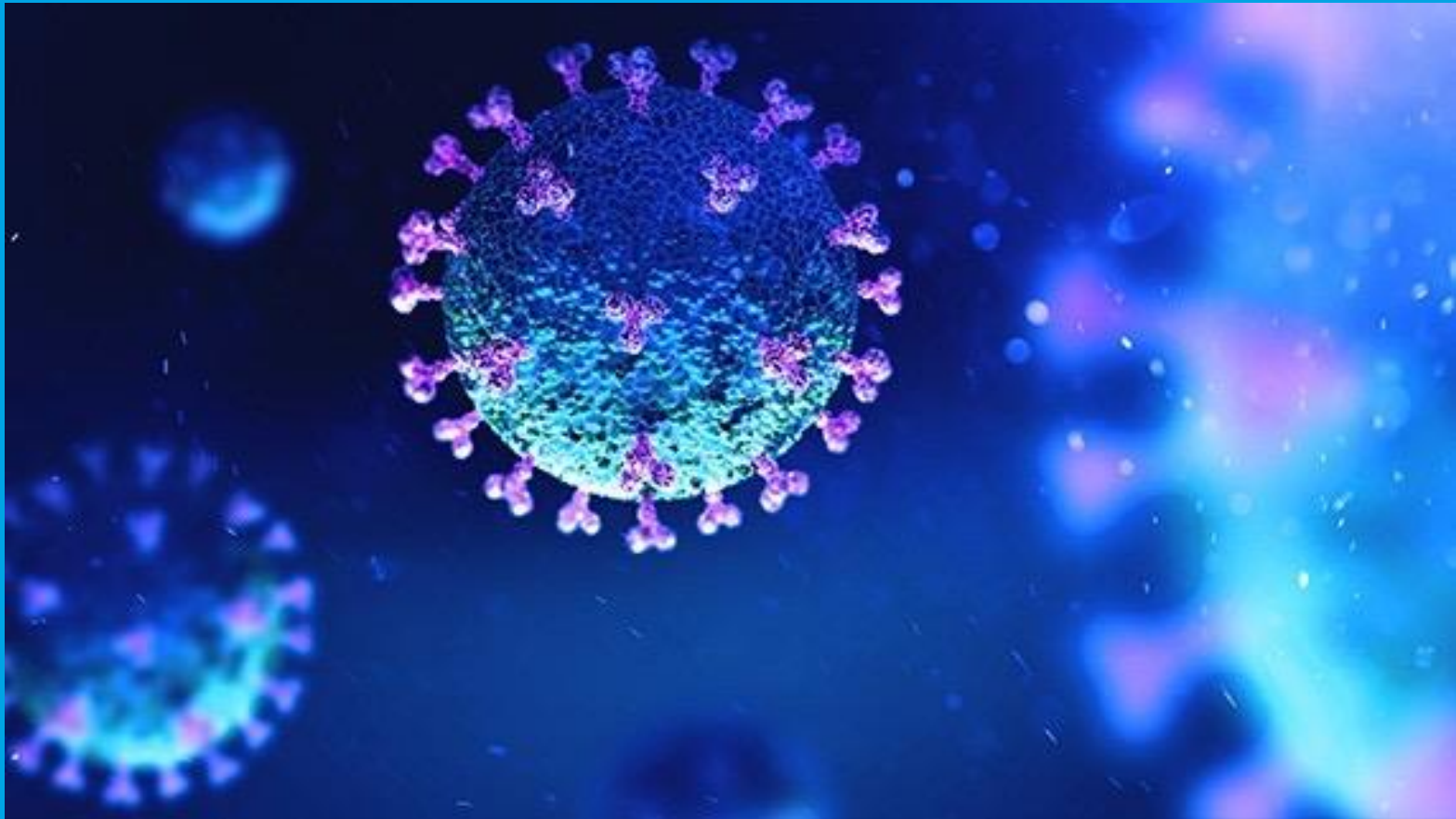


# Rebalancing Upstream and Downstream Scrutiny of Government during National Emergencies

Richard Mackenzie-Gray Scott

November 2021



## The Role of Good Governance and the Rule of Law in Building Public Trust in Data-Driven Responses to Public Health Emergencies

