leads to unclear duplication of the relevant law. The Rule of Law does not dictate one “best path” for States in this regard and the right equilibrium should be guided by the context.

(iii) Prevention of Misuse of Powers

The prevention of misuse of powers component of the Rule of Law requires that executive power is exercised in good faith, fairly and within the limits for which it was conferred. Limiting executive misuse of powers during an emergency is a particular challenge for courts and legislatures, but this is precisely where the Rule of Law operates as safeguard and should best inform responses to the emergency. As highlighted in the Venice Commission’s Rule of Law Checklist “State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law.” The scope of the Rule of Law in this regard does not (should not) alter during a crisis.

The Principle in Practice

In the **UK**, the Health Secretary has stated that:

Existing legislation (especially the Data Protection Act 2018 and the Human Rights Act 1998), our commitment towards transparency, and the commitments I have previously set out ensure high levels of security and privacy, and will provide the public with the right protection and give them clarity and confidence to download and use the app.

Source: [Letter to Rt Hon Harriet Harman MP](#), 21 May 2020

Singapore launched the TraceTogether app in March 2020, which uses Bluetooth to ping close contacts. As an alternative to the smartphone app, the government also offers TraceTogether tokens. With a very broad app acceptance rate (almost 80%), citizen disquiet emerged in early 2021 as a result of announcements made to the public that data collected from *TraceTogether* can be retrieved by the Singapore police.

As a response, the government passed new laws guaranteeing that data can only be accessed for investigation or criminal proceedings relating to serious offences laid out in the COVID-19 (Temporary Measures) Act.

Source: Kirsten Han, [Broken promises: How Singapore lost trust on contact tracing privacy](#), 11 January 2021.

²² UK Parliament, Joint Select Committee on Human Rights, ‘Human Rights and the Government’s Response to Covid-19: Digital Contact’, <https://publications.parliament.uk/pa/jt5801/jtselect/trights/343/34302.htm>.

²³ Norton Rose Fulbright, Contact tracing apps in United Arab Emirates. A new world for data privacy, <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/contact-tracing/uae-contact-tracing.pdf?revision=15694ff9-c6c0-4419-81e0-b89600c54356&la=en-za>

The Rule of Law requires that emergency public powers are only used amidst emergencies. Thus, when applied in practice, the prevention of misuse of powers principle requires that if an app is part of a long-term response, it should not rely on an emergency legal basis.

The principle also requires judicial and legislative oversight of the use of powers.

For the courts, this requirement feeds into the access to justice component and the concerns about the viability of judicial review/ *ultra vires* challenges to executive action during a public health emergency. Parliaments must also continue to debate, scrutinise, and explain the intended use of executive powers. Depending on context, media scrutiny may assist Parliamentary scrutiny (where it faces disruptions) but it is not an adequate substitute and fundamentally lacks the authority to provide monitoring of the use of executive powers.

The Principle in Practice

The **Israeli** Security Agency conducted electronic contact tracing without explicit statutory authorisation, acting under its general power (in s.7A of the ISA Law) to 'protect and advance essential national security interests'

The Israeli Supreme Court held that at this point in the crisis, such general authority no longer sufficed to authorise intrusive electronic surveillance. While the action was initially lawful, circumstances had now changed such that continued reliance on these powers was unconstitutional.

Source: Elena Chachko, [The Israeli Supreme Court Checks COVID-19 Electronic Surveillance](#), 5 May 2020.

In relation to data-driven emergency responses, fair and *bona fide* exercise of the public power to collect sensitive health data will functionally overlap with privacy principles (e.g. purpose limitation may be introduced in the law to ensure that powers are not used for ulterior objectives).

(iv) Non-discrimination, Equality Before the Law and Compliance with Human Rights

This component implies that the Rule of Law can only be fully realised in an environment that respects and protects human rights. The laws should refrain from discriminating against individuals or groups and should guarantee equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Related to this, equality before the law involves that all individuals should be subject to the same laws, with no individual or group having special legal privileges.

