

THE VITAL ROLE OF LAW IN THE COVID-19 RESPONSE

Key lessons from *'Advancing the right to health:
The vital role of law'*

The COVID-19 pandemic is challenging governments around the world to manage, coordinate and expand the key building blocks of a well-functioning health system. At both global and local levels, the law is a powerful tool for advancing the right to health and addressing public health emergencies. Now more than ever, strong legal capacity is needed to support effective national and international responses to the COVID-19 pandemic.

“The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States” as specified in the [World Health Organization \(WHO\) Constitution](#). The 2030 Agenda for Sustainable Development reinforces these links in Sustainable Development Goals (SDGs) 3 and 16:



SDG 3: Ensure healthy lives and promote well-being for all at all ages.



SDG 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

“Good governance and the rule of law are central to managing the COVID-19 crisis and promoting recovery in all countries.”

Jan Beagle, IDLO Director-General

[Advancing the Right to Health: The Vital Role of Law \(2017\)](#) and its [Update and Summary Guide \(2018\)](#), co-published by the WHO, IDLO, the O'Neill Institute for National and Global Health Law at Georgetown University, and the University of Sydney¹ provide key lessons that can support States as they respond to the COVID-19 pandemic and advance Agenda 2030 and SDGs 3 and 16.

As the only global inter-governmental organization exclusively devoted to promoting the rule of law and sustainable development, IDLO's efforts in the COVID-19 response focus on the importance of effective public health law frameworks, the need to ensure protection of the most vulnerable members of society, and promoting a just, sustainable and equitable recovery.

1. Key lessons and text are drawn from Chapters 1 (p. 6-23), 2 (p.27-34), 3 (p. 34-56), 4 (p. 57-72), 5 (p. 73-78), 10 (p. 151-164), and 11 (p. 165-180) as well as related Chapters in the Update and Summary Guide.



Lesson 1: Maintaining the rule of law and good governance is essential to ensuring health, justice, and inclusiveness

The rule of law offers an overarching framework to ensure health, justice and inclusiveness, even in the midst of a pandemic like COVID-19. Adherence to the rule of law means that law-making processes focused on public health emergencies and controlling infectious diseases need to be transparent, laws should be publicly disseminated and enforced fairly, and when required, independently adjudicated through courts and tribunals that ensure the administration of law and its substantive content is consistent with international human rights standards.

The rule of law applies equally to all individuals, institutions and the State to ensure accountability for just, fair and equitable application and protection of the law without discrimination. During a pandemic, people are more likely to trust the advice of governments, and to follow lawful directions, if they are confident that they will be treated fairly and in accordance with the rule of law.

The rule of law is especially important as many public health measures, such as lockdowns and other restrictions on movement and activities during outbreak of infectious diseases, require community support to be fully effective. When state authorities overreach or discriminate, individuals need avenues to seek independent review of decisions that restrict their fundamental rights.

The rule of law also requires 'good governance', ensuring the fair and efficient operation of public institutions, social and legal infrastructure, impartial courts and tribunals and the capacity to effectively implement legal rules. Good governance encompasses all the norms, processes and institutions of a just society that passes and enforces laws for the common good and with an equal hand.

Good governance frameworks typically include:

- setting priorities
- monitoring outcomes
- transparency
- civil society participation
- anti-corruption
- accountability



Lesson 2: Strong legal and policy frameworks are vital to prevent and mitigate consequences of public health emergencies

