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The diagram on the laptop screen features a central green map of East Africa. Surrounding the map are six circular icons connected by a dotted line: a judge in a black and white robe, a book with the word 'CODE' on its cover, a scale of justice, a shield, a gavel, and a pair of glasses. To the right of the map is a red virus icon with orange spikes, representing COVID-19.

# The Impact of COVID-19 on Access to Justice in East Africa: temporary disruption or paradigm shift to e-justice?

**AFRICA JUDGES AND JURISTS' FORUM (AJJF)  
REPORT 2021**



**AFRICA JUDGES & JURISTS FORUM**

**The Africa Judges and Jurists Forum (AJJF)**

**The Impact of COVID-19 on Access to Justice in East  
Africa: temporary disruption or paradigm shift to e-justice?**

**July, 2021**



## **The Africa Judges and 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, Intergovernmental entities, non-governmental formations, and the private sector.



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Africa Judges and Jurists Forum



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The report also benefitted from comments made by prof. Chris Mbazira of the School of Law, Makerere University.

This study is part of the implementation of a larger project on: “The Impact of COVID-19 on Access to Justice in East and West Africa,” implemented by the AJJF in 2021. I wish to extend my heartfelt gratitude to the colleagues at the Secretariat who coordinated this project. Their management of the project has contributed invaluablely to its success.

I would like to acknowledge the Open Society Foundation (OSF) for their financial support which enabled AJJF to undertake this Study. We are grateful for the supportive approach that their representatives took. The challenges revealed by the study remain substantial. The need for continued collaboration in order to mitigate the effects of COVID-19 on access to justice speaks for itself.

I recommend this study to all those interested in promoting access to justice in the region – from government ministries and agencies, civil society groups, donor agencies and to the academia, among others. The Study provides solid evidence for the multifaceted effects of COVID-19 on access to justice in the countries under study. It also inspires possible interventions for the immediate, medium and long-term.

Martin Okumu-Masiga

Secretary General

Africa Judges and Jurists Forum

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## FOREWORD

In January 2020, the World Health Organisation (WHO) declared COVID-19 as a Public Health Emergency of International Concern. Both the virus (COVID-19) and the restrictions imposed by States to combat its spread have had drastic effects on the way societies across the globe function or ought to function.

Access to justice is one of the areas which suffered serious regressive disruption. In order to enjoy access to justice, certain pre-requisites must be in place. Individuals and groups must have access to independent tribunals where their legal disputes are resolved impartially in accordance with the law. They must have access to legal services that are necessary for them to bring their legal cases before the tribunals. These services must be affordable and physically accessible. Legal disputes must be resolved timeously, and effective remedies must be given and enforced. Prior to the COVID-19 pandemic, some of these pre-requisites for access to justice were not available to some sections of society, particularly vulnerable groups who include women, children, persons with disabilities who are economically marginalized. For example, legal services were already inaccessible to many because legal fees are expensive, and many economically marginalized persons cannot afford them.

However, the outbreak of the COVID-19 pandemic further reduced access to justice. Both the virus and the restrictive measures undertaken by States disrupted public access to the systems and structures that had been established to facilitate access to justice. For example, public access to court buildings was severely restricted while court hearings were postponed during periods of national lockdowns. In some cases, judges and court staff contracted the virus and the courts had to shut down. The suspension of economic activity during national lockdowns further pushed many people into abject poverty and increased the number of people who can no longer afford the costs of legal services and litigation. Restrictions on human movement and public gatherings prevented many indigent persons from accessing pro-bono legal services from civil society. Like many other businesses, law firms are struggling financially because of the economic meltdown brought by the pandemic.

In an attempt to evaluate and examine the full scope of these challenges, the Africa Judges and Jurists Forum (AJJF) commissioned a study on the impact of the COVID-19 pandemic on access to justice in West Africa, focusing on selected countries as case studies. The study has culminated in this report. We hope that this report will assist stakeholders in the justice sector to better understand the impact of this pandemic on access to justice in these countries, the challenges which have arisen and the solutions that are needed to address these challenges.

Justice Mohammed Chande Othman

Retired Court Justice of the United Republic of Tanzania & Member of the Judicial Elders' Council, AJJF.





## **ABBREVIATIONS AND ACRONYMS**

CCAS	Court Case Administration System
CCR	Case Clearance Rate
CCTV	Closed Circuit Television
CUC	Court User Committees
DPP	Directorate of Public Prosecutions
ECMS	Electronic Case Management System
GBV	Gender-Based Violence
GDPR	General Data Protection Regulation
HiiL	Hague Institute for the Internationalisation of Law
ICT	Information and Communication Technology
IDPs	Internally Displaced Persons
JLOS	Justice Law and Order sector
JRC	Juvenile Reformatory Centre
JTF	Judiciary Transformation Framework
KNCHR	Kenya National Commission of Human Rights
LASPNET	Legal Aid Services Providers network
LSK	Law Society of Kenya
NGOs	Non-Government Organisations
NLAS	National Legal Aid Service
PHEIC	Public Health Event of International Concern
PWDs	Persons with Disabilities
SOPs	Standard Operating Procedures
UBOS	Uganda Bureau of Statistics
ULS	Uganda Law Society
UNDP	United Nations Development Programme
WHO	World Health Organisation

### **1.0 INTRODUCTION**



## 1.1 Background and objectives of the study

Goal 16 of the Sustainable Development Goals is to “Promote just, peaceful and inclusive societies.” This goal is informed by the fact that “conflict, insecurity, weak institutions and limited access to justice remain a great threat to sustainable development.” The need for justice arises from the problems people face in their day to day lives, many of which have a legal element. According to The Hague Institute for the Internationalisation of Law (Hiil), across the globe, 100s of millions find difficulty in achieving fair solutions for their land or work-related problems. Families need assistance when they face separation, violence or accidents. Conflicts with neighbours and authorities are also a big problem, as are consumer-related problems. Hiil’s research shows that half of legal problems have a strong negative impact on people’s lives.<sup>1</sup>

Access to justice was a serious problem all over the world even before COVID-19. The 2019 *Justice for All* report established that 253 million people worldwide face situations of extreme injustice, such as statelessness, slavery and insecurity and that 1.5 billion people had a justice problem that they could not resolve. Also, 4.5 billion are excluded from the opportunity for justice provided by the law because they have no legal identity. Moreover, 5.1 billion people, or two thirds of world’s population, lack meaningful access to justice. Women, children, poor people, persons with disabilities, and people from minority communities find it hardest to access justice.<sup>2</sup>

The outbreak of the Corona virus in Wuhan, China was declared on December 31<sup>st</sup>, 2019, from where it spread to other parts of the world including East Africa.<sup>3</sup> The speed at which the virus was spreading led the World Health Organization (WHO) to declare the outbreak “a Public Health Event of International Concern (PHEIC) on 30 January 2020 and a pandemic on 11 March 2020.<sup>4</sup>

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<sup>1</sup> Hiil, 2018. *Understanding Justice Needs: The Elephant in the Court Room*. Available at: <https://www.hiil.org/wp-content/uploads/2018/11/Hiil-Understanding-Justice-Needs-The-Elephant-in-the-Courtroom.pdf>. Accessed 6 May 2021.

<sup>2</sup> The Task Force on Justice, 2019. *Justice for All*. Available at [https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/90b3d6\\_746fc8e4f9404abeb994928d3fe85c9e.pdf](https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/90b3d6_746fc8e4f9404abeb994928d3fe85c9e.pdf) Accessed 6 May 2021.

<sup>3</sup> World Health Organisation (WHO), 2020. WHO Director-General's opening remarks at the media briefing on COVID-19-19 - 11 March 2020. Available at <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19-19---11-march-2020>

<sup>4</sup> Ibid

COVID-19 exacerbated existing access to justice problems and created new ones. “It is not only a health crisis but also a human rights crisis.”<sup>5</sup> Sickness and death affected the fundamental rights to health and life of millions, and the loss of employment, livelihoods and income for billions, especially those who were already vulnerable and disadvantaged, created and exacerbated myriad justice needs. Emergency orders, laws, regulations and directives enacted in haste led to various human rights abuses as governments sought to tighten their grip on power, while lockdowns heightened risks of insecurity, crime, and gender-based and domestic violence.<sup>6</sup>

Even as COVID-19 gave rise to new justice needs, the means to address them was severely curtailed by the lockdown measures that were imposed in most countries, and the accompanying closure of courts of law and other justice and law enforcement premises. Proceedings were halted, judgments could not be executed, and people were left in limbo as the entire justice system came to a standstill. As a matter of fact, many people with justice needs do not necessarily use the formal court system. They instead use alternative dispute resolution through informal justice mechanisms such as traditional courts.<sup>7</sup> Nonetheless, the formal courts still have a huge burden, and many have a persistent problem of case backlogs. In situations of pandemics or emergencies of this nature, it is important that judicial institutions are able to offer their services effectively, in a manner that allows for fair trial guarantees and access to effective remedies.<sup>8</sup> This is among the ways the rule of law and democracy can be safeguarded during such times.<sup>9</sup> This is more so since there is a high propensity to violate human rights in enforcement of directives issued during the pandemic. Indeed, increased chances of domestic violence and other abuses have been witnessed as people stay at home. Yet government efforts have concentrated on curbing the pandemic rather than preventing violations and abuses of human rights.

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<sup>5</sup> Pathfinders, 2020. *Justice for All and the Public Health Emergency*. Available at [https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/6c192f\\_1e8d8e91cfec4098b7b26db9cd296d30.pdf](https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/6c192f_1e8d8e91cfec4098b7b26db9cd296d30.pdf) Accessed 6 May 2021

<sup>6</sup> Ibid.

<sup>7</sup> HiiL, op.cit

<sup>8</sup> International Commission of Jurists (ICJ), *Videoconferencing, Courts and COVID-19-19: Recommendations Based on International Standards*, November 2020, at 2 available at, [https://www.unodc.org/res/ji/import/guide/icj\\_videoconferencing/icj\\_videoconferencing.pdf](https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf) ( accessed May 18,2021)

<sup>9</sup> Ibid.



The pandemic has highlighted the importance of modernizing court systems and procedures to bring them into the digital age. In East Africa and other countries across the world, many justice systems were unprepared for the pandemic and the ensuing shift to tele-working and digitized processes. Even though many courts use digital technology, it often replicates existing systems and processes. It does not necessarily transform the systems to improve efficiency.<sup>10</sup> Sourdin et al (2020) observe that judges and courts are inherently conservative and may be reluctant to innovate: ‘Many courts continue to closely resemble the courts of the past century (and even the century before that).’<sup>11</sup> They quote Justice Michael Kirby of Australia, whose words ring true for the situation facing East African Courts even though he uttered them over two decades ago in Australia:

A lawyer from Dickens’ time, walking out of Bleak House into a modern Australian court on an ordinary day, would see relatively few changes. Same wigs and robes. Same elevated Bench and sitting times. Very similar basic procedures of calling evidence and presenting argument. Longer judgments: but still the same structure of facts, law and conclusion. Contrast, if you will, the astonishment of a physician from Guy's Hospital in London, from the middle of the last century, wandering into the electronic world of beepers and monitors, of CAT scans, genomic tests and automated diagnosis of a modern Australian hospital. We have made progress in the law and in the courts, including the past twenty-five years. But not as much as other professions. Will it stay this way?

In line with the above, this report considers the judicial innovations that have arisen because of COVID-19, particularly the shift towards e-justice that was catalysed by the need for social distancing. The question is whether this is indeed a paradigm shift in the modus operandi of Courts of Law, or whether it was a temporary solution put in place to deal with the crisis. Only time will tell, but the on-going digital revolution in other aspects of life such as mobile money and banking would suggest that change is inevitable. Indeed, the situation in two of the countries that were the focus of the study, Kenya and Uganda, where significant progress has been made in digitising several court processes, shows that e-justice is here to stay. On the other hand, South Sudan, a new country still establishing its justice system, has not made much progress, but has the opportunity to learn from its neighbours and adopt e-justice as part of its state-building process.

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<sup>10</sup> Sourdin, T., Li, B., & McNamara, D. M. (2020). Court innovations and access to justice in times of crisis. *Health policy and technology*, 9(4), 447–453. <https://doi.org/10.1016/j.hlpt.2020.08.020>

<sup>11</sup> Ibid.



## **1.2 Study methodology, scope and synopsis**

The study was based on a desk review of the relevant statutory laws, directives and guidelines issued by government agencies and departments in response to the COVID-19 pandemic. This is in addition to a review of relevant literature, including journal articles, official reports and news articles. Interviews with selected key informants in the Justice System provided further information and insights. A list of interviewees is in the Appendix.

The Report considers the impact of the COVID-19 pandemic on the administration of justice and access to justice, focusing on Kenya, Uganda and South Sudan. Other East African countries (Tanzania, Rwanda and Burundi) were left out in conformity with the study project design. The Report analyses the implications of court closures, online processes and social distancing for access to justice and offers suggestions and a way forward for the immediate future and for the longer-term post-pandemic period. As South Sudan is a new nation still working towards peace and stability, the Report also considers how the COVID-19 affected transitional justice mechanisms and processes.

After the introduction, part II of the study analyses the situation in Uganda. It explains how the pandemic affected Ugandan society in general. It considers the general situation on access to justice in Uganda, including the law and policy that facilitates it and then looks at the pandemic's impact on the justice system and access to justice. Following a similar logic, part III looks at Kenya and part IV at South Sudan. Part V focuses on a discussion and analysis of what the ongoing changes imply for traditional notions of the right to a fair trial, due process and access to justice. Part 6 concludes the study and offers policy and practical recommendations for improved administration of and access to justice as part of pandemic recovery efforts.

## **2.0 COVID-19 AND ITS IMPACT ON ACCESS TO JUSTICE IN UGANDA**

### **2.1 Situation Analysis**

Uganda, just like the other countries of the world, first experienced the COVID-19 pandemic in March 2020. To prevent the spread of the virus, some measures were introduced by the Government of Uganda. These included prevention of concentration of people in the same place



by closing down schools, churches, mosques and banning public gatherings.<sup>12</sup> Public transport was banned, and mandatory quarantine for travellers from high-risk countries was introduced on March 25<sup>th</sup>, 2019.<sup>13</sup> At the end of March, a total lockdown was declared, and curfew hours set for 7.00 pm to 6.30 am. Shopping-malls and all non-food selling shops were closed. A ban on movement for private vehicles was instituted.

The above measures affected various sections of society and the continuance of their work. For instance, even human rights defenders could not operate normally,<sup>14</sup> community workers could not move,<sup>15</sup> and market vendors had to sleep in the markets.<sup>16</sup> Also, judicial institutions and lawyers could not operate normally.<sup>17</sup> The listed essential service providers that continued operating included medical service providers, the media, Uganda Revenue Authority (URA), food service providers, security personnel, pharmacies, and providers of such utility services as water and electricity, among others.<sup>18</sup> Legal and judicial services were not listed as essential. It was not until later on during the total lockdown that the Judiciary was allowed to work on urgent matters.<sup>19</sup> Lawyers were never listed as essential service providers. This was unsuccessfully challenged by some members of the Uganda Law Society (ULS).<sup>20</sup> Later, a presidential directive allowed the ULS to make a list of 30 lawyers who would continue to operate while others remained at home.<sup>21</sup>

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<sup>12</sup> Museveni orders closure of schools, suspends religious gatherings over coronavirus, *The Monitor* 18 March 2020, available at <https://www.monitor.co.ug/News/National/Museveni-closes-schools-religious-gatherings-coronavirus/688334-5495888-srauuwz/index.html> (accessed May 3rd 2021). This was during a presidential address on 18 March 2020.

<sup>13</sup> Ibid.

<sup>14</sup> The Human Rights Centre Uganda (HRCU) - Human Rights Issues arising out of the Measures taken in Uganda to Prevent the Spread of the COVID-19-19 Pandemic note by the HRCU, 1st May 2021 at page 2, available at, <http://www.hrcug.org/publications/file/HUMAN%20RIGHTS%20ISSUES%20ARISING%20OUT%20OF%20MEASURES%20TO%20PREVENT%20SPREAD%20OF%20THE%20COVID-19-19.pdf> (accessed 18 May, 2021)

<sup>15</sup> Diana Oroma, Uganda: Women, Peace, Security and The Pandemic: Mediation to Address Tensions during COVID-19-19, at 10, in, UNOCHA, On the Front Lines; Defending Rights in the Time of COVID-19-19, December 2020.

<sup>16</sup> See, YouTube, NTV-Uganda video, COVID-19-19 Pandemic; No Reprieve for Vendors Sleeping in Markets, 5 May 2021, Available at <https://www.youtube.com/watch?v=yILaPOOoTaU> (accessed 18 May 2021)

<sup>17</sup> HRCU, *supra* note 14.

<sup>18</sup> Ibid

<sup>19</sup> Ibid.

<sup>20</sup> Muwema Fred, “Legal Services essential during COVID-19-19”, *Daily Monitor* 9 May 2021, available at <https://www.monitor.co.ug/uganda/oped/commentary/legal-services-essential-during-COVID-19-19-lockdown-1888808> (accessed May 18, 2021)

<sup>21</sup> Daily Monitor, Judiciary asks for list of 30 lawyers, 6 May, 2020, available at <https://www.monitor.co.ug/uganda/news/national/judiciary-asks-for-list-of-30-lawyers-1888428> (accessed May 18, 2021).



This caused outcry among members of the ULS, whose registered advocates are over 3000. The question was what criteria would be used to select the 30?<sup>22</sup> Considering the pending access to justice needs, just 30 advocates would not be able to handle all matters that would arise.<sup>23</sup> The above also meant that access to lawyers for lockdown related offences such as domestic violence was curtailed.<sup>24</sup>

Other measures recommended during the lockdown were wearing face masks in public places; constant washing of hands with detergents or regular use of sanitizers, social distancing and avoiding gatherings of many people – in short “stay at home”.<sup>25</sup>

The findings of this Report show that the courts in Uganda could not function normally, thereby affecting access to Justice. By the directive of the Chief Justice, to prevent the spread of the pandemic, only a few exceptional cases would be heard, and video conferencing was recommended as a measure to avoid human interaction.<sup>26</sup> Field findings show that lack of proper criteria for selection of the few cases increased corruption; advocates had to pay bribes to some court officers to have their cases included.<sup>27</sup> Case backlogs remain a current problem; inability to get a timely effective remedy was an issue. Consequently, increased human rights violations heightened the demand for justice moreover the supply of justice services remained limited. Restricted movements affected the pursuit of remedies, among others.

In the circumstances, vulnerable groups such as women, children, persons with disabilities (PWDs), persons living with HIV, women and children were doubly marginalized during the pandemic. The inability of Legal Aid Service Providers and Non-Governmental Organizations (NGOs) to function meant that their pro-bono services were limited in accessibility. Indeed, the vulnerable groups suffer impediments to access to justice even during normal times. COVID-19

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<sup>22</sup> Ibid.

<sup>23</sup> Muwema, *supra* note 20. In contrast to Uganda, in Kenya and South Africa, legal services were considered essential.

<sup>24</sup> Interview with a Justice of the Court of Appeal of Uganda, June 2021.

<sup>25</sup> See, the Public Health (Control of COVID-19-19) Regulations 2020, made under the Public Health Act 1935.

<sup>26</sup> See, The Judiciary Circular No CJ/C.7, Administrative and Contingency measures to prevent and mitigate the spread of Corona Virus (COVID-19-19) by, dated March 19 2020, available at - <https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/COVID-19-19> (accessed May 3, 2021).

<sup>27</sup> Phone interview with an advocate, May 2021.



has exacerbated this. In several African countries, the pandemic has heightened violations and abuses of the rights of vulnerable groups. Affected rights have included freedom of association, freedom from torture and inhumane or degrading treatment or punishment, and the violation of several economic social and cultural rights, among others.<sup>28</sup> During the pandemic, the restrictions of the Chief Justice in his Directive further hampered the possibility of access to justice for violation of rights of the vulnerable groups.<sup>29</sup>

Digitalization of access to justice during the pandemic was instrumental in preventing the spread of the COVID-19 virus. However, this entrenched the challenges in access to justice faced by women. This is because of the gender gap in access to digital technology affecting women mainly. A recent Report puts the percentage of men owning mobile phones at 84% and women at 69% in Uganda.<sup>30</sup> In terms of internet use, the percentage of men using internet is at 24% and compared to only 13% for women.<sup>31</sup> The Study generally indicates slow growth in women's ownership of mobile phones.<sup>32</sup> The barriers that women face include lack of mobile phones and inaccessibility to affordable internet services.<sup>33</sup> It is therefore right to say that inaccessibility to mobile phones and data to run them is a key factor that may affect access to justice for women during the pandemic.

During the pandemic, the need for justice for such groups was heightened due to increased susceptibility to abuses and violations meted against them because of restricted movement, closedown of many activities; leading to domestic violence.<sup>34</sup> Also affected were Persons living with HIV whose health deteriorated due to inability to access Anti-Retroviral Drugs (ARVs) and

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<sup>28</sup> International Services for Human Rights –ISHR, NGO Forum; The Impact of COVID-19-19 on human rights in Africa, November 19, 2020, available at, <https://www.ishr.ch/news/ngo-forum-impact-COVID-19-19-human-rights-africa> (accessed May 14, 2021).

<sup>29</sup> Mugenyi. M. L, *Locked Down Justice: Gender and Access to Justice under COVID-19-19 in Uganda*, Available at -<https://www.africanwomeninlaw.com/post/locked-down-justice-gender-and-access-to-justice-under-COVID-19-19-in-uganda> (accessed May 13, 2021).

<sup>30</sup> GSMA, The Mobile Gender Gap Report 2020, at 11- available at <https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2020/05/GSMA-The-Mobile-Gender-Gap-Report-2020.pdf> (accessed May 13, 2021)

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*, at 14.

<sup>33</sup> *Ibid*, at 16

<sup>34</sup> Mubiru Mukalazi.D., Access to Justice under COVID-19-19, *The Independent* April 27, 2020, available at <https://www.independent.co.ug/access-to-justice-under-COVID-19-19/>, (accessed May 13, 2021).





other services; a violation of their right to health. With the financial distress and restrictions on movement, the lockdown affected many aspects of life of vulnerable groups including access to justice.<sup>35</sup>

Unlike some of the other countries, 2020 was a significant year in Uganda's politics. This is because this period was close to the end of a political term in office, with Presidential, Parliamentary and local government elections slated for January 2021. This led to campaigns for aspirants for political office, from the office of the president to the lowest units. This is usually a period of high level political and social interaction, with economic significance to persons engaged in the various aspects of the campaign, and national actors such as the Independent Electoral Commission and Ministry of Finance. The above context fact also means that persons holding political office were already strategizing on retention of office. The political period also meant that Standard Operating Procedures were to some extent used as schemata to reduce the space for political opponents. Attempts to enforce them were at times perfunctory, for public show. In such an environment, the demand for justice increased, yet the judiciary was limited and the operations of its partner entities such as the Police and Prosecutions Service was hampered too.

