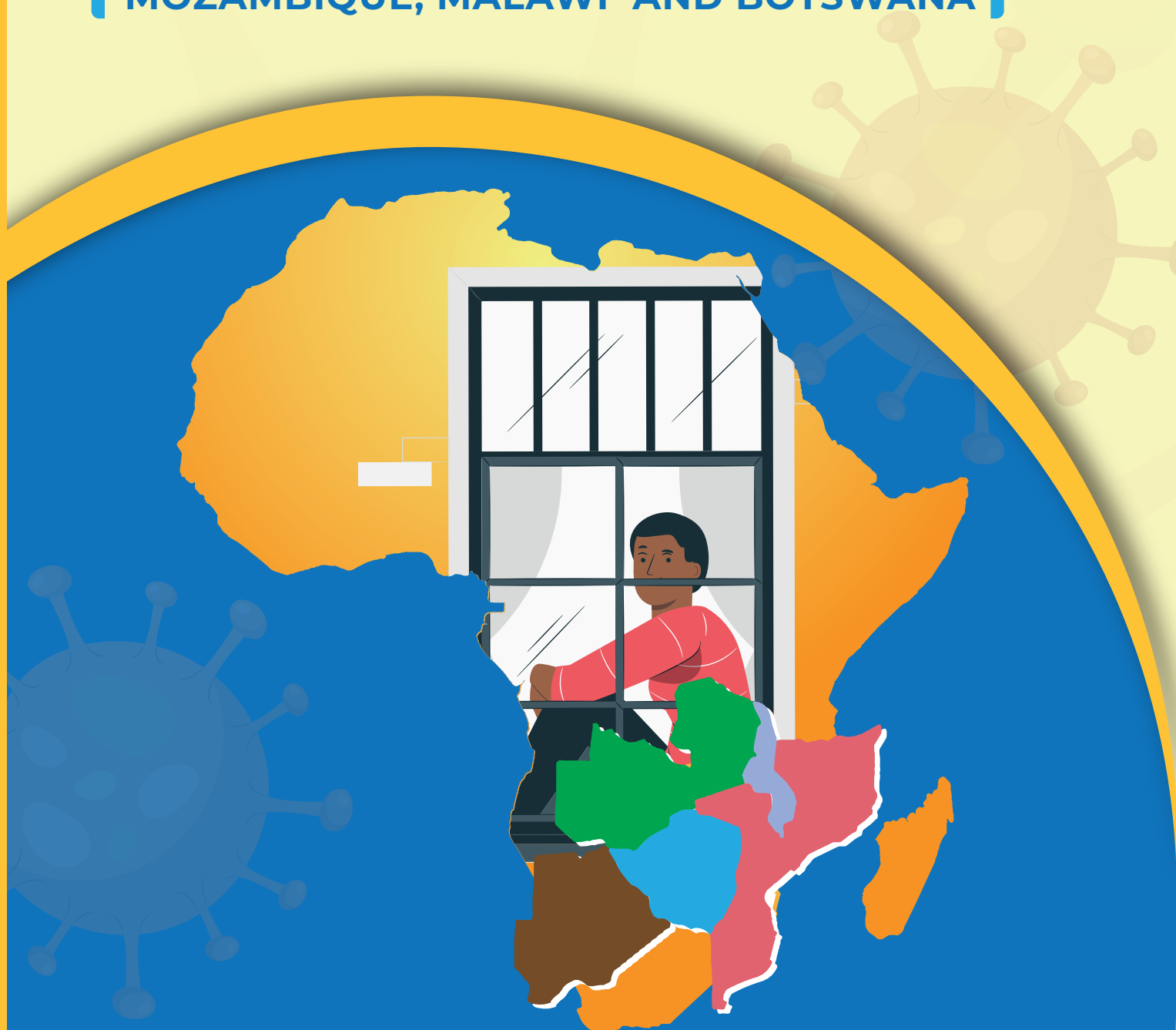


# ACCESS TO JUSTICE DURING LOCKDOWN IN SOUTHERN AFRICA:



A CASE STUDY OF ZIMBABWE, ZAMBIA,  
MOZAMBIQUE, MALAWI AND BOTSWANA



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**Africa Judges and Jurists Forum**

## **The Africa Judges & Jurists Forum (AJJF)**

Africa Judges & Jurists Forum (AJJF) is a network of judges and jurists across the continent. The membership of AJJF is inspired by the imperative to promote the rule of law in the context of Africa's development. The Headquarters of AJJF are based in South Africa. The Forum works with governments, Inter-governmental entities, non-governmental formations, and the private sector.

