



# Constitutionality of Criminal Procedure and Prison Laws in Africa

# Mozambique

By Tina Lorizzo

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# Table of contents

|  |           |
|--|-----------|
| <b>ACRONYMS</b> .....  | <b>3</b>  |
| <b>COPYRIGHT STATEMENT</b> .....   | <b>4</b>  |
| <b>INTRODUCTION</b> .....  | <b>5</b>  |
| <b>1. GENERAL INFORMATION</b> .....  | <b>7</b>  |
| 1.1. Recent constitution-making history .....  | 7         |
| 1.2. General constitutional principles .....   | 7         |
| 1.3. Overview of judicial system.....  | 8         |
| 1.4. Overview of law enforcement structure .....   | 9         |
| 1.5. Overview of criminal procedure legislation, prison laws and other legislation regulating arrested and detained persons .....  | 10        |
| <b>2. CONSTITUTIONALITY OF PROVISIONS RELATING TO ARREST</b> .....   | <b>11</b> |
| 2.1. Policies leading to arrest .....  | 11        |
| 2.2. Rights during arrest .....  | 12        |
| 2.3. Right to redress following rights violations .....  | 14        |
| 2.4. Regime applicable to children .....   | 14        |
| <b>3. CONSTITUTIONALITY OF PROVISIONS RELATING TO CUSTODY PRIOR TO FIRST COURT APPEARANCE</b> .....                                | <b>16</b> |
| 3.1. Outline of the different places of custody prior to first court appearance: police, secret services, special units, etc. .... | 16        |
| 3.2. Rights in custody prior to first court appearance.....  | 16        |
| 3.3. Right to have one’s case summarily decided upon before the first court appearance ....  | 20        |
| 3.4. Rights of foreigners .....  | 21        |
| 3.5. Right to redress following rights violations .....  | 21        |
| 3.6. Complaints and oversight mechanisms.....  | 21        |
| 3.7. Regime applicable to children .....   | 21        |
| <b>4. CONSTITUTIONALITY OF TRIAL-RELATED PROVISIONS</b> .....  | <b>22</b> |
| 4.1. Universal trial-related rights.....   | 22        |
| 4.2. Rights of foreigners .....  | 27        |
| 4.3. Rights specific to the trial .....  | 27        |
| 4.4. Rights specific to sentencing proceedings.....  | 28        |
| 4.5. Regime applicable to children .....   | 30        |
| 4.6. Right to redress following rights violations .....  | 31        |
| 4.7. Impartiality and independence of the courts.....  | 31        |
| 4.8. Jurisdiction/competence of courts.....  | 31        |
| <b>5. CONSTITUTIONALITY OF DETENTION-RELATED PROVISIONS</b> .....  | <b>32</b> |
| 5.1. Universal detention-related rights .....  | 32        |
| 5.2. Rights of foreigners .....  | 34        |
| 5.3. Right specific to pre-trial detention: Right not to be detained awaiting trial .....  | 34        |
| 5.4. Rights specific to detention while under appeal: Right not to be detained while the case is heard on appeal .....             | 35        |
| 5.5. Specific rights of sentenced prisoners: Prohibition of unlawful detention.....  | 35        |
| 5.6. Right to redress following rights violations .....  | 36        |

|                          |   |           |
|--------------------------|---|-----------|
| 5.7.                     | Oversight and complaints mechanisms.....                  | 36        |
| 5.8.                     | Regime applicable to children .....                       | 36        |
| 5.9.                     | Impact of detention on all other fundamental rights ..... | 36        |
| <b>6.</b>                | <b>CONCLUSION AND RECOMMENDATIONS .....</b>               | <b>38</b> |
| 6.1.                     | Arrest .....  | 38        |
| 6.2.                     | Custody prior to first court appearance .....             | 39        |
| 6.3.                     | Trial-related provisions.....                             | 40        |
| 6.4.                     | Detention-related provisions .....                        | 41        |
| <b>BIBLIOGRAPHY.....</b> | <b>.....</b>  | <b>42</b> |

## Acronyms

|        |  |   |
|--------|--|---|
| AR     | Assembleia da República  | Parliament of the Republic                                |
| ACIPOL | Academia de Ciências Policiais                                       | Police Science Academy                                    |
| CNDH   | Comissão Nacional Direitos Humanos                                   | National Commission of Human Rights                       |
| COMPOL | Comissão Nacional dos Assuntos Policiais                             | National Commission for Police Affairs                    |
| CP     | Código Penal   | Penal Code  |
| CPC    | Código do Processo Penal   | Criminal Procedure Code                                   |
| CPLP   | Comunidade de Países de Língua Portuguesa                            | Community of Countries of Portuguese Language             |
| CCT    | Convenção contra a Tortura e outros Tratamentos Cruéis e Degradantes | Convention Against Torture, Cruel and Degrading Treatment |
| FIR    | Força de Intervenção Rápida  | Rapid Intervention Force                                  |
| LDH    | Liga dos Direitos Humanos  | Human Rights League                                       |
| NGO    | Organização não Governamental  | Non-Governmental Organisation                             |
| NPM    | Mecanismo de Prevenção Nacional                                      | National Preventing Mechanism                             |
| OAM    | Ordem dos Advogados de Moçambique                                    | Bar Association of Mozambique                             |
| PARP   | Plano de Acção para Redução da Pobreza                               | Action Plan for the Reduction of Poverty                  |
| PES    | Plano Economico e Social   | Economic and Social Plan                                  |
| PRPRM  | Plano Estratégico Policia da República de Moçambique                 | Strategic Plan of the Police of the Mozambican Republic   |
| PIC    | Polícia de Investigação Criminal                                     | Criminal Investigation Police                             |
| PQG    | Plano Quinquenal do Governo  | Five Year Plan of the Government                          |
| PRM    | Polícia da República de Moçambique                                   | Police of the Republic of Mozambique                      |
| RENAMO | Resistência Nacional Moçambicana                                     | Mozambican National Resistance                            |

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Civil Society Prison Reform Initiative (CSPRI)

c/o Dullah Omar Institute

University of the Western Cape

Private Bag X17

7535

SOUTH AFRICA

[www.cspri.org.za](http://www.cspri.org.za)

The aim of CSPRI is to improve the human rights of people deprived of their liberty through research-based advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes.

CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity-building.

# Introduction

Mozambique is a presidential republic that gained its independence from the Portuguese in 1975. The Civil Law system, imported by the Portuguese, continues to administer the country through codes.<sup>1</sup> A one party rule, proclaimed by the Mozambican Liberation Front (*Frente de Libertação Moçambicana* (FRELIMO)) lasted between the independence and 1992 when Mozambique began to follow the principles of the World Bank and International Monetary Fund.<sup>2</sup>

Since its independence, the country has promulgated three constitutions, respectively in 1975, 1992 and 2004, which represent three periods in Mozambican history: the independence period, the post-independence period, and current liberal period.<sup>3</sup> Over these four decades, these documents have enhanced individual rights and respect for the rule of law.

At the criminal justice level, the Criminal Procedure Code, from 1932, continues to govern justice in the country, while a new Penal Code, promulgated with Law 35/2014 on 28 November 2014, entered into force in June 2015, replacing the old one which dated back to 1886. Among the recent changes, the new Penal Code has introduced alternative penalties and measures to imprisonment.<sup>4</sup> However, there is disagreement among lawyers and others in the justice sector over whether these changes could or could not be applied until a new Criminal Procedure Code is promulgated.<sup>5</sup> Some believe that a more dynamic position is needed and that judges and lawyers should begin applying the new law, creating good practices that are in line with the new Penal Code. Others are of the opinion that these changes should not be put into practice until a new Criminal Procedure Code specifically regulates the new provisions.

This report looks at the constitutionality of criminal procedure and prison laws in Mozambique. The research aims at assessing and analysing the extent to which the 2004 constitutional rights have been translated into subordinate legislation and possibly regulations. However, the level of implementation of the rules is not the subject of this research.

Since the 1990s, the country has ratified the majority of international treaties<sup>6</sup> and participated in various regional events, such as the Declaration of Kampala on the Acceleration of Prison Reform in Africa in 1996 and the Ouagadougou Conference in 2003. Following the Kampala Declaration,

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<sup>1</sup> Portuguese colonisation imposed all the codes such as the Civil and Civil Procedure Codes and the Criminal and Criminal Procedure Codes to the Overseas Territories of Mozambique, Angola, Guinea Bissau, Cape Verde and São Tomé and Príncipe. After the independence, only the European laws complying with the principles of the new country remained in place.

<sup>2</sup> M. Anne Pitcher, *Transforming Mozambique: The Politics of Privatisation 1975-2000* (CUP 2002); Joseph Hanlon, *Who Calls the Shots* (James Currey 1991).

<sup>3</sup> Carlos Manuel Serra, *Estado, Pluralismo Jurídico e Recursos Naturais. Avanços e Recuos na Construção do Direito Moçambicano* (Escolar Editora 2014).

<sup>4</sup> A new Penal Code has been promulgated after a decade of discussion and public consultations in the country. The first revision's attempt was made in 2006, without success. The former president of the country, Armando Emilio Guebuza, promulgated the Law 35/2014 during the last days of his mandate.

<sup>5</sup> A new Criminal Procedure Code is still under discussion in Parliament. Without its promulgation, the changes of the new Penal Code cannot be implemented.

<sup>6</sup> Available at <[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MOZ&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=MOZ&Lang=EN)> accessed 10 July 2015.

Mozambique approved the Prison Policy in 2002.<sup>7</sup> Since then, prison legislation has undergone periodic reform through amendments of codes and judgments of the Constitutional Council and the High Court. Notable among them is the revolutionary Judgment 4/CC/2013 of the Constitutional Council that reformed part of the legal framework on pre-trial detention. In respect of the 2004 Constitution, some articles of the Criminal Procedure Code were considered unconstitutional.<sup>8</sup>

This report aims to serve as a tool and baseline to inform further advocacy work to assess the extent to which international obligations have been translated into the domestic Constitution of Mozambique, to challenge the constitutionality of outdated legislation, to advocate for the adoption of absent legislation, and to press for effective implementation of existing legislation.

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<sup>7</sup> The Prison Policy was approved with Resolution 65/2002 by the Council of Ministries to comply with the recommendations given during the Kampala Conference on prison reforms in Africa.

<sup>8</sup> See Tina Lorizzo & Jean Redpath, 'Revolution in Pre-Trial Detention in Mozambique', available at <<http://www.osisa.org/law/mozambique/revolution-pre-trial-detention-laws-mozambique>> accessed 30 November 2013.

# 1. General information

## 1.1. Recent constitution-making history

After a decade of liberation war against the Portuguese, Mozambicans themselves for the first time in history created the document that was going to regulate their lives. Promulgated in 1975, the first Mozambican Constitution followed socialist principles and collective-based rights.

After the 1992 Rome Peace Agreement that ended the sixteen years of war between the FRELIMO and the Mozambican National Resistance (*Resistência Nacional Moçambicana* (RENAMO)), the current Constitution was promulgated. The 2004 Constitution has further enhanced the respect of individual rights; a multi-party political system; market-based economy; free elections; and respect for the rule of law.

## 1.2. General constitutional principles

The Constitution of the Mozambican state is supreme, as stated in article 2 of the Constitution of the Mozambican Republic (*Constituição da República de Moçambique* (CRM)).<sup>9</sup> The state, founded on legality, is subordinated to the CRM, the provisions of which prevail over all other laws.

