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Will the COVID-19 Crisis Help Us Trace a Path Towards More Equitable Access to Justice?

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Abstract

COVID-19 infections continue to rise, and every segment of society has been significantly disrupted. While there is advocacy for adherence to the rule of law and human rights principles in the pandemic response, there remains a lack of attention towards access to justice specifically. It is already clear that COVID-19 has impacted access to justice for all, and especially for vulnerable groups – although to what extent is not yet known. As justice systems have rapidly adapted new technologies and innovations in response to the pandemic, we have the opportunity to ensure our “new normal” enhances, rather than prevents, more equitable access to justice for the most vulnerable. This article is a call to action urging justice systems to seize this unique opportunity to enhance equitable access to justice.

Introduction

On March 11, 2020, the COVID-19 outbreak was declared a global pandemic by the World Health Organization (WHO). With global infection numbers continuing to rise, every segment of society has experienced significant disruption. Global priorities have shifted towards health and economic responses, with resources being diverted away from justice systems towards more immediate public health measures to address the virus (United Nations Office on Drugs and Crime [UNODC], 2020). Globally, courts and supportive legal services have shut down or significantly restricted operations (Hiil, 2020). Simultaneously, the pandemic created new legal needs and left those seeking resolution with limited options.

While large international development and justice-focused organizations are advocating for strict adherence to the rule of law and human rights principles in the pandemic response (International Develop-

ment Law Organization [IDLO], 2020; International Center for Transitional Justice [ICTJ], 2020; UNODC, 2020), there remains a lack of specific attention to the heightened access to justice issues caused by the current public health crisis and its social and economic impact. It is too early to assess the full impact of COVID-19 on access to justice, yet it is already clear that: (1) the pandemic itself has affected access to justice for all, but especially for vulnerable groups; (2) pandemic containment measures, including social distancing requirements, the closing of courts, the postponement of cases, and others, have affected all, but especially vulnerable groups; and, (3) the justice system has been forced to improvise and innovate to face the crisis, and we have yet to understand the full impact of these changes on access to justice, especially for vulnerable groups. The question remains as to what the “new normal” will look like. We are at a critical juncture. Will we preserve and build upon innovations that have proven to be worthwhile, many of them enabled by technology? Or we will revert to deficient practices that were already extremely problematic, particularly for vulnerable groups?

Understanding Access to Justice

Access to justice plays a key role in the realization of human, social and political rights, peacebuilding, the reduction of violence, the resolution of conflict and in strengthening the rule of law (Kleinfeld, 2012). The most widely accepted definition of the concept is: “the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards” (United Nations Development Program [UNDP], 2005). Departing from historical definitions of access to justice, which focused primarily on access to the courts and legal aid, current conceptualizations include not only access to mechanisms, but also to outcomes which are considered fair and just – particularly from the perspective of justice system users (Action Committee on Access to Justice in Civil and Family Matters, 2019; Bedner & Vel, 2010).

Access to justice is referenced in international human rights law and is a key component of the 2030 Agenda for Sustainable Development’s Goal 16: Peace, Justice and Strong Institutions (United Nations, 2015). A target of Goal 16 – Target 16.3 explicitly

seeks to “promote the rule of law at the national and international levels and ensure equal access to justice for all” (United Nations, 2015). Despite innovative efforts to reach this target, prior to the pandemic there was a serious access to justice problem, particularly for vulnerable populations and experienced more harshly by those in conflict-affected and post-conflict settings. The 2019 Task Force on Justice report, *Justice for All*, reported that, at that time, 1.5 billion people had a justice problem that they could not resolve.

Finding a pathway towards a legal remedy depends on many factors. Generally, and across countries, barriers to access to justice include limited knowledge of the law or one’s rights; cost; physical, language and geographical accessibility of the justice mechanism; availability of legal assistance; poverty; lack of trust; corruption, stigma, fear, intimidation and discrimination (Marchiori, 2015; McKay, 2015; O’Connor, 2015). It is also widely acknowledged that these barriers disproportionately impact women and other vulnerable groups, such as Indigenous populations, ethnic or language minorities, persons with disabilities, migrants, refugees, LGBTQ+ persons, those in poverty and others (Task Force on Justice, 2019). It is not yet fully understood how COVID-19 will impact these barriers over the long-term; however, it is clear that the pandemic has intensified vulnerability, especially for those who lack access to justice the most.

