

Bingham Centre for the Rule of Law
Submission to the Scottish COVID-19 Inquiry's Draft Aims and Principles

About the Bingham Centre

1. The Bingham Centre for the Rule of Law 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". One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.
2. This submission has been prepared by Katie Lines¹ and Dr Richard Mackenzie-Gray Scott.²

Summary

3. We welcome the public inquiry into the Scottish Government's handling of the coronavirus pandemic. In addition to the aims already set out in the Inquiry Factsheet, we recommend that the inquiry:
 - a. Examine the extent to which the Scottish Government's response to the COVID-19 pandemic complied with the Rule of Law and principles of good governance;
 - b. Consider how the Rule of Law and good governance can best be secured in future public health emergencies.
4. Below we set out examples of the Rule of Law themes that the inquiry should consider, which include:
 - a. Parliamentary scrutiny of coronavirus legislation;
 - b. Transparency of scientific evidence;
 - c. Clarity of coronavirus legislation and Government messaging;
 - d. The necessity and proportionality of measures adopted to address coronavirus; and
 - e. Impacts of the pandemic on the court system and access to justice.

Defining the Rule of Law and good governance

5. A clear and concise definition of the Rule of Law is found in Tom Bingham's 2010 book, *The Rule of Law*.³ Lord Bingham outlines the following eight principles:
 - (1) The law must be accessible and so far as possible intelligible, clear and predictable.

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³ Tom Bingham, *The Rule of Law* (Penguin, 2011)

- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
 - (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
 - (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
 - (5) The law must afford adequate protection of fundamental human rights.
 - (6) Means must be provided for resolving in good faith, without prohibitive cost or inordinate delay, civil disputes which the parties themselves are unable to resolve.
 - (7) The adjudicative procedures provided by the state should be fair.
 - (8) The rule of law requires compliance by the state with its obligations in international law as in national law.
6. There are a number of ways to define good governance, but it can be generally understood as encompassing the following characteristics:
- (1) Participatory.
 - (2) Consensus oriented.
 - (3) Accountable.
 - (4) Transparent.
 - (5) Responsive.
 - (6) Effective and efficient.
 - (7) Equitable and inclusive.
 - (8) Follows the rule of law.⁴

The relationship between good governance and the Rule of Law is thus complementary. By upholding the principles of the Rule of Law, one of the characteristics of good governance is also satisfied.

Why should the inquiry consider the Rule of Law and good governance?

- 7. The Scottish Government's COVID-19 Inquiry Factsheet explains that the inquiry will give particular consideration to "the four harms of the pandemic": (1) direct health impacts of COVID-19; (2) other health impacts; (3) societal impacts; and (4) economic impacts.⁵ When examining these impacts, the inquiry will determine "the explanations for decisions taken, and causes of anything which may not have gone as expected", "if and how different outcomes could have been achieved", and "any lessons to be learned".⁶
- 8. We recommend that the inquiry also:

⁴ Meetika Srivastava, 'Good Governance – Concept, Meaning and Features: A Detailed Study' (SSRN, December 2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1528449>

⁵ Scottish Government, 'COVID-19 Inquiry' (24 August 2021) <<https://www.gov.scot/publications/covid-19-inquiry/pages/aims-and-principles/>>

⁶ *ibid.*

- a. examine a fifth “harm”, or impact, of the pandemic: the extent to which the Scottish Government’s response to the pandemic complied with the Rule of Law and principles of good governance;
 - b. consider how the Rule of Law and good governance can best be secured in future public health emergencies.

9. The reasons for this recommendation are threefold. First, the inquiry cannot properly examine the health, societal and economic impacts of the COVID-19 pandemic without examining the extent to which the Government’s response complied with the Rule of Law and good governance. A full examination of the health, societal and economic impacts of this pandemic must take into account:
 - a. the processes by which relevant policies and laws were made (i.e. did Scottish coronavirus legislation receive sufficient scrutiny and could additional scrutiny have mitigated any negative impacts?)
 - b. the necessity and proportionality of Government measures to tackle the pandemic (i.e. were the restrictions imposed to protect public health a necessary and proportionate interference with the rights protected under the European Convention on Human Rights?)
 - c. the clarity and accessibility of policies and legislation that impacted upon health, society and the economy (i.e. was legislation and Government messaging sufficiently clear so that relevant parties were properly informed of their legal rights and duties?)
 - d. the lawfulness of decisions taken by public officials that impacted upon health, society and the economy (i.e. did public officials only restrict individuals’ rights to the extent provided for by law?)
 - e. the outcome of legal challenges to the health, societal and economic impacts of Government policies (i.e. did the courts provide an effective means of scrutiny and redress?)

