Chapter 5: Good governance in the process of public health law reform

SUMMARY POINTS

- To maximize the success and legitimacy of the public health law reform process, countries should integrate the following six principles into the law reform process: stewardship, transparency, participation, fairness, accountability and following the rule of law.
- Like other forms of corruption in the health sector, corruption in the development and implementation of public health laws threatens progress towards national health goals. Civil society organizations and an independent media play important roles when powerful industries or other vested interests seek to weaken legislation or to subvert the will of Parliament through the corruption of public officials who are charged with enforcing legislation.

Previous chapters in this Part of the report considered some of the issues that may arise for governments as they review their public health laws, and following review, as they seek to implement recommendations for law reform. This section emphasizes the importance of good governance throughout the law reform process. “Governance” can be understood to refer both to the capacity of a government to develop and implement policies, and to the ways in which power is exercised for the purposes of managing a country’s economic and social resources. Good governance refers to governance processes that reflect the values and principles that will contribute most effectively to economic and social development, including the progressive realization of the right to health. The World Bank has pointed out that:

Good governance is epitomized by predictable, open and enlightened decision-making (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; all behaving under the rule of law.

Good governance maximizes the capacity of States to develop and implement policies for the public’s benefit, to manage resources in a prudent manner, and to provide services efficiently and effectively. Understood in this way, the “good” in governance refers to those distinctive features that characterize how governments formulate and implement policies, rather than the content of policies themselves.

5.1 Public health law reform, good governance and human rights

Good governance is essential to a successful law reform process. Like any other policy process, the process of public health law reform may be inappropriately influenced by those pursuing their own economic or political interests. Attempts to undermine public health law may take the form of...
lobbying efforts and other attempts to influence the content of the law or to undermine its implementation and enforcement. By ensuring transparency, and by providing opportunities for community participation, governments can improve the quality of the information available to lawmakers while also protecting the process from attempts to undermine the public good.

Within the context of public health law reform, there are close connections between the principles of good governance and human rights. For example, ensuring the participation of those who are affected by public health laws is both an important principle of good governance⁴ and a well-recognized dimension of the right to health.⁵ Similarly, the principle of fairness, if honoured in the law reform process, will help to ensure that law does not legitimize the discriminatory treatment or exclusion of individuals or vulnerable groups, in violation of the right to health. The process of reforming a country’s public health laws also illustrates the obligation of States to fulfil the right to health.⁶ Without good governance, however, the State cannot discharge its obligation to respect, protect or fulfil that right in a systematic and sustainable manner.⁷

### 5.2 Good governance and corruption

In some cases, the process of developing, passing, implementing or enforcing the law will be vulnerable to corruption. Like other forms of corruption in the health sector, corruption in the process of public health law reform threatens progress towards national health goals (see Box 5.1). Civil society organizations and an independent media can play an important role when powerful industries or other vested interests seek to weaken legislation, or to subvert the will of parliament through the corruption of public officials who are charged with enforcing legislation. For example, by investigating and documenting corruption, and publicizing the findings, civil society organizations may be able to generate the necessary political pressure for an independent investigation into inappropriate actions or activities. Similarly, by publicizing the results of investigations and keeping the issue of corruption before the public, media organizations can help to keep governments accountable and generate political pressure for police or prosecutors to investigate corruption and take action against corrupt officials.

#### Box 5.1: Good governance and corruption in the health sector

Generally, corruption can be understood as “the abuse of entrusted public power for private benefit”.⁸ The principles of good governance help to strengthen the law reform process against corruption and other failures by governments or government officials to faithfully serve the public interest. Whereas the attributes of good governance are stewardship, transparency, participation, fairness, accountability, and adherence to the rule of law, “corrupt governance fails to offer citizens adequate and accurate information about government and policies, curtails the public’s opportunities for participation, violates the public’s right to be informed about government activities and procedures, and compromises the right to political participation. Thus, corruption weakens the accountability of State officials, reduces transparency in the work of State institutions and allows human rights violations to go unpunished”.⁹

Corruption can be problematic in the health sector, especially in low-income countries.¹⁰ Prominent
examples of corruption in the health sector include poor health facility construction, absenteeism of health professionals, improper spending and diversion of funds, theft of drugs, soliciting of informal payments to improve levels of service, and accreditation and licensing bribery. 

5.3 Principles of good governance

There are a variety of conceptual frameworks that seek to identify the attributes of good governance. This section draws on the attributes of good governance identified by the United Nations Development Programme (UNDP), and adds the concept of stewardship, which is a core public health function of government. To maximize the success and legitimacy of the public health law reform process, countries should integrate the following six principles into the law reform process: stewardship, transparency, participation, fairness, accountability and following the rule of law.

