Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies

Policy Brief – August 2020

Dr Joelle Grogan
Middlesex University London
Co-Investigator, WP7 “Rule of Law – Principles”

Nyasha Weinberg
re:constitution Fellow
Research Fellow, Bingham Centre for the Rule of Law
DISSEMINATION LEVEL

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Introduction

The COVID-19 crisis is a global public health emergency. As of the 7th August 2020, 19.1 million cases had been confirmed worldwide with over 715,000 deaths. Governments have adopted a wide variety of responses to contain the spread of the virus, and to mitigate its negative social and economic effects. The restrictions that have been placed worldwide on individual liberty, movement, assembly, worship, education, and commercial activity — as well as on elections, and the working of parliaments and the courts — are the most restrictive in contemporary history. The success of these measures in reducing infection depends to a significant extent on compliance by the public, which itself is facilitated by trust in the actions taken by government.

This paper presents eight principles of rule of law and good governance to guide action during a public health emergency. The principles are based on the analysis published in the “COVID-19 and States of Emergency” Symposium, a global study of states of emergency and the use of the emergency powers in response to the COVID-19 crisis. The Symposium published reports on 74 countries by over 100 scholars worldwide, and so provided analysis of legal measures which impacted nearly 80% of global population. While this paper does not consider health policy choices made by states, it instead highlights the good practices which appear to have correlated with positive outcomes, including lower infection rates, lower mortality rates, and the earlier lifting of restrictions. Building on these principles, this paper provides recommendations based on evidence of emerging best practice worldwide which are likely to result in higher levels of public trust and compliance with legal measures and policy decisions taken under an emergency. We also highlight concerning practices which may only serve to undermine efforts as well as the rule of law and good governance.

The rule of law has been recognised as a foundational legal value, and a central tenant of constitutional democracies. It is a concept of universal validity which serves to both guide and constrain the exercise of public power and authority and, in doing so, protects against the arbitrary or unlawful use of public power. Good governance provides a set of values that should guide the work of governments, and performance standards for accountability that should inform the development of policies, programmes and legislative frameworks during emergencies. Good governance is “participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law”.

1 As reported on the John Hopkins Coronavirus Resource Centre <https://coronavirus.jhu.edu/map.html> accessed on August 7th.
2 See Methodology underlying these policy recommendations at p 27.
3 For example, within the preamble to the United Nations Declaration on Human Rights (1948), ‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’; one of the three ‘principles which form the basis of democracy’, Council of Europe, Statute of the Council of Europe, Preamble (1949). For an overview of the concept of the rule of law see e.g. Pech L, Grogan J et al ‘Unity and Diversity in National Understandings of the Rule of Law in the EU’ (20 May 2020) RECONNECT Working Paper No 7.1 <https://reconnect-europe.eu/publications/deliverables/>; Jowell J, ‘The Rule of Law’ in J Jowell and C O’Cinnede (eds), The Changing Constitution (9th edn, OUP 2019); Heuschling L, État de Droit – Rechtsstaat – Rule of Law (Dalloz 2002); Tamanaha BZ, On the Rule of Law: History, Politics, Theory (CUP 2012); and Allan TRS, The Sovereignty of Law (OUP 2013).
The exigencies of an emergency, particularly one of global scope and scale, place extreme pressures on governments and legal systems which can often mean the values of the rule of law and good governance are sacrificed, and even permanently altered. However, this paper argues that commitment to these values can serve to enhance and improve outcomes in a public health emergency.

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# Recommendations

From the **eight principles of the rule of law and good governance**, we derive a set of recommendations to guide government action and help promote an effective response to a global health emergency.

| Ensure Legal Certainty and Clarity in Public Communication | 1a. Legal rules and restrictions must be certain in their meaning, consistent and prospective in their application, and changes should be announced in advance with sufficient notice for those who need to act to prepare  
1b. Public messaging about the pandemic should be clear, accessible, and consistent  
1c. Early and regular updates on developments, policies and actions is essential to avoid misinformation and speculation  
1d. Governments should aim to implement and disseminate a staged and sequenced response plan which indicates what individuals and businesses may and may not do and when, updating as necessary where new information or evidence becomes available |
|---|---|
| Ensure Transparency in Decision-Making | 2a. The membership of key decision-making bodies, and the process for decision-making, should be made publicly available  
2b. The scientific evidence and rationale which underlies public policy and legal measures should be made available in both full and accessible executive summary on public websites |
| Comply with international law and human rights standards | 3a. States should only introduce measures which are necessary, proportionate, temporary in nature, and respect human rights and the principle of legality  
3b. States should respond to the crisis within the constraints of normally applicable powers as a far as possible  
3c. States should avoid the disproportionate use of force and penalties for breaches of COVID-19 measures, and guard against the arbitrary or discriminatory application of these measures  
3d. Governments must seek to ensure vulnerable populations are not disproportionately affected by measures taken in response to COVID-19  
3e. Responses should not require restrictions on media freedoms nor enable targeted use against political opponents  
3f. Governments should resist the introduction of data-driven technologies that extend state surveillance or are not purpose-limited to the pandemic |
| Deliver Rapid, Coordinated, and Collective Action | 4a. A rapid, systematic, cross-governmental adoption of a strategic approach to tackle the crisis is most beneficial to states  
4b. Coordinate action plans across national, regional, and local levels to ensure collective action which also facilitates adaptation to local conditions  
4c. The costs of underreaction can outweigh the costs of overreaction in a health emergency |
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1. **Ensure legal certainty and clarity in public communication**

Pandemics pose a significant threat to the whole population. Beyond those particularly vulnerable to the effects of the disease, the undetermined health, economic, and social impacts create a situation of deep uncertainty. People rely on information provided by governments and central authorities, alongside how this information is presented through mainstream media channels and social media, to understand what to do. Clarity in both the rules and the justifications underlying them, helps citizens understand what the rules and regulations designed to control the spread of the pandemic are, and why they are in place. This boosts compliance and helps citizens to manage their expectations and fears. The success of governance based on certainty and communication appears to track globally: state policies based on certain and clear legal provisions, which are clearly and consistently communicated to the public appear to correlate with the most positive outcomes.⁵

