

Overview and key findings

COVID-19 restrictions and the impact on criminal justice and human rights

Kenya, Malawi, Mozambique, South Africa & Zambia



By

L Muntingh, J Mangwanda & K Petersen

2022

Copyright statement

© Dullah Omar Institute, 2022

This publication was made possible with the financial assistance of the Open Society Foundations (Human Rights Initiative) and the Sigrid Rausing Trust. The content of this document is the sole responsibility of the Dullah Omar Institute and can under no circumstances be regarded as reflecting the position of the Open Society Foundations (Human Rights Initiative) or the Sigrid Rausing Trust. Copyright in this article is vested with the Dullah Omar Institute, University of Western Cape. No part of this article may be reproduced in whole or in part without the express permission, in writing, of the Dullah Omar Institute.

Africa Criminal Justice Reform
c/o Dullah Omar Institute
University of the Western Cape
Private Bag X17
Bellville
7535
SOUTH AFRICA

www.acjr.org.za

ACJR engages in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. Our work supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. Our work is anchored in international, regional and domestic law. We promote policy, law and practice reform based on evidence. We have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty.

Key aspects of our work include:

- Our explicit human rights focus. International and regional human rights law informs and guides all of our work and we partner with organisations with similar approaches. This distinguishes us from security-focused organisations.
- Our partnerships with local organisations. Partnerships ensure mutual learning and growth. Wherever possible we seek to support reform processes in partnership with government and civil society stakeholders across the continent, to ensure local ownership of reform processes and the transfer of skills.
- Our expertise in both social science research and legal research. We carry out empirical social science research to inform policy and processes, in addition to legal analysis and research.
- Our ability to engage in multiple languages. We have researchers fluent in English, French, Portuguese and Afrikaans, ensuring that we are able to engage with most countries in Africa.
- Our ability to translate law and research into plain language and multi-media. Where appropriate, our work is transformed for particular audiences.
- Our academic rigour.

We are based at the Dullah Omar Institute which is in turn part of the University of the Western Cape. We regularly publish in academic journals.

Overall report contents

Overview and key findings - COVID-19 restrictions and the impact on criminal justice and human rights

by Muntingh, L., Mangwanda, J. and Petersen K.

Annexure 1: Kenya - COVID-19 restrictions and the impact on criminal justice and human rights

by Mangwanda, J. and Petersen K.

Annexure 2: Malawi - COVID-19 restrictions and the impact on criminal justice and human rights

by Petersen, K. and Mangwanda, J.

Annexure 3: Mozambique - COVID-19 restrictions and the impact on criminal justice and human rights

by Lorizzo, T. and Petrovic, V.

Annexure 4: South Africa - COVID-19 restrictions and the impact on criminal justice and human rights

by Petersen, K., Mangwanda, J., Muntingh L. and Redpath, J.

Annexure 5: Zambia - COVID-19 restrictions and the impact on criminal justice and human rights

by Mangwanda, J. and Petersen K.

Contents

1. INTRODUCTION	5
2. OVERVIEW OBSERVATIONS	5
3. KEY FINDINGS	13
3.1. <i>State responses and measures implemented</i>	13
3.2. <i>The socio-economic consequences of state measures</i>	14
3.3. <i>Impact on the criminal justice system</i>	15
4. METHODOLOGY	17
5. ACKNOWLEDGEMENTS.....	18

1. Introduction

The coronavirus pandemic (COVID-19) had a myriad of implications the world-over and as a response, governments across the world, and in Africa, instituted rights-limiting measures, such as a state of disaster, state of emergency, state of calamity, and curfews in order to prevent the spread of COVID-19. In October 2021, Africa Criminal Justice Reform (ACJR) published its report '*Criminal justice, human rights and COVID-19 - A comparative study of measures taken in five African countries: Kenya, Malawi, Mozambique, South Africa and Zambia.*' The focus was on the constitutional and legal provisions for dealing with the pandemic and how states used the regulatory frameworks at their disposal. This was, however, a review of the available literature such as legislation and subordinate law, jurisprudence, media reporting and emerging research. More was needed to inform these findings.

