POLICY BRIEF

Digitalization of Justice in MENA's Fragile Contexts

Emily Patterson & Ali Alkhateeb

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The COVID-19 pandemic accelerated the use of technology in many justice systems around the world. Even in jurisdictions where the introduction of new technologies has been slow, the pandemic accelerated the discussion of how to apply digital tools. Technology can certainly help bridge gaps in access to justice, but it also poses risks. Building on ILAC's expertise on rule of law in fragile contexts, including in the Middle East and North Africa (MENA), this policy brief aims to highlight the risks of digitalizing justice in Iraq, Libya, Palestine, Syria, and Yemen—all considered "fragile" under the Organization for Economic Co-operation and Development's fragile states index—and to make recommendations for a gradual and risk-sensitive approach to the use of technology.

ilac International Legal Assistance Consortium

1. Introduction

Digitalization has become a hot topic in justice system reform for the right reason: it offers the potential to improve access and efficiency. A potential that to some degree and in some jurisdictions was fulfilled during the circumstances created by the COVID-19 pandemic. By many accounts, digitalization in the form of online court proceedings and the ability to remotely find information and file pleadings showed the benefits of applying digital technology to justice in emergency situations and also during "normal" periods.

Acknowledging the potential that technology brings, there are innumerable risks, both known and unknown, to digitalizing justice, particularly in fragile contexts. An obvious one is the lack of widespread access to technology. This lack of access stems from limited infrastructure; unavailable hardware; and, for some, a low level of technological skills. The risk of leaving behind already marginalized groups such as women, refugees and the displaced, minorities, and those in rural areas is great.

Key Points

- Acknowledging the potential that technology brings to access to justice, there are innumerable risks to digitalizing justice in fragile contexts such as Iraq, Libya, Palestine, Syria, and Yemen, starting with the lack of widespread access to technology. This lack of access stems from limited infrastructure; unavailable hardware; and, for some, a low level of technological skills.
- The risk of leaving behind already marginalized groups such as the poor, women, refugees and the displaced, migrants, minorities, and those in rural areas is great.
- The goal should be to improve the fairness of proceedings by ensuring clear procedural rules, access to legal counsel, reasoned judgments, and the right to present and contest evidence. Digitalization may improve the efficiency of some aspects of these proceedings, but inequality of arms and opaque procedures threaten fairness.
- In addition to potential fair trial violations, participants' disparate access to high-speed Internet, limited possession of appropriate and reasonably functioning hardware, and unfamiliarity with the justice system pose serious challenges to effective digitalization of trials.
- Any move toward digitalizing justice must be proceeded by a comprehensive capacity assessment, including an inquiry into whether the capacity and resources are available.

2. Fragile contexts defined

According to the Organization for Economic Cooperation and Development (OECD), fragile contexts are characterized by "the combination of exposure to risk and insufficient coping capacity of the state, systems, and/or communities to manage, absorb, or mitigate those risks."[1] The OECD's periodic States of Fragility report measures fragility across economic, environmental, political, security, and societal dimensions.[2] All of the contexts focused on here fall within the OECD's list of fragile contexts, with Iraq, Syria, and Yemen classified as extremely fragile.[3]

Under the OECD framework, these five countries share common indicia of fragility. All are very dependent on foreign aid and must address food insecurity. Unemployment rates are high, particularly among youth. State authorities are unable to control their entire territory; the risk of violent conflict is elevated; and more often than not that risk is a reality. Governments are characterized by clientelism, and there is a high public perception of corruption. Political instability and ineffective government persist, and there are limited and occasionally non-existent legislative and judicial restraints on executive power.[4]

Effective justice systems can protect civil and political rights, reinforce the rights of women and displaced persons, serve as checks on government power, and, if unable to directly protect life and property, they can hold to account those who infringe on the life and property of others. Digitalization offers the potential to bridge these justice gaps. And arguably, individuals living in fragile contexts need justice the most.[5]