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MOZAMBIQUE, MALAWI AND BOTSWANA

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# TABLE OF CONTENTS

<b><u>1. EXECUTIVE SUMMARY</u></b> .....	<b>4</b>
<b><u>2. INTRODUCTION</u></b> .....	<b>5</b>
<b><u>3. METHODOLOGY AND LIMITATIONS</u></b> .....	<b>6</b>
<b><u>4. NATURE OF MEASURES UNDERTAKEN BY STATES IN RESPONSE TO THE COVID-19 PANDEMIC</u></b> .....	<b>7</b>
<b><u>4.1 Executive Action</u></b> .....	<b>7</b>
<b><u>4.2 Practice directions and legal notices by judicial leaders</u></b> .....	<b>8</b>
<b><u>5. CONCEPTUAL FRAMEWORK FOR ASSESSING THE IMPACT OF COVID-19 ON THE ADMINISTRATION OF JUSTICE BY THE COURTS</u></b> .....	<b>9</b>
<b><u>5.1 Existence of a legal framework guaranteeing equal rights to all people</u></b> .....	<b>11</b>
<b><u>5.2 Availability and accessibility of legal representation</u></b> .....	<b>12</b>
<b><u>5.3 Existence of an accessible court system that is capable of discharging its functions</u></b> .....	<b>12</b>
<b><u>5.4 Ability to discharge matters timeously</u></b> .....	<b>13</b>
<b><u>5.5 Court processes must be fair</u></b> .....	<b>15</b>
<b><u>5.6 Legal awareness amongst the public</u></b> .....	<b>16</b>
<b><u>6. RECOMMENDATIONS</u></b> .....	<b>17</b>
<b><u>6.1 Digitising court services</u></b> .....	<b>17</b>
<b><u>6.2 Written submissions</u></b> .....	<b>17</b>
<b><u>6.3 Recruiting acting judicial officers</u></b> .....	<b>17</b>
<b><u>6.4 Development of COVID-19 protocols for courts</u></b> .....	<b>18</b>
<b><u>6.5 Scaling up civic education on key human rights issues</u></b> .....	<b>18</b>
<b><u>6.6 Allow law based civil society and para legals to resume their work</u></b> .....	<b>18</b>
<b><u>6.7 Programs targeted at assisting victims of rights violations</u></b> .....	<b>19</b>

## 1. EXECUTIVE SUMMARY

When COVID-19 spread to the SADC region, governments responded by undertaking various kinds of measures targeted at containing the spread of the virus, but these measures had a knock-on impact on the administration of justice by the courts. These measures can be classified into *executive action* taken by heads of government or cabinet ministers, and *practice directions* issued by judicial leaders. As part of the executive action, some governments declared states of emergency while others declared states of disaster, accompanied by stay at home orders. On the back of these executive measures, judicial leaders have issued practice directions imposing restrictions on the operations of the courts. Though necessary in some instances, both the executive action and the practice directions have had a negative impact on the administration of justice by the courts.

In Zimbabwe, Zambia, Malawi, Mozambique and Botswana, these restrictions have worsened the inaccessibility of courts and legal representation; they severely undermined the capacity of the courts to perform even some of the most basic functions; they severely limited (and in some cases suspended) some of the constitutionally guaranteed rights; they created delays in the resolution or finalization of cases; they constrained civil society, para-legals and university legal aid clinics from providing legal awareness at a time when such awareness was needed the most; and they undermined efforts to ensure transparency in court processes.

Although some of the restrictions have since been lifted or are being relaxed gradually, their impact on the administration of justice by courts is still ongoing. Given that another wave of COVID-19 is possible (especially as international travel resumes) there is a possibility that these restrictions may be re-imposed or may be tightened further.

In order to address the challenges created by the COVID-19 pandemic on the administration of justice by the courts, Africa Judges and Jurists Forum (AJJF) recommends the following measures to be considered: increase digitization of court services, develop and monitor the implementation of COVID-19 protocols for all courts especially for the benefit of litigants who do not have access to internet and who cannot use digital means to access courts; where possible increase the use or acceptance of written submissions in order to minimize physical appearances at courts by litigants, witnesses and lawyers; provide more funding for the recruitment and appointment of acting judicial officers to assist in reducing or clearing the backlogs created by the COVID-19 pandemic; the provision of legal awareness to the public should be treated as an essential service and therefore governments should put in place modalities to allow relevant civil society organisations, para-legals and university legal aid clinics to re-

sume full operations; and civil society and legal bar associations should consider designing programs targeted at seeking justice for those whose rights were violated during the COVID-19 states of emergency or states of disaster.



## 2. INTRODUCTION

Africa Judges and Jurists Forum (AJJF), with support from the Open Society Initiative for Southern Africa (OSISA) conducted a study aimed at establishing the impact of the novel corona virus (COVID-19) pandemic on the administration of justice by the courts in Zimbabwe, Zambia, Malawi, Mozambique and Botswana. These are the countries within the SADC region where AJJF has an ongoing project to promote the rule of law and access to justice. The COVID-19 pandemic is likely to continue until such a time when the vaccine or some kind of an effective treatment is made accessible to all. Although a vaccine has since been developed,<sup>1</sup> it will take a very long time before poor countries (including in Africa) can access the vaccine and make it available to the people.

Meanwhile, many countries (including in Africa) are undergoing a second wave of the COVID-19 pandemic, as they register huge spikes in infections and deaths. Therefore, there is a need to prepare for the possible second wave of COVID-19 infections as well as come up with measures to address the existing challenges created by the COVID-19 pandemic, on the administration of justice by the courts.

