

Access to justice in Latin America

Report on survey results about the situation regarding access to justice in the context of the pandemic, from the perspective of organizations and social activists.

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Executive summary

The pandemic caused by COVID-19 has deepened inequalities in Latin America even further, affecting vulnerable groups in particular, with the rise in poverty and unemployment and less social and health care protection (CEPAL, 2020). In this context, problems with access to justice impact on groups, collectives and communities in vulnerable positions unequally and distinctively.

Even though many of these issues are structural and, therefore, existing before the sanitary emergency deriving from the COVID-19 pandemic, it is after the emergency and compulsory social distancing measures, the suspension of court proceedings and the state of constitutional exception, that social, economic, environmental and political inequalities are deepened and made visible with greater intensity.

Although several countries in the region have implemented, to varying degrees, measures recommended by international organizations and health authorities, such as lockdowns, these have not always been accompanied by people-centered compensatory measures and differential approaches.

In this sense, vulnerable groups are not guaranteed access to fundamental rights such as the right to health, physical and mental assistance and access to preventive measures, medical supplies, food, adequate housing for confinement, among others. Besides, sanitary measures go generally with restrictions on individual civil and political rights (movement restrictions, curfew, state of siege, militarization of public safety) and *securitarian measures* which, in some countries, have led to abuse and a rise in policy brutality.

That is why, in the context of the pandemic, access to justice mechanisms become even more relevant to be able to face the sanitary, economic, social and political crisis in the region and to guarantee the effective protection of rights.

Almost every country in the region has suspended or limited the functions of the judiciary and, due to this, people do not have appropriate means to channel their conflicts and the lack of *accessibility, affordability and availability* of justice services deepens.

Therefore, there is an interest in producing information and diagnoses about the situation regarding access to justice in the context of the pandemic in the region, in order to influence the public policies being created and implemented, with special emphasis on vulnerable groups.

In order to achieve this goal, we held meetings with several civil society organizations and research centers from different Latin American countries, and formed a workgroup composed of **ACIJ (Argentina), Dejusticia (Colombia), FIMA (Chile), LABA (Brazil), JSCA-OAS, DPLF (regional) and the Legal Empowerment Network (global)**. We prepared a survey with the objective of knowing the situation regarding access to justice in Latin America in the context of the pandemic, from the perspective of civil society organizations and several players who interact with the justice system, such as universities, lawyers, legal advocates and research centers, among others.

An online survey was designed (with open-ended, closed-ended and multiple choice questions) in order to know the situation regarding access to justice in the context of the pandemic caused by COVID-19. The survey was reviewed and adjusted after a pilot test, till the final version in Spanish and Portuguese was achieved. Then, the survey was sent to key informants from different countries in the region during May and June. It is worth noticing that the situations reported could have changed since the sending of the survey, its collection, data analysis and publication in November.

For the study sample, renowned social organizations regarding access to justice and human rights in the region were selected. Perception surveys provide relevant information from the point of view of players, which may (or may not) coincide with objective information. The contribution lies in this point, but also does the technical limitation. In those countries where the survey was answered by more than one organization and the answers did not match, this disagreement was pointed out in a footnote.

Likewise, answers were complemented and cross-checked with additional sources (documents from official and non-official institutions, reports submitted before human rights organizations by key actors and Internet portals), in order to increase the validity and reliability of the answers (which is called triangulation of data sources). Whenever this happened it is identified in the report.

The survey was answered by 42 organizations in 17 countries, namely: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

Results are submitted following these guidelines:

- 1) Measures of constitutional exception
- 2) Measures adopted by the judiciary
- 3) Judicial modernization and digital governance
- 4) Free legal aid for judicial proceedings
- 5) Free legal aid for administrative proceedings
- 6) Class and collective actions
- 7) Vulnerable groups and legal empowerment
- 8) Budget
- 9) Good practices
- 10) Impact of the pandemic on civil society organizations.

The systematization and analysis of the information collected allowed to identify patterns of infringement on rights repeated in different countries of the region. A series of measures adopted by countries in order to approach the crisis have also been systematized.

Among the results obtained, the following are worth mentioning:

- 1. Measures of constitutional exception, affecting the separation of State powers, were adopted** in 12 out of the 17 countries analyzed, and a process of accumulation in the functions of the executive branches (delegation of extraordinary powers) took place, in some cases along with the suspension of the functions of the legislative Branch and curfew.
- 2. Judicial branches in most of the countries functioned atypically, interrupting, suspending and/or affecting the regular development of justice services, providing only basic services, for urgent matters¹ or for certain issues or topics.** Their performance was perceived as barely effective to meet the needs in the context of the pandemic.
- 3. Suspension of jurisdictional activities had an impact on the irreplaceable role that the judicial branch plays** in the protection of rights and the control over the other branches of the state.
- 4. Judicial branches had a limited reaction to the need of generating organizational changes and innovations** to give specific answers to the additional demands of the vulnerable groups.
- 5. The functions of the judicial branches were not extended or increased** in response to the pandemic. So, **no country shows an increase in the installed capacity of the Judiciary** since the pandemic.
- 6. Measures implemented by judicial branches, in general, were not evenly distributed in the subnational jurisdictions** of the countries under analysis.