Between December 2021 and March 2022, ACJR together with partners Research for Mozambique (REFORMAR), Centre for Human Rights Education Advice and Assistance (CHREAA) in Malawi, Ubuntu Justice Initiative in Zambia, and the Legal Resources Foundation Trust (Kenya) (LRF) in Kenya, hosted stakeholder engagement meetings in the respective countries to discuss the socio-economic impact of COVID-19 and its impact on criminal justice and human rights. This report reflects the findings from these consultations and is supported by other research findings.

This report first makes a number of overview observations dealing with broader issues of governance, human rights and the criminal justice system. The following section provides a descriptive summary of the key findings from the stakeholder consultations, focussing on how states responded; the socio-economic consequences of the restrictions, and the consequences for the criminal justice systems in the countries surveyed.

2. Overview observations

Governance is fundamentally about how the state uses its power and accounts for it. In constitutional states, state powers are typically set out in the constitution and from there flows the enabling legislation, regulations, standing orders and so forth. Constitutions also typically provide for emergency situations that threaten the stability and well-being of the nation, such as a war, internal unrest and natural disasters. Such exceptional circumstances that permit the declaration of a state of emergency allow a limitation of rights in order to restore peace and calm. A rational connection

between the limitation and the objective to be achieved is necessary. Constitutions typically regulate states of emergency tightly, requiring, for example, parliamentary approval, setting a clear time limit and limiting the number of extensions. Under a state of emergency state officials are usually granted more powers and citizens' rights are limited, and, importantly, the controls over that power yielded by officials, are relaxed. States of emergency are also intended to be of a short duration; weeks and perhaps months, but not years. What seems to have developed during the COVID-19 pandemic was a softer, but longer state of restrictions akin to a state of emergency.

In the countries surveyed (Kenya, Malawi, Mozambique, South Africa and Zambia), states generally did not opt for a state of emergency, but rather for something ostensibly less restrictive. This found expression in utilising powers to make subordinate law under disaster management and health care legislation, for example. Subordinate laws such as regulations, decrees, directions, directives, and standing orders were passed. Subordinate law can typically be drafted and issued by the executive (the president or cabinet member responsible) without too much public consultation or parliamentary oversight. The perceived urgency of the situation also created an atmosphere where strong state action and quick decision-making were generally accepted above a wait-and-see approach. Africa simply does not and did not, wield the economic and political power to beat its own drum in the run-up to the COVID-19 restrictions (the period January to March 2020) and generally followed what the global north was doing.

State responses to COVID-19 were initially largely guided by the World Health Organisation (WHO) and from there governments domesticated the guidance to a greater or lesser extent. COVID-19 was defined, first and foremost, as a public health problem requiring states to take measures to prevent the spread of a highly infectious virus with a significant morbidity and mortality rate that if unchecked would have devastating consequences, not only in the number of deaths, but in its impact on public healthcare systems. This meant restricting contact and the movement of people.

Africa constitutes some 3% of the global economy whilst having 17% of the world's population.¹ The ability of African economies to absorb economic stress is significantly less than that of countries to the north. Economic sustainability (and ultimately growth) hinges on the ability to survive a crisis. African states are not only poorer in general, but institutions of states and services provided by the state (e.g., health care) are also fewer, less developed and accessible to fewer people. Nonetheless, it is important to note that despite the continent's weak healthcare system compared to developed

¹ C Coleman, 'This Region Will Be Worth \$5.6 Trillion within 5 Years - but Only If It Accelerates Its Policy Reforms', *World Economic Forum* (blog), 11 February 2020, <https://www.weforum.org/agenda/2020/02/africa-global-growth-economics-worldwide-gdp/>.

countries, and fears from scientists that the pandemic would further dent the already crippled system, it appears that as far as official COVID-19 mortality rates are concerned, African countries apparently fared better than expected.² Commentators have offered numerous views for Africa's relatively low death rate including quick action by states to invoke measures, public support as well as the continent's youthful population.³ Nonetheless, the reach of the state is not the same in Africa as it is in Europe or North America and some of the difference may relate to accuracy of record-keeping. State control is typically stronger in urban areas but this may also be mediated by ruling party support and historical factors, amongst others.