*Funded by the UK Arts and Humanities Research Council, grant AH/V015214/1*

This project, at the intersection of law, ethics, citizen deliberation, public health and data science, aims to develop a distinct values-based framework to help understand and address the challenges posed by data-driven responses to public health emergencies and the need to build public trust. In their COVID-19 responses, states have relied on data-driven approaches to justify far-reaching measures, including closing entire business sectors and categories of travel, curtailing personal liberties and requiring compliance with new technologies for contact tracing and social distancing. To be effective, such measures must be internationally co-ordinated, nationally adopted and adhered to by a high proportion of the public. Trust underpins both national adoption and public adherence: trust in international institutions, in the measures adopted, and in their scientific foundations. This project examines two critical enablers of that trust: good governance and the Rule of Law. It aims to provide practical guidance on how international and national institutions can build public trust in the processes by which they design and implement data-driven responses to public health emergencies. The research consists of four interconnected work packages which examine:

- (1) International governance frameworks for public health emergencies.
- (2) Values-based principles to guide data-driven responses by national institutions including governments, parliaments, and courts.
- (3) UK case studies and a literature review of data governance (national and international) in relation to the use of data driven technologies in the pandemic emergency
- (4) A citizen jury deliberation on the trustworthiness of data-driven measures and what additional safeguards may be needed.

This output forms part of Work Package 2. It was first published as a post on the UK Constitutional Law Association blog on 21 September 2021, <https://ukconstitutionallaw.org/2021/09/21/richard-mackenzie-gray-scott-rebalancing-upstream-and-downstream-scrutiny-of-government-during-national-emergencies/>. The blog is reproduced with kind permission of the UKCLA blog editors.



## 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 policy-making, 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](http://www.binghamcentre.biicl.org)

## Rebalancing upstream and downstream scrutiny of government during national emergencies

Scrutiny comes in many forms, which can lead to many outcomes. Public scrutiny of Government is one such form, which is an element of democratic governance that aligns with the rule of law. Yet those experiencing and observing the ongoing administration of life in the UK during the COVID-19 pandemic might be forgiven for arriving at the conclusion that public scrutiny of Government is an ideal currently evaporating into the ether.

The marginalisation of Parliament during this pandemic is well known. Many government measures that have been introduced to address COVID-19 have received little or no scrutiny from parliamentarians. As highlighted in an evidence submission provided by the Bingham Centre to the Public Administration and Constitutional Affairs Committee (PACAC), instruments have become law without parliamentary scrutiny, as well as entering into force before they have been put in front of Parliament. The subsequent PACAC report outlines the importance of ensuring that measures which may adversely impact the exercise of human rights are enacted using primary legislation, so as to provide Parliament ‘the appropriate amount of time to consider, scrutinise and where necessary amend the Government’s proposals’ (para. 83). Many regulations that have been implemented during this time have not been made using primary legislation, even though they have interfered with and restricted the exercise of human rights. Whether these measures were necessary and proportionate in the pursuit of the legitimate aim of safeguarding public health can be debated on a number of grounds. However, the focus here is on another matter: the coupling of this minimal parliamentary scrutiny of government measures with the apparent trend of judicial deference towards these very same measures. The combination of these two factors depicts a lopsided separation of powers that can enable executive abuse.

### Judicial deference during COVID-19

Government responses to COVID-19 have led to a number of cases that challenged regulations pertaining to this pandemic, including those concerning restrictions on the exercise of human rights during times of emergency. These judgments reveal a general trend of judicial deference to Government. In the Hussain case, the court refused an application for interim relief to permit a mosque opening one day per week to allow prayers to take place whilst observing social distancing, ruling that Government should be allowed a suitable margin of appreciation in deciding what balance should be struck between interferences with individual rights and the general public interest. Here the court highlighted: ‘What steps are to be taken, in what order and over what period will be determined by consideration of scientific advice, and consideration of social and economic policy. These are complex political assessments which a court should not lightly second-guess’ (para. 21). In the Francis case, the court dismissed a claim regarding the requirement to self-isolate, ruling that Government regulations in this regard were not disproportionate in their interference with the human rights at issue, namely the right to liberty. In the Dolan case, the court rejected the arguments of the claimant challenging the regulations on multiple human rights (and other) grounds, ruling that decisions regarding the necessity and proportionality of the regulations were matters for the

government. On appeal, the court refused permission to appeal on human rights grounds, noting: ‘In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence’ (para. 97).

