

UNIVERSITY OF CAPE TOWN

FROM RULE OF LAW TOWARDS HUMAN RIGHTS-
BASED APPROACHES TO CRIMINAL JUSTICE
REFORM IN MOZAMBIQUE

The case of Pre-Trial Detention

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DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master in Criminal Justice in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of course

I hereby declare that I have read and understood the regulations governing the submission of the Master in Criminal Justice dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

SIGNATURE: _____ DATE: _____

Dedication

I dedicate this thesis to Felice, Grazia and Nunzia, my family

Thank you for the freedom and support that you have always given to me

Thank you to Elrena van der Spuy for your mixture of professionalism and elegance

To Eldred de Klerk for the encouragement given me throughout this journey

To Mozambique, its colors, dances, perfumes, sun sets and sun rises

and for all the tears and joys I've had over the years,

To those who I lost during my travels for the new friends I met,

To Jenuario and the success of the work done with unending passion

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I am grateful for

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the love for knowledge and curiosity that open minds hearts and souls

To life

And the belief that only with a mission, life is worthy of being lived

For 'out of box' thinking, where anything is right or wrong

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for 'Unspoken words in a rainy day'

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ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACIPOL	Police Science Academy (Academia de Ciências Policiais)
AMETRAMO	Traditional Healers' Association of Mozambique (Associação da Medicina Tradicional de Moçambique)
AMMCJ	Mozambican Association of Women in Legal Careers (Associação das Mulheres Moçambicanas de Carreira Jurídica)
BOP	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
CEA	Centre for African Studies (Centro Estudos Africanos)
CLC	Community Law Centre, University of Western Cape
CFJJ	Centre of Judicial and Legal Formation (Centro de Formação Jurídica e Judicial)
COMPOL	National Commission for Police Affairs (Comissão Nacional dos Assuntos Policiais)
CPC	Policing Community Councils (Conselhos de Policiamento Comunitario)
CPF	Policing Community Forums (Forums de Policiamento Comunitario)
CPI	Corruption Perceptions Index
CPLP	Community of Portuguese Language Countries (Comunidade dos Países de Língua Portuguesa)
CRC	Convention for the Rights of Children
CRM	Constitution of the Republic of Mozambique
CSMJ	Higher Council of the Judiciary (Conselho Superior da Magistratura Judicial)
CSO	Civil Society Organizations
CSPRI	Civil Society Prison Reform Initiative
DFDI	Department For International Development, UK Government
FRELIMO	Liberation Front of Mozambique (Frente de Libertação de Moçambique)
ICCPR	International Covenant on Civil and Political Rights
ICPS	International Centre for Prison Studies
IHRL	International Human Rights Law
INE	National Institute of Statistics (Instituto Nacional Estatísticas)
IPAJ	Institute for Legal Assistance (Instituto do Patrocínio e Assistência Jurídica)
ISCTEM	Mozambican Superior Institute for Science and Technology (Instituto Superior de Ciências e Tecnologia de Moçambique)
ISPU	Superior Polytechnic Institute (Instituto Superior Politécnico e Universitário)
JDLR	United Nations Rules for the Protection of Juveniles Deprived of their Liberty

MAE	Ministry of Administration of the State (Ministério da Administração Estatal)
MDM	Democratic Movement of Mozambique (Movimento Democrático de Moçambique)
MINED	Ministry of Education (Ministério da Educação)
NPA	National Prosecutor Authority
OAM	Mozambican Bar Association (Ordem dos Advogados de Moçambique)
OSF	Open Society Foundation
OSISA	Open Society Initiative Southern Africa
PARPA	Action Plan for the Reduction of Absolute Poverty (Plano de Acção para a Redução da Pobreza Absoluta)
PEPRM	Strategic Plan of Police of the Republic of Mozambique (Plano Estratégico da Polícia da República de Moçambique)
PIC	Criminal Investigation Police (Polícia de Investigação Criminal)
PPJA	Promoting Pre-trial Justice in Africa
PRI	Penal Reform International
PRM	Police of the Republic of Mozambique (Polícia da República de Moçambique)
RBA	Rights-Based Approach
RENAMO	Mozambican National Movement (Resistência Nacional Moçambicana)
RIF	Rapid Intervention Force (Força de Intervenção Rápida)
ROL	Rule of Law Orthodoxy
SADC	Southern African Development Community
SMR	Standard Minimum Rules for the Treatment of Prisoners
SNAPRI	National Service for Prisons (Serviço Nacional das Prisões)
SPR	Special Rapporteur on Prisons and Conditions of Detention in Africa
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UEM	University of Eduardo Mondlane
UTREL	Technical Unity for Legal Reform (Unidade Técnica da Reforma Legal)
ZANU	Zimbabwe Africa National Union

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MAP OF MOZAMBIQUE



ABSTRACT

Since the beginning of the 1990s, the international development community has pursued two approaches to criminal justice reform in post-conflict African countries, namely 'rule of law' (ROL) and 'human rights-based approach' (RBA). Although, the conceptual framework of these theories embodies two distinct approaches, ROL and RBA often overlap conceptually and in practice.

This research considers the criminal justice reform that Mozambique has undergone since the end of the Civil War, in the light of the two named approaches imposed on it by international donors. The questions it seeks to answer are: to what extent have ROL and RBA been recognised by the Mozambican government and to what extent criminal justice authorities have sought to implement RBA within prison reforms?

In this paper law enforcement agencies, judicial and prison systems are assessed with a particular focus on at pre-trial detention that, worldwide, has come to capture the attention of government institutions, international organizations and civil society alike.

Research on the size and shape of pre-trial detention population and into the conditions under which detainees are imprisoned has increased in both developed and developing countries. The socio-economic impact of pre-trial detention and the links between pre-trial detention, torture, ill-treatment and corruption within criminal justice agencies have received the largest share of research interest and international attention. The assessment of the conditions of detention and access to legal representation of pre-trial detainees in the Civil and Central prisons of Maputo is the case study for this research.

The study concludes that, while ROL and RBA have achieved limited positive results at the legislative and institutional levels of criminal justice

reform in Mozambique since 1990, RBA has yet to be fully implemented within the prison system. The human rights and basic needs of pre-trial detainees and prisoners are not been realized or fulfilled. Civil society organizations continue to not be involved in prison reform and informal systems of justice have not been supported by international donors neither by the government.

CHAPTER ONE

INTRODUCTION

1. BACKGROUND

Every day thousands of people are arrested and held in prisons increasing the number of pre-trial detainees across the world. Every year arrestees lose not only their liberty but they also suffer the injustices of criminal justice systems. Every hour many detainees experience deplorable conditions while in detention: they are likely to not have access to a minimum level of basic necessities or human rights regarding accommodation, food and water; or access to medical care; the rights to clothing and to keep their own belongings are likely to be denied; they may also not have access to legal representation.¹ In addition they may not know the crime which they are suspected of; they might suffer ill, inhuman and degrading treatments or be exposed to the arbitrary actions of prison officials.² Pre-trial detention might last months and often years.

Pre-trial detention has received particular attention from the international community and national organizations in recent years. In 2007 the European Commission (EC) conducted a study to analyse the minimum standards in pre-trial detention in the member States of the European Union. This study was undertaken in collaboration with Tilburg University, in the

¹ OSI (Open Society Institute). (2009). Why we need a Global Campaign for Pretrial Justice. Available at: http://www.soros.org/initiatives/justice/articles_publications/publications/pretrialjustice_20090903/pretrialjustice_20090903.pdf. Accessed on 15 August 2011.