1a. **Legal rules and restrictions must be certain in their meaning, consistent and prospective in their application, and changes should be announced in advance with sufficient notice for those who need to act to prepare**

As with the drafting of all laws, legal certainty in the design of the relevant provisions is essential.⁶ Legal measures must not have vague meaning or be open to different interpretations by state actors including the police and local authorities. This is connected to the clear and accessible communication of what is required of citizens and how measures will be applied by state actors. Regulations and other measures proscribing or prohibiting action must be written in clear and accessible language which communicates what individuals can and cannot do. When rules change too frequently, or are inconsistently interpreted by state actors, it is difficult for the population to understand what is expected of them, and to follow the rules.⁷

The Czech Republic introduced 65 resolutions in response to the pandemic between 12 March and 12 May 2020.⁸ Between 28 January and 23 July 2020, 153 Coronavirus-related statutory instruments (regulations) have been laid before the United Kingdom Parliament.⁹ Government officials’ communication of the frequently changing legal rules, exceptions, and exceptions to the exceptions create a situation of confusion and concern about non-compliance.¹⁰

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⁵ This claim is based on the reported experiences of the following states: Denmark, Finland, Germany, Iceland, New Zealand, Norway, Taiwan, Singapore and Switzerland. See Methodology on p 2727.


¹⁰ In the Czech Republic, see: Vikarská Z: ‘Czechs and Balances – If the Epidemiological Situation Allows…’ (Verfassungsblog, 20 May 2020) [https://verfassungsblog.de/czechs-and-balances-if-the-epidemiological-situation-allows]. In the UK context, see: Grogan J: ‘Right Restriction or Restricting Rights? The UK Acts to Address COVID-19’ (Verfassungsblog, 17 April 2020) [https://verfassungsblog.de/right-restriction-or-restricting-rights-the-uk-acts-to-address-covid-19/].
1b. Public messaging about the pandemic should be clear, accessible, and consistent

Clear and consistent messaging not only has the effect of tackling the spread of misinformation but is also critical to ensure trust and high degrees of compliance with measures.\(^\text{11}\) It is also important that the government clearly distinguish what is guidance, and what is the law to avoid confusion.\(^\text{12}\) Communication must be accessible and include provision for sign language and minority language populations. The efficacy of the social-distancing measures requires a high level of individual compliance which is grounded in both trust in the legitimacy of the intervention, and the clarity with which those measures have been communicated. The exercise of social influence, sometimes described as ‘peer pressure’, considered to be strong in some countries that have effectively managed the crisis, is enabled by a clear communication of the messages and requirements by trusted voices.\(^\text{13}\)

Government communication must avoid ‘mixed messaging’ or inconsistent directions and advice, which can frequently occur in crisis periods where pressure to act and be seen to be acting is intense.\(^\text{14}\) Incoherent or inconsistent government messaging paired with frequently changing rules and restrictions leads to critical uncertainty. Government policy must be clearly connected with the legal measures which must not have vague meaning or be open to different interpretations by state actors. This creates space for misinformation.

The WHO Director-General Tedros Adhanom Ghebreyesus identified that mixed messaging (for example calling for schools to reopen without having broader control mechanisms in place) undermines the most critical element of COVID-19 response: trust.\(^\text{15}\) New Zealand has all but eliminated COVID-19\(^\text{16}\) within its borders through a combination of ordinary legal powers and some emergency provisions, centrally driven by social nudges communicated through clear, consistent and constant government messaging. Prime Minister Jacinda Arden repeatedly underlined the central message of social responsibility, rather than relying on sanctioning measures to deter non-compliance.\(^\text{17}\) Iceland’s ‘rule of common sense’\(^\text{18}\) was driven by clear government guidelines, recommendations and daily advice delivered by health experts.

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\(^\text{14}\) OECD, ‘Transparency, communication and trust: The role of public communication in responding to the wave of disinformation about the new coronavirus’ (3 July 2020) <www.oecd.org/governance/public-governance-responses-to-covid19/).


\(^\text{16}\) Cousins S, ‘New Zealand eliminates COVID-19: An aggressive approach has enabled New Zealand to end community transmission of SARS-CoV-2’ (2020) 395 The Lancet 1474.


1c. Early and regular updates on developments, policies and actions is essential to avoid misinformation and speculation

A lack of information centrally communicated can result in inaccurate, incomplete, or false information being widely disseminated. Misinformation can undermine efforts to control or mitigate the virus.\(^{19}\) Updates on relevant developments must be communicated by government promptly in order to avoid speculation, and to minimise the risks associated with disinformation or ‘fake news’.

*Slow communication concerning the coronavirus and of policy to be taken by the central government in response to it has been identified as the catalyst for the spread of disinformation in Zimbabwe which has had a negative impact on the country’s ability to contain the virus.*\(^{20}\)

1d. Governments should aim to implement and disseminate a staged and sequenced response plan which indicates what individuals and businesses may and may not do and when, updating as necessary where new information and evidence becomes available

Following initial emergency responses, governments should, where possible, use available information to produce indicative ‘roadmaps’ which communicate to individuals and businesses what is expected of them; what restrictions apply and do not apply; and when and under what circumstances or conditions the rules will change. The response plan should aim to set out sequential stages which set out certain pre-communicated, and pre-determined conditions which when met, allow for a change to the next stage. Both exceptions and subsequent changes to the plan should be minimised and announced with sufficient advance notice as to enable maximum dissemination of the relevant information and for those affected to make the necessary adjustments.