10. Second, the impact of the COVID-19 pandemic on the Rule of Law and good governance is a crucial consideration in its own right. Respect for the Rule of Law is a foundational component of any constitutional democracy. The Rule of Law protects individual rights and freedoms, secures access to justice, and sustains accountable and representative institutions. The Rule of Law should not be set aside during a national emergency, but should form a core part of a state’s response to that emergency. Sustained compliance with the Rule of Law during a pandemic can actively assist “an effective pandemic response by promoting transparency, clarity, participation, engagement and representation, international cooperation, equality, accountability and anti-corruption, among other principles”.⁷ Good governance during such times is also important as it helps ensure that the “harms” (or impacts) of a pandemic are reduced.

11. Third, by considering the impact of the COVID-19 pandemic on the Rule of Law and good governance, the inquiry will function as an accountability mechanism and in doing so will help uphold the Rule of Law. The Rule of Law requires there to be an accountable process for enacting law, and proper parliamentary and judicial scrutiny

⁷Advocates for International Development, ‘The Rule of Law in Times of Health Crisis’ (2020), p.1 <https://www.ed.ac.uk/files/atoms/files/rule_of_law_in_times_of_health_crises_final.pdf>

of any derogations from the Rule of Law during times of emergency.⁸ Research conducted by one of the authors of this submission has found that the English courts and UK Parliament have thus far afforded considerable deference towards the UK Government's COVID-19 response, calling into question whether there is sufficient public scrutiny of measures adopted to address the pandemic.⁹ The broad themes of this research are applicable to the Scottish context, although we note that the scrutiny of coronavirus measures in Scotland has in some cases been more robust than in England. The scrutiny procedures in the Scottish Parliament have at times been more extensive than those in Westminster (for example, the COVID-19 Committee has provided enhanced scrutiny of the Scottish response),¹⁰ and the Court of Session conducted a thorough analysis of the Scottish Government's decision to close places of worship in *Philip v Scottish Ministers* [2021] CSOH 32. Nonetheless, the inquiry can still help ensure that accountability gaps do not arise.

12. We understand that the COVID-19 Review Observatory has also recommended that the inquiry consider the democratic governance harms of the pandemic as part of its work programme.

Examples of Rule of Law Themes that an Inquiry Should Consider

13. The Rule of Law Checklist produced by the Venice Commission of the Council of Europe can be used to systematically analyse how far the Scottish Government's response to the pandemic has complied with the Rule of Law.¹¹ Some broad themes that would be useful for the inquiry to consider are as follows:

Parliamentary scrutiny of coronavirus legislation

14. The Rule of Law requires there to be an accountable and democratic process for enacting legislation, with Parliament having an adequate opportunity to debate and scrutinise proposed legislation.¹² The law-making powers of the Executive should be prescribed and controlled by Parliament, not only to ensure democratic legitimacy but also to prevent the abuse of executive power.¹³ Even during times of emergency, Parliament's ordinary legislative functions and its ability to scrutinise executive actions should be preserved as far as possible.¹⁴ Maintaining proper parliamentary scrutiny is important not only as a matter of principle, but also to ensure that emergency legislation is proportionate, justified, and free of errors or policy defects.¹⁵

⁸ Venice Commission, 'Rule of Law Checklist' (Council of Europe 2016), Benchmarks A5 and A6.

⁹ Richard Mackenzie-Gray Scott, 'Rebalancing upstream and downstream scrutiny of government during national emergencies', UK Constitutional Law Association (September 2021) <<https://ukconstitutionallaw.org/2021/09/21/richard-mackenzie-gray-scott-rebalancing-upstream-and-downstream-scrutiny-of-government-during-national-emergencies/>>

¹⁰ For a fuller discussion of the different scrutiny mechanisms in Westminster and Holyrood, see: Pablo Hidalgo, Fiona de Londras and Daniella Lock, 'Parliamentary scrutiny of extending emergency measures in the two Scottish Coronavirus Acts: On the question of timing', UK Constitutional Law Association (June 2021) <<https://ukconstitutionallaw.org/2021/06/21/pablo-g-hidalgo-fiona-de-londras-and-daniella-lock-parliamentary-scrutiny-of-extending-emergency-measures-in-the-two-scottish-coronavirus-acts-on-the-question-of-timing/>>

¹¹ Accessible at: [https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule of Law Check List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf)

¹² Venice Commission, 'Checklist', Benchmark A5.

