



**THE RULE OF LAW
IN TIMES OF
HEALTH CRISES**



ABOUT ADVOCATES FOR INTERNATIONAL DEVELOPMENT

Advocates for International Development (A4ID), founded in 2006, is a global charity that believes the law can and should, be used more effectively to advance fair and sustainable development. A4ID aims to inspire and enable lawyers to join the global fight to eradicate poverty by advancing the UN Sustainable Development Goals (SDGs). Through A4ID, the world's top lawyers provide free legal support to organisations, working to advance human dignity, equality and justice. Its work has so far impacted in over 130 countries.

Run by A4ID, the Rule of Law Expertise (ROLE UK) Programme is funded by the Department for International Development (DFID). It supports partnerships to provide pro bono legal and judicial expertise with the aim to strengthen the rule of law in official development assistance (ODA)-eligible countries. The Programme's Knowledge Hub provides the pro bono legal sector with access to targeted and relevant information to inform and improve their technical assistance in development contexts.

www.roleuk.org.uk | roleuk@a4id.org

ACKNOWLEDGEMENTS

We thank Dr Julinda Beqiraj, Dr Jean-Pierre Gauci and Nyasha Weinberg of the Bingham Centre for the Rule of Law at the British Institute

of International and Comparative Law, and Dr Luciana Brondi of The University of Edinburgh Global Health Academy for undertaking the research and drafting the paper. We are grateful to Neha Bhansali for layout and design.

FOREWORD

The COVID-19 pandemic has again highlighted the close links between authorities' responses to a health crisis, and the rule of law.

To control the spread of the virus, and to preserve health systems and human lives, governments around the world have limited individual freedoms. They have taken measures ranging from collecting and processing private data, to general population confinement – including strict quarantine. Without pronouncing on their necessity or effectiveness, in respect to controlling the epidemic, these measures question the principle of the rule of law: were they taken by competent authorities, in accordance with the procedures and conditions established by law, without giving rise to discrimination? This paper considers the relevance of the rule of law in the event of major crises: can countries with a robust legal system be considered better equipped to deal with an epidemic? Should development aid programmes aimed at strengthening the rule of law in developing countries include this dimension of crisis resilience in their support?

A4ID believes that the law and lawyers are now,

more than ever, required to work together with the development community to contribute to the recovery from the effects of COVID-19 worldwide. To this end, in collaboration with our Legal Partners, A4ID has developed a series of COVID-19 Updates, which provide an overview of the key legal issues that impact charities and social enterprises, as governments respond to the pandemic. Such collaborative working and sustainable partnerships are fundamental to improving conditions for poor and vulnerable people, while providing greater access to justice for all parts of society.

Taking a holistic approach, which aims to achieve long-term sustainable impact, our ROLE UK Programme focuses on improving laws, policies, systems and practices by fostering and strengthening strategic partnerships and development-centric pro bono legal technical assistance. The Programme specifically supports collaboration between the UK legal sector and legal actors in ODA-eligible countries to strengthen the rule of law and facilitate progress towards the SDGs. As part of this work, the Programme aims to build an inclusive community of practice on rule of law and development by

bringing together and fostering discussion amongst rule of law stakeholders, and legal and development professionals, on key topics related to strengthening the rule of law.

The Programme's central role in coordinating efforts to strengthen the rule of law ensures that A4ID is well positioned to develop this paper, at a time when the principles of the rule of law are being challenged by the COVID-19 pandemic and its aftermath. When a health crisis, and the measures taken to deal with it, have significant consequences for all, it is important to emphasise the rule of law as the foundational framework

enabling open, fair and peaceful societies, where citizens and businesses can prosper.

In examining the relationship between rule of law and health crises, focusing in particular on the present COVID-19 crisis, this paper draws lessons about how the rule of law and its core elements have the potential to contribute to the empowerment of societies to respond to crisis situations. Furthermore, the paper offers clear recommendations as to how programmes aiming to strengthen the rule of law in ODA-eligible countries, and legal sector actors (especially those involved in pro bono technical assistance), can meaningfully contribute to this response.

YASMIN BATLIWALA
Chief Executive

LIST OF ACRONYMS

A4ID	Advocates for International Development
AU	African Union
DFID	Department for International Development
EAC	East African Community
ECOWAS	Economic Community of West African States
EIU	Economist Intelligence Unit
EU	European Union
GDPR	General Data Protection Regulation
GHSI	Global Health Security Index
HMG	Her Majesty's Government
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Social Economic and Cultural Rights
ICT	Information and Communications Technology
IHR	International Health Regulations
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LMICs	Low- and Middle-Income Countries
MDGs	Millennium Development Goals
ODA	Official Development Assistance
PHEIC	Public Health Emergency of International Concern
ROLE UK	Rule of Law Expertise UK Programme
SADC	Southern African Development Community
SARS-CoV-2	Novel coronavirus
SDGs	Sustainable Development Goals
UN	United Nations

UN-DESA	United Nations Department of Economic and Social Affairs
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
WTO	World Trade Organization



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EXECUTIVE SUMMARY

Following the spread of COVID-19, the world has been plunged into an unprecedented crisis. States have taken drastic measures to control the spread and impacts of the novel coronavirus (SARS-CoV-2), with many declaring a 'State of Emergency'. These measures have significant consequences for the functioning of States, including the operation of courts and parliaments; and impacts for human rights and freedoms. In this paper we consider the relationship between the rule of law and health crises, focusing in particular on the present crisis (COVID-19), but also looking at identifying lessons for pandemic preparedness programmes that would strengthen the rule of law.

The relationship between rule of law principles and public emergencies is set out in both international instruments and national legal frameworks. These include the World Health Organization's International Health Regulations; the International Covenant on Civil and Political Rights (ICCPR) and the Siracusa Principles; the UN 2030 Sustainable Development Agenda; and the Venice Commission Rule of Law Checklist. From these documents, ten main principles governing the relationship between the rule of law and public health emergencies can be derived.

These include: legality, necessity, proportionality, non-discrimination, time-limits, non-derogable rights, international obligations, parliamentary scrutiny, effective remedy and transparency.

Government interventions to contain the spread of COVID-19 impact the rule of law by threatening institutions and how they function, as well as individual rights and freedoms. Threats to institutions include a concentration of power in the executive branch of government and disruptions to parliamentary activities, elections and courts. Simultaneously, the specific measures to control the crisis pose threats to rights and freedoms, which include expanded surveillance; new powers of detention; migration and movement controls; increased risk of disinformation and restrictions to freedom of expression; discrimination; impact on vulnerable groups; and disruptions to economic rights, food security, education and healthcare.

The rule of law contributes to an effective pandemic response by promoting transparency, clarity, participation, engagement and representation, international cooperation, equality, accountability and anti-corruption, among other principles.



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Moving forward, development programmes must have the dual function of both supporting States in responding to health crises in a way which is compatible with the rule of law, and reinforcing the enabling environment that the rule of law provides. As the experience of A4ID's ROLE

UK Programme has established, this can be achieved by:

- **Strengthening Policies:** monitoring country adherence to rule of law principles; raising awareness of the importance of legal frameworks; sharing policies for managing health emergencies that minimise negative impacts on rule of law/human rights; and promoting transparency and participatory approaches when new policies are developed and implemented
- **Strengthening Laws:** developing specific laws/rules on the state of emergency, in compliance with rule of law safeguards, that can be swiftly invoked during a crisis; lining up legal frameworks with the rule of law and transparency objectives set out in SDG 16; and using laws as an instrument of development
- **Strengthening Institutions:** triaging court cases; ensuring access to justice; and increasing use of written procedures and parliamentary scrutiny
- **Strengthening Practices:** addressing inequalities and differentiated impacts; increasing training opportunities; supporting States in closing the digital divide, while putting in place rule of law safeguards; and building capacity to monitor the impacts and responses to health emergencies through collaboration with other different sectors (e.g. health)

INTRODUCTION: SETTING THE PARAMETERS

In November 2019, a new infectious disease (COVID-19), caused by a novel coronavirus (SARS-CoV-2), was discovered in China.¹ On 30 January 2020, WHO declared COVID-19 a Public Health Emergency of International Concern (PHEIC), and on 11 February 2020 it was declared a global pandemic. As of 1 June 2020, a total of 6,040,609 confirmed cases of COVID-19 and 370,657 deaths have been reported to the WHO in all continents.² Apart from the rapid speed of transmission of the virus, other important features of this pandemic include the lack of available and effective treatment for the disease; the respiratory transmission route,

which requires enhanced control measures; the need for complex medical support, including hospital care (and sometimes intensive care for a significant percentage of the cases); and the high lethality in vulnerable groups, including the elderly and those with underlying health conditions. In response to the virus, most States mobilised quickly, taking drastic measures to control its spread. At the time of writing, many countries around the world have declared a 'state of emergency'.³ Some have relied on existing legislation that establishes the framework for emergencies. Others have enacted specific legislation to control the spread of the virus.



DEFINING AN EMERGENCY

A state of emergency can broadly be described as a situation which enables the government to enact laws and policies outside the bounds of what would usually be permitted. The Cambridge Dictionary defines it as “a temporary system of rules to deal with an extremely dangerous or difficult situation”.⁴ State of emergencies can be declared by States in a variety of contexts, including natural disasters, security situations and health emergencies. It appears that a ‘state of emergency’ in its different national adaptations is the highest-level response in all States and produces extraordinary powers, but is not always called upon when there are disasters. In such

cases, governments may choose to respond by declaring a ‘state of disaster’, which involves a limitation to existing rights within what is permitted by law, but no use of extraordinary powers.