(a) Stewardship

Stewardship refers to the “careful and responsible management of something entrusted to one’s care”. Those who exercise the authority to make policy – the minister of health and others who work to reform public health laws – must exercise stewardship, putting aside personal desires and working to maximize the health interests of the people they serve. Unless law reformers approach the task of law reform with the public’s benefit in mind, public health laws cannot maximize their potential to assist countries to progressively realize the right to health for all members of the population.

(b) Transparency

Transparency is “built on the free flow of information”. It requires that, as far as possible, the process of developing, implementing and enforcing the law should be open and visible to the public. Transparency helps to build public understanding about the law, and confidence that legal powers will be exercised for the benefit of society as a whole.

A variety of processes can help to ensure transparency during the law reform process. These include public forums, parliamentary debates and a political environment that permits media scrutiny and public reporting of government actions. Transparency supports the human right to participation because it allows members of the public to provide feedback on law reform proposals and draft laws. Once new laws have been passed, governments can enhance transparency by ensuring that legislation, regulations, executive orders and other laws remain accessible to members of the public and to representative groups. This principle also applies to the judgements of courts and tribunals.

(c) Participation

In cases where the law is intended to influence and alter behaviour, 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. To achieve public support for a new public health law, lawmakers should consult affected communities, civil society groups, public health organizations and other stakeholders. When the community is given a seat at the negotiating table, it is more likely to support and comply with a new law. On the other hand, engaging with those who have a vested interest in defeating or weakening the law may be harmful to public health. For example, the Guidelines for the implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control recommend that government officials should avoid conflicts of interest and “interact with the tobacco industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products”.

There are a variety of other ways that governments and health ministries can ensure community participation in the law reform process. For example, by publishing discussion papers and making draft legislation available (including on the Internet), governments can ensure that members of the public and representative organizations can give comments and other feedback. Where a commission or government committee considers options for law reform, it is customary for these bodies to accept submissions and to consult extensively. An example of this occurred in South Africa, where the Ministry of Justice conducted a “road show” as part of the process of amending the Marriage Act, sharing information and building community support for the proposed changes. As discussed in Section 3.4(b), formal mechanisms for community participation can also serve as the trigger for public health law reform.

(d) Fairness

The principle of fairness makes a significant contribution to good governance because it encompasses the related human rights of equality and non-discrimination. Article 26 of the International Covenant on Civil and Political Rights states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Discrimination entrenches health inequalities and undermines the capacity of governments to pursue the right to health for all members of the population. Governments have an obligation to take immediate action to eliminate discrimination; doing so will help to ensure equality of access to health services and to the resources needed to lead a healthy life. This does not necessarily mean that the State must provide health services and other social services to everyone free of charge. On the other hand, the State does have an obligation to ensure that individuals and vulnerable groups do not miss out on health care and health services because of their inability to pay. Law is a powerful tool for establishing the principle of “equality of opportunity for people to enjoy the highest attainable level of health”.

Advancing the right to health: the vital role of law
(e) Accountability

Accountability means taking responsibility for the success and failure of laws and policies, and putting processes in place to ensure that changes are made to improve decision-making and the performance of public health functions in future. In the context of public health law reform, accountability requires that legislation should set out the responsibilities and functions of public health officials so that it is clear who is accountable for enforcing the law and for exercising powers to protect the public’s health.

In countries where resources and administrative capacity are limited, even the best laws and policies may be poorly implemented. As part of normal budgetary processes, therefore, governments should allocate resources to ensure that laws are administered effectively at both national and local levels. In circumstances where the activities and behaviour of businesses and individuals are subject to legal requirements, the law should set out the consequences for non-compliance, including the penalties imposed for offences.

Many of the factors that influence the health of the population may fall outside the authority of the health ministry. As a result, accountability for the progressive realization of the right to health must be shared across government as a whole. Discharging this responsibility will require coordination between ministries, as discussed in Chapter 6.

(f) The rule of law

Good governance is based on the rule of law. The principle of the rule of law means that 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 (see Box 1.1 in Section 1.1). The rule of law ensures that the law reform process itself is clear, fair and that it remains focused on the public interest.

In summary, each of the principles of good governance create an enabling environment for the effective management of the law reform process so that it can best achieve its goal of realizing the right to health for all members of the population. Where opportunities exist for civil society to participate in the law reform process, through a transparent and well managed process, there is a greater chance that a consensus will form around the need for reform. This improves the chances of success in the implementation and administration of public health laws.

REFERENCES


All references were accessed on 1 May 2016.