*The Republic of Ireland*\(^{21}\) produced a highly accessible and easy to understand Roadmap for Reopening Society and Business\(^{22}\) which communicates what citizens can and cannot do, as well as presenting a clear path through to the end of the health emergency.\(^{23}\)

2. Ensure transparency in decision-making

A common factor amongst states identified as having the most positive outcomes in managing the crisis has been high levels of transparency in the decision-making processes in both policy and legal measures taken in response to the coronavirus. This includes the publication of **who is making the decisions;** the **evidence** which underlies the decisions being made; and the **reasoning or rationale** underlying these decisions. This is particularly important as COVID-19 represents a situation where the risks are large, and decisions are being made on the basis of

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evidence that is emerging and yet still preliminary and limited. Transparency in decision making is linked with building broad confidence in government action which in turn offers a significant advantage in achieving higher levels of compliance. In many states with opaque decision-making and a lack of trust in government responses to the pandemic, we see higher rates of infection and a correlation with an increased risk of both outbreaks and political violence.

2a. The membership of key decision-making bodies, and the process for decision-making, should be made publicly available

Transparency over whom decision-making bodies are consulting as a source of advice and evidence is essential to building public trust in decision-making. Challenging and complex decisions are being made which affect entire populations raising questions for both democratic legitimacy (where these decisions are perceived as being made by unelected individuals) and scientific legitimacy (where decisions are perceived as being made by unqualified individuals). These decisions necessarily involve the coordinated efforts of a wide variety of decision-makers and stakeholders. Knowing the expertise and qualification of non-elected officials who are involved in key-decisions on public policy is important to build trust in the legitimacy of those measures. So too is understanding the process for decision makers reaching conclusions. Where membership of those groups causes risk to those advisors, governments should provide public support and protection for the individuals concerned.

Concern has been raised in the degree of democratic oversight of the de facto power of the advisory body in Ireland. In Croatia, the reputation of the decision-making body was damaged when it was discovered that two experts and main public faces of government responses were not part of it. Transparency over the membership of decision-making bodies also enables the identification of problems of representation. While epidemiologists and virologists are often represented in decision-making bodies, other experts relevant to the secondary health consequences of the pandemic (including e.g. mental health, children’s health, preventive medicine and chronic disease) as well as social scientists and other disciplines have not been. A further issue of underrepresentation has been highlighted: a review of Global Health Security Representation found that women are in the minority in decision-making for and yet comprise 70% off the global health workforce fighting COVID-19.

2b. The scientific evidence and rationale which underlies public policy and legal measures should be made available in both full and accessible executive summary on public websites

The clear and accessible scientific explanation of the rationale which underlies the policy and the law is important for higher levels of compliance. Cultivating citizens’ desire to cooperate, out of responsibility

26 Africa Centre for Disease Control and Prevention, Responding to COVID-19 in Africa: Using Data to find a balance.
for themselves and others, comes from changing restrictions according to clear, transparent and evidence-based criteria to show that the response has been both necessary and proportionate. Maximum possible transparency is necessary for any pandemic-response that involves significant threats to human rights and civil liberties to enable this to be fully contested through democratic channels. In pursuit of a coordinated and collective response adhered to by the whole population, accurate information and transparency help to enhance citizen cooperation.

The success in Germany in reducing infection rates to a manageable level for the public health system has been attributed to the Chancellor’s ability to translate the science into ‘easy to follow language’ which encouraged the population to follow the rules.

3. Comply with international law and human rights standards

The pandemic and responses to the pandemic have significant implications for both fundamental rights and democracy. Adherence to international law and domestic human rights standards do not prevent countries from imposing restrictions on citizens to curb the spread of the virus. However, these restrictions must be subject to the principles of legality, necessity, proportionality, temporariness, effective oversight and prospectivity. Countries which work to secure rights are ‘more likely to be more effective and sustainable over time than arbitrary or repressive ones’. The legitimate aim of protecting public health and the positive duty to protect the right to life should be balanced against the protection of civil liberties, and in particular the rights of liberty (in restricting movement outside personal residence), religion (in restricting religious practices), and freedom of assembly and association (in limiting any gatherings of people).

3a. States should only introduce measures which are necessary, proportionate, temporary in nature, and respect human rights and the principle of legality

It is clear that legal systems must quickly adopt new measures and policies to fight COVID-19, but most countries have been able to pass new laws and modify regulations to enable response to the pandemic without violating the requirements of legality, necessity, proportionality and timeliness and with derogating from convention rights under regional human right agreements (i.e. Article 15 European Convention on Human Rights; and Article 27 American Convention on Human Rights) and international human rights agreements (i.e. Article 4 International Covenant on Civil and Political Rights). Measures that exceed the emergency in duration, or scope cannot be justified aside from in exceptional situations.

36 Article 9 ICCPR, Article 7 ACHR, Article 5 ECHR.
37 Article 18 ICCPR, Article 12 ACHR, Article 9 ECHR.
38 Articles 21-22 ICCPR, Articles 15-16 ACHR, Art 11 ECHR.
The Hungarian Parliament successfully delegated almost unlimited legislative power to the Hungarian government which has since been used to introduce policies with little connection with COVID-19. The delegated power is without a time limit, prompting international criticism including from the Secretary General of the Council of Europe.\(^\text{41}\)

3b. States should respond to the crisis within the constraints of normally applicable powers as a far is possible

There has been considerable debate among academics about whether countries should derogate from international human rights instruments, or simply to limit rights, following almost twenty States parties to the three main human rights treaties choosing to derogate. Rather than enter this debate we follow Martin Scheinin in recommending countries handle the crisis through normally applicable powers as far as possible.\(^\text{42}\)

In Estonia\(^\text{43}\) and Latvia\(^\text{44}\) derogations have taken place in relation to Article 8 ECHR in relation to location tracking to control the pandemic, which it has been argued was not necessary, as it is argued that indiscriminate location tracking is not strictly necessary, and less intrusive alternatives exist.\(^\text{45}\)

3c. States should avoid the disproportionate use of force and penalties for breaches of COVID-19 measures, and guard against the arbitrary or discriminatory application of these measures

One of the most concerning and widely reported developments has been the criminalisation of breaches of the restrictions on movement and assembly. Most states have introduced either criminal or administrative penalties for breach of restrictions to movement taken in response to COVID-19. However, in a number of states, these penalties are disproportionate to the offence, such as multiple years’ imprisonment or fines that are excessive in respect of the country’s median wage. In some cases, these changes to the criminal code are permanent. Higher rates of the use of coercive enforcement and large-scale crackdowns have not correlated with better outcomes, but they have correlated with the militarisation of civilian roles.