The International Health Regulations (IHR) make provision for the determination of a PHEIC at the international level, whilst domestic law makes provision for a domestic declaration of a public health state of emergency, whose effects remain confined to the national territory.⁵ The IHR define a PHEIC as “...an extraordinary event which is determined (...): to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response”.⁶

DEFINING THE RULE OF LAW

Lord Bingham’s book *The Rule of Law* offers a clear and concise functional definition of the rule of law as requiring eight conditions:

1. the law should be accessible and predictable
2. legal questions should be determined according to law, not by the exercise of discretion
3. the law should apply equally to all, except where 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 without prohibitive cost or inordinate delay, bona fide civil disputes, which the parties themselves are unable to resolve

7. adjudicative procedures provided by the State should be fair

8. the State must comply with its obligations in international law as in national law⁷

These eight ingredients have been further distilled into four essential components of the rule of law: legality, legal certainty, equality and access to justice and rights (Jowell and O’Cinneide;⁸ McCorquodale;⁹ Bingham¹⁰). The last two, in particular, embody substantive elements, in the sense of the distinction drawn by Paul Craig between formal conceptions that are concerned with legal procedures and formulation of laws, and substantive notions that address the content of laws and encompass human rights (Craig 1997; See also: Barber 2004).

The international element of the rule of law is important for public health emergencies. Lord Bingham puts it as follows: the rule of law requires compliance by the State with its obligations in international law as in national law. It requires laws to be consistent with States’ international obligations including, but not limited to, their human rights obligations.¹¹ The closeness of the relationship between international protection of human rights and the rule of law has been increasingly recognised. The functional definition of the rule of law, adopted by A4ID’s ‘ROLE UK Programme’, also refers to the ends that a society



“The rule of law requires compliance by the State with its obligations in international law as in national law. It requires laws to be consistent with States’ international obligations including, but not limited to, their human rights obligations.”

values and that are generally agreed to be desirable in a fair, open and democratic society. According to that definition the rule of law advances five main ends:

1. public authority is bound by and accountable before pre-existing, clear, and known laws

- 2. citizens are treated equally before the law
- 3. human rights are protected
- 4. citizens can access efficient and predictable dispute resolution mechanisms

- 5. law and order are prevalent

The rule of law constitutive elements, enabling conditions and outcomes are summarised in the diagram below.¹²

CONSTITUTIVE ELEMENTS	
<p>THE RULE OF LAW IS WHERE:</p> <ol style="list-style-type: none"> 1. Public authority is bound by and accountable before pre-existing, clear and known laws 2. Citizens are treated equally before the law 3. Human rights are protected 4. Citizens can access efficient and predictable dispute resolution mechanisms 5. Law and order are prevalent 	
ENABLING CONDITIONS	OUTCOMES
<p>The rule of law needs...</p> <ul style="list-style-type: none"> ■ Broad acceptance of rules of the game based on: <ul style="list-style-type: none"> □ Stable / inclusive political settlement □ Legitimate state-society social contract □ Good fit between formal and informal institutions and norms ■ Organisations (state and non-state) able to make, administer and enforce the rules ■ Checks on executive / public authority: <ul style="list-style-type: none"> □ Separation of powers □ Effective accountability mechanisms ■ Disciplined political parties, active civil societies 	<p>The rule of law contributes to...</p> <ul style="list-style-type: none"> ■ Justice ■ Equality ■ Democracy and accountability ■ Control of impunity and corruption ■ Effective public administration and equitable service delivery ■ Personal security ■ Peaceful conflict management ■ Common resource management private sector investments ■ Business growth ■ Job creation

THE RELATIONSHIP BETWEEN THE RULE OF LAW AND SUSTAINABLE DEVELOPMENT

Health crises can have a considerable impact on sustainable development. The current pandemic is destabilising the global economy and upending the lives of billions around the globe, threatening to push them into (further) poverty. From a law and development perspective, “the rule of law, poverty eradication and sustainable development have a mutually reinforcing relationship”.¹³ The ways in which this operates have been eloquently summarised in a note by the General Assembly’s President:

“[i]n regard to the rule of law, there is international consensus that rule of law is critical to sustainable development, not only as an essential condition thereof but also as a development outcome in its own right. There is moreover a general acknowledgment that its integration into the post-2015 development agenda can advance inclusive economic growth, reduce inequalities and build well-functioning institutions that ensure participation and the delivery of services, including providing access to justice for all, especially the poor and most vulnerable. In this way, the rule of law, poverty eradication and sustainable development have a mutually reinforcing relationship.”



“The rule of law, poverty eradication and sustainable development have a mutually reinforcing relationship.”

Such vision was ultimately reflected in the 2030 UN Sustainable Development Agenda, through the inclusion of a specific Sustainable Development Goal (SDG), which incorporates rule of law elements (SDG 16).¹⁴

However, while there is agreement that the rule of law matters for development, the evidence does not indicate which institutions are likely to matter more given the local context and circumstances. Accordingly, there are different possible rule of law related pathways to economic development and poverty reduction.

Rule of law programmes must be tailored to the local context and must follow a ‘problem solving’ or ‘diagnostics’ oriented approach, if they are to facilitate growth and investment.

STRUCTURE OF THE PAPER

The drastic measures taken by States in the context of responding to COVID-19 have significant implications on the rule of law. In turn, the extent to which a State adheres to the rule of law impacts the effectiveness of that State's response. It is this dynamic relationship that this paper seeks to unpack. The analysis consists of four parts, which reflect the four objectives of the paper:

- 1. to capture the nexus between rule of law and emergency situations, with a focus on public health emergencies (Part 1)
- 2. to highlight the implications of a health crises

on the rule of law, as exemplified by the current COVID-19 situation (Part 2)

- 3. to assess whether strong rule of law is an asset when dealing with a health crisis or, to the contrary, whether authoritarian regimes handle epidemics better (Part 3)
- 4. to draw lessons on how programmes aiming to strengthen the rule of law in ODA-eligible countries, and legal sector actors, especially those involved with pro bono technical assistance, should consider a country's ability to respond to health crises in their work. Part 4 also outlines some means by which these actors can meaningfully contribute to the global COVID-19 recovery (Part 4)



PART 1: THE RELATIONSHIP BETWEEN THE RULE OF LAW AND PUBLIC HEALTH EMERGENCIES

The nexus between rule of law principles and public emergencies (including PHEIC) is set out in both international instruments and national legal frameworks. On the one hand, in the vision of the 2030 Sustainable Development Agenda: the rule of law constitutes an important **enabling factor** of development when dealing with a range of challenges, such as health, food or education, including when these are the result of an emergency. On the other hand, the rule of law provides a **perimeter of legitimacy** (both procedural and substantive) of the restrictive measures taken in response to a crisis. Put differently, responses to public emergencies (including PHEIC) 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 emergency measures, is expected to strengthen public trust in the institutions and the legitimacy of the measures. This should ultimately bolster their effectiveness through increased compliance.¹⁵

The international framework of standards for a



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legitimate state of emergency can be drawn from international human rights' instruments. This

paper focuses on the International Covenant on Civil and Political Rights (ICCPR) and on the International Covenant on Social Economic and Cultural Rights (ICESCR), due to their reach in countries which are recipients of ODA, as well as on a series of non-binding instruments which are of relevance to this topic.¹⁶

WHO INTERNATIONAL HEALTH REGULATIONS

WHO's International Health Regulations (IHR) 2005, in force since June 2007 and binding for 196 States, are the sole binding global legal instrument dedicated to the prevention and control of the international spread of disease.¹⁷ The IHR enable, under Article 12, the declaration of a "public health emergency of international concern" (PHEIC). The regulations contain clear obligations on due diligence and cooperation of countries, alongside general and more routine health measures. The IHR set out that WHO's Director General may issue temporary recommendations in the form of "non-binding advice" under the IHR. This may cover State responsibilities in relation to issues such as travel, and trade with affected countries (Art. 1).

The IHR require that health measures be implemented by countries, "with full respect for the dignity, human rights and fundamental freedoms of persons" (Art. 3) and that countries

report any additional health measures for emergencies to WHO (Art. 43).

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Restrictions on the human rights and freedoms enshrined in the ICCPR are generally permitted within well-defined limits, as described below.

Restrictions on human rights can take the form of simple limitations or derogations (a more severe form of restrictions in times of a public emergency). There are also limits as to which rights can be subject to limitations and derogations.

Limitations of some of the rights set out in the ICCPR are permitted if based on public health grounds. Limitations can be legitimately introduced with regard to the liberty of movement, the freedom of expression, the right to peaceful assembly, etc.

To be justifiable, however, limitations must also be:

- prescribed by law
- necessary in a democratic society in the interests of public health
- proportional, i.e., the least restrictive alternative to deal with the situation

The ICCPR also permits States, “in times of (...) public emergency, threatening the life of the nation, (...) to take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law” (Art. 4). Some human rights, however, cannot be subject to derogations – the more severe form of restrictions. Such rights include the prohibition of torture, cruel and inhuman treatment, right to life, principle of no punishment without law, recognition before the law, or freedom of thought, conscience and religion. Article 4 subjects both the very measure of derogation, as well as its material consequences, to a specific regime of safeguards, based on the principles of legality and the rule of law, inherent in the Covenant as a whole.