The next section of the report considers access to justice issues in Uganda in the pre- and post-pandemic phase, covering the responses of the Judiciary to COVID-19 in the interest of justice.

## **2.2 Legal and policy framework for access to justice in Uganda**

Justice is not a cloistered virtue. It is a tree under whose spreading branches all who seek shelter will find it. But it is a tree which flourishes only in the open, in the glare of public scrutiny...if it is kept in the darkness of secrecy this tree will wither and its branches will become deformed...<sup>36</sup>

The notion of access to justice connotes an independent judicial system that is open to all without discrimination; it is a key factor in the promotion of the rule of law.<sup>37</sup> Justice in the open, as referred to by Newbold P in the above quote, promotes transparency and accountability. Through access to

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<sup>35</sup> Ibid.

<sup>36</sup> Newbold P., Omari Musa and others vs Republic (1970) E.A at 42.

<sup>37</sup> See, T the Declaration of the High Level meeting on the rule of law- Para 13, 14 & 15 , available at - <https://www.un.org/ruleoflaw/blog/document/declaration-of-the-high-level-meeting-of-the-67th-session-of-the-general-assembly-on-the-rule-of-law-at-the-national-and-international-levels/> (accessed May 18, 2021)



justice, violations of human rights can be challenged in pursuit of remedies, and accountability for executive decisions.<sup>38</sup> Uganda has a robust legal and policy framework to facilitate access to justice, as seen below.

### ***2.2.1. The 1995 Constitution, other statutory enactments and justice systems***

Uganda operates a Common Law legal system. The Constitution of Uganda provides that judicial power is exercisable in the name of the people and “in conformity with the law and with the values, norms and aspirations of the people.”<sup>39</sup> The hierarchy of the Courts of Judicature in Uganda is set out under Article 129(1) of the Constitution. The Supreme Court of Uganda is the highest court and final court of appeal which handles appeals from decisions of the Court of Appeal.<sup>40</sup> The Court of Appeal is the second highest court, which handles appeals from the High court in accordance with the law.<sup>41</sup> The Court of Appeal can sit as a Constitutional Court to address questions of constitutional interpretation; allegations that an Act of parliament or other law or an act or omission of a person or authority contravenes the constitution and that the court should make a declaration to that effect and/grant an appropriate remedy.<sup>42</sup> The third court in the hierarchy is the High Court, which by the Constitution, has unlimited jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law.<sup>43</sup> The High Court receives appeals from all lower courts, subject to the constitution and other laws.<sup>44</sup> To ease administration, and promote specialization, the High Court of Uganda is sub-divided as follows; civil, criminal, commercial, family, and anti-corruption and war crimes divisions.<sup>45</sup> Ideally, this should facilitate speedy delivery of justice. Magistrate’s courts on the other hand operate below the High Court, under its supervision, and appeals from them go to the High Court.<sup>46</sup> The High Court and the Supreme Court are courts of record, while the rest are not; they are subordinate courts. The

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<sup>38</sup> The United Nations and the Rule of Law, Access to Justice, Available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>, accessed April 6, 2021.

<sup>39</sup> Constitution of Uganda 1995, Article 126 (1).

<sup>40</sup> *Ibid*, Article 132 (1)-(3), Judicature Act, Section 3 and 4.

<sup>41</sup> *Ibid*, Article 134 (2), and Section 9 and 10.

<sup>42</sup> *Ibid*, Article 137.

<sup>43</sup> *Ibid*, Article 139 (1).

<sup>44</sup> *Ibid*, Article 139 (2), Judicature Act, Section 14.

<sup>45</sup> *Ibid*, at 350

<sup>46</sup> *Ibid*, Article 129 (d), Magistrate Court Act, Uganda.



jurisdiction of the courts has for the most part been divided into civil and criminal jurisdiction.<sup>47</sup> The binary dichotomy is less relevant today.

The functioning subordinate courts include the Local Council Court system established under the Local Council Court Act 2006,<sup>48</sup> and the military justice system operating on the basis of the Uganda Peoples' defences Forces Act, 2005. Qadi courts are also envisaged.<sup>49</sup> Besides the state run systems, customary and religious justice systems are recognised alternative justice systems.<sup>50</sup> The High court is mandated to apply written law, and "any established and current custom or usage" in situations where written law does not apply.<sup>51</sup> This has created space for customary justice systems. They are most predominant in the Eastern and Northern regions of the country.<sup>52</sup>

Therefore, Uganda is a legally pluralistic country running diverse justice systems. This lends credence to the belief that "Africa is probably today's largest living laboratory of effective legal pluralism."<sup>53</sup> Legal pluralism is about creating an environment in which pluralistic legal systems or hybrids thrive in the delivery of justice.<sup>54</sup> This study found that formal justice systems were affected by the pandemic. In this regard, legal pluralism would be advantageous, creating room for the informal justice systems to fill the justice gap. Local council Courts are grass root in nature, closer to the communities they serve. They have however not been fully operationalised and

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<sup>47</sup> Kiryabwire, G. (2009), "The Development of the Commercial Judicial System in Uganda: A study of the Commercial Court Division, High Court of Uganda" 2 J Day, 2 J. *Bus. Entrepreneurship & L. Iss.* 2 at 349. Available at: <https://digitalcommons.pepperdine.edu/jbel/vol2/iss2/3> (accessed April 7, 2021)

<sup>48</sup> *Ibid*, Article 129 (d).

<sup>49</sup> Constitution of Uganda 1995, article 129 (d).

<sup>50</sup> Roseveare, C. The Rule of Law and International Development, DFID research and Evidence Division Evidence Products, at 39-40, available at [https://assets.publishing.service.gov.uk/media/57a08a0be5274a27b20003c7/Literature\\_Review\\_RoL\\_DFIG-GSDCH-PEAKS\\_FINAL.pdf](https://assets.publishing.service.gov.uk/media/57a08a0be5274a27b20003c7/Literature_Review_RoL_DFIG-GSDCH-PEAKS_FINAL.pdf) (accessed April 7 2021).

<sup>51</sup> Judicature Act Section 14 (2) (b) (ii).

<sup>52</sup> Callaghan., S., Overview of Customary Justice and Legal Pluralism in Uganda, paper presented at the Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, Hosted by the United States Institute of Peace, George Washington University and the World Bank, November 17-18, 2009, Available at - <https://issat.dcaf.ch/sqi/Learn/Resource-Library/Policy-and-Research-Papers/Customary-Justice-and-Legal-Pluralism-in-Post-Conflict-and-Fragile-Societies> (accessed April 7, 2021).

<sup>53</sup> Jacques Fremont (2009), "Legal Pluralism, Customary Law and Human Rights in Francophone African Countries," 40 VUWLR, 149-166 at 149.

<sup>54</sup> O'Connor, V. (2012), Common Law and Civil Law Traditions: A Practitioners Guide, INPROL - International Network to Promote the Rule of Law.



facilitated to dispense justice during normal times.<sup>55</sup> This doubly affects their potential to deliver during a pandemic.

Considering the fragile nature of customary justice systems in normal times, it is reasonably expected that their operation was affected by COVID-19. The study did not find cogent evidence about the extent to which they were affected, if at all. According to one respondent, “most traditional courts were upcountry where the effects of lockdown or compliance with SOPs like social distancing were not as enforced as in urban areas; so, I believe these were largely unaffected, but I have no proof.”<sup>56</sup>

### ***2.2.2. Legal aid service provision and the challenges encountered***

Provision of legal aid is an important component of access to justice, especially in Uganda’s context where the poor and vulnerable are always in dire need of legal services, including during the COVID-19 pandemic. Gaps in the legal and policy framework on legal aid service provision coupled with limited access to courts of law negatively impacted on legal aid service provision during the pandemic.

Uganda does not have a clear legal and policy framework on access to legal aid. Article 28(3)(e) of the Constitution guarantees the right to legal aid (at the expense of the state) for every person charged with a criminal offence which carries a sentence of death or life imprisonment. However, Legal Aid is not only legal representation in the court system. It extends to legal advice, assistance, representation, education, and alternative dispute resolution.<sup>57</sup> The situation in Uganda regarding legal aid has been summarised as follows:

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<sup>55</sup> Lumunye, T, *COVID-19-19 and the Administration of Justice in Uganda*, Available at <https://www.jlos.go.ug/index.php/document-centre/COVID-19-19/426-COVID-19-19-and-the-administration-of-justice-in-uganda/file> accessed July 22, 2021

<sup>56</sup> Interview with a Justice of the Court of Appeal of Uganda.

<sup>57</sup> The Lilongwe Declaration on Accessing Legal Aid in Criminal Justice Systems in Africa, 2004. The declaration was adopted by the African Commission on Human and Peoples’ Rights (Res.100/XXXX/06) and by the United Nations Economic and Social Council, ECOSOC Res. 2007/24). The Lilongwe Declaration forms the basis of new draft UN Principles and Guidelines on Legal Aid in Criminal Justice Systems currently pending an inter-governmental meeting of experts in Vienna in November 2011.



The provision of legal aid in Uganda currently operates in a policy vacuum. The result is a patchwork of services, many of which provide excellent value for money, but which lack an overarching strategy and standardized set of services that would provide for the legal needs of all persons in Uganda.<sup>58</sup>

The above notwithstanding, there are various laws that govern the provision of Legal Aid in Uganda. These include the Poor Persons Defence Act,<sup>59</sup> which provides for legal aid for poor persons if it is desirable in the interests of justice. Under the Advocates (Amendment) Act 27 of 2002, Section 15A, Advocates must provide pro bono services to indigent persons for a period of at least 40 hours per year.<sup>60</sup> Also, as part of training, students of the Bar Course at LDC may represent indigent persons under supervision of an advocate under the Advocates (Student Practice) Regulations, 2004. All the above were affected by the outbreak of COVID-19 and the restrictions and lockdown that followed.

Legal aid services are mainly provided by the private sector/civil society organizations and not government entities.<sup>61</sup> These are coordinated under the Legal Aid Services Providers Network (LASPNET) which has about 54 providers operating in 80 districts of Uganda.<sup>62</sup>

Lack of a clear legal and policy framework means that efforts aimed at provision of legal aid to facilitate access to justice are not effectively coordinated and streamlined. To address this problem a Draft National Legal Aid Policy June 2012 and the National Legal Aid Bill, 2019 have been developed. These aim at consolidating, updating and modernizing the law on legal aid in Uganda.<sup>63</sup> The Central Government agency responsible for the provision of legal aid will be Justice Centres Uganda. Among other provisions, the Bill imposes an obligation on Government to provide legal aid services and expands the definition of legal aid to mean more than providing counsel.<sup>64</sup>

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<sup>58</sup> Justice Law and Order Sector, Draft National Legal Aid Policy, Draft 6 (Final, June 2012, Para. 23.

<sup>59</sup> Chapter 20 of Laws of Uganda.

<sup>60</sup> See, The Advocates (Pro Bono Services to Indigent Persons) Regulations, 2009.

<sup>61</sup> See, The Baseline and Needs Analysis Survey Report on Legal Aid in Uganda (2004).

<sup>62</sup> LASPNET, Statement on the Preliminary Findings on the Impact of the 2021 General Elections on Human Rights; Access to Justice and Rule of Law in Uganda, February 1<sup>st</sup> 2021, available at <http://www.laspnet.org/blog/562-a-statement-on-the-preliminary-findings-on-the-impact-of-the-2021-general-elections-on-human-rights-access-to-justice-and-rule-of-law-in-ugand> (accessed May 7 2021)

<sup>63</sup> Centre for Public Interest Law, Understanding the National Legal Aid Bill, 2019., available at , <https://cepiluganda.org/3258/understanding-the-national-legal-aid-bill-2019/>, (accessed April 19, 2021)

<sup>64</sup>See National Legal Aid Bill, 2019.



This report finds that legal aid services were greatly affected by the COVID-19 pandemic, thereby reducing the poor and vulnerable peoples' ability to access justice.

## **2.3 The state of access to justice in Uganda prior to COVID-19: - challenges and progress**

### **2.3.1 Supply-Side Factors in Access to Justice**

#### *Accessibility to Judicial officers and geographical access to courts*

The exercise of judicial power under Article 126 of the Constitution for the people of Uganda can only happen if there are a sufficient number of accessible judicial officers to dispense justice while resolving disputes.

Uganda has 10 justices of the Supreme Court, 13 justices of the Court of Appeal/Constitutional Court, 55 judges of the High Court and 02 Judges of the Industrial Court (all as at 15<sup>th</sup> July 2021).<sup>65</sup> This means that the population of over 35 million peoples is served by only 80 judicial officers in the courts of record.<sup>66</sup> At the lower level, there are 54 Chief Magistrates, 162 Grade One Magistrates, 23 Grade Two Magistrates all totalling to 242. It is therefore no wonder that due to the inaccessibility of judicial officers, the majority Ugandans resort to networks of social capital and other systems such as the Local Council Courts more than the formal justice systems.<sup>67</sup>

Despite attempts to improve the situation over years, geographical proximity of justice institutions remains a stumbling block to access to justice. The Judicature (Designation of High Court Circuits) Instrument, No. 55 of 2016, creates 20 High Court circuits, with the intention of expediting case resolution and improving proximity to those in need of judicial services.<sup>68</sup> The schedule to the

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<sup>65</sup> See List of Judicial Officers as at 15<sup>th</sup> July 2021, from the Judiciary of Uganda, Adjusting information available at the Judiciary, *Judicial Officers*, available at, <http://judiciary.go.ug/data/smenu/91/1/Judicial%20Officers.html>(accessed April 24, 2021).

<sup>66</sup> Uganda's population was 34.6 in 2014 and is projected to be 46 million in the year 2025. See, Government of Uganda, State of Uganda Population Report 2017, at 5-6, available at <http://npcsec.go.ug/wp-content/uploads/2013/06/SUPRE-REPORT-2017.pdf> (accessed April 24, 2021).

<sup>67</sup> The Hague Institute for the Internationalisation of Law (Hiil), Justice Needs in Uganda 2016: Legal Problems in Daily life at 4, available at, <https://www.hiil.org/wp-content/uploads/2018/07/Uganda-JNST-Data-Report-2016.pdf> (accessed 7 May 2021)

<sup>68</sup> See The Judicature (Designation of High Court Circuits) Instrument, 2016, Para. 3d



statutory instrument names the circuit and also indicates the geographical area it covers. The Arua circuit, for example serves Nebbi, Moyo, Adjumani, Yumbe, Zombo, Maracha, Koboko and Arua, and yet these districts are geographically far apart. The Fort Portal circuit serves Kasese, Bundibugyo, Kamwenge, Kyenjojo, Bunyangabo, Kabarole, Kyegegwa and Ntoroko.

Due to the large geographical area served by a circuit, courts are not accessible. Moreover, not all new circuits become fully operational after establishment. In 2017, of the newly established circuits, only Mukono, Mubende, Mpigi were fully functional (and not Luwero, Moroto, Hoima, Rukungiri and Tororo).<sup>69</sup> It is expected that Luwero circuit will be operationalized by July 2021.<sup>70</sup>

To improve geographical proximity, magisterial areas were also increased. The Magistrate Courts (Magisterial Areas) Instrument, 2007, No.45 paragraph 2 and 3 designate 30 magisterial areas. For example, the Masaka circuit serves Masaka, Sembabule, Rakai, Lyantonde and Kalangala Districts. This is an indication that the problem of geographical proximity remains unresolved.<sup>71</sup>

Besides geographical accessibility, physical accessibility of courts for categories of people such as PWDs is an important component of access to justice. Not all courts have ramps or other facilities such as elevators and appropriate restrooms to accommodate PWDs. This raises several issues extending to the constitutional rights to equality and non-discrimination for PWDs.<sup>72</sup> Indeed, a lawyer with a disability, a wheelchair user, filed a suit against the government of Uganda over court buildings that do not fulfil the requirements under the Building Control Act, 2013 and Persons with disability Act, 2020. The lawyer states that the affected buildings include the Supreme Court of Uganda, the main High Court Building, The family Division in Makindye, High courts in Masaka, Mbale, Soroti, Gulu, Fort Portal and some Chief Magistrates courts.<sup>73</sup>

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<sup>69</sup> JLOS, A Report of the Case Backlog Reduction Committee, March 29<sup>th</sup>, 2017, at 39.

<sup>70</sup> Justice Dr. Zeija, *Luwero High Court to be operationalized by July 2021*, available at - <http://judiciary.go.ug/data/news/949/1817/Luwero%20High%20Court%20to%20be%20Operational%20by%20July,%202021.html> (accessed April 24, 2021).

<sup>71</sup> Ibid. Note that the magisterial areas have been increased to 81, although a good number of them are not yet fully functional.

<sup>72</sup> Constitution of Uganda 1995, Article 21.

<sup>73</sup> Wasswa. S, Disabled Lawyer Sues Government over PWD- unfriendly Court Buildings, ChimpReports, June 19, 2018, available at - <https://chimpreports.com/disabled-lawyer-sues-government-over-pwd-unfriendly-court-buildings/> (accessed April 24, 2021)



### *Language of Court and Complexity of Proceedings*

Uganda has diverse communities and diverse indigenous languages.<sup>74</sup> That notwithstanding, the Constitution of 1995 designates English as the official language.<sup>75</sup> Any other language may however, “be used ... for legislative, administrative or judicial purposes as Parliament may by law prescribe.”<sup>76</sup> The Civil Procedure Act echoes the provision of the Constitution, setting English as the language of all courts. It further provides that “Evidence in all courts shall be recorded in English”<sup>77</sup> and that “written applications to the courts shall be in English.”<sup>78</sup>

Access to interpretation services for accused persons who do not speak or understand the language of court is a very important component of fair trial.<sup>79</sup> The Constitution of Uganda provides that anyone charged of a criminal offence has a right to know the nature of the offence charged in the language that he understands.<sup>80</sup> Indeed, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides essential elements of the right to include “an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body...”<sup>81</sup>

Literacy denotes ability to read, comprehend, and write in any language. The Government of Uganda has reported improvement in literacy rates, seven in ten people were literate in the year 2015.<sup>82</sup> Since literacy is not about ability to read and write in English, one cannot assume that majority Ugandans can read and understand the language of Court, English. Therefore, the inability to provide interpretation services hampers access to justice.

The language barrier in court proceedings may further be complicated by the complexity of proceedings in courts of law. Uganda uses the adversarial system which involves two parties

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<sup>74</sup> See the third Schedule to the Constitution of Uganda, 1995.

<sup>75</sup> *Ibid.*, Article 6(1).

<sup>76</sup> *Ibid.*, Article 6 (3).

<sup>77</sup> Civil Procedure Act, Section 88 (2).

<sup>78</sup> *Ibid.*, Section 88 (3).

<sup>79</sup> Brown-Blake, C., (2006), “Fair Trial, Language and the Right to Interpretation”, *International Journal on Minority Group Rights*13; 391-412, 2006 at 391.

<sup>80</sup> The Constitution of Uganda, 1995 Article 28 (3) (b).

<sup>81</sup> See the African Union, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AU- DOC/OS (XXX) 247, available at- [http://hrlibrary.umn.edu/research/ZIM%20Principles\\_And\\_G.pdf](http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf) (accessed April 24 2021).

<sup>82</sup> Uganda Bureau of Statistics, Statistical Abstract 2017, at page 22, available at, [https://www.ubos.org/wp-content/uploads/publications/03\\_20182017\\_Statistical\\_Abstract.pdf](https://www.ubos.org/wp-content/uploads/publications/03_20182017_Statistical_Abstract.pdf) ACCESSED April 24, 2021.)





haggling over an issue in court. This follows preliminary processes of filing documents and preparation for hearings, precincts that only persons trained in legal practice and not the lay person can handle. In effect the complexity of the whole process can lock out persons who may not have the qualifications and technical know how to do it for themselves or hire qualified advocates.

### *Funding for the Judiciary*

The Judiciary of Uganda has for a long time been grappling with insufficient budgetary allocations, thereby affecting its constitutional independence and ability to exercise judicial functions.<sup>83</sup> It is reported that the Chief Justice has for some time been forced to “plead for funds” from the Executive arm of government, putting the independence of the judiciary at stake. The budgetary processes subjected the judiciary to control by the Minister of Justice and Constitutional Affairs, and the Secretary to the Treasury of the Ministry of Finance and Economic Development yet, under the constitution, the judiciary should be self-accounting.<sup>84</sup>

Insufficient funding affects the judiciary in several ways. For example, the Judiciary is understaffed and some courts are not operational - it is reported that only 200 out of 429 gazetted courts are operating. Lack of funding is a contributory factor to the case backlog, which is endemic.<sup>85</sup>

Constraints on budgetary processes and allocations have been a subject of challenge in the Constitutional Court. The case of *Krispus Ayana Odongo v. The Attorney General and The Parliamentary Commission*<sup>86</sup> was brought under the constitution Article 50(2) and 137(2) and (3) asserting that the absence of a law for administration of judiciary was problematic, and so was its administration under the public service which contravenes the Constitution. Further, that the Judiciary was an independent body that should not be subject to the control of the Executive.

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<sup>83</sup> The Independent, Judiciary funding inconsistent with the Law: Constitutional Court, *The Independent*, February 10, 2020, available at - <https://www.independent.co.ug/judiciary-funding-inconsistent-with-the-law-constitutional-court/> (accessed April 25, 2021).

<sup>84</sup> Carmel Rickard, Judicial Independence infringed when Uganda’s Chief Justice Has to ‘plead’ for funds – Constitutional Court, March 18<sup>th</sup> 2020, available at <https://africanlii.org/article/20200318/judicial-independence-infringed-when-ugandas-chief-justice-has-plead-funds> (accessed April 25 2021).

<sup>85</sup> Ibid.

<sup>86</sup> Constitutional Petition No. 30 of 2017.



Indeed, the Court found among others that managing the budgetary affairs of the judiciary under the Appropriation Act 2013 affected the independence of the judiciary.<sup>87</sup>

To cure the budgetary constraints of the Judiciary, and improve the welfare of judicial officers, the Administration of the Judiciary Act, 2020 was assented to on 19<sup>th</sup> June 2020. It aims at facilitating efficient and effective administration of the Judiciary, as stated in its long title. It further aims to “strengthen the independence of the Judiciary by streamlining the provisions and management of funds for the judiciary ... provide for retirement benefits of judicial officers and related matters.”<sup>88</sup> Details on these are set out in part IX (finances) and part VIII (retirement benefits for judicial officers) of the above Act.