¹³ Venice Commission, 'Checklist', Benchmark C.

¹⁴ Joelle Gorgan and Nyasha Weinberg, 'Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies', RECONNECT Policy Brief (August 2020) p.20 <https://reconnect-europe.eu/wp-content/uploads/2020/08/RECONNECTPB_082020B.pdf>

¹⁵ See the Bingham Centre's discussion of the practical benefits of parliamentary oversight of delegated legislation in Ronan Cormacain, 'Parliamentary Scrutiny of Coronavirus Lockdown Regulations: A Rule of Law Analysis' (Bingham Centre for the Rule of Law, September 2020), pp.8-9

15. The Scottish Parliament has taken some positive steps to ensure that proper scrutiny of coronavirus legislation can take place. Commentators have praised the “high quality scrutiny” provided by “energetic parliamentary committees”.¹⁶ Parliament also adapted its procedures relatively quickly in response to the pandemic: by September 2020 almost all types of Chamber and committee business could be conducted in a hybrid or virtual way.¹⁷ However, other aspects of the COVID-19 response raise Rule of Law concerns around the sufficiency of parliamentary scrutiny.

16. The majority of the laws enacted in response to the pandemic have taken the form of delegated legislation. Between 1 March 2020 to 1 March 2021, 137 COVID-19-related statutory instruments were laid in the Scottish Parliament.¹⁸ These statutory instruments made wide-ranging and unprecedented changes to the law, for example: restricting people’s liberty, closing schools and places of worship, and limiting international travel. The reliance on delegated (rather than primary) legislation enabled the Scottish Government to exercise significant discretion with relatively limited parliamentary oversight. In March of this year Michael Clancy, Director of Law Reform at the Law Society of Scotland, gave evidence to the Scottish Parliament’s COVID-19 Committee in which he raised concerns around the “extent to which subordinate legislation” has been used, “and to the bulk of it”.¹⁹ During the same Committee meeting, Calum Steele, the General Secretary of the Scottish Police Federation, gave evidence that it would have been preferable for Parliament to have relied upon primary rather than secondary legislation to respond to the COVID-19 pandemic:

“I believe, with a fair degree of confidence, that the Government could have put in place a legislative framework that was capable of responding to events as they arose, rather than dealing with them through emergency legislation. We were often chasing outcomes, rather than dealing with them in advance.”²⁰

17. In addition, much of the delegated legislation made in response to the coronavirus pandemic has been enacted using the made affirmative procedure. This is an emergency procedure which allows Scottish statutory instruments to be made immediately and remain in force for up to 28 days without parliamentary approval. If Parliament does not approve the instrument within 28 days then it will cease to have effect, meaning that each instrument enacted under the made affirmative procedure must be scrutinised by the Delegated Powers and Law Reform Committee, the COVID-19 Committee and the Chamber within 28 days of being made.

18. The COVID-19 Committee has noted that the use of the made affirmative procedure was “rare” prior to the COVID-19 pandemic, but Scottish Ministers have since “relied upon this procedure heavily” to bring coronavirus measures into force at short notice. The Committee raised concerns that: “the sheer speed and volume of legislation has created challenges for parliamentary scrutiny, in terms of enabling public consultation on these measures; scrutinising the detail of the drafting and cross-checking updates

<<https://binghamcentre.biicl.org/publications/parliamentary-scrutiny-of-coronavirus-lockdown-regulations-a-rule-of-law-analysis>>

¹⁶ Pablo Hidalgo, Fiona de Londras and Daniella Lock, ‘Parliamentary scrutiny of extending emergency measures’

¹⁷ Scottish Parliament Standards, Procedures and Public Appointments Committee, ‘Inquiry into the resilience of the Scottish Parliament’s practices and procedures in relation to its business’ (23 February 2021, SP Paper 953), p.18.

¹⁸ Scottish Parliament COVID-19 Committee, ‘Legacy Report’ (23 March 2021, SP Paper 1010), p.3.

¹⁹ Scottish Parliament COVID-19 Committee, ‘Official Report Thursday 4 March 2021’, col 17.