The populations of Iraq, Libya, Syria, Palestine, and Yemen have limited voice and little power to hold officials to account. The freedoms of expression, association, and the media are curtailed. Civil society is generally weak. And the needs of large numbers of uprooted people must be addressed.[6] Additionally, gender discrimination and inequality endure, and only a small share of women hold political power. Women also make up a small proportion of the work force. Access to justice is limited, and rule of law challenges persist.[7]

Many of the OECD's fragility indicators relate to justice. Effective justice systems can protect civil and political rights, reinforce the rights of women and displaced persons, serve as checks on government power, and, if unable to directly protect life and property, they can hold to account those who infringe on the life and property of others. Digitalization offers the potential to bridge these justice gaps. And arguably, individuals living in fragile contexts need justice the most.[8]

Certain areas might work well for digitalization. Online case filing and remote hearings can obviate the need to travel through dangerous areas and could save money in places where inflation increases the cost of travel. Putting case information and laws online increases access to information in information-poor environments. And providing

basic information on legal rights may reduce the costs of justice for the poor and marginalized, in addition to the fact that knowledge of one's rights can be empowering.

But digitalization will not be easy to implement in these fragile contexts and poses many risks. Obvious challenges include inconsistent electricity supplies, limited or slow Internet access, old or poorly functioning hardware, lack of digital skills, and the imperative to fulfil basic human needs first. There are less obvious risks as well. As described above, a characteristic of fragile states is the lack of government control over the entire territory. Portions of some of the countries addressed here are governed by different entities claiming state authority. In these cases, external actors supporting digitalization should consider whose justice system is being digitized and how long that system will remain in existence. The increasingly popular approach of supporting digital tools for legal self-help may in some cases engender weak state authority. Proponents of self-help applications should consider whether it makes the most sense to facilitate ad hoc approaches to justice or to support the development of a functioning justice system. Finally, many disputes in these contexts are interpersonal and can sometimes serve as drivers of larger conflict. Resolution of these disputes is very much relationship-dependent and is often undertaken pursuant to customary law. As such it may not be amenable to technology that enables communications over a distance. Additionally, it does not seem unreasonable to conclude that fragile states in MENA may not be well positioned to protect the security and privacy of digital justice users and a digital justice system.14

3. Digitalization risks for marginalized groups

Marginalized group are those "that experience discrimination and exclusion (social, political and economic) because of unequal power relationships across economic, political, social and cultural dimensions."[9] Women, the poor, inhabitants of rural areas, uprooted people, and those in conflict with the law are often considered marginalized. The classifications are not rigid; marginalized individuals may possess several characteristics such as rural residence, poverty, and gender, and different contexts may be comprised of different sets of marginalized groups. However the dynamics play out, digitalizing justice risks exacerbating these societal power imbalances.

3.1. The poor

Technology promises to advance the legal empowerment of the poor. Unfortunately, the poor in MENA's fragile contexts struggle with a set of circumstances that drives access to technology further out of reach. The COVID-19 pandemic brought on economic decline and exacerbated structural unemployment that potentially reduces connectivity and increases costs for poor people.[10] The United Nations Broadband Commission has set an affordability target for mobile voice and data package fees, but in many places the target has not been met, cutting off access to millions of families.[11]

Internet access can be expensive. In **Yemen**, the poorest 40 percent of the population must spend more than 51 percent of their monthly income for mobile Internet service.[12] And costs of Internet service have increased 50 precent with a 400 GB mobile service now reportedly US$160 and 200GB at US$105.[13]

In **Syria**, which has a per capita monthly income of around US$75, a 1 MB digital

connection costs around US $11 per month; a 1 GB data network costs around US $19 per month; and a 1 MB Internet connection in rebel-held areas in the north was around US $10 per month.[14] Further, Syria's Ministry of Communications and Technology initiated an "Internet rationing" system in March 2020 which increased the cost of access.[15] Monthly Internet costs are US$50.24 in Palestine and US$41.70 in Iraq.[16] According to the World Bank, the 2018 monthly per capita gross national income in **Palestine** was US$349 and US$403 in **Iraq**.[17]

