

## **First Webinar of the Global Network on Electoral Justice**

### **“Emergency Measures and the Protection of the Rule of the Law in Latin America”**

May 2020

There are now more than 5 million people infected from the novel SARS-CoV-2 across the world, and more than 300 million have lost their life so far (WHO, 2020). Educational, financial, health, and social security systems, as well as global chains of production and distribution, face one of the most important challenges in recent memory. Systems that are central for democracy have not gone unchallenged. Almost sixty countries have now postponed elections, including ten in Latin American (IDEA 2020), while 27 countries around the world have carried out elections since February despite the inherent risks of doing so during the pandemic. The challenges to the rule of law during health emergencies go beyond the complex decisions about what to do with elections. Governments, courts, and a panoply of stakeholders in democratic regimes need to adopt unprecedented measures to ensure the continuity of institutions and the protection of human rights.

This already complex situation is aggravated by the fact that medical and scientific knowledge is being generated while governments must make these complex decisions. It is therefore important that decisions-makers and academics share their analyses and experiences related to the pandemic to bolster the rule of law. This document seeks to spur these very reflections. After a brief overview of the concept of rule of law, this document analyzes the state of emergency in Latin America, and it goes over one of the central issues faced by electoral management bodies (EMBs) and other institutions; namely, whether to postpone elections or how to adapt electoral procedures during these times. Finally, in the concluding section, the document suggests questions that participants may use to prompt their discussion.

### **1. Rule of law**

There is consensus about the main characteristics of the rule of law, although little agreement exists about its more specific contours. It is both an ideal of government, and a set of parameters to evaluate existing democratic regimes.

Despite the plurality of conceptions of the rule of law, some definitions find agreement. For instance, the United Nations, defines it as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency” (UN, 2004). Furthermore, the World Justice Project (WJP) defines this concept as a “durable system of laws, institutions, norms, and community commitment that delivers accountability, just laws, open government, and accessible and impartial dispute resolution” (WJP, 2020).

The British judge and scholar Tom Bingham suggests the following conceptualization: “[t]he core of the existing principle is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts” (Bingham, 2011:16). Lastly, it is worth considering a definition from a Latin American country. Colombia’s Constitutional Court considers that “rule of law refers to the State’s activity being governed by judicial norms, this is to say that they follow the law. The fundamental judicial norm is the Constitution, which implies that all of the State’s activity must be carried out within this norm. In this situation, we must speak of a constitutional rule of law” (Colombian Constitutional Court, 98).

## 2. The state of emergency and the rule of law in Latin America

On February 26, 2020, almost a month after the World Health Organization declared a global health emergency, Brazil confirmed its first case of COVID-19, making it the first in Latin America. Since then, the virus has advanced throughout the region and, as of May 19, over 650,000 cases had been confirmed. Several countries are still in critical stages of the pandemic, like Brazil, Peru, Chile, Mexico, and Ecuador, but strict measures will still be necessary in the immediate future in most countries. According to Oxford University’s Coronavirus Government Response Tracker (2020) the region’s governments have generally taken stringent lockdown (although there is variation), including: closing of schools and workplaces, cancelling events including mass gatherings, shutting down public transport, issuing stay-at-home orders, closing borders, and limiting movement within their territory.

Generally speaking, the region had relatively robust capacities to respond to biological emergencies. According to the John Hopkins University’s Global Health Security Index<sup>1</sup> (NTI and JHU, 2019), countries like Brazil, Argentina, Chile, Mexico, Ecuador, and Peru score above or close to the 50-point mark, which is above the global average of 40.2, and puts them in the top 50 countries in the world with the highest health security. However, these are precisely the countries with the epidemiological hotspots in the region. This may be explained by looking more closely at their scores for each component of the index. These countries score low in aspects related to their political and institutional capacities, suggesting that, despite their system capacities, their political and economic context and institutions have made them vulnerable to the pandemic.

Latin America is experiencing manifold political and socioeconomic difficulties, which complicates government responses to the emergency. On the one hand, large informal economies and poverty make isolation and prevention especially difficult. A study by the International Labor

---

<sup>1</sup> The *Global Health Security Index* measures a country’s capacity to respond to large-scale biological emergencies and catastrophes. The index takes into account pathogenic prevention schemes; detection and registration of potential epidemiological cases; rapid response systems in place to mitigate an epidemic’s spread; the strength of a country’s health system; its commitments to international norms; and risk factors (such as its political system and the effectiveness of its government) that make a country vulnerable to a biological threat. It ranges from 0 to 100. The USA has the highest score at 83.5, and Somalia has the lowest at 0.3 (NTI and JHU, 2019).