### *Judicial Corruption*

Besides the effects of insufficient funding, there have been complaints concerning demotivation due to the low salary for judicial officers.<sup>89</sup> Within this context, the subject of corruption in the Judiciary becomes pertinent. In a recent study, the Uganda Judiciary was associated with bribery, extortion, undue influence, and misuse of funds.<sup>90</sup> The JII study found that in Uganda, the incidences of judges approaching lawyers to engage in corruption were reported at 20 percent and that “... Uganda was the only country where 40 percent of the respondents believed that judges approach court personnel to engage in corrupt behaviour.”<sup>91</sup> Corruption is prevalent in several sub-Saharan African countries. It is reported that 28 of people who had contact with a judge or court official paid a bribe for a service.<sup>92</sup> Yet, corruption affects access to Justice and should be curbed

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<sup>87</sup> This is an Act which contains the amount of money that each government ministry, department local government etc., can draw from the Consolidated Fund.

<sup>88</sup> See the long title to the Act.

<sup>89</sup> The Independent, *supra* note 95.

<sup>90</sup> See, The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption ( in partnership with the Basel Institute on Governance), May 2016, Report available at <https://www.ibanet.org/MediaHandler?id=F856E657-A4FC-4783-806E-6AAC6895D37F> (accessed April 25th 2021)

<sup>91</sup> *Ibid*, at 28.

<sup>92</sup> See, Transparency International, People and Corruption: Africa Survey 2015-Global Corruption Barometer, available at- <https://www.transparency.org/en/publications/people-and-corruption-africa-survey-2015> (accessed April 25, 2021).



to improve access to justice.<sup>93</sup> Improvement in funding for the judiciary may improve performance and curb corruption.<sup>94</sup>

Field findings reveal that COVID-19 and restrictions on access to judicial services has introduced new dynamics of corruption in the Judiciary. Advocates had to bribe prison warders to access inmates in prison.<sup>95</sup> Since criminal justice is dispensed with coordination from the Courts, Police and the Directorate of Public Prosecutions (DPP), physical interaction with all of them about any particular issue concerning an inmate was impossible. There was increased boldness of Police Officers and staff of the DPP to ask for money in exchange for a service during the phone interaction than was the case in physical engagements.<sup>96</sup> According to one Respondent:

It made bribery very prominent and pronounced. No more hiding. We practically had to pay everyone on the chain of access to justice to get some breathing space. But I think you are using a wrong phrase ‘access to justice’. There was no access to justice - there was pay for justice.<sup>97</sup>

The above respondent asserted that e-justice was for those who could pay for it. For instance, bond should be free, but Police released some detainees to decongest police cells – for a fee. Some lawyers were forced to obtain travel stickers on the black market to serve their clients, since not everyone made it on to the ULS list.<sup>98</sup>

### *Case Backlog*

The 1995 Constitution under Article 28(1) guarantees the right to a speedy hearing among the fair trial guarantees. Prior to interruption of the judicial system by Covid- 19, the right to a speedy hearing was not always realized by litigants in Uganda.

Case backlog is defined as a case that has been in the system for over two years.<sup>99</sup> Case backlog has been a challenge of the judicial system, prompting a court case census which was conducted

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<sup>93</sup> United Nations, transforming our World: the 2030 Agenda for sustainable Development, available at <https://sdgs.un.org/2030agenda> (accessed April 25, 2021)

<sup>94</sup> Centre for Public Interest Law, The state of the Judiciary Report 2016, at 23, available at [https://cepiluganda.org/wp-content/uploads/2018/10/CEPIL\\_State\\_of\\_the\\_Judiciary\\_Report\\_2016.pdf](https://cepiluganda.org/wp-content/uploads/2018/10/CEPIL_State_of_the_Judiciary_Report_2016.pdf) (accessed April 25, 2021).

<sup>95</sup> Interview with Advocate (No.2) in Kampala, May 2021.

<sup>96</sup> Ibid.

<sup>97</sup> Interview with an Advocate (No.7) in Kampala, May 2021.

<sup>98</sup> Ibid/

<sup>99</sup> JLOS, A Report of the Case Backlog Reduction Committee, March 29<sup>th</sup>, 2017, at 31



in December 2015. The census found that there were 114,808 cases pending, 28,864 of which were backlog and 968 were pending in the system for more than ten years.<sup>100</sup> Another 22,005 cases if not disposed of within 6months had potential to become case backlog.<sup>101</sup> From the analysis of the report: -

The committee... determined that 56% of the cases in the system were less than a year old, 19% were under 2 years, and 18.6% were over 2years old but less than 5years old. However, 5.64% were over 5 years but less than 10 years while about 1% of the cases were over 10 years.<sup>102</sup>

To address the problem, a case backlog committee was set up and several strategies were laid out as explained in the table below:

### Goals and Strategies to Deal with Case Backlog.<sup>103</sup>

	Aim/goal	Strategy or approach
1	Deliver overdue judgments that are pending	<ul style="list-style-type: none"> <li>All pending judgments that are over 60days by 30 March 2017 to be delivered by 30 April 2017.</li> <li>Concentrate on writing judgments for cases pending beyond 60 days</li> </ul>
2	Clear exiting backlog	<ul style="list-style-type: none"> <li>Judiciary to draw an ‘ageing case list” that would be regularly updated.</li> <li>All cases older that two years to be completed in 20 months</li> </ul>
3.	Management of cases	<ul style="list-style-type: none"> <li>All courts should develop plans to clear backlog in 3 months and implement them under supervision of the case backlog committee.</li> <li>Courts to develop annual case disposal plans with clear performance indicators.</li> </ul>
4.	Strengthen existing initiatives and use them	<ul style="list-style-type: none"> <li>Effective utilization of mediation, plea-bargaining, small claims procedure, and support Local Council Courts’ involvement</li> <li>Introduce Justice Centres in all High court circuits to offer legal aid</li> </ul>
5.	Strengthen measures against corruption	<ul style="list-style-type: none"> <li>Develop an anti-corruption strategy for the judiciary.</li> <li>Intensify training on ethical conduct for judicial officers.</li> <li>Facilitate the inspectorate of government to deal with corruption cases.</li> <li>Timely investigations of cases by Judicial Service Commission</li> </ul>
6.	Human Resource management	<ul style="list-style-type: none"> <li>Recruit enough judicial officers and other administrative staff</li> <li>Monitor performance of judicial officers.</li> </ul>
7.	Advocate for law reform	<ul style="list-style-type: none"> <li>Pursue legal reforms to expedite processing of cases.</li> </ul>

<sup>100</sup> *Ibid*, at 4.

<sup>101</sup> *Ibid*, at 21

<sup>102</sup> *Ibid*.

<sup>103</sup> Re constructed from a JLOS Report, *Ibid*, at 5-6.



8.	Proper record management and use of court case Administration System (CCAS)	<ul style="list-style-type: none"> <li>• Implement the Civil procedure Rules Order 12, granting judicial officers' powers of case management</li> <li>• Upgrade the Court Case Administration System (CCAS).</li> <li>• Computerize filing and storage of documents.</li> <li>• Improve file storage and introduce a file movement system run by the registry.</li> <li>• Rehabilitate some files, etc.</li> </ul>
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It has been reported that many of the strategies have indeed been implemented in an effort to reduce case backlog. These include establishing a case backlog programme, creating High court Circuits, Divisions and Magisterial Areas, starting a sessions system for criminal and civil cases to handle cases daily during the session, application of the CCAS as a source of information in case management. The challenge is that it has not been fully implemented, mediation, small claims procedure, plea bargaining etc.<sup>104</sup>

The assumption is that the above strategies would go a long way in facilitating the reduction of case backlog. A comparison of the 2015 with 2017 figures indicates that instead, case backlog increased:

As of 31st January 2017, case backlog in the Judiciary stood at 37,827 cases compared to the 28,864 cases which were backlog as per the 2015 National Court Case Census. In percentage terms backlog cases as a proportion of total pending cases reduced from 25% in 2015 to 24% in January 2017. However, the number of cases that are backlog increased by about 8900 cases by January 2017.<sup>105</sup>

The increment can be explained by a number of factors including:<sup>106</sup> poor work ethic of judicial officers, low numbers of judicial officers whereby the ratio of staff to cases pending in the High court in 2017 was 1:1287 and 1:560 in the Magistrate courts.<sup>107</sup> The number of High Court judges in Uganda was 51 in 2017, and now stands at 58 for a population of over 40 million Ugandans. Another problem is inadequate preparation by Advocates leading to endless adjournments, delays in the criminal justice system as a result of delays in investigations by Police, insufficient

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<sup>104</sup> *Ibid* at 38-41.

<sup>105</sup> *Ibid* at 31.

<sup>106</sup> *Ibid* at 45 to 50.

<sup>107</sup> *Ibid* at 47.



infrastructure, poor record keeping and management – leading to difficulties in record retrieval and preservation.<sup>108</sup>

In 2018, the Case Backlog Committee decried the challenges that hamper efforts at clearing case backlogs. These ranged from delays in making plans for implementation of strategies to other logistical aspects such as insufficient space/court halls, lack of furniture in some courts, intermittent power supply, and lack of means of transport for judicial officers, among others.<sup>109</sup>

It is not surprising that due to the interruptions of the judicial system by COVID-19 and the resulting lockdown, the situation of case backlog only escalated. This was due to resumption of proceedings in halted cases, and others filed after the pandemic.

### **2.3.2 Demand Side Factors**

The “demand side factors” are factors on the part of the person seeking justice in Uganda.

#### *Poverty*

National statistics indicate that 21% of Ugandans are poor, in the sense that they cannot meet “their caloric requirements and to afford them a mark-up for non-food needs.”<sup>110</sup> The non-food needs include access to justice in case of a conflict. There were remarkable declines reported in income poverty in Uganda, from 38 % in 2002/03 to 19.7% in 2012/13 and 21.4% in 2016/17.<sup>111</sup> These statistics arise in a situation of relative calm and stability, where people engage in economic activities with a certain degree of normalcy.

Household incomes are mainly from wage employment, crop farming, non-agriculture enterprise, etc.<sup>112</sup> It should be noted that during 2019/2020, poverty levels reduced to 20.3% (from 21%) , although the population living in poverty increased from 8% in 2017/18 to 8.3%. Poverty and lack

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<sup>108</sup> *Ibid* at 47.

<sup>109</sup> See Hon. Justice Richard Buteera, Monitoring the Implementation of the Case Backlog Strategy; Preliminary findings, 24 January 2018.

<sup>110</sup> The Uganda National Household Survey 2016/2017 at 89, available at [https://www.ubos.org/wp-content/uploads/publications/03\\_20182016\\_UNHS\\_FINAL\\_REPORT.pdf](https://www.ubos.org/wp-content/uploads/publications/03_20182016_UNHS_FINAL_REPORT.pdf) (accessed April 25, 2021).

<sup>111</sup> *Ibid*, at 91.

<sup>112</sup> *Ibid*, at 106



of knowledge about avenues for accessing justice are among the reasons why a good number of Ugandans do not seek justice from the established formal institutions.<sup>113</sup> This compromises the quality of justice they get. The field findings of this Study show that due to the pandemic, legal fees were hiked for many reasons; lawyers needed more money to navigate the justice system during the lockdown – “oiling the system”. The lawyers were uncertain about where the next case and cheque would come from.<sup>114</sup> It is therefore no wonder that justice could easily elude the poor who could not pay for it.

### *Knowledge of procedures, high lawyers' fees and court costs*

Accessing courts of law requires knowledge on several issues such as jurisdiction, procedures, documents to file and the court fees to be paid for a given process/service. This highly technical and procedural venture can be very daunting for non-lawyers - literate or illiterate. There are diverse prerequisites/requirements for accessing justice in all the courts. For example, a civil suit has to abide by the requirements in the Civil Procedure Act and Rules, such as filing the case by plaintiff.<sup>115</sup> The Constitutional Court (Petitions and References) Rules 2005 lays down the requirements for constitutional petitions, and for the Magistrate Court, one would have to familiarize with the procedure in the Magistrates Courts Act. Similarly, fees for procedures before the various courts are legally mandated in the Judicature (Court Fees) Rules SI 13-1 and the Magistrate Courts Act, Third Schedule, Appendix B.

The processes and fees are so detailed and not easy to grasp for an ordinary person. The best alternative is to hire an advocate, yet their fees can be astronomical for an everyday poor person. This is a gap that legal aid and access to pro bono services could fill.

Among the challenges identified with provision of the above is that a number of services providers have not decentralized their services to the rural areas, yet it is difficult for the rural population to

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<sup>113</sup> Hiil Report, *supra* note 76.

<sup>114</sup> Interview with an Advocate (2) in Kampala, May 2021.

<sup>115</sup> See orders VII and IV rule 1.



reach them in the urban centres where they operate.<sup>116</sup> Justice Centres, the government provider of legal aid services, is only operating in a few courts.<sup>117</sup>

### *Vulnerability and access to justice*

Vulnerable and marginalized people cover a number of categories including children, PWDs, elderly, refugees, indigenous and ethnic minorities, internally displaced Persons (IDPs) and LGBTQI persons.<sup>118</sup> Marginalization is about exclusion of some categories of people from access to resources or a system.<sup>119</sup> The Constitution of Uganda provides for the rights to equality and non-discrimination for some marginalized groups such as women and children. This is found in articles 33 and 34 respectively. The Constitution goes further and embeds under Article 32 the right to affirmative action for marginalized groups. It recommends the establishment of the Equal Opportunities Commission as an institution to deal with issues that affect the marginalized groups.<sup>120</sup>

Several efforts have been put in place to promote access to justice for marginalized or vulnerable groups. Institutions such as the JLOS aim to ensure that all Ugandans no matter their status access justice whenever they need it.<sup>121</sup> Public Interest Litigation has been used to dismantle patriarchy and discrimination that may be embedded in the law, as a way to eliminate structural discrimination and injustice against marginalized groups such as women. An example is the recent challenge to the custom of return of bride price at divorce/separation, which made women vulnerable to being trapped in abusive marriages.<sup>122</sup>

The above efforts notwithstanding, vulnerable people still experience challenges in accessing justice. During the pandemic, legal aid services were to a great extent unavailable, yet legal fees

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<sup>116</sup> White and Case LLP, Access to Justice for Children in Uganda, Child Rights International (eds.) 2014, At 10 Available at, [https://archive.crin.org/sites/default/files/uganda\\_access\\_to\\_justice\\_0.pdf](https://archive.crin.org/sites/default/files/uganda_access_to_justice_0.pdf) (accessed May 6 2021).

<sup>117</sup> LASPNET, Access to Justice for the Poor, Marginalized and Vulnerable People of Uganda, Dec 2015, at 13. It was reported that they were in only 4 centres.

<sup>118</sup> *Ibid*, at 12.

<sup>119</sup> *Ibid*, at 46.

<sup>120</sup> Also see, The Equal Opportunities Commission Act, 2007.

<sup>121</sup> Cite JLOS WEB and justice for all, SIP III

<sup>122</sup> MUFUMI U (LTD) & vs. Attorney General & another, Constitutional Appeal No. 2 of 2014, UGSC 13.





and other related costs increased. This report finds that access to justice became too expensive for the vulnerable people. According to one of the respondents:

You are first of all poor and then COVID-19 added vulnerability. The truth is that we lawyers also became expensive during COVID-19 because we were not sure when the next cash cheque would come in. So, it was critical for one to over bill for the future due to uncertainty over COVID-19. In criminal matters, ... In fact, during that time, it was so bad on our side as lawyers, at least for myself, that the moment I got a case, I was not moved by my big charges as previously because all sources of income were now closed. So, the truth is that in a way even we lawyers contributed to this vulnerability in a bid to also secure our survival. The prices became exorbitant.<sup>123</sup>

There was another conceptualisation of vulnerability to the effect that everyone became vulnerable during the pandemic. All processes were halted (including mediations) and it did not matter that a client had a lot of money to proceed.<sup>124</sup> Even then, the vulnerable groups were doubly affected by the situation.

During Covid everyone was vulnerable. We had clients who had lots of money but our cases .... could not be moved in any way to make releases. Secondly, even if you wanted a mediation and can cause the same to happen, there was a blanket stay of all. So basically, for me every one was vulnerable in as far as she/he could not have his/her rights respected and protected at the exact moment. May be what we can say is that some people became more vulnerable than others-so it's a degree of vulnerability but certainly all of the persons were vulnerable. Yes, may be the very poor were strongly affected by the covid 19 pandemic, they had no access to justice whatsoever and not considered as an emergency or essential to access justice normally.<sup>125</sup>

The above is an indication that the vulnerability of vulnerable groups in access to justice was heightened during the pandemic.

## 2.4 Efforts to address existing access to justice challenges

Access to affordable or free legal services is among the impediments to access to justice in Uganda. In a bid to address this, several legal aid models are implemented in the country. These include:<sup>126</sup>

- *State briefs*: Where advocates are hired by the State to offer services to persons accused of capital offences as required by Article 28(3) (e) of the Constitution.

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<sup>123</sup> Interview with an Advocate, Kampala May 2021.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> LASPNET, *supra* note 124, at 13.



- *The Pro-bono services of the Uganda Law society*: where the Law Council requires all advocates to provide free legal services to persons in need of them.
- *Bar student's practice*: The Law Council has authorised Bar students to provide legal services as a part of their practical legal training at the Law Development Centre through its Law Clinic. Their services are supplemented by services of other Universities such as Makerere University School of Law (through its Public Interest Litigation Clinic (PILAC)).
- *Justice Centres Uganda*: An initiative of the Government that is being piloted to offer legal and related services to persons in search for Justice.
- *Civil society Organizations*: These are networked through the Legal Aid Services Providers Network (LASPNET). They offer legal aid and related services to bridge the justice gap.

The above efforts are very instrumental but insufficient to cater for all the justice needs of the people. This is due to several reasons, including absence of geographical proximity between the service providers and the people in need of services.<sup>127</sup>

- *Case backlog reduction*: Several strategies have been implemented over the years to reduce the case backlog. These have included alternative dispute resolution, special court sessions, cleaning out redundant cases and the Small Claims Court. These though are yet to produce the required mileage in terms of reducing case backlog.<sup>128</sup>
- *Plea bargaining*: This was introduced in May 2014 to serve a number of purposes including reduction of case backlog and prevention of congestion in prisons. Other justifications include “a reduction in financial and human resources related to criminal trials, a speedier adjudication process,<sup>129</sup> and the promotion of asset recovery for victims.”<sup>130</sup> In addition, it offers timely disposal of cases at a less cost. In 2014, it was noted that in a typical session, judges are expected to handle 40 cases in each session lasting 30 days which costs approximately UGX 1 million shillings per case. Plea bargaining cuts the number of days needed to conclude a case and this drastically reduces the cost.<sup>131</sup> During the Pilot period in 2015, the High court disposed of 1,500 cases in a very short time. The case clearance rate was 95 percent per session.

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<sup>127</sup> *Ibid*, also see Namubiru Mukasa, S, “The Experiences of Uganda with Establishing an Effective Framework for Delivery of Legal Aid Services: The Law and Practice”, A paper presented to the Judicial Symposium on Human Rights in the Context of Criminal Justice: Rethinking the working of Justice Process in Uganda, organized by AJJF, held at Botanical Beach Hotel, Entebbe, 16<sup>th</sup> November 2017, at 10.

<sup>128</sup> Chibita, M. J., “Pleas Bargaining: Issues, Benefits, Challenges and Proposals for Reform” *Ibid.*, at 4.

<sup>129</sup> Kiyonga D, 2016. “Plea bargain innovation helps clear 1,500 cases.” *The Observer*, October 3<sup>rd</sup>, 2016. Available at <https://observer.ug/news-headlines/46770-plea-bargain-innovation-helps-clear-1-500-cases>. Accessed 30 July 2021.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid*, at 5.



The process of plea bargaining takes place within the framework of the Judicature (Plea Bargaining) Rules Statutory Instrument No.46. The challenges associated with plea bargaining include the following: limited knowledge about it, it is susceptible to being labelled as institutionalized corruption, inability to have the accused represented by counsel to ensure a good agreement that is in line with the rights of the accused.<sup>132</sup>

## **2.5 The impact of COVID-19 on access to justice in Uganda**

The first case of COVID-19 in Uganda was registered on 21<sup>st</sup> March 2020, with a traveller who entered the country from Dubai.<sup>133</sup> As of 1<sup>st</sup> May 2021, there were 41,715 confirmed cases and 341 cases of death in Uganda.<sup>134</sup> Yet this was before the outbreak of a new strain in India, that later made its way into Uganda leading to another phase of restrictions. Following the identification of the first case in Uganda, several efforts were put in place to protect the public and control the spread of the virus.

Even before the registration of the first case in Uganda, on 18 March 2020, the President of Uganda made orders with the following effect:<sup>135</sup> (i) closure of schools, universities and tertiary institutions on March 20, 2020 for one month to eliminate concentration of people and therefore prevent spread of the virus, (ii) suspension of religious gatherings for one month, (ii) suspension of public rallies and cultural gatherings for 32 days, (iii) Banning of travel to countries with high incidents of the virus such as China, France, Italy, USA, UK, and Malaysia, among others. All persons returning

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<sup>132</sup> *Ibid*, at 6.

<sup>133</sup> Jane Ruth Achieng, Update on the COVID-19- 19 Response in Uganda, available at, <https://www.health.go.ug/COVID-19/2020/04/02/update-on-the-COVID-19-19-response-in-uganda/> (accessed May 1<sup>st</sup>, 2021).

<sup>134</sup> Ministry of Health Uganda, <https://www.health.go.ug/COVID-19/2020/04/20/dos-and-donts/#> (accessed May 1, 2021)

<sup>135</sup> Museveni orders closure of schools, suspends religious gatherings over coronavirus, *The Monitor* 18 March 2020, available at <https://www.monitor.co.ug/News/National/Museveni-closes-schools-religious-gatherings-coronavirus/688334-5495888-srauwz/index.html> (accessed May 3rd 2021)

from abroad required quarantining for 14 days.<sup>136</sup> Other important timelines in the spread and fight against the Corona virus in Uganda include the following.<sup>137</sup>

- 25 March 2020 - suspension of public transport for 14 days and restriction of private vehicle movement.
- 30 March 2020 - declaration of 14 days nationwide curfew starting from 7.00 pm to 6.30 am.
- 12 April 2020 - lockdown and curfew were extended for 21 days.
- 4<sup>th</sup> May 2020 - lockdown extended for 14 days with mandatory wearing of masks in all public places.
- 26 May 2021 - private vehicles resumed moving with only 3 passengers and general merchandise shops opened with social distancing.
- 4 June 2020 - public transport in non-border districts resumed.<sup>138</sup>

The lockdown impacted several aspects of access to justice. As mentioned earlier, on the 25 March 2020, public transport and movement of private vehicles was restricted as a means of containing the spread of COVID-19. In Kampala and other urban centres, public transport (by *Matatus*/minibuses) offers the widest and cheapest means of moving from one place to another.<sup>139</sup> Physical accessibility of courts of law has been cited among the prerequisites of access to justice.<sup>140</sup> Under normal circumstances, courts and other JLOS institutions are not easily geographically accessible to all people in need of their services. Restrictions of public transport no doubt exacerbated this inaccessibility thereby impinging access to justice.