This study was conducted in order to identify the challenges and make recommendations on measures which can be introduced in the short-term period, in order to return the courts to full scale operations even as the COVID-19 pandemic continues. The existence of fully functional courts is a necessity for access to justice by millions of people and therefore, countries cannot afford to scale down court operations until the vaccine against COVID-19 is made accessible to all.

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<sup>1</sup> A vaccine against COVID-19 has been manufactured.  
See <https://www.bloomberg.com/graphics/covid-vaccine-tracker-global-distribution/>

### 3. METHODOLOGY AND LIMITATIONS

Due to the time limitations, the public health threats posed by COVID-19 as well as the restrictions on human movements and public gatherings; the research which culminated in the development of this report was conducted as a *scoping study*, to establish the impact of COVID-19 on the administration of justice by the courts in Zimbabwe, Zambia, Malawi, Mozambique and Botswana. These countries are referred in this report as “case studies or countries of study”.

The scope of the research was limited to the administration of justice by “courts” and did not include an assessment of the impact of the COVID-19 pandemic on the operations of other role players in the administration of justice system. This is because, AJJF’s work is mainly with the courts and therefore, AJJF had to prioritize the courts in its initial research on this subject. Further research by AJJF and other partners may also be conducted in future to assess the impact of the pandemic on the operations of other stakeholders (in the justice system) such as the prisons or correctional services and the police.

Data analysed in this report was gathered through desktop review and key informant interviews. Key documents studied as part of the desktop review included government legal notices and practice directions issued by the heads of the judiciaries in the countries of study; academic articles on access to justice and administration of justice, media reports and government notices on the management of the COVID-19 pandemic. A total of 40 Key Informant Interviews were conducted. These were selected from civil society (5), the academia (5), legal bar associations (5), prosecutors (5), the media (5), the judiciary (5), five victims of human rights violations and policy makers (5) in the five countries of study. 60% of the key informants were women.

## 4. NATURE OF MEASURES UNDERTAKEN BY STATES IN RESPONSE TO THE COVID-19 PANDEMIC.

In order to identify the impact of COVID-19 pandemic on the administration of justice by the courts, there is a need to first identify the measures which were undertaken by governments in response to the pandemic, which then had an impact on the operations of the courts in the five case studies.

By the end of March 2020, COVID-19 had spread to many countries in the Southern Africa Development Community (SADC), and governments had begun to implement some measures aimed at preventing or containing the spread of the virus. These measures can be classified into two categories namely the executive action undertaken by heads of government and practice directions issued by judicial leaders.

### 4.1 Executive Action

Some of the governments in the region declared states of emergency, others declared states of disaster while others avoided making those declarations and choose to issue preventative guidelines. Zimbabwe<sup>2</sup> and Malawi<sup>3</sup> are amongst countries in SADC which responded by means of declaring a state of disaster. Mozambique<sup>4</sup> and Botswana<sup>5</sup> are amongst the countries that responded to the COVID-19 pandemic by declaring states of emergency. As part of the declaration of the state of emergency and state of disaster, governments imposed national lockdowns whereupon various restrictions were imposed on human movement and public gatherings. These restrictions included that:

- i. Members of the public were ordered to stay at home and only travel from their homes for essential reasons such as buying food and seeking medical care.
- ii. Public transport was suspended.
- iii. Only those classified as providers of essential services were exempted from the stay at home orders.
- iv. Public gatherings were prohibited
- v. Curfew hours were imposed.

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<sup>2</sup> <https://www.africanews.com/2020/03/17/despite-zero-case-zimbabwe-declares-national-emergency-over-covid-19/>

<sup>3</sup> <https://malawi.un.org/en/46778-declaration-state-disaster-malawi-president-peter-mutharika>

<sup>4</sup> <https://allafrica.com/stories/202005290804.html>

<sup>5</sup> <https://www.iol.co.za/news/africa/botswana-declares-six-month-state-of-emergency-due-to-covid-19-46506989>

Since May 2020, some of these measures have been relaxed. For instance, people are allowed to move around but subject to wearing masks and maintaining social distance when in public places, in some countries curfew hours have been adjusted to begin at 2000hrs, public transport has resumed operations subject to complying with certain guidelines while in some countries public gatherings of smaller numbers are permitted subject to social distancing regulations.<sup>6</sup> However, it is important to note that although the general trend has been that these restrictions are being gradually relaxed, there are instances where the restrictions have been tightened in response to the changes in the rate of COVID-19 infections. For instance, in June and August, the government of Botswana re-imposed strict lockdown in Gaborone as a response to the spike in the number of new COVID-19 infections.<sup>7</sup>

Zambia neither declared state of emergency nor state of disaster but the President issued directives in terms of the Public Health Act.<sup>8</sup> In Malawi, government's decision to impose a lockdown was reversed by the courts on grounds that the decision was illegally undertaken.<sup>9</sup>

## 4.2 Practice directions and legal notices by judicial leaders

However, although governments in these five countries invoked different legal instruments in their response to the COVID-19 pandemic, all their judiciaries undertook similar measures in response to the pandemic. Notably, the heads of the judiciaries in all the five countries issued practice directions and legal notices which imposed restrictions on the operations of the courts and public access to the courts. The following are the key restrictions:

- i. Courts were directed to suspend full operations and only sit to hear urgent matters. In some jurisdictions, such as Botswana, at some point the courts could only sit to decide on "extremely urgent matters".<sup>10</sup> All non-urgent matters which had already been set down were rolled over to a later date.
- ii. Court support staff were directed to stay at home and come to the workplace on rational basis and in some cases, to come to court only when there was business to be transacted.
- iii. Access to court rooms was restricted to those who have a direct interest in the matter, such as the parties, their lawyers and witnesses.

