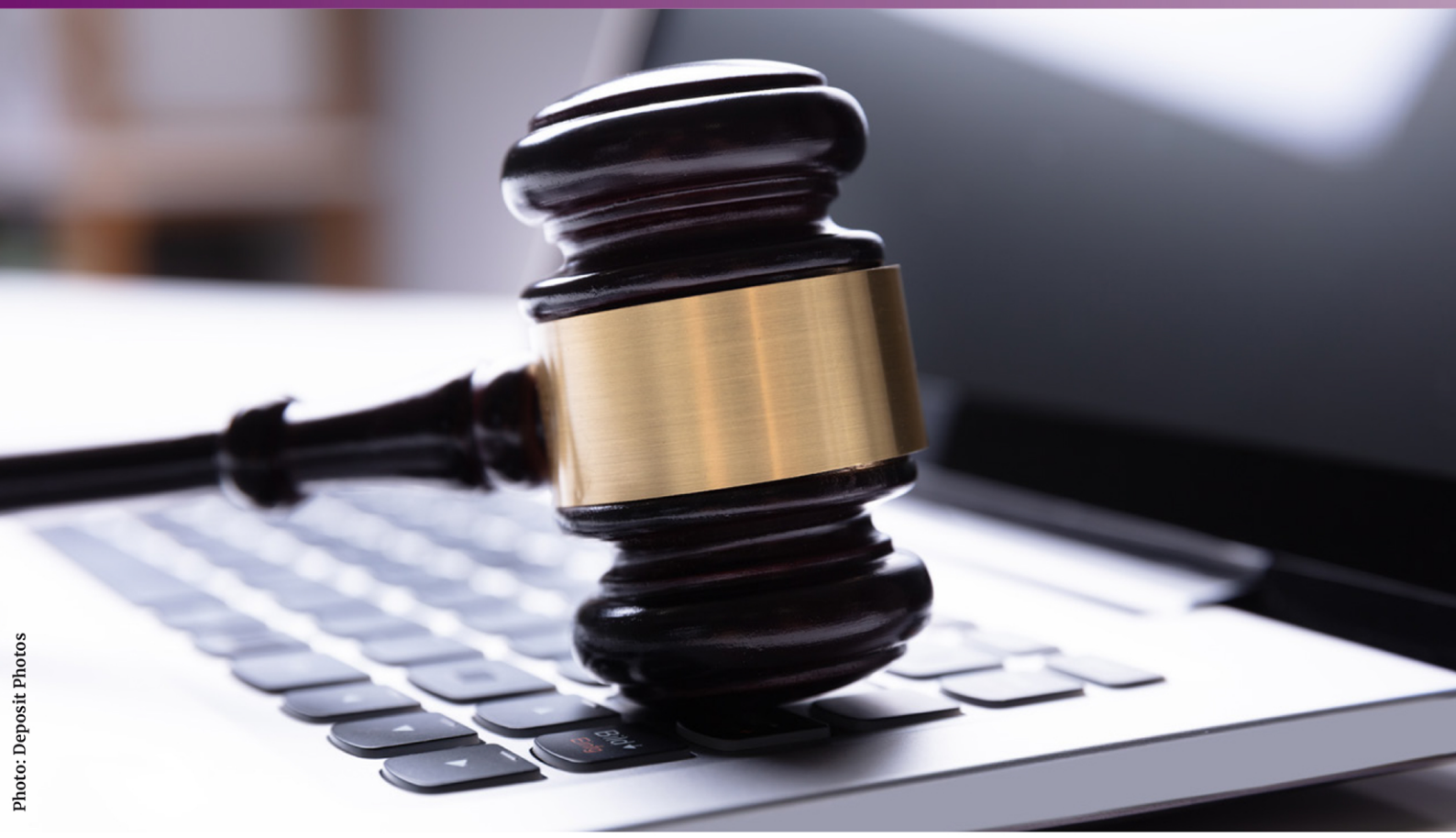
ILAC Report:

# Justice in the time of COVID-19

## Challenges to the Judiciary in Latin America & the Caribbean



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CYRUS R. VANCE CENTER FOR INTERNATIONAL JUSTICE

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December 2020



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# Acronyms and List of abbreviations

| | |
|---|---|
| **ACHR** | American Convention on Human Rights |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **JEP** | Acronym in Spanish of Special Jurisdiction for Peace (Jurisdicción Especial para la Paz) |
| **PPE** | Personal protection equipment |

# Executive Summary

The judiciary is a key institution for the protection of rule of law and accountable governance. This report, drawing on the experience of judges in Latin America and the Caribbean, describes how measures to manage the pandemic has challenged the judiciary. The challenges and impact are varied and range from putting checks and balances at risk to impairing justice delivery and access to justice.

The declaration of states of emergency and adoption of emergency measures across Latin American and the Caribbean in response to the COVID-19 pandemic have greatly impacted how the judiciary practically functions. This in turn affects individual rights and access to justice. In the past, crises that resulted in states of emergency and emergency measures were usually short lived, and institutions were generally able to return to a state of normalcy relatively quickly. The current crisis is unique in the fact that it is long lasting and has an unknown end date. Some of the implications protracted states of emergency and emergency measures are having on the judiciary, and in turn court users, have already become evident and are discussed in this report.

The pandemic has also immediately affected the judiciary as the executive and legislative branches were handed additional powers to respond to the crisis. In several countries covered in the report, funds and resources have even been reallocated away from the judiciary, impacting the effectiveness of the judiciary's ability to deliver justice and even putting judicial independence into question. Due process and fair trial standards have been impacted by the inability to hold trials in person and the use of digital justice tools, which raise additional cybersecurity questions. Access to justice and the resolution of everyday justice problems have slowed and backlogs are building in instances where urgent matters, such as criminal and family matters, are being prioritised. Moreover, the digital gap threatens access to justice, and even brought it to a standstill, in some countries. Yet, there are also examples from the region where the judiciary had or was provided with adequate resources and was able to quickly move to using digital justice tools and become even more effective during the pandemic.

Mapping the new challenges and problems presented by the pandemic and subsequent emergency measures, the report identifies best practices, trends and gaps in how governments and the judiciary itself have responded to the crisis. The report provides recommendations as to how governments can respond in the short and long term to ensure that the judiciary can continue guaranteeing access to justice, while also protecting judicial independence, during a protracted crisis like the COVID-19 pandemic.

**Key recommendations**

- **Conduct assessments and reviews to develop plans regarding the allocation of funds and resources** in order to ensure that the judiciary can guarantee access to justice on all matters, not just those deemed urgent, and to resolve backlogs built by a slowdown in the delivery of justice in the beginning of the crisis. This should also include

reviewing whether courts in capitals and at the national level versus those in provinces and at the regional level have been impacted differently and, if so, in what ways.

- **Expand and improve digital justice tools and minimise the digital gap** so that due process and fair trial rights are satisfied and access to justice on all matters is guaranteed.

- **Establish clear guidelines on cybersecurity, conducting judicial proceedings virtually and ensuring access to public hearings.** Such guidelines must be in line with human rights law and rule of law principles to protect guaranteed individual rights, judicial independence and the legitimacy of the judicial proceedings.

The "Justice in the time of COVID-19 – Challenges to the Judiciary in Latin America and the Caribbean" report draws on interviews with judges and research conducted by local counsel from thirteen countries in the region. The interviews were conducted during the spring and summer of 2020 by the Cyrus R Vance Center for International Justice of the New York City Bar Association. The past tense is used throughout the report as the data gathered captured how judiciaries had responded to the pandemic as of September 2020. The perspectives and insights provided by those judges and local counsel made this report and recommendations possible.

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   5.1. Magistrado Alejandro Ramelli Arteaga
   5.2. Magistrada Catalina Díaz Gómez
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10. **Jamaica**
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11. **Mexico**
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* ILAC member

# Introduction

The outbreak of the COVID-19 pandemic has caused great disruption in the functioning of societies around the world. Governments have been forced to take extraordinary measures, such as stay-at-home orders, restricting public gatherings and the interruption of public services, in order to slow down the spread of the virus and protect public health.

Judicial services are one of the various public services that have been affected by the health crisis brought about by the COVID-19 pandemic. Across Latin America and the Caribbean, courts have been forced to interrupt procedural deadlines, suspend trials and postpone hearings. These measures have impacted rights such as the right to trial within a reasonable time and access to justice in a fair and effective manner, especially for persons in situations of vulnerability.

