

Post Covid-19 Access to Justice and SSG/R

Advisory Note

June 2020

Community Access to Justice in a Post-Covid-19 World

The Covid-19 crisis has placed state resources and decision-making under acute pressure. No sensible analysis suggests that the crisis is nearing the end, nor that a return to what was normality before the pandemic broke is a likely short-term (or even permanent) outcome. Secondary impacts have been forecast to include a severe economic recession leading to a reduction in available public funds and therefore also public services. As many donors look inwardly, counting the domestic cost, foreign aid budgets will understandably come under scrutiny. With less ODA likely to be available, it will be vital that the investment of public funds overseas is able to demonstrate not only its efficiency and effectiveness but also its relevance and responsiveness to the crisis. This is particularly important as donors consider reallocating spend on 'access to justice programming'.

For the purposes of this paper 'access to justice' is a concept familiar to both rule of law (ROL) and security sector reform/governance (SSG/R) and mostly implicates the judiciary, police and prisons. This paper narrows its lens to focus on the impact of Covid-19 on the judiciary in developing countries with more focus on the criminal over the civil courts. The role of the police and prisons are only briefly examined, as other ISSAT papers will look at that in more detail. In addition, the role of non-state justice actors, which is well understood to be an enormous provider of access to justice across the globe, either when sanctioned by the formal system or entirely independent of it, is largely outside the ambit of this paper and will be considered later.

This Advisory Note makes the case for maintaining donor engagement on community 'access to justice'. This is not only because access to justice is a vital public service, but because, if done well, it can be part of a robust and effective response to the current pandemic. That said, for donors to act, two conditions must be met. First, the ongoing need for access to justice support needs to be proven- why prioritise access to justice programming over all the other competing demands on decreasing aid budgets? In other words, the central observation of this paper namely of compatibility of good access to justice programming and crisis resilience should be tested in different countries, against different challenges. Second, the status quo in programming methodology can no longer be acceptable. An evidence-based rethink of how to maximise value for money and have increased impact by pivoting access to justice programming to respond to the changed Covid-19 world is needed.

This paper is separated into four sections. First, it puts the criminal justice crisis on the radar by explaining the nature of the crisis that is looming. Second, it makes the argument that Covid-19 does not raise entirely new challenges, but rather highlights the importance of pre-existing ones. It follows that the solutions can also be found in existing practice and principles. This suggests that a complete overhaul of the system is not required, but rather a recalibration, and in fact revalidates the need for good access to justice programming against these challenges. The third section is the most detailed, discussing trends and issues affecting the criminal justice system due to Covid-19 and where relevant suggesting possible solutions. Last, it makes recommendations for donors as regards both immediate and medium-term interventions in support of the criminal justice system in developing countries as they grapple with the fall out of Covid-19 in their ability to provide access to justice.

Judicial Institutions Resilience: The Real Weak Link

As the world's focus is upon frontline services, principally the provision of healthcare, it is easy to be distracted from the impact of the crisis upon justice systems and the consequences for those reliant upon them if they do not function effectively and expeditiously. Domestic violence and the growing influence of militias assuming a law enforcement role are some of the trends that are emerging across the globe. Burgeoning prison populations, caused principally by the inability to process trials, has been compounded by the Covid-19 crisis. Most legal frameworks typically allow for a certain period- often months- of pre-trial detention. The full effects of the courts' inability to hold effective trials is felt once those periods have been exceeded. It is also likely that there is a degree of cultural tolerance for the curtailment of certain rights, which is also assisting in staving off the crisis for the time being. But unless these trends can be reversed, it seems likely that it is only a matter of time before dissatisfaction and unrest sets in.

Covid-19 may well prove to be a flashpoint for the Rule of Law in many states as stretched or unreliable regimes diminish democratic principles, either through incompetence or as a veil for more sinister motives, leaving large vulnerable populations threatened or unprotected. The Rule of Law is not a dispensable luxury. The temptation to construe the Rule of Law as unfit for the exigencies of the crisis and a justifiable casualty of it can develop into a

vicious circle where rights are denied exacerbating secondary effects by creating greater pressure on public services; in turn, foreseeably cascading into risks to stability.