The Constitution is divided into XVII titles. This report focuses mainly, but not only, on the provisions provided in Title III and specifically in its Chapter III. As shown in the following sections, these principles do not separately look at the distinct criminal procedure phases. Each provision should rather be seen as a generic principle that can be applied at different stages of the criminal justice process. This already speaks to the lack of specificity of the provisions provided in the CRM, something which this report emphasises throughout.

The main derogation to the constitutional principles is generally stated in article 56(2) of the CRM and specifically provided in article 72 CRM, which specifies that ‘individual freedoms and guarantees may be temporarily suspended or restricted only in the event of a declaration of a state of war, of a state of siege, or of a state of emergency’. While there are no constitutional provisions relating to limits of rights’ derogability in times of war, article 286 states that ‘the declaration of a state of siege or a state of emergency shall in no event restrict or suspend the right to life, the right to personal integrity, the right to civil capacity and to citizenship, the non-retroactivity of criminal law, the right of accused persons to a defence, and freedom of religion’.

Article 287 CRM provides for six different freedoms’ limitations that can be applied in relation to siege or state of emergency,<sup>10</sup> among them detention in buildings not intended for persons accused or convicted of common crimes, and restrictions relating to the inviolability of correspondence and home search and apprehension. Specifically, on detention, article 288 CRM declares that the following shall

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<sup>9</sup> Throughout the report, the author uses the English translation of the analysed Constitution provided by Mozlegal, Lda, Advising Investors, available at <[www.mozlegal.com](http://www.mozlegal.com)> accessed 1 July 2015.

<sup>10</sup> Article 282 CRM states that ‘[a] state of siege or of emergency may be declared [...] only in cases of actual or imminent aggression, cases of disruption of or serious threat to the constitutional order, or in the event of a public disaster’.

be respected: a) a relative or trusted acquaintance of the detainee, indicated by the detainee, shall be notified immediately and informed of the applicable legal rules within a period of five days; b) the name of the detainee and the legal basis for his or her detention shall be made public within five days; c) the detainee shall come before a judge within a maximum of ten days.

While the CRM is quite specific on this matter, the Mozambican government has always preferred to solve delicate situations through Amnesty Laws,<sup>11</sup> such as the last Law 17/2014. Promulgated after the unrest caused by RENAMO, which destabilised the Sofala province,<sup>12</sup> the law does not contain any provisions providing for redress to the victims of these events.<sup>13</sup>

### 1.3. Overview of judicial system

Following the provisions of article 223(3) CRM, Parliament (*Assembleia da República* (AR)) created the Superior Courts of Appeal of Maputo, Beira and Nampula, through law 24/2007 (*Lei Orgânica dos Tribunais Judiciais*). This law has increased to four the main levels into which courts are divided in Mozambique: District, Provincial, Appeal Court, and the Supreme Court in Maputo. The Law 24/2007 also provides for the administrative autonomy of these courts (article 4); their division (article 29); and competences (articles 3, 33, 34 and 35).

Article 223(3) CRM provides for the courts' hierarchical order, from district courts<sup>14</sup> to the Supreme Court, and their common jurisdiction in civil and criminal matters and in all areas not assigned to other more specific courts. Finally, it provides for specialised courts to adjudicate particular matters, such as Community Courts (Law 4/1992),<sup>15</sup> Labour Courts (Law 18/92) and the Juvenile Court of the City of Maputo (Law Decree 40/1993).

Article 217 CRM states the independence and impartiality of judges, a principle iterated in article 10 of Law 24/2007. However, the President of the Republic nominates the president and the vice-president of the High Court, as stated in article 226 n.2 CRM. On this point, the Special Rapporteur on the Independence of the Judiciary noted in 2010 that 'there were indications that membership of the ruling party, in power since 1975, is sometimes a de facto prerequisite for access to the public administration'.<sup>16</sup> This fact affects and/or undermines the real independence of these judicial organisations of the country.

Title XI CRM sets the organisation, composition and powers of the Constitutional Council. Responsible for administering justice on matters of a legal-constitutional nature, the Constitutional Council was

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<sup>11</sup> See Victor Igreja, 'Exploring the role of *Gamba* spirits and healers in the post-war recovery period in Gorongosa' (2003) 40 *Transcultural Psychiatry* 459.

<sup>12</sup> Available at <<http://www.dw.com/pt/tropas-moçambicanas-bloqueiam-acesso-a-sede-da-renamo-em-mar%C3%ADngué/a-17919033>> accessed 18 July 2015.

<sup>13</sup> Available at <<http://www.portugues.rfi.fr/africa/20140821-lei-de-amnistia-esquece-vitimas-do-conflito-em-mocambique>> accessed 1 July 2015.

<sup>14</sup> Law Decree 24/98 divided the district courts into the courts of first and second classes. They have the power to know the causes related respectively to crimes punishable by not more than 12 and eight years in prison.

<sup>15</sup> These courts can deal with minor civil and criminal disputes.

<sup>16</sup> OHCHR, *Preliminary conclusions and observations to the Visit to Mozambique by the Special Rapporteur on the independence of Judges and Lawyers*, UN press release, 10 December 2010, Maputo, available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10596&LangID=E>> accessed 1 January 2012.

created in 1990 but its powers have been temporarily exercised by the Supreme Court until 2003. The duties of the Council include appraisal and declaration of the unconstitutionality of laws and the legality of legal acts of state bodies, electoral disputes and legality of the constitution of political parties, coalitions and their names, initials and symbols.<sup>17</sup>

While the constitutionality of criminal justice-related legislation has yet to be regularly challenged, the Judgment 4/CC/2013 has been revolutionary in terms of the development of the legal framework that regulates pre-trial detention in the country. The judgment, binding and final, mainly decided that the length of pre-trial detention should be limited and only a judicial authority could order pre-trial detention, removing this power from other authorities such as administrative chiefs and police.<sup>18</sup>

## 1.4. Overview of law enforcement structure

Constitutional provisions (Chapter II of Title XII) and subordinate legislation govern the Police of the Republic of Mozambique (*Policia da República de Moçambique* (PRM)). Created by Law 19/92,<sup>19</sup> under the responsibility of the Ministry of Interior, the PRM has been reorganised into four main branches: the Protection Police (*Policia de Ordem e Segurança Publica*), the Criminal Investigation Police (*Policia de Investigação Criminal* (PIC)), Police Borders (*Policia de Fronteiras*) and Coastal, Lakes and River Police (*Policia Costeira, Lacustre e Fluvial*).

Article 4 of Law 16/2013<sup>20</sup> states that the PRM must ensure public order, security, peace and compliance with the law; protect people and goods; and guarantee the fundamental freedoms of citizens. Especially in respect of arrest, the PRM has specific expertise in the areas of repression of crime.

Although de jure independence of the PRM is guaranteed (article 264 n.2 CRM), the police have been accused of being under FRELIMO political control.<sup>21</sup> Absence of oversight and police accountability mechanisms has raised concern in the international community, especially on matters related to summary executions and extra-judicial killings.<sup>22</sup>

While the government has made significant progress in adopting legislation, strategies and policies to modernise the PRM,<sup>23</sup> low salaries, lack of resources and equipment, high levels of corruption<sup>24</sup> and inadequate flow of information within the police and between the police and other agencies of the criminal justice system have had a negative impact on the functioning of the safety and security sector

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<sup>17</sup> Until 2005 all the judgments made related to electoral disputes; since 2006 the Council has also begun to evaluate and declare the unconstitutionality of laws.

<sup>18</sup> As Law 2/93 stated.

<sup>19</sup> Law Decree 22/93 approved the Organic Statute of the PRM.

<sup>20</sup> Law 16/2013 has amended Law 19/92 dividing the PRM into more forces.

<sup>21</sup> Amnesty International Report, *State of the World's Human Rights, Human Rights in the Republic of Mozambique* (POL 10/001/2009).

<sup>22</sup> Amnesty International, *I can't believe in justice any more: Obstacles to justice for unlawful killings by the police in Mozambique* (AFR 41/004/2009).

<sup>23</sup> A. Nuvunga, B. Nhamirre, J. Matine and T. Lorizzo, *Militarização da Formação Policial em Matalane e na ACIPOL é Preocupante*. Centro de Integridade Publica (CIP), Newsletter 10/2016 –Maio also published in the Newspaper Savana, 20 e 27 de Maio de 2016.

<sup>24</sup> Marcelo Mosse, 'A Corrupção do Sector da Justiça em Moçambique' (2006) 3 Documento de Discussão Centro de Integridade Pública de Moçambique. Maputo, Moçambique.

in the country.<sup>25</sup>

## 1.5. Overview of criminal procedure legislation, prison laws and other legislation regulating arrested and detained persons

The following table shows the criminal procedure legislation and prison laws in place in Mozambique:

| <b>Name</b>  | <b>Year of Adoption</b>  |
|--|--|
| Criminal Procedure Code ( <i>Código de Processo Penal</i> (CPP)) | 1932 (last amended in 1993)  |
| Penal Code ( <i>Código Penal</i> (CP))                           | Promulgated on 28 November 2014 and entered into force on 29 June 2015 |
| Prison Organization ( <i>Organização Prisional</i> )             | Law Decree 26643/1936  |
| Prison Policy ( <i>Política Prisional</i> )                      | 65/2002  |

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<sup>25</sup> Amnesty International, *Licence to Kill: Police accountability in Mozambique* (2008) (AFR 41/001/2008).

## 2. Constitutionality of provisions relating to arrest

### 2.1. Policies leading to arrest

Article 59 CRM states that ‘nobody shall be arrested except in accordance with the law’. While the term ‘nobody’ can generally state a no

n-discrimination right, the article provides for the principle of legality.

This has been translated into, respectively, the new Penal Code (*Código Penal* (CP)) and the outdated Criminal Procedure Code (*Código de Processo Penal* (CPP)) on when and how a person can be arrested. While article 7 n.1 CP<sup>26</sup> reiterates the principle of legality, article 8 CP focuses on the non-retroactivity of the criminal law.<sup>27</sup> The special part<sup>28</sup> of the CP specifically provides for the acts and omissions that are considered crimes in the country.

The new Penal Code has also decriminalised outdated offences such as mendicancy and vagrancy.<sup>29</sup> These offences, dating back to colonial times, have adversely affected the poorest people of society, as the UN Special Rapporteur on Human Rights and Extreme Poverty, Sepúlveda, has stressed in a recent report.<sup>30</sup>

The Constitution does not provide for who can arrest and for which acts or omissions; it does not distinguish between arrest with or without a warrant (*mandado de captura*) and between *flagrante* and *fora flagrante delicto* (caught in the commission or not of a criminal offence). However, the Judgment 4/CC/2013 of the Constitutional Council has made it clear that it is the judicial authority that can authorise the arrest *fora flagrante delicto*, taking this power away from other authorities such as prosecutors, police and administrative chiefs. In these cases, the arrest cannot be made without warrant. By deciding so, article 293 CPP along with Law 2/1993 have been declared unconstitutional because they did not respect the principle of article 64 CRM that declares the judicial authority as the only competent authority to order pre-trial detention. However, two years from this important ruling,

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<sup>26</sup> The Portuguese version of the code says the following: ‘(Princípio da Legalidade) 1. Nenhum facto, consista em acção ou omissão, pode julgar-se criminoso, sem que uma lei anterior o qualifique como tal.’