In addition to the consequences of the slowdown in judicial activity during the pandemic, the judiciary must also address new 'justice problems' generated by the crisis. Indeed, the pandemic has been shown to deepen pre-existing inequalities as its economic impact has already begun to and will continue to increase debt, evictions and other similar cases leading to an increase of cases filed in courts.

The judiciary's function to step in as a guarantor of the rule of law and human rights has been tested more during the pandemic than before. In just a few instances, courts throughout the region have had to assess the legality of emergency and social distancing measures and review their enforcement.

While there is no doubt that the pandemic created many challenges to the administration of justice in the region, it has simultaneously created a new opportunity for the region to rethink and improve access to justice. Courts in Latin America and the Caribbean have increased the use of technology to continue serving the public during the pandemic while minimising the risks associated with large gatherings. Human rights advocates have welcomed the use of technology in judicial proceedings as they contribute to a more speedy delivery of justice, reduce procedural delays and may also increase access to justice by allowing for the filing of complaints through easy digital mechanisms or avoiding travel expenses for people in remote places. These technological innovations, however, do not come without challenges. Human rights advocates have also expressed concern about this form of remote justice and its impact on defendants' rights and fair trial standards.

This report assesses how the judiciary in Argentina, the Bahamas, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Guatemala, Haiti, Jamaica, Mexico, Panama and Trinidad & Tobago has responded to the COVID-19 pandemic, from a justice provider's perspective. It is based on interviews with judges in these countries as well as desk research conducted by local law firms. Section 2 provides an overview of international standards

regarding the judiciary's role, access to justice and fair trial rights in times of crisis. Sections 3 to 6 analyse how the pandemic has affected the judiciary and how courts have responded to the crisis. These sections examine issues such as the implementation of digital justice and the safety of justice operators during the crisis. Sections 3 through 6 further identify trends, best practices and gaps in the ways the judiciary has coped with the crisis. Section 7 contains the report's conclusions. Section 8 includes recommendations for protecting and strengthening the judiciary's capacity to function and ensure continued access to justice during crises such as the COVID-19 pandemic.

# 1 International Standards

International human rights law recognises that extraordinary situations may arise and require states to impose restrictions on the exercise of certain rights.[1] The COVID-19 pandemic, which poses a serious public health threat, is one such extraordinary situation where states may invoke emergency powers and adopt special measures, including the scaling down of several public services such as justice services. Such exceptional measures, however, must comply with international standards that acknowledge, for example, the judiciary's essential role in preventing abuses of power and safeguarding fair trial rights and access to justice.

International human rights guidelines on preserving core justice rights in times of crisis align with the United Nations Sustainable Development Goal 16 (SDG 16) of the 2030 Agenda.[2] SDG 16 acknowledges the intersection between peace, justice and strong institutions and calls for access to justice for all and effective, accountable and inclusive institutions at all levels. Practically, SDG 16 includes ensuring effective, fair and humane criminal justice systems and promoting the rule of law and equal access to justice.

## Role of the judiciary

Societies face unique rule of law and human rights challenges in times of crisis.[3] Crisis situations such as armed conflicts, natural disasters and public health calamities often lead to the adoption of exceptional measures and declarations of states of emergency, where individual rights are at greater risk of being violated. Indeed, declarations of emergencies bring about extraordinary measures which may be used to quash minorities, further restrict civic space and lead to other abuses as governments seek to perpetuate their time in power.[4]

The judiciary's role as the guardian of fundamental rights is of heightened importance in crisis contexts as it serves as an essential check on the executive and legislative branches of government. Judicial checks serve to deter abuses and ensure that the restriction of rights resulting from (declared or undeclared) states of emergency are grounded in law, necessary and

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[1] *See* International Covenant on Civil and Political Rights (ICCPR), art. 4 and General Comment 29.

[2] The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 Sustainable Development Goals (SDGs), which are an urgent call for action by all countries – developed and developing – in a global partnership.

[3] International Commission of Jurists (ICJ), "Legal commentary to the ICJ Geneva Declaration: upholding the rule of law and the role of judges & lawyers in times of crisis" (May 2011).

[4] Office of the High Commissioner for Human Rights (OHCHR), "COVID-19: Exceptional measures should not be cover for human rights abuses and violations – Bachelet" (April 2020) [webpage, accessed 19 Nov. 2020].

proportional to the interest at stake and non-discriminatory.[5] Under international human rights law, any declaration of a state of emergency and measures to address crises must be subject to judicial oversight.[6] In addition, judicial operations must be maintained to the extent possible during emergencies.[7]

The judiciary is unable to serve as a check on the executive and legislature, and also on private and supranational entities, if the separation of powers is not respected.[8] International law therefore provides that the legislative and executive branches must refrain from interfering with judicial independence and respect courts' decisions. Even in times of crisis and national emergencies, judges must not be subject to arbitrary removal, the rights of judges and lawyers to freedom of association should be respected[9] and the judiciary must have adequate resources to discharge its functions.[10]

## Access to justice

A fully operational and independent judiciary is also vital to guarantee access to justice in a timely, fair and effective manner in times of crisis. Under international human rights law such as the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR) and the Brasilia Regulations Regarding Access to Justice for Vulnerable People, governments must ensure at all times that citizens have access to effective remedies and full reparations for rights violations, as well as access to legal information and services. Such access to justice is of heightened importance in times of crisis when pre-existing inequalities are often exacerbated and vulnerable groups are disproportionately impacted.

Data shows that marginalised groups, such as persons lacking legal identification documents and access to quality internet connection, have encountered greater barriers to solving their legal needs during the COVID-19 pandemic. While persons without legal identity or internet connection[11] cannot access emergency social protection benefits or healthcare in several

[5] OHCHR, "Emergency Measures and COVID-19: Guidance" (April 2020).
[6] ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principle 4.
[7] United Nations Development Programme (UNDP) and United Nations Office on Drugs and Crime (UNODC), "Ensuring Access to Justice in the Context of COVID-19" (May 2020).
[8] *Supra* note 3, p. 20.
[9] ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principle 5.
[10] *Id.*, Principle 6.
[11] The Inter-American Commission on Human Rights (IACHR), Press Release, "IACHR concerned about specific risks faced by Persons Deprived of Liberty in the Americas during the COVID-19 pandemic" (9 Sept. 2020).

countries, people without land tenure face a heightened threat of dispossession and land-grabbing.[12]

Additionally, access to justice for women under the current crisis has been seriously impaired. The pandemic has been an especially dangerous time for domestic abuse victims, with lockdown measures making it even more difficult for women to flee from perpetrators and report abuse.[13] This demonstrates the need to maintain and expand accessible mechanisms to resolve disputes, redress grievances and counter discrimination during emergencies.[14] The Inter-American Commission on Human Rights (IACHR), in the framework of its Coordination Unit for the Rapid and Integrated Response to the COVID-19 pandemic (SACROI COVID-19, acronym in Spanish), has called on member states to incorporate a gender perspective in their responses to the crisis and to combat sexual and domestic violence, as well as discrimination that affects women in this context.[15]

## Maintaining a functioning justice system

States must actively work to support the judiciary before, during and after a crisis. This should include provisions for financial and other support to the judiciary in national response plans.[16] In the context of a health emergency such as the COVID-19 pandemic, support to the judiciary must include the provision of personal protection equipment (PPE) for those providing and using justice services. Implementing and widening remote case management systems must also be a priority.[17] While the closing of courts or scaling down of justice operations may be necessary during a crisis, the administration of justice cannot come to a complete standstill. At the very least, judicial activity must continue at least to address urgent matters.

States must also provide support to the judiciary in order to address the long-term impacts of a protracted crisis like the COVID-19 pandemic which has resulted in a backlog of cases caused by the interruption or reduction of courts' activities. In addition to the backlog, the pandemic has brought about new "justice problems" that the judiciary must also be prepared to address. The economic impact of COVID-19 will create further strain on already

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[12] World Justice Project, "The COVID-19 Pandemic and the Global Justice Gap" (Oct. 2020). *See also* IACHR, Press Release, "IACHR Completes 117th Period of Sessions Remotely" (15 Oct. 2020) and "States of the Region must Accelerate Universal Internet Access Policies during the COVID-19 Pandemic and Adopt Differentiated Measures to Incorporate Groups in Vulnerable Situations" (31 Aug. 2020), in which the IACHR expresses concern about the differentiated impacts of the pandemic and barriers to justice faced by vulnerable groups in the Americas.