States in Africa responded by implementing a range of restrictions to prevent, or at least limit, the spread of the virus and these were largely aimed at restricting mobility and limiting gatherings, as well as mandating certain protective measures (e.g., mask wearing, sanitising and social distancing). Mask-wearing and moving about became key foci of restrictive measures and their enforcement. A central finding of our earlier research⁴ is that the states surveyed relied heavily on the criminal justice system, and specifically the police, to respond to COVID-19 and ensure general compliance with restrictive measures. Mask-wearing, gatherings and mobility are relatively easy to police as transgressions are clearly visible to the police, irrespective of how effective, or not, these measures are in curbing the spread of the virus. In the countries surveyed new or existing legislation was used to criminalise actions that were previously legal or not mandatory. While the adoption of restrictions in law and their enforcement can be seen as the active response to COVID-19, the large-scale closing, withdrawal, limiting and diluting of other state services can be regarded as the passive response. Closing certain services (i.e., education) and scaling down others (i.e., criminal justice system) were fundamentally designed to limit contact between people. Prisons, police holding cells, immigrations centres and any place where people are legally detained presented an obvious challenge. Whilst every effort was being made to prevent contact and gatherings, in detention facilities, social distancing was simply not possible, yet prison staff continued to commute between the prison and community.

² M Cheng and F Mutsaka, 'Scientists Mystified, Wary, as Africa Avoids COVID Disaster', *ABC News*, 19 November 2021, <https://abcnews.go.com/Health/wireStory/scientists-mystified-wary-africa-avoids-covid-disaster-81271647>.

³ A Soy, 'Coronavirus in Africa: Five Reasons Why Covid-19 Has Been Less Deadly than Elsewhere.', *BBC News*, 8 October 2020, <https://www.bbc.com/news/world-africa-54418613>.

⁴ L Muntingh et al., 'Criminal Justice, Human Rights and COVID-19 - a Comparative Study of Measures Taken in Five African Countries - Kenya, Malawi, Mozambique, South Africa and Zambia' (Bellville: Dullah Omar Institute, 2021), <https://acjr.org.za/acjr-publications/research-report-criminal-justice-human-rights-and-covid-19-a-comparative-study-of-measures-taken-in-five-african-countries-kenya-malawi-mozambique-south-africa-and-zambia>.

The lengthy COVID-19 lockdown or curfew (depending on the country) and associated restrictions were far-reaching interventions into people's lives and resulted in numerous, presumably unforeseen, adverse consequences. As will be shown later, the impact of the restrictions on mobility and gathering were not only visible during the various types of lockdowns and curfews imposed, but the economic impact was soon evident and will remain visible for years to come, especially for the poor. The large-scale and lengthy interruption in access to education will similarly have an impact in years to come.

Numerous instances were encountered where the rule and its consequent enforcement simply did not make sense to the ordinary public and were perceived to be irrational and void of logic. Some examples are prohibiting people from going to the beach (South Africa) or fining and even arresting members from the same household travelling together in their car and reportedly exceeding the new capacity restrictions (Malawi) or individuals travelling alone by car and not wearing a mask (Malawi). Data from South Africa shows a massive increase in arrests by the police in 2021. Irrational rules and/or irrational enforcement diminishes trust in the state and in particular in the enforcement agencies. It has a delegitimising effect on especially the police as the interface between the state and the public. In general, the police have wide discretionary powers and such powers ought to have been used to support procedural fairness and inculcate voluntary compliance.

COVID-19 restrictions and their enforcement were largely focused on policing public spaces that normally see high concentrations of people, such as central business districts, markets, busy streets, pedestrian routes, public transport, taxi ranks, bus depots and so forth. Country-specific prohibitions also resulted in targeted enforcement, such as the alcohol and tobacco ban in South Africa which were highly contested issues with significant economic impact.

Not all people have an equal risk of being arrested, or at least of attracting the attention of law enforcement and it is generally accepted that those who are perceived to have less power are more at risk of arrest.⁵ The general pattern appears to have been one where those people dependent on public spaces for their income due to the concentration of people there to whom they can sell their goods, were not only deprived of the crowds due to restrictions, but also became a target of enforcement. It was then typically poor people - dependent on a daily income - who faced the higher risk of exposure to law enforcement.