² OSJI (Open Society Justice Initiative). (2011). The Socioeconomic Impact of Pretrial Detention. A Global Campaign for Pretrial Justice Report. New York: Open Society Foundation.

Netherlands.³ In September 2009, the Open Society Foundation (OSF) began a global campaign to raise awareness with the view to minimising the excessive use of pre-trial detention and improving the conditions of such detention. In Africa, too, civil society organizations began to focus on the plight of pre-trial detainees.⁴ While research has explored the conditions of detention and access to legal representation of detainees in prisons, relatively little is known about the conditions of detention in police lock-ups.

According to the International Centre for Prison Studies (ICPS) - situated at Kings College at the University of Essex - in any given year almost ten million people are held in pre-trial detention across the world. In Africa, in 30 countries for which statistics are available, pre-trial detainees represent more than 35 per cent of the prison population.⁵ The African countries with the highest percentage of pre-trial detainees are: Liberia with 97 per cent of pre-trial detainees, Mali with 88.7 per cent, Benin with 79.6 per cent, and Niger with almost 76 per cent and Congo (Brazzaville) with 70 per cent. Whilst it is not clear if these statistics include detainees in police custody, the emerging literature on pre-trial detention highlights the urgent need to focus on the plight of pre-trial detainees.

³ Van Kalmthout, A.M., Knapen, M.M., Morgenstein, C., Bahtiyar, Z.[et al.]. (2009). Pre-trial detention in the European Union: an analysis of minimum standards in pre-trial detention and the grounds for regular review in the member states of the EU/Tilburg: Wolf Legal Publishers. Available at: http://ec.europa.eu/justice/doc_centre/criminal/procedural/doc/appendix_en.pdf. Accessed on 14 August 2011.

⁴ See the project of the Civil Society Prison Reform Initiative (CSPRI) of the Community Law Centre at the University of Western Cape, on the promotion of pre-trial justice in Africa available at <http://www.ppja.org/>. Accessed on 12 January 2012.

⁵ Available at http://www.prisonstudies.org/info/worldbrief/wp_b_stats.php?area=africa&category=wb_pretrial. Accessed on 12 August 2011.

The United Nations Working Group on Arbitrary Detention⁶ and the Special Rapporteur on Prisons and Conditions of Detention in Africa⁷ have shown that the length of pre-trial detention, the conditions of detention and the consequences associated with detention are tougher than those of sentenced prisoners. Reports have illustrated that pre-trial detainees are often exposed to violence and torture; subject to the arbitrary decisions of corrupt officials; they have to share their cells with sentenced prisoners, and in many countries access to food, water and sanitation is not adequate and pre-trial detainees are more frequently exposed to HIV and other diseases. More often than not pre-trial detainees do not know their basic rights and rarely get to see a lawyer or a judge before their trial. In addition, they are more likely than sentenced prisoners to lose their jobs and their homes while in custody. As a result, they are also likely to be without the psychological support of their families and to suffer emotionally, causing psychological damage that may last longer than the effective detention.⁸ Pre-trial detainees thus constitute a particular group at risk from institutional neglect and injustice.

2. PRE-TRIAL DETENTION IN MOZAMBIQUE

The statistics of the ICPS and the more current data of the Mozambican National Service of Prisons (SNAPRI) note that, in Mozambique, the prison population is estimated to be around sixteen thousand people with a pre-trial

⁶ The Working Group on Arbitrary Detention, established in 1991, is a UN body of independent human rights experts that investigates cases of arbitrary arrest and detention that may be in violation of International Human Right Law.

⁷ The Special Rapporteur on Prisons and Conditions of Detention in Africa, established by the African Commission on Human and Peoples' Rights in 1996, is an innovative procedure aimed at addressing the dire position of detainees in Africa. Its greatest achievement so far has been the impact through visits to places of detention in eleven African Union member states.

⁸ Supra note 1.

population of between 26.9⁹ per cent and 34 per cent¹⁰ of the total prison population.

Whilst it is not clear if the statistics for pre-trial detainees also include the number of detainees in police cells in Mozambique, the Special Rapporteur¹¹ has noted that detainees lack access to legal representation and suffer deplorable conditions while detained in prisons (ACHPR, 2001). In addition, a study conducted by the Open Society Initiative Southern Africa (OSISA) noted that 'conditions of detention in police cells and prisons are not in compliance with the UN Standard Minimum Rules for the Treatment of Prisoners, with severe overcrowding, poor physical infrastructure and an ensuing lack of sanitary conditions and access to basic health care' (AfriMap, 2006).

Mozambique is a member of the United Nations (UN) and the African Union (AU); it has signed and ratified different international treaties and regional conventions and it has domestic legislation grounded in such international standards. These norms provide that pre-trial detainees, in Mozambique, should be considered innocent until proven guilty and that while in detention should be treated with dignity. Access to suitable humane accommodation, adequate food, clean water and sanitation, clothing and the right to personal belonging should be respected as well as a prompt access to legal representation.

⁹ Estimation from ICPS dated June 2011. Available at: <http://www.prisonstudies.org/info/worldbrief/wpbcountry.php?country=35>. Accessed on August 2011.

¹⁰ José, A.C. (2010). *Alguns Desafios Para a Aplicação de Penas Alternativas à Prisão em Moçambique* [Some challenges to the implementation of Alternative Measures to Imprisonment]. Available at http://www.cfjj.org.mz/IMG/pdf/Artigo_Andre_C._Jose.pdf. Accessed on 21 August 2011.

¹¹ ACHPR (African Commission Human Peoples' Rights).(2001). *Prisons in Mozambique. Report on a visit 4-14 April 2001. Special Rapporteur on Prisons and Conditions of Detention in Africa. (On file with Vera MlangazuwaChirwa).*

3. FOCUS OF THIS ENQUIRY

This study considers more generally two approaches to criminal justice reforms that the international community has pursued in Mozambique since the beginning of the 1990s, namely the rule of law (ROL) and human rights-based approach (RBA).

More specifically, this study focuses on the reforms of the criminal justice system in post-conflict Mozambique, with reference to pre-trial detention as a critical issue within the wider ambit of prison reform. Field work conducted in the Civil and Central prisons of Maputo allowed for an assessment of the conditions of detention and access to legal representation for pre-trial detainees. The research examines criminal justice reforms and pre-trial detention through the lenses of ROL and RBA to development of post-conflict countries pursued by donors in Mozambique.

The Rule of Law (ROL) paradigm, argues the American scholar Frank Upham¹² (2002: 19), is 'a set of uniformly enforced, established legal regimes [as well as] programs and activities geared toward achieving sustainable growth and other goals'. ROL is a top-down approach that prioritises legislative reforms to be pursued through legal professionals within state institutions. Within this programme, foreign expertise and consultants are considered critical players in the quest for development. According to Golub (2003), ROL is the mainstream approach that international community has

¹² See Upham, F. (2002). *Mythmaking in the Rule of Law Orthodoxy*, Carnegie Endowment Working Paper No. 30, Rule of Law Series, Democracy and Rule of Law Project (Washington, D.C.: Carnegie Endowment for International Peace, September 2002). See also Golub, S. (2003). *Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative*. Rule of Law Series, Democracy and Rule of Law Project Carnegie Endowment Working Papers, 1-41.

employed in pursuing socioeconomic development in post-conflict countries, in Africa and elsewhere.