[13] UN Women, "The impact of COVID-19 on women" (April 2020).

[14] *Supra* note 7, p.6.

[15] IACHR, Press Release, "The IACHR calls on Member States to adopt a gender perspective in the response to the COVID-19 pandemic and to combat sexual and domestic violence in this context" (11 April 2020).

[16] *Supra* note 7, p. 12.

[17] *Id.*

swamped justice systems.[18] Unemployment and business closures have increased debt and evictions, resulting in an increase of cases filed in courts.[19] The judiciary must strengthen alternative dispute resolution mechanisms, such as online mediation and community-based dispute resolution in order to reduce the demand on the justice system.

Governments must ensure that justice services are better prepared to deal with future emergencies. Such preparedness should include a proper assessment of the judiciary's response to the crisis and the sharing of lessons learned and best practices in dealing with the emergency.[20]

## Fair trials and due process rights

International human rights law authorises the restriction of certain rights such as freedom of movement and assembly during emergencies.[21] However, the basic elements of the right to a fair trial cannot be subject to limitations.[22]

Core fair trial rights are generally contained in article 14 of the ICCPR and in article 8 of the ACHR, both legally binding treaties. These provisions include a set of specific guarantees to persons suspected, accused and convicted of crimes,[23] including the right to a public hearing by a competent, independent and impartial tribunal established by law, the presumption of innocence and the right to legal assistance. According to interpretations by the Human Rights Committee,[24] the Inter-American Court of Human Rights[25] and the Inter-American Commission on Human Rights[26], even in extreme situations, these basic rights must be secured.

The COVID-19 pandemic poses particular challenges to due process and the right to a fair trial. The restrictions on prison visitations to contain the spread of the virus, for example, have interfered with the right to access legal

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[18] The Pathfinders for Peaceful, Just and Inclusive Socieities, "Justice for All and the Public Health Emergency" (April 2020), p.4.
[19] *Id.*
[20] *Supra* note 7.
[21] *Supra* note 1. The "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) identify standards for the justification of limitations and detail requirements for laws that directly restrict individual freedoms during emergencies. Specifically, emergency laws placing restrictions on human rights must respond to a pressing public or social need, pursue a legitimate aim and be proportionate to that aim. They must use no more restrictive measures than required for the achievement of the purpose of the limitation and should not be extended indefinitely. *See* Limitation Clauses A (10) and (11).
[22] Inter-American Court of Human Rights, Advisory Opinion, *Judicial Guarantees in States of Emergency*, OC-9/87 of 6 October 1987.
[23] Amnesty International, "Fair Trial Manual (Second Edition)" (2014).
[24] ICCPR, General Comment 32.
[25] *Supra* note 22.
[26] *See* IACHR, Press Release, "IACHR Calls for Guarantees for Democracy and the Rule of Law during the COVID-19 Pandemic" (10 June 2020) and IACHR, Resolution 1/20, *Pandemic and Human Rights in the Americas* (10 April 2020).

assistance.[27] The closing of courts and the suspension of trials have impacted the right to be tried within a reasonable time. Remote hearings, an option to tackle such problems, have raised concerns among defence lawyers. Indeed, defence lawyers worry that defendants' physical absence in virtual proceedings will likely impact their ability to participate fully and effectively in criminal proceedings and ultimately undermine trial fairness.[28] Another issue raised is the difficulty in guaranteeing that witnesses recount their testimony in their own words and without any interference from others not seen in a virtual hearing. Defence lawyers also claim difficulties in consulting in private with their client during a hearing.

Furthermore, virtual hearings have impacted the transparency of proceedings and affected the right to a public hearing.[29] In several countries, only the parties and their counsels have access to the virtual courtroom and the general public and media are excluded from attendance. This fails to align with international standards that require as a general rule that hearings are public in order to ensure transparency in decision-making and deter abuses.[30]

While measures to maintain social distancing and keep the administration of justice running are often necessary to address public health emergencies, authorities must consider their implication on the right to a fair trial. Human rights must guide the justice sector's response to crises and extraordinary measures must be adopted with the appropriate safeguards.[31] For example, if a lawyer is unable to meet with an imprisoned client in person, the client must be compensated with frequent and easy access to a telephone in the detention centre.[32] Further, in remote hearings, defendants should be provided with a full view of the courtroom and have the ability to observe all courtroom participants.[33] States must also take steps to ensure that the public has access to courtroom proceedings.[34]

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[27] Fair Trials, "Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings" (March 2020).
[28] *Id.*
[29] OSCE Office for Democratic Institutions and Human Rights (ODIHR), "OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic" (2020).
[30] ICCPR, General Comment 32.
[31] UNODC, "Defence Rights in Remote Justice Procedures" (2020) [webpage, accessed 20 Nov. 2020].
[32] *Supra* note 27, p. 5.
[33] *Id.*, p. 6.
[34] *Supra* note 29.

# 2 State of Emergency

## State of Emergency declarations

The states of emergencies declared in response to the pandemic and usually dictated by the executive and legislative branches, provide the legal basis for exceptional and extraordinary measures in order to address the new challenges brought about by the pandemic.

In March, governments in Latin America and the Caribbean began to issue state of emergency declarations or other declarations and orders, such as states of calamity, exception or health emergency.[35] Some countries adopted both measures at the same time. In some countries, the measures were limited to 'stay-at-home' orders. In general, whatever the form of the declaration or order, these emergency measures allowed countries to respond quickly to the pandemic by approving additional resources for certain public institutions, shortening public procurement processes and restricting certain rights.

> **Trend:** All thirteen countries covered in this report enacted extraordinary measures in response to the pandemic, although with varying degrees of restrictions.

In Chile, Colombia, Guatemala and Panama, the measures included stricter restrictions on rights such as freedom of movement; and, in Chile, and also Colombia, the declarations were time-limited and required the enactment of new measures as the pandemic continued.

## Judicial oversight

> **Trend:** Although emergency orders are subject to judicial review, few review requests have been filed in court.

In Argentina, the Bahamas, Haiti, Mexico and Panama, the judiciary has the power to review state of emergency declarations and extraordinary measures according to national legislation. Nonetheless, no requests for review have been filed in those jurisdictions to date. The Dominican Republic is a unique case where emergency declarations, despite having to be authorised by Congress, are not subject to judicial oversight. This raises a particular concern given that international standards call for judicial review of state of emergency declarations.

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[35] *See* ACHR, art. 27.3 ("Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."). The OAS has a page on its website titled, "Recent Suspensions of Guarantees regarding Multilateral Treaties" which includes an updated list of state parties that have informed the OAS they have suspended guarantees during the crisis.

Emergency declarations, orders and decrees have been reviewed by the courts in other jurisictions. In Colombia, automatic review of emergency decrees is carried out by the Constitutional Court within thirty-five days. Colombia's Constitutional Court determined that 50% of the decrees were in accordance with the Colombian Constitution, 42% required some modification and 6% were declared unconstitutional.[36] In Guatemala, legal actions were brought against the expansion of the emergency measures, mainly concerning the procedures for approving the measures. The Constitutional Court in Guatemala rejected the challenges. In Buenos Aires, Argentina, two bar associations filed a constitutional action to be excluded from the lockdown, but without success. In Costa Rica, more than 200 cases were filed against the executive decree containing the emergency measures. In Colombia, after the president issued Decree 491 authorising Congress to hold its sessions through videoconference, the Constitutional Court of Colombia declared that it was unconstitutional for the president to decide how Congress should conduct its sessions given that Congress has autonomy over making such decisions.

**Trend:** There were fewer challenges to emergency declarations/orders or emergency measures in the Caribbean compared to the rest of the region.

## Economic assistance to the judiciary

**Trend:** The needs of the justice sector were not addressed explicitly in emergency orders and related economic relief plans. Most countries did not provide additional financial support to the judiciary.

Most state of emergency declarations in the thirteen countries included in this report included the provision of financial resources to public institutions in order to respond to the pandemic. Yet, Guatemala and Trinidad & Tobago were the only instances where the state contemplated additional funds for the judiciary. The Guatemalan Congress approved a loan that would allocate 85 million USD to the judiciary for the modernisation of the justice sector. Interlocutors interviewed in this study, however, reported that these funds were not used to address the specific challenges brought by the pandemic, but were part of a previous plan for modernisation of the justice system.[37]

**Good practice**: Trinidad & Tobago approved additional funds for the judiciary to address new challenges brought by the

[36] El Tiempo, "Con 115 fallos, Corte termina revisión de decretos de la emergencia" (20 Oct. 2020) [webpage, accessed 20 Nov. 2020].