<sup>27</sup> Two following exceptions are provided to the principle of non-retroactivity: the offence punishable by law applicable at the time when it was committed ceases to be an offence if a new law eliminates this from the list of the offences. When the penalty established in the law in force, at the time when the offence was committed, is different from the one established in later laws, the scheme more favourable to the agent of the crime is always applied, even whether a conviction has already been pronounced by a final judgment.

<sup>28</sup> The Penal Code is divided into two parts. The first or generic part focuses on provisions related to criminality, agent of the crime, penalties, criminal measures, their consequences and their application; while the special part provides for the offences considered crimes in the country, divided into offences against people, against property, against the state, and cybercrimes, among others.

<sup>29</sup> As.256 and 260 previous CP

<sup>30</sup> <[http://www.nlchp.org/Cruel\\_Inhuman\\_and\\_Degrading](http://www.nlchp.org/Cruel_Inhuman_and_Degrading)> accessed 22 July 2015.

police are still found arresting people *fora flagrante delicto*.<sup>31</sup>

In case of *flagrante delicto*, article 287 CPP states that all the authorities and agents of authorities can arrest people who are caught *in flagrante delicto* in relation to a crime punishable by a prison sentence. If the offence for which the person is caught does not provide for a prison sentence, a person can be arrested only when his or her name and residential address are unknown and they cannot be immediately determined.<sup>32</sup> In this case, the person should be brought before the judicial authorities as soon as possible (article 290 CPP). The article does not specify the time-frame. While policies during arrest have received indirect attention during the last few years, the Constitution does not provide for comprehensive rights during this phase, as will be shown in the following sections.

## 2.2. Rights during arrest

### 2.2.1. Prohibition of arbitrary or unlawful arrest

Article 59 CRM provides for the prohibition of arbitrary or unlawful arrest by stating that ‘Nobody can be arrested...except by law.’

### 2.2.2. Obligation of law enforcement to use reasonable force

No constitutional provision provides for the obligation of law enforcement to use reasonable force in general or during public protest in particular.

Article 306 CPP, providing for the general rights of arrested people, states that it is ‘prohibited to all authorities or law enforcement officials to abuse or insult or use violence against prisoners’. While the use of force is permitted only in case of resistance, flight or attempted flight,<sup>33</sup> there is no detailed information on the amount of force permitted, which gives great power of action to the police. This is also highlighted in article 33 of Law 16/2013 which declares that the police use the necessary and proportionate force (and other means) to overcome illegitimate resistance to members of the police. The use of coercive means is also permitted to arrest people, under the terms of the criminal procedure legislation. Furthermore, the provision states that the use of these means shall respect the principles of necessity, proportionality and reasonableness.

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<sup>31</sup> Field work conducted by the author in the Mozambique.

<sup>32</sup> Unofficial translation of the author from the following: ‘*Em flagrante delicto a que corresponda pena de prisão todas as autoridades ou agentes de autoridades devem, e qualquer pessoa do povo pode, prender os infractores. § Único. Se o facto punível não corresponder pena de prisão, o infractor só poderá ser detido por qualquer autoridade ou agente da autoridade quando não for conhecido o seu nome e residência e não possa ser imediatamente determinado...*’

<sup>33</sup> Unofficial translation provided by the author from the following: ‘*É proibida a toda a autoridade ou agente da autoridade, encarregados de efectuar qualquer prisão, maltratar ou fazer insultos ou violência aos presos, e só no caso de resistência, fuga ou tentativa de fuga lhe será lícito usar a força ou dos meios indispensáveis para vencer essa resistência ou para efectuar ou manter a prisão*’

### 2.2.3. Right to be promptly informed of the reasons for arrest

The Constitution does not provide for the right to be promptly informed of the reasons for arrest when arrest is effected. However, article 64 provides to be informed for detention's reasons.

### 2.2.4. Right to conditional release before being brought into police custody

There are no constitutional provisions related to the right to conditional release before being brought into police custody. Only the judicial authority can authorise the release on bail, but at first court appearance. Articles 271 to 285 CPP regulate how provisional release can be granted on bail and bond and its modalities. However, these provisions do not apply to the phase of the arrest, and are examined below.

### 2.2.5. Right to remain silent

There is no constitutional provision on the right to remain silent at the moment of the arrest.

### 2.2.6. Privilege against self-incrimination

There is no constitutional provision on the privilege against self-incrimination. However, this principle is indirectly stated in article 59 n.2, which provides for the presumption of innocence.

### 2.2.7. Right to privacy

There is no constitutional provision with specific reference to search powers on the person. The only principle relating to the right to privacy on premises, during the arrest, is stated in article 68 n.2 CRM. The provision subjects the entry into a house to a judicial order, during the day, while article 68 n.3 CRM states that, during the night, no one can enter into premises without the consent of the person concerned.

This matter is analysed in detail in articles 300, 301 and 302 CPP. Specifically, article 302 CPP states that if the authority shall enter into a premise to arrest a person, the same authority shall show a written warrant. In case the entry is prohibited, the authority can use force to arrest the person. But in this case an incident certificate (*certidão de ocorrência*) should be presented.<sup>34</sup>

In relation to search powers on the person, article 7 of Law 16/2013 states that the PRM can apply

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<sup>34</sup> The incident certificate is a document that gives information about the event. The translation is an unofficial translation of the following: 'A autoridade ou agente da autoridade que precisar de entrar em qualquer casa ou suas dependências fechadas, para efectuar uma prisão, devera mostrar a mandado de captura, sempre que lhe seja pedida. Se a entrada lhe for negada, nos casos em que a lei a permite, poderá usar a força para a efectivar, passando nesse caso certidão de ocorrência.'

certain police measures. Among them, the article gives the PRM the power to require proof of identification and search any suspected person or vehicle that circulates in a public space, open to the public or subject to police surveillance.<sup>35</sup> No specific limitations are provided by law.

### 2.2.8. Right to be informed of one's rights

As already mentioned in section 3.2.3 in relation to the right to be informed of reasons for arrest, the Constitution does not provide for the right of a person to be informed of his or her rights at this stage of the criminal justice process. It does so in relation to imprisonment or detention and only when people are already deprived of their liberty (article 64 n.3 CRM). The latter will be analysed below.

## 2.3. Right to redress following rights violations

There is no constitutional provision on the right to redress specifically related to arrest. The provision on this matter, article 58 CRM, is quite generic, providing for the right to claim compensation generally related to 'violations of [people's] fundamental rights caused by the unlawful acts of public agents'. In the last few years, reports of international and national organisations have repeatedly testified how victims of human rights violations have found it very difficult to exercise their right to redress, including as this relates to arrest.<sup>36</sup> However, in 2012, the Administrative Court ordered the state (Ministry of Interior) to pay 500 thousand meticais (12 thousand dollars) to the family of an 11-year-old child who was killed by the police during a public protest in Maputo.<sup>37</sup>

## 2.4. Regime applicable to children

Article 47 CRM is the only constitutional principle on the rights of children, which provides for the 'paramount interests of the child in all acts carried out by public entities or private institutions'. Article 236 CRM states that 'the Public Prosecution Service shall [...] ensure the legal defense of minors and absent or incapacitated persons'.

In 2008, Parliament (AR) promulgated Law 7/2008 on the Promotion and Protection of the Rights of Children (*Lei de Promoção e Protecção dos Direitos da Criança*) and Law 8/2008 on the Jurisdictional Organisation for Minors (*Organização Tutelar de Menores*). These two laws contain a series of provisions protecting and promoting children's rights, reinforcing the principle stated in the Constitution and in international conventions such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.<sup>38</sup>

Children up to 16 years (not criminally responsible) should not be arrested, although this does not happen in practice. Alternatives to arrest for children not criminally responsible beyond the age of

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<sup>35</sup> Unofficial translation by the author of the following: '*A exigência de prova de identificação e revista a qualquer pessoa ou viatura suspeita que se encontre ou circule em lugar público, aberto ao público ou sujeito à vigilância policial.*'

<sup>36</sup> Available at <[http://www.amnistia-internacional.pt/dmdocuments/Mocambique\\_Obstaculos\\_Justica.pdf](http://www.amnistia-internacional.pt/dmdocuments/Mocambique_Obstaculos_Justica.pdf)> accessed 10 August 2015.

<sup>37</sup> Judgment n. 89/2012, of process n. 214/2010 – 1<sup>st</sup> Chamber of Administrative Court.

<sup>38</sup> Mozambique ratified the Convention on the Rights of the Child in 1990 and the African Charter on the Rights and Welfare of the Child in 1998.

criminal capacity are not provided. At the stage of arrest, they are legally treated as adults.

## 3. Constitutionality of provisions relating to custody prior to first court appearance

### 3.1. Outline of the different places of custody prior to first court appearance: police, secret services, special units, etc.

There are no constitutional provisions about places of custody prior to first court appearance. However, the only two places of custody provided in subordinate laws, prior to first court appearance, are cells of police stations and court cells.<sup>39</sup> People arrested for Summary Crime Process<sup>40</sup> (*Processo Sumário Crime*), for which pre-trial detention cannot be ordered, should wait in the cell of the court before their first court appearance (see section 4.3). There is no public information available relating to secret service facilities and army barracks.

### 3.2. Rights in custody prior to first court appearance

#### 3.2.1. Prohibition of arbitrary or unlawful detention

There is no constitutional provision on the prohibition of arbitrary or unlawful detention. However, the new Penal Code punishes whoever detains a person in an unknown place of detention for more than 12 hours.<sup>41</sup>

#### 3.2.2. Right to be presumed innocent until proven guilty

The principle of presumption of innocence is specifically provided in article 59 n.2 CRM. The principle refers to people yet to be charged with a criminal offence (*arguidos*) and their presumption of innocence lasts until the final court judgment. This principle has never been challenged by any court, with the result that the presumption of innocence does not apply in custody prior to first court

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<sup>39</sup> Most of the people arrested are detained in police stations or the police command in so-called transitional cells. The courts also have transitional cells for detainees that are arrested and immediately brought before the judge. These courts work only during the day.

<sup>40</sup> Summary Crime Process applies to defendants charged with crimes punishable with a fine or up to one year imprisonment and a corresponding fine, caught *in flagrante* or *fora flagrante delicto*.

<sup>41</sup> CP, art. 200. The Portuguese version of the code says the following: '(Cárcere privado) Aquele que fizer cárcere privado, retendo por si ou por outrem, mais de doze horas, alguém como preso em alguma casa ou em outro lugar onde esteja retido, e guardado desse modo, que não seja em toda a sua liberdade, ainda que não se verifique qualquer meio que o prenda será punido com pena de prisão de um mês a um ano. 2. A simples retenção por menos tempo é considerada como ofensa corporal, e punida conforme as regras da lei em tais casos. 3. Se a retenção durar mais de doze horas, será punido com a pena prisão de três meses a dois anos. 4. Se dentro de três dias o agente do crime der liberdade ao retido, sem que tenha conseguido qualquer objectivo a que se propusesse com a retenção, e antes do começo de qualquer procedimento contra ele, a pena será atenuada. 5. Se a retenção, porém, durar mais de vinte dias, a pena será a de prisão maior de dois a oito anos e multa.'

appearance.