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\(^{42}\) Scheinin M, ‘COVID-19 Symposium: To Derogate or Not to Derogate?’ (Opinio Juris, 6 April 2020) \(<\text{http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate}>\).


3d. Governments must seek to ensure vulnerable populations are not disproportionately affected by measures taken in response to COVID-19

Measures implemented to prevent or slow the spread of the virus have a disproportionately negative impact\(^{59}\) on vulnerable categories of people including the elderly, prisoners, those with physical or mental disabilities, migrants, ethnic minorities, detainees and refugees.\(^{60}\) The sudden onset of mass unemployment of part-time, low-income, and informal workers, coinciding with the shut-down of childcare

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and schools, has also disproportionately affected women. Under stay-at-home orders, women and children also face escalating rates of domestic violence, and a majority of governments have failed to take preventive measures.

Failure to consider the needs of vulnerable populations, such as in the Odisha state government of India recently disallowing private transport, thereby failing to consider the needs of the elderly and vulnerable ended up with a court order to remove the restriction. In Scotland the Coronavirus (Scotland) Act includes an express provision on combating domestic violence.\(^{62}\)

3e. **Responses should not require restrictions on media freedoms nor enable targeted use against political opponents**

Paired with criminalisation of COVID-related behaviour are state censorship and restrictions on freedom of expression. Access to trusted, accurate and independent information is absolutely crucial, and offers an important mechanism for countering false and misleading narratives, or “fake news”\(^{63}\). However, COVID-19 has witnessed governments adopt measures that curb media freedoms and target opposition in other political parties, the media, and civil society. A number of states have also introduced criminal offences related to ‘miscommunication’ or the publication of false or misleading assertions related to the epidemic and the measures introduced by governments to tackle it. Such offences are often drafted in terms general enough to ensure that political opponents fall within their scope, and have been introduced as permanent changes to criminal codes.

Laws criminalising the spread of disinformation regarding the virus or criticism of the government’s response (as in e.g. the Philippines\(^{64}\), South Africa\(^{65}\)) have in some instances been used against political opponents or journalists (e.g. China\(^{66}\), Serbia\(^{67}\), Morocco\(^{68}\)).

3f. **Governments should resist the introduction of data-driven technologies that extend state surveillance or are not purpose-limitied to the pandemic**

Countries worldwide have introduced provisions to allow for the collection of personal data in an effort to track the virus. The forms of tracking have varied: from the requirement to send an hourly GPS-tracked ‘selfie’ as proof of staying at home, to the deployment of tracking software, designed for national security or military purposes. Data-driven interventions to combat the pandemic covering digital contact tracing, wristbands, preventative epidemiology, and passporting services have caused significant concerns. This is

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62 Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020.


a primary concern where the use of this technology by the government or the police is without either the consent of knowledge of individuals, and without any degree of judicial or political oversight.

A legislative proposal in Croatia which would have allowed the tracking of cell phone data was effectively blocked and heavily criticised for its lack of constitutionally mandated safeguards and temporal limitations. Israel’s decision to enlist Shin Bet to conduct electronic surveillance against COVID-19 failed to secure parliamentary consent and then was challenged before the Supreme Court with the Court ruling that the government lacked authority to authorise surveillance without explicit statutory provisions.

4. Deliver rapid, coordinated, and collective action

States which responded rapidly to the COVID-19 crisis have been able to exert more control to mitigate the negative consequences of the epidemic. The national executive is typically best placed to respond rapidly to an emergency, and in nearly all countries has led the response. The legislature is not typically suitable to quick decision-making in the context of an emergency. However, the legislature with the judiciary, fulfil an important function in the oversight and review of executive action undertaken in the emergency. To support and sustain the effectiveness of measures, coordination across national, regional, and local levels is needed. Multilateral and international cooperation is also important.

4a. A rapid, systematic, cross-governmental adoption of a strategic approach to tackle the crisis is most beneficial to states

Countries that were able to adopt and implement strategies to contain the virus appear to be performing better than countries that have delayed their response to COVID-19. As the infection has an exponential growth rate, countries that initiate suppression measures at an earlier stage of their epidemic tend to have more positive outcomes as this enables maximum reduction in transmission by containing infected and exposed populations while infection was at lower levels. This resulted in a reduced gap between capacity in hospitals and demand for hospital beds.

South Korea responded promptly aggressively to the first signs of concern regarding coronavirus, introducing and quickly expanding on extensive testing and contact tracing, isolation and treatment. New Zealand’s early response and coordinated messaging has been credited with ensuring the country has one of the lowest fatality rates in the world. Japan’s cluster analysis helped to identify local hotspots including the risk of mass gatherings and avoidance of super spreader events for example closures of sports stadia, museums, theatres and theme parks.

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4b. Coordinate action plans across national, regional, and local levels to ensure collective action which also facilitates adaptation to local conditions

Action plans and regulatory measures which are coordinated across national, regional, and local levels produce better outcomes. It is imperative for national, regional, and local authorities to share all relevant data. Adoption of measures in this instance relates to both social distancing, restrictions on commercial and educational activity as well as the introduction of large-scale and targeted testing and tracing. These measures should take account of local conditions including: demography, ability to work from home, general economic vulnerability, household sizes, level of labour informality, and state capacity to provide support to vulnerable populations.\footnote{Walker PGT and others, ‘The Impact of COVID-19 and Strategies for Mitigation and Suppression in Low- and Middle-Income Countries’ (Science, 12 June 2020) \url{https://doi.org/10.1126/science.abc0035}.} The localisation of emergency response can improve the speed of reaction, and allocation of resources as needed based on local awareness, but its ultimate success depends on being complimented by a coordinated national response.