In **Libya**, economic instability, in particularly the drop in value of the currency, has increased the cost of Internet access, though the country's Post Telecommunications and Information Technology Company has reportedly reduced fees,[18] and mobile rates are said to be low compared to the rest of the region.[19] That said, a subscription to a 30 GB mobile package costs around US$50 per month. 20 GB and 10 GB packages run around US$40 and US$25, respectively.[20]

The issue is not limited to the cost of Internet service. There remains a persistent divide between those with access to computers, tablets, and phones and those for whom these modern-day "basics" are out of reach.[21] Those without tend to be poor children, residents of rural areas, refugees, and girls.[22] For those that have smarphones, digitalized justice is not necessarily a reasonable solution. Many justice-related software applications, especially those designed for court hearings and trials, are intended for use on a computer and are not optimized for smartphones.[23] Additionally, lack of technical knowledge and skills further hinders full access to digital justice.

3.2. Rural v. urban

Rural areas in countries around the world lack technical infrastructure, often because service providers do not see the economic benefit of extending service to areas with few potential customers.[24] Conflict and fragility exacerbate this divide. What in some places may be a lack of economic incentive for companies to build infrastructure and provide service becomes a security risk in fragile contexts. Even for countries where digital infrastructure is treated as a public utility or monopoly, security risks caused by conflict—as well as a political interest in denying access to real or perceived opponents—can leave rural residents without Internet or reliable mobile phone service.[25]

3.3. Uprooted people

Most of the countries covered in this policy brief struggle to support and protect large numbers of uprooted people, including internally displaced people, refugees, and migrants whose justice needs include personal identity documents, displacement related property claims, human trafficking, missing persons, labour exploitation, discrimination, and gender-based violence. Many are poor, lack fluency in the local language, know little or nothing about domestic legal procedures, and have little or no freedom of movement. All of these factors make access to digital technology a challenge.

3.4. Women

As discussed earlier, gender discrimination and inequality and limited women's representation in government are common characteristics of fragile states. Almost half of women in the Arab world do not have access to the Internet nor to

a mobile phone.[26] In **Iraq**, 98.3 percent of men have access to the Internet compared to only 51.2 percent of women.[27] Taking that together with the fact that the technological divide between men and women in MENA grew from 2020 to 2021, increased digitalization threatens to exacerbate the justice gap for women.[28]

Additionally, the pandemic disproportionately drove women out of the work force and simultaneously increased the load of unpaid work they carry.[29] This situation threatens to push women even further behind in terms of access to digital technology. Not only due to the burden of unpaid work duties, women's access to the Internet at home is often limited by "discriminatory norms prioritizing male access to the family computer."[30] It is not uncommon for women in the region to be denied access to smartphones and forbidden from participating in WhatsApp groups and similar.[31] Women are also marginalized from technology due to their relatively high illiteracy rates and a lack of access to funds, putting hardware even further out of reach.[32]

That said, women do consistently access one form of technology—the telephone. Early in the pandemic, the organization SAWA recorded a 10 percent increase in calls from women concerning domestic violence and abuse in the **West Bank**.[33] The Palestinian Working Women Society for Development provided more than 510 phone consultations in a less-than-two-week period in March and April 2020; 206 of the calls concerned gender-based violence.[34] Nevertheless, increased digitalization of justice threatens to further alienate women from the justice system due to their disproportionate lack of access to digital technology.

3.5. People in conflict with the law

Perhaps not classically considered "marginalized groups," criminal defendants, individuals in detention, respondents in divorce proceedings, those defending encroachments or usurpations of their property, people challenging state authority, and others have much to lose in a judicial process. The goal should be to improve the fairness of such proceedings by ensuring clear procedural rules, access to legal counsel, reasoned judgments, and the right to present and contest evidence. Digitalization may improve the efficiency of some aspects of these proceedings, but inequality of arms and opaque procedures threaten fairness.

Further, one often suggested venue for digitalization is the trial. Online trials are deeply concerning. This brief will not address the laundry list of serious risks to fair trial rights posed by online proceedings, as numerous publications to that effect have been produced, particularly relating to the pandemic.[35] The aim here is merely to point out that, in addition to potential fair trial violations, participants' disparate access to high-speed Internet, limited possession of appropriate and reasonably functioning hardware, and unfamiliarity with the justice system pose serious challenges to effective digitalization of trials as well as potentially undermining fair trial rights.