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<sup>6</sup> See International IDEA's global monitor accessible at <https://www.idea.int/gsod-indices/#/indices/countries-regions-profile>

<sup>7</sup> <https://www.voanews.com/covid-19-pandemic/botswanas-capital-city-back-covid-19-lockdown>.  
Also see

<https://www.dailymaverick.co.za/article/2020-07-31-botswana-reinstates-coronavirus-lockdown-in-capital-for-two-weeks/>

<sup>8</sup> <https://africanlii.org/akn/zm/act/si/2020/22>

<sup>9</sup> <https://www.dailymaverick.co.za/article/2020-04-20-malawi-high-court-sets-aside-coronavirus-lockdown-pending-review/>

<sup>10</sup> See Practice Direction No. 2 of 2020 available at <https://www.justice.gov.bw/sites/default/files/Practice%20Directive%20No.%20%20of%202020.pdf>

- iv. In some locations, courts were directed to completely shut down for a number of days and only re-open after the premises have been fumigated.

## 5. CONCEPTUAL FRAMEWORK FOR ASSESSING THE IMPACT OF COVID-19 ON THE ADMINISTRATION OF JUSTICE BY THE COURTS.

These restrictions imposed as part of both the executive action and practice directions, had an impact on the administration of justice by the courts. However, in order to conduct a systematic assessment of the impact of these restrictions, it is necessary to identify a conceptual framework for conducting such an assessment. Such a framework must be derived from the prerequisites or pro-conditionalities for the proper administration of justice by the courts.

Various studies<sup>11</sup> have already identified these pre-requisites. In order to have effective administration of justice by the courts, there must be:

- i. A legal framework which guarantees equal rights to all people
- ii. Available and accessible legal representation
- iii. An accessible court system that is capable of discharging its functions.
- iv. Courts must be able to discharge matters timeously through a fair process.
- v. Adequate legal awareness amongst members of the public

The above is underscored in both regional and international law that is binding on the states that were studied in this research. The African Charter on Human and Peoples' Rights (African Charter) protects the right of access to justice. In particular, article 7 of the African Charter states that:

*Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.....(c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.*

The International Covenant on Civil and Political Rights (ICCPR) also recognises these rights under articles 9(3) and 2(3), as critical elements of access to justice.

As a way of assessing the impact of COVID-19 on the administration of justice by

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<sup>11</sup> See Report by Teresa Marchiori. "A Framework for Measuring Access to Justice Including Specific Challenges Facing Women" (2015), available at <https://rm.coe.int/1680593e83>. Also see Report by Juan Carlos Botero and Alejandro Ponce. "World Justice Project: Rule of Law Index" (2010), available at <https://www.oecd.org/mena/governance/45447873.pdf>

the courts in the five countries of study, this report analyses how the restrictions imposed through executive action and judicial administrative decisions practically impacted on each of the above highlighted pre-requisites/critical elements of the access to justice.

### 5.1 Existence of a legal framework guaranteeing equal rights to all people

One of the pre-requisites for access to justice is that there must be a legal framework which guarantees equal rights for all people. In fact, as other scholars have rightly argued, the existence of a legal framework granting equal rights to all persons is the foundation of a justice system.<sup>12</sup> The countries studied as part of this research are constitutional democracies by design. Therefore, as a pre-requisite for access to justice, the Constitutions of those countries must guarantee equal rights for all. Each of the constitutions of the five case studies formally guarantee an extensive Bill of Rights, including the right to equal protection under the law for all.<sup>13</sup>

However, as an immediate impact of the spread of COVID-19, some of the rights guaranteed in the Bill of Rights were either suspended while in some cases they were severely limited as part of the measures adopted by the governments to curb the spread of COVID-19. For example, Botswana and Mozambique declared states of emergency and imposed a series of lockdowns during which the freedom of movement (amongst other rights) was suspended, except for persons deemed to be essential service providers.

In Zimbabwe, a state of disaster was imposed which heavily curtailed the freedom of movement. By taking away the freedom of movement, many other fundamental rights were also undermined. For example, without freedom of movement, many people could not exercise their right to freedom of trade while others could not exercise the right to access courts as they could not leave their homes. As part of the declaration of states of emergency and states of disaster, freedom of expression was heavily curtailed as well. For instance, in Zimbabwe, Botswana and Mozambique, governments promulgated or activated regulations which prohibited the spread of false information or “fake news”. Contravening these regulations attracted custodial sentences of up to 20 years.<sup>14</sup>

The criminalisation of the spread of false information and the accompanying harsh sentences had a chilling effect on freedom of expression, particularly for the media

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<sup>12</sup> Teresa Marchiori. "A Framework for Measuring Access to Justice Including Specific Challenges Facing Women" (2015) at page 126.