The Rights-based Approach (RBA) to criminal justice reforms is considered as an alternative paradigm to ROL and includes a variety of different development programs.¹³ While donors began to pursue ROL at the beginning of the 1990s, the use of human rights and 'rights based' terminology started after the Conference of Human Rights of Vienne, in 1993, but gained traction during the first years after 2000. In the literature (Anderson, 1999; van Rooij, 2001; Golub, 2003) RBA is described as a bottom-up approach consisting of legal interventions which benefits the poor and prioritises their needs. Typically, RBA emphasises the importance of involving civil society organizations, as well as the inclusion of non-state actors and support for informal methods of justice.

However, the relationship between ROL and RBA is more blurred than the conceptual distinctions would have us believe. Given the above introduction, this study aims to explore the outcomes of these approaches to criminal justice development in Mozambique, by taking pre-trial detention as a focus area of enquiry. This study argues that, in Mozambique, donors have primarily pursued a Rule of Law approach to criminal justice reforms. In the Mozambican case, rights-based approaches still need to be fully implemented.

¹³See Nyamu-Musembi, C. and Cornwall, A. (2004). What is the "rights-based approach" all about? Perspectives from International Development Agencies IDS Working Paper 234 First published by the Institute of Development Studies. Institute of Development Studies. University of Sussex: Brighton.

3.1. KEY RESEARCH QUESTIONS

1. What are the conceptual frameworks of ROL and RBA to criminal justice reforms, specifically how do these approaches address reform of pre-trial detention in police lock-ups, in post-conflict African countries?
2. How and to what extent have ROL and RBA to pre-trial detention been recognized in the legislation, regulations and policies in Mozambique?
3. To what extent has a RBA to pre-trial detention been implemented, in actual practice, in the Civil and Central prisons of Maputo?
4. Which kind of factors inhibits the implementation of a RBA to pre-trial detention in prisons in Mozambique?

4. RESEARCH METHODS

The research makes use of comparative analysis to determine how compliant relevant Mozambican legislation, regulations and policies are with regional and international standards, guidelines and normative practices on pre-trial justice. Further, this study examines the practices and treatment of pre-trial detainees in the Central and Civil prisons in Maputo.

The delineation of ROL and RBA conceptual frameworks has been grounded in a critical review of international and regional literature. The work of the

Indian Economist Amartya Sen,¹⁴ *Development as Freedom*, has been fundamental to the critical approach that this work engages with regarding the right to development.

The works of scholars such as F. Upham (2002), S. Golub (2003), T. Carothers (1999; 2006), R.C. Crook (2001), D. M. Trubek (2006), D. Kennedy (2003; 2006) and L. H. Piron (2005) have been reviewed to analytically engage the role of ROL to criminal justice reforms in post-conflict countries. Authors such as A. Frankovits (1996), J. Hausermann (1998), R. Anderson (1999) and H. De Soto (2000), as well as B. van Rooij (2001), A. Cornwall and C. Nyamu- Musembi (2002) and P. Uvin (2002) have been reviewed to analyse RBA.

International studies on criminal justice reforms in Mozambique have involved scholars such as B. Baker (2003; 2006), H.M. Kyed (2007; 2009; 2010) and A. Lala and L. Francisco (2008) while Portuguese literature has included the works of B. de Sousa Santos (1997; 2002; 2006; 2007; 2009; 2011), J. C. Trindade (2003), S. Araújo (2009; 2010) and A.C. José (2010).

The research adopts a critical approach to pre-trial prison justice in Mozambique and essentially questions: “why, although criminal justice legislation in Mozambique contains and respects international standards, the country fails to fully implement this legislation?” International and regional conventions on prisoner’s human rights on pre-trial justice serve as the benchmarks for examining the plight of pre-trial detainees in two prisons of Maputo.

14 Amartya Sen (1935) is an Indian economist, Nobel Prize in Economic Sciences in 1998. Pioneer of the Capability Theory, Sen’s main works are “Development as Freedom” (1999) and “The Idea of Justice” (2009).

This study included one month of field research in the Civil Prison and Central Prison of Maputo. The fieldwork involved face-to-face interviews in private with a sample of twenty pre-trial detainees, ten prisons officials and the respective directors of the two prisons. Open-ended questionnaires were used to interview detainees and officials on conditions of detention and access to legal representation. The interview with the directors also focused on the challenges confronting prison system and the wider criminal justice system in Mozambique.

Open-ended interviews were also conducted with international and national organizations as well as a number of governmental institutions to assess the involvement of these agencies in the process of the criminal justice reform in the country. Furthermore, the interviews also explored the main challenges that donors, civil society organizations and governmental institutions encounter, pursuing ROL and RBA in Mozambique.

The European Union (UE), the United Nations Development Program (UNDP), the United Nations International Crime and Justice Research Institute (UNICRI), SHARE, OSISA and the Danish International Development Agency (DANIDA) were interviewed. National organizations involved were represented by Prison Fellowship Mozambique and the Human Right League (Liga dos Direitos Humanos, LDH).

Governmental institutions included the Institute for Legal Assistance (Instituto Patrocínio Assistência Jurídica, IPAJ), the National Service for Prisons (Serviço Nacional das Prisões, SNAPRI) and the Technical Unity for Legal Reforms (Unidade Técnica das Reformas Legais, UTREL).

5. RESEARCHER POSITION

The interest in this particular research topic was borne out of my personal passion and experience working as a lawyer in Mozambique. For the purpose of this research, Human Rights are considered using a 'multicultural universalist' approach that, although it does not reject the universality of those universal entitlements, embodied in International Human Right Law in the last half-century,¹⁵ it acknowledges the important role of cultural diversities within the conception of people's human rights. As An-Na'im states so clearly:

Current and foreseeable new human rights cannot be seen as truly universal unless they are conceived and articulated within the widest possible range of cultural traditions... As normative propositions, human rights are much more credible and thereby stand a better chance of implementation if they are perceived to be legitimate within the various cultural traditions of the world.

(An-Na'im, 1992: 2)

This study departs from the academic work of B. de Sousa Santos and A. A. An-Na'im and explore criminal justice reforms that Mozambique has undergone through ROL and RBA pursued by the international community.

The relationships that I have maintained with Mozambican and international colleagues who work in the field of criminal justice and criminology have

¹⁵ International Human Rights Law represents the body of international law that promote human rights at an international, regional and domestic level. Primary sources, which are legally binding, include treaties and customary law. Other international standards contribute to the implementation and recognition of international human rights (Cook, 1992).

afforded me access to research literature, national statistics and research participants that have enriched this study. Furthermore, the fact that I speak and write Portuguese, French and Spanish provided me access not only to the Portuguese speaking human sources but also to a rich base of research material not routinely available in English.

6. SIGNIFICANCE OF THE STUDY

The importance of this study to Mozambique should not be underestimated. Being a Portuguese language country, Mozambique often suffers from a lack of ready access to the English speaking world. Furthermore, academic research, such as this piece, on criminal justice and particularly prison reforms opens the unexplored world of Mozambique prisons to the public.

The international campaign on pre-trial justice supported the study especially given the described conditions of pre-trial justice in Mozambique and it articulated the need to minimise the excessive use of pre-trial detention and to improve the conditions thereof.

7. DELIMITATION OF THE STUDY

In the initial phase, this research was meant to explore the conditions of detention and access to justice of those in police custody. However, research to a delicate sphere of the criminal justice system, such as Mozambican police lock-ups is not always guaranteed, and was not approved by the authorities. Time constrains and the difficulties encountered during the first part of the field work, represent the reasons for the change of the thesis focus from police lock up to prison as sites of pre-trial detention.