It was, however, not only space that was policed, but time as well. Curfews are typically used during times of socio-political unrest or natural disasters and have not been used (at least not in the five

⁵ L Muntingh, 'Arrested in Africa: An Exploration of the Issues' (Bellville: DOI, 2015), 20, <http://repository.uwc.ac.za/xmlui/handle/10566/5103>.

countries reviewed here) as a measure against a pathogen. Curfews were widely used and subsequent research on their effectiveness is inconclusive.⁶ Being outside after the specified time was an offence and from Kenya and Mozambique it was reported that some restaurant workers were arrested when they were returning home after their shift but the combination of travel time and the availability of public transport frequently left such people foul of the curfew.

The creation of new rules, in the form of COVID-19 restrictions, created new ‘commodities’ seen from a corruption and bribery perspective. The power to arrest for not wearing a mask, or breaking curfew, did not exist prior to late March 2020. Overnight, new crimes were created and even if they were of a petty nature, the risk of arrest and detention were real and the consequences devastating for many people. One is indeed dumbfounded about the case of two Pretoria (South Africa) waste-pickers who spent three months awaiting trial in prison after being arrested for collecting plastic in April 2020.⁷ The interpretation and application of these restrictions also resulted in confusion and uncertainty as to what is correct and legal. The overall impression is nonetheless gained that the COVID-19 restriction created a new source for bribes and extortion seen against the threat of arrest and detention. Moreover, it similarly appears that these restrictions were in general more rigorously enforced in poorer areas and informal settlements compared to affluent areas. Whether police officials have a general desire to punish people or parade their powers is open for discussion, but the impression remains that numerous and reportedly increased excesses in law enforcement were reported.

As noted already, many people earn their income daily in the informal sector and many are women. An initial, but short-lived, ban on informal trading in South Africa pointed to the lack of thought that went into the drafting of the directives and resulted in a justified outcry. Restricted markets and restricted trading hours (e.g., Mozambique from 06:00 to 17:00) placed daily income earners under further pressure to the extent that desperation often turned to defiance. The decision to restrict, if not ban, poor people from seeking an income in general and for a lengthy period now seems hard to justify.

COVID-19 also resulted in the creation of important terminologies and whilst there may be others, emphasis will be placed here on two, namely “essential” and “urgent”. Certain people were declared to be essential workers and certain activities had a similar status. This permitted such people to

⁶ J Jarry, ‘Do Curfews Work?’, *McGill Office for Science and Society* (blog), 23 April 2021, <https://www.mcgill.ca/oss/article/covid-19-general-science/do-curfews-work>; Philipp Sprengholz et al., ‘Good Night: Experimental Evidence That Night time Curfews May Fuel Disease Dynamics by Increasing Contact Density’, *Social Science & Medicine* (1982) 286 (October 2021): 114324, <https://doi.org/10.1016/j.socscimed.2021.114324>.

⁷ C Retief, ‘Lockdown Detentions: Arrested Waste Pickers Languish in Tshwane Jail’, *Daily Maverick*, 9 June 2020, <https://www.dailymaverick.co.za/article/2020-06-09-arrested-waste-pickers-languish-in-tshwane-jail/>.

continue performing their work and be unaffected by the general restrictions. While some classifications as essential were unproblematic (i.e., police officials) other officials who perhaps should have been declared essential workers were not. Mention has already been made of the short-lived ban on informal trading in South Africa. Other examples are staff of the Kenyan Independent Police Oversight Authority (IPOA) as well as Kenyan lawyers and paralegals and in South Africa, the staff and accredited visitors of the South African Judicial Inspectorate for Correctional Services (JICS). It was somehow argued that prison and police oversight are not essential services. These classifications were changed in due course, but their initial omission nonetheless indicates that the classifications and their impact were not well thought through. While it can be argued that managing a pandemic was new territory, it was also evident that there was little consultation between states and civil society which ought to have highlighted the predictable impact of the restrictions and “essential” classifications.

Whilst guidance was given in some states (e.g., Kenya) on what court matters are considered to be urgent and thus prioritised, much discretion was also left to lower court judicial officers to determine what was urgent and what was not (e.g., Kenya and South Africa). It is consequently not inconceivable that manipulation, bias and even corruption were real risks when there is competition to have a particular matter placed on the roll and there are additional resource constraints in place, such as a restriction on staff availability.