To be justifiable, derogations must be:

- related to a public emergency which threatens the life of the nation and the existence of which is officially proclaimed
- strictly required by the exigencies of the situation
- consistent with a State’s other obligations under international law
- non-discriminatory
- immediately communicated to the other parties of the ICCPR through the UN Secretary General

- of limited duration

The ICCPR provisions on restrictions to the rights set out therein, and the conditions for their legitimacy, are further explained and clarified in General Comment No. 29 on Article 4 of the Human Rights Committee (the monitoring body of the ICCPR).¹⁸ They are further elaborated in the non-binding “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights” of the American Association for the International Commission of Jurists.¹⁹ For instance, in relation to a derogation due to “a public emergency which threatens the life of the nation” General Comment No. 29 clarifies that “Not every disturbance or catastrophe qualifies as a public emergency, which threatens the life of the nation” (para. 3). This is typically the case of armed conflicts, but even in such cases, “measures derogating from the Covenant are allowed only if, and to the extent that, the situation constitutes a threat to the life of the nation” (para. 3).

“If State parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances” (para. 3). Therefore, in the words of the Committee, “If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a

mass demonstration including instances of violence, or a major industrial accident, they must be able to justify, not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.” (para. 5). Further in this regard, the Siracusa Principles specify that, “A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State; and (b) threatens the physical integrity of the population, the political independence, or the territorial integrity of the state, or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant” (para. 39). However, economic difficulties as such cannot justify derogation measures (para. 41).

Other notable provisions, similar to Article 4 of the ICCPR, are: Article 15 of the European Convention on Human Rights and Article 27 of the American Convention on Human Rights. Interestingly, the African Charter for Human and Peoples’ Rights does not have an equivalent derogation clause. However, States can legitimately impose restrictions on other rights (for example, the right to assembly (Art. 11), and freedom of movement (Art. 12)) to the extent that these are, provided for by law for the protection of national security, law and order, public health or morality.



“If States invoke the right to derogate from the ICCPR during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify, not only that such a situation constitutes a threat to life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.”

THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

Article 4 of the ICESCR sets out the possibility of limitations (but not of derogations) on the rights enshrined in the Covenant, “as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. This must also be read in the light of Article 2 of the Covenant on the nature of the general legal obligations under the ICESCR, which provides for the progressive realisation of the rights therein enshrined.

Article 12 of the ICESCR sets out the right “to the enjoyment of the highest attainable standard of physical and mental health”. In its General Comment No. 14, on Article 12, the Committee on Economic Social and Cultural rights acknowledges that, “issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights” and emphasises that “Article 4, is primarily intended to protect the rights of individuals, rather than to permit the imposition of limitations by States” (para. 28). It goes on to provide (paras. 28 and 29) that any restrictions must be:

- in accordance with the law, including international human rights standards



“Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights.”

- compatible with the nature of the rights protected by the Covenant
- in the interest of legitimate aims pursued
- strictly necessary for the promotion of the general welfare in a democratic society
- proportionate (i.e. the least restrictive alternative must be adopted where several types of limitations are available)
- of limited duration
- subject to review

Finally, any State restricting ICESCR rights “has the burden of justifying such measures in relation to each of the elements identified in Article 4”. Overall, these requirements are very similar to those set out in relation to limitations on the ICCPR rights based on public health grounds.

In a statement on the impacts of COVID-19 the Committee on Economic Social and Cultural Rights summarised the requirements for measures undertaken in response to the current crisis (para. 11) as follows:

“In essence, such measures must be necessary to combat the public health crisis (...), and be reasonable and proportionate. Emergency measures and powers adopted by States (...) should not be abused, and should be lifted as soon as they are no longer necessary for protecting public health.”²⁰

THE UN 2030 SUSTAINABLE DEVELOPMENT AGENDA

Following up on the Millennium Development Goals (MDGs), the UN 2030 Sustainable Development Agenda sets out a comprehensive plan of action “to end poverty, protect the planet and improve the lives and prospects of everyone, everywhere”.²¹ The recurring and overarching objective of the 2030 Agenda is “Leave no one behind”. An intrinsic element for the achievement of the SDG targets requires specific efforts aimed at curbing inequalities between people, groups and places, and correcting the legacies of discrimination and exclusion between and within countries. The Agenda, which reflects a three-dimensional understanding of sustainable development – economic, social and environmental – was adopted unanimously by

UN Member States in 2015. It consists of 17 SDGs, each broken down by a number of targets to achieve by 2030. Although the SDGs are not legally binding, countries have committed to take ownership and establish national frameworks for achieving the goals.

SDG 3 on health aims to, “Ensure healthy lives and promote well-being for all at all ages”. Target (3.d) sets out to, “Strengthen the capacity of all countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks”.

SDG 16, covering the rule of law, aims to, “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels”. The following targets are relevant for development:

16.3: Promote the rule of law at the national and international levels, and ensure equal access to justice for all

16.5: Substantially reduce corruption and bribery in all their forms

16.6: Develop effective, accountable and transparent institutions at all levels

16.7: Ensure responsive, inclusive, participatory and representative decision-making at all levels

16.8: Broaden and strengthen the participation of

developing countries in the institutions of global governance

16.10: Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

16.b: Promote and enforce non-discriminatory laws and policies for sustainable development

The Sustainable Development Agenda recognises the deep interconnections across the goals and targets in the Agenda. One such link is between the goal on health (SDG 3) and the understanding of the rule of law (SDG 16) as part of ‘the golden thread’ of growth and development.²² SDG 16 contains several targets that spell out how the rule of law and its elements are relevant for development. The Agenda includes global health threats among the “immense challenges to sustainable development”, which risk to reverse much of the development progress made in recent decades.

VENICE COMMISSION RULE OF LAW CHECKLIST

The European Commission for Democracy through Law (better known as the Venice Commission) is the Council of Europe’s technical advisory body on constitutional matters.²³ In 2016, the Commission adopted the Rule of Law Checklist, which sets out the core elements of the



Global health threats are one of the immense challenges to sustainable development. They risk reversing much of the progress made in recent decades.

rule of law and is accompanied by benchmarks for assessing adherence to the rule of law within a State.²⁴ 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 different Council of Europe and European Union (EU) institutions, as well as by the wide membership of the Venice Commission. Besides the 47 Member States of the Council of Europe, there are 15 other members, as well as other countries that participate with different statuses.²⁵ Such members include Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia,

Argentina, Japan, Saint Siege, Uruguay, Belarus, the South African Republic and the Palestinian National Authority.

The Venice Commission's Rule of Law Checklist, under the principle of legality, contains a specific section on exceptions in emergency situations. It sets out that, "State security and public safety can only be effectively secured in a democracy which fully respects the rule of law." It acknowledges that ensuring the security of the State and its democratic institutions, as well as the safety of its officials and population, are vital public and private interests, which deserve protection and may require temporary derogations from certain human rights and an extraordinary division of power.



“State security and public safety can only be effectively secured in a democracy which fully respects the rule of law.”

The Rule of Law Checklist includes a series of practice benchmarks to be considered in emergency situations to ensure necessary measures, taken to safeguard the nation, are not abused by those in power:

- Are there specific national provisions applicable to emergency situations?
- Are derogations to human rights possible in such situations under national law?
- What are the circumstances and criteria required in order to trigger an exception?
- Does national law prohibit derogation from certain rights even in emergency situations?
- Are derogations proportionate – that is, limited to the extent strictly required by the exigencies of the situation – in duration, circumstances and scope?
- Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?
- What is the procedure for determining an emergency situation?
- Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?

PRINCIPLES GOVERNING STATE OF EMERGENCY RESPONSES

From the sources and instruments above, this paper draws ten core principles that should guide State emergency responses. The decalogue of

principles includes procedural safeguards related to the introduction of the measures and their implementation, as well as principles that affect the content of the measures, especially when they result in restrictions on human rights. This paper also explains the significance of such principles during a health emergency.

<p>LEGALITY</p>	<p>Measures should be foreseen by the law in force at the time the limitation is applied. Derogations from human rights should be authorised in a law approved by parliament, or in an emergency decree issued by the government, which is later subject to parliamentary approval.</p>	<p>In health emergencies governments need to act swiftly and decisively. Emergency measures, however, must be in compliance with constitutional principles and authorised by law – through ex-ante delegation of powers to government, or ex-post parliamentary confirmation of government measures.</p>
<p>NECESSITY</p>	<p>Measures that impose restrictions on fundamental rights should be introduced if they are necessary against objective conditions and directed towards an “actual clear, present or imminent danger.”</p>	<p>COVID-19 is a potentially lethal, novel disease. The severity and geographical spread of the virus warrant restrictive measures to prevent a catastrophic breakdown of health systems and massive life losses. However, the measures must clearly relate to suppressing the spread of the virus; they should adapt as the situation develops, and containment requirements change.</p>

<p>PROPORTIONALITY</p>	<p>Restrictive measures should be limited to the extent strictly required by the exigency of the situation, in duration, circumstances, and scope.</p>	<p>Competent national authorities must individually assess restrictive measures taken or proposed to deal with the specific dangers posed by the emergency, thus State responses have varied depending on the intensity of spread. A measure would fail the proportionality test if a less restrictive measure were adequate to deal with the threat.</p>
<p>NON-DISCRIMINATION</p>	<p>Derogation measures should not involve discrimination on the grounds of race, colour, sex, language, religion, or social origin (Art. 4 ICCPR).</p>	<p>In designing restrictive measures to combat the virus, States must be alert to avoid discrimination against certain groups. Examples include if restrictions are designed to solely restrict the activities of certain groups with protected characteristics under international and domestic law (ethnicity, gender, age, disability status).</p>
<p>TIME LIMITS</p>	<p>Emergency laws and provisions enacted thereunder should be subject to clear time limits.</p>	<p>The appropriate duration of emergency measures depends on the nature of the emergency. The effects of emergency measures should be assessed and reviewed periodically; and any extensions should be subject to parliamentary oversight. Limitations to civil and political liberties beyond the duration of the emergency are illegitimate.</p>

