

Judiciaries during COVID-19: South American experience

Carolina Villadiego Burbano

ICJ Legal and Policy Adviser for Latin America

Several Latin American governments have adopted exceptional emergency [measures](#) to face the COVID-19 health crisis. The measures, motivated by policies with the objective of urgently protecting people's health, have been accompanied by restrictions to personal freedoms (i.e. quarantines, isolations).

Judiciaries have also adopted specific measures too to protect the right to health of persons involved in proceedings while providing services for guaranteeing access to justice during the emergency. They have reduced physical operations; adopted social distancing measures in courts; postponed proceedings; authorized remote work for judges and administrative officers; incorporated urgent mechanisms to guarantee fundamental rights and allowed the use of technology.

Judiciaries fulfil different roles under international humans rights law and, as a recent ICJ [briefing note](#) recalls, these roles remain as or even more important during the pandemic. Those roles include guaranteeing individual rights, including the right to a fair trial, freedom from arbitrary detention, freedom from torture and other ill-treatment and the right to an effective remedy. In addition, the responsibility of the judiciary is to securing the rule of law more generally by reviewing the government's decisions during the emergency.

This blog illustrates measures adopted by South American judiciaries and some preliminary and personal reflections on some of the factors to be considered in assessing their proportionality and effectiveness.

Specific measures to protect health while guaranteeing access to justice

[Brazil's](#) National Council of Justice has recommended to judges several measures that could reduce epidemiological risks, such as reassessing pre-trial detentions. This review could include revoking pretrial detentions when detainees were pregnant women or were under pretrial detention for more than 90 days.

[Chile's](#) Supreme Court has established criteria for judges and other personnel to work remotely, and for holding specific hearings by videoconference with previous coordination with the parties and by ensuring due process guarantees. Also, instructions have been given to prioritize cases linked to the sanitary emergency and related to the protection of rights of persons in vulnerable conditions.

[Colombia's](#) Judicial Council postponed proceedings except for urgent ones, such as those essential for the protection of fundamental rights (*tutela*), *habeas corpus*, constitutional and legal control of the emergency governmental decrees, decisions regarding persons deprived of liberty and protective measures related to domestic violence cases. The judiciary has published email addresses where urgent applications could be made electronically and allowed the use of videoconferencing and remote work for judges.

[Ecuador's](#) Judicial Council has allowed remote working by judges, and videoconference hearings have been adopted for crimes committed *in flagrante delicto*. Judicial proceedings have been postponed, except for urgent cases, such as for crimes committed in flagrante delicto, domestic violence, juvenile justice and prisoners' guarantees. The Supreme Court and the Constitutional Court has defined rules applicable to the procedures under their jurisdiction.

[Peru](#)'s Executive Council of the Judiciary postponed proceedings and established that some judges should work physically at courts on urgent proceedings, such as those related to rights of detainees, domestic violence and payment of parental support. Some remote work has also been allowed.

Other judiciaries have adopted similar measures. Provincial judiciaries from [Argentina](#) and judges from Bolivia have held hearings through videoconferences. [Paraguay](#)'s judiciary identified urgent matters for which it would provide services.

Judiciaries, right to an effective remedy and access to justice: what next?

More than one month after those judicial measures were adopted it is important to reflect on their proportionality and their effectiveness. It is also important to envision a middle-term plan to deal with the consequences of postponement of proceedings and the likely increase of judicial workload when restrictions end. I suggest three sets of issues that could be considered as a starting point for such reflection by Latin American judiciaries, civil society and international bodies and agencies:

1. Effects on the protection of the right to health and on rights of judges and court personnel

- a. There should be a review of the measures adopted to guarantee in-person services, especially analyzing if adequate health standards have been guaranteed for all persons participating in proceedings. There has been some criticism that protective measures have been insufficient and sometimes they were only available for judges and courts' administrative staff.
- b. There should be an assessment with judges and other personnel, whether the remote work complied with health-work standards. It is crucial to review the conditions of persons working remotely, in particular in relation to information technology, and if work schedules have been flexible when judges/personnel were caring for children or dependent adults.
- c. There should be a review as to whether there has been a disproportionate effect in the workload of female judges or other female personnel while working remotely, caring for children and performing domestic activities.

2. General considerations with a human rights approach

The following questions might be considered:

- a. Review whether judicial proceedings continue to be accessible wherever necessary to guarantee the right to an effective remedy regarding human rights, and to otherwise ensure judicial review of the lawfulness of governmental decisions. The Inter-American Commission on Human Rights has [established](#) that "appropriate legal proceedings to ensure the full exercise of rights and freedoms" should not be suspended.
- b. Review whether judicial measures that guarantee the right to an effective remedy are accessible for all persons in a country, especially for those in a situation of vulnerability or risk.
- c. Establish priorities and policies for cases related to persons or groups in conditions of particular risk (e.g. detainees, migrants, refugees), and for persons without access to technology.

- d. Review if hearings held by videoconferences guaranteed parties' rights, such as due process, right to defense, right to call and confront evidence, and right to consult confidentially with one's lawyer.
- e. Assess whether the security protocols used by the remote work and videoconferencing technologies, ensure that sensitive, confidential or otherwise private information, is adequately protected.
- f. Adopt transparency policies and adopt public assessment of the measures adopted, so individuals can exercise control and oversight of these measures as they affect defendants, parties, lawyers and the general public.

3. Medium-term plan for Judiciaries

- a. Judiciaries should develop a medium-term plan soon to guarantee the right to an effective remedy to address the adverse human rights effects that COVID-19 has brought and may continue to generate. The plan should be public and should consider the possible increase of workload due to postponement of proceedings and impacts on specific rights, such as health, work, water and sanitation and food. It could consider deploying teams of emergency judges to provide access to an effective remedy for these rights and the use of adaptive case management tools.
- b. Judiciaries should develop a strategy to ensure that cases of human rights violations that constitute crimes under international law, enforced disappearances, extrajudicial killings, torture and ill-treatment, are not indefinitely delayed, cancelled or otherwise compromised. Such impediments must not be allowed to result in impunity of perpetrators or pose obstacles to ensuring that victims receive complete information regarding the advance of their cases.

The COVID-19 pandemic has modified judiciaries' methods of work. As they adopted specific measures to protect the health of persons as well as to provide judicial remedies, it is important to review their measures with a human rights approach. It is also critical that judiciaries themselves analyze their practices and adopt changes when necessary. The Inter-American Commission of Human Rights and the UN Special Rapporteur on the Independence of Judges and Lawyers should continue to specifically monitor these measures and report on them.