There were reported human rights abuses meted against persons suspected of violating the lockdown rules such as moving contrary to set curfew rules or gathering contrary to restrictions against that. Among the common abuses were torture, inhuman treatment, extra judicial killings,

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<sup>136</sup> Ministry of Health, “Timelines, available at <https://COVID-1919.gou.go.ug/timeline.html>(accessed 3 May 2021).

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Regina Kamuhanda and Oliver Schmidt (2009), “Matatu: A case Study of the Core Segment of the Public Transport Market of Kampala, Uganda”, *Transport Reviews*, Vol.29 Issue 1, 129-142 at 129.

<sup>140</sup> LASPENT, “Access to Justice for The Women: The Affordability of Access to Justice for Women in Uganda and the plight of LASPS and Legal Fees in Case of having to Pay Fees after Losing a Case”. A presentation to FIDA-Uganda Advisory Committee, 26 November 2017 at Metropole Hotel, available at <http://www.laspnet.org/joomla-pages/reports/presentations/387-the-affordability-of-access-to-justice-for-women-in-uganda-a-the-plight-of-lasps-and-legal-fees-in-case-of-having-to-pay-fees-after-losing-a-case/file>, (accessed May 3 2021)



and arbitrary arrests by security operatives.<sup>141</sup> For example, 6 police officers on 28 March 2020, shot at a group of people in Bududa who were alleged to have gathered contrary to the ban on public gatherings.<sup>142</sup> The Local Defence Unit officers also became notorious for beating people such as *boda-boda* (motorcycle) riders, food vendors in downtown Kampala on assumption that they were violating the lockdown rules.<sup>143</sup> Journalists working on stories about curfew during curfew hours were on some occasions victims of assault by security forces.<sup>144</sup> Situations of this nature heightened the need for access to justice, yet operation of justice institutions was constrained by restrictions aimed at containing the pandemic.

In order to implement the President’s directives issued on 18 March 2020, The Chief Justice of Uganda issued some “Administrative and Contingency Measures” or guidelines for operations of all courts in the country. The Guidelines were aimed at preventing and mitigating the spread of Covid-19 in the Judiciary.<sup>145</sup> The guidelines had practical implications as explained below:<sup>146</sup>

- *Suspension of court hearings and appearances:* For thirty-two days starting 20<sup>th</sup> March 2020, there would be no appearances in courts or hearing of cases. For those cases that had advanced to the level of hearing submissions, parties were advised to submit written submissions in lieu of the oral ones.
- *Courts out of bounds for prisoners and others on remand:* These would remain wherever they were remanded or in prison during this period. Conducting proceedings by use of video link was an option provided “where possible”. Thus, it was limited to a few exceptional cases where it was conceivable. From the field, it was found that “... Magistrates were only hearing pleas and remanding accused persons to prisons.”<sup>147</sup> There was a possibility of overcrowding in prisons. An Advocate reported about a presidential pardon of about 833 prisoners to decongest prisons at the beginning of the lockdown.<sup>148</sup> The decongestion was however undone by rampant arrests of people flaunting covid restrictions and their remand using the Kampala Capital City Court.<sup>149</sup>
- *Execution of Judgments suspended:* Access to justice implies the ability to enjoy the fruits of proceedings through execution. Executions were suspended, with a few exceptions where attachment had already taken place. Advocates complained about having their fees

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<sup>141</sup> The Human Rights Centre Uganda (HRCU), *supra* note 3 at 2.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*, at 4.

<sup>145</sup> See, The Judiciary Circular No CJ/C.7, *supra* note 16.

<sup>146</sup> *Ibid.*

<sup>147</sup> Interview with an Advocate (05) in Kampala, May 2021.

<sup>148</sup> Interview with advocate in Kampala, May 2021

<sup>149</sup> *Ibid.*



caught up in the ban against executions, yet they had offered services entitling them to payment.<sup>150</sup> Evictions too, were halted.<sup>151</sup> The failure of the winning party to enjoy the fruits of his/her judgement comes at a disadvantage to the court system. “This may lead to loss of confidence in the court system and the use of self-help measures.”<sup>152</sup>

- *Courts to remain open to handle some matters:* This was intended to allow judicial officers to report on duty and do work in chambers such as completion of writing judgments and rulings, which they would issue to the parties virtually by email or through other online facilities. The above is among the ways through which access to justice was facilitated. To one advocate, this was extremely progressive since one needed not to move anywhere but check on your laptop. According to the Advocate, some judges used this time to write and deliver several judgements. This was a departure from the trend of issuance of judgements without written reasons leading to the judgement.<sup>153</sup>
- *Urgent matters prioritised:* During this time, the courts could handle plea taking for serious cases, bail applications and certificates of urgency. The applicant and the lawyer/advocate would be the only people allowed to be physically present in court, as well as sureties in case of bail applications. Respondents observed that the “certificates of urgency” was among the novel ideas. “The aspect of certificate of urgency and entertaining life-threatening situations especially in land cases –mainly the civil aspect of it, created an opportunity”. This was “to avert the troubles that would have arisen from the non-existence of the chances of injunctions”. That in fact, “currently we are dealing with cases in which we were able to secure injunctions during the Covid era of 2020.”<sup>154</sup>

Some Advocates mentioned that in some criminal cases, certificates of urgency did not yield results due to inability to bring witnesses to court due to lack of public transport.<sup>155</sup> Also for personal preservation, there were some witnesses especially the elderly who were uncomfortable to participate as witnesses for fear of exposure to COVID-19. The above, together with allegations that certificates of urgency were only available to those who could pay for them could have curtailed their positive contribution to accessing justice during the pandemic.<sup>156</sup>

Grant of bail to inmates was meant to decongest the prisons. One respondent, a lawyer with a firm that handled a number of cases for political prisoners arrested during the pandemic mentioned that bail was selectively granted; it was very difficult for them to secure access to bail for supporters of the opposition National Unity Platform (NUP) during the lockdown.<sup>157</sup>

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<sup>150</sup> Interview with and Advocate in Nsambya, May 2021.

<sup>151</sup> Interview with a Justice of the Court of Appeal of Uganda, June 2021.

<sup>152</sup> Ibid

<sup>153</sup> Interview with an Advocate (01) in Kampala May 2021

<sup>154</sup> Interview with an Advocate in Kampala, May 2021.

<sup>155</sup> Interview with Advocate practicing Criminal Law, May 2021.

<sup>156</sup> Ibid.

<sup>157</sup> Interview with lawyer and Firm clerk, May 2021.



- *Implementation of preventive measures:* Use of sanitizers was encouraged and thermometers were to be acquired for various court premises.

Field findings confirm the above and in addition, staff testing, COVID-19 vaccination, provision of sanitizers and limited provision of masks has been taking place in the Judiciary.<sup>158</sup>

## **2.6 The Policy and Legal framework on use of ICTs in the Judiciary**

The Judiciary has an ICT Policy of 2008, which provides a broader framework within which ICTs are used. The ICT Strategy 2009-2013 was made and implemented although financial constraints affected its full implementation achieving only 45% of the planned ICT projects.<sup>159</sup> To harness its achievements and also implement ICTs within the present environment, the Judiciary developed the ICT Strategy 2015/2016- 2019-2020, promising “e-justice to all.” It provides the strategic direction for the Judiciary for that period with the following as the strategic rationale:

- (i) Reduction in delays and backlog and improved efficiency and effectiveness in the administration of Justice;
- (ii) Adoption of a culture of application of technologies in the courtrooms; and,
- (iii) Facilitation of ICT and communication exchange between courts, parties and the general public.<sup>160</sup>

It is also envisaged that the new strategy will help in the reduction of corruption and improvement of transparency through use of ICTs.<sup>161</sup> The strategies in the document range from carrying out an ICT forensic audit, development of ICT training programs and training key staff, and acquisition of ICT hardware, among others.<sup>162</sup> Note further that the Judiciary has administrative structures to engage with ICTs. These include a Technology Committee, Technology Committee-Working sub-Committee, Secretary to the Judiciary and Registrar of Planning and Development, each handling

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<sup>158</sup> Interview with a Justice of the Court of Appeal of Uganda, June 2021

<sup>159</sup> The Judiciary of Uganda, ICT Strategy FY2015/16-fy2019/2020 at 13-14

<sup>160</sup> *Ibid*, at xxii, 15-19.

<sup>161</sup> *Ibid*, at 15-19.

<sup>162</sup> *Ibid*, at 50-53, 59.



specific ICT related functions.<sup>163</sup> Thus, a framework was already in place for applying e-justice during the COVID-19 pandemic.

In terms of the legal framework, existence of up-to-date cyber laws is a very important component of successful delivery of e-justice.<sup>164</sup> The general law applicable to ICTs in Uganda is applicable to use of ICTs by the Judiciary to deliver justice, although it may present limitations. The Computer Misuse Act, 2011 is among them. The long title of this Act is indicated as-

“An Act to make provision for the safety and security of electronic transactions and information systems; to prevent unlawful access, abuse or misuse of information systems including computers and to make provision for securing the conduct of electronic transactions in a trustworthy electronic environment and to provide for other related matters.”<sup>165</sup>

The Act creates a number of offences related to computer misuse, including unauthorized disclosure of information, contrary to the law.<sup>166</sup> Also important is the Electronic Transactions Act, 2011, intended to:

“Provide for the use, security, facilitation and regulation of electronic communications and transactions; to encourage the use of e-Government services and to provide for related matters.”<sup>167</sup>

The objectives of the Act include removing legal and operational barriers to electronic transactions and enhancing confidence in the public to use electronic communications and transactions.<sup>168</sup> The law makes modifications to the rules on admissibility of evidence - the rules of evidence should not be applied to deny admissibility of a data message or an electronic record in stipulated circumstances.<sup>169</sup> The burden of proof of authenticity lies on the person adducing the data or electronic evidence.<sup>170</sup>

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<sup>163</sup> See, Kikabi, D. S, “Information and Communication Technology (ICT) in the Judiciary”, a paper presented at the Induction workshop for the newly appointed Magistrate Grade One, Rider Hotel Seeta-Mukono, 23<sup>rd</sup> September -5<sup>th</sup> October 2012 on 4<sup>th</sup> October 2012, available at

[http://judiciary.go.ug/files/downloads/ICT%20in%20the%20Judiciary\\_%20PITO.pdf](http://judiciary.go.ug/files/downloads/ICT%20in%20the%20Judiciary_%20PITO.pdf) (accessed May 8, 2021).

<sup>164</sup> Kitoogo F.E, et al, e-Justice Implementation at a National Scale: The Ugandan Case, at 9, available at [https://link.springer.com/content/pdf/10.1007%2F978-3-642-12701-4\\_5.pdf](https://link.springer.com/content/pdf/10.1007%2F978-3-642-12701-4_5.pdf) (accessed May 8, 2021).

<sup>165</sup> See, the long title to the Act.

<sup>166</sup> See, The Computer Misuse Act, 2011, Section 18 (1).

<sup>167</sup> See the Long title to the Act.

<sup>168</sup> The Electronic Transactions Act, 2011, Section 4.

<sup>169</sup> *Ibid*, Section 8 (1).

<sup>170</sup> *Ibid*, Section 8 (2).





The Electronic Signatures Act 2011 regulates the use of electronic signatures, among others. It makes provision for use of electronic signatures to ensure authenticity of electronic transactions, security of documents and also suggests administrative structures such as setting up of Certification Authorities to fulfil the spirit of the Act.

Also important is The Data Protection and Privacy Act, 2019. However, the practical application and relevance to the use of ICTs by the Judiciary may highly be hampered by the lack of regulations for its implementation.

The laws above are a good start in efforts to promote use of ICTs in the delivery of justice by the Judiciary in Uganda. They may, however, not address the Judiciary specific ICT needs that arise in its unique role and operating environment. Indeed, the former Chief Justice of Uganda Bart Katureebe, had admitted that the enabling law for implementation of ICTs in the administration of justice was wanting.<sup>171</sup>

With specific application to use of visual-audio technology is the Judicature (Visual-Audio Link) Rules, 2016, No.2.<sup>172</sup> They are applicable to both civil and criminal matters.<sup>173</sup> Their objectives are set out under section 4 and include: (a) to make provision for taking evidence in court by visual audio link; (b) to ease giving evidence without having witnesses physically in court; (c) enable parties and advocates to participate in court proceedings without physical appearance in court; (d) facilitate speedy trial; (e)... (f) reduce the cost of litigation (g) promote witness protection.

The circumstances under which visual-audio link evidence may be allowed under Rule 5 include (a) where a witness is out of country; (b) in sexual or violent offences; (c) for security reasons; (d) safety of witness; (e) infirmity or health reasons and (f) any other that court deems necessary and appropriate for a witness to appear using visual-audio link. In the situation of COVID-19, “e” and “f” offer justification of use of visual audio link technology to give evidence in any matter in

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<sup>171</sup> Kiyonga, Derrick, “Uganda’s Judicial System: Virtual Courts are here but no laws”, available at, <https://www.unwantedwitness.org/ugandas-judicial-system-virtual-courts-are-here-but-no-laws-to-regulate-them/> (accessed May 8 2021).

<sup>172</sup> Made by the Rules Committee under the Judicature Act, Section 41(1) and (2) (y).

<sup>173</sup> The Judicature (Visual-Audio Link) Rules, 2016, No. 2 Rule 2.



court. A party that needs to precede by visual audio link needs to make an application for approval by the court; where upon suitability of conference facilities is determined.<sup>174</sup>

Participation in proceedings without physical appearance (e.g., for a person charged with an offence) may have implications for international human rights law on the right to a public hearing, and constitutional guarantees. This is discussed in more detail Part 5 of the report (Discussion and Analysis), as it has implications across the board, not just in Uganda.

## **2.7 Solutions and innovations in the justice sector to cope with COVID-19**

### *Visual-audio conferencing*

The use of visual-audio technology is provided for under the Judicature (Visual-Audio Link) Rules, 2016, No.2,<sup>175</sup> applicable to both civil and criminal matters.<sup>176</sup> The objectives of these Rules are set out under section 4 and include: (a) to make provision for taking evidence in court by visual audio link; (b) to ease giving evidence without having witnesses physically in court; (c) enable parties and advocates to participate in court proceedings without physical appearance in court; (d) facilitate speedy trial; (f) reduce the cost of litigation; and (g) promote witness protection.

The circumstances under which visual-audio link evidence may be allowed under Rule 5 include the following: (a) where a witness is out of country; (b) in sexual or violent offences; (c) for security reasons; (d) safety of witness; (e) infirmity or health reasons and (f) any other that court deems necessary and appropriate for a witness to appear using visual-audio link.

In the situation of COVID-19, “e” and “f” offer justification for use of visual audio link technology to give evidence in any matter in court. A party that needs to precede by such a link needs to make an application for approval by the court, where upon suitability of conference facilities is determined.<sup>177</sup>

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<sup>174</sup> *Ibid*, Rules 6 and 7.

<sup>175</sup> Made by the Rules Committee under the Judicature Act, Section 41(1) and (2) (y).

<sup>176</sup> The Judicature (Visual-Audio Link) Rules, 2016, No. 2 Rule 2.

<sup>177</sup> *Ibid*, Rules 6 and 7.



Participation in proceedings without physical appearance (e.g., for a person charged with an offence) may have implications for international human rights law and due process on the right to a public hearing, and constitutional guarantees.

Accordingly, the use of video - audio links was not new to Uganda's justice system. The Judicature Visual - Audio- Rules, clearly stipulate the circumstances under which this technology can be used. These include health reasons and court too has discretion to determine when to use them. In this context, use of this technology during the COVID-19 pandemic may be justifiable. Visual-audio link technology was installed in some courts with facilitation from UNICEF to offer protection to child witnesses in cases of sexual and gender-based violence.<sup>178</sup> It was launched by the then Chief Justice Bart. M. Katureebe. The beneficiary courts then (in 2016) were the High Courts of Kampala, Gulu, Fort Portal and there was a promise to install the system in the High Court Circuits of Mbale, Mbarara, Arua and Masindi.<sup>179</sup>

Also, in April 2019, the Judiciary commissioned a video conferencing system linking Luzira Prison to Buganda Road Court, to be used in mention of cases before trial.<sup>180</sup> This is considered time- and cost-effective. According to one respondent, "IT came in handy especially in respect of bail and mentions hearings first in the Kampala area and then upcountry due to the video link established between Buganda Road Court and Upper Prison Luzira." This was then augmented with the use of Zoom connections to prisons like Kitalya and Kigo where most of the arrested persons in the Kampala area were sent on remand. Video link hearings were very successful and continue to-date.<sup>181</sup>

Disruption of court and arbitration proceedings was inevitable but use of technology goes a long way in mitigating it, especially since there was a belief that lockdowns as a result of COVID-19

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<sup>178</sup> Nabatanzi, M, UNICEF supports installation of audio-visual technology at Uganda Courts for witness protection, available at, <https://www.unicef.org/uganda/stories/unicef-supports-installation-audio-visual-technology-ugandan-courts-witness-protection> (accessed May 3 2021).

<sup>179</sup> Ibid

<sup>180</sup> Kikonyogo, D.A., Government uses Video conferencing technology in court room for Bobi Wine's OTT case, available at <https://techjaja.com/video-conferencing-bobi-wine-ott-case/?amp> (accessed May 8, 2021).

<sup>181</sup> Interview with a Justice of the Court of Appeal of Uganda, June 2021.



may become inevitable and intermittent.<sup>182</sup>The challenge is that video conferencing is limited to bail applications and a few cases, leaving parties in cases that do not fall within this category wanting for justice.

During the pandemic, some cases were handled using video conferencing. They include a bail application by Gen. Henry Tumukunde, in which the ruling was delivered by video conferencing.<sup>183</sup> It proceeded that way since it was considered a special case in addition to inability of the accused to appear in court in person due to the lockdown.<sup>184</sup> In General Henry Tumukunde's bail application, one cannot rule out the nature of the offence against him (treason) and the profile of the accused, a General and a former presidential candidate. The case was a sensitive security matter in which caution needed to be exercised by use of video conferencing. Relatedly, Jamil Mukulu's case on various charges including treason, murder and aggravated robbery (and withdrawal of bail application) was heard by the International Crimes Division by video conferencing, connecting court to the Luzira upper prison.<sup>185</sup> Mukulu and others at some point rejected proceedings by video conferencing without their consent.<sup>186</sup>

The use of video conferencing in the bail application of former presidential candidate Robert Kyagulanyi stirred mixed reactions and a number of challenges were aired out.<sup>187</sup> Kyagulanyi had been arrested for holding a public meeting (to challenge the introduction of the Over-the-Top Tax (OTT) and mobile money tax), contrary to the Public Order Management Act 2013. Kyagulanyi was remanded to Luzira prison.<sup>188</sup>

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<sup>182</sup> Norton Rose Fulbright, COVID-19-19 and the global approach to further court proceedings, hearings, April 2020, available at <https://www.nortonrosefulbright.com/en-ug/knowledge/publications/bbfeb594/COVID-19-19-and-the-global-approach-to-further-court-proceedings-hearings> (accessed May 3, 2021).

<sup>183</sup> *The Daily Monitor*, Court to decide on Gen Tumukunde's Bail Application Today, Tuesday April 14, 2020, available at <https://www.monitor.co.ug/uganda/news/national/court-to-decide-on-gen-tumukunde-bail-today-1885214> (accessed May 8, 2021).

<sup>184</sup> *Ibid.*

<sup>185</sup> *The Independent*, Jamil Mukulu Withdraws Bail Application, August 6, 2020, available at <https://www.independent.co.ug/jamil-mukulu-withdraws-bail-application/> (accessed May 18, 2021).

<sup>186</sup> *The Independent*, Jamilu Mukulu, 28 others reject video conference trial, MARCH 15, 2021, available at <https://www.independent.co.ug/jamilu-mukulu-28-others-reject-video-conference-trial/> (accessed May 8, 2021).

<sup>187</sup> *The Independent*, Mixed reactions overuse of video conferencing at Bobi Wine's bail hearing, May 3<sup>rd</sup> 2019, available at <https://www.independent.co.ug/mixed-reactions-over-use-of-video-conferencing-at-bobi-wines-bail-hearing/> (accessed May 8, 2021).

<sup>188</sup> Kikonyogo Douglas Albert, *Government uses Video conferencing technology in court room for Bobi Wine's OTT case*, available at <https://techjaja.com/video-conferencing-bobi-wine-ott-case/?amp> (accessed May 8, 2021)



One of Kyagulanyi’s lawyers however raised concerns about how the system flouts court process and is therefore illegal. To him, a case should only proceed that way with consensus of both parties. That the prosecution ought to make an application giving justification to proceed by video conferencing, and then the accused’s advocates accepts only if it will be convenient for them and their client.<sup>189</sup> To the lawyer, video conferencing ought to be used in very exceptional circumstances such as the health of the accused or if s/he is out of country.<sup>190</sup> It was argued that impinges the accused’s right to access and consult his lawyers during the proceedings, and this affects the justice outcomes of the case. Indeed, similar concerns on limitation of the right to access one’s advocates have been highlighted in a previous report.<sup>191</sup>

#### *Application/Implementation of Practice Directions to guide processes*

The Constitution (Integration of ICT into the Adjudication process for Courts of Judicature) (Practice Directions) 2019, is another valuable Direction in the handling of judicial work during the pandemic.<sup>192</sup> It promotes the use of ICTs/ Technology at various stages of a case from filing to final disposal. In order to practically implement online court hearings, the Chief Justice issued Office Instruction No 2 of 2020 dated 29th April 2020.<sup>193</sup> The Office Instruction offers further guidance on a number of things, including the following: (i) the nature of cases that can be handled online including delivery of judgments and rulings, applications for bail, mentions and interlocutories; (ii) who can participate in online proceedings (including judicial officers, parties, advocates, clerks, media etc.); (iii) modes of sharing invitations to hearings using e modes (iv) recording of proceedings and their transmission (using email and other e modes such as WhatsApp, Twitter, etc.)

#### *E- Payment system*

To limit the levels of human interaction, the Judiciary introduced an online platform for payment of fees.<sup>194</sup> With this, court fees can be paid using smart-phone Mobile Money systems/platforms

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<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> ICJ report, *supra* note 14 at 5.

<sup>192</sup> Here in after referred to as “Practice Direction 2019”. See the Uganda Gazette of 31st May 2019.

<sup>193</sup> Available at <<http://judiciary.go.ug/files/downloads/Guidelines%20for%20Court%20Online%20Hearings%20-%2020200429175035.pdf>> (accessed May 10, 2021).