### 3.2.3. Right to be promptly charged or released

There is no constitutional provision on the right to be promptly charged or released. It is only article 236 CRM that provides for the Public Prosecutor as having the power to charge a person of a criminal offence. Among other duties, the article states that ‘the Public Prosecution Service shall ... exercise penal authority’. Articles 308 and 350 CPP provide for time-frames to be respected in relation to the right to be charged. Article 350 CPP states that in case the person is under arrest, he or she should be charged within five days (if *querela* process)<sup>42</sup> and three days in other kinds of processes. This information should be communicated to the person or his or her lawyer within 24 hours or five days, in case the person is not under arrest.<sup>43</sup> Article 308 provides for the time-frame between the person’s arrest and the notice of his or her charge (or to the request of the *instrução contraditória* by the Prosecutor). This cannot exceed 20 days for crimes punishable with a prison sentence of more than a year, 40 days for crimes punishable with a heavier prison term (*prisão maior*),<sup>44</sup> and 90 days for crimes of which the Preliminary Instruction is an exclusive competence of the PIC.<sup>45</sup>

### 3.2.4. Right to conditional release

There are no constitutional provisions on the right to conditional release prior to the first court appearance. This matter has already been mentioned in section 3.2.4.

### 3.2.5. Right to be promptly brought before a judge

While article 64 n.2 CRM provides for the generic right to be brought before a judicial authority, only the subordinate law fixes the time-frame. Article 311 CPP states that the person arrested should be brought to the judicial authority within 48 hours of the arrest. The prosecutor can extend this term up to five days, when the judicial authority did not order the arrest. This provision applies to the cases of *flagrante delicto* when the arrest can be made by anyone who witnesses the commission of a crime. The legislator has given great autonomy to prosecutors in extending the legal term of 48 hours under the generic condition that the prosecutor ‘recognises the absolute necessity to extend the timeframe’ (*reconhecendo absolutamente necessária maior dilação*).

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<sup>42</sup> *Querela* processes start with the lodge of a complaint.

<sup>43</sup> CPP, art. 352.

<sup>44</sup> Art. 61 CP states the following heavier prison terms: ‘(Penas maiores) As penas maiores são: a) a pena de prisão maior de vinte a vinte e quatro anos; b) a pena de prisão maior de dezasseis a vinte anos; c) a pena de prisão maior de doze a dezasseis anos; d) a pena de prisão maior de oito a doze anos; e) a pena de prisão maior de dois a oito anos.’

<sup>45</sup> Article 19 of Law 16/2013 says that ‘it is [the] responsibility of the PIC to conduct the instruction phase of crimes such as falsification of documents; kidnapping; people trafficking; corruption; production, growing, manufacturing, trade and illicit traffic of plants, substances ... applicable to trafficking and consumption of drugs ....’.

### 3.2.6. Right to remain silent

There is no constitutional provision on the right to remain silent in this phase of the criminal justice process. While the Constitution is silent around this matter, article 254 CPP states that the judge will warn the suspect that he/she is not obliged to answer to the questions related to the alleged facts.

### 3.2.7. Privilege against self-incrimination

There is no constitutional provision on this matter.

### 3.2.8. Right to communicate

While article 63 n.4 CRM provides for the right of the attorney to communicate personally and privately with the detainee, in both civil and military matters, article 64 n. 4 CRM provides for the right 'to communicate at once the decision of the judge about the imprisonment or detention, to the person indicated by the detainee'. The rights here are granted to the attorney and the public official that will communicate the information and not to the detainee. Furthermore, there is no provision that stipulates how the family will be notified about the person's imprisonment or detention.

On this matter, the petition led by the Human Rights League in 2013 asked the Constitutional Council to declare unconstitutional article 311 §. 1 CPP, which provided that a detainee could not communicate with any person until the first court appearance. The Council stated that the provision did not respect the dictate of article 63 n.4 CRM (see judgment 4/CC/2013 of the Constitutional Council).

### 3.2.9. Right to legal representation

Article 62 CRM provides for access to courts and the right to defence. However, the right to legal representation is not guaranteed in police custody. The article states that:

- The state shall guarantee that citizens have access to the courts and that persons charged with a crime have the right to defence and the right to legal assistance and aid.
- The accused shall have the right freely to choose a defence counsel to assist in all acts of the proceedings. It shall be ensured that adequate legal assistance and aid is given to accused persons who, for economic reasons, are unable to engage their own attorney.

On the legal representation of children, the Constitution states in article 236 that 'the Public Prosecution Service shall ... ensure the legal defence of minors and absent or incapacitated persons'.

The state guarantees the exercise of the right of defence through the Bar Association of Mozambique (*Ordem dos Advogados de Moçambique (OAM)*) and the Institute for Legal Aid (*Instituto Patrocínio*

*Assistência Judiciária (IPAJ)*.<sup>46</sup>

In particular, the IPAJ was created to provide legal and judicial assistance for people who, for economic reasons, cannot freely choose a defence counsel. During the last few years, various decrees and regulations have reorganised the competences and structures of the IPAJ,<sup>47</sup> while reinforcing its role in providing judicial assistance to indigent citizens (article 3 of its new statute, approved by Ministerial Decree 153/2013).<sup>48</sup> The IPAJ provides legal assistance to people possessing an affidavit of poverty (*Atestado de Pobreza*), which is issued by municipal authorities. Costing around 50-100 Mt (\$1.5-3) the *Atestado de Pobreza* is a simple document that certifies a person's state of poverty.<sup>49</sup>

### 3.2.10. Right to an interpreter

There are no constitutional provisions on the right to an interpreter prior to first court appearance or while being interrogated. Article 260 CPP provides for the right to have an interpreter in case the suspect (*arguido*) does not know the Portuguese language or when he or she is deaf-mute, but this provision only applies to the trial phase.

### 3.2.11. Right to be separated from different categories of arrested persons

There are no principles providing for the right of a detainee to be separated from different categories of arrested persons.

### 3.2.12. Right to safe custody

There are no constitutional provisions on the right to safe custody.

### 3.2.13. Right to humane conditions of detention

There are no constitutional provisions on the right to humane conditions of detention prior to first court appearance. The Constitution provides only for the access to health care to all citizens of the country,<sup>50</sup> while there is no mention in the Constitution of the right to food. It must be remembered that Mozambique has yet to ratify the Covenant on Economic, Social and Cultural Rights.

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<sup>46</sup> The OAM was created by Law 7/94 and the IPAJ established by Law 6/94. The IPAJ replaced the National Institute for Legal Assistance (INAJ) that was previously created with Law 8/86 under the Ministry of Justice.

<sup>47</sup> Law Decree 157/2013 of 26 April approved the Organic Statute of IPAJ; the Ministerial Decree 153/2013 of 27 September, approved the Statute of IPAJ. The Ministerial Decree 156/2013 of 27 September approved the Statute of Provincial and District Delegations. The Ministerial Decree 178/2014 of 23 October defines the terms for registration and internship of law graduates as practising lawyers.

<sup>48</sup> Tina Lorizzo, 'The African Commission's Guidelines on Pre-trial Detention: Implications for Angola and Mozambique' (August 2014) CSPRI-PPJA 1 Occasional Paper <<http://cspri.org.za/publications/research-reports/PPJA%20Occ%20Paper%201%20Lorizzo.pdf>> accessed 20 July 2015.

<sup>49</sup> *ibid*

<sup>50</sup> CRM, arts 89 and 116.

### 3.2.14. Right to be informed of one's rights

Article 64 CRM provides for the right to be promptly informed of one's rights when already deprived of one's liberty, beyond one's right to be informed of the reasons for imprisonment or detention. The article generally mentions that this information should be given in a manner that the person understands. There is no mention of the time-frame within which the information must be provided, nor about the person providing the information. This matter is not addressed in legislation.

### 3.3. Right to have one's case summarily decided upon before the first court appearance

There is no constitutional provision on the right to have a case summarily decided upon before the first court appearance. Title VI of the CPP (articles 556-61) regulated the Summary Crime Process (*Processo Sumário Crime*)<sup>51</sup> until the amendments recognised by Law Decree 28/75,<sup>52</sup> which alleviated the bureaucratic provisions of the CPP.

Law 28/75 provides that the judge sets the date for trial within 15 days of the crime's official report (*auto de notícia*), which is issued by the police at the moment the person is arrested.<sup>53</sup> The clerk will then communicate the date to the parties using the fastest communication tool available (article 3 n.3).<sup>54</sup> The Summary Crime Process can occur without the presence of the accused or/and only with the presence of a lawyer or his or her public defender (*defensor oficioso*).<sup>55</sup> Article 6 provides that the declarations, testimonials and opinions will be registered only if the lawyer or public defender declares, before the accused is interrogated, that he or she does not refrain from the appeal (*prescinde de recurso*). If he or she does not expressly say that he or she does not refrain from the appeal, the case will not be appealable anymore.

This process has created various concerns<sup>56</sup> over the years, specifically in relation to three different elements: the use of the fastest communication tool to notify the parties of the date of the trial; the appeal of this process, only possible when the lawyer or public defender declares he or she does not refrain from the appeal; and declarations, testimonials and opinions will be registered only if the lawyer or public defender does not refrain from appealing. This process should be revised to guarantee the individual rights of the suspect and so that they are not so dependent on the actions of a legal representative.

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<sup>51</sup> Article 1 of Law Decree 28/75 declares: 'Perpetrators of crimes punishable by a fine or imprisonment up to one year and a corresponding fine, caught or not *in flagrante delicto*, will be tried *in processo sumário*.' (Unofficial translation of: '*Serão julgados em processo sumário os autores de crimes puníveis com a pena de multa ou de prisão até um ano e multa correspondente, tenham ou não sido presos em flagrante delito*').

<sup>52</sup> In 1975, the Legislator created this law to speed up the bureaucratic application of justice in the country, with the aim to alleviate the work of the judicial courts in relation to the Sumário Crime processes.

<sup>53</sup> Article 4 of Law 22/2007 states that the Prosecutor exercises the role of Instruction Judge (*Juiz de Instrução*) in the *Sumário Crime*.

<sup>54</sup> Unofficial translation of the following: '*A secretaria avisara o queixoso, o participante, os declarantes, os peritos, as testemunhas e o arguido, pelo meio de comunicação mais rápido, lavrando-se cota no processo das diligências feitas; o aviso terá, para todos os efeitos, o valor de uma notificação judicial*.'

<sup>55</sup> CCP, art. 5.

<sup>56</sup> Gilberto Correia, 'Editorial' Bar Association Newsletter n. 7, November 2012.

### 3.4. Rights of foreigners

Foreigners have the same rights as Mozambican citizens. Article 67 CRM provides, in particular, for the right to extradition for foreigners only following a court decision and not at this stage.

### 3.5. Right to redress following rights violations

Article 58 CRM is the only provision on the right to redress following a rights violation. This is not specifically limited to this phase of the criminal justice system, although it can be applied to this phase.

### 3.6. Complaints and oversight mechanisms

There are no specific constitutional provisions relating to complaints during this phase. Article 79 CRM, on the right of petition, complaint and claims, can also be applied to this stage. The article states: 'All citizens shall have the right to present petitions, complaints and claims to the competent authority in order to demand the restitution of their rights violated or in defence of the public interest.'

In relation to oversight mechanisms, article 195 CRM gives the power to the Standing Commission of the Assembly of the Republic to: 'b) ensure compliance with the Constitution and the laws, and monitor the activity of the Government and the Public Administration'. Furthermore, article 236 CRM states that the Public Prosecution Service controls the legality and duration of detentions, among other powers. Article 4 of Law 22/2007 regulates this duty in detail. While the Public Prosecution Service is a 'hierarchically organised magistracy, which is subordinate to the Attorney General of the Republic ... [and] enjoy[s] its own statute and autonomy, within the terms of the law',<sup>57</sup> the Attorney General is appointed by the President of the Republic and is accountable to the Head of State.<sup>58</sup>

See also information provided in section 6.7. on the role of the National Human Rights Commission and the civil society organisation Human Rights League.