The ruling in the Adiatu case, regarding the furlough scheme, established that Government decisions were ‘plainly justified’ when ‘applying the test of a wide margin of discretion’ (para. 82). A further challenge against the Treasury in the Motherhood Plan case, appears to show the court ruling that even if it considered discrimination to have been present in this case, it would have apparently been justified in light of the ‘wide margin of appreciation’ afforded to government and the ‘simplicity’ of a scheme that carried out a cost-effective process reliant on automated decision-making (see paras. 79-85). In the Leigh case, which raised questions regarding the regulations prohibiting outdoor gatherings and the rights to freedom of expression and peaceful assembly, the court noted its hesitance to offer an interim declaration within a short timeframe (see para. 21). The ruling in the Manchester Airports case is a further instance of the deference afforded to the government’s legal position, one that has arguably made it tricky for travellers and businesses to navigate the current system regulating international travel. In the Khalid case, permission for judicial review was refused on all grounds, one of which concerned whether the requirement to quarantine in a designated hotel amounts to an unlawful deprivation of liberty, with the court ruling that in the context of a pandemic a ‘very broad margin of discretion is to be afforded to the Secretary of State’ (para. 24).

While some of these decisions may be questioned, they provide considerable authority stipulating that the UK government has a large discretion in addressing the COVID-19 pandemic. Although there are notable exceptions to the apparent general trend of judicial deference towards government measures that have been rolled out during COVID-19, should courts continue to afford government further space to operate off the basis of regulations that have not been appropriately scrutinised by Parliament, then a significant question arises: From where will public scrutiny that places a limit on government power and provides for the opportunity to pursue lawful forms of accountability come, if not Parliament or the courts? It is true that the courts have so far provided public scrutiny of government, but this scrutiny stops short of engaging with the data behind government decision-making regarding COVID-19, and why measures introduced on the basis of it are necessary and proportionate interferences with applicable human rights. Declaring that government has a margin of appreciation to address this pandemic as it sees fit does not clarify the extent of this margin, or why a particular government measure is or is not within the bounds of it in light of available evidence. There is a delicate interplay between Parliament and the courts in this respect. For those interested in being able to responsibly exercise their human rights, the current interplay, or, perhaps more accurately, lack thereof, between Parliament, government and the courts is a cautionary sign. Is there a way of ensuring that choices made by government do not lie beyond question, while ensuring that legal and political matters do not become conflated?

### **The importance of balancing upstream and downstream forms of governance**

Parliament forms part of upstream governance, in that it pre-empts possible futures by legislating with the aim of addressing and shaping those futures. Part of this

process involves setting clear parameters over what government can and cannot do, which can be achieved when Parliament scrutinises whatever policy is at issue, demands an explanation and justification for new legal measures, checks for any loopholes, and requires evidence before a new law is introduced. This mix protects people, businesses and society more generally from bad ideas translating into bad laws. The judiciary forms part of downstream governance. Courts make judgements on events from the past, setting clear limitations on what government can and cannot do within the bounds of the law. Parliament and the judiciary combined therefore shape the extent of the authority that forms the lawful basis for government to exercise its powers in the present. By complementing each other, with one catching what the other might miss, the political and legal scrutiny they provide are of equal value to the system of governance in the UK. While government is tasked with effectively engaging with situations that can stretch its powers to their very limit, it is important that its authority to do so is not unbound, including during times of national emergency, such as those brought on by a global pandemic.