<sup>194</sup> Kikonyogo D.A, Government uses Video conferencing technology in court room for Bobi Wine’s OTT case, available at <https://techjaja.com/video-conferencing-bobi-wine-ott-case/?amp> (accessed May 8, 2021).



for all High Courts, Court of Appeal/Constitutional court and Supreme court. Connectivity to such platforms is an issue, that may affect potential litigants, yet time is of essence in payment of court fees/dues. Field findings revealed that this worked well for official fees, but a lot of unofficial money exchanged hands in return for services during the lockdown.<sup>195</sup> This points to corruption which makes legal services expensive.

### *Case Management System*

The Court Case Administration System (CCAS) has been used by the Judiciary for twenty years as a means to, among others, eliminate case backlogs.<sup>196</sup> The system has over the years become outdated in terms of what it can be used for in light of the burgeoning IT inventions and demands.<sup>197</sup> Among its highlighted limitations is its inaccessibility to the public, leaving it open to a closed category of court staff.<sup>198</sup> Because of this limitation, the Electronic Case Management System (ECMS) is recommended. The ECMS covers a wide range of steps in the life of a case, from filing to determination/disposal, achieving and retrieval.<sup>199</sup> It was reported in 2019 that Synergy International partnered with an IT firm in Uganda (Sybil Limited) to design, develop and work on the Maintenance of the ECMS, aimed at modernizing court case management.<sup>200</sup> The Permanent Secretary of the Judiciary, Pius Bigirmana, had this to say about ECMS:

We think Uganda ECMS will enable us to do all case procedures, from case filing to making payments electronically, as well as to evaluate and prepare reports. The time needed to sort out cases will be significantly reduced, but most importantly it will minimize corruption, since the system will be limiting the human friction, which is the point where people are most exposed to corruption.<sup>201</sup>

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<sup>195</sup> Interview with an Advocate in Kampala, May 2021.

<sup>196</sup> Kikabi, D.S, “The Role of ECCMIS in a Modern, Professional and Effective Judiciary”, PAPER presented at the Annual Judges CONFERENCE; 27<sup>th</sup>-31<sup>st</sup> January, 2020 at Mestil Hotel, Kampala on 29<sup>th</sup> January 2020 at 6, available at [https://judiciary.go.ug/files/downloads/The%20Role%20of%20ECCMIS%20in%20a%20Modern-Professional%20&%20Effective%20Judiciary%20AJC%202020\\_David%20S%20Kikabi%20PITO%20Judiciary.pdf](https://judiciary.go.ug/files/downloads/The%20Role%20of%20ECCMIS%20in%20a%20Modern-Professional%20&%20Effective%20Judiciary%20AJC%202020_David%20S%20Kikabi%20PITO%20Judiciary.pdf) (accessed May 10, 2021).

<sup>197</sup> Ibid.

<sup>198</sup> Murungi, E. *et al*, COVID-19 -19: Law and Technology-Why an Electronic Case Management System is a necessary in Uganda, May 4, 2020, available at <https://www.bowmanslaw.com/insights/COVID-19-19-law-and-technology-why-an-electronic-case-management-system-is-a-necessity-in-uganda/> (accessed May 8 2021).

<sup>199</sup> Ibid.

<sup>200</sup> Uganda Electronic Case Management Information System Project Inception Workshop, October 29, 2019, available at <https://www.synisys.com/uganda-electronic-case-management-information-system-project-inception-workshop/> (accessed May 10, 2021)

<sup>201</sup> Ibid.



It is hoped that ECMS would enable one to track a case from the time of filing to completion in all courts from magistrate courts up to the Supreme Court.<sup>202</sup> This will facilitate development.<sup>203</sup> It may also improve justice for parties to cases in courts of law.

The system will have a number of useful features including: E-notifications, automatic allocation of cases to judges, integrated e-payment, etc.<sup>204</sup> Its implementation is intended to be piloted starting with courts in Kampala and Jinja.<sup>205</sup> The system will serve a wider category of people/entities and perform a variety of functions, including: (i) litigants (accessing it from anywhere, online services, filing, feedback etc.); (ii) Court staff (automated saving, case number allocation, notification on proceedings, etc.); (iii) Business intelligence(easy monitoring of performance, updated reports strategic planning, etc.); (iv)Administration of Justice (24 hour E filing option, digital case file allocation, reduced need for storage facilities, and automatic allocation of cases, among others); and (v) to the country (faster dispute settlement, limited interaction of court staff, job creation in internet kiosks, case information in one place, ease doing business in Uganda).<sup>206</sup>

The ECMS is under construction and has not yet been used to improve access to justice during the COVID-19 Pandemic. It is nonetheless hoped that once launched, it will ease the pursuit of justice in the circumstances of a pandemic. It will improve efficiency.<sup>207</sup> Some challenges have however been noted, it may require training to improve capacity, it could be resisted by judicial officers and staff who may prefer to do business as usual, it may also require amendments to several procedural laws.<sup>208</sup>

### *Innovations outside the Judiciary to facilitate access to Justice*

A few civil society organizations and private law firms came up with initiatives to facilitate access to justice during the COVID-19 lockdown. Among these is the Uganda Law society (ULS) using

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<sup>202</sup> Ibid

<sup>203</sup> Ibid.

<sup>204</sup> Kikabi, *supra* note 188.

<sup>205</sup> *Ibid* at 10.

<sup>206</sup> *Ibid*, 11-12.

<sup>207</sup> *Ibid* at 18, also see , Ssekweyama, S, Judiciary Considers Electronic Case Management System for Efficiency, Sep 18 2019, available at - <https://ugandaradionetwork.net/story/judiciary-considers-electronic-case-management-system-for-efficiency> (accessed May 10, 2021)

<sup>208</sup> *Ibid* at 15.



initiatives such as ‘PULIDAWO’, through which lawyers are connected to persons in need of their services through a mobile application.<sup>209</sup> The challenge identified with this initiative is that access to smart-phones and internet services is a preserve of few Ugandans. The vulnerable and most in need of these services may be left out. The Society recently entered a strategic partnership with the Buganda Kingdom, to take services closer to vulnerable people. The Kingdom offered the ULS space to operate from in the counties of Busiro, Mawokota and Buddu.<sup>210</sup> These are to be used as launch pads to reach out to the vulnerable in need of legal services and information without having to move to Kampala, the main seat of the ULS.

Others offering legal information and assistance to indigent persons and those in need of help using ICTs include Barefoot Law through social media and JusticeBot Uganda using Facebook, messenger to offer free legal advice.<sup>211</sup> Fida Uganda was also able to continue its legal aid service provision using ICTS to its clients most of whom are women.

## 2.8 Conclusion

The measures undertaken by the Government of Uganda to prevent the spread of the Covid- 19 virus had a great impact on various aspects of life (social, economic, and political). The lock-down and restriction on movement are among the hallmarks of the pandemic, with great implications for access to justice.

In response to the pandemic, the Chief Justice issued Directives to guide operation of courts of law, but the general environment of the pandemic would still inhibit delivery of services.<sup>212</sup> However, not all demands for justice would be addressed by courts. Only a few such procedures such as bail applications and plea-taking were taken care of. Videoconferencing as an option which

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<sup>209</sup> Kirabo, J., “Uganda Law Society launches Pulidawo app to provide free legal services”, *Nile Post* June 29, 2019, available at <https://nilepost.co.ug/2019/06/29/uganda-law-society-launches-pulidawo-app-to-provide-free-legal-services/> (accessed May 10, 2021).

<sup>210</sup> Kabengwa, J., “Uganda Law Society partners with Mengo to bring justice to vulnerable”, *The Monitor* May 9, 2021, available at <https://www.monitor.co.ug/uganda/news/national/uganda-law-society-partners-with-mengo-to-bring-justice-to-vulnerable--3394066> (accessed May 10, 2021).

<sup>211</sup> See, <https://www.justicebot.org/>. Also see, Chanwat Brian Geoffrey, Current ICT approaches to enhance Access to Justice in Uganda, 11 May 2021, available at <https://www.betterplace-lab.org/current-ict-approaches-to-enhance-access-to-justice-in-uganda> (accessed May 10 2021).

<sup>212</sup> The Judiciary Circular No CJ/C.7, *supra* note 16.





was resorted to is convenient in the circumstances but raises several issues including; how to strike a balance between public health imperatives and preservation of constitutional rights. Examples of such rights is the right to a fair trial, whose tenets include physical appearance in court. Questions here include how possible it would be for the accused person to consult his/her lawyer in confidence during video conferencing sessions that are recorded. How are the recordings used? Indeed, the legal framework analysed in this Report on use of ICTs to some extent offers some safeguards in the use of ICTs.<sup>213</sup> That does not however create absolute trust in the confidentiality of exchanges between client and counsel during proceedings, as it would be in open court sessions where both accused and counsel are present.

In essence, the efforts of the Judiciary to promote access to justice or to mitigate the impact of the pandemic on access to justice have not recorded high scores of achievements thus far. There have been unintended consequences of the pandemic in the realm of access to justice, which have not been curbed by the responses of the judiciary. For example, increasing case backlog, insufficient legal aid service provision due inability of providers to operate, crunching economic times making the pursuit of justice expensive, new dynamics of corruption, double marginalization of the poor, etc.

The Directives of the Judiciary facilitated the hearing of a specific category of cases but not all. In essence, some matters were more important and in need of urgent resolution than others. This contradicts Newbold P's argument that justice should not be a "cloistered virtue" for a few, but open and available to everyone that is searching for it.<sup>214</sup> This was not possible in Uganda's context. The field findings revealed that justice became a "cloistered virtue" for those who could pay for it, to beat the restrictions that were set.

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<sup>213</sup> See, for example, The Computer Misuse Act, 2011.

<sup>214</sup> Omari Musa and others vs Republic (1970) E.A at 42



### 3.0 COVID-19 AND ITS IMPACT ON ACCESS TO JUSTICE IN KENYA

#### 3.1 Situation analysis of Kenya

Kenya is East Africa's biggest economy and Sub-Saharan Africa's fastest growing economy, with a growth rate averaging 5.7% over the past 5 years.<sup>215</sup> However, although Kenya has made significant gains in reducing child mortality, increasing life expectancy,<sup>216</sup> achieving near universal primary education enrolment and other markers of human development, poverty and inequality persist.

The COVID-19 pandemic reached Kenya in March 2020 and, like elsewhere, it has had a substantial impact on the livelihoods of the Kenyan population, affecting food security and income and reversing many of the gains in education and human development. As of 6<sup>th</sup> May 2020, Kenya had registered over 161,000 cases of COVID-19 positive persons and over 2800 deaths.<sup>217</sup>

COVID-19 negatively affected Kenya's economy; real Gross Domestic Product (GDP) is estimated to have contracted by 0.3% in 2020. This is due to the fact that manufacturing and services subsectors such as tourism and education were harshly disrupted.<sup>218</sup> Unemployment rose steeply - from 71% of the population being employed in the last quarter of 2019, to only 50% in May–June 2020. By March 2021, the situation had improved though, employment rates were back to 66%. The reduction of and loss in income caused many households to reduce their consumption in general, including food consumption.<sup>219</sup>

COVID-19 was not the only shock that affected Kenya in 2020. – There was a locust infestation in the North-East region of the country. This followed closely on the heels of intense drought and floods, all of which put food security and livelihoods at risk and severely affected economic activity in that region. The locust invasion exacerbated already existing problems of poverty and

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<sup>215</sup> The World Bank Group in Kenya, 2021. Kenya: Overview. Available at <https://www.worldbank.org/en/country/kenya/overview>, accessed 30 March 2021.

<sup>216</sup> Ibid.

<sup>217</sup> Our World in Data, Kenya Coronavirus Pandemic Country Profile, <https://ourworldindata.org/coronavirus/country/kenya> accessed 6 May 2021.

<sup>218</sup> The World Bank Group in Kenya, 2021, note 1 above.

<sup>219</sup> Ibid.



conflict, putting communities, especially girls and women, at increased risk of violence and other forms of insecurity.<sup>220</sup>

Before the pandemic, Kenya's justice system was beset by several challenges that hindered access to justice, but progress had been made in several areas. Afrobarometer's latest data on access to justice in Kenya published in 2020 revealed that 57% of Kenyans across various education levels trusted courts of law somewhat or a lot. However, rural Kenyans trust the courts more than those who live in urban areas. Kenyans embrace out of court settlements in seeking justice compared to courts of law and tribunals, and the overwhelming majority are satisfied with justice outcomes from the various avenues from where they seek justice. Notably, less than one in 10 Kenyans had contact with government courts in the two years preceding the survey.<sup>221</sup>

The Survey results showed that the major challenges faced by Kenyans in the formal courts include inability to meet costs and fees, a perception of not being listened to by the judge or magistrate, the complexity of courts processes and procedures, inability to obtain legal counsel or advice and long queues in handling cases.<sup>222</sup> These problems were likely to be exacerbated by the COVID-19 pandemic, especially for the poorest and most vulnerable members of society who were already excluded from the court system in several ways.

### **3.2 The Legal and Policy Framework for Access to Justice in Kenya**

The 2010 Constitution of Kenya enshrines the right to access to justice under Article 48, which states that “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” Article 22 obliges the Chief Justice to make rules to provide for the right of every person to access courts and seek the enforcement of rights or fundamental freedoms in the Bill of Rights. This is in addition to ensuring that there are

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<sup>220</sup> International Rescue Committee, 2020. *The Double Burden of COVID-19-19 And Locusts in East Africa: Saving Millions of People from Hunger and Malnutrition*. Available at:

<https://www.rescue.org/sites/default/files/document/4884/eastafricalocustsoutbreak.pdf> Accessed 6 May 2021.

<sup>221</sup> Afrobarometer, 2020. *Access to justice in Kenya- perceptions and experience: findings from Afrobarometer Round 8 survey in Kenya*. Available at

[https://afrobarometer.org/sites/default/files/ken\\_r8.\\_access\\_to\\_justice\\_presentation\\_12sep20\\_fin.pdf](https://afrobarometer.org/sites/default/files/ken_r8._access_to_justice_presentation_12sep20_fin.pdf) accessed 16 May 2021.

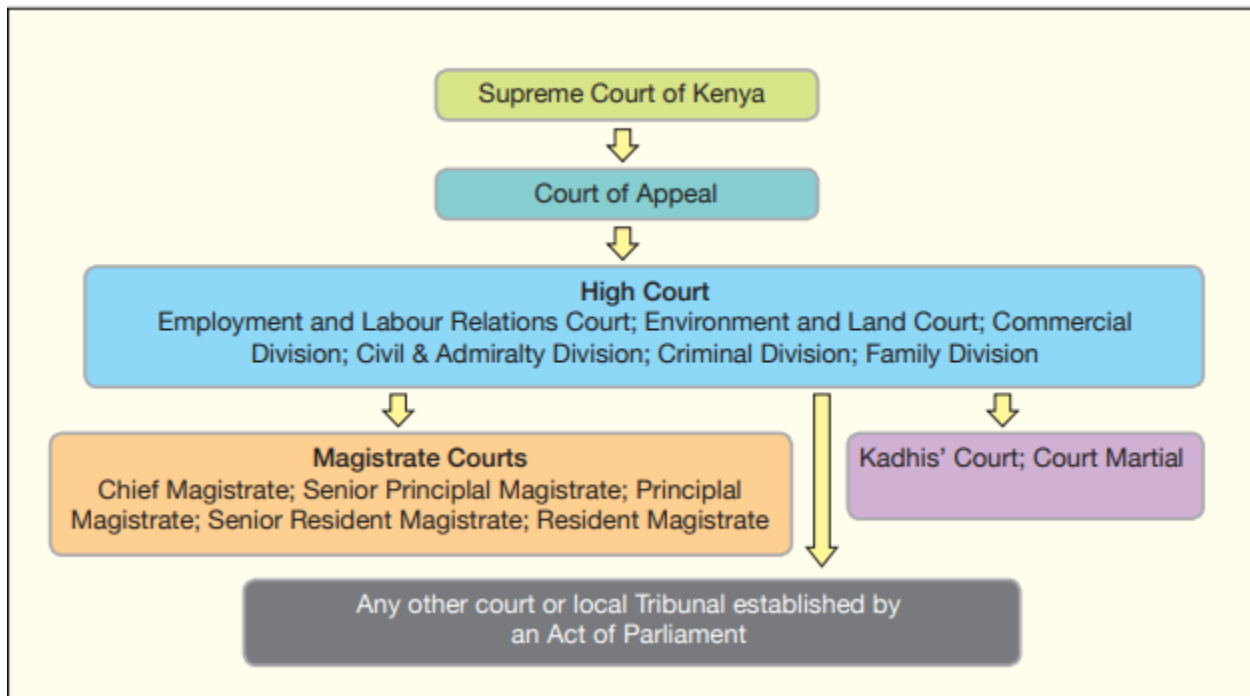
<sup>222</sup> Ibid.



no factors that will impede access to justice when enforcing the Bill of Rights by ensuring that no fees are charged for commencing proceedings. The constitutional provision further removes the strict legal requirement of proving locus standi, seeks to minimize procedural formalities and allows for entertaining the commencement of proceedings based on informal documentation. The provision also allows experts to appear as friends of the court where necessary.<sup>223</sup>

Article 50(1) enshrines the right of every person to a dispute to have the same decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 50 promotes expediency, fairness of process, equality in accessing legal services and effective dispute resolution mechanisms. Article 50(2)(h) provides for the right of every accused person “to have an advocate assigned [...] by the State and at State expense, if substantial injustice would otherwise result and to be informed of this right promptly.”

The Kenyan Court System is established as follows:



*Adapted from National Action Plan for Legal Aid 2019-2022.*

<sup>223</sup> Constitution of Kenya, 2010, available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>, accessed 16 May 2021.



Overall policy and governance for access to justice is entrusted with the National Council on the Administration of Justice (NCAJ), a semi-autonomous body established under Section 34 of the Judicial Service Act (No. 1 of 2011). It is a high-level policymaking, implementation and oversight coordinating mechanism composed of State and Non-State Actors. Its mandate is to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. The NCAJ is mandated to oversee and promote sector wide partnership through regular Council meetings, issue-based special working committees and the implementation of the recommendations of Court Users Committees (CUCs).

The Legal Aid Act, enacted in 2016, provides the overall framework for legal aid service provision. It establishes the National Legal Aid Service (NLAS) as a body corporate mandated to facilitate the provision of legal aid services in a coordinated manner to the indigent, vulnerable and marginalized citizenry, by ensuring that the services are accessible, affordable, accountable, transparent and efficient. NLAS is governed by a Board of 11 members who are representatives of State and non-State actors. It also has a Secretariat with a Director and technical and support staff. NLAS is in five counties- Nairobi, Mombasa, Kisumu, Eldoret and Nakuru. It has plans to establish offices in all the 47 counties of Kenya.<sup>224</sup>

However, the anticipated benefits from the law are still limited and the cost of accessing justice for indigent Kenyans is still high. Due to limited budgetary allocation, many provisions of the Legal Aid Act have not been implemented. These include provisions on the operationalization of the Legal Aid Fund, accreditation of community paralegals and legal aid providers and expansion of the legal aid scheme throughout the country. The Legal Aid Fund is supposed to cover costs such as remunerating legal aid providers, paying expenses incurred by represented persons and financing general operations and development activities of NLAS. Without the Fund, NLAS' capabilities are severely limited, and the justice gap remains. Most of NLAS activities are being supported by development partners bound by time and specific targets; government funding would be more sustainable.

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<sup>224</sup> Kenya National Legal Aid Service Website, at



According to the National Action Plan for Legal Aid 2017-2022, legal aid is imperative for the rule of law to flourish.<sup>225</sup> Section 2 of the Legal Aid Act 2016 defines legal aid as ‘legal advice; legal representation; assistance in resolving disputes by alternative dispute resolution; drafting of relevant documents and effecting service incidental to any legal proceedings; and reaching or giving effect to any out-of-court settlement.’ Furthermore, legal aid involves creating awareness through the provision of legal information and law-related education; and recommending law reform and undertaking advocacy work on behalf of the community. Accordingly, legal aid facilitates access to justice for those who cannot afford legal representation to enforce or claim their rights.

Access to justice is one of the key result areas in the Kenya Judiciary Strategic Plan 2019-2022. The Judiciary intends to enhance access to justice by improving physical access to courts, including building new courts, completing on-going construction, establishing new registries, mobile courts and specialised courts. The Plan also prioritises reliable electric power supply as a crucial component of improving access to the courts. It also aims to enhance access to court services through, among others, developing a manual on handling processes, operationalising Alternative Justice Systems, standardising court user fees, translating court procedures into Swahili and braille, recruiting and training and operationalising modern customer service centres in all courts (*Mahakama*).<sup>226</sup> The Judiciary also aims to recruit more judges and magistrates to handle cases and utilise technology to accelerate court proceedings.

### **3.3 The impact of COVID-19 on access to justice in Kenya**

#### ***3.3.1. Increased justice needs***

The International Commission of Jurists (Kenya chapter) and the Legal Empowerment Network held a webinar on the challenges and opportunities for legal aid actors in promoting access to

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<sup>225</sup> Kenya National Action Plan for Legal Aid 2017- 2022, available at <https://kecosce.org/wp-content/uploads/2020/02/NAP-Legal-Aid-2017-2022.pdf>, accessed 14 June 2021.

<sup>226</sup> Kenya Judiciary Strategic Plan, 2019-2023. Available at <http://academia-ke.org/library/download/the-judiciary-strategic-plan-2019-2023/?wpdmdl=8627&refresh=60c8e65150c8b1623778897>, accessed 10 June 2021.



justice for the poor and marginalized during the COVID-19 pandemic.<sup>227</sup> Participants from organisations such as the Kenya Legal Resources Foundations, Federation of Women Lawyers-Kenya, the Kenya National Legal Aid Service, Users and Survivors of Psychiatry- Kenya and Law Society of Kenya (LSK) pointed out that the pandemic had led to increased justice needs in several areas. For instance, confinement measures forced women to stay with abusive partners, leading to an increase in gender-based violence (GBV). In some cases, victims of abuse could not access health care services. Closure of schools placed children, especially girls, at increased risk of sexual abuse, forced child marriage and female genital mutilation. Notably, however, cases of domestic violence and gender-based violence have been prioritised for hearing by the Courts under the Kenya Judiciary's COVID-19 response.<sup>228</sup>

Lockdown measures also created new risks and sources of injustice. These included evictions, arbitrary dismissal by employers and demands for bribes by security and/or health officials for failure to adhere to lockdown rules or in return for accessing medical services in the case of health officials. These injustices disproportionately affect vulnerable communities, including among others persons with psychosocial disabilities living on the streets. Public health directives did not consider that this group would be unable to access information and fully understand what was happening. This left them vulnerable to abuse and coercion by the security forces.<sup>229</sup>

Widespread arbitrary arrests and excessive use of force in the implementation of directives, especially in enforcing curfew rules, led to an increase in human rights abuses. The Kenya National Commission for Human Rights (KNCHR) documented numerous instances of alleged violation of human rights by police officers, many of which had resulted in grievous injury and actual fatalities in Mombasa, Nairobi, Kwale and Migori.<sup>230</sup>

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<sup>227</sup> The webinar took place on 19 May 2020. See ICJ Kenyan Section, at <https://icj-kenya.org/news/communique-the-impact-of-covid-19-on-the-poor-and-vulnerable-in-society/>, accessed 29 July 2021.