### 3.7. Regime applicable to children

There are no constitutional provisions that provide for a specific regime applicable to children in this phase.

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<sup>57</sup> CRM, art. 234.

<sup>58</sup> CRM, art. 239.

## 4. Constitutionality of trial-related provisions

### 4.1. Universal trial-related rights

#### 4.1.1. Principle of legality

Article 59 n. 1 CRM, on the principle of legality and non-discrimination, refers specifically to the arrest and trial stages, while article 60 CRM refers to sentencing, declaring that ‘nobody shall be condemned for an act that did not constitute a criminal offence at the time when it was committed’. Both principles are translated into the new Penal Code. Article 8 CP states the non-retroactivity of the criminal law,<sup>59</sup> while the special part of the code specifically provides for the acts and omissions for which a person can be tried in the country.<sup>60</sup>

#### 4.1.2. Right to be presumed innocent until proven guilty

Article 59 n. 2 CRM focuses on accused people as persons that have the right to be presumed innocent until a final court ruling. The starting-point of this constitutional provision is when a person is yet to be formally charged with a criminal offence (*arguido*) and it ends when the court makes a final ruling (non-appealable) of a guilty or non-guilty verdict. This right, recognised for the first time in the 1992 Constitution<sup>61</sup> and restated in the 2004 Constitution, has created concern in relation to the Judgment 214/99 of the 2<sup>nd</sup> Criminal Session of the High Court, also known as ‘*cabeça cortada*’ Judgment. The judges acquitted the defendant based not only on insufficient evidence of his participation in the crime he was accused of, but also found article 291 n.2 CPP to be unconstitutional, on the basis of the violation of the presumption of innocence. Article 291 n.2 CPP stated that crimes punishable with a prison sentence of between two and 24 years and intentional crimes, committed by a recidivist or vagrant and punishable with a penalty greater than one year's imprisonment, were unbailable offences. However, the Supreme Court's ruling would only be binding on the lower courts if it had become ‘*Assento*’, which is a decision that the Supreme Court takes when two or more chambers of the court issue conflicting decisions on the same point of law.

While the Supreme Court's judgment remained unbinding, 14 years later the Constitutional Council declared article 291 n.2 CPP unconstitutional. The Council decided that the provision was not

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<sup>59</sup> The two following exceptions are provided to the principle of non-retroactivity: the offence punishable by law applicable at the time when it was committed ceases to be an offence if a new law eliminates this from the list of the offences. When the penalty established in the law in force at the time when the offence was committed is different from established in later laws, the scheme more favourable to the agent of the crime is always applied, even whether a conviction has already been pronounced by a final judgment.

<sup>60</sup> Supra note 27.

<sup>61</sup> CRM, art. 98 N.2

compliant with article 3 CRM ('the Mozambican State is based on the respect for and guarantees peoples' fundamental human rights and freedoms'), whereas the Supreme Court had found its basis for unconstitutionality in article 59 n.2 CRM.<sup>62</sup> By providing for unbailable offences, the legislator had prioritised imprisonment instead of freedom.

#### 4.1.3. Right to be promptly charged or released

There is no constitutional provision on the right to be promptly charged or released. No specific provision focuses on the right to be promptly charged in a language that one understands; no constitutional principle mentions the time-frame in which the charge shall be brought, nor the right to be transferred to prison only once charged. However, the Mozambican Constitution indirectly enshrine this right through the recognition of a right to trial.<sup>63</sup> While article 236 CRM gives to the Public Prosecutor the power to charge a person of a criminal offence, article 308 CPP provides for two distinct legal terms to be respected.<sup>64</sup> Article 263 CPP states that, after the first questioning, the judge shall decide whether the person will be sent to prison or released under bail or surety.

#### 4.1.4. Right to challenge custody

Article 66 CRM provides for the right to challenge unlawful detention and the time-frame within which the court must rule on such an application. Chapter VII of Title II CPP specifically regulates the *habeas corpus*. The chapter provides for the reasons for which detainees or sentenced persons can request the right of *habeas corpus*; the elements that the written request should contain; and the time-frame within which the judge should give a response.<sup>65</sup>

When pre-trial detention cannot be ordered<sup>66</sup> provisional release can be applied. Article 270 CPP provides for the ways in which provisional release can be granted: through Statement of Identity (*termo de identidade*), or bail (*caução*).

Article 271 CPP provides that bail can be granted to people who have committed a crime punishable with a prison term longer than 6 months or a penalty corresponding to *processo correccional*<sup>67</sup> or *querela*,<sup>68</sup> not provided in §2 and §3 of article 291 CPP.<sup>69</sup> The judge of the *instrução criminal*, at the

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<sup>62</sup> Judgment 4/CC/2013.

<sup>63</sup> Constitution of Mozambique, s. 65(1).

<sup>64</sup> See paras 4.2.3 and 6.7.1.

<sup>65</sup> CPC, arts. 312, 316 and 314.

<sup>66</sup> Article 291 CPP provides for the conditions under which pre-trial detention *fora flagrante delicto* is authorised. The article states that three different conditions should together apply: 1) The commission of intentional crimes punishable with a prison term greater than one year; 2) Great suspicion that the crime has been committed by the person; and 3) Inadmissibility of provisional release. Furthermore, pre-trial detention cannot be ordered following the commission of a crime *in flagrante delicto* not punishable with a prison sentence (article 286 CPP).

<sup>67</sup> Processes for crimes punishable with a prison term up to one year.

<sup>68</sup> Processes in which there is a complainant and to which correspond crimes punishable with a prison term greater than one year.

<sup>69</sup> Unofficial translation by the author of the following article: '*Artigo 271 CPP – Arguidos que ficam em liberdade provisória mediante caução: Ficam em liberdade provisória mediante caução os arguidos por crimes a que caiba pena de prisão por mais de seis meses ou pena que corresponda processo correccional ou de querela, se não estiverem compreendidos nos §§ 2*

first questioning, shall decide on the fate of the defendant. However, article 275 CPP states that the provisional release through *termo de identidade* or *caução* can be requested or granted in a pending trial or in a trial where the defendant is in custody. The defendant to whom the provisional release was granted through *caução* can be asked to fulfil one or more obligations, including the following: 1) not to flee the country without authorisation; 2) to live away from the place where she or he committed the criminal offence; 3) not to perform certain activities related to the crime or that may be perceived as related to new criminal offences; and 4) not to visit certain places and people.<sup>70</sup>

#### 4.1.5. Right to remain silent

There is no constitutional provision on the right to remain silent. Article 425 §1 CPP provides that the judge shall advise the defendant that he or she is not obliged to answer to the questions that are posed to him or her.

#### 4.1.6. Privilege against self-incrimination

There is no constitutional provision on the privilege against self-incrimination.

#### 4.1.7. Right to equality before the courts

Article 11 n. e CRM states that one of ‘the fundamental objectives of the Republic of Mozambique is the defence and promotion of human rights and the equality of citizens before the law’. However, the provision is very generic and does not provide further details.

The CPP provides for the right of the accused to present witnesses in the different phases of the process, starting with the *instrução contraditória* and extending to the final judgment, depending on whether the process is *querela* or *processo correcional*.

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e 3 do artigo 291, bem como os vadios e equiparados a aqueles a quem forem aplicáveis medidas de segurança privativas de liberdade.’

<sup>70</sup> Unofficial translation by the author of the following article: ‘Artigo 270 CPP – Deveres do arguido em liberdade provisória: Fora dos casos previstos no artigo 286, não pode ser ordenada a prisão preventiva, nem esta será mantida, ficando os arguidos em liberdade provisória. § 1 Em liberdade provisória mediante termo de identidade, o arguido fica sujeito às obrigações referidas no artigo anterior. § 2 Em liberdade provisória mediante caução, podem ainda ser impostas ao arguido, consoante as circunstâncias, alguma ou algumas das seguintes obrigações: 1. Não se ausentar do País...; 2. Não se ausentar de determinada distrito ou província, ou não se ausentar da sua residência a não ser para locais de trabalho, ou outros expressamente designados; 3. Residir fora onde cometeu o crime ou onde residem os ofendidos...; 4. Não exercer certas actividades que estejam relacionadas com o crime cometido e que façam reear a perpetração de novas infracções; 5. Não frequentar certos meios ou locais, ou não conviver com determinadas pessoas; 6. Sujeitar-se à vigilância de determinadas autoridades ...; 7. Exercer uma profissão, em local determinado, quando não se ocupe em trabalho certo ...’

#### 4.1.8. Right to be declared not competent to stand trial

There is no constitutional provision on the right to be declared not competent to stand trial.

#### 4.1.9. Right not to be tried in absentia

There is no constitutional provision on the right to not be tried in absentia, which is provided in article 418 CPP. Article 419 CPP provides for the consequences of the absence of the accused. If the absence was justified, the process is postponed; if it was unjustified, but the accused is in custody and had been notified, the judge communicates with the prison administration to determine whether the person is still in custody or not.<sup>71</sup> Articles 562-86 CPP set the modalities for the *processo de ausentes* (trial in absentia), which is provided for the commission of misdemeanours not punishable with a prison sentence. In this case, the person can be tried in absentia, represented by his or her lawyer.<sup>72</sup>

#### 4.1.10. Right to be tried and sentenced in a public and open court

Article 65 CRM states the right to a public criminal trial with the exception of cases where it is prudent to exclude or restrict publicity in order to safeguard personal, family, social or moral privacy, or for material reasons of trial security or public order.

There is no constitutional provision referring to sentencing.

#### 4.1.11. Right to be informed of an upcoming hearing

There is no constitutional provision on the right to be informed of an upcoming hearing.

#### 4.1.12. Right to an individualised trial

There is no constitutional or legal provision on the right to an individualised trial.

#### 4.1.13. Right to legal representation

Article 62 CRM provides for the accused the right to 'freely choose a defence counsel' and for the right to legal aid in case he or she cannot for 'economic reasons, engage a private attorney'. The right to defence is also contained in article 65 CRM, which declares that 'the right to defence, as well as the one to trial, shall be guaranteed to every accused'. The Constitution does not provide additional details on the right to legal representation. It provides this right for accused people, specifying the accusation

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<sup>71</sup> CPP, art. 317.

<sup>72</sup> CPP, art. 547.

as the starting point for the right but not where it ends. The subordinate law of IPAJ specifically regulates this matter.<sup>73</sup> Municipal authorities should provide an affidavit of poverty (*Atestado de Pobreza*) to people requesting legal aid to IPAJ.<sup>74</sup>

#### 4.1.14. Right to an interpreter

See section 4.2.10.

#### 4.1.15. Evidence-related rights

The only constitutional provision on evidence-related rights is contained in article 65 CRM. The article provides for the invalidity of evidence obtained through the use of torture or coercion; offences against the physical or moral integrity of the person; and the abusive intrusion into one's private and family life or into one's home, correspondence or telecommunications. There are no other constitutional principles on the right to access evidence; to have access to adequate facilities to prepare one's defence; to access a record of the trial; and to examine (and cross-examine) witnesses and evidence. There is no mention of the time-frame within which this right can be enjoyed. Article 437 CPP states that misleading, tricky, mischievous or vexatious questions are prohibited during trial.

#### 4.1.16. Right to privacy

The only provision relating to the right to privacy in trial is contained in article 65(2) CRM which states, 'Criminal trial hearings shall be public, except in so far as it is prudent to exclude or restrict publicity in order to safeguard personal, family, social or moral privacy.'