The study, then, addresses the conditions of detention and access to legal representation for pre-trial detainees in the Civil and Central prisons of Maputo. The research looks only at pre-charge and pre-trial detainees in prisons.¹⁶

It was not possible to get access to the warrants of each pre-trial detainee interviewed to assess the information given to the researcher. The research thus relies on the data recorded through the interviews.

8. CHAPTERS SYNOPSIS

The dissertation is divided into six chapters. Chapter One introduces the background and outlines the structure of the research. Chapter Two is divided into two main parts. The first part introduces the theoretical framework of ROL and RBA to criminal justice reforms in post-conflict African countries while the second part particularly looks at pre-trial detention through the lenses of the two theories. Chapter Three discusses the research process, the methods used during the field work and the lessons learnt along the way. Chapter Four describes how Mozambique has sought to mainstream international standards at a national level. A brief overview of the political, constitutional, criminal justice reforms, including prison law is provided. The first part of the chapter assesses the reforms that the country has undergone over the years, and the second part looks at specific key themes that have been underlined by the international donors interviewed during the field work. This chapter discusses the outcomes of a ROL approach pursued by donors since the beginning of the 1990s. Chapter Five provides an examination of conditions of detention and access to legal

¹⁶ Although different nomenclatures are used in different jurisdictions and researches, this study considers both detainees who have not been charged and those who, although charged are waiting proceedings in prisons.

representation of pre-trial detainees in actual practice. It describes the conditions under which pre-trial detainees are held and legal representation is accessed in the Civil and Central prisons in Maputo. While the ROL paradigm has shown positive results, it is argued that a RBA is yet to be fully implemented in Mozambique's prisons. Chapter Six concludes the study, critically evaluating the factors that prevent the fully implementation of RBA to human and just pre-trial detention in Mozambique, considering the case-studies of the Civil and Central prisons.

CHAPTER TWO

RULE OF LAW AND RIGHTS-BASED APPROACHES TO CRIMINAL JUSTICE REFORM IN POST-CONFLICT AFRICAN COUNTRIES

1. INTRODUCTION

Since the beginning of the 1990s, the international community has pursued rule of law and human rights-based approaches to development programmes in post-conflict countries. Criminal justice reform in African post-conflict societies has been supported by donors through the recognition of international treaties and covenants in national legislations and policies.

The first part of this chapter outlines the conceptual frameworks underlying ROL and RBA to criminal justice reform. It considers the theoretical ideas which have shaped the two approaches. The key features of each approach are outlined and the similarities and the differences between the two approaches explored.

The second part of the chapter looks particularly at prison reforms and pre-trial detention in post-conflict countries in Africa. This section illustrates international and regional norms that donors have been pursuing in efforts to reform prisons. While the ROL approach has been the dominant ideology employed used by donors, human rights terminology has increasingly been adopted following the 1993 Conference of Vienne. Subsequently, some RBA projects to pre-trial detention reforms have been implemented by the international community in few post-conflict African countries.

2. RULE OF LAW AND HUMAN RIGHTS-BASED APPROACHES

The international community's assistance in development projects in Africa has a long history that began during the 1960s and 1970s, shortly after the anticolonial struggles. Programs of economic reconstruction and adjustment development have flourished at the beginning of the 1980s mostly through the initiatives of multilateral agencies such as the World Bank and IMF. In the process African citizens became recipients of financial aid and beneficiaries of utilities, income and consumable products. The concept of development, seen through the lens of the utilitarian theory,¹⁷ until the end of the 1980s, began to shift at the beginning of the 1990s. The work of the Indian Economist Amartya Sen,¹⁸ *Development as Freedom*, was influential in redefining development as freedoms to be achieved rather than utilities to be counted.

Since the 1990s, the shift of donor support to development initiatives also affected criminal justice reforms in post-conflict African societies. The international community began to pursue rule of law to reform criminal justice systems in post-apartheid South Africa, post-genocide Rwanda, as well as Liberia, Uganda, Sierra Leone, Burundi and Mozambique. The new approach, recognised as 'rule of law orthodoxy', was defined by the scholar Carothers:¹⁹

17 Laderchi, C., Saith, R. and Stewart, F. (2003). Does it matter that we don't agree on the definition of poverty? A comparison of four approaches. In Working Paper Number 107 QEH (Queen Elizabeth house, Oxford) Working Paper Series.

18 Amartya Sen (1935) is an Indian economist, Nobel Prize in Economic Sciences in 1998. Pioneer of the Capability Theory, Sen's main works are *Development as Freedom* (1999) and *The Idea of Justice* (2009).

19 Carothers, T. (2006). The Rule of Law Revival. In *Promoting the Rule of Law Abroad, In Search of Knowledge*, edited by Thomas Carothers, 3-14. Washington: Carnegie Endowment for International Peace. See also (1999). *Aiding Democracy Abroad: The Learning Curve* Washington: Carnegie Endowment for International Peace.

...as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

(Carothers, 2006: 4)

The ROL approach to criminal justice system reform in post-conflict jurisdictions has focused on the establishment of laws, the support of independent judiciaries and the creation of a formal justice system that included judicial, law enforcements and prisons systems. In Rwanda, after the genocide, bilateral and multilateral agencies such as UNDP, Penal Reform International (PRI) and the Danish Centre for Human Rights developed various programs aimed at reconstruction. A wide range of legal, judicial and penal reforms were pursued (Piron, 2005).²⁰

²⁰ See Piron, L.H. (2005). Donor Assistance to Justice. Sector Reform in Africa: Living Up the New Agenda? Open Society Initiative Series. Available at <http://www.odi.org.uk/resources/docs/2309.pdf>. Accessed 12 January 2012.

Upham²¹ (2002: 19) considered ROL as ‘a set of uniformly enforced, established legal regimes [as well as] programs and activities geared toward achieving sustainable growth and other goals’.

ROL is a top-down approach that involves the imposing rule of law made in the West to post-conflict countries in the South of the world. This system has been pursued by the international community to reform criminal justice systems since the 1990s. Post-conflict countries have domesticated their national legislations through the accession and/or ratification of international treaties and covenants, making them relevant to the local jurisdiction. The assistance of donors has focused on building infrastructure and establishing institutions; they have emphasised legal and judicial practitioners’ training and used foreign expertise looking to improve the legislation of recipient countries.²² Multilateral agencies, such as the World Bank, UNDP, UNICEF as well as bilateral organizations have pursued ROL approaches to reform criminal justice systems. As Piron has explained:

In Mozambique, following a diagnostic process in the late 1990s, USAID helped establish a national judicial training center and provided support to improve the efficiency of the Maputo City Court through the provision of equipment, bench books, a computerized case-tracking system, and a court administrator.

(Piron, 2005: 6)

This donor’s commitment to development was pursued together with a new approach that emerged in the middle of the 1990s and increased at the

²¹ Uvin, P. (2002). On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise. In *The Fletcher Journal of Development Studies*, XVII: 1-11.

²² See Golub, S. 2003. Beyond Rule of Law Orthodoxy The Legal Empowerment Alternative. Rule of Law Series, Democracy and Rule of Law Project Carnegie Endowment Working Papers pp. 1- 41.

beginning of 2000. As Frankovits (1996)²³ has stated, the terminology of donors aid to development began to change after the Conference on Human Rights held in Vienna, in 1993. The World Bank and UNDP, among others agencies, started to insert the term human rights in their guidelines and documents. Cornwall and Nyamu-Musembi²⁴ (2004: 1415) have noted that since 2000 a “rights-based approach” has become the latest designer item to be seen to be wearing’.