<sup>228</sup> Interview with Kenyan Advocate, June 2021.

<sup>229</sup> Namati, 2020. Communiqué on legal aid approaches for marginalized and indigent persons in the wake of the COVID-19-19 pandemic. Available at <https://namati.org/network/communique-COVID-1919-africa/> accessed 16 May 2021.

<sup>230</sup> See *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties)* [2020] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/193192/>, accessed 16 May 2021.



This increase in unmet justice needs was compounded by the absence of justice mechanisms to address them, especially during the early stages of the pandemic in 2020. The National Council for the Administration of Justice issued a Directive scaling down court activities across the board. The Council directed that prisoner and accused persons on remand would not be presented to court. Concerning new arrests, all cases except serious ones, would be dealt with at the police stations. Furthermore, all appeals, hearings and mentions in criminal and civil cases in all courts, as well as execution proceedings, were suspended with immediate effect. However, courts would continue to handle certificates of urgency and taking plea for serious cases. Judicial officers and staff would continue being on duty but there would be no open court appearances.<sup>231</sup>

The Directive has been reviewed several times over the past year. Many courts have resumed business, but intermittent court closures are still common whenever staff are infected, and contamination is suspected.<sup>232</sup> Overall, there has been a decline in case disposal, especially criminal cases, ‘due to the lack of ICT gadgets in prisons and places of remand’.<sup>233</sup>

Under the National Corona Virus Response Guidelines, legal services were at first not seen as essential, and Advocates, paralegals and human rights defenders were initially unable to do their jobs. The courts were largely closed except for urgent matters, which would be attended to just once a week on Thursdays.<sup>234</sup> Some courts offered e-filing services and virtual hearings, but the availability of such services was uneven due to disparities in electricity and internet coverage across the country. Notably, even though over 20 million Kenyans have access to mobile phones, only 1 in 5 Kenyans has access to the internet.<sup>235</sup> Moreover, e-filing is available only to litigants represented by lawyers, since the registration system requires the use of a law firm or lawyer. Legal

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<sup>231</sup> Kenya Judiciary, 2020. *Press Statement: Administrative and Contingency Management Plan to Mitigate COVID-19-19 In Kenya’s Justice Sector*, March 15, 2020. Available at <https://www.judiciary.go.ke/press-statement-administrative-and-contingency-management-plan-to-mitigate-COVID-19-19-in-kenyas-justice-sector/>, accessed 17 May 2021.

<sup>232</sup> See Kenya Judiciary, 2021. COVID-19-19, at <https://www.judiciary.go.ke/resources/judiciaryke-COVID-19-19/>, accessed 17 May 2021.

<sup>233</sup> Interview with Kenyan Advocate, June 2021.

<sup>234</sup> Public Notice by Kenya High Court Registrar Judith Omenge. Available at <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Regulatory-operations-at-Milimani-Law-Courts.pdf>, accessed 17 May 2021.

<sup>235</sup> Sunday F, 2020. “Report says 1 in 5 Kenyans has access to the internet.” *The Standard*. Available at <https://www.standardmedia.co.ke/business/article/2001361388/report-says-one-in-five-kenyans-has-internet-access>, accessed 17 May 2021.





documents must be prepared in advance and then uploaded upon the payment of filing fees. The party then waits for the court file to be activated and the granting of audience by court. Litigants who do not have lawyers or who cannot understand legal terminology therefore face substantial barriers in using the e-filing system.<sup>236</sup>

Even as some courts re-opened, Personal Protective Equipment for Judicial Officers and Court Personnel proved to be a problem, especially early in the pandemic. PPE was in short supply and the costs of masks and hand sanitiser had shot up, yet obviously, the judiciary had not budgeted for this expense. Judicial officers were forced to spend their own money to buy masks rather expensively in a bid to protect themselves from infection. Subsequently the judiciary had to adjust its budget to cover these costs.<sup>237</sup>

### ***3.3.2. LSK petitions Court to allow lawyers to operate as an essential service***

Following the lockdown and restrictions on operations of courts and lawyers, the LSK filed a petition before the High Court against the Inspector General of Police, the Cabinet Secretary for the Interior, Cabinet Secretary for Health and Attorney General of Kenya.<sup>238</sup> The Petition sought the following:

- (i) A declaration that the curfew order was unconstitutional, “illegal, illegitimate and unproportionate”, “blanket in scope and indefinite in length” and therefore of no legal effect.
- (ii) A prayer that the first respondent (Inspector General of National Police) be held personally liable for the excessive use of force in the enforcement of the curfew order.
- (iii) A declaration that in accordance with article 43 of the Constitution, Kenyans and every other person are entitled to the highest attainable standard of health and consequently, an order be issued directing the Cabinet Secretary for Health to exercise his powers under section 36 of the Public Health Act, and issue proper guidelines for curfew, quarantine, and containment of COVID-19 Coronavirus.

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<sup>236</sup> Muende M, 2020. Op cit.

<sup>237</sup> Interview of Kenyan Advocate.

<sup>238</sup> Ibid.



- (iv) A declaration that access to justice by Kenyans or the public vide the courts, the institution of the Judiciary and its processes, even in instances of public curfews or a state of emergency is necessary in a free and democratic society.
- (v) A declaration that, even in cases of a state of emergency or public curfews, the courts must operate so as to check against any excesses by the executive or any lawful body and reinforce the principle that there is no temporary suspension of the rule of law and that those n authority have no power to act in disregard of the principle of legality by which they are bound at all times; and
- (vi) Any other relief deemed fit and just to grant in the interests of justice.

The Court ruled in LSK’s favour. Justice Korir noted the Government’s opposition to the society’s petition that lawyers and legal services should be added to the list exempted from the curfew. The state had argued that the fact that they were left off the exemption list did not violate due process rights as courts operate during the day. Nonetheless, he went on to rule that lawyers’ work ‘is not limited to court work,’ and LSK members should have been added to the list of essential workers exempted from the curfew.

As a result of the ruling, the NCAJ decided to upscale courts sessions, tribunals, and registry services. There was an increase in the number of court sessions and tribunal hearings. Registry services resumed and the Chief Justice ordered the presentation of suspects in court within 24 hours of arrest as required by law.<sup>239</sup> The Petition and ruling therefore transformed legal services into an essential service, something quite remarkable given that they were not characterised as such by many jurisdictions throughout the world. Subsequently, LSK formulated digital ID cards that designated lawyers as essential service providers. Lawyers could print these cards and show them to the authorities.<sup>240</sup>

Unfortunately, not all lawyers were characterised as essential service providers. Also left out were lawyers from the National Commission of Human rights or the Independent Policing Oversight Authority. Yet these would have especially been important in the COVID-19 response to ensure

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<sup>239</sup> Tanui C, 2020. Courts to Scale Up Hearings As NCAJ Orders Expeditious Arraignment Of Suspects, Capital News, available at <https://www.capitalfm.co.ke/news/2020/04/courts-to-scale-up-hearings-as-ncaj-orders-expeditious-arraignment-of-suspects/>, accessed 16 May 2021. See also Muendo, M 2020. *Kenya is struggling to deliver justice online: what needs to be done*, The Conversation <https://theconversation.com/kenya-is-struggling-to-deliver-justice-online-what-needs-to-be-done-139675>, accessed 16 May 2021.

<sup>240</sup> Interview with Kenyan Advocate, 4 June 2021.



that Police do their work in accordance with the law and refrain from using excessive violence in enforcing the lockdown.<sup>241</sup> Indeed, whereas the Court ordered the Inspector of General of Police to come up with guidelines to guide police on how to discharge their duties while adhering to principles of human rights, it is not clear whether this has been done.<sup>242</sup>

### **3.4 COVID-19 as a catalyst for innovations in Kenya’s Justice Sector**

The Government of Kenya had already made several investments in digitising judicial processes and improving e-justice. The Judiciary Transformation Framework (JTF) 2012-2016 laid the foundation for the transformation of the Kenyan Judiciary. ICT was one of the pillars in the JTF, where it was recognized as an enabler of justice. Under the JTF, the Judiciary distributed about 900 laptop computers. All the Supreme Court judges, Court of Appeal Judges, Magistrates, Legal Researchers, directors and other senior officers received laptop computers, and many received tablet computers. The Judiciary also provided about 2500 desktop computers which were widely distributed in all the 120 court stations countrywide. Officers assigned desktop computers included Court Assistants, Accountants, Clerical officers, Secretaries/Typists and Librarians/Archivists.<sup>243</sup> The Judiciary had also completed structured cabling for all the high courts and other important facilities, as well as provision of the Internet Local Area Network. The structured cabling covered provision of adequate and commensurate number of data points, Wide Area Network, Clean Power System, Uninterruptible Power Supply System, generators, Closed Circuit Television (CCTV), IP Telephony and Access Control.<sup>244</sup>

Moreover, rapid development in Kenya’s Information Technology Sector over the past two decades, has made it the epicentre of technology innovation in the region.<sup>245</sup> The country was therefore well-placed to adapt and innovate to the challenges posed by COVID-19. Google, Intel,

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<sup>241</sup> Ibid

<sup>242</sup> Ibid.

<sup>243</sup> Odima D, 2013. E-justice: Defined Steps by the Judiciary of Kenya. Available at <http://journals.jkuat.ac.ke/index.php/jscp/article/view/1075/879>, accessed 10 June 2021.

<sup>244</sup> Ibid

<sup>245</sup> Smith, D. 2012. *Kenya building a digital future in Africa’s Silicon Savannah*, The Guardian, Tuesday 30 October 2012. Available at <https://www.theguardian.com/world/2012/oct/30/kenya-silicon-savannah-digital-technology> accessed 16 May 2021.



Microsoft, Nokia, and Vodafone have a presence in Kenya, and Nairobi hosts IBM's first African research lab. Kenyans enjoy faster broadband connections than many other countries on the continent.<sup>246</sup> Kenya became the first developing country to adopt open-source data,<sup>247</sup> and is renowned for its mobile money platform M-Pesa and Ushahidi, a crowd-sourcing platform that was originally developed to map reports of violence in Kenya after the post-election violence in 2008.<sup>248</sup>

Of the three countries in the study, Kenya's justice system, unsurprisingly showed the highest innovation in responding to the challenges posed by COVID-19. Even before the pandemic, higher courts, including the Supreme Court, had already issued guidelines for digital proceedings, such as the filing of applications and submissions, as well as the delivery of judgments, via email. This was in line with the aforementioned JTF and the Sustaining Judiciary Transformation initiative. The COVID-19 has therefore been a catalyst to digitization of judicial processes in Kenya.<sup>249</sup>

On 20<sup>th</sup> March 2020, the Chief Justice gazetted "Electronic Case Management Directions" and the Chief Registrar issued an internal memo, directing all staff to work from home and comply with Electronic Practice Directions. Electronic filing (e-filing) is the creation and submission of case documents electronically (online) to Court Registries. It is a web-based application that sits on a server and can be accessed from any location with internet connection. E-filing System provides a platform for law firms, lawyers, and other litigants to initiate and complete the process of filing cases online from their offices /remotely. They do not need to physically visit courts to file cases or banking halls to pay court fees, which can be paid via Kenya's Mobile money service, M-Pesa.<sup>250</sup> The system is being used by the Supreme Court, Court of Appeal, All High Court Divisions in Nairobi, Environment and Land Court (ELC) Nairobi, Nairobi Anti-Corruption Court,

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<sup>246</sup> Ibid.

<sup>247</sup> Khokhar, T., 2011. *What's special about open data in Kenya?* World Bank Blogs. Available at <https://blogs.worldbank.org/developmenttalk/whats-special-about-open-data-in-kenya#:~:text=On%20July%208th%202011%2C%20President,first%20datasets%20to%20be%20released.,> accessed 16 May 2021.

<sup>248</sup> About Ushahidi, <https://www.ushahidi.com/about> accessed 16 May 2021.

<sup>249</sup> Mutambo, A., 2020. COVID-19 Speeds Up Digital Judiciary, Reporting of Good Governance in Kenya, available at <https://roggkenya.org/2020/08/24/COVID-19-19-speeds-up-digital-judiciary/>, accessed 17 May 2021.

<sup>250</sup> See Kenya Judiciary, 2020. Public Notice to All Litigants and Advocates: court Standard Operating Procedures during COVID-19-19 Pandemic. Milimani Law Courts and Milimani Commercial Courts. Available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Court-Processes-During-The-Upscaling-Of-Court-Service-At-Milimani-Law-Courts.Pdf>, accessed 17 May 2021.



Nairobi Employment and Labour Relations Court (ELRC). Other stations in Nairobi where the system is now in use include Milimani. Chief Magistrate Court Commercial, Children Court Milimani Nairobi, Makadara, JKIA and Kibera Law Courts as well as Deputy Kadhis Court & City Court.<sup>251</sup>

Justice Joel Ngugi, a judge in Kenya’s High Court, speaking at a webinar organized by the Commonwealth Secretariat, said that there had been a “stupendous” uptake in video-conferencing and other technologies and that COVID-19 has accelerated digitalization - “courts have gone almost completely virtual.” He further opined that this led to justice being speedier and less costly for many people, and that procedural formalism in the law was on the decline.<sup>252</sup> A Kenyan lawyer described the innovations as “awesome.”<sup>253</sup>

However, the uptake of such technological innovations was slow and uneven, as already noted, given the limited access to the internet by most Kenyans, and difficulties in accessing legal services due to their high cost.<sup>254</sup> Moreover, the system has not yet been rolled out to all the courts in Kenya. 130 out of 132 courts in Kenya had been connected to the internet by August 2020, but only 32 of them have a running electronic transcription system, 60 of them have installed a case tracking system while the remaining 72 were scheduled to have the system by end of October.<sup>255</sup> Sometimes, the system is inefficient due to power cuts and unstable internet connection.

The Government made some efforts to be inclusive of the poor and those with limited access to technology by supporting the establishment of a toll-free line which NLAS utilised to administer legal aid services. In addition, NLAS put in place desktop computers with internet access to support clients who needed to attend online hearings, although this happened only in Nairobi. Outside Nairobi, legal aid delivery was curtailed.

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<sup>251</sup> Kenya Judiciary, 2020. E-filing takes shape in Kenya’s Courts, Available at <https://www.judiciary.go.ke/e-filing-takes-shape-in-nairobi-courts/>, accessed 16 May 2021.

<sup>252</sup> Commonwealth Secretariat, 2020. COVID-19-19 has spurred changes to justice systems. Available at <https://thecommonwealth.org/media/news/COVID-19-19-has-spurred-changes-justice-systems> accessed 16 May 2021.

<sup>253</sup> Quoted in Mutambo, A., 2020. COVID-19-19 Speeds Up Digital Judiciary, Reporting of Good Governance in Kenya, available at <https://roggkenya.org/2020/08/24/COVID-19-19-speeds-up-digital-judiciary/>, accessed 17 May 2021.

<sup>254</sup> See Muende, M., op cit.

<sup>255</sup> See Mutambo, A., 2020. Op. cit.



One of the first measures taken by the Kenya Judiciary was to allow the operation of open-air courts. COVID-19 is known to spread more easily indoors than outdoors, so this was a simple but effective innovation, although it created new problems such as papers being blown away by the wind. All offences related to COVID-19 were moved to the Kasarani Stadium arena as a means of avoiding congestion in court, and magistrates were assigned to handle the cases.<sup>256</sup>

Generally, the justice system in Kenya has adjusted and users are now getting accustomed to the “new normal.” Advocates appreciate the efficiency of the system. “You don’t have to burn time in traffic or go and wait in a court room for a judge... a lot can happen between getting out of your firm and getting to the court...”<sup>257</sup> One of the respondents noted that the reduction in the transport costs of getting to court is one advantage to come out of the pandemic.

Another advantage is that e-justice and the availability digital footprint of proceedings will end the tendency of court files and records to get lost or misplaced.<sup>258</sup>

E-justice will also cure the conundrum around digital evidence. In most courts, it was previously difficult to adduce some evidence due to outdated laws that did not provide for it.<sup>259</sup> The Kenyan Evidence Act includes two apparently conflicting provisions. Under section 106B, the Evidence Act prescribes conditions for admissibility, and uses the concept of a certificate as a means of proof of authenticity. On the other hand, under section 78A, electronic evidence is admissible, with no mention of the use of a certificate. There has been conflicting jurisprudence as a result. In 2016, in the case of politicians referred to as “Pangani six” on charges of hate speech, a video clip uploaded on YouTube was rejected as evidence for lack of credibility as required by the Evidence Act.<sup>260</sup> On the other hand, the historical nullification of Kenya’s 2017 election demonstrated a strong acceptance of digital evidence as the case was won on allegations of digital fraud.<sup>261</sup> While

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<sup>256</sup> Kenya Judiciary Standard Operating procedures during COVID-19-19, op. cit.

<sup>257</sup> Interview with Kenyan Advocate.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Muraya, J. 2017. MPs Moses Kuria and Waititu Acquitted Of Hate Speech Charges. Capital News, available at <https://www.capitalfm.co.ke/news/2017/02/mps-moses-kuria-waititu-acquitted-hate-speech-charges/>, accessed 10 June 2021.

<sup>261</sup> Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/140478/> accessed 11 June 2021.



this is still a developing area, there is no doubt that the admissibility of digital evidence will henceforth become less controversial<sup>262</sup>

### 3.5 Conclusion

Kenya's Justice Sector made laudable attempts to continue delivering justice despite the pandemic. However, the number of cases that were resolved in all courts reduced substantially from 469,359 in 2018/19 to 289,728 cases in 2019/20.<sup>263</sup> The Case Clearance Rate (CCR), measured by the ratio of resolved to filed cases, reduced from 97 per cent in FY 2018/19 to 86 per cent in 2019/20.<sup>264</sup> Maranga *et al* opine that despite the numerous measures instituted by the Kenyan judiciary to ensure the continuity of service delivery during the pandemic, COVID-19 severely affected the resolution of cases.<sup>265</sup> Moreover, access to justice was limited for those without access to lawyers, digital technology and the internet. However, it is anticipated that digital innovations that have sped up due to COVID will play a role in limiting the backlog and ensuring that cases are disposed of speedily and efficiently. Matters will also be helped by the ongoing recruitment and appointment of additional judges and magistrates.

The absence of physical in-person hearings has of course come at a cost. Hearings have become impersonal, and judges and magistrates cannot consider the body language of litigants.<sup>266</sup> This has implications for the right to a fair trial that will be discussed further under section 5 of this report.

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<sup>262</sup> Ibid.

<sup>263</sup> Marang'a, M. W., Kimalu, P. K., & Ochieng, M. A. (2021). Effect of COVID-19-19 pandemic on resolution of cases in courts: The Kenyan Judiciary. Research Paper No. 1 of 2021. The Judiciary. Available at [https://www.researchgate.net/publication/350513318\\_EFFECT\\_OF\\_COVID-19-19\\_PANDEMIC\\_ON\\_RESOLUTION\\_OF\\_CASES\\_IN\\_COURTS\\_THE\\_KENYAN\\_JUDICIARY](https://www.researchgate.net/publication/350513318_EFFECT_OF_COVID-19-19_PANDEMIC_ON_RESOLUTION_OF_CASES_IN_COURTS_THE_KENYAN_JUDICIARY), accessed 17 May 2021.

<sup>264</sup> Ibid, quoting Judiciary of Kenya. (2020a). COVID-19-19 pandemic updates. The Judiciary. Available at: [https://www.judiciary.go.ke/resources/judiciaryke-COVID-19-19/\(2020\)](https://www.judiciary.go.ke/resources/judiciaryke-COVID-19-19/(2020))

<sup>265</sup> Above, note 117.

<sup>266</sup> Interview with Kenyan Advocate, June 2021.

## 4.0 THE IMPACT OF COVID-19 ON ACCESS TO JUSTICE IN SOUTH SUDAN

### 4.1 Situation Analysis

South Sudan became an autonomous country in 2011. The Country is however still beset by ongoing conflict and impunity, characterised by a culture where burning of entire villages, raping of young girls and boys, using forced starvation as a method of warfare, shooting civilians and other war crimes and crimes against humanity go unpunished.<sup>267</sup> Since 2013, more than 400,000 people have been killed in the violence, and more than four million have been forced to flee their homes.<sup>268</sup> South Sudan is currently under targeted sanctions by the US government, in addition to a United Nations Security Council Arms Embargo.<sup>269</sup>

In September 2018, South Sudan's warring parties, President Salva Kiir, and rebel leader Riek Machar, re-committed to a 2015 peace deal establishing transitional justice mechanisms including a Commission for Truth, Healing and Reconciliation, the Hybrid Court for South Sudan, and the Compensation and Reparations Authority, with the aim of addressing past abuses. However, the deal was not implemented, and South Sudan made no progress in establishing the mechanisms for some years. In February 2020, rival factions agreed on a transitional power-sharing government and in 2021 the Government of South Sudan decided to move forward with the establishment of the transitional justice institutions. This was viewed as an important step towards confronting and dealing with past human rights violations to prevent further violence.<sup>270</sup>

With violence and fighting erupting sporadically, the COVID-19 pandemic hit South Sudan hard. There was an increase in gender-based violence and other abuses of women's rights. High inflation

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<sup>267</sup> Amnesty International, 2021. *UN Security Council must not lift South Sudan arms embargo until human rights benchmarks are met*, available at <https://www.amnesty.org/en/latest/news/2021/05/un-security-council-must-not-lift-south-sudan-arms-embargo-until-human-rights-benchmarks-are-met/>, accessed 17 May 2021.

<sup>268</sup> Global Conflict Tracker, 2021. *Civil War in South Sudan*. Available at <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan>, accessed 19 May 2021.

<sup>269</sup> See Reuters, 2018. *U.S. targets South Sudan oil firms with sanctions to choke off war funds*, available at <https://www.reuters.com/article/us-usa-southsudan-oil-sanctions/u-s-targets-south-sudan-oil-firms-with-sanctions-to-choke-off-war-funds-idUSKBN1GX27N>, accessed 19 May 2021.