In the context of data-driven responses to public health emergencies, measures should strike the right balance between specific conflicting rights, such as the right to liberty, freedom of movement, the right to work, manifestation of religion, privacy, non-discrimination and the right to life and health. There is no one solution fits all in this regard, rather decisions can be driven by respect of contextual differences. However, in finding such balance, governments should be guided by and respect the general principles of necessity and proportionality and opt for the least rights-intrusive measure.

The Principle in Practice

The **Polish** app, *Kwarantanna domowa*, does not seem to comply with the proportionality requirement that measures taken should be the least restrictive of HRs as is possible. Are these measures necessary for the app to be effective?

Data is retained for 6 years, stored on a centralised server, and uploaded automatically. It can be accessed by the Health Department, the State IT Department, and the Police.

Source: Norton Rose Fulbright, [Contact tracing apps in Poland](#), 2 February 2021.

In relation to the introduction of apps as a public health emergency-related tool, the principle is particularly relevant in relation to interferences with the right to privacy. Privacy principles governing the collection of data have been elaborated extensively by some legislatures (e.g., Australia, Canada, Germany, Hong Kong, Russia, the United Kingdom etc.).²⁴ The most significant elements are voluntariness, purpose and time limitation and data minimization. In some cases, the app itself may operate in a discriminatory manner, through digital exclusion, particularly for older and disabled people, or by preventing access to work, to public places or to certain services for those who do not use the app (e.g., debate in France).²⁵ In other cases, the app may exacerbate existing discrimination in society, such as for instance against LGBT community in South Korea, following the Coronavirus outbreak in queer communities,²⁶ or against BAME communities in England.²⁷

General principles mandate continual assessment of the suitability and effectiveness of apps in the fight against COVID-19. In theory, if the app is not effective enough (due to lack of participation or design flaws), the intrusion on privacy rights will cease to be justifiable. While harnessing the resources of private parties may make States' responses more effective throughout the populace, this may come at the cost of a trade-off in terms of trust and a risk of interference with human rights. Similar concerns about the necessity/justifiability/effectiveness of the app (the proportionate balance between health security and privacy) may arise when case numbers fall substantially.

(v) Access to Justice

Access to justice requires that everyone should be able to challenge governmental actions and decisions adverse to their rights or interests. Prohibitions of such challenges, or unavailability of an effective remedy will not meet the Rule of Law requirements. Courts have a vital function during and after the pandemic and the legal system should continue to provide fair and effective means of dispute resolution.

In relation to data-driven responses to public health emergencies, including apps, the principle applies at (at least) two levels. First, operationally, there must be a means to challenge false positives produced by the app, malicious conduct by other users etc. This may involve dispute resolution between citizens, and the State, and other private parties (e.g., tech companies). In this latter regard, app-based challenges can provide

The Principle in Practice

In **China**, many users of Alipay's Health Code app have complained that the means by which it assigns a Health classification (Green, Yellow, Red) is opaque and error-prone, produced by an algorithmic black box.

Officials have been quoted telling false positive users "Wait, and don't be nervous" but no clear means are provided to challenge the classification or its consequences. As a result the app can potentially lead to arbitrary, unchallengeable limitations of personal freedoms, including the freedom of movement.

Source: Paul Mozur, Raymond Zhong and Aaron Krolik, [In Coronavirus Fight, China Gives Citizens a Color Code, With Red Flags](https://www.wired.com/story/china-gives-citizens-a-color-code-with-red-flags/), 1 March 2020.

²⁴ Norton Rose Fulbright, Contact tracing apps: A new world for data privacy, <https://www.nortonrosefulbright.com/en-it/knowledge/publications/d7a9a296/contact-tracing-apps-a-new-world-for-data-privacy> .

²⁵ Norton Rose Fulbright, Contact tracing Apps, a new world for data privacy, France, <https://www.nortonrosefulbright.com/en-it/knowledge/publications/d7a9a296/contact-tracing-apps-a-new-world-for-data-privacy#France>.