Compounding Vulnerabilities: Unique Access to Justice Needs Due to the Crisis

In an unfortunate twist, citizens whose human rights are generally less protected are more likely to experience unique difficulties as a result of the pandemic (Hall et al., 2020). For example, senior citizens are now more susceptible to being victimized by elder abuse and other forms of human rights violations (D’cruz & Banerjee, 2020; Elman, Breckman, Clark et al., 2020), while also being at the highest risk of fatality from the virus. Refugees, whose access to justice is always extremely precarious (Bond & Wiseman, 2020), may be at an increased risk of contracting COVID-19 due to overcrowding and lack of basic sanitation in refugee camps. In violation of international law, refugees may also be returned to their countries of origin where they are at risk of persecution or death

(Kluge, Jakab, Bartovic, D’Anna & Severoni, 2020). Racial, religious or ethnic minorities may experience increased xenophobia and hate crimes due to conspiracy theories and quarantine measures that focus on their specific population group (Ahearn, 2020; Ehsan, 2020). In non-pandemic time, those living in conflict-affected or post-conflict settings experience diminished access to justice for a variety of reasons (Brinkerhoff, 2005; OECD, 2005).

The nature of these states may make them less likely to protect citizens from the virus, increasing mistrust in the state (UNDP, 2020) which, along with the further breakdown of fragile justice institutions, leads to diminished access to justice. These states may not have the logistical capacity to provide judicial oversight of the implementation of emergency measures — possibly leading to excessive use that may target vulnerable or social, ethnic, or religious minority groups (UNDP, 2020). Inmates and people facing accusations are another highly vulnerable group. Prisons and remand centers generally experience high levels of crowding, a concentration of vulnerable populations, possibly limited access to health care and the challenging logistics of physical distancing requirements — creating an ideal breeding ground for COVID-19 (Amon, 2020; Corrections Forum, 2020; Morczek, Durante & Kennedy, 2020). For these individuals access to justice may be seriously limited by decreased access to legal aid, delayed trials, pressures to plead guilty and less access to public oversight mechanisms. Their rights to equality before the law, rights to an independent and impartial justice and rights to appeal decisions in a timely manner to reduce being arbitrarily detained may be significantly impacted (UNDP, 2020). Limits on visitation may impact their right to counsel or access to children or family supports (Morczek, Durante & Kennedy, 2020).

Gender-Based and Domestic Violence during Lockdown Measures

Women, who generally experience unequal access to justice in non-pandemic times (Committee on the Elimination of Discrimination Against Women [CEDAW], 2015), are more likely to be victims of gender-based violence during the COVID-19 crisis. Past pandemic experiences (including Ebola, Cholera and Zika) have demonstrated

an increase in gender-based violence as well as a culture of impunity due to the overwhelming nature of police and security actors (UN Women, IDLO, UNDP, UNODC, World Bank, and the Pathfinders, 2020). Since the beginning of the COVID-19 pandemic there were warnings of an impending boom of domestic and gender-based violence and, for victims, there have since been clear examples of failing to provide access to justice. Current examples have begun to emerge across the globe and have disproportionately impacted women (Simonovic, 2020). To highlight one instance, an experience from Lebanon shows diminished access to justice for victims of gender-based violence, due both to court closures and to the hesitancy of forensic doctors to document physical abuse of victims at police stations for fear of spreading the virus (National Commission for Lebanese Women, UN Women, WHO, UNFPA, 2020). Aside from the limited information on experiences of accessing justice once the victim has reported the offence, it is challenging to determine how COVID-19 is impacting offending and victimization rates for these types of crimes. In no way diminishing the risk to victims, it is not yet clear if domestic and gender-based violence has significantly increased during COVID-19, and is not being reported, or if the warnings of a massive increase have been unfounded.