Nicols M, 2018. *UN Security council imposes arms embargo on South Sudan*. Reuters. Available at <https://www.reuters.com/article/us-southsudan-unrest-un/u-n-security-council-imposes-an-arms-embargo-on-south-sudan-idUSKBN1K3257>, accessed 19 May 2021.

<sup>270</sup> Reliefweb, 2021. *Press briefing notes on South Sudan* (2 February 2021), available at <https://reliefweb.int/report/south-sudan/press-briefing-notes-south-sudan-2-february-2021>, accessed 17 May 2021.





is affecting women's livelihoods and increasing poverty.<sup>271</sup> Many children have dropped out of school - only a third of children who were in school before the pandemic are engaging in any form of distance learning, which is through radio programs. Half of all households report a fall in income since the start of the pandemic - one in eight households have lost all income from their main activity. Businesses and markets closed, and many households are suffering food security, with four in five households skipping meals or running out of food. The results are consistent across urban and rural parts of South Sudan.<sup>272</sup>

The pandemic has therefore had a severe impact on the transitional justice process in South Sudan. The Government and other parties have not been to meet the security benchmarks agreed on in the Peace Accord. Mediators are unable to hold meetings that are needed to advance the implementation of the Accord and conferences and workshops hosted by civil society to build peace at local levels had to be cancelled.

As a result of the inability to implement the Peace Accord, communal violence and clashes between the Government forces and rebel groups have spiked, with a steep increase in civilian casualties. Cattle raids and revenge killings, especially in Jonglei state, have increased, leading to internal displacement, and creating conditions of overcrowding where COVID-19 can spread easily.<sup>273</sup>

### **4.3 Judicial response to COVID-19 in South Sudan**

South Sudan's new judiciary, as established under its Transitional Constitution of 2011,<sup>274</sup> faces several challenges, especially severe underfunding, and understaffing. The legal system is a "common law-based hybrid, with a largely adversarial procedure, was established through the

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<sup>271</sup> Yuyada R W, 2020. In South Sudan, women's rights cannot wait for COVID-19-19 or peace. ACCORD, available at <https://www.accord.org.za/analysis/in-south-sudan-womens-rights-cannot-wait-for-COVID-19-19-or-peace/>, accessed 17 May 2021.

<sup>272</sup> Finn, Arden; Von Der Goltz, Jan; Fatima, Freeha; Nichanametla Ramasubbaiah, Rakesh Gupta. 2020. *Monitoring COVID-19-19 Impacts on Households in South Sudan, Report No.1: Results from a High-Frequency Phone Survey of Households*. World Bank, Washington, DC. © World Bank.  
<https://openknowledge.worldbank.org/handle/10986/34799> License: CC BY 3.0 IGO

<sup>273</sup> Kwanje N & Zaremba N, 2020. [In South Sudan, Civic Activists take on COVID-19](#). United States Institute of Peace Blog.

<sup>274</sup> Pending a permanent Constitution at the conclusion of the ongoing transitional phase.



Transitional Constitution of the Republic of South Sudan (2011) and the Code of Criminal Procedure Act (2008).<sup>275</sup>

This new legal system faces several challenges, including lack of clear separation of powers and judicial independence. Legal pluralism is also a challenge, as most people are living according to their customary laws as enforced by the local tribal chiefs established during colonial rule. The chiefs frequently exceed their jurisdiction and abuse their powers. This is further compounded by the fact that the population is largely illiterate and does not understand the new system, nor are there enough lawyers to provide legal advice and representation.<sup>276</sup> South Sudan adopted English as the official language even though most of the present judges and lawyers in South Sudan were trained in Arabic language under old Sudan's sharia based civil law system. Many lawyers find it difficult to practice in English and apply the Common Law Principles. This has resulted in non-uniform legal practice in the country.<sup>277</sup> Lack of physical infrastructure – premises where trials could be conducted, has also been another hindrance to access to justice. As a result, a huge case backlog, sometimes extending as far back as five years, has been a persistent challenge with several knock-on effects for access to justice such as long periods of pre-trial detention and lost evidence and witnesses.<sup>278</sup>

Accordingly, before the pandemic, the Government of South Sudan, supported by the United Nations Mission in South Sudan, was working to improve access to justice by establishing mobile High Courts that would visit several towns. The mobile courts have been instrumental in reducing the numbers of people held in detention without trial and reducing the case backlog.<sup>279</sup> However, they are severely under-funded, and sometimes Judges have to pay some of their own costs from

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<sup>275</sup> Vik LT (n.d.). *Strengthening Justice Capacity in South Sudan*. Nordem Thematic Papers Series. Norwegian Centre for Human Rights, University of Oslo. Available at [https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/docs/leift-vik\\_thematicpapersserie\\_f.pdf](https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/docs/leift-vik_thematicpapersserie_f.pdf) accessed 19 May 2021.

<sup>276</sup> Ibid.

<sup>277</sup> Apach GM & Garang G, 2018. *An Overview of the Legal System of South Sudan*, GlobalLex, available at [https://www.nyulawglobal.org/globalex/South\\_Sudan1.html](https://www.nyulawglobal.org/globalex/South_Sudan1.html), accessed 19 May 2021.

<sup>278</sup> Braak B, 2016. *Exploring Primary Justice in South Sudan Challenges, concerns, and elements that work*. Available at <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-metajuridica/south-sudan-report-vs-2016.10.27.pdf>, accessed 19 May 2021.

<sup>279</sup> Mbugo P, 2019. Mobile Court opens in Yambio to handle serious cases, UNMISS News, available at <https://unmiss.unmissions.org/mobile-court-opens-yambio-handle-serious-cases>, accessed 18 May 2021.



their salaries when they travel around the country.<sup>280</sup> Judges sometimes work on their own, with no interpreters or clerks.<sup>281</sup> Sometimes, they also face hostility and lack of cooperation from the chiefs who enforce Customary law and view the new legal system with its emphasis on human rights as foreign and imposed.<sup>282</sup> With COVID-19, the operations of the mobile courts have ground to a halt due to restrictions on movement.<sup>283</sup>

Efforts have been made to reduce the backlog of juvenile cases awaiting trial and to decongest the Juvenile Reformatory Centre (JRC) as part of the COVID-19 prevention and response strategy. In March 2020, hearings for more than 118 young people on remand for alleged criminal activity were completed at the JRC in Juba. The Judiciary worked with the Ministry of Justice, Directorate of Public Prosecutions, National Prison Service, and legal aid providers to conduct hearings at a temporary location in the JRC. Judges prioritized cases of petty offences and granted bail to 85 young people on remand, greatly helping to reduce congestion during COVID-19. Accused young persons received free legal representation and support from social workers assigned by the National Prison Service. Family reunification and other support services were also arranged through close collaboration with UNICEF.<sup>284</sup>

The Government of South Sudan received assistance from the UNDP Access to Justice and Rule of Law Project to protect the staff and users of justice services against the COVID-19 pandemic. UNDP provided hygiene and personal protection kits to the Ministry of Justice. These included washing liquids, sanitisers, hand washing water dispensers, disinfecting equipment, gun thermometers, face masks and gloves to ensure the safety of frontline personnel from infection. UNDP further supported the justice system to take additional precautions whilst continuing to perform their roles that were deemed as essential services for the justice system to remain operational. The Judiciary scaled down its operations, prioritizing criminal cases and the continued

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<sup>280</sup> Braak B, 2016. *Exploring Primary Justice in South Sudan Challenges, concerns, and elements that work*. Available at <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-metajuridica/south-sudan-report-vs-2016.10.27.pdf>, accessed 19 May 2021.

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

<sup>283</sup> Interview with South-Sudanese Advocate, June 2021.

<sup>284</sup> Reliefweb, 2020. *UNMISS support national efforts to resolve juvenile court cases amidst COVID-19-19*. Available at <https://reliefweb.int/report/south-sudan/unmiss-support-national-efforts-resolve-juvenile-court-cases-amidst-COVID-19-19> accessed 17 May 2021.



deployment of Mobile Courts. Unfortunately, not every state in South Sudan received this assistance, UNDP though is working to expand to all the ten states to protect the staff and users of justice services against the Coronavirus pandemic.<sup>285</sup>

The Judiciary, with the help of UNDP, established a functioning Gender Based Violence (GBV) Court, which is currently expediting the handling of GBV cases.<sup>286</sup> Courts issued administrative directives reducing the number of people allowed inside the court room for hearings and measures for social distancing. Standard Operating procedures (SOPs) issued by the National Task force on COVID-19 were in place in courts. As South Sudan does not yet have the capacity for digital proceedings, it is especially important that SOPs are adhered to.

A few other cases were handled as a matter of public urgency. One concerned a young man who had slaughtered 3 children in a revenge killing. The trial was made urgent as a result of public outcry and not necessarily as a result of judicial initiative. Another case handled concerned a Pastor who resisted Government directives on COVID-19.<sup>287</sup>

Due to the limitations of the formal justice system, most people in South Sudan access justice through traditional courts and informal mechanisms. They offer alternative means to justice in hard-to-reach provinces. However, before the pandemic, a link has always been maintained between the formal and informal justice mechanism through open communication channels and in-person interaction with chiefs as handmaidens of informal justice systems. Following the outbreak of the pandemic, however, it was difficult to communicate and offer complementary channels of justice between the formal and informal justice mechanisms. The informal justice mechanisms were left to operate, sometimes in an extrajudicial manner due to a conflict of interpretation of justice. For example, chiefs acting as judges in informal systems often handed down sentences beyond or below what the law dictates.<sup>288</sup>

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<sup>285</sup> Africanews, 2020. *Coronavirus - South Sudan: Protecting the Staff and Users of Justice Services Against Coronavirus Pandemic*. Available at: <https://www.africanews.com/2020/04/18/coronavirus-south-sudan-protecting-the-staff-and-users-of-justice-services-against-coronavirus-pandemic/> accessed 17 May 2021

<sup>286</sup> Interview with UNDP legal officer, South Sudan.

<sup>287</sup> Interview with South Sudan Advocate, June 2021.

<sup>288</sup> Interview with South Sudanese Advocate, June 2021.



Overall, South Sudan is still reeling from the war, and COVID-19 has been an additional challenge to be tackled along with other urgent tasks needed for the rebuilding of the country. There was a shock in the legal system following the COVID-19 outbreak as all courts began operating on a half-day basis, and the chain of the law was interrupted with Police officers and court officers often not turning up for work. No online court proceedings were carried out. However, this problem has to be considered alongside the fact that the formal justice system has a very limited reach in South Sudan. Over 10 states, especially in the Upper Nile region, have no formal justice mechanisms. Accordingly, addressing the challenges posed by COVID-19 is being done as part of the overall post-war reconstruction strategy, with many institutions still rebuilding from the war.<sup>289</sup>

### **4.3 Impact of COVID-19 on the peace and transitional justice process**

Despite the pandemic, some progress in the peace process has been made. The Revitalized Transitional Government of National Unity was formed along with the Presidency and Council of Ministers. State Governors were appointed, and local administrative officials and structures established. However, much remains to be done.<sup>290</sup>

The pandemic has hindered the implementation of several aspects of the latest Peace Accord, the Revitalised Agreement on Resolution of the Conflict in South Sudan in September 2018 (R-ARCSS). It has prevented public consultations and participation by South Sudanese, including victims, in the conceptualisation and formation of the anticipated transitional justice measures. This has resulted from the lockdowns and restrictions on movement, social distancing, and the risk of physical interactions. The weak internet and digital technology coverage in South Sudan mean that it is often not possible to have online meetings and consultations.<sup>291</sup> While national consultations were originally envisaged to have been concluded by April 2020, this has not

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<sup>289</sup> Interview with South Sudanese Advocate, June 2021.

<sup>290</sup> Shearer, D. 2021. *The challenges of confronting COVID-19-19 amidst fragile peace in South Sudan*. Available at <https://www.accord.org.za/analysis/the-challenges-of-confronting-COVID-19-19-amidst-fragile-peace-in-south-sudan/>

<sup>291</sup> Human Rights Council, 2020. *Transitional justice and accountability: a roadmap for sustainable peace in South Sudan*. Conference room paper of the Commission on Human Rights in South Sudan. 45<sup>th</sup> Session 14 September, 7 October 2020. Available at [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_45\\_CRP\\_1.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_45_CRP_1.pdf) accessed 19 May 2021.



happened. Furthermore, the African Union Commission postponed a meeting with stakeholders that should have happened in March 2020. The aim was to draft rules and regulations for the operation of the Hybrid Court. Overall, the inability to hold face-to-face meetings and the difficulties of holding virtual ones has further delayed the peace process and the transitional justice mechanisms that were set up to promote peace and healing. However, the Human Rights Council also noted a lack of political will to implement the peace process, and to do more to ensure that it continues despite the pandemic.<sup>292</sup>

Overall, COVID-19 has severely disrupted transitional justice, with negative connotations for peace and stability in South Sudan. There are no easy solutions, given the lack of digital and physical infrastructure. Due to the substantial challenges involved in peace processes, including ongoing conflict, the most important thing is that societies such as South Sudan continue to prioritise justice and human rights despite the pandemic. Maintaining the cease-fire and working with civil society to ameliorate the suffering of victims of conflict, now double jeopardised by the pandemic, is important. With no end to the pandemic in sight, it is important that all options for peace, including amnesty as well as accountability, are on the table.<sup>293</sup>

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<sup>292</sup> Ibid.

<sup>293</sup> Iyi JM, 2021. Reflections on transitional justice in Africa during 2021. African Centre for Transnational Criminal Justice, <https://law.uwc.ac.za/entities/transnational-criminal-justice/news-tcj/reflections-on-transitional-justice-in-africa-during-COVID-19-19>, accessed 18 May 2021

## 5.0 DISCUSSION AND ANALYSIS

### 5.1 Implications of virtual proceedings for the right to a fair trial

COVID-19 has led to justice systems re-thinking their procedures and modus operandi to comply with public health infection prevention measures and protect judicial officers and the public from infection. In Kenya and Uganda, the move towards online filing systems, hearings and delivering judgments warrants careful consideration of the implications for justice and the right to a fair trial.

Notions of justice are intimately tied to step-by-step rituals of a typical public hearing in adversarial common law systems such as those that exist in Kenya and Uganda as a legacy of British colonialism. These have been introduced to the relatively new nation of South Sudan fledgling legal system. Online and virtual processes have profound implications for traditional conceptualisations of justice and the right to a fair trial as they greatly reduce the formalism, serious demeanour and appropriate decorum that are key components of a public hearing.<sup>294</sup>

More importantly, the International Covenant on Civil and Political Rights, 1966 ICCPR), to which both Uganda and Kenya are signatories, stipulates minimum guarantees for a person appearing in criminal proceedings. These include the right to be tried in person (in his presence) or through a lawyer of his choice, and to examine witnesses aligned against him.<sup>295</sup> Along the same lines, for example, under the Constitution of Uganda, a person charged with a criminal offence “shall be permitted to appear before the court in person, .... or by a lawyer of his or her choice.”<sup>296</sup>

The question then arises – how does the use of video conferencing instead of physical appearance affect the right to a public hearing in situations where informed consent is not granted? The right to a fair hearing is one of the non-derogable rights that cannot be departed from even in states of emergency under Uganda’s Constitution.<sup>297</sup> This can be interpreted to mean that physical appearance in court as a key component of the right to a fair hearing cannot be suspended at all,

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<sup>294</sup> McIntyre J et al (2020) [Courts and COVID-19-19: Challenges and Opportunities in Australia](https://auspublaw.org/2020/05/courts-and-COVID-19-19-challenges-and-opportunities-in-australia/). Australian Public Law Blog. Available at <https://auspublaw.org/2020/05/courts-and-COVID-19-19-challenges-and-opportunities-in-australia/>

<sup>295</sup> See, ICCPR, article 14(3)(d) and (e) (c).

<sup>296</sup> Article 28 (3) (d).

<sup>297</sup> Article 44 (c).



including during emergencies. Note that the same Constitution provides for general limitations on human rights and freedoms covering public interest as justification. However, “public interest” shall not permit “any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter *beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution (emphasis added).*”<sup>298</sup>

Does the COVID-19 pandemic pass the above test as established by the Uganda Constitution?<sup>299</sup> Beyond what is emphasized in the quote above, elsewhere, other safeguards in cases of non-consensual video conferencing include that it must be provided for by law, be carried out in a way that promotes non-discrimination, and avoids violating other fair trial guarantees.<sup>300</sup> While the COVID-19 pandemic is without precedent, an ordinary interpretation of the Uganda Constitution favours the view that the limitation of the right of an accused person to appear in person without any checks/ safeguards would be unconstitutional.

Another problem is that online proceedings are by nature closed to the public, unless they are live streamed, and limiting public access to public proceedings in this manner is potentially problematic. Lack of access by the public to court hearings could weaken public trust and confidence in the courts and violate the right to a fair and public hearing as guaranteed by international and constitutional law.

Rendering decisions without oral arguments means lawyers are unable to respond in real time to the Judge’s questions and may produce substantively different outcomes.<sup>301</sup> There are concerns that not being able to directly observe witnesses’ counsel and judges’ demeanour will diminish the

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<sup>298</sup> The Constitution of Uganda 1995, Article 43 (2) (c).

<sup>299</sup> Note that the Kenya constitution does not have similar provision; and any right may be limited as required by an emergency. See 2010 Constitution of Kenya, Article 58. This difference is probably due to Uganda’s brutal history of dictatorship with detention without trial and disappearances of persons.

<sup>300</sup> Fair Trials, “Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings, available at <https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf> (accessed May 3<sup>rd</sup>, 2021).

<sup>301</sup> Baldwin, J. M., Eassey, J. M., & Brooke, E. J. (2020). Court Operations during the COVID-19-19 Pandemic. *American journal of criminal justice: AJCJ*, 1–16. Advance online publication. <https://doi.org/10.1007/s12103-020-09553-1>





value of public trials because it is harder to judge sincerity and trustworthiness and could occasion miscarriages of justice.<sup>302</sup>

Courts must ensure that counsel of both parties can communicate and exchange documents with each other when needed, to avoid lack of disclosure and miscarriages of justice. Doing this virtually as opposed to actual exchange of physical documents could make it harder for those who do not have access to the necessary technology.

Some types of hearing such as first appearance hearings can easily transition to virtual spaces, while others that require witness examination and cross-examination are more complex. Video images can be distorted depending on lighting, framing and the angle of the camera, and this could affect how counsel and judges assess witnesses and defendants.<sup>303</sup>

Although the Study did not find evidence of this, in some jurisdictions there are concerns that plea-bargaining has increased during the pandemic, necessitating the need to prepare for post-pandemic appeals and recanting.<sup>304</sup> There is also a possibility that more bail applications have been granted than normal to avoid prison congestion, which may lead to several unforeseen consequences such as abscondment and re-offending.

## **5.2 Security and logistical concerns of virtual proceedings**

Providing remote access to court records is a major concern because it cannot be done well without full digitization of court records and court case management systems.

Aside from the substantial expense of acquiring the technology, such as laptop computers, webcams, Wi-Fi, software for video conferencing and document sharing technology, that is needed for a virtual court, another concern is the technical capacity of court staff. This includes the capacity of clerks, registrars, and judicial officers, to operate the technology and equipment. Courts

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<sup>302</sup> Denault V, Patterson ML. Justice and non-verbal communication in a post-pandemic world: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges. *J Nonverbal Behav.* 2020 Aug 9;1-10. doi: 10.1007/s10919-020-00339-x. Epub ahead of print. PMID: 32836607; PMCID: PMC7415193

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.



and other justice institutions might need to employ more Information Technology and Computer Science Staff, with financial implications. Kenya has made the most progress in this regard. Uganda has also made some progress towards digitisation. South Sudan is still caught up in conflict and has not considered this issue. Nonetheless, it is important that international development partners and the transitional government consider digitisation alongside expanding the reach of the formal justice system.

The platforms used for hearings and document sharing should be user-friendly for counsel and other personnel, otherwise virtual systems could end up creating unforeseen bottlenecks and hurdles.

Confirming identities and obtaining signatures is a major challenge if the justice system is to operate in a virtual environment. Identity confirmation in turn depends on the progress each country has made with digitized citizen registration. According to the World Bank,<sup>305</sup> the South Sudan Directorate of Nationality, Passport, and Immigration in the Ministry of Interior is responsible for issuing national IDs (NIDs) in South Sudan. The cost of a NID is SSP 30 (about US\$5) or SSP 45 (US\$11), which is rather prohibitive. South Sudan officially launched passport and ID cards for the first time in 2012, mandatory for individuals 18 years or older. South Sudan also issues biometric nationality certificates and had issued about 1 million of them by 2017. Many South Sudanese who fled the country during past conflicts have had trouble obtaining IDs.<sup>306</sup> In Kenya, national IDs have been issued since 1915 and are mandatory for adults aged 18 years or over and are issued free of charge. By 2017, over 24 million had been issued and registration continues at the rate of around 1.2 million additional registrations a year.<sup>307</sup> Uganda launched its national ID registration system in 2010 and has made substantial progress towards universal registration by requiring national IDs for voting in elections and to buy a sim-card. By 2016, over 15 million people had registered, and the pace has been increasing. Children too, are required to

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<sup>305</sup> The World Bank Group, 2017. *The State of Identification Systems in Africa Country Briefs*. Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/28310/1/19065-WP-ID4D-country-profiles-report-final-PUBLIC.pdf?sequence=1&isAllowed=y>, accessed 15 May 2021

<sup>306</sup> Ibid, at p.50

<sup>307</sup> Ibid, at p. 26.



have National Identification Numbers (NINs) until they turn 16, at which point biometrics can be collected and IDs issued.<sup>308</sup>

When proceedings and important documentation shift online, cyber security risks increase. There is a risk that criminal networks and unauthorized third parties could get hold of important confidential information or leak decisions prematurely, which could seriously weaken confidence in the justice system. Zoom, a popular video-conferencing platform, has been exposed as posing cyber security risks, even as the number of participants using it daily has increased from 10 million in December 2019 to 300 million by May 2021. Lack of encryption is a concern, as are reports of meetings being hacked and data being cross-referenced to other platforms such as LinkedIn and Facebook.<sup>309</sup>

### **5.3 Selection criteria for urgent matters and the fight against corruption**

Unique dynamics of corruption have been reported in judicial processes taking place during the pandemic. The restrictions on the categories of cases to be handled by the courts pushed a number of advocates and litigants to find underhand means of getting their cases considered, thereby heightening corruption and in turn affecting justice outcomes. Uganda is one such country where this was reported. Strict adherence to general objective criteria set in selection of cases needs to be strictly followed to stamp out possibilities of paying for justice. Instead, access to justice for all, including the poor and the vulnerable, should be promoted.

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<sup>308</sup> Ibid, pp. 56-57.

<sup>309</sup> Aiken, A. (2020) 'Zooming in on privacy concerns: Video app Zoom is surging in popularity. In our rush to stay connected, we need to make security checks and not reveal more than we think', *Index on Censorship*, 49(2), pp. 24–27. doi: 10.1177/0306422020935792.