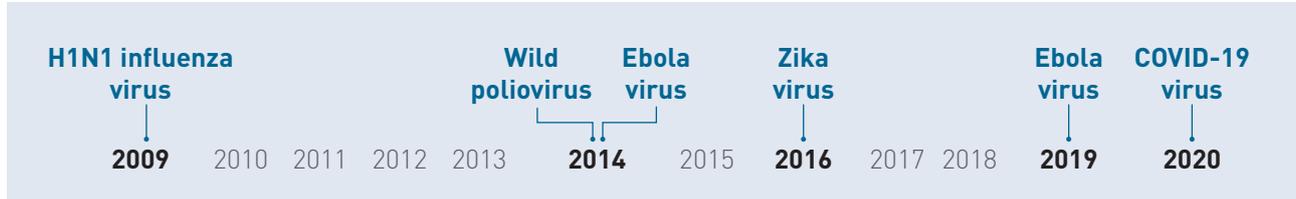
The law plays a critical role in preventing and mitigating health consequences of emergencies such as the COVID-19 pandemic in two important ways:

1. it establishes the institutional structures and formal processes through which governments respond to disease outbreaks; and
2. it sets limits for the exercise of coercive power over individuals and businesses in order to mitigate the risk of disease spread.

Good legal and policy frameworks contribute to the prevention of infectious diseases by improving access to vaccinations and by facilitating screening, counselling and education of those at risk of infection. Despite differences, all states need effective legal frameworks to deal with important public health challenges shared across nations and regions, especially during public emergencies such as infectious disease pandemics.

The International Health Regulations

The [International Health Regulations \(2005\)](#) provide the international legal framework guiding States in their response to public health risks and emergencies of international concern. Since 2005, the WHO has declared six infectious disease outbreaks as a public health emergency of international concern.²



All WHO Member States are obliged to cooperate in detecting, containing, and controlling public health emergencies. State laws and emergency plans should be guided by the *International Health Regulations*. Critical features for Member States include:

- the legal obligation to notify WHO of events that may constitute a public health emergency of international concern; and
- the obligation to develop, strengthen and maintain national capacities to detect, assess, notify, report and respond effectively to public health risks and emergencies.

Following a determination by WHO that a public health emergency of international concern is occurring, the WHO Director-General may issue temporary recommendations including requirements to:

- carry out medical examinations and vaccinations;
- place suspect persons under public health observation;
- quarantine, isolate or require the contact tracing of contacts of affected persons;
- carry out exit screening; and
- refuse entry to suspect or affected persons.

2. WHO, '2019-n-CoV outbreak is an emergency of international concern', 31 January 2020.

States may use a variety of ways to regulate public health risks and other health matters, including legislation, subsidiary regulations, decrees and executive orders, as well as codes of conduct and guidelines or deferral to customary law as a valid source of law or governing source in certain contexts.

During an emergency, the legal authority and roles of key officials should be defined in law. Laws may authorize powers and authority to take actions that are reasonably required to deal with a serious risk to public health such as:

- expand the health care or emergency management workforce;
- seize property in order to establish emergency response centers and to ensure the availability and rapid distribution of medicines and supplies;
- conduct surveillance and mandate vaccinations, treatment, isolation or quarantine of infected or potentially infected individuals; and
- close businesses and premises.

Without discrimination, the exercise of these powers must be based on public health considerations and include fair compensation for those who have suffered economic loss due to a public health order affecting their property or facilities.

Limits and human rights safeguards

Importantly, health measures should not be more restrictive of international traffic and trade nor more intrusive to persons than reasonable and appropriate alternative measures. States are required to implement the *International Health Regulations* in a transparent and nondiscriminatory manner, with full respect for the dignity, human rights and fundamental freedoms of individuals. This may include consideration for gender, sociocultural, ethnic or religious concerns.

Laws should establish clear triggers for the application of emergency powers, with clear time limits. Laws that directly restrict the freedom of individuals during a public health emergency should comply with the human rights protections set out in the *International Health Regulations* as well as the United Nations' [Siracusa Principles](#).

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights

The *Siracusa Principles* detail requirements for laws that directly restrict individual freedoms during a public health emergency. Emergency laws placing limitations on individual freedoms must:

- Respond to a pressing public or social need;
- Pursue a legitimate aim;
- Be proportionate to the legitimate aim; and
- Be objectively considered and no more restrictive than required to achieve the purpose of the limitation.