The RBA has been introduced by donors as an alternative approach to criminal justice reforms. The RBA was considered a new paradigm that ‘calls for existing resources to be shared more equally and for assisting the marginalised people to assert their rights to those resources’ (Nyamu-Musembi, 2004: 1417).

The RBA is a bottom-up approach that focuses on the less privileged, their perspectives and needs; it emphasises the legal enforcement of human rights, recognises the importance of informal justice mechanism,²⁵ and the cultural practices of African societies (Piron, 2005). The RBA departs from the perspectives of the people in need through the involvement and contribution of civil society organizations (CSOs) (van Rooij, 2001; Piron, 2005). The ‘Access to Justice’ program of the World Bank and UNDP²⁶ and the recent ‘Legal Empowerment of the Poor’ pioneered by Golub (2005) represent two examples under the umbrella of RBA programmes to criminal justice reform

²³ Frankovits, A. (1996). Rejoinder: The Rights Way to Development. In *Food Policy* 21(1): 126.

²⁴ Cornwall, A. & Nyamu-Musembi, C. (2004). Putting the ‘rights-based approach’ to development into perspective. In *Third World Quarterly*, 25:8, 1415-1437.

²⁵ This study considers informal methods of justice dispute resolution mechanisms outside the formal justice system. See Wojkowska, E. (2006). Doing Justice: How informal justice systems can contribute. United Nations Development Programs. Oslo Governance Centre. Available at http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30535/0280Doing_Justice__How_informal_justice_systems_can_contribute_%282007%29.pdf?sequence=1. Accessed 1 January 2012.

²⁶ United Nations Development Programme (UNDP) Access to Justice for All and Justice Sector Reform. Access to Justice Workshop, Oslo, March 2002.

in post-conflict countries. Both projects aim to service the citizens at the bottom; they focus on access to justice and legal empowerment of the most vulnerable people. Golub emphasizes that RBA gives:

great attention to domestic ideas and initiatives, or experience from other developing countries..., to administrative agencies, local governments,...[as well as] media, community organizing, group formation and civil society partnership.

(Golub, 2005: 26)

Other organizations have developed projects in line with these characteristics such as the UK Department for International Development (DFID), the Swedish Sida and NGOs such as CARE and ActionAid. Cornwall and Nyamu-Musembi (2006: 1430) note that there are two common principles that characterise these projects. Summarily these projects:

- strengthen the capacity of duty-holders (generally state, but increasingly this includes non-state actors)
- build the capacity of citizens to claim their rights, either by working alongside them as advocates, and/or seeking to provide opportunities for people to empower themselves.

Given this introduction, ROL and RBA are schematically represented as follows:

Figure 1: The ROL Approach

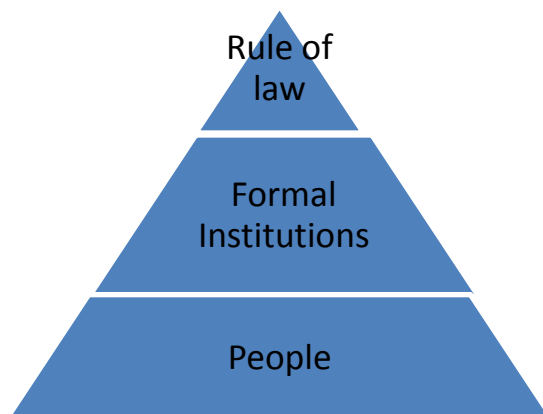
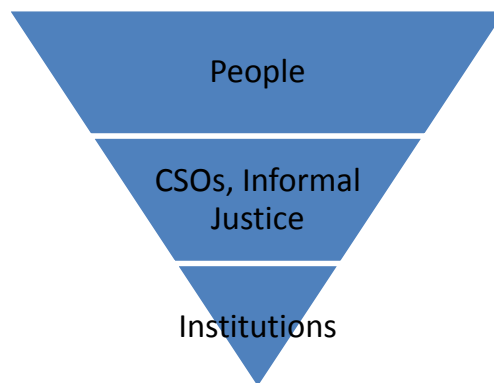


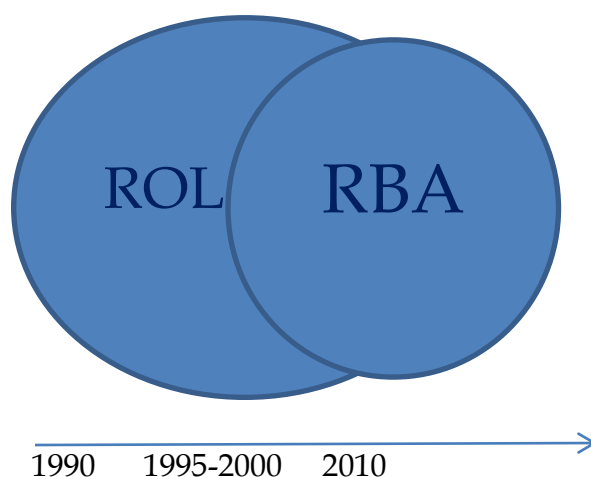
Figure 2: The RBA



The theoretical idea of the ROL and RBA illustrates two distinctive frameworks: the first approach prioritizes the rule of law while the RBA departs from the people and their needs. However, literature has noted that these distinct frameworks do not apply in practice. To this extent, scholars such as Uvin (2002), Cornwall and Nyamu-Musembi (2004) and van Rooij (2008), have considered RBA as an old dress adorned with new details. Although the previous figures distinguish ROL neatly from the RBA, the literature suggests that both approaches have various principles in common. For example, both approaches focus on institution buildings and legal reforms. Cornwall and Nyamu-Musembi (2006: 1418) have noted that RBA ‘approaches have come to turn on the use of legislative instruments in development and on the usefulness of a normative framework that has its basis in international covenants and conventions’. Experts and foreign consultants apply international rule of law and human rights instruments to develop post-conflict society legislation. Rather than an alternative to ROL, this study, then, considers RBA as a continuation of the mainstream paradigm pursued by donors in criminal justice reform. Even though RBA contains new elements that distinguish itself from ROL, van Rooij (2001: 1) has noted that RBA ‘does not completely substitute ROL or free some of the same problems that have plagued existing legal development cooperation practices’.

Rather than an alternative to ROL, RBA merges RBA into ROL approach. Thus, the following scheme represents, in practice, the relationship between ROL and RBA as well as their evolution over time.

Figure 3: Relationship between ROL and RBA



Uvin (2002: 10) argues:

Much of [the emerging RBA] it is about the quest for moral high ground: draping oneself in the mantle of human rights to cover the fat belly of the development community while avoiding challenging the status quo too much, cross-examining oneself, or questioning the international system.

Certain scholars have noted that the international community has only changed terminology and RBA represents 'new wine in old bottles' (Uvin, 2002: 1). What distinguishes RBA from ROL is the involvement of civil society organizations and RBA's support for informal methods of justice. These, however, have yet to be fully implemented in most of the criminal justice system of post-conflict African countries. The ROL approach, thus,

has mainly been the theory pursued by donors to criminal justice reform. These prevailing positions are going to be outlined in relation to the Mozambique criminal justice system.