From a crisis management perspective, Covid-19 presents a very new set of challenges for access to justice. Whereas health care systems and law enforcement services, for example, are accustomed to adapting to a crisis, justice systems have rarely been called on to operate in such circumstances. Therefore, they tend to lack the institutional resilience that can be found in other public services. Moreover, in many developing and post-conflict jurisdictions justice systems exhibit traits of machine-type bureaucracies, where decisions are made in hierarchies and the ability of actors to exercise professional discretion within those hierarchies is limited. This model often leads to stagnated rather than dynamic decision-making, rendering it unsuitable to address the quickly evolving challenges of the crisis.

COVID-19 is New but the Challenges are Not

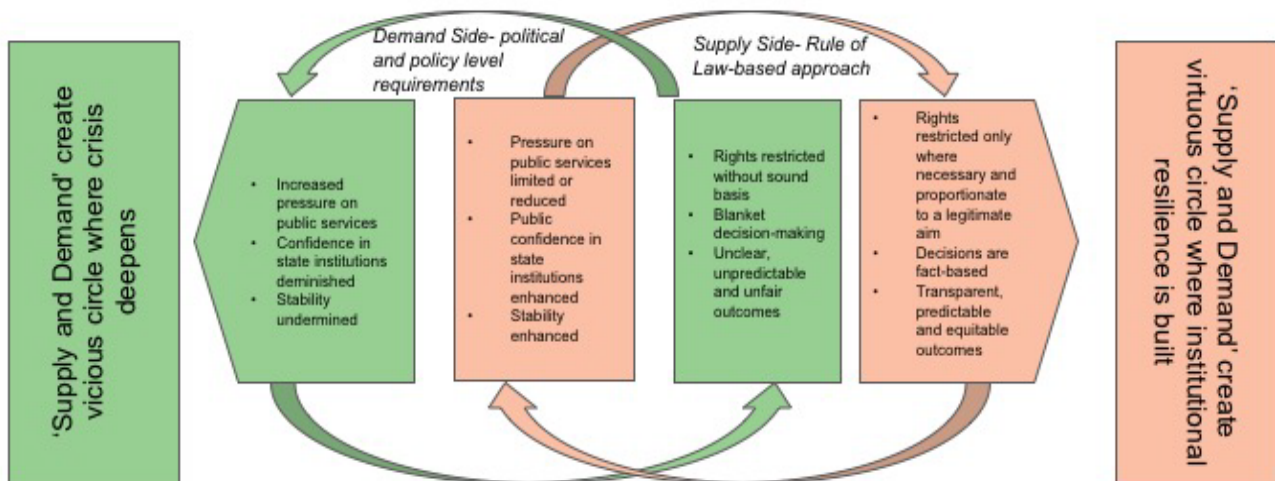
Whilst Covid-19 is a new pathogen afflicting the system, the challenges that it presents for the justice systems are not. At the micro-level, the current crisis has accentuated the importance and urgency of many of the challenges that Security Sector Governance and Reform (SSG/R) has been attempting to address within the criminal justice system for decades. Because areas of the justice system simply cannot function now, the pandemic has brought into sharp focus those areas that are dysfunctional or sub-optimal, laying bare some of the inadequacies of SSG/R methodology and its implementation.

Case Study - Maldives

The Maldives Criminal Court is one of the five superior courts located in Male. It has a chronic backlog of cases now further exacerbated by having been shut for over six weeks during Covid-19. While the Criminal Court is over-burdened, many of the 132 sitting magistrates that staff the 187 magistrate courts across the Maldives' inhabited islands only hear a handful of cases each year. A mobile court system has long been mooted as an efficient and effective court structure that could ensure more effective access to justice so long as safeguards are built in, however it would lead to the loss of jobs for some magistrates - which is commonly thought to be why the reform has never occurred. Going forward, the Criminal Court will not be able to institute social distancing measures, because the building and court room are both too small. The pressures now bearing down on the Maldives's Criminal Court shows how Covid-19 has heightened pre-existing access to justice issues, i.e. relating to backlog and inefficient administration of human resources. Covid-19 presents a catalysing opportunity to reform the structure of the Maldives judiciary to make it more accessible to islanders – by shutting down/re-purposing many Magistrates Courts and through the introduction of technology to make court hearings more accessible.