Law 34/2014 on Access to Information provides that the right to information is governed by the following principles, among others, respect for the dignity of the human person.<sup>75</sup> Article 5 provides more detail, stating that 'the exercise of the right to information should safeguard other rights and interests protected by the Constitution, including the right to honor, good name, reputation...'. However, article 20 of the same law states that 'the right to information may be restricted, conditioned or limited where the information requested applies to ... information relating to criminal proceedings, disciplinary proceedings or otherwise, when its disclosure would undermine the ongoing investigation and other constitutionally enshrined principles'.<sup>76</sup>

#### 4.1.17. Right to be informed of one's rights

The Constitution provides the right to be informed of one's rights to anyone deprived of his or her liberty. Article 64 CRM provides for the person's right to be promptly informed of his or her rights

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<sup>73</sup> *Supra* nota 44.

<sup>74</sup> The certificate attests to the person's state of poverty and costs between 50 and 100 Meticaís (\$1.5 and \$3).

<sup>75</sup> Art. 4.

<sup>76</sup> Tina Lorizzo, 'Linchamento Mediatico?' in *Savana* 6 November 2015.

when already deprived of liberty, besides the right to be informed of the reasons for imprisonment or detention. The article mentions that this information should be given in a way that the person understands. There is no mention of the time-frame within which the information must be provided, nor of the person providing the information. Title V (Prisoners' Treatment) of Law Decree 26643/1936 provides for the prisoners' right to be informed of their duties rather than of their rights. Article 229 of the regulation states that 'the prisoners' treatment shall focus on the spirit of order and respect of the authority ...', while article 230(2) declares that 'the administration shall monitor prisoners in order to inform the prisoners of their duties ...'.

## 4.2. Rights of foreigners

Article 67 CRM provides for the right to be extradited only pursuant to a court decision. The constitutional provision declares that the extradition shall not be authorised for political reasons and it shall not be permitted 1) for crimes punishable by death or by perpetual imprisonment under the law of the requesting state, or 2) when there are grounds to believe that the extradited person may be subjected to torture or inhumane, degrading or cruel treatment. This provision does not apply to Mozambican citizens. There are no constitutional provisions providing for the refusal of the extradition.

Mozambique has promulgated the Extradition Law 17/2011 and it has signed bilateral extradition agreements with Malawi<sup>77</sup> and Zambia,<sup>78</sup> and conventions with the countries belonging to the Community of Portuguese Language (*Comunidade dos Países de Língua Portuguesa* (CPLP)).<sup>79</sup> The CPLP Extradition Convention contains provisions related to assistance in judicial matters among these countries. Article 13 provides for the transfer of detainees and/or prisoners to the requesting state, with the exception of cases where the person to be transferred is required to be present for a process in the country where the person is found; the transfer will delay the term of pre-trial detention; and the country where the person is found believes that the transfer is inconvenient.

## 4.3. Rights specific to the trial

### 4.3.1. Right to a speedy trial

There is no constitutional provision on the right to a speedy trial and/or to be tried without undue delay.

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<sup>77</sup> Available at <<http://www.rm.co.mz/index.php/home-2/item/5565-mocambique-assina-acordo-de-extradicao-com-o-malawi>> accessed 10 July 2015.

<sup>78</sup> Available at <<http://www.panapress.com/Zambia-e-Mocambique-assinam-acordo-sobre-transferencia-de-prisioneiros--3-786392-51-lang1-index.html>> accessed 10 July 2015.

<sup>79</sup> The Convention on the Transfer of Sentenced Persons between Member States of the CPLP, ratified by Resolution 2/2007 of 28 June; the CPLP Extradition Convention, ratified by Resolution 3/2007 of 28 June and the CPLP Legal Assistance Convention in Criminal Matters, ratified by Resolution 4/2007 of 28 June.

#### 4.3.2. Protection against double jeopardy (non bis in idem)

Article 59 CRM refers to trial and sentencing stages. The provision gives protection against double jeopardy not only to trial, declaring that ‘no citizen shall be tried more than once for the same crime’, but also to the penalty, which shall be the one provided or not heavier than when the criminal offence was committed. This right is also reflected in article 138(3) of the Mozambican CPC.

#### 4.3.3. Right to compensation for malicious prosecution

Article 58 CRM provides that everyone can claim compensation in all cases of their fundamental rights being violated, which is broader and more generic than malicious prosecution. The same article declares that ‘the State shall be responsible for damages caused by the unlawful acts of its agents, in the performance of their functions, without prejudice to rights of recourse available under the law’.

Article 119 of Law 22/2007 provides that ‘the Prosecutor cannot be arrested neither detained, without being charged, with the exception of *flagrante delicto* cases and for crimes punishable with a *prisão maior* (from more than two years up to 24 years)’. In case of disciplinary violation of duties, prosecutors are subjected to disciplinary measures provided by article 131 of the law. Depending on the gravity of the violation, prosecutors can be warned, fined, transferred, dismissed and expelled.

### 4.4. Rights specific to sentencing proceedings

There are four different constitutional provisions on rights related to sentencing proceedings. Article 40 CRM provides for the prohibition of torture or cruel or inhuman treatment, and it states that there is no death penalty in the country.

The new Penal Code has gone further on the matter of torture, criminalising the act of torture as a ‘heinous’ crime.<sup>80</sup> The use of unreasonable force that can amount to torture can be punished with a prison term of between 20 and 24 years. However, torture has not been defined in Mozambican legislation, and the judiciary will therefore need to rely on the definition contained in the UN Convention against Torture as well as on general comments and communications from the Committee against Torture and the African Commission on Human and Peoples’ Rights.<sup>81</sup>

Article 59 CRM provides for the principle of legality and non-retroactivity. It states that ‘nor shall a penalty be imposed that was not provided for, or is heavier than the one that was applicable, at the time when the criminal offence was committed’. Furthermore, on penalties, article 61 CRM prohibits unlimited penalties and security measures, as well as the non-transmissibility of penalties. This provision is also reflected in article 59 CP, which prohibits penalties and restrictive measures of liberty for life, with unlimited or indefinite terms of imprisonment.<sup>82</sup>

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<sup>80</sup> Art. 160 n. i CP.

<sup>81</sup> Available at <<http://a5i.org/wp-content/uploads/2014/11/04%20-%20DIP%20A.pdf>> accessed 19 July 2015.

<sup>82</sup> Unofficial translation of the following: ‘Artigo 59 CP. (Proibição de penas perpétuas) São proibidas as penas e medidas criminais privativas ou restritivas da liberdade com carácter perpétuo, de duração ilimitada ou indefinida.’

#### 4.4.1. Right to submit evidence in mitigation of sentence

There is no constitutional provision on the right to submit evidence in mitigation of sentence.

Article 443 CPP provides for the admission, during the process, of evidence that can influence the final decision. This may postpone the process.

#### 4.4.2. Right to an individualised sentence

There is no constitutional or legal provision on the right to an individualised sentence.

#### 4.4.3. Right to life

The right to life and the absence of the death penalty in the country are expressed in article 40 CRM. This principle has been translated in article 59 CP, which declares the prohibition of life sentences.

#### 4.4.4. Right not to impose unusual or degrading punishment as a sentence

There is no specific constitutional provision on the right not to impose unusual or degrading punishment as a sentence. However, this principle can be indirectly found in article 40 n.1 CRM, which provides for all citizens the right not to be subjected to torture or to cruel or inhuman treatment. Therefore, the Constitution does not protect foreigners against torture and other ill-treatment.

Corporal punishment is addressed in section 6.1.9. below. Corporal punishment is no longer authorised as a disciplinary measure in prison.

#### 4.4.5. Right to be sentenced to an appropriate facility, including a psychiatric hospital

There is no constitutional provision on the right to be sentenced to an appropriate facility.

#### 4.4.6. Right to review or appeal one's sentence

There is no constitutional provision on the right to review or appeal one's sentence. Title IX CPP regulates the appeal process.<sup>83</sup>

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<sup>83</sup> CPP, arts 645-72.

#### 4.4.7. Right to a non-custodial sentence

There is no constitutional provision on the right to a non-custodial sentence. However, the new Penal Code has provided for the possibility to suspend a prison term with a non-custodial sentence in relation to crimes punishable with a prison term of between two and eight years. Article 89 CP provides for four alternative penalties, community service being one of them.<sup>84</sup> However, certain requirements, as provided by article 102 CP, need to be satisfied in order to be granted alternative penalties. These are that the sentenced person should not be a recidivist; the stolen goods should have been returned; and the victim has had his or her rights partially or totally restored.<sup>85</sup> The legislator has not declared whether these requirements need to occur cumulatively or not.

#### 4.5. Regime applicable to children

There is no constitutional provision on the regime applicable to children on trial. Article 46 CP states that children between 0 and 16 years are not criminally responsible for their acts, while juveniles between 16 and 21 years have a relative criminal responsibility.<sup>86</sup>

In relation to children in conflict with the law, up to 16 years old, article 27 of Law 8/2008 provides for measures of criminal prevention (*medidas de prevenção criminal*). Among the 11 measures, the law provides for the delivery of the child to his or her parents or guardian or foster family; prohibits the child from attending certain places for a certain period of time; and provides for the child's placement in family or boarding arrangements and community service for a period up to 90 days.

Following the commission of a criminal offence, children between 16 and 18 years can receive a maximum prison term of eight years.<sup>87</sup> Juveniles between 18 and 21 years old can be sentenced to a maximum prison term of 12 years.<sup>88</sup>

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<sup>84</sup> Other alternatives to imprisonment are provided in the following article: '*Penas alternativas à pena de prisão*) 1. São penas alternativas à pena de prisão: a) a prestação de trabalho socialmente útil; b) a prestação pecuniária ou em espécie; c) a perda de bens ou valores; d) a multa; e) a interdição temporária de direitos. 2. As penas alternativas à pena de prisão são obrigatoriamente impostas ao condenado nos casos em que a conduta criminosa seja punível com pena superior a dois e até ao limite máximo de oito anos, verificados os pressupostos gerais estabelecidos no artigo 102. 3. As penas alternativas substituem a pena de prisão, obstando à sua efetivação.'

<sup>85</sup> Unofficial translation of part of article 102: '*Pressupostos de aplicação das medidas e das penas alternativas*) 1. Para além das exigências consagradas n. 2 do artigo 88 e no artigo 112, as medidas e as penas alternativas à prisão só se aplicam nos casos em que o agente: a) for delinquente primário por prática de crime doloso; b) proceder à restituição dos bens de que se tenha apropriado, se for o caso; c) tiver reparado total ou parcialmente os danos e prejuízos causados à vítima ou à comunidade com a prática do crime e, no caso de reparação parcial, assumir a continuação da reparação ainda em falta no prazo e condições judicialmente fixadas d) expressamente, sujeitar-se às medidas ou injunções, aos deveres e às regras de conduta previstas no Código de Processo Penal, sobre as condições da suspensão provisória no processo, e que o tribunal vier a fixar na decisão. 2. Para estabelecer a relação de confiança entre o ofendido e a comunidade e infractor, no caso das penas alternativas à prisão, o juiz de instrução deve aplicar provisoriamente as interdições temporárias de direitos ao infractor previstas no n. 3 do artigo 101, de modo a garantir a celeridade da justiça com a reparação do dano em tempo útil.'

<sup>86</sup> CP, art. 47.

<sup>87</sup> CP, art. 108.