4. Infrastructure requirements

Among the unsurprising challenges to digitalization in MENA's fragile contexts is limited infrastructure. Digitalizing justice requires money. Hardware. Software, including software licenses. Connectivity. Security. Mechanisms for presenting and managing evidence. Processes for protecting data. Any move toward digitalizing justice must be proceeded by a comprehensive capacity assessment, including an inquiry into whether the capacity and resources are available.[36]

Internet and mobile phone blackouts are common in **Syria**, and the war has caused considerable damage to the telecommunications network.[37] Mobile service in Damascus is reportedly satisfactory, but other major cities such as Aleppo, Qamishli, and Homs lack reliable coverage.[38] Regular power cuts take place, especially in Greater Idlib and in areas in the east under Kurdish control.[39] And remote areas often only have access to satellite services, which are expensive. [40] Internet penetration is around 47 precent.[41]

In **Libya**, regular electricity cuts disrupt fixed and mobile Internet access.[42] Copper thieves consistently sabotage cabling and batteries, and "engineers and staff face security threats when attempting to fix isolated sites or remote facilities."[43] Around 46.2 percent of the population has some form of Internet access.

In addition to power cuts lasting hours and even days, limited coverage in the south of **Yemen** has left 80 percent of that area with no Internet at all.[44] The Houthis took over telecommunications infrastructure in the areas under their control, cutting off 80 percent of the Internet and prompting the telecommunications minister of the officially recognized government in July 2020 to launch a 4G mobile network to expand access, but it only reaches government-controlled areas.[45] A damaged submarine fibre optic cable also contributes to service outages.[46] Internet service providers continue to operate, in spite of repeated attacks on their infrastructure; fibre optic networks are particularly vulnerable to attack as they sit above ground.[47] Even before the conflict, connections were slow and attacks on Internet and electricity infrastructure from Al Qaeda and Houthi rebels were not uncommon.[48] Internet penetration is a paltry 26.7 percent. [49]

In **Palestine**, the Palestinian Authority has already warned about delays in digital development because of lack of access to the 4G and 5G mobile spectrum.[50] Palestine was the last country in MENA to gain access to the 3G mobile network in 2018.[51] "Gaza still has 2G and the coverage is the lowest in the region," though a new World Bank project is targeted at developing the fibre-optic infrastructure.[52] The challenge for Palestine is that broadband operators must "go through Israeli companies to access international submarine cables" and there are restrictions on bringing telecommunications equipment into the Palestinian territories.[53] Internet penetration was 70.6 percent in January 2021.[54]

In **Iraq**, lack of market competition between the three main telecommunications providers due to cronyism is often cited as a cause of the poor state of Internet infrastructure and the poor quality of Internet service.[55] The country faces regular power cuts due to terrorist attacks on electricity lines, power station fuel shortages, and suspended imports of energy supplies from Iran.[56] Nevertheless, Internet penetration was 75 percent in January 2021.[57]

Economic setbacks caused by the pandemic may inhibit further development of digital infrastructure. The International Monetary Fund estimates MENA's recovery rate will fall behind the global average in 2021.[58] The pandemic also exacerbated poverty rates in the region.[59] In addition to economic challenges, obstacles to the development of a modern Internet infrastructure include violent conflict and associated instability and "the political economies of reform, market concentration, and the continued dominance of state-owned enterprises, and political isolation."[60] Ironically, any improvements in infrastructure may at least in the short term have a negative impact on speed, as increased use of Internet means increased pressure on limited bandwidth.[61]

5. Internet security

Digitalizing justice also means digitalizing confidential information, including individuals' personal details, protected evidence and witnesses, and other data. Any application of technology must include a corresponding security and privacy protection program. Data must be encrypted both where it is stored and as it is transmitted. Confidential evidence must be protected whether used in trial, saved in a case management system, or handled some other way. The consideration should be to protect data from criminal actors as well as to prevent the intentional or inadvertent disclosure of private information.[62] However, there are low regional standards for data protection.