Hodgkinson and Andresen (2020) and Ashby (2020) both showed no notable changes in violence or domestic assaults during the first 12 weeks of lockdown in 16 large American cities and Vancouver, Canada, respectively. Contradicting this, Mohler et al. (2020) showed a significant increase in domestic violence calls in both Los Angeles and Indianapolis. The United Nations (2020) reports that in France domestic violence reports have increased by 30% since lockdown measures were implemented with Argentina and Singapore reporting increases of 25% and 33% respectively. At the time of this writing all available studies focused on reporting to the authorities, which is problematic due to the sensitive nature of these crimes (Ashby, 2020; Hodgkinson and Andresen, 2020). Survey-based measures of victimization may be helpful in qualifying the available administrative data and putting it in perspective, but this kind of sensitive data is typically hard to collect (Rodriguez, Takeuchi and

Hine, 2015) and even more difficult to gather during lockdowns (Ashby, 2020) or, in conflict affected societies (Saferworld, 2013). The logistics of lockdown and quarantine measures, along with the shut down or reduction of supportive services (Elman, Breckman, Clark et al., 2020; Townsend, 2020), make it realistic that domestic violence would increase and that victims would be less likely to report during COVID-19. Whether or not violence levels within the home have remained the same, victims' access to protection and support would be affected by the pandemic as a result of isolation during a lockdown and/or the victim's greater economic dependence on the offender.

While the long-term impact of COVID-19 on vulnerable persons has yet to be fully revealed, barriers to accessing any support at all in a minor pandemic were consistent with the known barriers to access to justice in non-pandemic times (DeBruin, Liaschenko and Marshall, 2012). Pathfinders (2020) highlights that those who are poorly served by both health and justice systems in non-pandemic times are less likely to seek support from either system during COVID-19.

The Pandemic as the Great Revealer of System's Strengths and Past Failures

A historical lack of attention on ensuring fair and effective access to justice for these groups is now leaving some of our most vulnerable citizens without recourse or effective protection – at a time when the pandemic is making them more vulnerable than ever. Those who have been traditionally neglected by the justice system now risk being completely abandoned by it. The current global pandemic has confronted justice systems with their past failures to innovate and address persistent fundamental challenges. Herein lies perhaps also a great opportunity. The pandemic is providing us the occasion to revisit areas which have not been getting enough attention. We are being offered a rare and distinctive opportunity to address the deep and persistent access to justice issues that have been made even more salient by the crisis. The pandemic has the potential to profoundly reshape our justice institutions towards significantly increased access to justice, particularly for the most vulnerable.

A challenge remains that available research is generally focused on one area – such as access to legal assistance, without accounting for the diverse and varied ways people access justice. The current research also fails to tell us why some individuals do not begin to embark on a journey of resolution, and it tells us even less so about the pandemic’s impact on these choices.

To increase access to justice, particularly for vulnerable groups, we must recognize their experiences. We must understand exactly how the pandemic and the related justice reforms have impacted the pathways they use to resolve a legal issue. We must also understand the experiences of those who don’t embark on a pathway towards accessing justice. With a general and consistent lack of performance measures in the justice sector, this task becomes exceptionally difficult.

It must be acknowledged that there will never been a one size fits all solution to justice reform. In our world of diverse and plural legal and justice systems access to justice measurement and monitoring must be unique and relevant to each context. The time is right to seize the opportunity to monitor and address these issues. In order to truly achieve more equitable access to justice we must learn from our past failings and fully accept data and measurement processes as essential components of understanding and reforming access to justice.

Justice Innovation made Necessary by the Crisis

While the virus continues to spread to unknown numbers, the pandemic crisis has had a profound disruptive effect on the justice system and on access to justice. As noted in the terms of reference of the Action Committee on Court Operations in Response to COVID-19 (2020), the pandemic has exposed some of the shortcomings of existing processes and practices. It has introduced new challenges to Canada’s justice system, most notably the creation of significant backlogs, but it has also created a great opportunity for sector-wide innovation and reform. Our justice institutions have been submitted to a very revealing stress test.

