LEGAL DIMENSIONS OF COVID-19 SERIES
PAPER #2

CONSIDERATIONS FOR HEALTH GOVERNANCE: STRENGTHENING INSTITUTIONAL CAPACITY AND CONNECTEDNESS THROUGH COVID-19 RESPONSES

World Health Organization
Western Pacific Region

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Legal Dimensions of COVID-19 Series: Paper #2

CONSIDERATIONS FOR HEALTH GOVERNANCE: STRENGTHENING INSTITUTIONAL CAPACITY AND CONNECTEDNESS THROUGH COVID-19 RESPONSES

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This publication is part of a series developed in collaboration with the University of Melbourne. The main authors of the series of publications are the following: Jonathan Liberman (Associate Professor, University of Melbourne) and Ben Lilley and Darryl Barrett (WHO Regional Office for the Western Pacific).

The named authors alone are responsible for the views expressed in these publications.
Key points

- Legal frameworks are critical to enabling collaboration and coordination, as well as protecting against misuses of power and potential unintended consequences of COVID-19 responses.
- Strengthening legal frameworks and related regulatory capacity in responding to COVID-19 can support leadership and governance, and the achievement of universal health coverage, beyond the COVID-19 crisis.
- Legal frameworks can ensure government accountability and transparency, support evidence-based decision-making, provide for the engagement of the community and regulate engagement with private sector actors.
Purpose

To support Member States in the Western Pacific Region in developing legal frameworks and related regulatory capacity to support governance for health in the COVID-19 response and beyond.

Background

Success in preventing and controlling the spread of SARS-CoV-2, the virus that causes COVID-19, and in responding to the social and economic dislocations caused by the pandemic requires effective action and collaboration throughout the health system and across government and society. Legal frameworks are critical for achieving this.

Responses to the pandemic have been both supported and constrained by the legal frameworks in place when COVID-19 emerged. In many countries, legal frameworks and related governance arrangements were not sufficiently prepared for the challenges that COVID-19 has presented. The pandemic has inevitably highlighted gaps and disconnections.

At the same time as responding to the immediate crisis, COVID-19 presents an opportunity for countries to review and strengthen legal frameworks for health governance beyond the pandemic, in line with their commitments in *Universal Health Coverage: Moving Towards Better Health*, the action framework for the Western Pacific Region, emphasizes the rule of law and regulatory institutions as critical enablers of health. The action framework highlights the importance of clear responsibilities and authorities, participatory processes, accountability mechanisms, transparency and integrity, the avoidance of conflicts of interest and prevention of corruption, and the involvement of civil society.

The use of law in responding to COVID-19, and for health generally, should be grounded in the right to the highest attainable standard of health, as well as obligations to respect, protect and fulfil other human rights. In the political declaration of the high-level meeting on universal health coverage, Member States reaffirmed “the right of every human being, without distinction of any kind, to the enjoyment of the highest attainable standard of physical and mental health” (paragraph 1). In the resolution adopted by the World Health Assembly in May 2020 on the COVID-19 response, WHO Member States recalled “that the Constitution of WHO defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, and declares that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being, without distinction of race, religion, political belief, economic or social condition”.

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Through the political declaration, Member States recognized the need for enabling legislative frameworks to support “health systems that are strong, resilient, functional, well-governed, responsive, accountable, integrated, community-based, people-centred and capable of quality service delivery” (paragraph 10), and “the vital importance of strengthening legislative and regulatory frameworks and institutions for the achievement of universal health coverage” (paragraph 21).
Discussion

While COVID-19 presents initially as a health crisis, both the disease itself, and measures required to prevent and control the spread of the virus, create a broader crisis, with social, economic and legal dimensions.

Salient features of this crisis include:

- The urgency of the need for action, both to prevent and control the spread of the virus, and to provide health and related care to those who contract the virus. Across countries, responses have either been supported or constrained by existing legal frameworks and practices and cultures of collaboration that have developed (or not developed) to address health emergencies, both within and beyond the health sector.
- The enormous social and economic dislocations created by the virus and the measures implemented to prevent and control its spread, which have often disproportionately impacted already vulnerable and marginalized populations.
- The restrictions on individual rights and freedoms entailed by many of the measures implemented to prevent and control the spread of the virus. Competing considerations have often played out as a trade-off between public health and human rights, rather than through consideration of how taking a human rights approach (including the right to the highest attainable standard of health) is a foundation of effective public health measures and an element of good governance, ensuring a voice and participation of all people, particularly vulnerable and marginalized populations.
- The range of negative health impacts caused by COVID-19, as recognized by the World Health Assembly resolution on the COVID-19 response, “including hunger and malnutrition, increased violence against women, children and frontline health workers, as well as disruptions in the care of older persons and persons with disabilities”.
- COVID-19 impacts differently on different populations, including, as recognized by the World Health Assembly resolution: people with pre-existing health conditions; older people; health professionals, health workers and other relevant frontline workers, especially women, who represent the majority of the health workforce; people with disabilities; children and adolescents; and people in vulnerable situations.
- Several measures implemented to prevent and control the spread of the virus have involved substantial expansion of the ordinary powers of governments, and the suspension or limitation of their ordinary processes, including some significant accountability and oversight mechanisms.
- In many jurisdictions, legal frameworks for public health and health emergencies have been neglected and are critically outdated and unfit to enable an effective public health response. In these circumstances, some governments quickly enacted COVID-19-specific laws and with limited opportunity for consultation or deliberation.
- The activation, in many jurisdictions, of emergency frameworks that determine the powers and functions of government entities during public health emergencies. These frameworks may be being utilized for a public health event for the first time and may be outdated and, in postcolonial states, rooted in colonial laws.
- That the global nature of the COVID-19 crisis has seen the adoption of substantial restrictions on significant aspects of international cooperation, including international travel and trade. This has impacted freedom of movement and the distribution of essential goods and services, particularly in landlocked countries, islands and remote settings.

