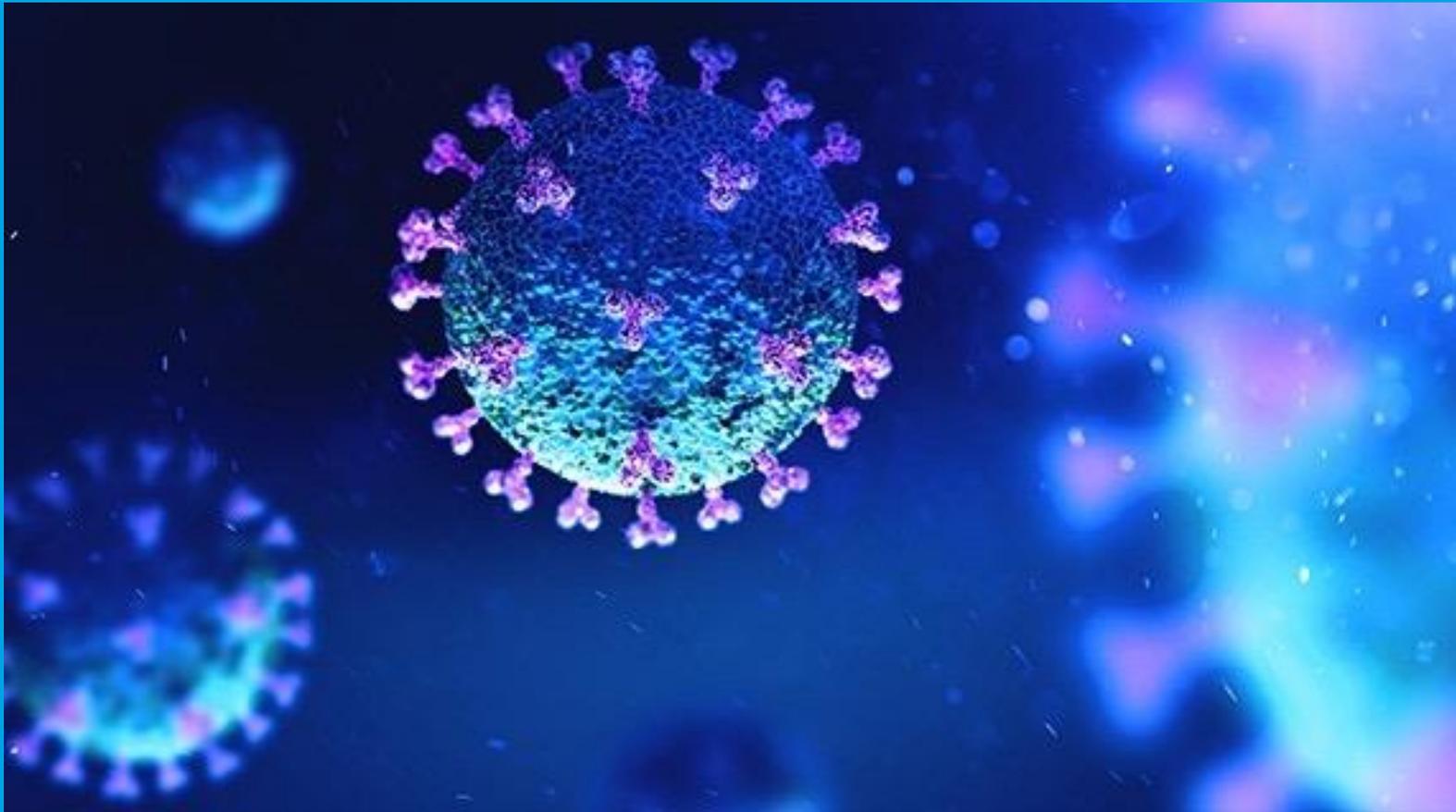


Rule of Law and Good Governance Principles Applicable to Data-Driven Responses to Public Health Emergencies

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

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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) Reforms that may be needed to data governance (national and international) given the scale of personal data sharing that is required.
- (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. The authors are grateful to colleagues for discussion of earlier drafts.