²⁰ *Ibid.*, col 30.

to regulations against the existing statute book; as well as creating sufficient time to take evidence on and debate new legislation.”²¹

Transparency of scientific evidence

19. The Rule of Law requires proposed legislation to be adequately justified. Where appropriate, Parliament should be provided with explanatory reports and impact assessments before legislation is adopted.²²
20. It seems that the Scottish Parliament has not always been provided with the information it needs to make properly informed decisions about the COVID-19 pandemic. In July 2020, the House of Commons Scottish Affairs Committee raised concerns that there was a lack of transparency around the scientific advice the Scottish Government received from its COVID-19 Advisory Group. Parliament cannot adequately scrutinise Government proposals without knowing the advice upon which those proposals are based. The Scottish Affairs Committee called upon the Scottish Government to “provide details of the procedures and processes used by [its] advisory groups for providing scientific advice”, as “a commitment to transparency around scientific advice would provide the public and Parliament with the means necessary to scrutinise decisions around the pandemic.”²³

Clarity of legislation and Government messaging

21. A central component of the Rule of Law is that laws must be accessible and foreseeable.²⁴ Individuals cannot claim rights to which they are entitled, or perform their legal obligations, if they cannot reasonably understand what those rights and obligations are. It is of particular importance that legislation creating criminal offences is accessible and foreseeable, so that people know what they must or must not do in order to avoid criminal penalties.²⁵
22. A number of organisations have raised issues with the clarity of Scottish coronavirus legislation. As Calum Steele, the General Secretary of the Scottish Police Federation, explained in March 2021: “the biggest difficulty police officers face has been the inelegant nature of how legislation has been presented. I defy anyone with moderate computer skills to navigate the legislation website to find specifically what provisions apply in area at any time”.²⁶ In addition, Steele noted that “the speed and frequency with which legislation was changing, and the notice that was provided to those who were expected to enforce provisions [...] were enormously challenging for the police service.”²⁷ Similar points have been made by the Law Society of Scotland, which has found that “with so much subordinate legislation (and the potential for more) covering so many areas of the law, it is difficult for legislators, advisers, and those subject to the regulations to be clear about the law which applies.”²⁸ The Law Society has suggested that the coronavirus legislation should be consolidated on a regular basis.

²¹ COVID-19 Committee, ‘Legacy Report’, p. 4.

²² Venice Commission, ‘Checklist’, Benchmark A5.

²³ House of Commons Scottish Affairs Committee, ‘Coronavirus and Scotland: Interim Report on Intergovernmental Working’ (2019-21, HC 314) p.28-29.

²⁴ Venice Commission, “Checklist” Benchmark B1.

²⁵ Bingham, *Rule of Law*, p. 37.

²⁶ COVID-19 Committee, ‘Official Report Thursday 4 March 2021’, col 15.

²⁷ *Ibid.*, col 3.

²⁸ Law Society of Scotland, ‘Stage 1 briefing Coronavirus (Extension and Expiry) (Scotland) Bill’ (June 2021), p. 5.

23. The confusion caused by inaccessible legislation was exacerbated by Government messaging. At times during the pandemic, Scottish Ministers have issued guidance that is more restrictive than the legal rules imposed by coronavirus legislation. For example, at the start of the pandemic the Scottish Government informed the public that they could only exercise outside for up to one hour a day, when the law imposed no time limits on outdoor exercise.²⁹
24. There are no inherent Rule of Law problems with Government advice being more restrictive than the relevant legal requirements. However, it is important that Government messaging does not blur the line between the law and guidance, i.e. what is legally required versus what is advisable according to Government. A failure to clarify the difference between legal rules and Government advice undermines the Rule of Law by creating confusion for both the public and the police as to what the law actually requires. The Scottish Police Federation gave evidence to the COVID-19 Committee earlier this year explaining that the difference between Government advice and the law had not been made sufficiently clear, and “for a long period of time – I dare say that, to some extent, this probably still prevails – there was genuine confusion among the public our members interact with about what they were meant to be doing”.³⁰
25. The current guidance on the Scottish Government’s website continues to blur the line between law and advice. For example, the “Coronavirus in Scotland” landing page tells people that they “need to follow the rules in place” in order to stay safe, before listing various things that people “should” do”. This list includes both legal requirements (“wear a face covering when required”) and Government advice (“meet outside if you can”) without distinction.³¹

Necessity and proportionality of restrictions

26. The Rule of Law requires measures introduced in response to an emergency to be strictly necessary and proportionate to the situation.³² Any interference with individuals’ rights should be the least intrusive measure necessary to achieve the policy aim in question. The concept of proportionality is also embedded in human rights law. The European Convention on Human Rights (“ECHR”), incorporated domestically via the Human Rights Act 1998, permits public authorities to interfere with many of the rights it protects, but only if the interference is necessary and proportionate in order to achieve a legitimate aim.
27. The Court of Session has already found that the closure of places of worship implemented by the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3) was a disproportionate interference with the petitioners’ constitutional rights and the right to freedom of religion protected by Article 9 of the ECHR.³³ Other legislative measures may also have gone beyond what was strictly necessary and proportionate to deal with