The federal executive government in Brazil has adopted neither a coordinated approach nor a comprehensive plan of action aimed at reducing coronavirus infection rates.\footnote{Coelho, FC and others, ‘Assessing the Potential Impact of COVID-19 in Brazil: Mobility, Morbidity and the Burden on the Health Care System’ (22 March 2020) \url{https://ssrn.com/abstract=3559609} or \url{http://dx.doi.org/10.2139/ssrn.3559609}.} Attempts by state governors to fill the vacuum in leadership have had limited effect, as the messaging by President Bolsonaro critically dismisses the risk of COVID-19.\footnote{Ajzenman N, Cavalcanti T and Da Mata D, ‘More Than Words: Leaders’ Speech and Risky Behavior during a Pandemic’ (22 April 2020) \url{https://ssrn.com/abstract=3582908} or \url{http://dx.doi.org/10.2139/ssrn.3582908}.} Brazil currently has among the highest number of confirmed cases in the world, with a still rising trend.\footnote{See John Hopkins Coronavirus Resource Centre \url{https://coronavirus.jhu.edu/map.html}.} In Germany’s federal system, both state and federal governments have cooperated in coordinated responses to the virus nation-wide.

4c. The costs of underreaction outweigh the costs of overreaction in a health emergency

Rapid response requires a delicate balance between urgent decision-making and rational weighting available facts; for example, taking into account the intensity of interventions against the wider ramifications of devoting all attention towards the treatment and prevention of spread of a single disease. While there are justified concerns in overreaction, the COVID-19 emergency has shown the negative consequences of underreaction. The adoption of precautionary principle,\footnote{‘COVID-19 Policy Applying the Precautionary Principle When the Science is Uncertain’ (Royal Society of Chemistry) \url{www.rsc.org/news-events/articles/2020/apr/covid-19-policy-applying-the-precautionary-principle-when-the-science-is-uncertain/}.} or the ‘better safe than sorry’ approach important for issues of this scale, can help to promote rational and prudent risk trade-offs even in times of emergency.\footnote{Meßerschmidt K, ‘COVID-19 Legislation in the Light of the Precautionary Principle’ (2020) 8 The Theory and Practice of Legislation 1.}

States which are currently counted among the highest infection and mortality rates in the world are case studies cautioning against delayed, internally inconsistent, and uncoordinated action. Where the executive denies the threat or delays in response, this creates a vacuum in leadership and compounds challenges in controlling and mitigating the negative consequences of the emergency. There is an emerging economic consensus that tolerating significant shutdown in commercial and economic activity is a necessary for eventual recovery.\footnote{‘Policy for the COVID-19 Crisis | IGM Forum’ \url{www.igmchicago.org/surveys/policy-for-the-covid-19-crisis}.} Conversely, delaying the restriction or shutdown of commercial activity has not so far shown the likelihood of reduced negative economic impact or swifter economic recovery.
Taiwan, Singapore, and South Korea all utilised quick decision-making based on available facts to introduce measures to control the spread of the virus. The United Kingdom and Spain had slow rollouts for testing and social interventions, and this delay is now estimated to have cost lives without necessarily limiting the economic damage. Sweden, which largely avoided imposing prohibitions has seen many more deaths than in neighbouring countries, without sparing economic damage.

5. Ensure mechanisms for response are explicitly targeted at resolving the crisis

Non-pharmaceutical interventions should be limited to the purpose of responding to the crisis and should never be the means by which government policy unrelated to the emergency is introduced. Policies which differentially impact on different groups, particularly those in vulnerable categories, should not be introduced without objective, and health-based justification.

5a. Ensure COVID-19 interventions are tailored to respond only to the emergency

A number of countries have introduced policy responses aimed at making changes that are not related to combatting the pandemic. These responses risk undermining public trust in government. People respond better to mandates and official guidelines if they are not used for separate purposes than the targeted elimination of the virus.

In Hungary, the government introduced policy changes under emergency provisions that removed crucial sources of funding for local governments, a move that was identified as a covert attempt to challenge opposition-led municipalities. In Poland, attempts were made to pass unrelated bills criminalising abortion and banning sex education through emergency measures.

5b. Ensure that measures adopted are non-discriminatory and protect groups in vulnerable circumstances

Inconsistent application leads to higher non-compliance rates as political distrust drives scepticism about motivations for policy responses, and the unfair treatment or targeting of some groups over others. There is increasing evidence of the targeted policing and disproportionately penalising of minority groups including migrant communities, and indigenous peoples, and particularly racialized individuals. These groups have been subjected in some instances to violence, discriminatory identity checks, forced


85 Akpan N, ‘How to measure your nation’s response to coronavirus’ (n 83).

86 Hopkins V, ‘Hungary’s Viktor Orban Comes under Fire for Coronavirus Response’ (Financial Times, 19 May 2020) <www.ft.com/content/9c107c3b-1ca9-4246-bb68-8ff64b111e91>.

quarantines and fines. Some ethnic groups are at greater risk during the pandemic, for example black communities, as they are more likely to be impacted by infection, more likely to be hit economically by measures to contain infection, and also more likely to be penalised under COVID-19 measures.

In Slovakia already marginalised Roma communities have been subject to targeted lockdown measures and military policing where other communities with higher rates of testing positive for the coronavirus were not. Indigenous populations in Australia were previously identified as being at higher risk in the H1N1 pandemic, the national government established national aboriginal and Torres Strait Islander advisory group on COVID-19 to fast-track an emergency response plan with broad representation of indigenous health groups and based on principles of ‘shared decision-making, power-sharing, self-determination, and empowerment.’

5c. Ensure equal and consistent application of the relevant rules, differentiating in treatment only for objectively justified and health-based reasons

It is imperative that government and other state officials lead by example, and model good behaviour, and face the same consequence for not following government rules so as not to create the perception of double standards. Those in position of authority should never ignore, avoid, or reinterpret the rules at the risk of critically undermining their own legitimacy, and the rules’ efficacy. Where measures are highly restrictive, there are increased concerns for the fear of an abuse of power, particularly where enforcement and sanctions to deter and punish transgressors are disproportionate to the identified transgression.