## 6.0 CONCLUSION AND RECOMMENDATIONS

### 6.1 COVID-19: mixed implications for judicial innovation and access to justice

The innovations that have been adopted to deal with the COVID-19 pandemic have mixed implications for access to justice. Virtual proceedings or Online Dispute Resolution in some of the jurisdictions have enabled some of the courts to continue operations and can even be regarded as beneficial. This is, for instance, by removing the need for transportation, which is a barrier to access to justice for many.<sup>310</sup> However, one of the main challenges is that, even though digital access in East Africa has been improving over the past decade, it is still out of reach for many. This is especially for the poorest and marginalized who already face severe challenges accessing justice. This is especially so in South Sudan, a young country still at war. In Kenya and Uganda, even where participants have access to smart-phones and laptop computers, they may not have strong-enough internet connections to log in and follow virtual proceedings. Moreover, unscrupulous counsel and other participants may use the excuse of poor internet connections to sabotage cross-examination, for instance.

An important consideration is that innovations adopted for dealing with COVID-19 should not increase the costs of accessing justice, which is already an expensive undertaking that is out of reach for most of the population in Kenya, Uganda, and South Sudan. Justice systems themselves do not have sufficient resources to ensure that all judicial officers and staff have laptop computers and other necessary equipment for remote access of records or participating in online proceedings.

Regardless of what course of action is taken, any modifications to court processes and participant requirements should be communicated to participants both verbally and in writing.<sup>311</sup> Courts should draft and publish official guidance on virtual processes for court proceedings, bearing in mind the constraints and challenges different parties may face in this regard. The guidance should

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<sup>310</sup> Baldwin, J. M., Eassey, J. M., & Brooke, E. J. (2020). Court Operations during the COVID-19-19 Pandemic. *American journal of criminal justice: AJCJ*, 1–16. Advance online publication. <https://doi.org/10.1007/s12103-020-09553-1>

<sup>311</sup> Ibid



explain clearly how to proceed in court in a manner that minimizes the risk of contamination, and where virtual technology is available, they should explain how to use the virtual technology.

## **6.2 Reconfiguring courts to comply with social distancing measures**

Courts have been implementing the necessary protocols, but it is important to ensure that these are consistently applied throughout the justice system, including in rural areas. Courts should have a screening tool for symptoms of coronavirus. Each person entering the premises should be asked whether they have tested positive for coronavirus or have symptoms such as cough, fever, or loss of taste and smell. They should also be asked whether they have travelled outside the country during the past 14 days. People answering in the affirmative should not be allowed on the premises. Courts should consult with public health officials and ask for the possibility of having a health worker seconded to premises to conduct screenings.

Courts and other institutions such as Police Stations should try to limit the number of people entering or congregating at any one period of time. This requires careful scheduling of cases.<sup>312</sup>

Courts should try to ensure that vulnerable people such as the elderly and those with compromised immune systems or underlying health conditions that make them vulnerable to COVID-19 do not need to appear unless necessary in the interests of justice.<sup>313</sup>

Where possible, unless it is in the interests of justice, hearings may be held remotely. Pleadings to be submitted electronically and all written judgments should be delivered electronically to the parties and posted online as soon as possible.

All people attending court should wear face masks and maintain 2-metre distance between persons. Courts and other justice institutions such as police stations should provide hand sanitizer and hand washing facilities. Frequent cleaning and disinfection of the entire premises is important. Rapid testing on site for court users should be available, to avoid infected people on court premises. Test

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<sup>312</sup> NCSC, 2020. Considerations in resuming court operations: a pandemic response from the NCSC. Available at [https://www.ncsc.org/data/assets/pdf\\_file/0015/34314/Considerations-in-Resuming-Court-Operations.pdf](https://www.ncsc.org/data/assets/pdf_file/0015/34314/Considerations-in-Resuming-Court-Operations.pdf) Accessed 16 May 2021.

<sup>313</sup> Ibid.



and trace for all court users is important to prevent the spread of infection. All court- users should register their phone numbers and physical addresses upon entering the premises.

Ultimately, Court rooms might have to be re-designed to ensure that they are properly ventilated. According to the WHO, the risk of getting COVID-19 is higher in crowded and inadequately ventilated spaces where infected people spend long periods of time together in close proximity.<sup>314</sup> The WHO recommends that public spaces such as court rooms, and commercial spaces, among others, should promote adequate natural ventilation wherever possible. That building managers may consider increasing openings and adding or modifying doors and windows. Where air/conditioning units are used, they have to meet the WHO specifications and be properly cleaned and maintained. The WHO recommends an evaluation process, through which ventilation rate and airflow direction are assessed and evaluated before undertaking any action on the ventilation system. This first evaluation will provide the baseline and allow authorities to better understand the gap between the ventilation system functionality and the proposed requirements.<sup>315</sup>

### **6.3 The way forward on virtual proceedings**

The adoption of virtual proceedings where possible is a welcome development in order to avoid delays, and therefore denial of justice. However, caution is called for in several areas. Indeed, the International Commission of Jurists recommends maintaining in-person hearings as much as possible, and that the “right of any person to be physically present for his or her trial on criminal charges should be fully respected, including in situations of crisis or emergency such as the COVID-19 pandemic.”<sup>316</sup> Where resources are available for virtual proceedings, the justice system should ensure that software licenses acquired can be used on as many devices as possible, including laptops, smartphones, tablets, and desktop computers. Where signatures are required in real time, justice systems can use DocuSign or Adobe Acrobat. Both Uganda and Kenya already have laws

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<sup>314</sup> World Health Organisation, 2021. *Roadmap to improve and ensure good indoor ventilation in the context of COVID-19-19*, <https://apps.who.int/iris/rest/bitstreams/1333991/retrieve>

<sup>315</sup> Ibid.

<sup>316</sup> International Commission of Jurists (ICJ) (2020) Videoconferencing, Courts and COVID-19-19 Recommendations Based on International Standards. Available at [https://www.unodc.org/res/ji/import/guide/icj\\_videoconferencing/icj\\_videoconferencing.pdf](https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf)



that allow for electronic signatures. Identity verification is also enhanced by IT solutions such as Peleza, a Kenyan company that specializes in background checks including educational qualification verification, as well as validation and verification of identity cards.<sup>317</sup>

Any hearings that have been held via audio or video technology should be made available to the public by streaming them online but *should not* be saved on YouTube or other public platforms for posterity,<sup>318</sup> in line with privacy rights under General Data Protection Regulations (GDPR) and “the right to be forgotten.”<sup>319</sup> During streaming, a watermark can be included asking the public not to record the hearing.<sup>320</sup>

Courts and the justice system should have a good understanding of how various platforms use and secure data. For instance, there have been concerns over the security of Zoom as mentioned above, but some simple measures such as using meeting passwords and the waiting room facility can substantially reduce security risks.<sup>321</sup>

To improve cyber-security, justice officials, counsel and parties logging in remotely should use Virtual Private Networks (VPNs), which facilitate remote access to intranets cheaply.<sup>322</sup> Justice personnel need training on cyber-security risks and how to minimize them, and courts and other institutions require technical assistance to proactively deal with such threats.<sup>323</sup>

Lastly, the justice system should carefully consider the implications for fair trials involved in running virtual proceedings, because witness demeanour has long been an important feature of

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<sup>317</sup> <https://peleza.com/>

<sup>318</sup> In the US, the Washington DC Circuit and the Michigan and Texas Supreme Courts streamed their audio and video sessions, respectively, online for the public to observe in real time and a Texas court decided to stream video of their hearings live on YouTube with watermark asking viewers not to record the hearing. Once the hearing is over, it is not saved on YouTube. See Baldwin et al, *ibid*.

<sup>319</sup> For more on GDPR, see “Complete Guide to GDPR Compliance,” at <https://gdpr.eu/> On the right to be forgotten, Rosen notes that “In theory, the right to be forgotten addresses an urgent problem in the digital age: it is very hard to escape your past on the Internet now that every photo, status update, and tweet lives forever in the cloud.” Rosen J (2012) The Right to Be Forgotten. 64 STAN. L. REV. ONLINE 88. Available at <https://review.law.stanford.edu/wp-content/uploads/sites/3/2012/02/64-SLRO-88.pdf>

<sup>320</sup> Baldwin et al, *op.cit*.

<sup>321</sup> Aiken, A. (2020) ‘Zooming in on privacy concerns: Video app Zoom is surging in popularity. In our rush to stay connected, we need to make security checks and not reveal more than we think’, *Index on Censorship*, 49(2), pp. 24–27. doi: 10.1177/0306422020935792.

<sup>322</sup> R. Venkateswaran, "Virtual private networks," in *IEEE Potentials*, vol. 20, no. 1, pp. 11-15, Feb-March 2001, doi: 10.1109/45.913204.

<sup>323</sup> Baldwin et al, *op. cit*.



assessing their veracity. Nonetheless, new evidentiary techniques such as forensic evidence can reduce the need for relying on impressions and demeanour.

#### **6.4 Responding to the post-pandemic case ‘boom’ and added case backlog**

It is highly likely that there will be a post-pandemic case ‘boom’ or ‘tsunami.’ Lockdowns have exacerbated human rights abuses by state agents enforcing them. Human rights abuses in the domestic sphere have increased, with spikes in sexual abuse and domestic violence across the three countries and indeed across the globe. Accordingly, it will be important to:

- (i) Strengthen and encourage ADR through arbitration, mediation, and informal justice mechanisms.
- (ii) In addition to recruiting additional judges and magistrates, it might be important to extend working hours of courts to catch up on the backlog. This will necessitate increasing the budgets for the courts and governments should consider paying bonuses to judicial officers for working extra hours. Pay for Performance (P4P) schemes have long been practiced in the sectors such as health and have been proven to improve health outcomes.<sup>324</sup> Governments and development partners should consider extending them to the justice system as a way of dealing with the backlog and improving access to justice.
- (iii) Set up mobile or temporary courts in buildings such as theatres<sup>325</sup> and other public venues and hire additional judicial officers to reduce any backlog that has built up.

#### **6.5 E-Justice in the digital era**

The pandemic has highlighted the need to move away from paper processing towards digital case management and open justice data. This requires substantial investments by governments and will also depend on the progress made with digital registration and identification systems in different countries to ensure validation and verification of parties’ identities.

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<sup>324</sup> Kovacs, R.J., Powell-Jackson, T., Kristensen, S.R. *et al.* How are pay-for-performance schemes in healthcare designed in low- and middle-income countries? Typology and systematic literature review. *BMC Health Serv Res* **20**, 291 (2020). <https://doi.org/10.1186/s12913-020-05075-y>

<sup>325</sup> Scotland is doing this to facilitate jury trials using video feeds during COVID-19. See <https://www.law360.com/articles/1253873/coronavirus-the-latest-eu-court-closures-and-restrictions> Accessed 14 May 2021.





Implementing a digitized and open justice approach requires a thorough understanding of justice needs, which necessitates regular legal and justice needs surveys. East African governments conduct regular surveys on poverty, health and demographics, public service delivery, integrity, and so on, so including justice needs in regular statistical surveys is possible. Indeed, Kenya's statistical agency is including legal needs methodologies in ongoing, general-interest state surveys.<sup>326</sup>

Most justice needs are civil in nature and include consumer protection issues, employment and labour issues, land, and property issues such as evictions and disputes between tenants and landlords, family matters, and debt. Legal needs surveys can determine the scope of legal needs in a community or in a country by adopting an individual-tailored approach rather than an institutional one.<sup>327</sup> Data can confirm what the most pressing needs are and how they are being handled, and thereby enable judiciaries and other actors to respond appropriately. Governments and development partners should therefore prioritise legal needs surveys to catalyse access to justice in post-pandemic recovery efforts.

So far, justice has not received as much attention as other public services in the push for open government data, and the justice sector has lagged behind in the adoption and use of Information and Communication Technologies (ICTs), compared to sectors such as health and education.<sup>328</sup> This is in part, due to the complex structures in the justice system, conservatism, the sensitive nature of the information in judicial cases, and the political relationships between different actors in the system.<sup>329</sup>

Nonetheless, the importance of digitized and open justice data is increasingly recognized. Open justice applies the principles of open government – transparency, civic participation, and public

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<sup>326</sup> Open Society Justice Initiative, 2018. *Strengthening Access to Civil Justice with Legal Needs Surveys*. Available at <https://www.justiceinitiative.org/uploads/ddb88dcf-25bc-4fcd-bceb-aa5735c92461/strengthening-access-to-civil-justice-with-legal-needs-surveys-20180628.pdf>. Accessed 16 May 2021.

<sup>327</sup> Open Society Justice Initiative, 2018. *Ibid.*

<sup>328</sup> Open Government Partnership, 2019. *Justice: from advocacy to concrete commitments*, at <https://www.opengovpartnership.org/campaigns/global-report/priority-policy-areas/>, accessed 14 May 2021.

<sup>329</sup> Inter-American Development Bank, 2020. *Digital Technologies for Better Justice: A Toolkit for Action*, Discussion Paper No. IDB-DP- 761. Available at <https://publications.iadb.org/publications/english/document/Digital-Technologies-for-Better-Justice-A-Toolkit-for-Action.pdf>, accessed 16 May 2021.



accountability – to the justice system.<sup>330</sup> According to the Open Government Partnership, ensuring transparency in the justice system includes opening data as far as possible; providing clear, publicly available operating procedures; as well as public access to decisions and opinions of the courts and information about public officials. On the other hand, accountability involves ensuring that there are processes and procedures for public complaints about justice system actors, as well as independent oversight boards for justice institutions. Disciplinary processes that allow for sanctions and removal of corrupt and unethical justice officials should be clearly communicated, although of course the need for accountability should always be balanced against the principles of impartiality and independence.<sup>331</sup>

In addition, open justice implies that civic participation in the justice system is crucial for improving access to justice. It means allowing citizens to participate in holding justice officials accountable for their action in accordance with public accountability demands.<sup>332</sup> It also implies that participatory budgeting should be applied to the justice sector. This is especially important, as the sector is chronically underfunded. Participatory Budgeting is a democratic process in which community members decide how to spend part of a public budget. According to the Participatory Budgeting Project, participatory budgeting is a better way to manage public money because service users' inputs help fill gaps in official knowledge, leading to better, more equitable and innovative solutions and at the same time, bringing people and their governments closer together. Participatory budgeting can be a way to allow disenfranchised and marginalized groups to participate in governance and have their voices heard.<sup>333</sup>

Thus, the current crisis presents an unprecedented opportunity to modernize court processes and improve access to justice. The idea is not necessarily far-fetched, despite the resource and infrastructure challenges. Africa can 'leap-frog' its way into the on-going 'fourth industrial revolution' and adopt several aspects of e-government to catalyse development by improving

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<sup>330</sup> Ibid.

<sup>331</sup> Open Government Partnership, 2020. Justice Policy Series, Part II: Open Justice, Available at: <https://www.opengovpartnership.org/documents/justice-policy-series-part-ii-open-justice/#about>, accessed 14 May 2021.

<sup>332</sup> Ibid.

<sup>333</sup> Participatory Budgeting Project, *Why do participatory budgeting?* <https://www.participatorybudgeting.org/what-is-pb/>



efficiency.<sup>334</sup> The fourth industrial revolution is the digital revolution, characterized by a fusion of technologies that are blurring the lines between the physical, digital, and biological spheres. It involves emerging technology in artificial intelligence, robotics, the Internet of Things, autonomous vehicles, 3-D printing, nanotechnology, biotechnology, materials science, energy storage, and quantum computing. ‘Leap-frogging’ refers to:

... bypassing traditional stages of development to either jump directly to the latest technologies (stage-skipping) or explore an alternative path of technological development involving emerging technologies with new benefits and new opportunities (path-creating).<sup>335</sup>

A commonly cited example of stage-skipping is the mobile revolution, which put phones in the hands of millions of people and allowed developing nations to skip directly to mobile phones without the need to invest in landline infrastructure.<sup>336</sup> Similarly, as South Sudan continues its transitional phase and works towards long-lasting peace, it could leap-frog to e-justice and skip the need for analogue court case management.

Online dispute resolution is transforming the paradigm of delivering justice in countries such as China. In British Columbia, Canada, the Civil Resolution Tribunal (CRT) is an online dispute resolution tribunal that deals with simple personal injury, employment, construction, and property matters. Applicants apply online and the system automatically classifies the dispute and provides applicants with the necessary documents to file their claim. They may then lodge submissions and evidence for the tribunal member to assess online. If oral hearing is required, Skype is used. The CRT remained fully operational despite COVID-19.<sup>337</sup>

Online dispute resolution has also been used in China for some years, even before the pandemic. ‘Virtual courts’ such as the Beijing Internet Court utilise ‘e-litigation’ procedures, where the entire

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<sup>334</sup> See, Schwab, K., 2016. *The Fourth Industrial Revolution: what it means, how to respond*. World Economic Forum. Available at <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/m>, accessed 16 May 2021.

<sup>335</sup> Yayboke E & Carter, W A, 2020. *The Need for a Leapfrog Strategy*, Centre for Strategic and International Studies, Available at [https://www.csis.org/analysis/need-leapfrog-strategy#:~:text=Leapfrogging%20occurs%20when%20a%20nation,opportunities%20\(path%2Dcreating\).](https://www.csis.org/analysis/need-leapfrog-strategy#:~:text=Leapfrogging%20occurs%20when%20a%20nation,opportunities%20(path%2Dcreating).), accessed 16 May 2021.

<sup>336</sup> Ibid

<sup>337</sup> Sourdin, T., Li, B., & McNamara, D. M. (2020). Court innovations and access to justice in times of crisis. *Health policy and technology*, 9(4), 447–453. <https://doi.org/10.1016/j.hlpt.2020.08.020>



process from ‘filing to ruling and mediation’ is conducted online. It is a 24-hour a day system and has a ‘mobile micro court’ that enables parties to appear via WeChat - China's leading social media platform. It is accessible via smart phones and can therefore be used by those who do not have access to computers.<sup>338</sup>

COVID-19 has demonstrated more than ever, the importance and relevance of these ideas to improve access to public services, including justice. Although Africa may appear to be lagging in the on-going global technology revolution, there have been many notable improvements, especially in digital financial services. Africa had nearly half of global mobile money accounts in 2018 and will see the fastest growth in mobile money through 2025.<sup>339</sup> Kenya has been a pioneer in this area, with M-Pesa considered the most successful mobile phone-based financial service in the developing world.<sup>340</sup> Mobile phone technology is already being used in innovative ways in the region, for example, by health workers in Uganda to track stocks of essential medicines, diseases, maternal and child deaths through the mTrac system. Data is automatically integrated into the Health Information Management System. When a pre-set threshold is reached, for example, if there are 20 cases of typhoid or a single case of viral haemorrhagic fever, an SMS alert is sent to every member of the district health management team for immediate response. A clinician can also send an alert to the Ministry of Health and district health team notifying them of any other critical issue.<sup>341</sup>

These examples of mobile money and mTrac show that mobile technology has unexplored potential for improving justice delivery services and thereby access to justice. Digital technology can build smarter, more efficient justice systems through technology-based solutions such as machine learning, case management systems, process-automation, online conflict resolution, legal

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<sup>338</sup> Ibid.

<sup>339</sup> Ndungu N & Signe L, Capturing the Fourth Industrial Revolution: A regional and national agenda. Foresight Africa. Available at [https://www.brookings.edu/wp-content/uploads/2020/01/ForesightAfrica2020\\_Chapter5\\_20200110.pdf](https://www.brookings.edu/wp-content/uploads/2020/01/ForesightAfrica2020_Chapter5_20200110.pdf), accessed 16 May 2021

<sup>340</sup> Fengler, W., 2012, *How Kenya became a world leader for mobile money*, World Bank Blogs. Available at <https://blogs.worldbank.org/africacan/how-kenya-became-a-world-leader-for-mobile-money> accessed 16 May 2021.

<sup>341</sup> UNICEF Uganda, (n.d.) *What we do- Innovation: mTrac*, Available at <https://www.unicef.org/uganda/what-we-do/mtrac>, accessed 16 May 2021



research, litigation analysis, case prediction, and data visualization.<sup>342</sup> It can assist in addressing the crises of legitimacy and confidence affecting justice systems in the following ways:

- (i) Improving efficiency and effectiveness in case management, by speeding-up the processing of cases and allowing different parts of the justice system, including the police, private lawyers, parties, prosecutors, and the courts to exchange information easily.
- (ii) Improving the quality of justice information and access to such information.
- (iii) IT can secure legal documents, and thereby reduce opportunities for corruption.
- (iv) Digital processes and virtual hearings can improve access to justice by reducing the need for transportation and the need for physical court buildings.

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<sup>342</sup> Inter-American Development Bank, 2020. Digital Technologies for Better Justice: A Toolkit for Action, Discussion Paper No. IDB-DP- 761. Available at <https://publications.iadb.org/publications/english/document/Digital-Technologies-for-Better-Justice-A-Toolkit-for-Action.pdf>, accessed 16 May 2021.



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## **APPENDIX – LIST OF RESPONDENTS**

### **Uganda**

Hon. Justice Geoffrey Kiryabwire, Justice of the Court of Appeal of Uganda

Mr. Jude K. Kasozi- Advocate, Kisauzi and Kasozi Co. Advocates

Mr. Sserunjogi Amos- Advocate, Byaruhanga and Co. Advocates

Mr. Jack Daniels Ochwo- Advocate, Ochwo and Sebuguzi Co. Advocates

Mr. Ntambazi George- Firm Clerk, Wameli and Co. Advocates

Ms. Tondo Racheal- Advocate, Sempijja and Jjinga Co. Advocates

Mr. Ntende Derrick- Advocate, Kagarura and Co. Advocates

Ms. Patricia Acam – Advocate, PEARLO and Co. Advocates

### **Kenya**

Commissioner Mwaniki Gachoha, Kenya Ethics and Anti-Corruption Commission, Advocate

Mr. Martin Mavunjina, Kenya Human Rights Commission, Programme Officer, Transitional Justice; Advocate

Ms. Faith Ngethe, Kenya Ethics and Anti-Corruption Commission (Legal), Advocate

Ms. Catherine Ngari, Kenya Ethics and Anti-Corruption Commission (Investigation)

Ms. Judith Langa, Kenya Ethics and Anti-Corruption Commission (Prevention)

Mr. Kenneth Matiba, Kenya Ethics and Anti-Corruption Commission (Field Services & Coordination)

### **South Sudan**

Ms. Gladys Cheruto, Advocate and Member of South Sudan Law Society

Mr. Farouk Ismail Ukach, Advocate, South Sudan Law Society Member

Mr. Daniel Chorima, United Nations Mission in South Sudan (UNMISS)



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