Courts have been forced to limit their activities to urgent matters thus creating a potentially challenging backlog of cases that will soon require attention and might only be solved by diverting certain matters to alternative resolution or adjudication processes (HiiL, 2020). As some of the normal pathways to justice and conflict resolution narrowed or were obstructed, new pathways to justice opened, even if only on a temporary basis. In British Columbia, Canada, for example, family courts increased their encouragement of early resolution through mediation while also supporting the implementation of readily accessible, free, online mediation in family matters, where appropriate (Sixta, 2020). As physical distancing was required for public health reasons, distance transactions and interactions were introduced in the justice system in ways that had previously been held as impractical or impossible. Online court applications, filings, submission of documents, and registration were facilitated, as well as online scheduling, remote legal consultations, online witness testimonies, remote mediation, and distance hearings (Helmer, 2020). In addition, there were many forms of innovation happening among community-based legal service providers – including mobile justice clinics, drive through legal services, and cross-sectoral collaborations (see for example, Robert, 2021).

Along with these necessary adaptations, it is evident that legal needs are changing and/or increasing as the pandemic evolves (Legal Aid BC, 2020). There are predictions that family and civil issues, such as housing and employment, will drastically increase (HiiL, 2020). Indeed, there are already situations of this emerging. For example, Pro-Bono Ontario, a free hotline providing civil legal advice to low-income Ontarians, saw a 72% increase in calls when compared with the previous year (Brockbank, 2020). Requests for support with employment and housing needs witnessed the biggest demands, with employment-related calls up 153% and housing calls up 142%. This is consistent with other examples showing drastically increased demands for employment and housing support (Busy 2020 for Sudbury, 2020; Legal Aid BC, 2020).

While we understand that there have been modifications to justice system operations and increasing legal needs, what remains less known is how people choose to resolve their legal challenges, or not,

and what their experiences of accessing justice are (OECD, 2019). Prior to the pandemic, a gap existed, in particular, in understanding resolution of civil and family justice issues (Action Committee on Access to Justice in Civil and Family Matters, 2013; Pereira, Perry, Greevy and Shrimpton, 2015). With legal needs in these categories amplifying (Legal Aid BC, 2020) understanding the experiences of those seeking remedies for these grievances will be essential in ensuring the success of current and future reform.

Whether the “new normal” emerging in a post-pandemic era will be more conducive or detrimental to greater access to justice for all is not something that will be determined by accident. It will be determined by concrete efforts to learn the lessons we were taught by the pandemic, especially focused on those whose vulnerability and legal needs have been exacerbated by the crisis. The only way to capture the experiences of these groups, and learn these lessons, is by adopting monitoring and measurement processes now.

Rapid Adoption of Technology and the Opening of New Pathways to Justice

The impact of COVID-19 on our justice institutions, and those seeking to access them, has created an environment which is ripe for change. This potential for transformative change is somewhat hindered as past failures to develop and adopt robust measurement processes now leave some justice authorities without the metrics needed to make urgent, and often difficult, decisions. There is promise, however, as previous resistance to change is overwhelmed by the need to invent a radically different “new normal” (Dandurand and Millar, 2020). It is too early to tell if many of the resulting adjustments and innovations amount to little more than improvisation and may eventually prove to be quite problematic. Nevertheless, amid these swift changes some interesting innovations have become possible. These include new practices based on the same technologies that justice institutions have been notoriously slow to adopt and adapt to their specific functions.

Technology or “going virtual” was swiftly implemented in response to COVID-19. A report published by Pathfinders in May 2020

highlights that at least 40 countries have moved towards making court services online in response to the pandemic. The rapid expansion of remote hearings is what has allowed, to some extent, courts to continue to proceed during the pandemic. It is not clear to what extent this approach will be integrated within the justice system in the longer term.

Increased technology in the court process have generally been welcomed by justice system actors at local (Chidley-Hill, 2020), national (McLachlin, 2020), and global levels (UNDP, 2020). Anecdotal feedback is being shared which presents this shift as a positive advancement towards access to justice for all (Lokur, 2020). Unique adaptations must be, and are being, made to preserve the fundamentals of strong and trustworthy justice (Schmitz, 2020), while barriers to access to justice, including time, money, transportation, and childcare challenges are reduced by the move to an online space. Even in fragile settings, there are practical strategies that can be implemented to ensure virtual justice mechanisms, such as remote courts, are successful and sustainable in the aftermath of COVID-19 (United Nations Peacekeeping, 2020).