[37] Two credits were approved – one from the Inter-American Development Bank to implement the "*Programa de Fortalecimiento y Modernización del Ministerio Público*", "a program designed to strengthen the criminal branch of the judiciary", and another one from the Central American Bank for Economic Integration to implement the "*Programa de Inversión y Modernización para el Sector Justicia*", a program intended to modernise the judiciary system as a whole.

pandemic (an interlocutor reported that the funds were properly allocated, although the amount of funds was not stated).

In fact, judiciaries in the remaining jurisdictions covered in the study adopted various austerity measures to reduce spending. The judiciary in Chile, Colombia, Costa Rica, Haiti, Mexico and Panama received no additional funding. In Argentina, Chile and Mexico, the judiciary suspended non-essential administrative and fixed expenses, reallocating those resources to attend to specific needs related to the pandemic. In other countries, including Mexico and Costa Rica, the government even requested that the judiciary return funds from the approved budget. The returned funds were redistributed to other services, such as health services, and utilised for financial relief measures.

In Haiti, to compensate for the judiciary's lack of funds, the National Association of Haitian Judges fundraised to acquire self-protection kits and equipment. Similarly, in Argentina, the Supreme Court set up a new voluntary solidarity contribution programme whereby judges who met specific requirements could contribute a percentage of their salary to a public health fund. Colombia attempted to impose a transitory tax ranging between 10% and 15% on the salaries of the highest-paid public servants, to be allocated to the government's general budget, but the Constitutional Court declared the tax unconstitutional.[38] Some jurisdictions like Mexico State in Mexico simply reallocated money from administrative costs not required during the pandemic to cover pandemic-related expenses.

[38] Corte Constitucional de Colombia, Comunicado No. 32, *El Decreto Legislativo 551 de 2020, en el que se prevén exenciones respecto del IVA, fue declarado exequible, bajo el entendido de que la exención prevista perderá vigencia al término de la siguiente vigencia fiscal* (agosto 5 y 6 de 2020).

# 3 Functioning of the Judiciary During the Pandemic

## Measures adopted during the pandemic

> **Trend:** Measures regarding the continued functioning of the judiciary during the pandemic came from judicial authorities themselves, protecting their own judicial independence.

Through the issuance of state of emergency declarations and extraordinary measures, which included restricting certain non-essential services, the executive branch was given primary authority over the protection of citizens. The judicial branch, for its part, has adopted its own measures to guarantee its continued functioning and to protect justice operators and users. The supreme courts and, in some cases, judicial administrative bodies (usually called the judiciary council in the region) have also adopted measures to guarantee the continued functioning of courts and tribunals. Colombia is the only jurisdiction where the president, through his state of emergency powers, issued legal measures on digital services that applied to how the judiciary carries out its mandate. The measures mandated by the president were then adopted by the Colombian Judicial Council (for all courts) and by the Special Jurisdiction for Peace (JEP) (for its jurisdiction).

In all thirteen countries, measures adopted under state of emergency declarations or extraordinary measures have either directly or indirectly affected the functioning of the judiciary and resulted in a general scaling-down of judicial activity between March and July.

> **Good practice:** Several jurisdictions established committees or commissions to respond to how the state of emergency affected the functioning of the judiciary.

In Argentina, Brazil, Haiti and Mexico, specialised committees or commissions were created to monitor the situation and recommend, and in some cases adopt, measures to reduce demand and ensure the judiciary continued to function. Although Guatemala's judiciary created a specialised committee, it was criticised by interlocutors for not including medical experts.

Most judiciaries began with strict measures that included the suspension of all judicial activities, except for those matters considered urgent or essential, and the measures were adopted temporarily and later extended or modified depending on the particular circumstances of each jurisdiction.[39] The Bahamas is an exception, having started with less restrictive measures and then moving to stricter measures later. On the other hand, Costa Rica very quickly returned to "normal" activities under strict sanitary conditions,

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[39] *See* below section titled, "Suspension of activities, deadlines and prioritisation of cases", for a further discussion.

including social distancing, the use of PPE and reduction of personnel, among others.

It is worth mentioning that in the federated countries (Argentina, Brazil and Mexico), the federal measures differed from those dictated at the state level. In Brazil, local courts can adopt their own rules, as long as they do not conflict with rules enacted by the National Council of Justice. This resulted in each local jurisdiction having its own rules, causing some confusion and different results. In Mexico, most of the states replicated the measures enacted at the federal level. In states such as Mexico, Queretaro and Chihuahua, with more advanced digital tools, the measures differed from the federal ones, particularly because access to court buildings was not as critical as a higher volume of matters could be resolved virtually.

As for the nature of the measures adopted and implemented, two types were identified: (1) measures that concern the administration of justice and (2) measures that concern the working conditions of judicial personnel.

## Suspension of activities, deadlines and prioritisation of cases

**Trend:** The suspension of procedural deadlines was most common.

Judicial activities and procedural deadlines were immediately suspended when the pandemic began, with an exception made for 'urgent' cases, in nearly all jurisidctions. Costa Rica was an exception as there was no general suspension since the decision to suspend procedural deadlines rests with each judge and justice operators were thus able to transition to a 'work from home' scheme without suspending deadlines.

**Trend:** Judiciaries sought to reduce the demand on justice systems by prioritising cases, with priority given to criminal and family matters.

Most judiciaries established a list of matters considered 'urgent', which included matters involving constitutional-based actions to protect human rights (*amparos* and *tutelas*[40]), deprivation of liberty, domestic or gender-based violence, child custody, adoption or other cases related to children and those related directly to the pandemic. As a consequence, judges overseeing criminal and family matters continued to manage a higher caseload. In the Bahamas, however, judges were given the discretion to determine whether a matter was urgent on a case-by-case basis.

Several countries prioritised cases related to requests for early prison release as positive COVID-19 cases in detention centres were common. In Argentina, precautionary measures to protect persons in danger of domestic or gender-based violence were automatically extended. Argentina went as far as receiving criminal complaints via telephone or WhatsApp messages. In

[40] In general terms, *amparos* and *tutelas* are constitutional lawsuits filed against the governement for the inmediate protection of human rights.

countries like Costa Rica, the Dominican Republic, Guatemala, Mexico and Panama, the judiciary implemented a roster system for judges and court staff of specific courts (typically criminal courts) to be present in courthouses in order to process cases deemed urgent.

**Trend:** Courts reserved in-person hearings for urgent cases.

Courts were often given the discretion to decide whether or not to hold in-person hearings. Such was the case in Brazil, where each local court could determine the conditions under which to hold in-person hearings, as long as they complied with the general recommendations of the National Council of Justice. In other countries like Colombia, Costa Rica, Guatemala, Mexico, Panama and Trinidad & Tobago, in-person hearings were allowed only for urgent cases. In Guatemala, the Juzgados de Paz[41] never closed and continued their activities throughout the pandemic.

As the pandemic continued, new types of cases were added to the list of 'urgent' matters, virtual or physical hearings resumed and/or new technological tools were adopted to facilitate the continuation of court activities. Yet, interlocutors reported that the measures adopted to suspend many procedural deadlines and activities resulted in a significant reduction of judicial activity. In turn, the number of everyday justice problems like minor civil and commercial matters being resolved was reduced. Countries like the Bahamas, Costa Rica, Jamaica and Mexico responded with encouraging alternative dispute resolution mechanisms to prevent cases from reaching the courts. The use of alternative dispute resolution, however, has not been observed as a major trend throughout the region.

On the other hand, in certain instances, the number of cases being filed during the pandemic grew. In Chile, a legal reform allowed for the use of 10% of retirement funds during the pandemic in response to unemployment and the dire economic situation, but many of those receiving the funds ended up being sued to pay alimony debt. This created an overload of cases in the Chilean family courts and a new webpage was created to file this type of claim in response.

An interlocutor from the JEP in Colombia reported that virtual hearings improved effectiveness because it facilitated including persons in different places and a better handling of matters that if held in person would raise security concerns.

## Safety, prevention and attention measures

At a minimum, most courts followed the safety and prevention measures dictated by the government to prevent the spread of COVID-19 and judiciaries often adopted measures to protect justice operators and others who needed to be physically present in court buildings.

[41] The Juzgados de Paz courts are in charge of non-serious crimes or civil cases involving claims with lower sums.