<sup>13</sup> See Chapter 4 of the Constitution of Zimbabwe, Chapters 1 and 2 of the Constitution of Mozambique, Chapter 4 of the Constitution of Malawi and Chapter 2 of the Constitution of Botswana.

<sup>14</sup> [https://www.veritaszim.net/sites/veritas\\_d/files/SI%202020-083%20Public%20Health%20%28COVID-19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf](https://www.veritaszim.net/sites/veritas_d/files/SI%202020-083%20Public%20Health%20%28COVID-19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf)

practitioners whose work involved holding the state accountable. For example, 80 percent of the journalists interviewed during this research said that they at least had one story which they wrote on exposing government corruption but they did not publish it because they were afraid that the story could be misinterpreted as carrying false information, and they could end up being imprisoned for that. The suspension of these fundamental rights through the promulgation of regulations tampered with the legal framework and consequently took away a range of rights which citizens are entitled to.

In some cases, the limitations imposed on these rights, such as freedom of movement, may have been justified but in some of the cases, the limitations were disproportionate. For example, the criminalisation of the spread of false information regardless of *dolus eventualis*<sup>15</sup> considerations and the attendant harsh sentences for contravening these regulations, are amongst some of the disproportionate limitation measures which unnecessarily curtailed the freedom of expression. Thus, the spread of COVID-19 undermined access to justice, first by triggering the suspension and or severe limitation of certain of the rights that are guaranteed by the legal framework.

## 5.2 Availability and accessibility of legal representation

In order for people to be able to engage the court system to seek justice, there must be accessible legal advice. In all the five case studies, the main providers of legal advice include the government legal aid institutions, private law firms (the legal profession), civil society organisations and university law clinics. It is important that these institutions be physically accessible to the public and that they must be adequately capacitated to provide efficient services upon demand. An immediate impact of the spread of COVID-19 was that most of the institutions that provide legal advice either became physically unavailable (because they had to shut down) or they became too under staffed to provide services to the public. For instance, in Zimbabwe when the President declared a state of disaster, members of the legal profession were not exempted from the stay at home orders and therefore they could not be physically present to be consulted by clients.<sup>16</sup> Although lawyers were later on designated as essential service providers, they still could not be easily accessed by clients because the clients could not move from their homes as a result of the stay at home orders. For example, civil society key informants interviewed during this research reported that 12 victims who suffered inhuman and degrading treatment at the hands of the police during the lockdown in Botswana, Mozambique and Zimbabwe said they could not seek legal representation to demand justice because, they were prevented by the stay at home orders from accessing their lawyers.

<sup>15</sup> <https://mg.co.za/analysis/2020-04-05-southern-africa-has-cracked-down-on-fake-news-but-may-have-gone-too-far/>

<sup>16</sup> [https://www.veritaszim.net/sites/veritas\\_d/files/SI%202020-083%20Public%20Health%20%28COVID-19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf](https://www.veritaszim.net/sites/veritas_d/files/SI%202020-083%20Public%20Health%20%28COVID-19%20Prevention%2C%20Containment%20and%20Treatment%29%20%28National%20Lockdown%29%20Order%2C%202020.pdf)

Government legal aid boards across all the five countries of study were operating with skeletal staff as most of the staff members were instructed to stay at home. Civil society organisations and university law clinics, which in all the five case studies are the major<sup>17</sup> providers of pro bono legal advice shut down their operations as their services were not considered essential and therefore, their staff had to comply with the stay at home orders.

Although the lockdown measures have been relaxed, universities remain closed and therefore, the legal aid clinics are not operational. Restrictions on public gatherings and human movement make it difficult for civil society organisations to arrange meetings with their potential and existing clients. Although government legal aid institutions have re-opened they do not have enough staff members to provide services to the people. For instance in Zambia, the legal aid board office in Lusaka is reportedly manned by one lawyer.

### **5.3 Existence of an accessible court system that is capable of discharging its functions**

Another pre-requisite for the effective administration of justice by the courts is that there must be accessible courts that are capable of addressing the justice needs of the people.<sup>18</sup> In practice, there must be courts which are physically accessible and those courts must be able to receive applications, set matters down, conduct impartial hearings and hand down fair decisions. In all the five cases studies, significant strides have been made to decentralise the court system by establish courts/divisions in different parts of the country to cater for the justice needs of the people. However, as an immediate impact of the spread of COVID-19 in all the five countries of study, court operations were scaled down. Practice directions were issued which imposed various limitations on public access to court buildings. Notable limitations included the decision to allow courts to only accept urgent applications as well as bail applications. In some jurisdictions, such as Botswana, the courts were at some point directed to hear only matters that were “extremely urgent.”<sup>19</sup> In Zambia, between 20 May and 1 June 2020, the courts could only sit to hear urgent matters,<sup>20</sup> while in Zimbabwe the courts only resumed normal operations on 11 May 2020.<sup>21</sup>

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<sup>17</sup> See “Access to Legal Aid in Criminal Justice Systems in Africa Survey Report” by UNODC, available at [https://www.unodc.org/pdf/criminal\\_justice/Survey\\_Report\\_on\\_Access\\_to\\_Legal\\_Aid\\_in\\_Africa.pdf](https://www.unodc.org/pdf/criminal_justice/Survey_Report_on_Access_to_Legal_Aid_in_Africa.pdf)

<sup>18</sup> Teresa Marchiori. “A Framework for Measuring Access to Justice Including Specific Challenges Facing Women” (2015) at page 128.