At the meta-level, the current crisis will threaten the justice sector differently depending on how the state security and justice institutions respond to it. In countries where people look to their judiciaries and see them appropriately tackling the urgent issues Covid-19 has raised – for example, adequately overseeing States of Emergency by holding the Executive to account, while slowly devising ways of re-opening courts to address access to justice issues, and where all decisions are taken in an equitable and dynamic way, a virtuous circle should be created where citizens will have faith in the justice institutions which will enhance confidence in government and build stability. In this virtuous circle, institutional resilience and stability should become enhanced. On the other hand, a vicious circle will be created if during Covid-19 the state justice and security institutions abuse their role in society. The legacy of such action carries the risk of creating or enhancing instability.

This diagram highlights a vicious circle Covid-19 risks creating which impacts access to justice, and the virtuous circle we need to rebuild.



Trends, Challenges and SSG/R Solutions

TREND: Crime patterns are changing; demand is increasing, and supply is compromised

The impact of Covid-19 on the supply of access to justice is far-reaching and obvious. In most jurisdictions, courts have been closed for months and police are overloaded combatting Covid-19 related issues. Compounding this problem is the apparent increase in demand, as certain categories of offences appear to be on the rise. There is evidence, for example, that incidents of domestic violence, [cybercrime and fraud](#) are all experiencing upward trends across multiple jurisdictions.

Case Study - Nigeria

Maiduguri State in Northern Nigeria (amongst others) is experiencing surges in reports of domestic violence as well as all types of sexual and gender-based violence (SGBV). Food insecurity, general lawlessness and the absence of social structures that were there before are amongst a number of consequences of the crisis that have created space for SGBV to proliferate unpunished. The Civilian Joint Task Force, a militia that has assumed law enforcement responsibilities in Maiduguri State are reported to be forcing women and girls to have sex in exchange for food. Violent rapes including during armed robberies in victims' homes are also being reported. The rise of militia groups such as the Civilian Joint Task Force during the current crisis follows a trend set by other crises. For example, conflict-affected parts of Nigeria also experience increased prominence of civilian militia and the consequential problems for security caused by their enhanced influence.

There is also a sense that the true picture may be much worse than is documented as women and children are unable to report abuse for various reasons. Notwithstanding, Lagos State Sexual and Domestic Response Team reported a significant increase in calls reporting abuse almost immediately (i.e. within 36 hours) of lockdown measures being announced.

There are also [indications](#) that the threat posed by terrorism will increase as groups seek to take advantage of security apparatus' debilitated by the pandemic and an international community looking elsewhere. [Al-Qaeda](#) and the [Da'aesh](#) have both issued formal public statements on the pandemic through their respective media channels, providing guidelines to their followers. Da'aesh urged its followers to actively continue to wage global jihad and to take advantage of overburdened security capabilities to launch attacks.

To address the changing nature of the demand side, it would be advisable for countries to map crime patterns and re-allocate resources accordingly. On the supply side, as justice systems reopen, if

backlogs are too unwieldy there may be cause to think creatively about traditional or informal solutions to take the pressure off the formal court system.