¹ The definition of “urgent matter” was not always determined by governing bodies of the judiciary. In some cases, it was left to the interpretation of jurisdictions, or even each court, affecting legal predictability and increasing the uncertainty about which cases were included or not.

7. The processes of State modernization and the incorporation of **information and communication technologies (ICT)** have sped up and deepened since the pandemic, even though these processes have not been accompanied by a similar one regarding the development of digital security protocols. In most countries (15 out of 17) the judicial branches modified their policies related to the ICTs.
8. **Only 7 countries adopted a differential approach seeking to reduce the digital gap for the most vulnerable groups** when making contact with justice services.
9. **Only two countries made progress by taking measures to guarantee digital information security and/or approved security protocols for the use of ICTs.** There were also protocols approved for the protection of auxiliary judicial information systems and the access to anonymized digital jurisprudence. Also, there were cases of progress on restrictions regarding the use of sensitive data.
10. **Measures for the incorporation of ICTs were not evenly distributed** towards subnational jurisdictions of each one of the countries.
11. Most of the countries in the region **have been implementing some type of action for the elimination of economic barriers affecting judicial proceedings**, mainly by means of several measures (exemption of court fees and granting of litigation in forma pauperis). However, it should be noticed that **none of the countries analyzed has broaden the guarantee of gratuitousness or defined new strategies in the context of the pandemic**, but preexisting measures continued.
12. **Barriers affecting vulnerable groups deepened** during the pandemic. Besides the digital gap, there are still gaps in these groups regarding access to institutions, legal empowerment and the design and formulation of rules.
13. **Free legal aid in administrative proceedings as well as in judicial proceedings was affected by the suspension of justice services**, in spite of the changes in assistance, from face-to-face to digital or telephone assistance.
14. In 10 out of 17 countries the surveyed people considered that **the measures of free legal aid implemented were not evenly distributed in the different jurisdictions** of their country.
15. Most people surveyed reported that **there are no national policies or initiatives that guarantee** free legal aid to make claims or requests in administrative proceedings (free legal aid in administrative proceedings is not provided in 11 out of 17 countries).
16. In those countries where class and **collective actions are permitted, most people and organizations reported that the implementation of judgements in this type of proceedings was affected by the pandemic**, although modalities and degrees of impact vary.

17. In 12 out of 17 countries in the region the surveyed people reported that, in the context of the pandemic, **specific protocols regarding access to justice services, legal assistance and non-discrimination for vulnerable groups were designed and implemented. Almost every country set some measures to approach violence against women and freedom-deprived people or related to certain groups** (children and adolescents, elderly people, migrants). Some of the measures taken regarding migrants turned out to be restrictive –border closures- as long as the state of sanitary emergency continues. Besides, some countries suspended face-to-face assistance on the premises of the Migration Bureau.
18. **Even though protocols were drawn up for certain vulnerable groups, they did not participate in their preparation, validation and implementation. There was no participation either from professional associations or civil society organizations.**
19. Most countries (15 out of 17) have imposed sanitary, preventive, social and economic measures related to vulnerable groups (at least, one). **But not all of them have designed strategies to spread these measures within the most vulnerable groups or communities.**
20. **Among the most widespread measures in the countries analyzed are health measures (knowledge of the disease and treatment);** then measures restricting certain rights (as preventive social isolation); those about the access to preventive measures and protection or care supplies and economic, social or fiscal measures that benefit vulnerable groups; access to social measures or those that compensate for the effects of lockdowns.
21. Most of the surveyed people considered that in their country **the contents to be communicated have not been adapted considering people, collectives and communities for whom the policies were made and that the spreading of rights and issues related to COVID-19 was done without any kind of adaptation (related to culture, ethnicity, language, age or gender).**
22. Since the pandemic, **the most frequently used communication channel to spread policies related to COVID-19 were official media** and, to a lesser extent, alternative or non-traditional communication media.
23. **Budgets were not increased or reallocated to the justice sector in most countries.** In the cases where measures related to budget were adopted, they were **not evenly distributed** in subnational jurisdictions.
24. From the cross check with secondary sources, it was found out that most countries analyzed have adopted budget measures involving: **reforms to the annual budget act; budget reallocation; granting of extraordinary credits to key sectors, which not included the judiciary. An emergency fund was created in several countries to mitigate the effects of the pandemic.** State austerity plans or economic emergency laws and public expenditure rationalization were made. A **one-time humanitarian contribution** from high-income people and over company profits was stipulated in one country only.