Organization (Salazar-Xirinachs and Chacaltana, 2018) estimates that over half of all those employed in the region work in the informal sector, unblanketed by labor legislation or social protection (which excludes them from receiving unemployment benefits or paid sick leave). Those in the informal sector have low and irregular income and often work in unsafe conditions. In addition to this, 30% of the region's population lives in poverty, and close to 10% of the urban, and nearly 40% of the rural population, lacks access to clean water (ECLAC, 2018).

On the other hand, the pandemic came at a time of political instability and broad disenchantment among citizens in the region. For instance, after a wave of repression against protestors in 2018 in Nicaragua, reports of systematic human rights violations continue throughout that country. Political instability has also coincided with the rise of charismatic and populist leaders such as Bolsonaro in Brazil, a country where serious political turmoil came to a head with the impeachment of Dilma Rousseff. Furthermore, in 2018, only 24% of Latin Americans were satisfied with the functioning of democracy, and even fewer, 5%, thought that they lived in a full democracy. Support for democracy has, in fact, decreased every year for the past seven years in the region (Latinobarometro, 2019). According to the last WJP report (2020), almost half of Latin American countries score below 0.5 in the rule of law index,<sup>2</sup> and this score is in a downward trend in countries such as Brazil, Peru, Suriname, Guatemala, Mexico, Argentina, and Nicaragua.

This is the context in which decision have been made to contain the pandemic. These decisions involve balancing the right to health with some social, political, and economic rights, and they may require emergency declarations. This balance is particularly complex in Latin America, considering its history, as declaring states of emergency is reminiscent of the authoritarian and military governments of the region's past century. Emergency declarations served as cover for mass human rights violations and would often distort this constitutional provision (Goizueta Vértiz, 1997). There have been attempts at regulating states of emergency within national and regional legal frameworks. The 1969 Pact of San José, for instance, includes provisions to suspend guarantees "in time of war, public danger, or other emergency that threatens the independence or security of a State Party" (OAS, 1969: art. 27). In an important caveat, the Pact stipulates that these measures must be accompanied by a strict temporal limit and sets forth that some fundamental rights cannot be suspended, such as some political rights.

In the face of the current pandemic, governments will have to make decisions that stray from political and institutional "normality." Mexico, for instance, has declared a health emergency to implement extraordinary action such as the closure of public places and workspaces, and some businesses. Other countries have declared states of emergency. Chile, on March 18, declared a "constitutional state of emergency and catastrophe" for 90 days. In El Salvador, the government chose an early declaration of health emergency without a defined temporal limit. Then, it declared a state of emergency on the 11th of March, and then a state of exception based on its "Temporary

---

<sup>2</sup> The Rule of Law Index from WJP includes indicators from eight categories: a) constraints on government, b) absence of corruption, c) open government, d) fundamental rights, e) order and security, f) regulatory enforcement, g) civil justice, h) criminal justice.

Restriction of Constitutional Rights Law” four days later. Human rights defenders have raised concerns about the Salvadoran government’s excessive use of force and the constant extension of the state of exception. The last unilateral declaration of emergency on the part of the executive was met with the judicial branch’s questioning of the constitutionality of the measure. States of emergency and of exception raise key questions for the region’s democratic regimes.

### **3. Elections during the emergency**

Decisions about whether or not to hold elections during the emergency are particularly complex, and they lie at the heart of the problem of maintaining the rule of law. Ten countries in the region have thus far postponed elections this year (IDEA, 2020).<sup>3</sup> The elections that have been delayed are of different nature, and the decision to modify the date has come from different rule of law institutions. For instance, Chile’s historic constitutional referendum was scheduled for April and will now take place on the 25th of October as the date was modified by a near unanimous vote in the country’s Congress. In Bolivia, an extremely important general election to vote for the permanent successor of Evo Morales has been postponed by their Supreme Electoral Tribunal, after it had been scheduled for May 3. In the Dominican Republic, the electoral management body delayed presidential and legislative elections from May 17 to July 5. In Mexico, the EMB postponed local elections in two states that were meant to be held in June, possibly to July or August (the dates are still to be confirmed).

In some cases, the right to vote and the right to health have been balanced while holding elections. South Korea’s decision to go ahead with elections on 15 April 2020, despite the coronavirus outbreak, is a case worth studying as it shows the crucial role that EMBs can play. The country’s EMB adopted extraordinary measures to create a safe environment for voting. Early voting was encouraged via a robust communications campaign, and 26.7% of the South Korean electorate showed up early to vote. Patients with COVID-19, or those in self-isolation, and medical staff attending certain facilities, were allowed to vote by mail. Additionally, citizens had their temperature taken at the polls, and were directed to special booths if they had signs of a fever. Face masks were obligatory in polling station lines and were removed only briefly for poll workers to confirm their identification (Spinelli, 2020).