<sup>19</sup> See paragraph 1 of Practice Direction No. 2 of 2020, issued by the Chief Justice, available at <https://www.justice.gov.bw/sites/default/files/Practice%20Directive%20No.%202%20of%202020.pdf>

<sup>20</sup> See public notice issued by the Chief Justice, available at <http://www.judiciaryzambia.com/wp-content/uploads/2020/05/Notice-to-all-Legal-Practitioners-and-Members-of-the-Public-%E2%80%93-22nd-May-2020.pdf>. Also see the full guidelines available at <http://www.judiciaryzambia.com/wp-content/uploads/2020/05/JUDICIARY-CORONAVIRUS-MAY-2020-GUIDE-LINES.pdf>

<sup>21</sup> See Practice Direction No. 3 of 2020 available at <http://zimlii.org/zw/blog/COVID%2019%20PRACTICE%20DIRECTION%203%20OF%202020.pdf>



The table below shows the periods during which the courts in the 5 countries could only sit to hear urgent matters:

Country	Date on which courts scaled down operations to hear only urgent matters	Date on which courts resumed normal operations
Botswana	1 April 2020	20 May 2020
Zambia	20 May 2020	1 June 2020
Zimbabwe	24 March 2020	11 May 2020
Malawi	27 March 2020	24 May 2020
Mozambique <sup>22</sup>	1 May 2020	11 June 2020

All other matters could not be heard by the court. In practice, this meant that there were no courts to address justice needs of the citizens as long as those needs did not fit within the formal definition of urgent matters. Yet all the lawyers interviewed as part of this research said over 60% of the cases brought to them by clients did not fit within the formal definition of urgent matters, and therefore there were no courts to hear and resolve those legal disputes.

#### 5.4 Ability to discharge matters timeously

In order to provide justice, the court must be able to deliver all its services timeously. Undue delays in court procedures (such as setting down matters, conducting hearings and delivering judgments) undermine access to justice by depriving litigants of a timely remedy to their grievance. As part of the measures undertaken to curb the spread of COVID-19, practice directions were issued in which matters that were not considered to be urgent were postponed.<sup>23</sup> Such matters included remand hearings, sentencing proceedings, applications for criminal discharge and labour disputes.

For example, in Malawi the Commercial Court (Blantyre) postponed 117 cases, in Zimbabwe the High Court (Harare) postponed 123 cases, in Botswana the High Court postponed 93 cases and in Mozambique the Supreme Court postponed hearings in 43 cases.<sup>24</sup> By postponing proceedings in these matters, the right of the parties to timely remedies was undermined and consequently, access to justice for the litigants was undermined.

In some instances, courts had to completely close down after suspected cases of COVID-19 infections and would only re-open after the necessary precautionary measures. For example, in Zambia on 13 and 14 August 2020, 4 courts were closed off for fumigation and legal matters had to be rescheduled.<sup>25</sup> In some countries such

<sup>22</sup> <https://iclg.com/briefing/12188-coronavirus-mozambique-impact-on-litigation-matters>

<sup>23</sup> See the relevant practice directions available at [http://veritaszim.net/sites/veritas\\_d/files/COVID-19%20protection%20measures%20in%20all%20Zimbabwe%20Courts.pdf](http://veritaszim.net/sites/veritas_d/files/COVID-19%20protection%20measures%20in%20all%20Zimbabwe%20Courts.pdf) <https://www.africanwomeninlaw.com/post/covid-19-and-malawi-courts-a-view-from-the-bench>

<sup>24</sup> These figures were provided by the key informants during the interviews.

<sup>25</sup> See public notice available at <https://www.judiciaryzambia.com/2020/08/12/notice-to-all-legal-practitioners-and-mem->

as Zimbabwe where early curfew hours (6pm to 6am) were imposed, court proceedings had to be terminated in order to allow court staff to go home and comply with the curfew regulations. For instance, a bail hearing was postponed in order to comply with curfew hours.<sup>26</sup>

In order to ensure social distance and avoid over crowdedness at the workplace, some of the courts' administrative staff were instructed to work from home. For example in Botswana between April and June 2020, the Chief Justice directed that each Magistrate court station and each High Court station would be manned by a single magistrate and judge on rotation basis and the skeletal court support staff required to deal with urgent matters would only come to court when there is business to be transacted.<sup>27</sup>

Zimbabwe, Malawi and Mozambique introduced similar restrictions. This meant that judges and magistrates presided over bail applications and urgent matters but without sufficient administrative support. As a result, it was reported by both the lawyers and judges interviewed during this research that some of the cases could not proceed because of missing files or missing documents. Two judges interviewed during this research study said they had to postpone at least three bail applications hearings during the month of March because they could not locate certain files without the assistance of administrative staff.