Laws restricting rights should not be applied or implemented in an arbitrary or discriminatory manner. Additionally, where limitations are placed upon fundamental rights, such as freedom of movement, they must be substantiated by evidence and implemented in ways that take account of the values of participation, transparency and accountability. Legal protection from discrimination and legal requirements to maintain the security, privacy, and confidentiality of personal information are also essential safeguards for the control of infectious diseases.



Lesson 3: The rule of law is vital to control transmission of infectious diseases and ensure respect for basic human rights

A core function of public health law is to minimize the transmission of infectious diseases. Factors guiding the appropriate exercise of legal powers will include the seriousness of the disease, the means of transmission, and how easily the disease is transmitted. Under certain conditions, States may limit temporarily some human rights and personal freedoms to address diseases such as COVID-19.

When public health laws authorize interferences with rights such as freedom of movement or the right to control one's health and body, privacy, and property rights, they should balance these private rights with the public health interest in an ethical and transparent way. Public health powers should be based on the ethical principles of public health necessity, reasonable and effective means, proportionality, distributive justice, and transparency.

Public health necessity:

coercive powers should be exercised on the basis of a demonstrable threat to public health.

Reasonable and effective means:

the specific measures adopted must be appropriate to prevent or reduce the threat and governments should monitor the effectiveness of public health interventions and ensure that they are based on sound science.

Distributive justice:

the risks, benefits and burdens of public health interventions should be shared fairly and restrictive measures or exclusions from treatment, vaccines or other benefits should not fall on vulnerable populations.

Transparency:

to build trust, the public should have an opportunity to participate in the formulation of public health policies, and governments should give reasons for policies and decisions that restrict individual freedoms.

Proportionality:

there should be a reasonable fit between the coercive measures imposed on individuals, and the public health benefit that they seek to achieve and the least burdensome measures to mitigate the risks in question should be adopted.

Openness and accountability are needed to generate public trust, and are also likely to improve public health decision-making. Without public trust and voluntary cooperation, governments will find it harder to achieve their goals and to act in the public interest.

Governments must meet their obligation to frame public health laws in ways that are consistent with human rights obligations. During major disease outbreaks, it must be considered whether the proposed public health law is equitable and fair, offering protection and prohibiting discrimination so that the greatest burdens do not fall on the vulnerable, marginalized and impoverished. The law should ensure just health outcomes, particularly for the least powerful and most disadvantaged in society.

To maximize the success and legitimacy of public health laws, States should integrate the following six principles into law-making processes, embracing good governance: stewardship, transparency, participation, fairness, accountability and following the rule of law.

- **Stewardship:** careful and responsible management is required to maximize the health of all individuals in the public interest.
- **Transparency:** developing, implementing and enforcing the law should be open and visible to the public to generate understanding and confidence that legal powers will be exercised for the benefit of society as a whole.
- **Participation:** where the law is intended to influence and alter behavior, it is important that those who are directly affected by the law should be aware of it, understand it and also appreciate the goals that the law is seeking to achieve through effective consultations with affected communities, civil society groups, public health organizations and other stakeholders.
- **Fairness:** laws must prohibit discrimination and guarantee to all persons equal and effective protection.
- **Accountability:** responsibility must be taken for the success and failure of laws and policies and processes need to be in place to ensure that changes are made to improve decision-making and the performance of public health functions in the future.

Following the rule of law

All persons, officials and institutions, including the State itself, are accountable under laws that are publicly disseminated, equally enforced, independently adjudicated, and consistent with international human rights standards, as well as ensuring that law-making is clear, fair and focused on the public interest.