<sup>88</sup> CP, art. 107.

#### 4.6. Right to redress following rights violations

Article 58 CRM remains the only generic provision providing for the right to compensation. This provision refers to 'everyone victim of damage caused by a violation of their fundamental rights'. Responsibility for the actions of state officials lies with the state. However, there is no jurisprudence for accused people whose rights were violated during trial who seek to obtain redress.

Law 15/2012 was promulgated for the protection of the rights of victims, whistle-blowers and witnesses, with compensation the primary form of redress. Relating specifically to trial, article 151 n.10 CP states that 'the convict found innocent in court of review, or their heirs are entitled to receive state compensation for damages'.<sup>89</sup> Therefore, compensation for rights violations, in this scenario, is only available after an appeal.

#### 4.7. Impartiality and independence of the courts

See section 2.3.

#### 4.8. Jurisdiction/competence of courts

There are no specific constitutional provisions on courts' jurisdiction or competence related to the different stages of the trial. On this matter see section 2.3. above.

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<sup>89</sup> Unofficial translation by the author of the following: '*O condenado julgado inocente em juízo de revisão, ou seus herdeiros, tem direito a receber do Estado uma indemnização pelos danos sofridos.*'

## 5. Constitutionality of detention-related provisions

### 5.1. Universal detention-related rights

#### 5.1.1. Right not to be arbitrarily or unlawfully detained

There are no constitutional provisions on the right not to be arbitrarily or unlawfully detained.

#### 5.1.2. Right to be informed of the reasons for one's detention

Article 64 CRM provides for the right to be promptly informed when the person has already been deprived of his or her liberty. The principle provides that information shall be given about 1) the reasons for a person's imprisonment or detention, and 2) his/her rights. The same article mentions that this information should be communicated in a way that the person understands.

There is no mention of the time-frame within which the information must be provided, nor about the person providing the information. While this provision can be used only at the stage when the person is already deprived of his or her liberty, and not at the moment of his or her arrest, it is only the CPP that clarifies its reason. When the person is caught in *flagrante delicto*, he or she should already be aware of the reason for his or her detention or imprisonment; while in the case of *fora flagrante delicto*, the reasons must be stated in the warrant. However, these principles do not refer to the information that must be given to the person arrested concerning his or her rights. This should be given immediately on the arrest, but the Constitution does not distinguish between the different stages of the criminal justice process.

#### 5.1.3. Right to challenge one's detention

Article 66 CRM provides for the right to challenge unlawful imprisonment or detention and the time-frame in which the court shall decide. See section 5.1.4. above.

#### 5.1.4. Right not to be detained for civil debt

There is no constitutional provision on the right not to be detained for civil debt. It is not authorised in law.

#### 5.1.5. Right to family visits

There is no constitutional provision on the right to family visits. Law Decree 26643/1936 provides for

this right.

#### 5.1.6. Right to legal representation during detention (including post-sentence)

See section 4.2.9 and 5.1.13. above.

#### 5.1.7. Evidence-related rights

See section 5.1.15. above.

#### 5.1.8. Right to be separated from different categories of detainees

There are no constitutional provisions providing for the right to be separated from different categories of detainees. Articles 11, 12 and 13 of Law Decree 26643/1936<sup>90</sup> and the Guiding Principles of Prison Policy 65/2002 provide for the separation of detainees from sentenced people. Furthermore, the Prison Policy states that the sex, age and type of crime and sentencing are criteria of prisoners' separation.

#### 5.1.9. Right to safe custody

There are no constitutional provisions on the right to safe custody. Corporal punishment was abolished by Law 4/1989.<sup>91</sup> Law Decree 26643/1936 regulates custody in prison. Title IV regulates formalities upon admission and release of a prisoner (Chapter II). Title V regulates prisoners' treatment such as access to food and use of uniform (Chapter II); access to health (Chapter III); labour (Chapter IV); religious and moral assistance (Chapter V); education (Chapter VI); visits (Chapter VII); maintenance of order (Chapter IX); and disciplinary sanctions (Chapter X). Following the commission of an offence, the inmate can be placed in solitary confinement for up to 30 days.<sup>92</sup>

Corporal punishment is no longer authorised as a disciplinary measure in prison.

#### 5.1.10. Right to humane conditions of detention

There are no constitutional provisions on the right to humane conditions of detention. The Constitution provides only for access to health care for all citizens of the country,<sup>93</sup> while there is no

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<sup>90</sup> New legislation on Prison Organisation is under discussion in Parliament and awaiting approval.

<sup>91</sup> *Lei da Chicotada* (Law of Lashing) was introduced with Law 5/1983 and remained in force for six years. From 1983 to 1989 people who committed certain criminal offences such as theft or politically related offences were lashed in a public square. This was an additional punishment to the prison sentence.

<sup>92</sup> Art. 359 n.7.

<sup>93</sup> CRM, arts 89 and 116.

mention in the Constitution of the right to food.

Law Decree 26643/1936 regulates conditions of detention in prison. However, it does not provide for access to programmes and services preparing the inmate for his or her release. Among the special measures for inmates with mental disabilities, the Law Decree provides for psychiatric pavilions (*anexos psiquiátricos*) inside prison. These facilities, run by a clinical director, were established to keep inmates that appeared to have mental disorders under observation. The Law Decree does not provide for any special measures for inmates with physical disabilities.

Article 84 CRM provides for the prohibition of forced labour except where the work is performed within the framework of penal legislation which is still regulated by Title IV of Law Decree 26643/1936.

The Prison Policy 65/2002 is very much human rights-focused. Under treatment of inmates, the document says that

inmates shall be treated with justice and dignity, to respect their personality, rights and legal interests non-affected by the sentence. They shall not suffer humiliations or harmful influences to their rehabilitation. The promotion of detainees' human rights in prison is done through the observance of inmates' rights and the performance of their duties. Inmates have the right to access basic standards of food, sanitation, including access to drinking water.<sup>94</sup>

#### 5.1.11. Right to be informed of one's rights

See sections 3.2.8. and 4.2.14.

### 5.2. Rights of foreigners

See sections 4.4 and 5.2.

### 5.3. Right specific to pre-trial detention: Right not to be detained awaiting trial

Article 64 CRM provides for the permission of pre-trial detention only in the cases provided by the law. Article 291 n.1 CPP states that pre-trial detention *fora de flagrante delicto* is authorised when the following requirements are cumulatively met: commission of a crime punishable with a prison term superior to one year; strong suspicion that the accused has committed the crime; and inadmissibility of provisional release or its inadequacy towards the realisation of its objectives. Article 291 §. 1 further states that 'there is a strong suspicion that the accused has committed the crime when this is proved

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<sup>94</sup> Unofficial translation of the following: '*Os reclusos devem ser tratados com justiça e dignidade de modo a respeitar-se a sua personalidade e os direitos e interesses jurídicos não afectados pela sentença. Eles não devem sofrer humilhações ou influências prejudiciais a sua adaptação social. A promoção do respeito pelos direitos humanos nos estabelecimentos prisionais faz-se através de observância dos direitos dos reclusos e do cumprimento por estes dos seus deveres. Os reclusos tem direitos a usufruir de padrões básicos de nutrição e saneamento, incluindo o acesso a água potável.*'

and when there are enough evidences to hold the accused accountable; being always illegal the arrest of a person to find evidence'. As noted by the Constitutional Council in its Judgment 4/CC/2013, pre-trial detention is an exception rather than the rule. Article 3 CRM clearly states this principle: 'The Republic of Mozambique is a State [...] based [...] on the respect for and guarantee of fundamental human rights and freedoms.' While removing the power to order pre-trial detention from other authorities *ad* exception of the judge, the Constitutional Council has revolutionised the legal framework in which pre-trial detention was embedded.<sup>95</sup>

Other important principles, such as the right to automatic or regular review of pre-trial detention, are only indirectly guaranteed in the Constitution. Article 236 CRM, for example, provides that it is '[t]he Public Prosecution ... [that] shall control the legality and duration of detentions', a provision supported by Law 22/2007. However, there is no mechanism in law that allows for regular review of pre-trial detention by a court.

On the duration of pre-trial detention, article 308 CPP provides for two periods. The first one has been analysed above (see section 4.2.3), while the second one starts at the communication of the charge to the accused or from to the Prosecutor's request that the investigation phase starts (*instrução contraditória*) to the decision of the Court (*Despacho de Pronuncia de 1ª Instancia*).<sup>96</sup> These cannot exceed three months if related to a crime of correctional process (*processo correcional*)<sup>97</sup> or four months for the *querela* process.<sup>98</sup>

#### 5.4. Rights specific to detention while under appeal: Right not to be detained while the case is heard on appeal

There are no constitutional provisions on the rights specific to detention while under appeal. Title IX CPP regulates the appeal,<sup>99</sup> the mandatory appeals of the Prosecutor<sup>100</sup> and its legal terms.<sup>101</sup> Article 658 §. Único CPP states that the appeal of a court ruling does not prevent the accused from being imprisoned or from bail being granted.<sup>102</sup>

#### 5.5. Specific rights of sentenced prisoners: Prohibition of unlawful detention

There is no provision in the Constitution for the specific prohibition of unlawful detention, nor is there

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<sup>95</sup> Vitalina do Carmo Papadakis, 'Medidas de coacção: A prisão preventiva: o regime geral, a discutida questão da (in) constitucionalidade do § 2 do Artigo 291 CPP' (2007). Centro de Formação Jurídica e Judiciária.

<sup>96</sup> The Court of the *1ª Instancia* is the court where the case has been opened. It does not refer to a decision of a Court of Appeal.

<sup>97</sup> Processes in the CPP (article 11) are divided into 1) *processo de querela*; 2) *polícia correcional*; 3) *transgressões*; and 4) *processo sumário*.

<sup>98</sup> See n 40.

<sup>99</sup> CPP, arts. 645-72.

<sup>100</sup> CPP, art. 647.

<sup>101</sup> CPP, art. 651.

<sup>102</sup> Unofficial translation of the consultant from the following: '*O recurso do despacho de pronuncia não impede que se mantenha a prisão dos arguidos ou a caução prestada.*'

provision for the accurate and comprehensive keeping of prison records to guarantee the certainty of one's sentence. Article 636 CPP states that 'ending the execution of the sentence or security measures, the convicts will be released by a written order of the respective judge'.<sup>103</sup>

## 5.6. Right to redress following rights violations

See sections 4.1 and 5.6.

## 5.7. Oversight and complaints mechanisms

Article 236 CRM provides for the control of the legality and duration of detentions as a duty of the Public Prosecution Service. Article 4 of Law 22/2007 regulates this duty in detail.

Among other oversight and complaints mechanisms, the Human Rights League signed a Memorandum of Understanding in 2009 with the Ministry of Justice to monitor places of detention. Furthermore, following the Mozambican ratification in July 2014 of the Optional Protocol to the Convention against Torture, the newly established National Commission of Human Rights (*Comissão Nacional Direitos Humanos* (CNDH)) was appointed as National Preventing Mechanism (NPM). The CNDH has the right to oversee all places of detention and to receive complaints.<sup>104</sup>

## 5.8. Regime applicable to children

There are no specific constitutional provisions on the regime applicable to children, including the imprisonment of mothers and their babies. Law Decree 26643/1936 provides for the creation of prison-maternity<sup>105</sup> to host sentenced mothers with their children up to three years and prison-schools for sentenced children older than 16 years old and younger than 21 years old.<sup>106</sup>

## 5.9. Impact of detention on all other fundamental rights

Article 61 CRM provides for restrictions on penalties and security measures. It states that 'no penalty shall deprive persons of any of their civil, professional or political rights, nor shall any penalty deprive a convicted person of his or her fundamental rights'. The only exceptions are the ones provided in articles 105-109 CP. While Article 107 CP<sup>107</sup> translates into the Penal Code the provision already expressed in article 61 CRM, article 106 CP provides for the financial consequences of a criminal

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<sup>103</sup> Unofficial translation by the author of the following: *'Terminando o cumprimento da pena ou medida de segurança privativa de liberdade, os condenados serão soltos por mandado do respectivo juiz.'*

<sup>104</sup> Available at <<http://tudonumclick.com/noticias/mundo/26611/comissao-dos-direitos-humanos-denuncia-irregularidades-nas-prisoas-de-mocambique>> accessed 22 July 2015.