It was widely the practice that access to prisons was restricted and this meant a general ban on prison visits. In some states visits by lawyers and paralegals were able to continue (e.g., Malawi and Mozambique), but in South Africa these were also prohibited and even extended to a prohibition of telephonic contact unless it was ‘an emergency.’ Visits by family and friends are important for the mental and physical well-being of prisoners. Not only is emotional support rendered, families also provide direct support to prisoners in the form of clothing, food, medicine, toiletries and so forth which the state ought to, but cannot, provide.⁸ Prison visits are also an important management tool for the prison administration to encourage good behaviour. The general ban on prison visits thus had negative consequences for both prisoners and prison officials. Data from South Africa indicates an increase in inter-prisoner violence as well as official-on-inmate violence. This can be regarded as symptomatic of the additional isolation imposed on prisoners as well as the lack of oversight for the first six months of restrictions.

Based on advice from the WHO, a number of states undertook measures to decongest prisons. South Africa has the largest prison population on the continent and consequently announced the largest

⁸ L. Muntingh and J. Redpath, ‘The Socio-Economic Impact of Pre-Trial Detention in Three African Countries’, *The Hague Journal on the Rule of Law* 10, no. 1 (2018): 139–64.

number of releases; some 19 000 releases, which was preceded by 16 000 unrelated releases in December 2019 prior to the pandemic. Other countries saw more modest releases but all releases targeted sentenced prisoners; those who were awaiting trial benefitted from relaxed bail or bond requirements, or other measures applied by judicial officers. The core challenge remains that social distancing in prisons is simply not possible and this is especially the case with overcrowded facilities where the norm is communal cells. Furthermore, it is at this stage not known what the impact was of the earlier releases on families and communities, especially in the context of socio-economic strain.

A core state response was to restrict movement and gatherings. This soon developed into new administrative requirements, such as a COVID-19 test, a permit, or similar official authorisation allowing a person to travel, be somewhere or do something that was now prohibited. Having a valid COVID-19 test became important and in Kenya, prisons would not admit detainees from the police unless they had been tested. The result was that some detainees spent excessively long periods detained in police stations. A similarly confusing arrangement emerged in South Africa where street traders were initially excluded from the definition of essential services, as noted above, and when this was changed, they had to obtain a permit from their local ward councillor or municipality. Complying with seemingly petty administrative requirements at a time when people's movements were restricted placed an additional burden on poor people who were already made vulnerable. The underlying logic was also not evident.

Across the board some form of restriction was placed on criminal justice systems. This took various forms such as cutting back on available personnel at courts, prioritising certain cases and not others, and so forth. While some cases could be expedited, especially if less serious, more serious and complex cases were frequently placed in a holding pattern for months if not a year at least. Unravelling the backlog is likely to take considerable time.

The countries surveyed all have National Human Rights Institutions (NHRI). However, oversight and monitoring were largely not effective. Two of the countries surveyed are states parties to OPCAT (Mozambique and South Africa) with designated National Preventive Mechanisms (NPMs). There are also designated domestic oversight and investigation mechanisms such the Independent Police Oversight Authority (IPOA) in Kenya and the Judicial Inspectorate for Correctional Services (JICS) in South Africa. Some of their activities were initially restricted by being excluded from the definition of essential services and others simply did not have the resources to engage in the monitoring activities that they believed to be necessary in the context. Regardless of the type of general restriction imposed on the population (e.g. state of disaster or emergency), the overall impression gained is that many law enforcement officials interpreted this to mean that they have more latitude to use coercion and force.

There is also sufficient reason to conclude that detention conditions deteriorated (e.g., lack of contact with and support from family members). Despite the efforts of NHRI and other monitoring agencies, there has been a pushback on human rights standards and especially police officials saw it necessary to arrest people for COVID-19 restriction violations that were at least in hindsight unnecessary, if not arbitrary and unlawful.

State responses to COVID-19 and their ensuing consequences demonstrated the interconnectedness of society. It was not possible to restrict the impact of the measures taken to curb the spread of the virus. Even with the best of intentions, there were not only adverse unanticipated outcomes, but to this must be added that when states are not strong, have low levels of trust and their enforcement agencies are less than scrupulous, opportunistic excesses against the public (ranging from bribes and extortion to assaults and killings) appear to have been fairly commonplace.