With an eye to the most vulnerable, there is promise and humble reservation as to how the shift to increased reliance on technology will impact equitable access to justice. COVID-19 forced the increased use of technology in the courts to streamline the justice process, but is not a new concept. Prior to COVID-19, Katsh and Rabinovich-Einey (2017) urged, “Investing in both old and new forms of dispute resolution should be an important societal priority” (p.3). For many years there has been a slow international movement towards online filing, online forms, and online court diaries, with online dispute resolution (ODR) being piloted in many courts around the world (Hodson, 2019; Sela, 2017).

Despite this positive potential, technology should not be seen as the ultimate solution for increasing access to justice. While research is lacking, Byrom (2020) presents some interesting insights. In a review of 21 small scale and qualitative studies focused on parties in detained settings some key themes emerge. These include the challenge with parties fully appreciating the seriousness of

proceedings and, in return, being less likely to afford themselves procedural safeguards, including legal advice. Defendants also found it difficult to communicate with their legal representatives when they were having challenges in following the proceedings (Byrom, 2020). Witness credibility was found to be decreased and the vulnerability of the client was more difficult to assess (Byrom, 2020). With this review focused on criminal processes, there remains an absence of research focusing on experiences with technology in civil or family issues. This is exceptionally problematic as legal needs in these categories are increasingly rising (Legal Aid BC, 2020) and are predicted to continue doing so (HiiL, 2020).

It is irrelevant to discuss the challenges with realizing the aims of justice through technology, without also recognizing the inherent inequalities with internet and technology access (Landry, 2020; McLachlin, 2020). Those in poverty likely have less access to mobile phones and computers to access the internet and thus court services. This may lead to a reduction of judicial participation for low-income populations (Landry, 2020). There are already early reports of clients missing out on Tribunal hearings due to a lack of access to technology (Busy 2020 for Sudbury, 2020). Rural communities may not have appropriate bandwidth and people may be unfamiliar with technology (UN Women, IDLO, UNDP, UNODC, World Bank, and the Pathfinders, 2020). In low-income countries only 40% of people without identification have a mobile phone, compared with 65% of those with identification. It is also clear that the digital divide disproportionately impacts women. The 2020 Gallup World Poll surveyed 150 countries and found that almost 500 million women were not connected to the internet in 2017. The largest gender gaps were found in South Asia (20%), Sub-Saharan Africa (13%) and the Middle East and North Africa (10%). For those who have access to technology, such as mobile phones, gender norms may prevent women from using them (Barboni et al., 2018; UNDP, 2020). Coupled with the predicted rise in domestic violence, this is a concern which requires dedicated practitioner awareness and additional research.

While there is an eye towards ensuring those who don't have access to technology are not left behind (Hasham, 2021), it is less

understood how exactly this would work in practice. While the very use of technology in the courts can increase data availability (McLachlin, 2020), to date, there is a drastic lack of data analyzing how the shift towards increased reliance on technology has been experienced by justice system users — especially for those experiencing family or civil issues. The challenge with these conversations, although extremely necessary, is that they take a limited conceptualization of access to justice — one which focuses solely on the court process. To truly improve access to justice it is essential that we understand the experiences of all people experiencing a legal issue, not solely those who pursue a remedy through the courts.

The Future of Access to Justice: Our Ultimate Test

We are living in a unique time in history. The suddenness of the COVID-19 crisis, the great turbulence it has created in our institutions and the demands it places on them for immediate changes allows us to reflect on our assumptions of equitable access to justice. Unfortunately, this opportunity is limited due to our past and current failures to consistently incorporate measurement and monitoring processes into our justice systems.