<sup>105</sup> Chapter V, Session III.

<sup>106</sup> Chapter V, Session I.

<sup>107</sup> Unofficial translation by the author of the following: *'(Efeitos da condenação em pena maior) A condenação em pena de prisão maior não implica a perda de quaisquer direitos civis, profissionais ou políticos, nem priva o condenado dos seus direitos fundamentais, salvo as limitações impostas por lei, inerentes ao sentido da condenação e as exigências específicas da respectiva execução.'*

sentence. This article declares that a sentenced person loses ownership of any instruments of crime, any goods, rights or advantages he or she acquired as a consequence of the crime, and must return any goods stolen to the victim or pay back the value of the stolen goods to the victim or his or her successors. The sentenced person is also obliged to compensate the victim for the damage caused, when the victim or his or her successors request compensation; and to pay the court fees.<sup>108</sup>

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<sup>108</sup> Unofficial translation by the author of the following: *‘O réu definitivamente condenado, qualquer que seja a pena, incorre: a) na perda, a favor do Estado, dos instrumentos do crime, não tendo o ofendido, ou terceira pessoa, direito à sua restituição; b) na perda, a favor do Estado, das coisas, direitos ou vantagens adquiridos em consequência da prática do crime; c) na obrigação de restituir ao ofendido as coisas de que pelo crime o tiver privado, ou de pagar-lhe o seu valor, legalmente verificado, se a restituição não for possível, e o ofendido ou os seus herdeiros requererem esse pagamento; d) na obrigação de indemnizar o ofendido pelo dano causado, quando o ofendido ou os seus herdeiros requererem a indemnização; e) na obrigação de pagar as custas do processo e as despesas da expiação.’*

## 6. Conclusion and recommendations

The 2004 Constitution does not contain separate provisions on the different stages of the criminal justice process: the arrest; custody prior to first court appearance; trial; sentencing and detention. This report has focused mainly on the provisions of Chapter III, which under the title 'Rights, Liberties and Individual Guarantees' focuses simultaneously on these different stages, providing here and there for a few generic rights while leaving many others unmentioned.

This gives greater autonomy to subordinate laws, some of which are outdated, have obsolete terminology and do not always comply with the new Constitution, its human rights and the rule of law. Contrary to the Penal Code, which entered into force in June 2015, the Criminal Procedure Code dates back to 1932 and the Prison Organisation Law to 1936. The Prison Policy of 2002 is more in compliance with international human rights standards, drawing from the Kampala Conference recommendations. However, it is a very brief document that contains generic provisions. The following sections will look at each stage of the criminal justice process, underlining where outdated legislation should be challenged, where new and specific provisions should be drafted and, finally, where the new and progressive legislation, already in force, should be implemented.

### 6.1. Arrest

Policies during arrest have received indirect attention through Judgment 4/CC/2013, while the Constitution does not provide for comprehensive rights during this phase. The Judgment of the Constitutional Council has changed the legal framework on pre-trial detention, affecting the phase of arrest in relation to the authorities that can arrest *fora flagrante delicto*. The Council has taken the power to arrest *fora flagrante delicto* away from Prosecutors, officials of the PIC and administrative authorities of rural localities where the police is absent, giving this authority solely to the judge, who can order arrest *fora flagrante delicto*, as provided by article 64 n.2 CRM. While this change can be considered an important milestone for Mozambique, two years after the ruling the police still arrest *fora flagrante delicto*, which shows that much more needs to be done to implement new and progressive legislation. Regular training of the police will not alone be enough if the highly punitive culture of the law enforcement structure is not adequately challenged.

Among the nine rights listed in the arrest section, the Constitution provides only for the right to privacy,<sup>109</sup> specifically the search power to be used on premises, not on people. The CPP specifically regulates this right as well as the right to the reasonable use of force by law enforcement. However, article 306 CPP and article 33(2)c permit the use of force to arrest and imprison a person, without clarifying the amount of force. The absence of constitutional provisions and the created gap gives the police great autonomy to decide on how much force to use during the arrest, an aspect that should be reformulated in the CPP and provided in the Constitution. Furthermore, it is the CPP that provides for the 48-hour time-frame between the arrest and the first appearance before the judge, a legal term that can be extended by the prosecutor by up to five days where necessary. However, the reasons for

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<sup>109</sup> Art. 68 n.2 and 3.

the extension are not detailed, giving the prosecutor great power in how this provision is applied.

Alternatives to arrest for crimes punishable by a prison sentence are not provided. Bail and/or bond can only be granted by a judge at the first appearance or in a pending trial. In the CP, exceptions are made for children between 0 and 16 years old who are not criminally responsible. Law 8/2008 provides for measures of criminal prevention such as the delivery of the child to the child's parents or guardian or foster family. However, children between 16 and 18 years old do not receive different treatment to adults during the arrest.

There are no provisions on important rights that should be specifically formulated in the Constitution: the right to remain silent, the privilege against self-incrimination and to be informed of rights and the reasons for arrest at the moment of arrest, as well as specific provisions on the arrest of foreigners or children.

## 6.2. Custody prior to first court appearance

The Constitution does not provide for nine of the 14 rights relating to custody prior to first court appearance.

There is no constitutional provision on the prohibition of arbitrary or unlawful detention. It is the Penal Code that criminalises the act of detaining a person for 12 hours in an unknown place.<sup>110</sup> There is no provision on conditional release; on the right to remain silent; on the privilege against self-incrimination; or on the right to an interpreter. These provisions should be inserted into the Constitution.

The right to be informed of one's rights as well as of the reasons for the detention are provided to all people deprived of their liberty. The Constitution provides also for the right to communicate, but it is a safeguard guaranteed to the lawyer or a public official and not to the detainee.<sup>111</sup> On this matter, the Constitutional Council confirmed in 2013 that article 311 §.1 CPP was unconstitutional because it effectively authorised incommunicado detention until the first court appearance, whereas the detainee should be directly provided with this right.

Last but not least, there is an absolute silence, in the Constitution and in subordinate laws, on rights related to conditions of detention and custody in police cells, and on the rights of foreigners and children. This gap gives the police unlimited power and means that people's rights in police custody are more likely to be abused, even more so where oversight and complaints mechanisms and their responsibility are not specifically provided for. In fact, article 79 CRM is the only generic provision on the right to petition, complain and claim (relevant to this stage), while article 236 CRM provides that the prosecutor is the competent authority to oversee the legality and duration of detentions.

Particularly in this stage, the Process *Sumário-Crime* has created concern over the years. Regulated by Law Decree 28/75, which came to accelerate the procedures of this process and alleviate the work of district level courts, this process should be revised. First, notice of the trial's date should be given in writing in advance of the date of the trial and not using messages and calls from cellular phones, a

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<sup>110</sup> CP art. 200.

<sup>111</sup> CRM art. 63 n.4.

method that has been used over the years for accused persons who are often detained with no access to phones. Consequently, such a person is likely not to be aware of the upcoming trial. Secondly, all declarations of the procedure should be registered and reflected in the final sentence, whereas article 6 of Law 28/75 states that declarations and testimonials are not registered if the lawyer or public defender does not say that he or she does not refrain from the appeal. This registration would uphold the right to a just trial. Finally, the appeal should be a mandatory safeguard. In fact, the accused in this particular procedure is more likely to be defended by a public defender, who most of the time are not well-trained and -prepared, and do not know about the requirement that they must declare, before the accused is interrogated, that he or she does not refrain from appealing. These are only the major concerns of this process, which should be completely revised.

### 6.3. Trial-related provisions

The Constitution provides for 13 of the 28 rights listed in the section related to the trial. Alongside the ones already analysed in the previous stages, the Constitution provides for the right to challenge illegal detention or imprisonment through the right of *habeas corpus*,<sup>112</sup> which is regulated by the CPP.

Article 65 CRM provides for the right to have a trial in an open and public court, while article 59 CRM prohibits that a person be tried more than once for the same offence. On sentencing, the Constitution provides for the invalidity of evidence obtained through the use of torture, coercion, offences against the physical or moral integrity of the person, or through the abusive intrusion into one's private and family life or into their home, correspondence or telecommunications. Article 65 and article 40 CRM provide for the right to life and the prohibition of torture.

In relation to foreigners, there is a particular provision on extradition, which can occur pursuant to a court decision.<sup>113</sup> There are no other principles in any subordinate legislation in the country. Beyond the extradition agreements, which Mozambique has signed with Zambia and Malawi, Conventions with the CPLP were promulgated in 2007. These reiterate the provisions of article 67 CRM and create mechanisms of assistance in penal matters among the CPLP countries.

The only provision relating to children in the sentencing phase is provided in the CP. Article 108 CP states that, following the commission of a criminal offence, children between 16 and 18 years old can receive a maximum prison term of eight years. Juveniles between 18 and 21 years old can be sentenced to a maximum prison term of 12 years.<sup>114</sup>

There is no constitutional provision on the right to remain silent during trial, to not to be tried in absentia, to be declared not competent to stand trial, to be informed of an upcoming hearing, and no provision on the right to a speedy trial. These rights should be constitutionally protected.

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<sup>112</sup> CRM art. 66.

<sup>113</sup> CRM art. 67.

<sup>114</sup> CP art. 107.

## 6.4. Detention-related provisions

With the exception of the right to be informed of the reasons for one's detention and one's rights, provided in article 64 n.3 CRM, the Constitution does not provide for any rights in relation to conditions of detention. While there is a generic protection for all citizens to access the right to health,<sup>115</sup> no mention is made of the right to food. However, access to health care is not constitutionally provided strictly for detainees. The Law Decree 26643/1936 and Prison Policy 65/2002 contain the provisions relating to humane conditions of detention in prison.

Finally, contrary to detention in police custody, there are oversight and complaints mechanisms for prison detention that are provided in subordinate laws. While the Constitution provides only for the Prosecutor office as the oversight mechanism, other institutions such as the CNDH and the LDH have been taking on this role. In 2009 the LDH signed a memorandum with the Ministry of Justice to oversee prisons and the CNDH became the designated NPM following the ratification of OPCAT in 2014. However, while the LDH does not have access to police cells, the new CNDH has yet to produce any public report, although it is known that the organisation has made various visits to centres of detention.

While the implementation of new legislation and the binding ruling of the Constitutional Court is the first challenge that the country faces in relation to criminal procedure and prison laws, this report has shown that there is still outdated legislation which dates back to colonial times and should be amended. Moreover, a great number of rights related to arrest, police custody, trial and sentencing are not constitutionally protected and should be inserted in the Constitution and specifically detailed in subordinate laws to enhance fundamental rights in Mozambique.

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<sup>115</sup> CRM art. 89.

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