The anticipated impact of the pandemic, and measures in response, appear to have been considered only against the impact on the formal health care system and expected mortality rates resulting from COVID-19. What seems to have been excluded from the analysis at the time are other forms of impact and consequences. These were at least: (1) impacts on rights, especially due process rights as well as civil and political liberties (2) the immediate impact on the economy and in particular sectors that are large employers of poor and low income people (e.g., tourism, accommodation, informal trade and services) (3) the cost of loss vis a vis the cost of recovery - returning to what the situation was will take more than the losses incurred (4) the cost of interrupting the existing and continuing investments, such as education, oversight agencies, any investment in girls (i.e., health and education) and crime prevention (5) the cost of associated corruption to the economy and trust in the state (6) the cost to civil society organisations who are dependent on donors who had redirected their support (7) the cost of social and economic relief funded by the fiscus or loans (8) the cumulative impact of exclusion i.e. mental health costs.

The section below highlights some of the key findings stemming from the stakeholder engagement workshops as well as recommendations for potential future pandemics.

3. Key findings

3.1. State responses and measures implemented

The five governments instituted various restrictive measures. Many were problematic, irrational and counterproductive as they did not contribute to stopping the spread of the virus. Some may in fact have created crowds where none would otherwise have existed.

In South Africa for example, among the COVID-19 measures was one (later ruled as irrational by the High Court) which limited outside exercise to three hours per day during a specific time in the morning within a five-kilometre radius from one's home, leading to crowds.

People were fined and arrested for being in possession of goods or food items that were not deemed to be 'essential goods'. In Kenya, changing curfew times and the 'closing-off' of selected counties (districts) rendered movement between counties difficult. While there was no curfew in Zambia, there was a general lack of clarity about government-imposed measures as presidential pronouncements were not formally gazetted; leaving it up to law enforcement officials to interpret rules. This created problems in terms of which rules applied at any given moment.

In all five countries, movement restrictions severely limited the rights of homeless persons, street vendors, hawkers, spaza shops owners and other informal workers to provide for their families, leaving many impoverished and forced to defy rules for the sake of survival. This resulted in the arrest and penalisation of many who were forced to pay hefty fines, which exceeded what these persons could afford; this was the case in Malawi and Kenya where fines for not wearing masks often exceeded the price of masks.

It appears that all countries surveyed adopted a punitive approach to handling the public health crisis and this was also accompanied by a spike in excessive use of force by officials, especially through the initial phases of lockdown or restriction measures, even leading to deaths in some countries. In Zambia, law enforcement officials forcefully closed small businesses and assaulted bar owners in poorer areas, whereas this was not the case in more affluent areas. In Kenya and South Africa, law enforcement officials made use of excessive force to torture, humiliate and even kill citizens for breaching lockdown regulations. Referencing South Africa as an example, the UN High Commissioner for Human Rights, Michelle Bachelet noted that there have been numerous reports from different regions that police and other security forces have been using excessive, and at times lethal force to make people abide by lockdowns and curfews. Sadly, there has been little to no accountability for

police brutality in the enforcement of measures. The recommendation for future pandemics or public health crisis is that state responses and measures should be necessary, proportional, reasonable, lawful, non-discriminatory and time bound while at the same time upholding the human rights of citizens.

3.2. The socio-economic consequences of state measures

The COVID-19 measures imposed by governments impacted on livelihoods, household income, transportation and food security in all countries surveyed. Limited working hours due to curfews resulted in lower household income. Curfews, travel bans and movement restrictions caused a sharp increase in transportation fares of up to 100% in Kenya, Malawi and Mozambique. This not only negatively impacted the poor who often make use of public transport to get to and from town and the markets, but it also created challenges for food imports into landlocked countries like Malawi, resulting in food insecurity and price gouging, especially in rural areas.

The general view from all the workshops was that governments did not consider the socio-economic condition of the population when imposing measures. This was especially true in Malawi where civil society organisations challenged the government in court for failing to provide a means to cushion the impact of an intended lockdown on the generally poor population. Unfortunately, even after social grants were considered, in almost all the countries, the distribution of grants was characterised by corruption due to unclear eligibility criteria and the misappropriation of funds. It is important that in the future, states take proactive measures to ensure that the poor and most vulnerable in society are considered and catered for and that funds destined for social and poverty alleviation reach the intended persons.