<p>NON-DEROGABLE RIGHTS</p>	<p>The right to life, the prohibition on torture, slavery and retroactive punishments are rights which are not derogable under any condition, even for preserving the life of the nation.</p>	<p>Restrictions affecting non-derogable rights have been less controversial in the case of COVID-19 than in relation to counterterrorism related emergencies. A non-derogable right that could be relevant in a health emergency is the prohibition of medical or scientific experimentation without consent (Art. 7 ICCPR).</p>
<p>INTERNATIONAL OBLIGATIONS</p>	<p>Even in an emergency situation, when derogation from the ICCPR obligations is allowed, States continue to be bound by other international obligations, including international humanitarian law or trade law.</p>	<p>Emergency measures to counter COVID-19 do not suspend a State's other international obligations, including those in the field of economic, social and cultural rights. The World Trade Organization (WTO) trade system, for instance, is crucial to ensuring access to food, medicines and medical products. The WTO allows members, under certain circumstances, to adopt restrictive measures that are necessary to protect public health and public welfare (e.g. export bans, quantitative restrictions on exports, subsidies etc.), but these should be temporary, non-discriminatory, and should not constitute a disguised restriction on international trade.</p>

<p>PARLIAMENTARY SCRUTINY</p>	<p>Parliaments should continue to work and be able to oversee (by modifying or annulling) orders by the executive.</p>	<p>Parliaments have a vital role to play in protecting the health of the democracy, especially during times of emergency. Despite social distancing rules, parliaments should be able to meet, to exercise parliamentary control and judicial review of the existence and duration of the emergency, and the scope of any derogation thereunder.</p>
<p>EFFECTIVE REMEDY</p>	<p>Court activity may be impacted by an emergency, and adjustments may be necessary. However, States are under an obligation to provide an effective remedy in the case of human rights violations, as well as guaranteed access to a court for urgent matters.</p>	<p>The way COVID-19 has affected the right to an effective remedy is through the temporary closure of courts, or the slowing down of their activities due to social distancing, or due to staff being infected with COVID-19. Under the ICCPR, effective remedies should be available to persons challenging the legitimacy of the derogation measures. States should ensure (including by conducting hearings remotely) that essential court cases are dealt with, e.g. cases involving security measures resulting in deprivation of liberty, or civil and administrative cases involving minors, or necessary to avoid harmful actions.</p>

TRANSPARENCY

States are subject to a regime of international notifications in the event they derogate from human rights during a state of emergency. The requirement also applies when the emergency is terminated.

In the case of COVID-19, the regime of notifications has consisted in reporting to a series of international organisations (the UN Secretariat, WHO, WTO etc.) about the declaration of a state of emergency and the adoption of restrictive measures affecting international rights and obligations, in compliance with the specific rules applicable. At the international level, transparency helps to better coordinate global action, share experiences, and support countries to tailor responses to the virus. From an internal perspective, transparency affects accountability and public trust in government.



PART 2: THREATS TO THE RULE OF LAW

States of emergency do not, inherently, violate the principles of the rule of law, although they do create an environment where rule of law safeguards are simultaneously more critical and difficult to uphold. Such difficulty has been depicted through the image of ‘grey holes’ where powers to deal with a public health crisis are open-ended and/or vague.²⁶ Another key concern is the use of emergency powers for purposes other than those for which they were created.

This section explores some of the threats to the rule of law that have been identified during the current pandemic. Broadly speaking, we divide them into threats to institutions and to how they deliver their functions and threats to human rights. Both types of threats are discussed separately here and insights on the potential impact of these threats in low- and middle-income countries (LMICs) are also provided. The pandemic spread from Asia across Europe and the US, with a growing number of cases reported in Central and South America, Africa and the Middle East (as shown in the map below), with potentially serious social, economic and political consequences for these regions. Some of the poorest countries in the world may also be the

most vulnerable to the impact of the virus. However, some of these countries have experiences of responding to epidemics (SARS / HIV / Ebola / Zika), from which they (and other countries) can learn.





Coronavirus Resource Centre, John Hopkins University. 'Cumulative Confirmed Cases,' 30 May 2020.

THREATS TO THE RULE OF LAW	
THREATS TO INSTITUTIONS	
Concentration of power in the executive branch	Disruptions to elections
Disruptions to parliamentary activities	Disruptions to courts activities
THREATS TO RIGHTS AND FREEDOMS	
Expanded surveillance powers	Vulnerable groups
New powers of detention and impacts on personal freedom	Disruptions to economic activities and rights
Disruptions to freedom of movement	Food security
Media freedom and disinformation	Education
Discrimination	Healthcare

THREATS TO INSTITUTIONS AND THEIR FUNCTIONING

CONCENTRATION OF POWER IN THE EXECUTIVE BRANCH

The concentration of (law-making) power in the executive branch of government disturbs the usual equilibrium between the different branches of government; and may invite overuse, misuse or even abuse of powers. This demands that the other branches of government have enacted, or are able to enact, appropriate constitutional safeguards over both the substance of measures taken by executives, as well as the processes through which they are enacted. Without such controls, the concentration of power in the hands of the executive and the potential for interference with the judicial and legislative power make for a dangerous combination. An extension of the concentration of power in the executive is the overuse of the powers by the police and military. Examples from various countries have highlighted the risk of the police overusing and, in some cases, abusing their powers. For instance, in India, a peaceful protest was suppressed by the police as part of the COVID-19 response. In Peru, risks have been flagged about a law that exempts police officers and soldiers from criminal responsibility for death or injury caused during the state of emergency.²⁷

In a statement, the UN High Commissioner for



“There have been numerous reports from different regions that police and other security forces have been using excessive, and at times lethal, force to make people abide by lockdowns and curfews.

Human Rights noted: “There have been numerous reports from different regions that police and other security forces have been using excessive, and at times lethal, force to make people abide by lockdowns and curfews. Such violations have often been committed against people belonging to the poorest and most vulnerable segments of the population”.²⁸ Some States have gone some way to controlling some of the police powers, with the Conseil d’Etat in France, for instance, banning the police from

using drones to survey the public during the epidemic.²⁹ However, concerns continue. In various countries, the military has also taken a role in the response to COVID-19.

DISRUPTIONS TO PARLIAMENTARY ACTIVITIES

Many legislatures have been forced by COVID-19 to close their doors and to significantly limit their activities. Although there is no indication that legislature closures would be anything other than temporary; the closing will lead to postponed/delayed legislation, an end to or reduction of the activity of parliamentary bodies and a reduction in the level of scrutiny given to government actions. At a time when legislation that could significantly impact lives and livelihoods is enacted, parliamentary scrutiny should be more important than ever. However, this is put to test by the requirement of physical distancing, which make regular meetings of parliaments increasingly difficult.

The current situation has revealed States' limited readiness to use technology as part of the law making and parliamentary scrutiny processes. Some parliaments, such as the European Parliament, are moving to electronic voting;³⁰ although some legislatures still require physical presence for voting.³¹ Even in the absence of emergencies like COVID-19, the functioning and resolution capacity of key government institutions,

including the judicial, legislative and executive power, is limited in many LMICs. These institutions or branches of government are usually overstretched, overburdened and under-funded. Many LMIC institutions are unable to cope with such challenges, especially when it requires flexibility, innovation, and digital technologies.

DISRUPTIONS TO ELECTIONS

Many constitutions provide for the postponement of elections during emergencies. Holding an election during emergency conditions can be difficult. Depending on the nature of the emergency and the degree of disruption it causes, it may be nearly impossible to organise the distribution of ballots, to ensure the safety of candidates, campaigners and voters, or to validate the integrity of the result. In extreme circumstances, holding an election during an emergency might also divert energies and resources from more urgent lifesaving work.

There is also a risk that the government in power might use the health emergency as an excuse for postponing elections indefinitely, or beyond the duration of the emergency. Also, an unscrupulous government could use emergency restrictions on rights (e.g. the power of administrative detention) to repress opposition candidates or critical media, which may make elections held under emergency conditions less free and fair than they should be.

With at least 22 countries in Africa organising polls in 2020, 13 of which will be for the positions of president or prime minister, the Former Chair of the National Human Rights Commission of Nigeria, Chidi Anselm Odinkalu, has suggested that, “The combination of a pandemic and emergencies is lethal to both campaigning and competitive politics”.³² Thus, he concludes, the pandemic in Africa “is a story about constitutional politics, which begins with elections, [and] is really about how African governments derive their legitimacy and what they do with power.” This scenario could equally be applied elsewhere in the world.

DISRUPTIONS TO COURTS

As a response to COVID-19 a number of courts have closed or suspended their main activities, this at a time when the judiciary needs to remain the guardian of the rule of law and fundamental rights.³³ Key functions of courts include review of the legality of emergency measures, judicial review of emergency legislation, with regard to constitutionality and compatibility with international law, and urgent legal matters where delay would cause irreparable harm.