TREND: The Role of Technology and Digitalisation

Undoubtedly IT has a significant role to play in ensuring access to justice in a post-Covid-19 world. Video-links to prisons and police stations are currently enabling appropriately distanced hearings to continue. The possibility of hearing witness evidence by video-link also improves the chances of effective trials during restricted times. As mentioned, most jurisdictions with the infrastructure to do so are holding non-evidentiary hearings via video-link. Several jurisdictions including [Singapore](#), and the [UK](#), have already put in place the infrastructure and protocols to enable civil and criminal trials to proceed by video-conference. However, these measures appear temporary and in many developing countries access to such technology may simply be out of financial reach. At the moment in some jurisdictions, Microsoft Teams and other tools are being trialled, upon which adaptations to meet the contextualized needs of each jurisdiction could be made. However, it is very difficult to foresee that holding trials wholly through multi-channelled video platforms will not be replaced as soon as restrictions lift, or an alternative is found.

In order to ensure systemic resilience to future crises, we recommend that a range of possible solutions for holding trials whilst respecting social distancing, making full use of IT-based methods, be scoped to assess their suitability for ensuring a fair and effective trial.

CHALLENGE: Ensuring judicial oversight of pre-trial detention

Invariably, [domestic criminal procedure](#) will involve producing defendants in custody before competent courts at regular intervals. These procedural obligations are commonly constitutional in nature and derive from or are read in compliance with applicable international human rights instruments. Article 5(3) of the [ECHR](#), for example, provides that arrested persons shall be brought “promptly” before a judge, as an important guarantee against arbitrary or unjustified deprivation of liberty. “Prompt”, in this context, means no more than four days. Thereafter, suspects or defendants must reappear before judges at [regular intervals](#).

Such hearings usually take place in courts and form a very considerable part of the lower courts’ daily workload. So, where court business is restricted plainly a problem arises in meeting these obligations. These issues can be tackled through the use of video-link technology, if available, where detained persons are not required to leave the police station or prison of detention. Indeed, in many jurisdictions, including the UK, conducting so-called “remand hearings”, as well as administrative hearings (e.g. taking pleas, setting directions for trial, committing to the Crown Court etc) via video-link is common practice and compatible with international human rights law.

Where video-link technology capability is unavailable, SSG/R should support justice systems to acquire it. Not only does it provide a solution for conducting hearings remotely during restricted times, it can also be a more efficient and secure method of doing so at all times, limiting the costly need for secure transport of high value defendants. This is a good example of the compatibility of international best practice with building inherent systemic resilience.

CHALLENGE: Ineffective trials

The consequences of being unable to conduct trials presents a far more challenging problem on the basis that “justice delayed is just denied”. However, it is most acutely felt where defendants await trial in custody.

Human rights legislation demands that overall limits be placed on the amount of custody that can be served before a defendant is tried. In many jurisdictions across the world trials have been suspended. This raises a number of concrete questions of concern:

- Whereas custody time limits can often be extended upon a showing of good cause, how should judges assess the emergence of Covid-19 against that criterion and how should they balance it against the defendant’s right to liberty?
- How do judges differentiate between defendants of petty crimes and demonstrably dangerous defendants? Does there come a point at which judges are compelled to bail dangerous defendants who are nevertheless not convicted of the offence with which they charged and therefore presumed innocent? How should judges approach this exercise?

- As arrests continue to be made at one end of the criminal justice pathway, cases are not being processed at the other. This has obvious and very serious consequences for prison populations which will be most acutely felt in developing countries where over-crowding in prisons is a common feature (see observations on prison populations below).

Plainly, judiciaries with functional bail regimes are at an advantage. Again, in evidence is a strong alignment of human rights principles and crisis resilience. [Best practice](#), rooted in human rights traditions, demands that bail should be the presumptive outcome of a remand hearing and that liberty should only be deprived where proportionate to and necessary to avert legitimate concerns (for example where the defendant is a flight risk or is likely to pose harm to the public). States that operate bail procedures based upon these principles are not only more likely to comply with human rights standards, they also have a mitigation built into their procedural framework against the risk of uncontrollable growth of prison populations caused by the inability to hold trials.

Aside from custody time limits, many jurisdictions limit the time between arrest or the commencement of an investigation and trial. Clearly, these statutory time limits will be under threat from the inability of judiciaries to conduct trials. The question arises as to whether these time limits can be suspended? If so, are any rights undermined. If not, is there a risk that some meritorious prosecutions become time barred. How should judges or policymakers balance these competing interests?