The pandemic has simultaneously created new access to justice challenges, particularly for vulnerable groups, while also revealing the weaknesses of existing institutional arrangements. Creative solutions are being proposed, out of necessity, including innovative approaches that may bring the courts into the digital age or reconsidering the current use of pre-trial detention and incarceration. While we are still in the early stages of understanding COVID-19's full implications on access to justice for all, it is clear that the future of access to justice is no longer what it used to be. We are left with the question: how will we shape it? The systemic adaptations and accelerated change that COVID-19 has forced have created a great opportunity for us to learn about justice innovation and to reaffirm our commitment to equal access to justice for all.

It is evident that positive outcomes are enhanced with a coordinated interdisciplinary approach recognizing the intersecting vulnerabilities

an individual may have (Bowling, Reiner, and Sheptycki, 2019). With the greater shift towards technology, achieving equitable access to justice is not the responsibility of the justice sector alone. In fact, since the pandemic, justice stakeholders broadly believed formal court processes were less effective than community justice mechanisms and suggested more investment in this area was necessary (Hiil, 2020). During the current global pandemic and beyond, it is essential for justice system actors to coordinate with the social service and community capacity building sectors to empower vulnerable populations in achieving access to justice through technology. This can only be successful if there is a greater understanding of their needs.

These issues are not insurmountable. They can be mitigated by adopting a rational approach based on understanding the experiences of users, through robust measurement processes, and focused on the primary justice principles of transparency, fairness and due process (Schmitz, 2020; Sela, 2018). We must grasp this unique opportunity for long overdue change. As stated by Susskind (2019),

I see no reason to wait for a new generation to bring the great change in the delivery of court service. If it is within our grasp to effect meaningful improvements now, then we should be applying ourselves today, rather than leaving the job to our descendants. (p. 2)

Change is meaningless unless we can assess its impact. We must understand the importance of monitoring and measurement now. We must commit to understanding the experiences of vulnerable groups and recognize the holistic nature of access to justice, which goes beyond the court system.

Urgent Need for Research

A challenge remains in that the many urgent questions confronting the justice system, as a result of COVID-19, are unlikely to find many answers in existing data and research. New efficiency measures have been introduced, budget cuts made, rules suspended, new technologies applied, all without the data or the means to monitor the

impact of such changes on access to justice, particularly for vulnerable groups — or to hold decision makers accountable for the choices they make. If we are committed to renewing our justice sector in a way which increases access to justice for the most vulnerable, further work is required to ensure that the impact of remote hearings, remote mediation and other innovative practices that have emerged can be researched effectively in order to inform future practice. We must also understand the unique legal needs that have arisen due to the pandemic. Developing a research program in the context of the pandemic will have its own challenges; however, in all this lies new opportunity to learn about how to understand, measure and, ultimately, improve access to justice for all — including for our most vulnerable citizens. Specific research is needed on the following:

- Understanding the new legal needs that have arisen from the pandemic.
- Understanding how the pandemic has affected a person’s pathway to justice.
- Understanding the user experiences for court processes dependent on technology.
- Monitoring the effectiveness of newly implemented technology.
- Evaluating service delivery models and their impacts on justice pathways.
- Determining key areas where the justice system and community-based practitioners can work together to promote access to justice.

Conclusion

The COVID-19 crisis has created evolving justice innovation, while also providing the unique opportunity for long-term sustainable reform. The potential of this reform to lead truly equitable access to

justice is severely limited unless we understand how it is impacting those who need the system most. The only way to do so is through dedicated commitment to measuring and monitoring the impact of reform, particularly for vulnerable groups. This unprecedented global experience is testing us and our value systems. Our commitment to vulnerable citizens — generally experiencing access to justice barriers and now additionally marginalized by the virus — is being challenged. We must grasp this opportunity to renew our justice systems in a way that is responsive and accessible to all. Said best by Harvard University President Lawrence Bacow in a March 13, 2020, email to the university community:

No one knows what we will face in the weeks ahead, but everyone knows enough to understand that COVID-19 will test our capacities to be kind and generous, and to see beyond ourselves and our own interests. Our task now is to bring the best of who we are and what we do to a world that is more complex and more confused than any of us would like it to be. May we all proceed with wisdom and grace.

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