A first set of issues concerns the ability of courts to hold executives and others to account for measures undertaken during and in response to the pandemic. It is essential that courts are able to judicially review the actions of the executive,

to ensure that the exercise of executive power is consistent with the law. Even without court closure, court capacity to conduct judicial review is likely to be severely limited by the number of staff and lawyers who are isolating. Moreover, COVID-19 has challenged the principle of open justice, by making it harder for anyone to sit in the public gallery after walking in off the street.



It is essential that courts are able to judicially review the actions of the executive branch of government to ensure that the exercise of executive power is consistent with the law.

A second set of concerns relates to the impact of court disruptions on access to justice more broadly (as has been reported by Fair Trials).

The impacts range from a restricted ability to challenge executive decisions, to delays in judicial processes, to challenges to access to justice, and the further extension of backlogs by courts. All of these challenges clearly impinge upon the requirement of access to (effective, timely) justice, under rule of law principles, and the right to a fair trial, under broader human rights frameworks. Particularly critical are the so-called ‘urgent cases,’ which include cases with defendants in (pre-trial) detention; cases where immediate protection is required by women or other vulnerable groups from (domestic) violence (in particular, during confinement in quarantine); other urgent family disputes; and cases relating to violation of measures concerning COVID-19 that imply irreparable harm.³⁴ It is worth noting at this juncture that the right to a fair trial is one of the rights from which derogation is not allowed under the ICCPR, as well as under the European Convention on Human Rights.

A further set of concerns relates to the transition towards e-Justice. COVID-19 has seen the speeding up of States’ transition to digital courtrooms. Whilst this is likely to be a silver lining to the crisis, as with any period of significant adaptation, initial teething problems may impact the quality of hearings and the ability of courts to perform their functions.

Moreover, there are significant potential pitfalls of digitisation from an ‘access to justice’ perspective, with significant populations globally, especially in non-urban centres, being ‘digitally excluded’.³⁵ Whilst movements towards digital courtrooms is a positive development, rule of law requires that access to justice is safeguarded for all.

Finally, the pandemic and the resulting economic crisis will increase the demand for justice (because of the consequences of the delays produced, and the new cases that have arisen as a result of COVID-19), while also reducing the capacity of the system to function.³⁶ The international community and governments must act in a timely manner to protect justice systems, recognising their critical role in a country’s infrastructure. Delivering justice is mainly a matter of resources, and the scarcity of public resources will require the mobilisation of knowledge and funding from multiple sources, including through public-private partnerships.³⁷

INCREASED RISK OF CORRUPTION

Transparency International has noted, “outbreaks like this one also tend to expose cracks in our health systems, highlighting potential risks and opportunities for corruption – corruption that may undermine the response to the pandemic and

deprive people of healthcare”.³⁸ Instances of corruption prior to the outbreak of the COVID-19 pandemic may also undermine the preparedness and ability of a State health service to manage the pandemic. Moving forward, corruption is likely to hinder economic recovery.

Health systems in LMICs are particularly vulnerable to COVID-19-related corruption risks associated with emergency funding and procurement; price gouging and resale of pilfered supplies on the grey and black markets; substandard and falsified products entering the market; among others. Examples from Brazil, Costa Rica, Kenya and Uganda, show the importance of addressing corruption risks among COVID-19 responses.³⁹

“Outbreaks like COVID-19 tend to expose cracks in our health systems, highlighting potential risks and opportunities for corruption – corruption that may undermine the response to the pandemic and deprive people of healthcare.”



THREATS TO RIGHTS AND FREEDOMS

According to the United Nations Development Programme (UNDP), in 2020, for the first time in 30 years, human development is expected to drop, especially due to the triple hit of COVID-19 on health, education and income. Simulations based on an adjusted Human Development Index highlight the severity of the impact of COVID-19 on LMICs, which are less able to cope with structural effects of the pandemic, including social and economic ones. The UNDP report suggests that one of the main reasons for this inability to cope has to do with the big digital divide between richer and poorer countries. The following section examines how these challenges manifest in practice.

EXPANDED SURVEILLANCE POWERS

Aside from direct threats to the relationship between the executive, legislature and judiciary, there are a number of new coercive powers that could be abused. Examples include powers to track and trace members of the public with COVID-19, those showing COVID-19 symptoms, or their close contacts. This may be through digital technologies, such as drones, contact tracing apps uploaded onto phones, technologies for the enforcement of social distancing, and technologies that demonstrate individual healthcare status.⁴⁰ While many of these are

helpful tools in the containment of the virus, the increased amount of population monitoring, and collection of sensitive personal information increases risks of government or private sector misuse. Concerns have already been raised about apps currently in use, or being seriously considered in developed countries.^{41 42}

The contrast between the beneficial use of ICT and the related risks, is exemplified in LMICs, where systemic vulnerabilities, such as weak health systems and illiteracy already affect the response to the pandemic. On the one hand, the use of technological tools might be limited in some of these countries; while on the other hand, there is a heightened risk of abuse of the tools for surveillance beyond the health emergency, in countries where the rule of law is weak. For instance, in India, surveillance mechanisms have been developed for years, but the COVID-19 crisis has given the government the chance to run a test on tracking citizens through its official Coronavirus tracking app “Aarogya Setu” and making them accustomed to the idea of State surveillance.⁴³ Kenya and South Africa are also deploying contact tracing apps to trace back the movements of confirmed or suspected cases.⁴⁴ While there is no GDPR equivalent in Africa, there are signs of the development of a legal framework in this regard at the regional level. For instance, the 2014 African Union (AU)

Convention on Cybersecurity and Personal Data Protection (to-date ratified by only 4 countries, and signed by 14 countries);⁴⁵ the 2013, Southern African Development Community (SADC) model law on data protection;⁴⁶ the 2010 Economic Community of West African States (ECOWAS) Supplementary Act on Personal Data Protection;⁴⁷ and the 2008 East African Community (EAC) Framework for Cyberlaws.⁴⁸

As governments move towards more heavy-handed contact tracing, ensuring that these are adequately monitored over the duration of the crisis will also be essential to the maintenance of the rule of law.

NEW POWERS OF DETENTION AND IMPACT ON PERSONAL FREEDOM

To address the pandemic, many countries have extended emergency powers, making it easier to enforce policies to detain people. The International Health Regulations state that “Public health laws should authorize public health officials to take such actions as reasonably necessary to investigate the causes, sources and means of transmission of disease agents, to authorize diagnostic testing, compulsory medical treatment, and to make orders for isolation and/or quarantine”.⁴⁹ For example, the English Health Protection (Coronavirus) Regulations 2020 give power to detain a person for up to 48 hours, while the COVID-19 screening is taking place. These

powers should not be exercised in an arbitrary or discriminatory way, and should be exercised in accordance with the principle of proportionality.

DISRUPTION TO FREEDOM OF MOVEMENT

Isolation and quarantine are fairly common and ancient practices in public health, and both aim to control exposure to infected or potentially infected individuals.⁵⁰ The two strategies differ in that isolation applies to people who are known to have an illness, and quarantine applies to those who have been exposed to an illness, but who may or may not become infected. However, the use of quarantine must be achieved in a way that is consistent with international human rights standards (as elaborated in the Siracusa Principles).

The WHO’s International Health Regulations set out permissible restrictions on travel and emphasise that countries should treat all travellers with “respect for their dignity, human rights and fundamental freedoms”.⁵¹ With regards to migrants specifically, governments have implemented measures to restrict migration, including border closures, travel restrictions, and in some cases, restrictions on new asylum applications, or a more general suspension of the right to asylum (e.g. USA, Hungary).⁵² In other cases, rescue at sea and disembarkation was refused on the pretext of COVID-19 (e.g., Malta,

Italy).⁵³ In such cases, COVID-19 has been a pretext for governments to implement measures that they were legally precluded from enacting previously. Migrants needing to return home as a result of the crisis were not always supported in doing so (e.g., Nepal, India). In a statement, the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the Human Rights of Migrants warned that, “the COVID-19 pandemic is having serious and disproportionate effects on migrants and their families globally.”⁵⁴



“The COVID-19 pandemic is having serious and disproportionate effects on migrants and their families globally.”

MEDIA FREEDOM AND DISINFORMATION

Across the globe we have seen various

governments (Venezuela, Iran, Egypt, Turkey, South Africa, Myanmar, Russia, and Hungary, among others) use the pretext of disinformation to restrict the ability of the media to do its job and to restrict freedom of expression more broadly.⁵⁵ This comes at a time when public information is critically important, not least as it impacts public trust. The misuse of legislation targeting disinformation as a tool towards restrictions of media freedoms, and freedom of expression more broadly, are not new. Nor are they unique to health emergencies. The current crisis is, however, likely to provide further pretext for such measures.

At the same time, there have already been significant issues relating to misinformation, particularly in regards to conspiracy theories about the Chinese origins of the virus. This is linked to further problems, in that it is likely to result in the spread of racial or ethnic hatred, and the dissemination of hate speech.