3. RULE OF LAW AND RIGHTS-BASED APPROACHES TO PRE-TRIAL DETENTION

Pre-trial detention represents the denial of individual liberty: the most important of all human rights guaranteed in International Human Rights Law (IHRL). The right to liberty is not an absolute right and pre-trial detention can be exercised by the state as one of the most incisive measure of coercion.²⁷ Although personal liberty can be denied, IHRL has recognised norms that protect the rights of pre-trial detainees and oblige countries to respect their presumption of innocence, treat them with dignity and protect their humanity.

Since the proclamation of the Universal Declaration of Human Rights (UDHR), in 1948, human rights of prisoners as well as those of pre-trial detainees have been established in both legally binding (hard laws) and non-legally binding (soft laws) norms.²⁸ Whilst international and regional treaties require countries to conform their legislation and to respect prisoners' human rights, other conventions include provisions to which states may choose to aspire.²⁹

²⁷ Cook, H. (1992). Preventive Detention- International Standards and the Protection of the Individual. In *Preventive detention: a comparative and international law perspective*. Edited by Frankowski, S., and Shelton, D. The Netherlands: Kluwer Academic Publishers.

²⁸ Although the existence of a controversial debate between hard and soft laws, this study considers soft law as non-binding instruments. Hard law constitutes binding laws rules that are authoritative and prescriptive and they result in enforceable commitments for states.

²⁹ For a comprehensive International Standards that relate to detentions, corrections and prisons, see INPROL, International Network to Promote the Rule of Law, available at <http://inprol.org/files/CR10002.pdf>. Accessed on 20 September 2011.

The point of departure of this section is that states are under an obligation to treat pre-trial detainees with dignity and humanity, and with the presumption of innocence. These principles were further recognised with the Universal Declaration of Human Rights (UDHR),³⁰ in 1948, and in the International Covenant on Civil and Political Rights (ICCPR),³¹ adopted by the United Nations in 1966 and entered into force in 1976. Article 11(1) of the UDHR notes that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'. The ICCPR establishes in Article 10(1) that: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. Whilst Article 14(2) notes that 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.

Universally binding law provisions on the minimum conditions of detentions and access to legal representation are inserted in the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1977 and the Convention on the Rights of the Child (CRC), ratified in 1990.

The relevant soft law include the Standard Minimum Rules for the Treatment of Prisoners³² (SMR), the Basic Principles for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BOP), declared in 1988 and 1990. The United Nations Convention Against Torture and Other Cruel, Inhuman or

³⁰ Available at <http://www.ohchr.org/en/udhr/pages/introduction.aspx>. Accessed on 24 August 2011.

³¹ Available at <http://www2.ohchr.org/english/law/ccpr.htm>. Accessed on 24 August 2011.

³² The SMR were declared in 1957 and are one of the oldest international instruments relating to the treatment of people in custody and has received great importance in the development of policies around prisoners' rights.

Degrading Treatment (CAT) of 1984, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDJR) of 1990 and the Code of Conduct for Law Enforcement Officials, recognised in 1979, contain relevant norms. The Basic Principles on the Rule of Lawyers and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly physicians, in the Protection of Prisoners against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were declared in 1982 and again 1990.

Relevant African regional norms include the African Charter on Human and Peoples' Rights (ACHPR), the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa adopted in 2003 and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa of 2004.

The above-mentioned treaties and guidelines contain provisions linked to the rights to adequate standards of living, food and water, property belonging to a detainee, as well as the right to clothing and bedding. Norms on the right to have contact with the outside world and access to health care together with norms related to the protection of women and juveniles detained in prisons are also included in those covenants and policies.

While the international community has mainly pursued the ROL approach towards prison law reforms in post-conflict societies, since the 1993 Conference of Human Rights held in Vienna, donors began to develop guidelines and handbooks to promote the respect of pre-trial detainees' human rights and develop good practices to reduce the use of pre-trial detention. In 1994, the Center for Human Rights, Crime Prevention and Criminal Justice Branch in Geneva published the 'Human Rights and Pre-

trial Detention Handbook of International Standards'. Donors have begun to fund research to insert post-conflict prison reforms into international debates, drawing up best practice manuals on prisoners' human rights. Since 2001, PRI has developed a series of guidelines to reduce pre-trial detention in Africa and elsewhere while the International Centre for Prison Studies has published the handbook entitled 'A Human Rights Approach to Prison Management', with a section dedicated to pre-trial detainees. The use of human rights terminology has increased among donors although the rhetoric draws primarily on international and regional treaties and guidelines.

Although projects using a RBA terminology have shown outcomes only at the legal and institutional levels of criminal justice system in post-conflict African countries, there are the RBA programs that have also actively involved civil society organizations, non-state actors and support informal mechanisms of justice. Since 2005, such projects have begun to differently approach reform prison systems in Malawi³³, Sierra Leone³⁴ and Nigeria.³⁵

In Malawi, PRI financed the 'Paralegal Advisory Service' (PAS) project, creating a partnership between civil society organizations and the Malawi Prison Service. PAS aimed at the establishment of legal education, advice and assistance to prisoners. The project began in 2000, involving four prisons and developed its services to police stations and courts. In 2007, the Paralegal Advisory Service Institute (PASI) became autonomous. PASI focuses its work on the potential role of trained paralegals that assist prisoners and their

³³ See Paralegal Advisory Service Institute (PASI) and the Village Mediation Programme on access to Justice available at: <http://www.demjustdata.org/PASI-VMP-booklet-Oct09.pdf>. Accessed 12 January 2012.

³⁴ Timap for Justice Project in Sierra Leone deployed paralegals in the traditional village courts. See OSJI (Open Society Justice Initiative). (2006). *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*. In *Yale Journal of International Law*, 31: 427- 476.

³⁵ See Home Spun Justice project in Lagos. Available at <http://www.kenyalaw.org/klr/index.php?id=810>. Accessed 12 January 2012.

families including those in rural villages. The manual produced by RPI, 'Where is no lawyer',³⁶ notes that PASI:

makes justice accessible to everyone, especially the poor and vulnerable...[and] links with rural communities and community based organizations to spread information about the criminal justice system and reduce pressure on the formal justice system by encouraging greater community participation in resolving local/private disputes through a mediated settlement.

(PRI, 2007: 11)

By 2004, the number of paralegals assisting prisoners and their families in Malawi had risen to 38; the paralegals were operating in more than 20 prisons, 18 police stations and 11 courts; outreach programs developed into rural communities.³⁷ PASI won the UN Habitat Best Practices Award, in 2004 and the project was extended and duplicated in other African countries such as Uganda, Kenya,³⁸ Sierra Leone and Nigeria. PASI represents an RBA with impact beyond the legislative and institutional levels of the criminal justice system.

However, while PASI is an example of a successful RBA, which engages with the need of the poor, development agencies have mostly pursued a ROL approach to pre-trial detention in Africa. Chapter Five will return to this issue, taking into consideration pre-trial detention in Mozambique with particular emphasis on the Civil and Central prisons of Maputo.

³⁶ Available at <http://www.governancejustice.org/images/stories/pdf/PASI.pdf>. Accessed on 15 February 2012.

³⁷ Ibid.

³⁸ The Kenya Prisons Paralegal Project (KPPP).

4. CONCLUSION

This chapter has provided an overview of the Rule of Law Based approaches to criminal justice reform. The chapter has introduced and discussed key features associated with the ROL orthodoxy and RBA as pursued by the international community since the beginning of the 1990s.