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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.

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This document seeks to outline a series of Rule of Law and good governance principles that should underpin data-driven responses to public health emergencies and can serve for assessing the legal frameworks that form part of such responses.

From the Citizen Jury deliberations that took place as part of this project, we know that Rule of Law and good governance considerations are relevant to public trust in the measures that have been adopted during the COVID-19 pandemic (Citizen Juries). The content of this output reflects an attempt to learn lessons from the on-going pandemic and identify principles applicable to this and any future health emergencies. This document does so by drawing together and building on previous work on the subject, including:

- Work Package 2.1 report for this project: Dr Jean-Pierre Gauci, *Rule of Law and Good Governance Principles for National Responses to Public Health Emergencies* ('WP 2.1 report').
- A4ID report: *The Rule of Law in Times of Health Crises* ('A4ID report').
- RECONNECT report: Dr Joelle Grogan and Nyasha Weinberg, *Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies* ('RECONNECT report').
- OMDDAC Research Compendium: *Data-Driven Responses to COVID-19: Lessons Learned* ('OMDDAC report').

Principle 1: Legality and Legal Certainty

- Measures introduced during PHEs should satisfy the principles of legality and legal certainty.

- Any response should be based in clear and known law, promulgated through pre-established processes (including if adopted through emergency procedures).
- The reliance on data to change measures should not diminish legal certainty. On the contrary, in situations where it can be expected that legislation and policy will need to change in response to an evolving PHE, ensuring as much legal certainty as possible becomes ever more important. For this reason, the data-driven criteria which will be considered when changing measures should be published.
- The law, including emergency measures, must be accessible and intelligible.

Principle 2: Necessity and Proportionality

- Measures introduced in response to PHEs that affect human rights are only permissible if they satisfy an established test for the limitation of qualified rights, through being shown to be necessary and proportionate in pursuit of a legitimate aim of protecting the public, including public health. Such measures should be time limited (including through the use of sunset clauses where applicable) and provided for under law (WP 2.1 report, pp. 6-8).
- Emergency situations and all restrictive measures taken in response to a PHE should be limited to what is strictly necessary and legislated for. (A4ID report, pp. 17-21).
- Principles of necessity and proportionality must be regularly assessed against the best available evidence.
- Data collection and sharing required to respond to emergencies should similarly be assessed against the principles of necessity and proportionality. It must be subject to 'appropriate controls, conditions and time-limitations' (OMDDAC report, p. 6).
- Measures, including data sharing, must clearly relate to suppressing the spread of the virus; they should adapt as the situation develops, and containment requirements change.
- Data on which necessity and proportionality are measured should be transparent and open to public scrutiny (see below).

Principle 3: Equality and Non-Discrimination

- Any measures implemented must respect the principles of non-discrimination including with respect to the protected characteristics set out in national and international law.
- The specific needs of vulnerable groups (including minorities, migrants and refugees etc.) must be addressed. Positive action measures should be put in place to help overcome some of the structural barriers. Used well, data can help provide insights into those barriers.
- Governments must monitor for bias in policies and consider the data sources used to inform policy, including the impact of bias in data collection practices and the data's own possible bias.
- Different groups must be represented in informing, deliberating, drafting, implementation and monitoring of policies so as to improve the ability to identify and address differentiated and discriminatory impacts of measures.

Principle 4: Existing Legal Obligations

- Whilst some limitations and derogations can be provided for in times of emergency, States continue to be bound by their international obligations. This includes, but is not limited to, human rights obligations including the right to privacy (WP 2.1 report, p. 9; RECONNECT report, pp.12-15).

- Any derogations to human rights obligations should be explicit, properly reasoned and time limited, clearly setting out evidence justifying such derogation (WP 2.1 report, p. 7).
- States should clarify the process through which the need for derogations is assessed, who holds the authority to notify such derogations and checks and balances on the determination of such derogations.
- In line with international law, States must perform their international law obligations in good faith.