Meeting these challenges requires genuinely whole-of-government (see Table 1) and whole-of-society responses, which in turn require laws and legal frameworks that enable necessary action and protect against misuses of power and potential unintended consequences.
Table 1. Non-exhaustive examples of the different sectors and functions of government (outside the health sector) that COVID-19 responses engage

<table>
<thead>
<tr>
<th>Sector</th>
<th>Functions</th>
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<tr>
<td><strong>Social protection</strong></td>
<td>Provide unemployment support, disability support, support to businesses, housing support, and support to migrants and displaced persons.</td>
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<tr>
<td><strong>Education</strong></td>
<td>Support the continuation of education in schools, tertiary institutions and child care, and provide safe premises and environments.</td>
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<tr>
<td><strong>Industry</strong></td>
<td>Ensure the continuity of essential services and supplies such as food, water, medical equipment, energy, telecommunications/information technology, banking, freight movement and support industries affected by economic disruptions.</td>
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<td><strong>Public transport</strong></td>
<td>Continue to facilitate the movement of people, including essential workers, and provide safe premises and services, including enabling physical distancing where required.</td>
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<tr>
<td><strong>Workplace/labour</strong></td>
<td>Support and regulate employers to provide healthy and safe premises and environments, including appropriate personal protective equipment to employees, and to provide appropriate leave entitlements.</td>
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<tr>
<td><strong>Agriculture</strong></td>
<td>Ensure the continuity of food supply and support agricultural industries and associated logistics systems affected by travel and trade measures.</td>
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<tr>
<td><strong>Emergency services</strong></td>
<td>Support coordination of emergency responses, including securing and distribution of essential supplies and services.</td>
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<tr>
<td><strong>Justice/Attorney-General</strong></td>
<td>Provide legal counsel and support, draft relevant legal instruments, ensure continued operation of essential legal services such as courts, ensure the continuation of essential corrections services, and protect the health and safety of those in correctional facilities.</td>
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<tr>
<td><strong>Consumer safety/protection</strong></td>
<td>Protect the community from unhealthy/unsafe health and other products, as well as from misinformation and scams or other exploitation.</td>
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<tr>
<td><strong>Immigration/border control</strong></td>
<td>Manage international borders (land, air and sea), including regulation and facilitation of international travel and trade.</td>
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<tr>
<td><strong>Foreign affairs</strong></td>
<td>Provide travel advisories, consular support, support people to return to their home countries, and lead and support international and regional cooperation.</td>
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<tr>
<td><strong>Trade</strong></td>
<td>Secure international supply chains, both for import and export, to ensure the continuing supply of goods, including food, medical equipment and other essential supplies.</td>
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<tr>
<td><strong>Finance/treasury</strong></td>
<td>Ensure adequate and sustained financing of the COVID-19 response, essential health and other services, and social and economic measures, and manage the overall economic response.</td>
</tr>
<tr>
<td><strong>Science and technology/innovation</strong></td>
<td>Support COVID-19-related ethical scientific research, including epidemiological analysis and the development of vaccines and therapeutics, and promote the development and application of digital technologies.</td>
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Actions for consideration

Six actions for WHO and Member States to work together to consider:

1. **Clarify roles and responsibilities for the COVID-19 response and future health emergencies**

   The roles and responsibilities of actors in the response should be clearly articulated, including decision-making, communication with the public and affected groups, resourcing, implementation, monitoring and enforcement. Structures based on distributed leadership and responsibility may be more sustainable over a long period than those based on centralized command and control. However, functions are allocated, it is crucial that clear and effective lines of responsibility and accountability are established.

   Roles and responsibilities should be assigned taking into account mandates, expertise and capacity, with additional resources (financial, human and technical) made available as necessary. This will require an understanding of the political economy, including how power and decision-making are exercised. Health authorities should have a core role in the overall response and lead decision-making and coordination of health measures, though other agencies may be better suited to leading other aspects of the response.

   Consideration should be given to the appropriate levels of government, such as national or subnational, for each role and responsibility, enabling the optimal combination of national action and locally tailored interventions, in accordance with constitutional and other legal frameworks.