The literature review has underlined that RBA have various principles in common with ROL, although other elements distinguish it from ROL. Both ROL and RBA take international treaties and covenants as points of departure. Much like ROL, RBA also focuses on the legal and institutional levels of criminal justice reform. Donors have pursued the ratification and domestication of international norms in the national legislation of post-conflict countries.

ROL is considered as the dominant paradigm used by the international community to reform criminal justice systems. This prevailing argument applies also to prison reform in post-conflict countries. The second section of the chapter has highlighted that donors have pursued ROL approach to prison reforms since the 1990s. The ratification of international and regional treaties that respect and promote prisoners' human rights and those of pre-trial detainees, have been pursued by the international community to restructure prison systems. After the Conference on Human Rights held in Vienne, in 1993, bilateral and multilateral agencies have begun to use human rights terminology to prison reforms in Africa and elsewhere. Manuals and handbooks have been published to insert the international debate on prison and pre-trial detention in African contexts. The rights of pre-trial detainees, their access to justice; the involvement of civil society organizations and the

support to informal methods of justice as well as non-state actors are elements that set RBA apart from ROL.

In practice, ad exception of projects such as PASI, the rights and needs of the most vulnerable people and the involvement of civil society organizations as well as the support of informal methods of justice and non-state actors still need to be developed in post-conflict societies.

Donors have pursued ROL approach while RBA has yet to be fully implemented in practice. Chapter Four and Five will bring the discussion of this chapter into the Mozambican context, while Chapter Three focuses on the research methods conducted for the research.

CHAPTER THREE

RESEARCH METHODS

1. INTRODUCTION

The inspiration to conduct this study goes back to 2006 when I moved to Mozambique to pursue a dream to work for prisoners' human rights in Africa. Since then, I have worked with different international and national organizations and institutions, experiencing different contexts and challenges, though my focus was always on prisons. In 2009 I began to practice as a lawyer for the Institute for Legal Assistance (Instituto do Patrocínio e Assistência Jurídica, IPAJ) and Dr. David Matusse became my mentor. The passion for his work and his encouragement gave me enduring perseverance. I would walk long hours under a hot sun; I travelled by 'chapas' (public taxi), every day, to give legal assistance to pre-trial detainees imprisoned in police cells as well as in prisons and assisting them through the legal proceedings.

My interest in conducting this research was also ignited by an encounter with a man called Jenuario. In 2010, at night, returning home from the wedding of his best friend, Jenuario got involved in a fight. He was the only person arrested by the police and was taken to the cells at a police station the cell of a police station. Jenuario spent three months between police cells and prisons. He was charged with the crime of physical offence, caused to a presumed victim who remained unknown. I became his lawyer and when the judge accepted my request of bail, Januario could not pay the large amount of money and remained in prison until when, after different and insistent requests, he was freed under the condition that he would be at court

every week, for three months. This expedited resolution would not have been possible without my legal work conducted through IPAJ. Today Jenuario, a single father, with three kids who live between Inhambane³⁹ and Maputo, makes beautiful handcrafted art work that he sells in different markets of the capital city. When I last met him, during the fieldwork in Maputo, Jenuario told me that he was planning to buy his first car, get his passport and start exporting his artworks to South Africa.

1.1. Key research questions

Initially I wanted to focus on persons in police custody but the difficulties and limitations I encountered attempting to negotiate access meant that the focus of the research changed on pre-trial detainees in prisons. Pre-trial detention in Mozambique was then assessed from a prisons' rather than from a police custody perspective. The initial research questions pursued included the following:

1. What are the conceptual paradigms which shape criminal justice reform and pre-trial detention in police lock-ups, in post-conflict African countries?
2. How and to what extent have ROL and RBA to pre-trial detention been recognized in the legislation, regulations and policies in Mozambique?

³⁹ The town of Inhambane is situated at 500km north of Maputo and it is one of the oldest towns in Mozambique. Dated back to the 10th century, Inhambane was the center for the Arab traders whilst the Portuguese established a permanent trading post during the colonialism are. Today Inhambane is the premier tourist destination of Mozambique.

3. To what extent has a RBA to pre-trial detention been implemented in two police stations of Maputo?
4. Which kinds of factors inhibit the implementation of a RBA to pre-trial detention in police lock-ups in Mozambique?

While the second question remained the same, the remaining three were adapted to the new focus of the research. Question one changed, to give particular emphases to ROL and RBA to pre-trial detention in prisons rather than in police custody. Questions three and four changed completely to focus on the Civil and Central prisons of Maputo.

2. NEGOTIATING ACCESS - THE IMPORTANCE OF PERSONAL CONTACTS AND NETWORKS

The initial research questions were revised in the light of the problems of access. Access to conduct a study in police stations in Maputo is authorised by the General Command of the Police,⁴⁰ which is under the responsibility of the Ministry of Interior. The request for authorization was submitted by an intermediary, one and a half months before my arrival in the country. During that period and then after I had arrived in Maputo, I received no response. Various attempts to approach the General Command as well as Commanders of various police stations were unsuccessful.

The physical presence of the researcher in the field is critical, especially when conducting a study on a sensitive subject such as the criminal justice system

⁴⁰ Some researches in this field were conducted only with the authorization of the Commander of the Police.

in the African continent. The traditionally bureaucratic and centralised approach of governments involves filling out many forms and applying for clearance, does not easily give space to the oral traditions and informality of most of the African world. The awareness of this oral tradition combined with well-established networks is important elements that can assist negotiating access to delicate research spaces.

The good working relationship built with the Mozambican colleagues meant I received a very warm welcome from SNAPRI. The networks built during the three years living and working in Mozambique assisted me in negotiating access. While international organizations had already been contacted from South Africa, local organizations and governmental institutions were approached and access granted during the month of field work.

3. PERSONS MET DURING THE FIELD WORK

The authorization from SNAPRI facilitated access to the Civil and Central prisons of Maputo. The field work in the prisons lasted two weeks, during the month of November 2011, while the interviews with international organizations and national institutions continued until my return to South Africa, in December 2011.

I entered the two prisons of Maputo to give voices to those on the inside. Detainees, officials and the directors of the prisons told me their stories, and shared their perspectives. Outside, I approached international agencies, national organizations and governmental institutions. Below, I am going to

introduce some of the people I met inside the prisons, highlighting key elements which emerged through our conversations.

Inside, I met a sixteen years old boy with no family, no education, who stole a computer from a parked car, to sell it and live for a short time without struggling hunger. I listened to the story of a Bolivian single mother of three children, with debt to pay, who got involved in the international drug trafficking between Bolivia, Brazil and Mozambique. I also met a man of 48 years old contracted as a driver by a transport company, who found himself implicated in a case of money laundering.

Inside prison, I listened to a twenty seven years old prison official with a visible passion for his work and its mission to rehabilitate prisoners and give them back to the society as skilled persons with a better future.

Outside the prisons, a Mozambican lawyer touched on a particular topic related to the political stability of the African countries. He said:

Estamos num bom caminho. O cenário é bom se não tiver factores externos como por exemplo mudanças políticas que as vezes são muito imprevisíveis e disastrosas.⁴¹

[We are on track. The scenario is positive if political changes which can be unpredictable and dangerous do not happen]

⁴¹ Interview conducted during the field work in Maputo, November 2011.