Lesson 4: Rule of law and good governance are indispensable to realize the right to health during COVID-19 and beyond

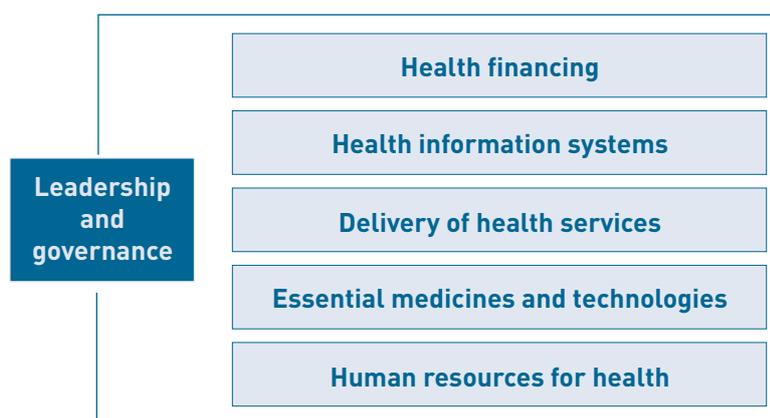
There is a critical need to maintain the rule of law and for States to strengthen governance and institutions so the right to health can be realized for all. The right to health is a fundamental human right and is indispensable for human well-being, well-functioning societies and economies, and for the ability to exercise all other human rights. Realizing the right to health is a legal obligation enshrined in the United Nations *International Covenant on Economic, Social and Cultural Rights* and other international and regional treaties, as well as in the constitutions and statutes of many States.

Realizing the right to health requires States to:

- *respect* the right to health: not directly or indirectly interfering with the enjoyment of the right;
- *protect* the right to health: taking actions necessary to prevent interference with the right; and
- *fulfill* the right to health: taking actions to facilitate, provide and promote conditions in which the right can be fully realized.

Building blocks of a well-functioning health system

The WHO provides guidance on the building blocks of a well-functioning health system which can support the realization of the right to health from leadership to financing, to delivery of services and medicines:



The principles of availability, accessibility, acceptability and quality provide guidance for governments as they make decisions about the goals, resources, focus and scale of public health laws and help clarify responsibility for realizing the right to health.

- **Availability:** health care facilities, goods and services need to be available in sufficient quantity.
- **Accessibility:** health care facilities, goods and services need to be accessible to all, which entails four dimensions:
 - i. **non-discrimination:** health services should not be denied because of racial or cultural identity, sex, language or religion, physical or mental disability, sexual orientation, political opinion, or health status.
 - ii. **physical accessibility:** health services need to be within physical reach of those needing to benefit from them, including vulnerable or marginalized groups and others who have difficulty accessing services.
 - iii. **economic accessibility:** health services should be affordable to everyone, including socially and economically disadvantaged groups, those with no fixed income, or with precarious incomes working in the informal sector.
 - iv. **information accessibility:** the right to seek, to receive and to express information and ideas about health issues.
- **Acceptability:** health services should be delivered in ways that are culturally appropriate, sensitive to gender and to different age groups, and consistent with ethical obligations.
- **Quality:** health services should be scientifically and medically appropriate and of good quality, meaning underpinned by a skilled health workforce, processes for assuring the supply of safe water, adequate sanitation, and officially approved and unexpired drugs and medical equipment.

READ MORE:

[Advancing the Right to Health: The Vital Role of Law \(2017\)](#) and [Update and Summary Guide \(2018\)](#), co-published by the World Health Organization (WHO), the International Development Law Organization (IDLO), the O'Neill Institute for National and Global Health Law at Georgetown University, and the University of Sydney.

[Statement](#) by the Director-General of IDLO, Jan Beagle: A Rule of Law Based Response to the COVID-19 Pandemic.

[Justice for Women Amidst COVID-19](#) documents the major challenges to women's access to justice in light of the COVID-19 pandemic and details recommendations to accelerate action and address threats to progress. It builds on the 2019 [Justice for Women](#) report, jointly produced by the High-level Group on Justice for Women, which was co-convened by UN Women, IDLO, the World Bank, and Pathfinders.