   Enforcement powers and responsibilities should be carefully assigned, considering the nature of the measures being enforced, and the different roles, powers and expertise of different authorities, such as public health officials, police and military.

2. **Promote coordination within the health system and invest in governance improvements that will have both immediate and longer-term benefits**

   Governments will need to mobilize resources and capacity across the health system to ensure that they can meet emergency demand and that COVID-19 does not lead to a neglect of other health concerns or of the rights of people requiring treatment or care for other health conditions. Effective coordination mechanisms between levels of the health system, including primary, secondary and tertiary services and national and subnational health authorities, as well as between public and private services, will be needed to allocate resources efficiently and reduce disruption to care. Governments may need to examine and, if necessary, amend legislative and regulatory frameworks to enable public–private cooperation, including purchasing arrangements, competition laws and workforce regulations.

   Where difficulties encountered in the COVID-19 response reveal either strengths or weaknesses in the way in which health systems, including their connections beyond the health sector, are organized and governed, these should be noted, and lessons should be applied to review and improve arrangements.
3. **Clarify mechanisms for whole-of-government and whole-of-society collaboration and coordination**

**Whole-of-government**

Mechanisms should be clarified for ongoing interaction between agencies and jurisdictions, enabling coordination and collaboration, mutual learning, ongoing review of arrangements, priorities and resourcing, and sharing of information. Clear roles and measurable indicators for each sector involved in the mechanisms will promote their effectiveness.

This may require the review and refinement of existing mechanisms or the establishment of new ones. Attention should be given to measures required to facilitate the appropriate and timely sharing of information across agencies and across jurisdictions, including protections against the misuse of information, particularly personal health or other sensitive information.

Mechanisms should extend beyond the national level and provide for collaboration and coordination with and between subnational levels of government, including local governments, cities, villages and municipalities, as appropriate. Sustained efforts across different levels of government will be needed to effectively implement response measures and maintain essential services and social conditions, especially in highly decentralized settings.

**Whole-of-society**

**Community participation and engagement**

The community should be empowered to engage and participate in decisions and actions that affect them. Across all measures, engagement with the community, including vulnerable and marginalized groups, should be undertaken to inform decisions, assist those affected, build trust, and support monitoring, evaluation, review and improvement of measures. Authorities should look to partner with civil society and community groups and utilize participatory mechanisms to involve communities in deliberation and planning. A number of communication and information-sharing methods should be used to ensure target groups are reached.

Additional effort may be required to overcome challenges to participation and engagement, including where emergency responses have had to be quickly implemented, and where the usual opportunities for people to come together in person cannot be safely carried out.

**Private sector**

The private sector has a critical role to play in the COVID-19 response, including as a provider of essential services and supplies, and as an employer. Engagement with the private sector should be managed to avoid conflicts of interest and the development of inappropriate reliance by government agencies on private sector actors. Commercial arrangements entered into with private sector actors should be transparent to promote accountability.

**International cooperation**

Mechanisms should be in place to enable international cooperation, including through WHO, including compliance with obligations of collaboration and assistance under Article 44 of the International Health Regulations (2005) and via bilateral and regional channels, in order to share knowledge and information, provide mutual support, facilitate travel and trade, and provide development assistance.
4. **Ensure decisions are based on the best available evidence**

Decisions should be made on the basis of the best available evidence (incorporating different kinds of evidence, including medical, epidemiological, behavioural, economic and lived experience), with a particular focus on vulnerable and marginalized groups, recognizing that there may be many uncertainties in evidence and that evidence will be rapidly evolving. Where appropriate, the exercise of legal powers should be made conditional on the consideration of relevant evidence, including through consultation with expert advisory committees and community representatives.

Evidence relied upon should, as far as possible, be made publicly available in an accessible and understandable format, facilitating greater understanding of the justification of measures and the considerations taken into account.

5. **Ensure appropriate limits and oversight of the exercise of government powers**

Government responses should be subject to oversight appropriate to the circumstances (for example, parliamentary committees, ombudspersons, independent commissioners and courts), to support the learning of lessons and strengthened accountability and, where appropriate, provide remedies to those affected by measures implemented.

The legal bases, criteria and conditions for the exercise of government powers should be clearly articulated. In light of progress in controlling the spread of COVID-19, measures implemented should be subject to regular review with lessons learned and the experiences of affected groups, individuals, communities and business incorporated. Any extraordinary powers granted or exercised should be with the explicit expectation that they will cease once no longer necessary.

6. **Ensure consideration of the impacts of all measures on different groups, particularly vulnerable and marginalized populations**

Across all measures and activities, consideration should be given to differential impacts on individuals and groups, particularly vulnerable and marginalized groups, and efforts made to avoid stigma, discrimination, or the exacerbation of existing inequalities. The health sector may need to exercise a leadership role in educating other sectors on the social determinants of health and the impacts of inequalities on health to ensure the health system and health protection efforts reach unreached populations.