Principle 6: Evidence-Based Policy-Making

- All measures adopted should be based on the best available evidence (WP 2.1 report, p. 11), which must inform and drive the development of policy, its implementation and monitoring.
- All measures should also be informed by evidence from other countries, including as regards which policies worked and did not work. States should consider sharing of evidence and analysis as part of their commitment to international cooperation.
- Data on the impacts of a particular policy response should be collected over time to monitor impacts of PHEs over time and to inform future decision-making (A4ID report, p. 48). States and relevant stakeholders should collect, and analyse qualitative data alongside quantitative data to improve their decision-making (OMDDAC report, p. 4).
- States should consider longer-term potential impacts before implementing new emergency measures (WP 2.1 report, p. 11). Policy impact modelling can help inform such due diligence considerations.

Principle 7: Effectiveness and Efficiency

- States and all relevant stakeholders should undertake regular monitoring and evaluation of policies and practices in order to make sure the most effective and efficient outcomes.
- Government should ensure that policy measures are targeted at specific aims and that they are monitored and evaluated against the achievement of those aims (RECONNECT report, pp. 18-22).

Principle 8: Transparency and Access to Information

- Transparency is critical for accountability and to fostering public trust. The public should have adequate access to information regarding the emergency itself (WP 2.1 report, p. 10), the measures being adopted to respond to the emergency, the data on which that response is based, and the evidence about the strengths and weaknesses of that response.
- Such information should be made available in formats and formulations that people can understand and effectively utilize. Transparency is required about the data itself as well as its sources and methods of analysis.
- Translating complex scientific data into plain language that general publics can understand may help the public overcome concerns that arise during PHEs. It can help mitigate the risks of misinformation and build public trust. Regular communication is critical.
- Transparency in decision making should be maintained across the policy cycle from development to implementation to monitoring and evaluation.
- The public must also be accurately and promptly informed of what data about them is being collected and why, and in which way and with whom it is being shared and the reasons why those entities (public or private) have access to the data. (OMDDAC, p. 6).

- With regard to government use and sharing of data, it is crucial to provide 'appropriate public transparency about data sources and methods of analysis' (OMDDAC, p. 6). Our citizen jury deliberations also indicated that some members of the public value transparency regarding what the data being used is, how it is being used, by whom it is being used and the safeguards in place.

Principle 9: Open Government, Participation, Engagement, Representation

- There is a need to support the active participation of civil society in the monitoring of processes and of substantive provisions, including with regards to data sharing and use.
- Government strategies for responding to PHEs should ensure decision-making is participatory and inclusive (WP 2.1 report, p. 11).
- Government should engage with traditional and non-traditional audiences in identifying issues to be addressed and best solutions.
- Government and other state bodies undertaking public consultation should engage with all sections of the public 'including under-represented groups and children and young people, employing multiple strategies of engagement' (OMDDAC report, p. 6).

Principle 10: Oversight, Accountability and Access to Justice

- Where decisions are made with the assistance of AI, human oversight remains critical (OMDDAC report, p. 4).
- Parliamentary scrutiny of legislation, including emergency measures, remains critical even in situations where it is difficult to implement (WP 2.1 report, p. 9) (A4ID report, p. 46). Parliamentary scrutiny must be informed by access to, and a clear understanding of, the data used to underpin policy initiatives.
- Parliamentary procedures should be such so as to allow effective scrutiny of legislation including when this is adopted quickly. Parliamentary scrutiny should itself be open to the public.
- Data sharing must be overseen by independent governance and monitoring bodies, duly authorised by law.
- Accountability must be ensured for all involved. No one (individual or entity) is above the law. Accountability is key to combatting corruption, ensuring good governance and maintaining public trust.
- There must be adequate judicial oversight of conduct to ensure that measures undertaken abide by legal obligations (including but not limited to human rights obligations) and the Rule of Law.
- Any individual or organization who feels aggrieved by any measure adopted must have full access to justice, including access to all relevant evidence required to make their case and affordable legal assistance in doing so. The use of online court proceedings, whilst justified in some circumstances, must be done with due regard to effective access to justice for all.

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