> **Trend**: Sanitary procedures and social distancing measures were adopted in court buildings that remained open.

Courthouses that remained open imposed restrictions regarding the time and length of access to reduce attendance, sanitation measures and social distancing rules and required the use of PPE and the disinfection of common areas and the installation of air filters, for example. In Panama, in addition to general safety measures, each judge was able to dictate special measures for his/her courtroom.

Most jurisdictions reported having received PPE and training, along with information on health measures and how to prevent infection, but Guatemala was an exception as interlocutors reported not having received enough PPE. Telephone lines were also set up to provide judges with information regarding the pandemic and subsequent measures established for safely operating in court.

> **Good practice:** In Mexico State, the judiciary set up a system and an accompanying application to provide updated information in real time and track infections among members of the local judiciary.

Some judiciaries also granted licenses to those with underlying medical conditions or who were caretakers for sick relatives so that elderly and other judges and court staff in vulnerable groups were allowed to work remotely. In Costa Rica and Panama, where judges and court staff quickly returned to court buildings after the pandemic began, personnel who preferred to continue to work remotely had to request vacation days.

COVID-19 testing was not typically made available specifically for members of the judiciary and several interlocutors reported receiving only the same access to the health system as other citizens – some interlocutors believed they should have been prioritised while others did not believe so. Interlocutors from the Dominican Republic reported, however, that the judiciary coordinated with the Health Ministry to guarantee testing for its personnel.

> **Good practice:** The Dominican Republic created a system for scheduling appointments for courthouse services and guaranteeing social distancing once courthouses reopened.

## Increased workload and backlog

> **Trend:** Most jurisdictions managed to maintain acceptable levels of efficiency but, in some instances, were even more productive than before the pandemic.

Most jurisdictions reported not having plans in place to effectively deal with the increased workload and backlog of cases resulting from the pandemic, but some interlocutors reported that the pandemic allowed them to catch up on their case backlogs as procedural deadlines were suspended. This has

resulted in the number of cases processed per judge increasing during the pandemic in many jurisdictions.

Jurisdictions like the Bahamas and Mexico sought to deal with backlogs created by the pandemic by identifying which procedural step was most likely to increase backlogs, such as personal notifications of parties. In the Bahamas, the judiciary considered hiring temporary judges to deal with the backlog of cases, while a system is being put in place to issue digital notifications to parties in Mexico State.[42] The situation in Guatemala is less promising where it is estimated that between March and May, more than 31,000 hearings were suspended across the country. Interlocutors also reported not having any plans to date to address backlogs in Guatemala arising from the pandemic.

Apart from the adoption of new digital justice tools, most jurisdictions do not yet have plans in place to ensure that the justice system can address new problems stemming from the pandemic, such as how to prioritise cases, implement safety measures and address backlogs.

[42] At the time this report was published, it was not known whether temporary judges were ultimately hired to address backlogs.

# 4 Digital Justice

**Trend:** Throughout the region, the judiciary turned to digital justice tools to ensure courts continued functioning during the pandemic.

Two models of digital justice have emerged throughout the region:

1. Where the judiciary already had a digital justice model in place, it continued to use or expanded the existing model during the pandemic.
2. Other countries introduced digital justice tools for the first time during the pandemic.

## Digital justice mechanisms before the pandemic

**Trend:** The majority of jurisdictions already had some form of digital justice tools in place before the pandemic.

The jurisdictions that already had some type of digital justice mechanisms in place before the pandemic then further implemented those mechanisms to guarantee more effective and rapid access to justice, along with a view to reduce administrative costs and promote transparency in court decisions. Yet, the capacities of those digital justice mechanism already in place varied greatly from one jurisdiction to the next. Countries such as Argentina, Chile, Brazil (in some states) and Mexico (in some states) transitioned to digital justice years ago. As a result, the judiciaries in those countries were able to function more efficiently during the state of emergency than in other jurisdictions. The digital justice mechanisms in these countries provided electronic systems to process online trials, including the presentation of claims, notifications, electronic signatures, electronic files etc.

Other jurisdictions had some digital justice tools available prior to the pandemic, such as equipment for virtual hearings, the ability to present expert reports remotely in cases where people could not participate in person (for example, cases involving persons in a remote prison, children, victims' protection matters etc.) and notifications via email. In Costa Rica and Guatemala, these tools were only used in some courts but not widely throughout the judicial system. In Colombia[43], Panama and the Dominican Republic, digital justice tools were not implemented due to several reasons, including a lack of resources (even though laws contemplate the use of such mechanisms). Haiti was the only instance where the law did not provide for the use of digital justice mechanisms before the pandemic and no special legislative provisions regarding such mechanisms were adopted during the state of emergency.

[43] In the JEP, however, digital justice tools have been implemented.

Despite the advances in some jurisdictions regarding the use of digital justice tools, justice operators identified new problems that arose during the pandemic. New procedural rules have been approved in response to allow for the digital filing of claims, presentation of evidence, submission of documents, notifications, etc. Similarly, the use of virtual hearings was extended to new types of cases, such as civil, family, commercial and labour, in many jurisdictions.

## Adoption of digital justice mechanisms during the pandemic

**Trend:** The pandemic underlined the need for judiciaries in the region to incorporate digital justice tools as part of their core functioning.

COVID-19 has accelerated the efforts of the countries where the process of implementing and/or expanding digital justice tools had already begun. The need to keep the justice system operating during the pandemic also helped overcome past resistance in transitioning to digital justice tools, particularly in the jurisdictions where the law already provided for such tools.

## Virtual hearings and other digital tools

Virtual sessions among judges for deliberation and virtual hearings were the most widely used means of digital justice, particuarily for 'urgent' matters. There were only a few jurisdictions where virtual hearings were permissible for all or almost all matters. Argentina and Chile already had advanced digital justice tools in place which allowed for all hearing matters to be handled virtually. Costa Rica, the Dominican Republic and Trinidad & Tobago also conducted remote hearings for nearly all types of matters. Colombia was the only instance where the law was amended to allow for virtual hearings in response to the pandemic since judges were previously required by law to be physically present at hearings.[44] To date, however, Haitian law does not allow for virtual hearings and the lack of resources is a significant obstacle to any initiative to digitalise the justice system.

**Trend:** Parties are not required to consent to virtual proceedings.

In some jurisdictions parties are required to participate in virtual hearings, without the judge having to first receive consent from the parties before holding the proceeding virtually. This is the case for parties in Chile and Mexico for all types of matters, cases before the Constitutional Court in Guatemala and criminal matters in Panama. Yet, remote hearings are held at the judge's discretion in most jurisdictions. While parties may state their opinion as to the convenience of a virtual hearing in those instances, it is ultimately the judge's decision. Only for criminal matters in the Bahamas and Guatemala is the judge required to consult with the parties regarding holding

[44] Colombian law had some provisions for the use of digital justice for particular cases already in place, including the JEP.

virtual hearings. If one of the parties objects, the hearing must then be carried out in person. In the Dominican Republic, the parties must first request a virtual hearing and the judge then determines whether to hold a virtual hearing based on the arguments and information presented by the parties.

In Trinidad & Tobago, parties may choose not to participate in remote hearings and request the session be held in person, but they must demonstrate that the virtual hearing will compromise fairness and the interest of justice. In Chile, judges have held informal virtual hearings with the parties to discuss the possibility of conducting a virtual hearing, primarily in cases that require evidence to be presented and cross-examined, in some instances. At the JEP in Colombia, civil society organisations have requested that hearings be held virtually, except for cases of gender-based violence.

In Trinidad & Tobago, a common law jurisdiction, judges reported initially facing challenges in holding virtual hearings in preparation for trials. The challenges included managing the number of jury members and how to ensure that communication with third parties was limited, but interlocutors reported they were able to overcome such challenges and carry out virtual trials in accordance with all the required formalities. In the Bahamas and the Dominican Republic, if one of the parties did not personally have internet access or electronic devices, the party could join the hearing from a courtroom while the judge and other parties participated in the hearing remotely.

Most interlocutors agreed with the trend, as it gave them the discretion to hold virtual hearings despite the parties' preference and to prevent further backlogs. However, questions remain as to whether human rights standards are fully satisfied in these instances, including the right to be present at a hearing, at least in criminal proceedings.[45] In Chile and Colombia, there have been challenges in court to the use of virtual hearings. In Colombia, an interlocutor reported that one such claim was rejected as the court found that digital justice tools safeguard due process and prevent paralysation of the justice system during the pandemic. In Mexico, defence lawyers have unsuccessfully requested to prevent the use of virtual proceedings claiming that they are not authorised by law.