Local elections held in the US state of Wisconsin on April 7 serve as a case that underlines the many potential shortcomings of modifying electoral timetables during the pandemic. The governor of Wisconsin did not postpone elections until April 4, and when the local legislature challenged the decision, the Wisconsin Supreme Court judged that the elections should go ahead. There was little preparation and confusion in the state resulting in long lines in urban polling stations. In the largest city in the state, Milwaukee, only 5 polling places of the 180 originally planned could be set up, risking the citizen’s health and limiting their possibilities to exercise their right to vote.

---

<sup>3</sup> Colombia postponed community board elections; Paraguay postponed primaries; Peru, Argentina, and Uruguay postponed local elections, and Brazil postponed a special election for the Senate (IDEA, 2020).

This case shows the importance of planning and achieving political agreements about how to react to emergency scenarios.

#### **4. Questions to prompt the debate**

1. Given the current emergency, and considering the context of Latin America, what plausible changes can voting procedures undergo so as to carry out elections that are integral and retain citizens' trust?
2. Despite sharing a common culture and heritage, Latin America also displays enormous diversity, including that of its many countries' institutional and legal designs. In your experience, what are the most important factors for the preservation of the rule of law in your countries of origin, and what are the most important challenges faced during times of emergency?
3. The region's democracies, in order to preserve themselves, include procedures to declare states of emergency and to ensure that the rule of law is maintained throughout. What temporal and procedural limits exist in your countries to ensure a balance between maintaining a state's functions and ensuring guarantees?
4. Considering the possibility of future emergencies faced by the region, what lessons have we drawn for Latin America from the current crisis?

## REFERENCES

- Bingham, T. (2011). *The Rule of Law*. London: Penguin Books.
- Colombian Constitutional Court (1998). “Sentencia SU-747/98”.
- Goizueta Vertiz, J. (1997). “Los estados de excepción en América Latina: Los controles desde el derecho internacional”. *Revista de la Facultad de Derecho y Ciencias Políticas*, 98: 183-215.
- International Institute for Democracy and Electoral Assistance (IDEA) (2020). “Global Overview of COVID-19: Impact on elections”. IDEA Multimedia Reports, available at <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>, accessed 19th of May, 2020.
- Latinobarómetro (2019). *Informe 2018*. Santiago, Chile. Available at: <http://www.latinobarometro.org/lat.jsp>
- Nuclear Threat Initiative (NTI) and Johns Hopkins University (JHU), School of Public Health ) (2019). *Global health security index: building collective action and accountability, 2019*. Available at <https://www.ghsindex.org/wp-content/uploads/2019/10/2019-Global-Health-Security-Index.pdf>
- Organization of American States (OAS) (1969). *American Convention on Human Rights "Pact Of San Jose, Costa Rica"*. Available at [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf)
- Oxford University (2020). “Coronavirus Government Response Tracker”. Available at <https://www.bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker>, accessed 18<sup>th</sup> of May, 2020.
- Salazar-Xirinachs, J.M. and Chacaltana, J. (2018). *Políticas de Formalización en América Latina: Avances y Desafíos*. Lima: International Labor Organisation. Available at [https://www.ilo.org/americas/publicaciones/WCMS\\_645159/lang-es/index.htm](https://www.ilo.org/americas/publicaciones/WCMS_645159/lang-es/index.htm)
- Spinelli, A. (2020). “Managing Elections under the COVID-19 Pandemic. The Republic of Korea’s Crucial Test International.” IDEA Technical Paper 2/2020. Available at <https://www.idea.int/publications/catalogue/managing-elections-under-covid-19-pandemic-republic-korea-crucial-test>
- United Nations (UN), Security Council (2004). “The rule of law and transitional justice in conflict and post-conflict societies”. S/2004/616 (23<sup>rd</sup> of August, 2004), available at <https://undocs.org/en/S/2004/616>, accessed 18th of May, 2020.
- United Nations Economic Commission for Latin America and the Caribbean (ECLAC) (2019), *Panorama Social de América Latina, 2018*. Santiago: CEPAL. Available at [https://repositorio.cepal.org/bitstream/handle/11362/44395/11/S1900051\\_es.pdf](https://repositorio.cepal.org/bitstream/handle/11362/44395/11/S1900051_es.pdf)
- World Health Organization (2020). *WHO Coronavirus Disease (COVID-19). Dashboard*. Available at <https://covid19.who.int/>, accessed 21<sup>st</sup> of May, 2020.
- World Justice Project (WJP) 2020. *Rule of Law Index 2020*. Washington: WJP.