At the start of the pandemic, school closures occurred in all five countries, resulting not only in loss of education, but also in the deprivation of food to millions of poor learners who rely on school feeding schemes. While some learners were able to continue to study 'online' at home during the pandemic, a greater number of learners were challenged as limited access to internet connectivity and computer resources, especially in rural areas, rendered online studies impossible. Moreover, in Kenya, school-going girls were particularly impacted by school closures. It was reported that within the first three months of the school shut-down, at least 5 000 girls reportedly became pregnant. By the time schools reopened some ten months later, many of these girls had dropped out of school.

Limited access to social services, mental and reproductive healthcare at the start of the pandemic created issues in all five countries. Workshop participants in Kenya bemoaned the fact that mental healthcare was not easily accessible during the pandemic. In Mozambique, women had challenges

receiving appropriate reproductive healthcare. Moreover, gender-based violence became a prominent issue with spikes of domestic violence cases recorded in Kenya, South Africa and Mozambique. It is recommended that in future, governments must ensure that all healthcare and social services continue to be provided to the population despite the presence of an epidemic or pandemic.

The dissemination of updated COVID-19 related information in all the surveyed countries through mainstream and social media played a role in informing the public about the COVID-19 situation. It was a unanimous view from workshop participants that not enough was done to quell misconceptions amongst the public about the gravity of the virus and address vaccine hesitancy. Public participation and stakeholder engagement appeared to be limited, especially at the start of the pandemic. Furthermore, there was a general lack of parliamentary oversight and stakeholder engagements were initially clouded in secrecy as the general public had no insight to meetings held by COVID-19 coordinating committees and select stakeholders. It is important that in the future, a more inclusive and participatory approach be taken when dealing with pandemics and public health crisis.

3.3. Impact on the criminal justice system

The implementation of COVID-19 mitigation measures created additional challenges for the criminal justice systems in the countries surveyed. As a result, there have been limited hearings, considerable delays in the prosecution of cases and delays in bail applications for accused persons.

Some COVID-19 measures, issued particularly in the judicial system, created much confusion amongst legal practitioners and permitted inconsistency in the application of cases that were prioritised for hearings. In Mozambique, courts were only dealing with new cases for a period of four months and in Kenya, South Africa, Malawi and Zambia, courts were prioritising 'urgent cases.' The latter situation saw differing interpretations as to what was 'urgent' and left practitioners confused as to what matters would be dealt with in court. This also created an opportunity for inconsistency in the application of the hearing of cases; the risk being the exclusion of cases that should have been considered as urgent. This situation infringed both on victims' rights to justice and on accused persons due process and fair trial rights. As time passed, mistakes were rectified and, in most cases, measures were amended accordingly. Unfortunately, as a result of the reduced court operations, the prioritisation of only 'new' or 'urgent' cases, and the punitive enforcement of lockdown measures; overcrowding in pre-trial detention centres continued to worsen.

Most countries (except for Mozambique) used virtual proceedings to mitigate against the loss of court time. Whilst this is considered a good practice which can be replicated in the future due to its cost-effectiveness and efficiency, limited infrastructure, lack of training and in some cases electricity outages made implementation difficult and often frustrated proceedings. Access to legal aid was curtailed in Mozambique as government institutions worked with reduced capacity, including the Legal Aid Institute - *Instituto de Patrocínio e Assistência Jurídica*. In Kenya, lawyers were initially excluded from the list of essential services, and legal proceedings had to be instituted to enforce the government to recognise them as essential.

All these difficulties increased the backlog in criminal cases and affected access to justice for victims of crimes and general fair trial rights of arrested and detained persons. Despite the challenges faced by criminal justice systems, each report highlights some good practices undertaken to ameliorate the effects of the COVID-19 measures in the respective countries. Amongst others, some good initiatives involve expediting access to bail and bond at police and prosecutorial level; the provision of free bail and bond for accused persons; the revision of bail and bond of those in pre-trial detention, the diversion of petty cases outside the court system and issuing of warnings; the reviewing of petty offenders' sentences and those serving short sentences; setting up special courts to deal with COVID-19 transgressions and the acceleration of camp courts - an initiative where courts sit in prisons, as a way of quickly delivering justice to those who are in pre-trial detention.