During the pandemic, the Mexican federal judiciary approved the use of electronic signatures, online trials and electronic receipt of documents as the Council of the Judiciary has the power to approve general rules regarding administration for the judiciary. Nevertheless, some litigants have publicly criticised these measures claiming that there is no specific legal basis for their adoption.

While the trend in the region over the past years has been to move from written to oral pleadings, Colombia and Brazil, for example, have maintained

[45] *See* ICCPR, art. 14(3)(d) and UN Human Rights Committee, General Comment 35 on Article 9 (Liberty and security of persons), CCPR/C/GC/35, § 34 (16 Dec. 2014).

written arguments as a special measure during the pandemic as it is allegedly quicker than organising virtual hearings.

## Tools and equipment

**Gap:** Judges and court staff are not provided with adequate resources (computers, internet connection and other hardware) in all countries.

In terms of equipment and technological tools, justice operators in some countries reported having received resources from the judiciary in order to work remotely. In the Bahamas, Brazil, Jamaica, Mexico (some states), the Dominican Republic and Trinidad & Tobago, the judiciary has provided its staff with the necessary equipment to work from home. In some cases, the judges already had portable computers provided by the judiciary, which facilitated the transition to working remotely. In other jurisdictions like Argentina,[46] Chile, Colombia[47], Guatemala and Mexico (some states), judges and court staff had to use their personal equipment to work remotely as the judiciary did not provide sufficient equipment. In the Dominican Republic, justice operators were allowed to use their personal equipment if the judiciary was unable to provide the needed equipment.

Justice operators reported facing difficulties working from home when most of their files were still in paper form in many jurisdictions. Similarly, in Colombia, Guatemala and some local jurisdictions in Mexico, justice operators reported not having scanners to digitalise documents. Most judiciaries approved the use of video conferencing software such as Zoom or Microsoft Teams. Cybersecurity was a major factor in the decisions to use those platforms and judges were only allowed to use the conferencing software that had been approved by the judiciary. In Argentina, for example, judges had the discretion to choose their preferred conferencing platform as long as it met the confidentiality and cybersecurity requirements set out by the judicial administrative authority. Interlocutors in most jurisdictions reported that they received training on the use of technology platforms and/or that resources were made available to answer questions and provide assistance regarding how to use the technology to work remotely.

Interlocutors from all countries covered in the study reported that information regarding the use of technological tools was made available to the public and, in most jurisdictions, that the information regarding the use of such tools was provided centrally on the judiciaries' websites and social media. In some countries like Brazil, each court was responsible for making the information available to the public while the Federal Judiciary in Mexico created a specific website to inform the public.

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[46] In Argentina, justice operators are using their personal equipment; however; in some instances they have been provided with equipment through agreements with unions.
[47] The JEP is more advanced than other courts in Colombia in terms of digital justice tools available to justice operators and the measures put in place to ensure the safety of digital communications.

## Privacy

Most interlocutors reported having no security concerns using the judiciary's computer equipment at home to access the judiciary's network and system, since appropriate safety measures were put in place.

> **Good practice:** Argentina, Chile and Mexico (federal and state level) implemented additional cybersecurity measures, including the use of tokens, new cell phone chips and VPNs to increase the safety and privacy of digital tools.

In jurisdictions where justice actors used their personal equipment, interlocutors reported that they were not confident that their equipment was properly protected from cyberattacks.

> **Gap:** The use of personal equipment by judges poses cybersecurity concerns.

Regarding the use of virtual platforms to conduct hearings, the trend was to rely on the platform's security protocol. Judges reported that they trusted some software more than others which in turn impacted their willingness to use certain tools. Interlocutors also often reported that safety protocols for the use of certain software to hold virtual meetings and social media platforms were lax and they had concerns regarding the lack of security protocols.

## Data collection

> **Trend:** The judiciary is gathering the usual data on productivity during the pandemic, but it does not include the new use of digital justice tools.

The disparities in court operations throughout the region make it difficult to collect data on how judges are performing during the pandemic and, where performance was evaluated, the trend was to focus on data regarding productivity. Argentina, Chile, the Dominican Republic and Mexico State, for example, used electronic systems to track data on judges' activity even before the pandemic for performance indicators. However, specific data on the use of digital justice tools, such as the duration of virtual hearings, use of digital signature, online notifications, etc., was not being gathered specifically. The Bahamas is the only jurisdiction where no data was being collected to evaluate performance.

> **Good practice:** The Chilean judiciary has welcomed the opinions of civil society and bar associations regarding the use of digital tools.

## Access to public hearings

> **Gap:** The requirement that hearings be made public is not being met.

Most jurisdictions have failed to make hearings that do not involve sensitive matters available and accessible to the general public or the media. Public

access to in-person hearings has been restricted as safety measures limit the number of people allowed in courtrooms. According to interlocutors, the public's access to virtual hearings has also been restricted due to cybersecurity concerns. These restrictions raise serious concerns about whether international standards on access to public hearings are being satifised – *see* article 14.1 of the ICCPR and article 8.5 of the IACHR.

Even more concerning is that several of the justice operators interviewed for this study reported that the failure to make hearings public was not even being raised or discussed within their judiciary. Yet, some jurisdictions have succeeded in keeping virtual hearings accessible to the public. For example, in the Bahamas, public hearings are broadcasted and made available on televisions in courthouse lobbies.

> **Good practice:** Costa Rica and Trinidad & Tobago have provided a link for the general public to access virtual hearings.
>
> **Good practice:** The Mexican Supreme Court of Justice live streamed its virtual sessions (the sessions were already made available via the internet and television before the pandemic).

## Advantages and disadvantages of digital justice tools from a justice provider's perspective

The use of digital justice tools, particularly where their implementation has accelerated or expanded because of the pandemic, has assisted in overcoming remaining resistance to the use of digital tools. More progress has been made in the jurisdictions where the use of digital justice mechanisms were less commonplace. Yet, as interlocutors highlighted, there are advantages and disadvantages in using digital justice tools. Interlocutors noted the following as advantages:

- Possibilities for carrying out procedures more expeditiously;
- Easier to manage audiences virtually than in person;
- Remote connection allows for the participation of parties in different locations;
- Increase in productivity while working remotely;
- Increase in use of digital justice tools eliminates paper waste;
- Reduction in costs for parties.

Some of the disadvantages noted include:

- Resistance by litigants who are unfamiliar with digital tools;
- Managing virtual hearings is harder than in person in some instances;
- Inability to read facial expressions and assess body language when taking the testimony of witnesses and experts;

- Unreliable internet connection, lack of technological resources (the 'digital gap') and lack of or insufficient training on the use of digital tools;
- Lack of consistency in digitalisation of the judicial system, even within the same country and throughout the region;
- Difficulties in analysing certain types of evidence virtually.

# 5 Independence and administration of justice

## Reduction in number of justice operators

**Trend:** No judges were laid off due to the pandemic.

No jurisdiction reported the dismissal of justice operators (particularly judges) due to the pandemic or the economic austerity measures adopted in several countries. In some countries, interlocutors reported having a reduced number of personnel in their courts as a consequence of quarantine requirements resulting from exposure to COVID-19. Personnel reduction was also common in jurisdictions where staff took sick days or family care leave. In several countries, justice operators have been infected and unfortunately COVID-19 has also taken the life of justice operators. In one local jurisdiction in Mexico, interlocutors reported that vacancies due to illness or death were being covered by temporary appointments that could become permanent without following the required legal procedure or formalities and using the state of emergency as an excuse.

## Threats or incidents of violence

**Trend:** In the majority of jurisdictions, no threats or violence towards judges have been reported.

Interlocutors reported that generally no threats or acts of violence against judges resulting from the pandemic or lockdown measures have been reported. In Chile, Guatemala, Jamaica, Mexico and Panama, threats were made against judges through social media in response to 'unpopular' decisions, but no threats were reported as being acted upon and such incidents were already commonplace before the pandemic.

## The situation in the provinces compared to the capital

**Trend:** With a few exceptions, courts in the provinces did not receive the same level of support in terms of digital tools and other resources as courts in the capital.