²⁹ See comments made to the Edinburgh News by a Government spokesperson: ‘It’s not for recreation’ - Scottish Government tell public what is (and is not) acceptable when outdoors during Covid-19 lockdown’ (10 April 2020) < <https://www.edinburghnews.scotsman.com/health/coronavirus/its-not-recreation-scottish-government-tell-public-what-and-not-acceptable-when-outdoors-during-covid-19-lockdown-2536137>>

³⁰ COVID-19 Committee, ‘Official Report Thursday 4 March 2021’, col 6.

³¹ <https://www.gov.scot/coronavirus-covid-19/>

³² Venice Commission: European Commission for Democracy through Law, *Respect for democracy, human rights and the rule of law during states of emergency – Reflections* (26 May 2020) CDL-PI(2020)005rev, pp. 4-5; Gorgan and Weinberg, “Principles to Uphold the Rule of Law”, p.12.

³³ *Philip v Scottish Ministers* [2021] CSOH 32.

the COVID-19 pandemic. This point was raised in a meeting of the Scottish Parliament last month, when Murdo Fraser MSP criticised the Scottish Government for failing “to remove unnecessary elements of coronavirus legislation that it promised to remove”.³⁴

Impacts on the court system and access to justice

28. A “cardinal requirement” of the Rule of Law is the protection of access to justice and fair trial rights, especially for defendants in criminal trials.³⁵ It is “axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all”.³⁶
29. During the COVID-19 pandemic many civil cases and tribunals in Scotland have moved to an online format and there has been an increased use of virtual hearings in criminal cases, with the first trial to use a remote jury centre taking place in Edinburgh on 29 September 2020.³⁷ The Scottish Parliament’s Justice Committee recently considered the impacts of virtual trials, and noted that while “the use of technologies might seem benign, they are not without challenges”.³⁸ The Committee highlighted concerns made by the Equality and Human Rights Commission that “video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions”, and “people with these conditions are significantly over represented in the criminal justice system”.³⁹
30. In addition, when considering the use of digital hearings in the criminal justice system in England and Wales, the House of Lords Select Committee on the Constitution has discussed how “the shift to remote hearings may have undermined litigants’ ability to engage appropriately with courts and tribunals, potentially to the detriment of their own case”, and created difficulties for effective communication between court users and their legal advisers, which could be “undermining access to justice”.⁴⁰ The Committee cited “growing evidence of a correlation between defendants appearing on video and receiving more punitive criminal justice outcomes”.⁴¹

Overarching Recommendation for the Inquiry

31. For the abovementioned reasons, we submit that the inquiry should be provided a mandate to consider the Rule of Law and good governance issues raised by the decisions that have been taken during the COVID-19 pandemic. This would provide a solid foundation to assist accountability efforts and learn lessons with respect to governance in the course of public health emergencies, thereby contributing to the Scottish Government being better prepared for any future pandemics. In particular, the inquiry should aim to carefully consider how the Rule of Law should be secured in future pandemic responses before the powers under the UK Coronavirus Act 2020 and

³⁴ Scottish Parliament, Meeting of the Parliament Tuesday 31 August 2021, Col 84.

³⁵ Bingham, *Rule of Law*, p.90.

³⁶ *R v Horseferry Road Magistrates’ Court, ex p. Bennett* [1994] 1 AC 42, 68, repeated in *Attorney General’s Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, 85, para. 13.

³⁷ SCTS News, ‘First cinema remote jury centre trial set to start’ (28 September 2020) <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/09/28/first-cinema-remote-jury-centre-trial-set-to-start>>

³⁸ Scottish Parliament Justice Committee, ‘Re-opening Scotland’s courts and tribunals system’ (28 September, SP Paper 817), p.22.

³⁹ *Ibid.*, p.22.

⁴⁰ House of Lords Select Committee on the Constitution, ‘COVID-19 and the Courts’ (2019-2021) HL Paper 257, p. 28.

⁴¹ *ibid.* p.64

the First and Second Scottish Coronavirus Acts are “given permanent effect”, as the Scottish Government has recently proposed.⁴²

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⁴² Scottish Government, 'Coronavirus (COVID-19) recovery - justice system, health and public services reform: consultation' (17 August 2021) <<https://www.gov.scot/publications/covid-recovery-consultation-public-services-justice-system-reforms/pages/5/>>