The COVID-19 measures reducing the operation of courts and preventing visits to prisons had severe consequences for prisoners and their families. In all the countries surveyed, restrictions on prisoners' access to amenities such as visitation rights severely curtailed access to food, medicine and other essentials. In Kenya and South Africa in particular, prisoners were not able to physically consult their lawyers. Whilst efforts were made in Kenya to source more infrastructure to ensure telephonic consultations between lawyers and their clients, in South Africa, the COVID-19 regulations only allowed telephonic consultations in 'urgent cases,' if resources permitted. Such provisions limited prisoner's constitutional right to legal representation and other fair trial and due process rights.

Moreover, the postponement of court cases resulted in the prolonged detention of remand detainees and, along with an influx of new cases, put strain on already overcrowded prison systems. The condition of prison facilities in the countries surveyed are generally poor and vectors for the spread of the virus. In order to mitigate overcrowding, South Africa, Kenya, Malawi and Mozambique took progressive measures to release low risk prisoners. Despite it being a good measure to alleviate prison overcrowding, the lack of transparency on the number of prisoners being released and concerns about the subsequent influx of COVID-19 cases raised questions about whether overcrowding was

adequately addressed. Human rights institutions should play a pivotal role during pandemics in ensuring that the treatment of prisoners and their conditions of detention are monitored and protected. There was a general sense that human rights institutions were operational during the pandemic in each country, and that a considerable amount of prison visits and monitoring took place. In South Africa, however, the Judicial Inspectorate for Correctional Service's prison visitors were not categorised as essential services and were therefore not able to visit detention facilities for the first four months of the pandemic. In Mozambique, participants opined that the Human Rights Commission could have done more to assist during the pandemic and that civil society did more to ameliorate the effects of the pandemic. It is recommended that as a last resort, if moratoriums are to be placed on prison visits, that; authorities should ensure that the moratorium is in place for the shortest period of time and detainees should also be provided with basic needs such as food and medicine. There should also be a concerted effort to ensure that prisoners are able to consult with their legal representatives and that human rights institutions and other statutory bodies be allowed to conduct oversight visits at detention facilities. Furthermore, it is important that measures implemented by authorities to reduce overcrowding are transparent.

4. Methodology

In collaboration with our partners, ACJR developed a questionnaire to guide workshop discussions (guidance note),⁹ and partners assisted in organising the workshops and identified relevant stakeholders such as members from civil society organisations, state officials, the judiciary and oversight institutions to participate in the workshop.¹⁰ These workshops were held in-person in the respective capitals between December 2021 and March 2022. A workshop was not held in South Africa, instead, extensive desktop research was conducted.

The workshop objectives were three-fold. Firstly, to discuss the State's response to the pandemic and to understand the rights limiting measures implemented during this period. Secondly, to highlight the socio-economic impact of lockdowns on detainees and citizens. Thirdly, the workshops aimed at understanding good-practice examples in the criminal justice and human rights sector for future use. The content of this report is guided by the guidance note and summarises the views of workshop participants and is further supported by contextual information based on desktop research.

⁹ Stakeholder Engagement Workshop Guidance Note is attached.

¹⁰ Participation lists of each workshop are included as appendices in each report.

The report annexures reflect the findings from the five countries in the following order: Kenya, Malawi, Mozambique, South Africa and Zambia.

5. Acknowledgements

We are grateful to the Open Society Foundations (Human Rights Initiative) and the Sigrid Rausing Trust for supporting our work and making this research possible.

We would also like to thank our in-country partners for their support and assistance in organising and hosting the workshops:

- Lenson Njogu - Legal Resources Foundation Trust (LRF) in Kenya
- Victor Mhango - Centre for Human Rights Education Advice and Assistance (CHREAA) in Malawi
- Tina Lorizzo - Research for Mozambique (REFORMAR) in Mozambique
- Rumbidzai Mutasa - Ubuntu Justice Initiative (UJI) in Zambia.