Countries such as Argentina, Brazil, Colombia, Mexico and the Dominican Republic reported that the technological equipment and access to digital justice tools made available in the provinces or other states were not equal to what was made available in the capital. This has resulted in a less efficient justice system in the provinces than in the capital and has undoubtedly hindered equal access to justice. In Mexico, states such as Chihuahua, Nuevo León and the State of Mexico continued to operate just as efficiently and, in some cases, even more efficiently than in the capital. On the other hand, some justice operators in other states in Mexico, like Chiapas, along with justice operators from the provinces in Brazil, Colombia and the Dominican Republic reported not even having internet access.

The stark contrast between what technology was made available in the provinces versus the capital and from province to province highlights the 'digital gap' that still exists in the region. In some countries, interlocutors reported that health and safety measures were less strict in the provinces because the number of COVID-19 cases were lower and that this allowed for a more 'normal' functioning of the judiciary and resulted in less of a need to handle matters virtually.

## Professional development and case assignment

**Trend:** Professional development programmes for judges continued and even increased in some instances.

Many countries reported that their judicial schools migrated most of their activities to online platforms, even if it took time to transition effectively. Additionally, in most cases, the number of training courses offered increased since remote work and the use of virtual platforms allowed judges to attend more training sessions. In other countries, however, training activities were reduced only to the essentials and topics related to the pandemic. In Haiti, online courses were not organised by the judiciary and in-person instruction was not permitted.[48]

**Trend:** The case assignment system continued operating normally.

Regarding case assignment systems, most countries reported that these systems continued to function as before the pandemic. In some jurisdictions, case assignment systems were modified to create a roster system so that the court was available at all times to attend to urgent matters.

## Enforcement of lockdown measures

The judiciary has not been called upon to decide on the enforcement of lockdown measures in most jursidictions covered in this report. In Chile and Colombia, interlocutors reported that fines were issued for violating lockdown rules, but no cases resulting from the issuance of such fines made it to court. In contrast, in Guatemala, the use of criminal law to enforce lockdown measures has been criticised as the arrest and detention of persons for violating social distancing rules has resulted in more infections of both detainees and justice operators.

[48] In September 2020, the IAWJ, an ILAC member, partnered with the Judicial Training School (EMA) to implement a ten-week virtual course on trafficking in persons for judges and prosecutors. The course was designed, and has been implemented via Zoom, as a direct response to COVID-19 restrictions and in order to build the capacity of the EMA to implement virtual training activities and online events.

# 6 Conclusions

There is no question that the pandemic has presented challenges to the judiciary in Latin American and the Caribbean. Some problems are new, and consequences of the restrictions to prevent the virus's spread, but other difficulties already existed – the pandemic just made them more evident. Most of the region's judiciaries were not prepared to respond to a pandemic and the administration of justice was immediately affected.

As the pandemic is a protracted crisis, judiciaries have been able to develop plans in response as time passes and the challenges become more evident. Although some judicial powers already had digital justice tools in place, they were not intended as a response to a crisis like the pandemic or to be used to carry out the majority of judicial procedures and court administration. Most of the countries covered in this report faced a remarkable challenge – transferring the functioning of the judiciary to a work scheme that had not been tested or evaluated before. For many courts in the region, the lack of resources has been an ongoing obstacle to modernising the justice system and it was only further aggravated by the pandemic which made resources even scarcer.

To date, judicial independence in the region seems to have been respected for the most part in relation to the pandemic. Most judiciaries have held the power to determine their own rules of action during the pandemic, both regarding the administration of justice and the protection measures required for continuing to hold courtroom proceedings in person. Although judicial activity has continued during the crisis, there are many instances where certain legal procedures could not be resolved with the existing digital justice tools and the workload and backlogs have increased substantially in some countries. These will continue to be the more testing challenges for judiciaries in the region as the pandemic continues.

The data gathered for this report reflects a new willingness to utilise digital justice tools in order to deliver justice, which will likely impact and alter the way the judiciary functions even after the pandemic subsides to improve the administration and delivery of justice. However, there are many challenges presented when using digital justice tools that must be formally resolved in order to ensure individual rights and access to justice on all matters. The pandemic has shed further light on the already existing 'digital gap', which is in danger of widening if resources are not allocated to close the gap.

*Below are conclusions from the region drawn from the data collected:*

1. All jurisdictions adopted state of emergency declarations and extraordinary measures to curb the pandemic.

2. State of emergency declarations and extraordinary measures did not include measures to guarantee the continued functioning of the

judiciary (except in Colombia, where the judiciary's functioning was included in the national plan).

3 In most jurisdictions, state of emergency declarations and extraordinary measures were not challenged in court.

4 Only in Guatemala and Trinidad & Tobago were additional resources allocated to the judiciary as part of the emergency measures. In some jurisdictions, the judiciary was required to hand over a portion of its budget which was then redirected to health and other relief programmes.

5 All judiciaries took measures during the pandemic to reduce demand and ensure that courts could continue to function. The most common measure was the suspension of procedural deadlines, followed by the adoption of safety and prevention measures for justice operators and justice users.

6 All judiciaries made provisions for hearing urgent cases, which included constitutional based actions to protect human rights (*amparos* and *tutelas*), criminal and family matters. Priority was given to cases involving deprivation of liberty, early release and other benefits, domestic and gender-based violence, children and cases related to lockdown measures.

7 In most jurisdictions, in-person hearings were only available for urgent cases. Virtual hearings were conducted for other non-urgent matters.

8 Courts followed general safety and prevention measures where courthouses remained open. Work flexibility was granted in most jurisdictions, however, justice operators in the region were not prioritised for COVID-19 testing and not all justice operators were provided with PPE.

9 Many jurisdictions reported working efficiently during the pandemic, even increasing the number of cases processed in some instances. There were instances though where cases were delayed and the judiciary has made no particular plan to deal with backlogs.

10 The use of digital justice tools has ensured that courts will continue to function during the pandemic. Few countries had advanced digital justice tools in place before the pandemic, but almost all jurisdictions have implemented such tools in the last months.

11 Virtual hearings and videoconferencing platforms were the most popular digital justice tools used. Most legislation allowed for the use of such platforms before the pandemic, but wider implementation was uncommon. A minority of jurisdictions allowed virtual hearings for all matters; however, virtual hearings are more common in criminal and family cases.

12 Judges generally had the discretion whether to hold hearings vritually. In some jurisdictions this raised concerns for the respect of fair trial rights, particularly in criminal trials. Accommodations for parties without access to digital tools are available in some countries.

13 Justice operators in several jurisdictions were not provided with the equipment necessary to work remotely (including computers and other hardware) and have used their personal equipment. In the opinion of some interlocutors, this has jeopardised judicial independence and the security and confidentiality of related information.

14 Even where data has been collected on judicial activity during the pandemic, specific data on the use of digital justice tools was not included. This is a lost opportunity because such information would allow for a proper assessment of the effectiveness of digital tools to then inform related policies.

15 The inability of the public to access hearings conducted in person or virtually during the pandemic has raised concerns and violates international standards.

16 The increased use of digital justice tools during the pandemic has assisted in overcoming resistance to their implementation. Yet, the 'digital gap' may have profound effects on access to justice, in particular for vulnerable groups.

17 Judges across the region have not been affected by layoffs.

18 No new threats to justice operators have been reported due to the pandemic; however, attacks on judicial independence continue.

19 Courts in provinces did not have the same access to digital tools as courts in the capital, widening the already existing 'digital gap'.

20 Professional development programmes for justice operators continued throughout the region and even increased in some jurisdictions.

21 Case assignment systems have continued to function normally during the pandemic.

22 Courts across the region have not been called upon to review the legality of lockdown measures.

# 7 Recommendations

1 Judiciaries should conduct a thorough review of the functioning of the justice system during the pandemic to determine if and what type of additional resources should be allocated to the judicial branch to ensure it can continue to properly function, not only during crises, but as a permanent improvement to justice administration. The executive and legislative branches should cooperate with the judiciary and judiciaries and justice seekers must be consulted throughout this process.

2 Mechanisms should be put in place to allow the judiciary to attend to all matters during a crisis, with special focus on urgent cases including deprivation of liberty, gender-based violence and cases related to children or other vulnerable groups.

3 The judiciary should develop and adopt plans to address backlogs and increased workloads caused by the pandemic to guarantee a timely administration of justice. These plans should be public, transparent and accessible, and must include strengthening alternative dispute resolution mechanisms such as online mediation and community-based dispute resolution.

4 It is fundamental to collect and analyse data and feedback from justice users and operators on the suitability and effectiveness of digital justice tools in adopting new policies that may expand and improve digital justice in the long term. Such policies must consider the impact of digital justice tools on the right to a fair trial and due process.