Although some of the court support services (such as research) could be provided remotely, the staff lacked sufficient internet connectivity either because of lack of reliable electricity supply or because of lack of internet connection. Four of the interviewed judges said their research support staff were unable to meet their deadlines and as a result they had to postpone the delivery of their judgements in at least 8 matters.

The restrictions in all the five countries of study are being relaxed gradually, and the courts have started to increase their operations. More court staff is being allowed to return to the workplace and the courts are now accepting to hear new matters, including those that are regarded as non-urgent. However, proceedings in a single matter are being staggered over a period of time in order not to keep litigants in court for long and in order to avoid many people appearing at the same time.<sup>28</sup> As a result, it is taking longer than usual to finalise matters.

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[bers-of-the-public-12th-august-2020/](#)

<sup>26</sup> See <https://www.dailymaverick.co.za/article/2020-07-24-whistle-blowing-journalist-remains-in-police-custody-as-bail-hearing-is-delayed/>

<sup>27</sup> See paragraph 5 of Practice Direction No. 2 of 2020, available at <https://www.justice.gov.bw/sites/default/files/Practice%20Directive%20No.%202%20of%202020.pdf>

<sup>28</sup> See for example the Practice Direction issued by the Chief Justice of Zambia, available at <http://www.judiciaryzambia.com/wp-content/uploads/2020/05/JUDICIARY-CORONAVIRUS-MAY-2020-GUIDELINES.pdf>

## 5.5 Court processes must be fair

As a pre-requisite, the ability of the justice system to ensure fair and non-discriminatory process and outcome is an essential element of the administration of justice.<sup>29</sup> In other words, after engaging the court system, a litigant must be guaranteed that their matter will be treated fairly and that they will be awarded appropriate relief. Although the legal systems of all the five countries of study formally guarantee judicial independence as means to ensure fair treatment of all cases and litigants, in practice judicial independence remains constrained by political interference as well as judicial corruption. For example, a recent study<sup>30</sup> conducted in Zimbabwe, Zambia, Mozambique, Botswana and Malawi identify political interference and corruption as the most prominent threats against access to justice. In order to mitigate against these threats, civil society and the media closely monitor and report on court proceedings. However, as a measure to curb the spread of COVID-19, judiciaries in all the five countries of study imposed restrictions on public access to the court buildings. One of these restrictions was that only persons with direct interest in the matter (such as the parties to the dispute, their attorneys and witnesses) were allowed to attend court hearings.<sup>31</sup> Though necessary to limit the spread of COVID-19, this undermined the ability of members of civil society and the media to monitor and report on court proceedings as safeguards against interference, prejudices and corruption.

Three prosecutors, interviewed during this research (who represented victims of domestic violence) said there was an increase in the tendency by judicial officers to show gender and cultural prejudices in favour of the perpetrators during trial proceedings conducted during the lockdown compared to the other time when members of the public were allowed to observe and monitor the proceedings.

## 5.6 Legal awareness amongst the public

The ability to seek access to justice is very much dependent on the level of legal awareness of the members of the public. For example, in order for people to seek the court's intervention in protecting their rights and legal interests, they must be aware of their rights and the relevant procedures as well as service providers who can help them to bring cases to court. In all the five countries of study, the major providers of such legal awareness are the civil society, para-legals and legal aid clinics.<sup>32</sup> They

<sup>29</sup> Teresa Marchiori. "A Framework for Measuring Access to Justice Including Specific Challenges Facing Women" (2015) at page 136

<sup>30</sup> See "Justice as a Right in Southern Africa: Challenges and Opportunities for strengthening Judicial Independence and Integrity" Report by Freedom House, available at <https://freedomhouse.org/sites/default/files/JARSA%20Final%20Symposium%20Report.pdf>

<sup>31</sup> See for example Practice Directives Issued by the relevant Chief Justices, available at [http://veritaszim.net/sites/veritas\\_d/files/COVID-19%20protection%20measures%20in%20all%20Zimbabwe%20Courts.pdf](http://veritaszim.net/sites/veritas_d/files/COVID-19%20protection%20measures%20in%20all%20Zimbabwe%20Courts.pdf) <https://www.justice.gov.bw/sites/default/files/PRACTICE%20DIRECTIVE%20NO.%201%20OF%202020-%2020032020%20.pdf>

<sup>32</sup> See "Access to Legal Aid in Criminal Justice Systems in Africa Survey Report" by UNODC, available at <https://www.unodc.org>

do so by way of conducting community sensitisation meetings as well as distributing information and education materials. However, the COVID-19 pandemic made it impossible for civil society and university law clinics to continue operating because of the prohibition against public gatherings and restrictions on human movement.

The public lacked adequate awareness of the implications of the declaration of states of disaster and states of emergency. For example, some of the key informants who were interviewed during this research said there was a general perception that the declaration of state of emergency or state of disaster meant that the government security forces were allowed to torture those found contravening the stay at home orders. As a result of this misperception, there are people who were beaten up or treated in a degrading manner by the police and soldiers but they did not seek justice partly because they were unaware that their freedom from inhuman punishment is inviolable. Other people were evicted from their homes during the lockdown despite the governments having put moratoriums against evictions. Three victims of such evictions interviewed during this research study said they did not attempt to seek justice because they were unaware that they had a legal right against evictions during lockdown.