In 2012, **Yemen** passed a law on the right of access to information that includes privacy protections, but given the active state of conflict and fragmentation of government authority, enforce-ment is challenging.[63] Additionally, any such law would require the promulgation of secondary legislation to ensure its effective application in the judicial context. Privacy and data protection legislation is being drafted in **Iraq**, but **Syria** and **Libya** do not appear to have any legislation protecting privacy.[64] Nor does **Palestine** have an effective data protection system; in fact, residents of Gaza and the West Bank have been subjected to "mass surveillance" and "the exploitation of their personal data for decades without accountability."[65]

6. The role of governments

Governments are major players in the development of Internet infrastructure, and digitalization of justice cannot take place without development of the information technology sector. Governments should direct their efforts at ensure universal access to digital technology.[66] However, digital development and access is often subsumed by state monopolies controlled by ministries of communications or by state-owned enterprises. These institutions represent a major obstacle to the development of the sector, and a potential obstacle to effective and inclusive digitalization.[67]

Further, governments in fragile states often prioritize security over development and consequently exhibit authoritarian tendencies. When they do support technological development, they often reinforce state powers of control in the process. "Many governments view digitization through the prism of control and surveillance. This led several countries to restrict Voice over Internet Protocol (VoIP) services (e.g. Skype and Zoom), only loosening their grip due to economic necessity during the pandemic. This rise in digital authoritarianism stifles innovation as it restricts the free flow of information, putting politics ahead of economic development and jobs, which the region desperately needs."[68] Further, the global movements to use social media and other digital resources to document war crimes and human rights violations incentivizes some governments to restrict Internet use.[69]

For example, **Syrian** authorities frequently suspend Internet access to control the spread of information, often in connection with planned or ongoing military actions.[70] Areas in northern Syria report service interruptions "under orders from Turkish authorities during their military operation in the Afrin region in January 2018 and in February of the same year in Idlib Governorate, where the cut-off was ordered by [the opposition group] HTS in response to a protest movement against

its presence in the city of Idlib."[71] Similarly in **Libya**, militias and governments sometimes cut Internet access to prevent information from spreading.[72]

Conclusion

Ultimately, technology is simply a tool. It is a means to an end; it is not an end in itself. The goal for justice systems should be improved accessibility, fairness, effectiveness, and transparency, not digitalization per se. Technology may very well be part of that solution, but proposals for digitalization must take into account the realities—and the risks—on the ground. The essential point is this: proceed with caution. While technology has the potential to improve justice, it simultaneously presents a risk of furthering the access to justice gap.

Recommendations

Any steps toward digitalization should take place after or commensurate with sustained efforts to ensure universal access to the Internet and should:

- Be preceded by the development of a set of rights-based standards to be applied to digitalization efforts.
- Be underpinned by a needs and a capacity assessment focusing on the state of digital technology, the degree of Internet penetration, Internet access for marginalized groups, and the functioning of the justice system in general.
- Begin with a focus on improving access to information, be it access to court procedures or case information, rather than focusing on conducting substantive proceedings on-line.
- Include concerted efforts on the part of justice system professionals to understand how digital technology works, including infrastructure requirements and security and privacy risks.
- Be accompanied by supplementary, not-necessarily-digital efforts to achieve the same goals, such as using TV, radio, flyers, and posters to communicate information as well as strengthening the legal aid system with a focus on improving marginalized peoples' access to justice.

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About the Authors

Emily Patterson is a Senior Lawyer at ILAC.

Ali Alkhateeb is a Legal Officer at ILAC.

International Legal Assistance Consortium

ILAC Secretariate
Stockholmsvägen 21,
SE-122 62 Enskede, Stockholm, Sweden
Phone: +46 (o)8-545 714 20
info@ilac.se
www.ilacnet.org

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ILAC is an international organisation based in Sweden that gathers wide-ranging legal expertise and competencies from around the world to help rebuild justice systems in countries that are in conflict, post conflict, or in transition toward peace and democracy.

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