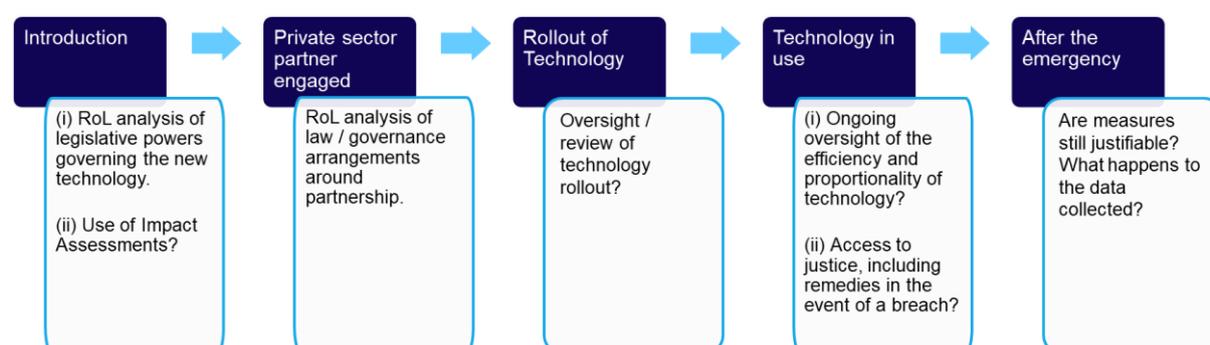
²⁶ Tracing homophobia in South Korea's coronavirus surveillance program, 18 June 2020, <https://theconversation.com/tracing-homophobia-in-south-koreas-coronavirus-surveillance-program-139428>

²⁷ Public Health England 'COVID-19: understanding the impact on BAME communities' <https://www.gov.uk/government/publications/covid-19-understanding-the-impact-on-bame-communities>; JCHR 'The Government's response to COVID-19: Human rights implications' <https://committees.parliament.uk/work/218/the-governments-response-to-covid19-human-rights-implications/publications/>.

a quick and inexpensive remedy, but they cannot be considered sufficient and a substitute to court remedies, especially when the measures introduced result in human rights limitations. Human rights are only effective through access to dispute resolution, whether formal or informal. Secondly, judicial (or similar) review of executive action imposing the app or for misuse of powers in relation to data collection should be possible and accessible to citizens. Principles of access to justice and fair dispute resolution remain relevant even when courts are temporarily closed.

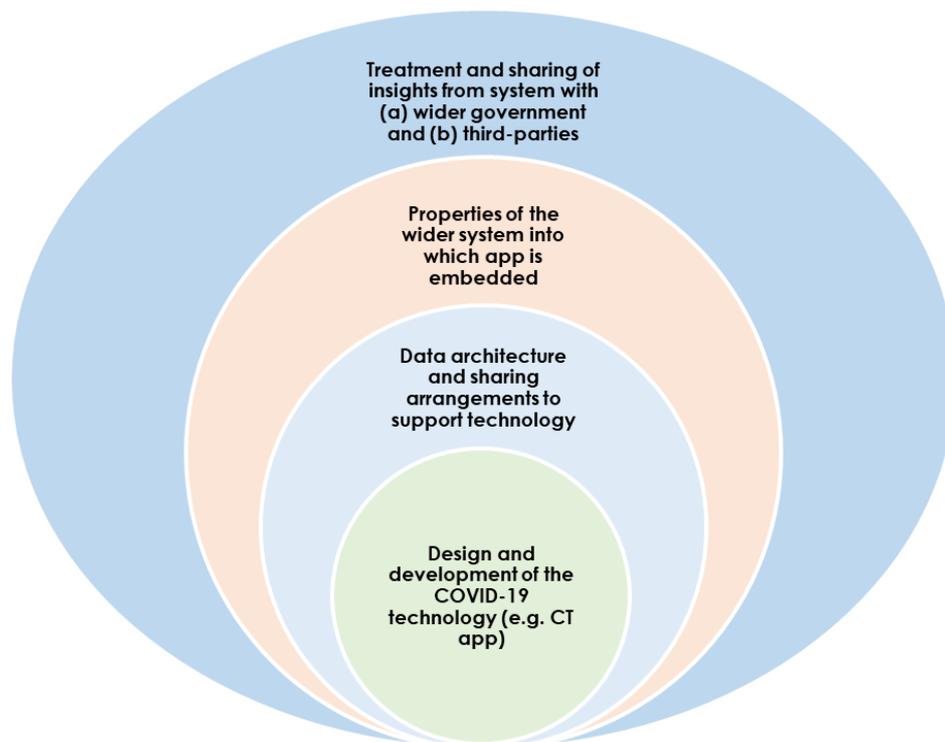
3. Assessing Technologies for Managing the Pandemic in the Light of Rule of Law Principles