Concern has been expressed in the United Kingdom as a government advisor accused of breaking lockdown restrictions on multiple occasions was defended by the government. In New Zealand, the Health Minister was demoted from government, and then resigned following breaches of lockdown restrictions.
6. Protect oversight mechanisms to ensure high quality law, policy and higher levels of compliance

Democratic oversight is guaranteed through political scrutiny, judicial review and public accountability through the media which cumulatively act as an important check on the use of power, and can improve the quality of the law, and effectiveness of the measures. While an emergency necessitates urgent action typically undertaken by the executive, ongoing review and reform of the measures taken is also essential. While strategies to combat COVID-19 have had in many cases limited democratic input and parliamentary oversight, it is inevitable that the decisions made by governments now will have lasting impact on their electoral systems and prospects in the years to come, and therefore oversight of the executive is extremely important. Where possible states should ensure that existing mechanisms for checks and balances, necessary to ensure respect for human rights and for democratic legitimacy, are robust in relation to pandemic containment measures.

Even where the protection of public health can justify action taken rapidly with more limited scrutiny by the legislature, there must be a robust and heightened commitment to the clear and transparent communication of the rationale for government action, substantiated with public debate and external engagement.

6a. Ensure the legislature continues its ordinary functions so far as is possible through reasonable adjustments

COVID-19 has delivered challenges to the ordinary functions of government, as social-distancing measures mean that Parliaments and legislatures are unable to meet in the same ways as before. It is, however, vital to ensure the continuity of the ordinary functions of the legislature even in an extraordinary time in order to fulfil its constitutional functions to debate, legislate, and scrutinise the actions of government. Meaningful legislative scrutiny is needed to ensure parliamentary oversight over the actions of the executive and the effective consideration of the proportionate, justified, and intended use of powers.

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Good practice has been seen in Finland\textsuperscript{103} and Latvia\textsuperscript{104} among others in the adoption of provisions to allow for virtual assembly and voting. The extended suspension of the legislature in Guatemala\textsuperscript{105} and the threats of dissolution of the legislature by the executive in Ecuador\textsuperscript{106} raise significant concerns as regards the potential for the abuse of power.

6b. Ensure the continuity of the courts to guarantee the ordinary administration of justice through reasonable adjustments

The continued functioning of the courts is necessary not only for the ordinary administration of justice, but even more important in respect of review of actions taken in the emergency. As could be expected, the COVID-19 crisis has introduced further delays to sometimes already back-logged justice systems, as a majority of states delayed or suspended cases with the exception of those considered urgent.\textsuperscript{107} In an effort to ensure the continuity of the courts, some states have suspended oral arguments in favour of written submissions, and provided for the expansion of video links to replace e.g. criminal, civil, family and tribunal sittings. Further measures to make remote access more widely available should be supported. It is important however to ensure such provisions also provide sufficient support for vulnerable defendants, including those with limited or without access to technology and the internet.

While the Supreme Court and High Courts of India\textsuperscript{108} are now holding virtual sessions, a restrictive interpretation of ‘urgency’ in High Courts in India has excluded bailing hearings from cases to be heard during the emergency, raising concerns for the constitutional right to personal liberty which cannot be suspended, even in a state of emergency.\textsuperscript{109}

6c. Enable processes to challenge the application of emergency measures

Judicial review is an essential avenue for ordinary citizens to challenge the legitimacy and proportionality of measures applied. An independent judiciary serves an important function in ensuring not only the legality of the measures applied, but also in underlying the importance of providing a principled justification for the measures. Where measures are the most restrictive on human rights, and often constitutional rights, in contemporary history, enabling remedy for the misuse or inappropriate use of powers is an important element of enabling a check on the legality of measures to guarantee justice and the legitimate use of power.


\textsuperscript{104} Dimitrovs A, ‘COVID-19 in Latvia: Precaution Above All’ (n 44).

\textsuperscript{105} Gonzalez J, ‘Challenges Beyond Public Health – Guatemala and the Covid-19 Crisis’ (n 49).


France has seen a number of challenges before its Constitutional Court, including a recent ruling to uphold criminal sanctions for breach of lockdown (“confinement”) conditions. In Brazil, federal judges suspended a government-approved public campaign to make people return to work on grounds it could harm public health. The Brazilian Federal Supreme Court also rejected the President Bolsonaro’s attempts to give indefinite validity during the emergency to his executive decrees and also stopped restrictions to access to information to be established by the federal government.

6d. Provide additional oversight mechanisms specifically targeted at the application of emergency measures

Oversight of the enforcement of emergency measures by state actors, including police forces and the military (where they have been assigned roles), is essential. A widespread concern has been the disproportionate and excessive use of force in the enforcement of restrictive measures. An independent oversight body can serve as an essential check on the use of force, and the application of restrictive measures, in turn also capable of highlighting where the law and guidance is unclear, or capable of misinterpretation.

In the United Kingdom, the Scottish Police Force appointed an independent reviewer to oversee the use of emergency powers to tackle COVID-19.

6e. Ensure public scrutiny and accountability through open access to the media

The media plays an important role in the communication of measures, and in raising concerns as to the application and compliance with those measures. While a number of states have introduced criminal offences related to ‘miscommunication’ or to the publication of false or misleading assertions related to the epidemic and the measures introduced by governments to tackle it, these can have a chilling effect on reporting the virus. Publishing government guidance, advice or policy in media outlets which is behind a paywall, and unavailable elsewhere, should be avoided at the cost of excluding large parts of the population who are unable to access the information.

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7. Engage with external (including scientific) expertise, and stakeholders and learn from international experience

The global challenges wrought by COVID-19 are unprecedented; but the inherent unpredictability of viruses mean that the task of responding to epidemics will always be an uncertain business. Initial analysis, based on limited evidence, can often be misleading, and the patterns of infection and disease can transform over time. For example, Information on COVID-19 was initially highly limited, and many aspects - including the likelihood of a vaccine - remain uncertain. While international experience has established that early introduction of restrictive measures and legal certainty and transparency have correlated with more positive outcomes, no state has achieved a ‘perfect’ response to the pandemic. While emergency necessitates urgent action, subsequent and ongoing review and reform is needed to ensure that states adapt to the latest information, developments, and challenges. Engaging with external expertise and examining international experience to adopt the most successful practices improves the quality of domestic law and policy.