Should judicial deference towards government measures continue, and should Parliament continue to be marginalised, then the combination of the two could contribute to the creation of more measures that have not been publicly scrutinised nor justified on the basis of objective criteria, yet all the while encroaching on human rights. With a passive Parliament and judiciary existing during a period of national emergency that demands an active government, there exist limited opportunities for public oversight and accountability of the decision-making and conduct of government and its members. Should such practices continue, so too could the erosion of public trust in government, and, perhaps more worryingly, trust in the institutions and processes that are meant to uphold the rule of law and democracy. Yet change can occur in which either Parliament or the courts become more active in scrutinising the details behind government decisions. One method conducive to this change involves striking a better balance between the parliamentary scrutiny of government proposals that can impact the exercise of human rights, with the judicial scrutiny of the margin of appreciation afforded to government when matters concerning the implementation of related measures are brought before the courts.

### **Building on a basis outlined by Bingham**

Before the world got a wee bit noisier, in 1999 Tom Bingham held the following whilst issuing the judgment in the *Cheese Company case*:

This appeal must be approached on the basis that the secretary of state, in making the emergency control orders on 20 and 21 May 1998, was not entitled to the broad margin of appreciation which might be accorded to primary legislation enacted by a national legislature. He is however entitled to the narrower margin of appreciation appropriate to a responsible decision-maker who is required, under the urgent pressure of events, to take decisions which call for the evaluation of scientific evidence and advice as to public health risks, and which have serious implications both for the general public and for the manufacturers, processors and retailers of the suspect cheese.

A takeaway from this decision is that the margin of appreciation afforded to government is relative. But to what? One answer: relative to the extent to which the

government measure at issue was scrutinised by Parliament, if at all. In other words, the margin of appreciation afforded to government should correspond to the degree of parliamentary scrutiny of the measure under challenge. This method is one factor that the courts could take into consideration, but need not necessarily be the predominant one. And there are reasons why it should arguably not be the principal consideration, a crucial example being whether its use would contribute to the courts intruding on matters of politics. That said, its use could help courts clarify why government has the margin of appreciation it does in each particular case, whether wide, narrow, etc. The wide margin of appreciation afforded to government at present correlates to urgent decisions being made on the basis of scientific evidence. Yet this evidence has changed and will likely continue to change. One way of ensuring that the margin of appreciation coincides with such changes is to reflect on how much scrutiny a measure, and the data it is based upon, has received in Parliament. Instead, at present, it appears that both Parliament and the courts view technical information as unquestionable, except when it gives an appearance of being manifestly illogical.

This approach towards scrutinising government holds promise, in particular with respect to preventing abuse of power and improving the effectiveness of emergency measures. By striking a balance between the levels of upstream (parliamentary) scrutiny of measures introduced by government and the levels of downstream (judicial) scrutiny of such measures, a robust system of curbing government powers exists, without placing undue burdens on government, the consequences of which can become particularly acute during times of emergency. Further use of this method could allow better compromises to be reached in decisions where discord between individual rights and collective interests arises. In practice this would mean government would be afforded a wider margin of appreciation by the courts for primary legislation that has been adequately scrutinised by Parliament, when compared to a narrower margin being afforded for secondary legislation that has not been subject to adequate parliamentary scrutiny. While it is unclear whether this approach requires new formal rules, judges could take it on board in reaching their decisions, reflecting on how much scrutiny, if any, a measure received in Parliament.

This approach could also help counteract at least some of the problems associated with lack of parliamentary scrutiny of new government regulations, whilst ensuring that judicial overreach does not occur when new laws have been appropriately scrutinised by Parliament. It is worth noting here that substantial scrutiny from Parliament does not mean the judiciary should provide none on every such occasion. Courts can sometimes review primary legislation that may have received much parliamentary scrutiny, for example, to issue declarations of compatibility/incompatibility with the Human Rights Act. This aspect of the constitution is important, particularly during periods where a parliamentary majority backs government. The broader purpose is counterbalancing government overreach, and achieving balance in the checks on public power by matching demanding upstream scrutiny with less demanding downstream scrutiny, and vice versa, where lack of one justifies more of the other (operating on a sliding scale).