DISCRIMINATION

Critical to the response to COVID-19 has been its impact on different communities. From the idea of being locked down in one’s own home and the impact of this on people living within secure housing situations; to increased reports of domestic violence and other forms of gender-based violence (and violence against children) during the lockdown; to differentiated impacts of the virus on ethnic minorities, there has been a

critical mass of evidence that the virus exposes existing inequalities and vulnerabilities.⁵⁶ These differentiated impacts reflect, both the current existence of discrimination, as well as historic discrimination, which can only be addressed through serious and sustained positive action measures, in line with the obligations under equality legislation. For example, research shows that minority ethnic persons are less likely to have sufficient savings to wait out an emergency; they are also more likely to work in jobs that do not allow flexible working arrangements, and are therefore more likely to be furloughed or fired during lockdown restrictions, or forced to continue working jobs, which present a higher risk of infection.⁵⁷ In addition to existing inequalities, COVID-19 and the responses to the crisis have had a specific impact on the services offered to particularly vulnerable groups. This has adversely affected the lives of, among other groups, trafficked persons, undocumented workers and detained persons.⁵⁸

VULNERABLE GROUPS

Beyond discrimination, a range of groups have been considered as vulnerable in the current crisis. This includes both those at a heightened risk if infected (older persons, persons with pre-existing health conditions), and those whose situations make them more vulnerable to being infected.⁵⁹ Among groups whose situation makes

them more vulnerable are prisoners and detained persons (including those in immigration detention); those residing in residential care facilities (such as orphanages); those living in communal arrangements (such as homeless shelters) or informal settlements (such as refugee settlements); those without adequate access to water, hygiene and sanitation; and certain categories of workers (such as manual labourers or delivery workers).

Inadequate supply of quality personal protective equipment has also heightened the risks for those working in health services. Moreover, other vulnerable categories will be negatively impacted by the employment closures, as well as the results of the economic downturn following the crisis. This includes precarious workers, informal traders and those in the gig and informal economies. Other groups that have been negatively impacted include: trafficked persons, people of African descent and LGBTI people.^{60,61}

As the world appears to move towards an economic crisis as a result of the current health crisis, governments and legislatures must bear in mind the need to ensure that vulnerable communities are not left behind, and that new vulnerable communities are not created as a result of this crisis. A number of States have implemented 'stop-gap' short term solutions to address the needs of particular vulnerable

groups. Efforts to house homeless persons in the UK is one example. However, long-term sustainable solutions must also be urgently found and implemented.



As the world moves towards an economic crisis, governments and legislatures must ensure that vulnerable communities are not left behind, and avoid the emergence of new vulnerable communities as a result of the crisis.

DISRUPTIONS TO ECONOMIC ACTIVITIES AND RIGHTS

The response to COVID-19, and other similar

health emergencies, will also have significant implications on economic activities and related rights. This includes impacts on the enforceability of contracts between private parties, as well as between public and private entities. Severe economic effects have already materialised, especially for smaller businesses. Workers on the other side, including those in the informal sector and domestic workers in many countries, are likely to face staff cuts, or loss of wages and social benefits. In addition, the likelihood of an increased number of judicial challenges to contractual violations is expected to contribute to the backlog accumulated in courts once the period of closure terminates.

At the international level, the impact of the virus and of the responses undertaken by States, have also been felt in the spaces of international litigation, arbitration, trade law, investment law, and elsewhere. As a response to such threats and challenges, a recent UN-DESA policy paper suggests that “reducing the cost of remittances could help spur recovery after the crisis and greatly assist in restoring household consumption in recipient countries”.⁶² This would have beneficial effects in LMICs and lower social pressure.

While presenting many challenges, the pandemic also provides the aid sector with a good opportunity to improve the quality of support

given to ODA-eligible countries, making it more sustainable, intersectional, multisectoral and keeping human rights at its core. It is, however, critical that existing international development cooperation commitments are maintained and met. It also remains to be seen whether supply of concessional finance by international institutions to the poorest countries will impact on and compel national financial institutions to be more lenient towards borrowers.

FOOD SECURITY

Another threat related to COVID-19, is how the measures aimed at containing the pandemic might disrupt supply chains, resulting in heightened food insecurity. In particular, least developed countries, and landlocked and small island developing states, may be the worst affected, as they often rely on international markets to secure food and other essential needs. Increased food prices due to higher transport and transit costs may be a concern for food importing countries. At the same time, many of these countries are dependent on high-value agricultural exports and a large share of their population is involved in agriculture and food production, processing, transportation, and distribution. In such cases the enforcement of export restrictions and prohibitions on foodstuffs increases the vulnerability of these countries and their populations. Accordingly, the Under-

Secretary-General and High Representative for the Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States noted that, “A global health crisis could cause a major food crisis and set back years of economic development, and make several SDGs unattainable.”⁶³ The Food and Agriculture Organization, the International Fund for Agricultural Development, the World Food Programme and the World Bank issued a joint statement highlighting the need for collective action to minimise disruptions to food trade between countries, and the World Bank have further elaborated on the importance of targeted support to governments, small enterprises and farms.^{64, 65}

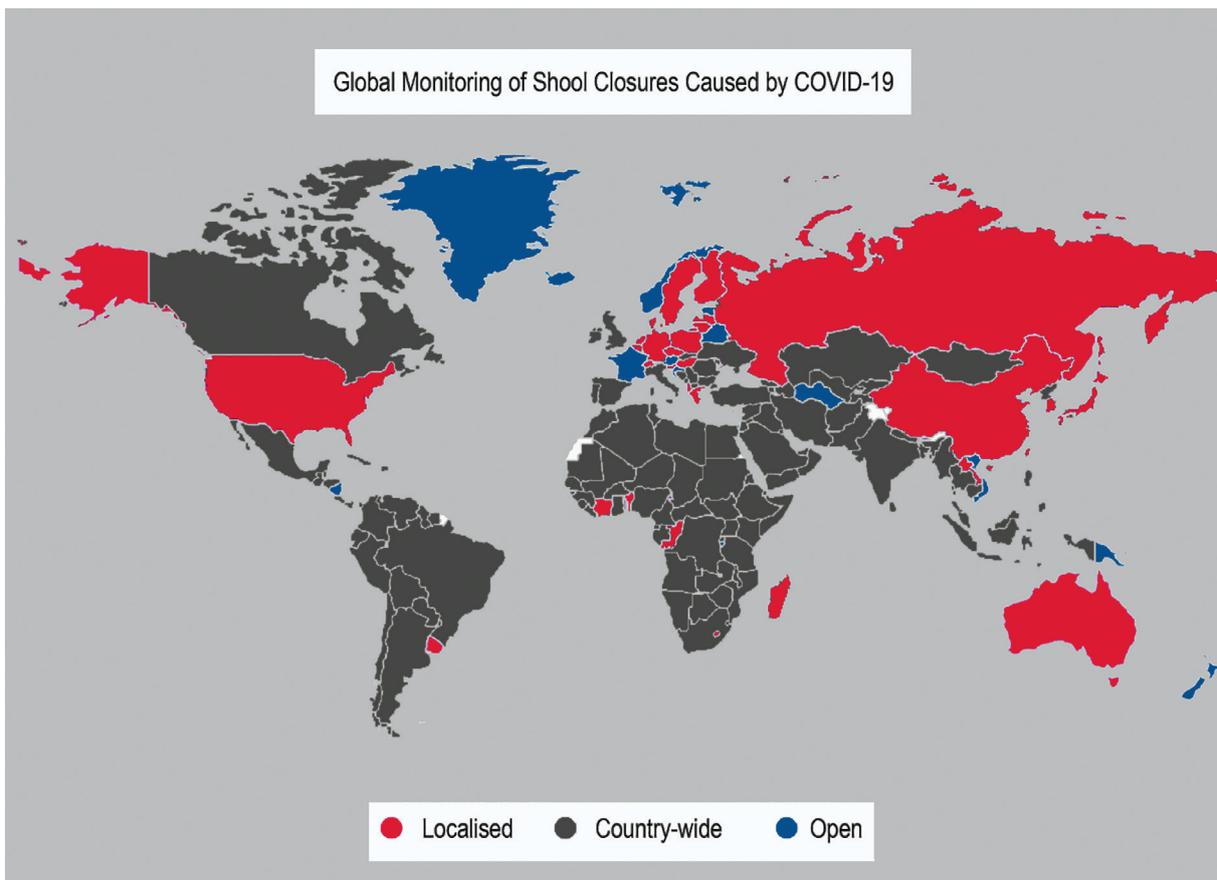


“A global health crisis could cause a major food crisis, set back years of economic development and make several SDGs unattainable.”

EDUCATION

To contain the spread of the pandemic, governments around the world have temporarily closed educational institutions. According to UNESCO, nationwide closures are impacting almost 70% of the world's student population and localised closures are affecting millions of other learners.⁶⁶ While school closures involve a high social and economic cost for all communities, their impact is more severe for the most vulnerable and marginalised families. In addition to the deprived opportunities for growth

and development, and possible disengagements in education in the long-term, due to the absence of regular assessments, a number of other negative impacts are likely to occur. These include declining nutrition, as children and youth who rely on free or discounted meals provided at schools lose access to these provisions; gaps in childcare for working parents who do not have alternative options; a possible rise in dropout rates after school closures come to an end, especially when household financial needs place pressure on children to work; social isolation;



Source: UNESCO, 'COVID-19 Impact on Education', 30 May 2020

and increased exposure to family violence and exploitation. The shift to online teaching, where the necessary technology is available, whilst positive, also risks leaving some of the most vulnerable children behind.

HEALTHCARE

COVID-19 impacts the right to the highest attainable standard of health in multiple ways, beyond the direct impact on the health of those who contract the virus. First, people with non-COVID-19 related acute conditions faced reduced healthcare services, which may be delayed or moved online, as hospitals struggled to address the needs of those directly impacted by the virus. Moreover, public awareness of the situation means that a drop in the use of accident and emergency services and hospital admissions has been experienced.⁶⁷ In Italy, for instance, official hospital statistics in the period

1 March 2020 to 27 March 2020, show substantial decreases in paediatric emergency department visits – ranging from 73-88% drop in visits – compared with the same time period in 2019 and 2018.⁶⁸ Social distancing measures in various countries have also shifted services online, this includes the sorting of patients according to the urgency of their need for care. Non-acute care has, therefore, also been negatively affected. Second, the virus and the resulting responses (including social distancing and school closures), are likely to have significant impacts on mental health, including anxiety, depression and related conditions. Third, the economic stresses that come from the results of the virus, such as unemployment or labour insecurity, also have significant health impacts. Even developed health systems have had to rely on the services of NGOs and other non-regular providers to meet the demand.