Donors need to support judicial authorities to put in place processes that will enable them to flag and to prioritise time-sensitive cases. This is part of their business continuity planning that aims to transition decision-making into a more dynamic model that is more capable of meeting the challenges presented by the crisis.

CHALLENGE: Functions of the highest court in the land are currently compromised

As States look to introduce extraordinary powers (some lawfully, some plainly not, and many at the margins), it is essential that the judiciary exercise quick and effective scrutiny of the constitutionality of measures introduced and the manner in which they are applied by law enforcement agents. Once again, restrictions to court business pose a threat to this important restraint on executive power, at a time when it is most required. Looking once again to international best practice, solutions can be found which not only enhance the judiciary's capacity to exercise vital oversight of emergency measures but simultaneously enhance access to justice, through:

- Creating an effective judicial review process by ensuring that the right cases are being brought before the courts. One way to achieve this is by introducing appropriate threshold tests to gatekeep the appellate process and concurrently ensuring that convicted persons are aware of their rights to appeal and how to access those rights. This should encourage first instance judges to make decisions with the expectation that bad decisions will be appealed and overturned and police officers and lawmakers equally to expect their actions to be subject to the courts' scrutiny;
- Ensuring that the judicial process is conducted expeditiously where issues are time-sensitive and in any event;
- Using technology to enhance the accessibility of the appellate courts to all people regardless of where they are geographically located and whether the courts are under restriction.

Case Study - Somaliland

The courts in Somaliland include six appeals courts, seated in various locations throughout the country, and a single Supreme and Constitutional Court, seated in Hargeisa. Cases from outside of Hargeisa can be appealed to the Supreme Court and in some cases the Supreme Court will travel to hear the case. Whilst this ensures a degree of access to justice in those regions, inevitably that access is more readily available in Hargeisa. Enabling hearings to be conducted remotely, via video-link, would be a more efficient and secure way of ensuring that the Supreme Court is able to dispense justice in the regions, particularly those that are a greater distance from Hargeisa and with a higher risk profile created for example by terrorist activity.

CHALLENGE: Over-crowded detention facilities

Overcrowded detention facilities, where sanitation is poor, healthcare is lacking and social distancing is impossible, will represent fertile ground for the spread of infection, amongst staff and inmates alike. As previously mentioned, implementing genuine bail regimes, as well as considering alternatives to detention (such as sentences served in the community), all of which are encouraged by human rights standards, can release some of the pressure on these detention facilities. As the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, a body of the Council of Europe, [has stressed](#) in response to Covid-19:

“concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation; reassess the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate, residents of social care homes; and refrain, to the maximum extent possible, from detaining migrants”.

Blanket and hasty decision-making can create unsatisfactory outcomes for victims of crimes and result in the release of potentially dangerous prisoners, posing an unacceptable risk to the public-at-large. SSG/R's focus should be on building discretionary decision-making processes, based upon lawfully established criteria, proportionality, in consideration of all the relevant facts and taken on a case-by-case basis. Decisions on early release formed in this manner can enhance incentives for rehabilitation and, critically in the times of crisis, reduce prison populations.

CHALLENGE: Lack of Disaster Risk Preparedness and Mitigation

Covid-19 is a major crisis for which judiciaries seem totally unprepared. Disaster risk preparedness and mitigation, or just simple 'business continuity planning' has proven to simply not have been a priority of court administrative bodies nor indeed for SSG/R. This needs to change.

In the immediate term, governing bodies need to develop a process through which to determine mission-critical services and, where there is limited back-office capacity, to prioritise the right services to keep courts in business. This is not a difficult process, but one that many justice systems have simply not practised. Courts administration systems tend to be run by judges and lawyers not by crisis preparedness experts or risk consultants.