The challenge is to avoid conflating the political scrutiny provided by Parliament with the legal scrutiny provided by the courts. The two have different aims and purposes, although there is equivalence between legal and political means of public scrutiny in

terms of facilitating answerability. A functional democracy requires both legal and political accountability, where one instead of the other can be satisfactory depending on the context. But having neither is not. The proposed method of balancing upstream and downstream scrutiny of government measures is a yardstick to bear in mind when questions arise on the extent to which government is afforded authority to utilise its powers when addressing a particular problem during a national emergency.

A key question is how the courts would determine what degree of scrutiny a measure received in Parliament. This does not only relate to the length of time spent scrutinising a measure, but also the quality of that scrutiny. There thus exists a potential for tension to arise in cases between a court evaluating parliamentary scrutiny and Article 9 of the Bill of Rights, which provides: 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. The Supreme Court has ruled that: 'the law of Parliamentary privilege is not based solely on the need to avoid any risk of interference with freedom of speech in Parliament. It is underpinned by the principle of the separation of powers, which, so far as relating to the courts and Parliament, requires each of them to abstain from interference with the functions of the other, and to treat each other's proceedings and decisions with respect. It follows that it is no part of the function of the courts under our constitution to exercise a supervisory jurisdiction over the internal procedures of Parliament' (para. 165). But how does this constitutional component factor into settings where government does not respect Parliament, for example, by 'relegating' it 'to the subordinate role of merely rubberstamping legislation', as has arguably occurred during this pandemic? Even beyond the context of COVID-19, government may attempt to rely on arguments in court based on measures having received 'enough' scrutiny in Parliament to substantiate claims that any review in the courts should be light touch. In engaging with such problems the courts will be undertaking a sensitive balancing act. Yet by putting courts in the position where they are called upon to examine such problems in the first place, it could be said that government is failing to appreciate the value of governing through a system that has the intention of being participatory in its shepherding of power.

Good governance in the administration of public affairs during an emergency includes a healthy balance being struck between the power and authority exercised by an executive, the mandates provided by a legislature, and the scrutiny imposed by a judiciary. Failure to realise each element can mean measures implemented in exceptional circumstances become normalised, slipping through back doors. Lack of parliamentary scrutiny of government measures being mirrored by lack of judicial scrutiny regarding the details that ostensibly guide the introduction of these measures, means government can implement new laws and policies without them being subject to meaningful public scrutiny. The Court of Appeal in the *Dolan* case noted: 'We must bear in mind that the regulations were approved by Parliament using the affirmative resolution procedure, albeit this occurred some weeks after they were made, as they were made in accordance with the emergency procedure [...] Although this does not preclude judicial review of the regulations, it does go to the weight which the courts should give to the judgement of the executive, because it has received the approval of Parliament' (para. 86).



However, parliamentary approval does not necessarily equate to parliamentary scrutiny, especially in circumstances where both Government and Parliament are under pressure to act quickly. Retrospective parliamentary approval of government measures emphasises this distinction. Some matters require priority being given to adequate legislative scrutiny over a speedy response, even during a national emergency. COVID-19 measures can be introduced by government under the guise that they are needed in order to protect public health, when in reality some of these measures – for example, the idea of vaccine passports – may be little more than ‘theatre’, with plots that are ill-conceived in light of available evidence. At this time, the courts in the UK may view many COVID-19 measures as legitimate matters for public debate that are best left to political forums, yet within their judgments is a potentially flawed assumption that such measures, incorporating the data that they are seemingly based upon, have been debated and scrutinised in such forums. Until Parliament has further opportunities to, and actually does, adequately scrutinise government pandemic measures, it is questionable whether the courts need be so disinclined to do so.

Charles Clore House  
17 Russell Square  
London WC1B 5JP

T 020 7862 5151  
E [binghamcentre@biicl.org](mailto:binghamcentre@biicl.org)

[www.binghamcentre.biicl.org](http://www.binghamcentre.biicl.org)

The Bingham Centre for the Rule  
of Law is a constituent part of the  
British Institute of International and  
Comparative Law ([www.biicl.org](http://www.biicl.org)).

Registered Charity No. 209425