5 Governments and private sector actors must work to close the 'digital gap' and ensure access to information and technology for all. As a short to medium-term step, the use of non-tech solutions such as radio, television, hotlines and flyers should be considered.

6 The adoption of privacy and cyber-security protocols are essential when using digital justice tools to safeguard information and prevent threats to judicial independence and the right to privacy.

7 Clear rules and procedures on when and how virtual hearings may be conducted should be adopted in accordance with international human rights standards and to guarantee legal certainty.

8 It is fundamental to guarantee access to public hearings. Ensuring that hearings are made public is vital to protecting a defendant's rights in criminal matters and guarantees the legitimacy of judicial proceedings.

9 Protecting judicial independence during times of crisis requires guaranteeing sufficient human and material resources, compensation, promotion, discipline, professionalisation and the safety and health of judges.

# 8 Methodology

This report intends to be qualitative in nature. It is based on information collected through desk research by local law firms in the countries covered. These law firms, who worked on the project pro bono, were recruited through the Pro Bono Network of the Americas.[49] The Vance Center created a questionnaire that encompassed the main issues the authors wished to cover in the research. The questionnaire was translated into Spanish, Portuguese, and French. One questionnaire was directed to local law firms who used it to present the information from the desk research.

The Vance Center conducted over 30 interviews with trial, appellate and high court judges in selected jurisdictions to supplement the information from the desk research. Judges were identified through the Vance Center's network in the region as well as through other ILAC member organisations. Another questionnaire, similar to the one used by the law firms, was used for the interviews with judges throughout the region. The interviews were conducted off the record via Zoom, Skype and telephone in English, French, Portuguese and Spanish throughout the months of June to early September 2020. In some cases, judges answered interview questions in writing. Judges interviewed for the research were asked whether they agree to be mentioned publicly in the report.

Vance Center Committee law firm Willkie Farr & Gallagher LLP consolidated the information from the local law firms, and the interview responses in a memorandum. This memorandum served as a basis for this report, which was jointly produced by ILAC and the Vance Center.

## Research questions

1 Did the country declare a state of emergency?
   1.1 What are the provisions in the state of emergency regarding the judiciary and the courts?
2 Is the state of emergency and other measures adopted to address the crisis subject to judicial oversight?
3 Has there been any judicial review of the state of emergency order or other emergency measures adopted in response to the crisis?
4 Have judicial orders regarding the state of emergency or other emergency measures been complied with?

[49] The Pro Bono Network of the Americas was born in 2011 as an informal collaborative mechanism between lawyers, NGOs, pro bono initiatives and other actors in the pro bono field across the Americas to strengthen access to justice and promote respect for human rights, the rule of law and democracy in the Americas. It has now become the main institutional home of the primary pro bono clearinghouses in the Americas, representing partnership among them. Today, the Network is comprised of more than eighteen organizations, representing thirteen countries. The Vance Center co-coordinates the Network.

5 Are courts decisions regarding the legality and/or enforcement of emergency measures made available to the public such as online or through radio and television?
6 Have there been any criticism by government officials or civil society of judicial orders regarding the state of emergency or other emergency measures?
7 Has assistance to the judicial sector been included in stimulus packages?
  7.1 Is it adequate?
  7.2 Has the judiciary participated in or been consulted in the decision?
8 Has the judiciary issued any provisions for the functioning of the judicial system during the pandemic?
9 Has there been any interruption or scaling-down of judicial activity because of the crisis?
  9.1 Have deadlines been suspended?
10 What measures have been adopted to reduce the demand on the justice system? Ex: declining to prosecute low-level offenses, non-custodial sentencing, adjournment, particularly for civil cases, increased use of alternative dispute resolution (ADR).
11 Has there been a prioritization of cases/procedures?
  11.1 How were such decisions adopted?
  11.2 Was specific legislation enacted?
  11.3 Were these measures adopted by judicial authorities?
12 In case physical proceedings are still going on, are measures taken to allow social distancing and the use of personal protective equipment?
  12.1 What other measures have been put in place to protect judges, staff, lawyers, and parties to a case, especially vulnerable parties?
  12.2 Have judges and staff been trained on safety measures?
  12.3 Are these measures adopted centrally or each judge sets the rule for his or her courtroom?
  12.4 Have justice operators been prioritized for testing?
  12.5 Is counseling available for justice operators?
13 Are measures being put in place to allow the judicial system to effectively deal with the likely increased workload and backlog of cases once it resumes normal work after the pandemic subsides?
14 What measures have been adopted to ensure that the judicial system can address new justice problems stemming from the pandemic and the emergency orders?
15 Did your country have in place digital justice mechanisms before the pandemic?
  15.1 Is there a legal basis for the use of digital tools, such as tele or videoconferencing in the courts, electronic filings by parties, electronic signatures of judges or other similar use of technology in court proceedings?
16 If remote proceedings/virtual hearings have been adopted:
  16.1 For what type of cases? (Civil, criminal, etc.)
  16.2 Are remote hearings mandatory or recommended?
  16.3 How is the decision to have a remote proceeding made? Who decides?
  16.4 Do the parties have a say?
17 Has extra funding been made available to the judiciary in order to implement alternative/flexible work methods such as tele and videoconferencing?
  17.1 Is the funding adequate?
18 Do judges have the necessary tools to be able to work remotely or conduct tele or videoconferencing including computers, tablets, high speed internet?
  18.1 Are they using their own computers, internet etc.?
  18.2 Are proper privacy and safety measures installed if they are using their own materials?
19 Did justice operators receive training on how to use digital tools?
  19.1 Are proper privacy and safety measures put in place for the use of such technology in judicial proceedings?
  19.2 For Judges: do they feel safe using this technology?
20 What could be done to ensure greater safety?
21 Has the judiciary issued guidance on the use of tele or videoconferencing, e-filing and other remote access to the courts?
22 Are data being collected regarding the effectiveness of innovative justice measures during the crisis to inform future implementation?

23 What are the disadvantages of using digital tools? (Access in remote places, etc.)
24 Has information been made available to the public regarding the use of digital tools in the courts and/or case prioritization, scheduling changes, and other special changes to judicial activity in the wake of the crisis?
25 Have lawsuits been filed to challenge the use of remote proceeding?
    25.1 What arguments were raised?
26 Have concerns been raised regarding fair trial rights and the use of digital justice mechanisms?
27 Have lawsuits been filed to challenge the use of remote proceedings?
    27.1 What arguments were raised?
28 Have transparency obligations for court information and access to public hearings been respected?
29 Do you see particular advantages to using digital justice mechanisms?
30 Have judges and/or other justice sector employees been laid-off or furloughed in the wake of the crisis?
31 Has the number of judges and/or other justice operators been reduced because of staff being sick with the coronavirus or self-isolating?
    31.1 How has that affected the effective functioning of the justice system?
32 Has there been any threat or incidents of violence against judges and/or justice operators?
    32.1 If yes, how have such incidents been dealt with?
33 Have courts been able to maintain the same level of functioning in the capital and in the provinces?
    33.1 If not, what are the major differences?
    33.2 For judges in provinces: how have the courts been functioning outside the capital? Do they feel they received the same level of support as courts/judges in the capital?
34 Have the mechanisms to assign cases remained the same?
35 Do the mechanisms for justice operator's professional development remain in place? (Training)
36 Do judges feel safe making decisions challenging the lockdown or emergency measures generally? What are some of the challenges they encounter?
37 Have courts been able to prosecute cases of abuse of power by security actors who enforce the lockdown measures?
    37.1 Have judicial decisions in these cases been complied with?
    37.2 What has been the public response to these cases?
    37.3 What has been the government and security sector's reaction to such cases?

For the questionnaire, the following terms were defined as follows:

**State of emergency**: Includes any situation in which a government is empowered to perform actions or put in place policies or restrict certain rights that it would normally not be permitted to.

**Alternative dispute resolution (ADR)**: any means of settling disputes outside of the courtroom. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration.

**Judges**: lower and appellate court judges and magistrates, sitting in different types of courts (civil, criminal, family, youth, etc.)

**Justice operators**: judges, magistrates and court staff.

**Digital justice:** technological solutions that allow justice institutions to incorporate online electronic tools in legal procedures with legal validity. Digital justice can include online trials, remote or virtual hearings, tele or videoconferencing, electronic filings, electronic signatures, among others.

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