In the medium-term, consideration must be given to the reintroduction of these critical support services. Back office issues need to be addressed as part of future SSG/R programming. For example, many jurisdictions have suspended processes such as appointments, the processing of disciplinary complaints, training of judges and prosecutors and performance appraisals. In many cases, justice systems can withstand the suspension of these services over a short period time, but bringing critical services back online first, can ensure minimum disruption. Again, this requires a straight-forward analytical process in which priorities are determined. The crisis also emphasises the importance of communications strategies to reassure the public through this and future crises that the criminal justice system is in business and remains in their service. Better planning around logistics – how to procure and provide critical logistical support, needs to happen. In all of this, the legal basis for crisis management decision-making needs to be confirmed – does crisis management require new laws, or should crisis management capabilities by and large be present (if dormant) on the statute books? Finally, Governing bodies need to devolve powers to individuals to act/respond dynamically to circumstances.

Case Study - Somaliland

The Courts in Somaliland are organised hierarchically, with the Chief Justice reserving nearly all decision-making to himself, including decisions that would be more appropriate to be taken by middle management. Whereas justice systems should function as professional bureaucracies, with educated and professional judges and staff being empowered to exercise their own judgement, the Somaliland judiciary more closely resembles a machine bureaucracy in the manner in which it functions. This is not only inefficient, creating bottlenecks for decision-making, it also wastes the skills of educated professionals, failing to build the confidence of critical actors within the system.

CHALLENGE: Crisis in the civil law

It essential that the public has confidence that their civil rights can be enforced. For example, where business is unable to enforce contractual rights there is a clear impediment to foreign investment. Similarly, suspension of tribunals to address issues such as labour rights, at a time when Covid-19 has seen millions lose their jobs presents grave issues.

Whereas the right to a fair trial extends to civil matters as well, criminal justice systems are rightly constrained by more exacting standards, commensurate with a criminal tribunal's ability to deprive liberty. For this reason, it is easier to envisage the restart of civil trials during restricted times.

As such, there is a greater scope for lateral thinking in civil law. Various forms of alternative dispute resolution (ADR), including arbitration and mediation are well established and comply with international standards. In certain jurisdictions customary or traditional systems play a vital role in ensuring civil rights in an efficient manner and reducing the workload of formal courts. As will be obvious, informal systems should be encouraged only with caution. Many lack the appropriate safeguards or sophistication for example to fairly try serious crimes.

Key Takeaways for Donors on Access to Justice post Covid-19

The crisis has proven that SSG/R is still valid and more relevant and required than ever. However, the challenges and emerging issues have shown that the donors' focus needs to be on the below issues:

- **New SSG/R evidence-based SSG/R methodologies.** What appears to be needed is not an overhaul of SSR methodology to guarantee access to justice going forward, but instead a recalibration of approach, based upon best practice and basic principles.
- **Focus on building capacity for institutional decision-making,** genuine respect for constitutional obligations, treating custody as a position of last resort, exploring innovative ways of dispute resolution.
- **Greater focus on disaster risk preparation and mitigation.** This is the work of the court administrators that has simply not been prioritized to date.
- **Significant role for innovation.** This includes technological solutions to the considerable challenge of conducting court business whilst respecting the newly twinned aims of the right to a fair and expeditious trial, on the one hand, and social distancing, on the other.
- **Show value for money.** As aid budgets tighten it will also be more important than ever to focus on showing the effectiveness of interventions and their value for money.

Way Forward for Donors on Access to Justice post Covid-19

Concretely, and pursuant to this overarching observation, ISSAT recommends the following steps in the immediate term:

- (1) **A case study analysis of multiple jurisdictions,** sampling different traditions and challenges, to interrogate the observations in this note on a country-by-country basis.
- (2) Specific investigation into cost efficient technological solutions for developing judiciaries.
- (3) **Emphasise the need to adhere to principles set out in the OECD DAC SSR Handbook,** particularly donor coordination. No longer can it be acceptable for donors to compete or to fail to collaborate. Donors should consider setting out mandatory collaboration targets.