At each stage of the lifecycle of a new technology, analysis from a Rule of Law perspective is relevant.²⁸ The graph below summarises such elements of relevance through the different stages of the introduction and implementation of data-driven technologies over the course of the emergency.



Moreover, a Rule of Law analysis is also relevant for the technology ecosystem, because pandemic technologies are embedded in wider digital architectures. Indeed, analysis of threats to the Rule of Law should go beyond looking at the specific technology – to consider all levels of activity: data collection and use, sharing, and the design, development and deployment of automated systems for analysis. In these regards, the presence and role of independent oversight mechanisms are paramount. To be effective such bodies should be endowed with sufficient powers (e.g., including ability to receive individual complaints) and adequate sufficient resources to carry out their functions. Also, particular safeguards should apply to minors, and collection and use of data regarding children should be specifically monitored.

²⁸ While outlined here in relation to the introduction of new technologies, the framework can also be used with regard to other types of responses.



4. Review: Advantages and Limits of Using a Rule of Law Lens When Assessing the Introduction of New Technologies

(i) What Does a Rule of Law Lens Bring?

When introducing new technologies (including (intrusive) surveillance technologies) it is essential that governments comply with and apply Rule of Law safeguards. Three main arguments support this statement. First, a strong reason for advancing Rule of Law as an ancillary regulatory approach to ethics and principled design is that, as explained above, there is now a (quasi) universal consensus on the core meaning of the Rule of Law and on the elements constituting it. As such, a Rule of Law regulatory paradigm presents the advantage of being universally accepted.

Secondly, the Rule of Law and its components operate as legitimators of government responses, thus potentially enhancing trust outcomes.

The third important reason is that the Rule of Law offers the institutional and process potentials for enforceability, actionability and remedy if ethics are breached or fail, as clarified in the discussion of the Rule of Law components made above.

(ii) Why Opt for a 'Thick' Definition?

As regards the conceptualization of the Rule of Law, it is important to refer to functional/outcome-oriented definitions such as that developed by the Venice Commission. 'Thin' definitions, based on formal legality, are less likely to temper arbitrary powers, and therefore may result being insufficient in terms of guaranteeing legitimacy, confidence, and trust in relation to the introduction of surveillance technologies. By resting on a narrower conception of formal legality,

'thin' conceptions do not consider aspects such as Human Rights, popular consent and compliance with international legal obligations in law-making.

Nevertheless, even 'thick' definitions of the Rule of Law may not capture all elements for ensuring confidence and trust in new surveillance technologies, because the mechanisms that allow measures to be appreciated as legitimate by data-subjects, and thereby generate trust in the application to ensure efficacy, are complex. Such complexity is even more relevant in crisis contexts where legality and legitimacy tend to decouple.²⁹

(iii) Contextualizing the application of the Rule of Law elements

Because both the challenges to the Rule of Law and possible solutions thereof are context-dependent, it is important to contextualise the application of the Rule of Law principles identified and discussed in the previous sections. The presence of legal safeguards is important to the Rule of Law, but the proper implementation of the law is also a crucial aspect of the principle and must therefore also be taken into consideration. The implementation and enforcement of legal rules, however, are contingent upon social and institutional factors, as these will impact how social institutions absorb and implement laws within their existing network of social rules and contexts.

²⁹ Philip A. Wallach, *To the Edge: Legality, Legitimacy, and the Responses to the 2008 Financial Crisis*. Washington, D.C.: Brookings Institution Press, 2015. Accessed March 19, 2021. <http://www.jstor.org/stable/10.7864/j.ctt13wztk3>.