## 6. RECOMMENDATIONS

### 6.1 Digitising court services

Judiciaries should consider digitising their services in order to provide litigants and the public with the option to use virtual means to bring cases to the court as well as observe court proceedings. In comparative jurisdictions,<sup>33</sup> the judiciary has migrated some of the court services to various online platforms, in order to allow litigants to make payments online, file applications electronically, serve notices electronically, conduct proceedings through video conferencing and allow judgments (especially in civil cases) to be handed down through video conferencing. However, in some jurisdictions,<sup>34</sup> there is need for the legislature to reform the laws regulating court procedures in order to allow the migration of these court services onto online platforms.

### 6.2 Written submissions

In order to minimise human movement and gatherings at court buildings, judiciaries should consider allowing certain matters to be adjudicated entirely on the basis of written submissions, without requiring physical attendance by the parties and lawyers. Such matters could include interlocutory applications, chamber applications, as well as bail applications. In some cases (especially criminal matters) where oral arguments may be indispensable, judiciaries should consider allowing litigants to make their closing arguments through written submissions.<sup>35</sup>

### 6.3 Recruiting acting judicial officers

One of the challenges created by the COVID-19 pandemic, as discussed above, is the increase in case backlogs as most of the courts were operating with minimum capacity. The legal frameworks governing the five countries of study allow for the recruitment and appointment of acting judicial officers at the level of magistrates and judges. The executive and legislative branches of government in the five countries should allocate resources to enable the judiciaries to recruit and appoint acting judicial officers to assist in clearing these backlogs. Currently, many governments are putting together economic recovery packages. There cannot be economic recovery without the rule of law<sup>36</sup> and therefore, it is essential that the discussions and strategies for economic recovery should incorporate funding for the recovery of the administration of justice by the courts.

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<sup>33</sup> Such as Kenya. See <https://www.capitalfm.co.ke/news/2020/07/maraga-revisits-call-for-more-funding-as-judiciary-goes-online/>

<sup>34</sup> Such as Zimbabwe. See Supreme Court Act [Chapter 7:13] which stipulates some restrictions on the use of online means.

<sup>35</sup> In Zambia, the Chief Justice has issued a directive to this effect. <http://www.judiciaryzambia.com/wp-content/uploads/2020/05/JUDICIARY-CORONAVIRUS-MAY-2020-GUIDELINES.pdf>

<sup>36</sup> <http://rolalliance.org/rol-alliance-impact/rule-of-law-economic-development/>

## **6.4 Development of COVID-19 protocols for courts**

Whilst digitisation of court services is a noble idea, there must be measures to ensure that those who do not have access to internet can still access justice. Therefore, judiciaries should allow some courts to continue providing services through physical appearances. However, extensive COVID-19 protocols should be developed to ensure that the users of those courts are protected from COVID-19. In some jurisdictions such as Zambia, extensive guidelines have been issued to regulate court operations. These regulations and guidelines include the requirement to regularly sanitise court premises, procedures to be followed when allowing members of the public to enter court premises, number of people who can occupy court rooms and the sitting arrangements in court rooms. The development of these guidelines and regulations should be backed up by effective enforcement, training of court staff as well as extensive civic awareness.

## **6.5 Scaling up civic education on key human rights issues**

As discussed above, limited public awareness especially on some of the issues that have emerged from the state's management of the COVID-19 pandemic, continues to undermine the capacity of the members of the public from seeking justice. Civil society should collaborate with the media to use creative ways of accessing the public and sensitize them in order to create the necessary legal awareness. Critical issues which the public require legal awareness include the legal implications of declaration of states of emergency or states of disaster. The public must be sensitized on the legal procedures to be followed when making such declarations, the norms and standards to be observed when limiting rights during the subsistence of such declarations. When empowered with such knowledge, the public can hold their governments accountable and seek justice where their rights were violated.

## **6.6 Allow law based civil society and para legals to resume their work**

One of the challenges discussed above is that the human travel restrictions have made legal advice and representation to be more inaccessible to the public. In an attempt to address this challenge, law firms and government legal aid boards have been allowed to re-open. However, civil society in some of the countries is still operating under severe restrictions which prevent them from conducting community meetings. University law clinics are still closed. Yet civil society and university law clinics are amongst the major providers of legal representation to the economically vulnerable groups. Governments should consider allowing university law clinics to reopen and they should allow civil society organisations which offer paralegal and legal representation services to resume their community work while observing social distancing and hygienic sanitation regulations and guidelines.

## 6.7 Programs targeted at assisting victims of rights violations

One of the challenges observed during this research is that several vulnerable groups of people<sup>37</sup> have experienced unlawful human rights violations since the start of the COVID-19 pandemic. These people have not been able to seek justice because of many reasons which include inaccessibility of courts, inaccessible legal representation as well as lack of legal awareness. Civil society should consider collaborating with legal bar associations to design and execute accountability programs that are aimed at identifying these violations and assisting the victims to demand justice.

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<sup>37</sup> These include people who are economically vulnerable who live from hand to mouth and who could not comply with the stay a home orders.







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