PART 3: STRENGTH OF THE RULE OF LAW AND MANAGEMENT OF PANDEMICS

COMPONENTS OF HEALTH EMERGENCY PREPAREDNESS

By the end of May 2020, COVID-19 had spread to more than 200 countries, with over 6 million infected people and about 370,000 reported deaths connected to the virus.⁶⁹ The high infection rate triggered a range of responses to COVID-19, from both democratic and authoritarian regimes. At the time of writing, it is difficult to compare the effectiveness of these different responses, as the world is still living through the crisis and the full impact of the pandemic is yet to be realised. Some more authoritarian regimes (such as China, Singapore, Taiwan) have demonstrated an ability to act swiftly and decisively in response to the pandemics. However, authoritarianism does not guarantee an effective response, as the experience of Iran, which has endured a high rate of infection and a second wave of COVID-19, demonstrates.⁷⁰ The record is mixed also among democratic countries.⁷¹ Countries such as Canada, Germany and Austria have successfully managed the pandemic without authoritarian

measures, while democracies such as the USA, UK or Italy have been less successful.

Accordingly, it has been pointed out that the initial evidence does not show a strong correlation between regime type and efficacy of responses to contain the virus.⁷² However, a correlation could be made between lessons learned from past experiences and the effectiveness of the response. Countries such as Taiwan, South Korea, Hong Kong, Singapore and Canada, although very different, were all hit by SARS and promptly put in place key lessons learned. Their responses to COVID-19 included: developing speedy tests and undertaking broad testing immediately after the virus spread; relying on heavily enforced quarantines; and having emergency legislation in place that allowed them to relax privacy protections in order to track the movements of infected individuals and widely alert citizens on the measures taken. Similarly, apparent successes in responding to the virus in some African States could be, in part, attributed to experience in the management of infectious diseases (e.g. Ebola crisis) and a greater emphasis on community health approaches.



Countries such as Taiwan, South Korea, Hong Kong, Singapore and Canada, although very different, were all hit by SARS and promptly put in place key lessons learned in their responses to COVID-19.

What are the components of preparedness that would have a bearing on the countries' rate of success? Beyond health-related factors, how does the social political economic and legal environment contribute to preparedness?

Researchers at the Johns Hopkins University and The Economist Intelligence Unit have conducted a first comprehensive assessment of health security and related capabilities across the 195 State Parties of the International Health Regulations.⁷³ The related 2019 Global Health Security Index (GHSI) scores nations on the

basis of categories such as, epidemic detection and reporting, rapid response, compliance with international norms around diseases, and the overall political and economic risk environment.⁷⁴

The study emphatically notes that, although some countries are better prepared to face a major disease outbreak, no country is fully prepared for epidemics or pandemics. COVID-19 related data confirms such a conclusion, but also suggests that being ranked at the top of the GHSI is not sufficient to ensure countries are well prepared. The US, the UK, the Netherlands, Australia and Canada occupy the first five places in the 2019 GHSI, but have had very different response records to COVID-19. Similarly, Germany and Spain – two countries which have very different records in terms of the level of efficacy of their responses in tackling epidemics – are ranked respectively in the 14th and 15th place, while China is ranked 51st and Iran 62nd.

Interestingly, under the sixth category on “overall risk environment”, the GHSI considers a series of elements which are strictly related to the rule of law and democracy:

- government effectiveness (The Economist Intelligence Unit (EIU) score)
- does the government's authority extend over the full territory of the country? (EIU Democracy Index)

-
- level of confidence in public institutions (EIU Democracy Index)
 - is media coverage robust? Is there open and free discussion of public issues, with a reasonable diversity of opinions? (EIU Democracy Index)

With more than half of countries facing major political and security risks, which could undermine national capability to counter biological threats (as evidenced by the GHSI), whether institutions abide by the rule of law and citizens have confidence in the government, among other factors, appear to have an important bearing on a country's success in combating the virus and in dealing with the consequential societal disruptions. The GHSI study interestingly shows that countries with effective governance and political systems have a higher overall score. When it breaks this down further, the GHSI finds that:

- 55% of the countries surveyed score in the bottom and middle tiers for political and security risk indicators
- only 15% of the countries score in the highest tier for public confidence in government
- the countries that score in the top tier for political system and government effectiveness, are only 23% of those surveyed, representing approximately 14% of the global population

HOW DOES THE RULE OF LAW SECURE AN EFFECTIVE PANDEMIC RESPONSE?

In times of nationwide crisis citizens revert to the State and its institutions for leadership, but this is also the moment when the capabilities of the State and its institutions are most strained. COVID-19 has created major disruptions to the functioning of State institutions and their capacity to deliver their functions and services, such as health, education, infrastructure, information, law-making, justice etc. (see Part 2). Beyond the health impact, the COVID-19 pandemic has created new or deepened existing divisions and inequalities in society.⁷⁵

A trusting relationship between State and people is thus essential in both ensuring that responses are accepted as legitimate and implemented, and in shaping and determining forward looking strategies and approaches aimed at building resilient societies. Central to building and strengthening such relationships are the rule of law principles reflected in SDG 16, in terms of transparency and access to information; the accountability and integrity of institutions; legitimacy; participation and engagement; equality and international cooperation. These elements are interrelated and have a compound beneficial impact on building trust and confidence

in institutions, which is a crucial component of health crisis responses.

CLARITY

In terms of the rule of law's requirement for legal certainty, as noted in the introduction, clarity helps the public to understand what is expected during a pandemic. It requires that the measures introduced to contain a virus are written and communicated in plain language. The use of such language requires a relatively low reading effort to understand and makes it easier for the public to use the information in a situation when timing is critical. Clarity has the potential to change behaviour, overcome the risk of using secondary sources or incorrect implementation of the rules, and ultimately to save lives. It increases the ability of governments to intervene competently in areas that range from communication and health provision to quarantine maintenance and equipment manufacturing. Moreover, a well-defined, appropriate, effective approach to communication with the public, other agencies (including international organisations such as WHO), and between sectors of government, is likely to result in a considerably more effective response.⁷⁶

TRANSPARENCY

Transparency and testing have been suggested to potentially work better than coercive measures in State responses to control the COVID-19

pandemic.⁷⁷ Transparency helps the public to understand why and how decisions have been taken and enables well-timed public health control. Experience of previous international public health threats, like the SARS crisis in 2003, has highlighted the importance of transparency in communications to deal with such events.⁷⁸ Secrecy, on the other hand, has been shown to be counterproductive, as it delays effective actions for control and promotes conspiracy theories, distrust, and challenges to already strained institutions. Transparency on the full impact of the crisis, and what is being done to handle it, is essential to ensure public trust and to support new policy approaches. It also mitigates the spread of disinformation by providing the public with a trusted avenue to confirm information.⁷⁹

PARTICIPATION, ENGAGEMENT AND REPRESENTATION

Containment measures in response to the COVID-19 pandemic have constrained the functioning of parliaments in many countries. As noted in Part 2, parliaments play a crucial role in times of crisis, in exercising independent oversight and in translating people's needs into legislation that meets those demands. Collaboration with stakeholder groups and citizen engagement has generated innovative responses to COVID-19, for example regarding remote working methods for parliaments and continuous engagement with constituencies via social media.

These measures, in turn, have helped increase public trust and support the continued functioning of government institutions.⁸⁰ In addition, civil society and citizen-led community responses have helped to inform the public on the risks of the pandemic and provided essential services such as food and care. These responses can be leveraged by public institutions to ensure effective and inclusive responses to the pandemic.

ACCOUNTABILITY AND ANTI-CORRUPTION

As an important component of the rule of law, accountability is an antidote to corruption and contributes to building trust in public institutions. As explained in Part 2, the COVID-19 crisis has seriously challenged fundamental safeguards of government accountability (for example, through the concentration of power in the executive branch of government, and disruptions to parliamentary activities and courts). Emergencies and related rapid responses create fertile ground for mismanagement and corruption to run unchecked. It is essential that governments remain accountable during the crisis, not only when adopting rapid responses, but also when taking decisions focused on the longer-term economic recovery. This applies to both the allocation and use of public health funds, and to the exercise of government functions, such as public procurement. Legislative and judicial oversight, as well as internal and external

auditors can play a critical role in reducing the opportunities for integrity violations, maladministration, and corruption.



It is essential that governments remain accountable during a health crisis, not only when adopting rapid responses, but also when taking decisions focused on the longer-term economic recovery.

EQUALITY AND EQUITY

Countries with high levels of inequality, strong political polarisation, and a sense of failed promise also face low citizen trust.⁸¹ COVID-19 has exposed important inequalities and inequities in societies, the impacts of which could last for years.⁸² Firstly, COVID-19

vulnerabilities are unequal: data shows that among the infected persons, older adults, men, and those with weaker immune systems or pre-existing health conditions face more severe outcomes. Disadvantaged groups, who may have less access to quality healthcare, are more predisposed to such pre-existing health conditions. Secondly, strategies to contain the virus also have unequal impacts: vulnerable groups, such as women, children, migrants, persons with disabilities and indigenous people, are affected disproportionately by increased poverty, reduced access to services, and heightened physical and health security risks at home.