7a. Follow guidance from multilateral institutions, in particular the World Health Organisation (WHO) guidance

WHO recommendations are not binding, but the expectation is that they can alter states legal obligations and individual behaviour. For member countries, stalling in decisions to implement emergency measures following national and international law, may risk both higher mortality rates and longer recovery periods. The WHO is working towards securing equal access for COVID-19 treatments, and moves to store and stockpile drugs or other resources can undermine the global cooperation necessary to end the emergency.

The initial United States’ resistance to, and notice of withdrawal from, the WHO, and its decision to ignore advice to implement recommended health measures based on specific WHO guidance, may be a contributing factor in the US experience - a country currently with one of the highest global mortality rates.

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7b. Review and learn from international experience

Examining the experiences of other states, particularly those with similar demographic and economic profiles, and discerning the most effective non-pharmaceutical, and pharmaceutical interventions has become a key part of a successful policy and legal response. This is necessary at all stages of the pandemic, from first response to recovery.

*Taiwan* and *Singapore* show the success of early response, while *New Zealand* has designed its measures in response to the approaches that had been successful in other states.

7c. Invite input from a broad range of stakeholders including civil society and non-governmental organisations in the drafting of legal measures

Relevant independent and expert external advice on the design of legal measures can improve the quality of the law. Where the emergency situation is rapidly changing, involving complex, context-specific and rapidly evolving policy, the possibility of the normal mechanisms of stakeholder engagement may appear more challenging. However, standing committees and open calls for evidence can introduce an important level of critical feedback, even under highly restricted timelines.

*Finland* offers an example of good practice for the review of constitutionality and rights-compliance of executive action through standing committees and engagement with external legal and constitutional experts, and through inviting public scrutiny of decrees through real-time posting on a legal blog.

7d. Invite constructive feedback and criticism of measures which have been introduced from external experts from a wide range of disciplines

Inclusive and multi-disciplinary decision-making will ensure that non-pharmaceutical responses are adaptive to the full range of societal needs. To aid this, a wide range of academic and NGO expertise has become rapidly available online in response to policy developments. External engagement, particularly with critiques of measures and reform on the basis of strongly evidenced and reasoned proposals creates better quality of law and policy.

*Italy’s* initial measures diverged at local, regional and national level, and were introduced so quickly and haphazardly as to create ‘regulatory and legal chaos’. Responding to the criticism from academics, lawyers and the media directed at earlier provisions the Italian government reformed the legal measures to include clear constitutional safeguards and protections for the Rule of Law.

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123 Lee C, ‘Taiwan’s Proactive Prevention of COVID-19 under Constitutionalism’ (n 81).
125 Knight D, ‘Lockdown Bubbles through Layers of Law, Discretion and Nudges – New Zealand’ (n 17).
129 Ibid.
132 Ibid.
8. Reform the law following identification and analysis of best practices at domestic and international levels

There is presently neither a cure to COVID-19 nor a vaccine. States exiting (either de jure or de facto) states of emergency will now grapple with the unprecedented social and economic consequences of measures taken in response to the emergency, while also having to consider whether (or when) to reintroduce measures in the event of a ‘second wave’ of infections. As the immediate crisis passes, there will be an opportunity for states and international bodies to examine and review the impacts on their constitutional and legal architecture, as well as health and crisis response preparedness. It may be some time before the best approach or combination of approaches which are most efficient and effective in dealing with a pandemic, may be discerned.\textsuperscript{133} However, there are some early indications of success: those state actions driven by legal certainty, transparency, clear communication, and early-reaction appear to have correlated with lower mortality rates, and the swifter lifting of restrictions.

8a. Review the legal provisions for the declaration of a ‘state of emergency’

A majority of countries globally have declared a state of emergency in response to the pandemic, and have made urgent use of emergency provisions enabled under a state of emergency. The situations justifying the declaration of a state of emergency, however, are intricately linked with national historical experience. Most constitutions stipulate war, external aggression, or armed rebellion as a condition for declaration. Only a few refer to a natural disaster, and fewer still refer to an epidemic or health emergency. This conditionality on the declaration of a state of emergency extends to who may call a state of emergency, although the executive (be it President or Prime Minister) is typically the most common. Arguably, the preferred frameworks from the perspective of the rule of law and democratic oversight is a two-step process whereby the executive may declare a state of emergency, but this must be consequently confirmed within a reasonable time by the legislature. Any extension on the state of emergency must also be confirmed by the legislature, and this should be a legal obligation of any emergency legislation.

\textit{For example, following 2011 constitutional reform, the 1917 Constitution of Mexico\textsuperscript{134} envisions the oversight by both judicial and legislative branches, and these political and legal safeguards against its misuse cannot be overridden by the executive.}

8b. Review and reform provisions in health legislation which relates to pandemics

A significant number of states have relied on ordinary legislation to manage the crisis without resorting to emergency powers, even where such powers are available in the legal or constitutional framework. By engaging powers under ordinary legislation only, the scrutiny and conditionality which normally attaches to the use of emergency powers is avoided. This raises concerns for the unchecked use of powers by the executive in a manner for which the ordinary powers were never intended to be used. States have relied on health legislation to provide the legal basis for sweeping powers for detention, quarantine, and even lockdown, and in many cases have had to amend existing legislation to do so. The speed of amendments in some countries however afforded extraordinarily little time for meaningful review. These amendments

\textsuperscript{133} Editorial, \textit{Facing the future—what lessons could we learn from COVID-19?} (June 2020) 42(2) Journal of Public Health 221–222 \url{https://doi.org/10.1093/pubmed/fdaa061}.

to the law (where not ‘socially distanced’\textsuperscript{135} from existing legislation through drafting mechanisms including sunset clauses) will need review and possible reform to adapt to recognised best practices. States which reformed their law and procedures following the experience of a previous epidemic, responded more quickly to COVID-19, and have had – on average – better outcomes. The national experiences have also been synthesized and enumerated in WHO guidance.\textsuperscript{136}