- 25.** It is worth noticing that most countries resorted to foreign debt in order to undertake the extraordinary expenditure required by the sanitary, social, jurisdictional and social security measures in the context of the pandemic. In most countries the executive branch was authorized to request loans or issue bonds in the international market (they resorted to loans from the Inter-American Development Bank -IADB-; the World Bank -WB-; the International Monetary Fund -IMF-, the Corporación Andina, the Central American Bank for Economic Integration).
- 26. Good state practices** and initiatives from civil society organizations were highlighted where alliances and regional networks were created for the diagnoses and visibility of infringement of rights and approaches to local issues. **Among the good state practices, those related to violence against women stood out** (women's assistance service declared as essential; economic support, creation of observatories to measure and monitor violence, extension of protection measures prior to the pandemic). It was noted that most countries applied gender perspective based on women only (one country alone took measures for the LGTBIQ+ community).
- 27. Civil society organizations were also affected and impacted on in the context of the pandemic**, which meant changes in organizational aspects, in their link with communities, and in the connection with the states. Civil society organizations were able to adjust their agendas and priorities to the context.

Lastly, judicial branches should account for the measures being taken to guarantee the full reinstatement of justice services and take all necessary measures to ensure their full accessibility, availability and affordability. In this scenario, the different judicial branches cannot fulfill only minimal jurisdictional functions. It is necessary that they generate and broaden their functions in order to provide for a growing social demand caused by the pandemic.

Even though judicial branches in Latin America have started modernization processes, they have not managed to result directly in a greater accessibility and affordability of justice services. This situation was evidenced in the context of the pandemic due to the suspension of almost all activities carried out face-to-face. The use of ICTs is an essential and innovative element to broaden the spread of information and accessibility and participation channels, as long as the digital gap² is considered.

The current context shows the need to promote active policies from the states, so that the citizenship can access clear information, culturally adequate and reliable, about all the provisions created around the prevention and treatment of COVID-19, isolation compensatory measures, programs, subsidies, plans, state strategies and ways of exercising rights.

²Digital gap means the distance between people (communities, states, countries) using ICTs in their everyday lives, and those with no access to them, or even having access, they do not know how to use them. Thus, it is not only the lack of technological devices, or lack of Internet or digital connectivity, but also the lack of knowledge, use and access to the ICTs.

It is necessary that the states guarantee access rights (to information, legal education and social participation), generating public policies regarding education about their rights and for the community legal empowerment, so that people can act above the barriers restricting the access to rights. For these reasons, it is necessary to have assistance and non-discrimination protocols for vulnerable groups (due to age, gender, migratory status, nationality, ethnics, disability or socioeconomic condition) including an intersectional focus. Having these protocols elaborated, known and implemented is a first step to revert some of the barriers affecting groups in their connection to justice services.

Budget constitutes a key element in public policies. The lack of access to budget information and the lack of transparency were pointed out as a recurring problem in the different countries. In this context it becomes necessary to guarantee and allocate enough resources to face the differential impact generated by the pandemic, guaranteeing a budget that is enough for the institutions in charge of access to justice, prosecutors and public defenders to be able to properly fulfill their functions and promote inclusion in the territory.

More than ever, the context forces to allocate resources with a human rights perspective. It is necessary to allocate a budget that is enough, transparent and non-discretionary. Besides, even though there are urgent matters which must not be delayed, it should be taken into account that public policies regarding transparency and accountability should be implemented, facilitating their control by the civil society organizations and the citizenship. In order to do that, standards of transparency should be established and applied even in contexts of crisis.

It is necessary to have a roadmap in the region regarding how to guarantee access to justice in contexts of crisis and the measures that states should adopt in order to ensure the effective exercise of economic, social, cultural and environmental rights (ESCR).

This context, as well as it generates greater and new challenges, can also be an opportunity for the states, as for justice administrators in general, to learn lessons³ and find possibilities to implement innovative policies that facilitate access to appropriate channels in order to reduce the infringement of rights, and promote reforms allowing to improve the justice system so that it becomes fairer and more inclusive. It is expected that this regional report may help civil society organizations, human rights international organizations and other players to influence local, national and regional public decisions that tend to revert some of the barriers faced by the vulnerable groups in their access to justice.

³ Boaventura de Sousa Santos (2020). "La cruel pedagogía del virus" Clacso. Available: 209.177.156.169/libreria_cm/archivos/La-cruel-pedagogia-del-virus.pdf
Interview: <https://www.youtube.com/watch?v=3SEducajT3s>