The response of policymakers will play a key role in the long-term outcomes of COVID-19. A resilient society and a resilient State should set forth strategic social protection and social security to protect vulnerable sections of society, both during normal times and during crisis. By reducing inequalities, governments also minimise public discontent and strengthen trust in institutions. Governments should use the lessons learned from history. Experience from other major crises demonstrates that State investment in healthcare and social protection, including through measures to preserve wage income, has contributed to reduced inequality in the aftermath of an initial shock.⁸³



A resilient society and a resilient State should set forth strategic social protection and social security to protect vulnerable sections of society, both during normal times and during crisis.

INTERNATIONAL COOPERATION

International cooperation helps governments to share information and mobilise to prevent and defeat Public Health Emergency of International Concern. Similarly to government responses at the national level, abiding by good governance and rule of law standards in the international response to global health crises contributes to building trust and confidence in the international efforts necessary to control and recover from epidemics. Such cooperation will also result in a better, internationally coordinated response to future pandemics.

PART 4: MOVING FORWARD - TAILORING RULE OF LAW CAPACITY BUILDING TO RESPOND TO CRISES

The rule of law and its core elements have the potential to make an important contribution to the empowerment of societies to respond to health crises. As explained in Part 3, countries that face major political and security risks, which could undermine their capability to counter health crises, would strongly benefit from strengthening the rule of law. For instance, increasing institutional compliance with the rule of law and citizen confidence that institutions will continue to perform their functions and deliver services during the emergency.

The legal community has the tools to identify poverty and development challenges where law is either part of the cause or part of the solution, and can use legal expertise, professional skills and legal training to address these challenges. There are more pathways through which legal sector actors involved in advocacy and pro bono technical assistance can play a role on a country's success in combating the virus and in dealing with the consequential societal disruptions. In particular, actors working on law reform, drafting of new legislation, improving

court efficiency, and legal education and representation have a key role in this. In presenting the relevant lessons and practices that would be useful when developing and implementing preparedness programmes and assistance aimed at strengthening the rule of law in ODA-eligible countries during a pandemic, the following recommendations are split into four elements, namely policies, laws, institutions and practices, based on A4ID's ROLE UK Programme approach.'



STRENGTHENING POLICIES

<p>STRESS TEST COUNTRY ADHERENCE TO RULE OF LAW PRINCIPLES:</p>	<p>Technical assistance programmes, or projects with governments, which support States in developing constitutional arrangements, legislation and other documents, should ensure that provisions are stress tested to ensure they are able to withstand the pressures that flow from situations of emergency, especially with regard to ensuring parliamentary oversight and judicial review. Lawyers undertaking assessments of clients' potential legal needs should also include a stress testing component.</p>
<p>RAISE AWARENESS OF THE IMPORTANCE OF LEGAL FRAMEWORKS:</p>	<p>Legal actors involved in technical assistance addressed at governments, civil society organisations, business and finance groups, and lawyers in developing countries, should provide leadership to strengthen understanding of the importance of legal frameworks in the context of a health crisis. Actors should aspire to reflect this in national policies and strategies on sustainable development.</p>
<p>SHARE POLICIES FOR MANAGING COVID-19 THAT MINIMISE NEGATIVE RULE OF LAW/ HUMAN RIGHTS IMPACTS:</p>	<p>Legal actors involved in technical assistance to governments should rely on previous experiences from working with States, experts and others to identify and share promising policies and practices that have successfully balanced the achievement of health outcomes with the minimisation of negative impacts on human rights and civil liberties. Programmes should also assist with examining how experience from other countries can be best tailored to the national context in the country in which they are working. Once this is established, programmes can work to ensure the lessons learned are incorporated in national policies and meet the concrete needs of the country benefiting from technical assistance.</p>
<p>PROMOTE TRANSPARENCY AND PARTICIPATORY APPROACHES WHEN NEW POLICIES ARE DEVELOPED AND IMPLEMENTED:</p>	<p>Transparency is essential to ensure public trust and support, especially in times of crisis. Both programmes aiming at strengthening the rule of law in ODA-eligible countries and pro bono technical assistance, should insist in promoting transparency and participatory approaches as general principles, during normal times, as well as during an emergency.</p>

<p>PROMOTE HUMAN RIGHTS-BASED POLICIES THAT ACKNOWLEDGE AND ADDRESS INEQUALITIES AND INEQUITIES:</p>	<p>Narrowing the inequality gap is essential to recovering in the long term from the consequences of health crises. As an ingredient of a resilient society, equality and equity promotion should be an essential element of legal technical assistance to ODA-eligible countries.</p> <p>Human rights should be used as guidance to address inequality. This includes designing tailored policies aimed at empowering vulnerable and disadvantaged groups, with the support and participation of representatives from the interested groups.</p>
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<h2 style="text-align: center; background-color: #0056b3; color: white; padding: 5px;">STRENGTHENING LAWS</h2>	
<p>DEVELOP SPECIFIC LAWS/RULES ON THE STATE OF EMERGENCY, IN COMPLIANCE WITH RULE OF LAW SAFEGUARDS, THAT CAN BE SWIFTLY INVOKED DURING A CRISIS:</p>	<p>Specific rules and procedures for states of emergency are an essential part of strengthening preparedness in responding effectively to emergency situations, including health crises. In this regard, pro bono technical assistance should support States by helping to develop legislative models that boost accountability and ensure checks and balances are in place, even in emergency contexts. This could include revisions to existing provisions or the drafting of new legislative tools.</p>
<p>LINE UP LEGAL FRAMEWORKS WITH THE RULE OF LAW AND TRANSPARENCY OBJECTIVES SET OUT IN SDG 16:</p>	<p>Beyond specific legislation regulating states of emergency, rule of law reinforcement programmes and legal technical assistance can play a key role in helping national institutions to uphold and enforce core rule of law principles when implementing existing legislation or introducing new legislation. Transparency, access to information, accountability, anti-corruption, participation and engagement, as set out in SDG 16, are particularly important in building institutional resilience to shocks.</p>

STRENGTHENING INSTITUTIONS

<p>IMPLEMENT COURT CASE TRIAGE:</p>	<p>Technical assistance could contribute to helping court systems to overcome the backlog of cases, which is likely to accumulate due to court closures, by providing courts with draft case management structures and frameworks, as well as supporting the development of these mechanisms over the short and medium term.</p>
<p>ENSURE ACCESS TO JUSTICE FOR ALL:</p>	<p>Rule of law reinforcement programmes and pro bono technical assistance could support States in developing and moving towards digital court systems, whilst aiding States to undertake risk assessments, including on the denial of access to justice for some communities and the development of mitigation strategies, which may also rely on public-private partnerships.</p>
<p>FACILITATE THE INCREASED USE OF WRITTEN PROCEDURES:</p>	<p>Support to States to strengthen responses to health crises could include pro bono technical assistance with the development of model documents to help overcome barriers to justice, including for the most vulnerable populations. This encompasses drafting model documents.</p>
<p>ENSURE PARLIAMENTARY SCRUTINY</p>	<p>Technical assistance could support parliaments in performing their functions during the pandemic, including helping to monitor legislation and policies adopted by the legislature. Such support could involve, both advising on parliamentary functioning whilst respecting social distancing, and substantive assistance through checklists for assessing executive action against rule of law principles.</p>

STRENGTHENING PRACTICES

<p>ADDRESS INEQUALITIES AND DIFFERENTIATED IMPACTS:</p>	<p>In addition to the recommendation on policies aimed at addressing inequalities and inequities, lawyers involved in pro bono assistance could work with civil society organisations and interest groups to promote legal empowerment of vulnerable groups. This could include legal awareness raising, fighting stigmatisation, legal education, provision of free or low cost legal assistance and representation of individuals, and strategic litigation on critical cases that are likely to expose malpractices, or broad violations with wider impact on society. Assistance would be particularly relevant in relation to developing and promoting positive action measures that address historic discrimination and help to overcome the inequalities and inequities resulting from COVID-19.</p>
<p>SUPPORT STATES IN CLOSING THE DIGITAL DIVIDE, WHILE PUTTING IN PLACE RULE OF LAW SAFEGUARDS:</p>	<p>Technical assistance programmes in ODA-eligible countries should support States in different ways to reduce the digital gap. For countries that lack the financial and human resource capabilities to quickly and efficiently develop digital tools that can support people during a crisis situation, assistance should focus on building partnerships with private technology companies, social entrepreneurs or other national and international organisations. In such cases and for those countries that have the necessary technology, assistance could focus on revisiting data protection and privacy legislation in compliance with rule of law and human rights safeguards.</p>
<p>INCREASE REMOTE TRAINING OPPORTUNITIES:</p>	<p>Technical assistance programmes should support States and lawyers in ODA-eligible countries by facilitating online communication between parties, providing online training modules, and raising awareness of good quality courses available for free (or reduced costs) online. Limitations with regard to technical infrastructure should be taken into account when considering and developing online training.</p>

**BUILD CAPACITY TO
MONITOR COVID-19
IMPACT AND
RESPONSES:**

Lawyers involved in pro bono technical assistance could support civil society organisations and human rights bodies through capacity building to help them monitor and report on the impacts of COVID-19 responses on human rights in the short, medium and longer term. Support could also be extended to help such organisations formulate proposals for evidence-based policies and put forward advocacy arguments for legal reform.



NOTES

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