Having experienced the SARS epidemic in 2002-2004, Taiwan\textsuperscript{137} engaged a rapid response to the identified threat of the novel coronavirus. The approach was characterised by daily press briefings by medical officials; and the early adoption of aggressive precautionary measures (including, for example hand sanitiser and measuring of temperature before entering shops). Despite its close proximity to the epicentre of the virus, the state counts itself as having one of the lowest mortality rates. Similarly, in India the ‘Kerala model’ of dealing with COVID-19 shows that systems that “[ha]ve effective protocols in place, and stick to the time-tested strategy of case isolation and contact-tracing, combined with an alert community surveillance system” perform well. Kerala adopted new procedures learned from the experience of dealing with the Nipah outbreak in 2018.\textsuperscript{138}

8c. Review the actions taken by all state actors during the pandemic for capacity, efficacy, and appropriateness of response

The actions taken by all state actors, including civil authorities, police, and the military, should be reviewed following the emergency. Reviewing actions to identify weaknesses in the efficacy of the implementation of measures, and the levels of compliance, will be essential to improving future responses to an emergency. Preparation at all levels for an emergency is essential. However, ultimately, the efficacy of learned lessons following pandemic are premised on the capacity of the current government to learn, reform, adapt and implement the lessons learned from them.

\textsuperscript{136} Further recommendations are likely to be forthcoming from the announced Independent Panel for Pandemic Preparedness and Response, to be launched by the WHO to deliver an independent and comprehensive evaluation of the lessons learned from the international health response to COVID-19. See WHO Newsroom, ‘Independent evaluation of global COVID-19 response announced’ (9 July 2020) [http://www.who.int/news-room/detail/09-07-2020-independent-evaluation-of-global-covid-19-response-announced].
\textsuperscript{137} Lee C, ‘Taiwan’s Proactive Prevention of COVID-19 under Constitutionalism’ (n 81).
Methodology

Overview

This paper draws from the research conducted as part of the ‘‘COVID-19 and States of Emergency ’ Symposium, a global study of analysing the use of emergency powers in response to the COVID-19 crisis which took place between 6 April and 26 May 2020.\textsuperscript{139}

The Symposium analysed emergency measures from the perspective of democracy, human rights and the rule of law in 74 countries worldwide, and was produced by over 100 constitutional experts, legal scholars, NGOs, and former judges of the European Court of Human Rights. Reports were published on the following countries: Albania, Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Croatia, Cyprus, Czechia, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Kenya, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mauritius, Mexico, Nepal, Netherlands, New Zealand, Nigeria, Norway, Peru, Philippines, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Kingdom, USA, Venezuela, and Vietnam.\textsuperscript{140}

Country Report contributors were asked to provide a quantitative assessment based on the following framework:

\begin{itemize}
    \item (1) Pre-existing emergency powers of the state and the limitations placed upon their exercise, and whether these have been used;
    \item (2) Newly implemented legislation/delegated powers in light of COVID-19 and the limitations placed upon the use or exercise of those powers;
    \item (3) Proposed/potential emergency powers [e.g. bills in progress, mooted powers];
    \item (4) Emergent, consequent, or potential impacts of these powers on democracy, human rights, or the rule of law - and how these may be balanced with public health objectives.
\end{itemize}

Contributors were asked to consider the following questions:

\begin{itemize}
    \item Are parliaments and courts being suspended, and/or how are functions being replaced?
    \item Are rights being suspended or side-lined? Is this consistent with constitutional rights or international obligations?
    \item Are competences and powers being centralized or exercised with limited or reduced oversight?
    \item What limitations are in place (or being placed) on the newly delegated powers (for example, sunset clauses)?
\end{itemize}

\textsuperscript{139} The global study was led by author of this policy paper, Joelle Grogan, and jointly hosted by the Verfassungsblog (<https://verfassungsblog.de/>) and Democracy Reporting International under the re:constitution programme with support from Stiftung Mercator. See <https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/>.

\textsuperscript{140} For all country reports and commentaries, see ‘Introduction and Country Reports’ (Verfassungsblog, 6 April 2020) <https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/>.
• Essentially, how do we prevent misuse or abuse of emergency powers?

Commentaries on human rights, democracy and the rule of law accompanied the country analysis. All reports and commentaries were published on the Verfassungsblog over the period of 6 April – 26 May 2020.

Drawing Recommendations

In drawing correlations between upholding principles of the rule of law and good governance and more positive outcomes in response and management of the public health emergency, we first identified the countries which have been either ranked and/or identified as producing the most (and least) positive outcomes based on a number of different factors including infection and mortality rates; the response times, and application of restrictions; as well as qualitative assessments of trust in government and quality of democracy and the rule of law, as identified by a range of data sets. While there has been variance in exact ‘ranking’ acknowledging a wide range of factors and externalities which can influence the identification of these states, the following countries have been identified as among those with the more positive responses to the COVID-19 pandemic in a number of studies: Austria, Australia, Canada, China, Denmark, Finland, Germany, Hong Kong, Iceland, Japan, New Zealand, Norway, Singapore, South Korea, Switzerland, Taiwan, and The Netherlands.

We correlated these measurements with the framework of legal and policy measures undertaken by these countries as reported within the Symposium, and supported by further qualitative analysis drawn from a range academic and non-academic sources which have been cited as relevant within this paper. We included examples from a variety of states outside this group, where we considered them to be particularly exemplary or indicative of certain beneficial or detrimental practices.

Limitations of the Study

Given the complexity of the current situation, the conclusions drawn by this paper are correlative, not necessarily causative, as it is too early to draw clear conclusions. It must also be acknowledged that there are externalities and factors which play into the comparative capacity of countries to respond to the pandemic including levels of wealth and poverty; population size and density; and the design and capacity of the health care system.

However, the ultimate recommendations of this policy paper are, in all circumstances, good practices grounded on sound principles of the rule of law and good governance.

RECONNECT, led by the Leuven Centre for Global Governance Studies, brings together 18 academic partners from 14 countries.

Find out more about the RECONNECT project at

www.reconnect-europe.eu