The link to the current political situation of many African and Middle Eastern countries showed the preoccupation around the vulnerability of political structures and organizations.⁴²

Members of international organizations highlighted the concern around the high level of corruption in the country. As one of the interviewees put it: “Talvez a corrupção mata mais que a SIDA em Moçambique. O numero de pessoas quem perdem direitos por causa da corrupção neste País é enorme”.⁴³ [Maybe corruption kills more than HIV/AIDS in Mozambique. The number of people who lose their rights due to corruption is enormous.] The most recent statistics of Transparency International (TI)⁴⁴ show that corruption in Mozambique has worsened. While in 2009 the Corruption Perceptions Index (CPI) was estimated at 2.5 score, the 2011 CPI was worse, at 2.7.⁴⁵

The work conducted during the field work and the stories heard have been enriched. The field work assessed not only conditions of detention and access to legal representation in the two prisons of Maputo, but it has also analysed the role that different international and national organizations play in the criminal justice reforms.

⁴² Around the ‘Arab Spring’ that is affecting Middle East and North Africa, in countries such as Tunisia, Libya, Morocco, Egypt, Syria, Bahrain and Yemen, see Goldstone, J.A. (2011). *Understanding the Revolutions of 2011: Weakness and Resilience in Middle Eastern Autocracies*. Available at <http://www.foreignaffairs.com/articles/67694/jack-a-goldstone/understanding-the-revolutions-of-2011>. Accessed 15 January 2012.

⁴³ Interview conducted during the field work in Maputo, November 2011.

⁴⁴ Transparency International (TI) is a global network that leads the fight against corruption and the devastating impact of corruption on men, women and children around the world. Founded in 1993, TI has played a lead role in improving the lives of millions around the world, raising awareness, diminishing apathy and tolerance of corruption, and implementing practical actions to address it. See http://www.transparency.org/about_us. Accessed 4 January 2012.

⁴⁵ Transparency International's Corruption Perceptions Index (CPI) is a tool launched in 1995 that has been widely credited with putting the issue of corruption on the international policy agenda. The CPI ranks almost 200 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys. The last Index was launched 1 December 2011. See <http://cpi.transparency.org/cpi2011/results/>. Accessed 5 January 2012.

4. RESEARCHER POSITION

The first challenge to face as an Italian woman and researcher from the University of Cape Town (UCT), was how to deal with peoples' preconceptions about my identity. The awareness about biases that we carry with us is an important factor to be considered. Our lives, the way people perceive and treat us, are affected by our nationality, our culture and background, our gender as well as by our role and/or professional position. It has been important to me to be aware of those preconceptions to conduct the study in a different cultural context.

To this extent, this study approaches the definition of human rights as conceived by scholars such as A. A. An-Na'im (1992) and B. de Sousa Santos (1997; 2002; 2006; 2007; 2009; 2011). Understanding any research within the context it is being conducted is essential. As cultures, customs and practices differ are often different between the researcher and his/her subjects, it is important for all academics to contextualise their study and make sense of it through the local environment. This knowledge needs to be accompanied with a form of cultural reflexivity.

Mozambique and its cultural heritage cannot be adequately understood with a universal or generic approach to human rights. The issue of pre-trial detention in Mozambique needs to be looked at through local lenses that consider the reality on the ground. The comprehension of the diversity of this world and its richness needs what An-Na'im (1992: 27) has called 'cross-cultural dialogues', any researcher should, then, be aware of the alternative possibilities to think about other alternatives.

Furthermore, consideration needs to be given to informal methods of justice.

De Sousa Santos notes:

The end of the twentieth century witnessed a global call for the rule of law and the reform of judicial system in many countries of the world. Multilateral financial agencies and international organizations (NGOs) made such changes one of their priorities for their efforts in the developing world. They focused exclusively on the official legal and judicial system, conceived of as a unified system, and left out of consideration the multiplicity of unofficial legal ordering and dispute resolution mechanism that had long coexisted with the official system, many dating back in the case of Africa, to the colonial period. The neglect of non-state legal structures, combined with the intense, globally induced call for reform and changes in the role of the state, ended up widening the gap between the law-in -book and the law-in-action.

(De Sousa Santos, 2006: 39)

Although informal justice systems are more accessible to most Africans than formal systems, new democracies in Africa have neglected and in some instances abandoned traditional mechanisms of justice. This is often a result of pressure from international commitments who do not understand or are not aware of traditional informal justice systems. Only at the beginning of the XXI century did we see revived efforts to resurrect the informal, seen as parallel tools to access justice.⁴⁶

⁴⁶ See Feenan, D. (2002). 'Re-introducing Informal Criminal Justice' in *Informal Criminal Justice* by Feenan, D (ed) Dartmouth Publishing Company. Aldershot: England. Schärf, W. and Nina, D. (eds) (2001). *The Other Law: Non-state ordering in South Africa*. Juta, Wetton. Schärf, W. and Tshehla, B.J., 'When the People do Justice' in *Crime and Justice in Transition* by Dixon, WJ, van der Spuy, E. and Schärf, W. (eds), Juta Wetton.

While ROL and RBA have shown progress at the legislative and institutional level, RBA has not yet been implemented. The globalized theory of human rights needs to be inserted into local contexts. RBA needs a local approach to be fully implemented.

In the book 'Another Day of Life',⁴⁷ the Polish writer Ryszard Kapuscinski wrote (2000: 85): 'L' assoluto esiste in teoria, ma mai nella pratica'. [The absolute exists in theory, but never in practice]. De Sousa Santos (1997: 11) looked towards the future when he said:

...os Direitos Humanos só poderão desenvolver o seu potencial emancipatório se se libertarem do seu falso universalismo e se tornarem verdadeiramente multiculturais.

[Human Rights can develop their emancipatory potential only if freed from their false universalism and become truly multicultural].

5. ETHICAL ISSUES

The first challenge faced in conducting this research was linked to ethical issues: the battle between the formalism of an institution such as UCT and the informality, often oral tradition, of African systems. The Ethic Committee of UCT, responsible for research involving human subject, did not authorize this study until a Mozambican institution officially approved the research. The General Command of the Police in Maputo however failed to respond to

⁴⁷ The book witnesses the Polish reporter's experience in the Angolan struggle against the Portuguese, in 1975.

the request for access. Only once the SNAPRI had formally authorized the access to the two prisons, did the Ethic Committee approve my study.

Another substantial challenge faced when conducting research in prisons is the tension between professionalism and humanism. Drawing this line is not always easy especially when the stories heard are heart breaking. The demand for analysis has to contend with the emotions and feelings solicited during field work. Particularly when individuals' needs are involved, the cold reporting of information in a document such as this study can be professionally adequate but not morally acceptable if not followed by social action.

6. LIMITATIONS OF THE RESEARCH

This study looks only at the conditions of detention and access to legal representation of pre-trial detainees of the Civil and Central prisons of Maputo. The two prisons have been chosen as case-studies to explore the prison environment in Mozambique.

The small number of interviews with pre-trial detainees does not constitute sufficient data to comprehensively assess conditions of detention and access to legal representation at the two prisons. However, the qualitative information collected has provided a critical view onto the perspectives of detainees, officials and senior management.

The research, thus, is only based on the stories heard by the interviewees. No arrest warrants were analysed and no further observation was conducted.

This study then is an exploratory enquiry of a qualitative nature into certain facets of criminal justice reforms with a particular emphasis on pre-trial detainees in prisons.

CHAPTER FOUR

CRIMINAL JUSTICE REFORMS IN MOZAMBIQUE

‘O mundo ocidental não tem nada a ver com o nosso mundo. Em Noiventa deixei de ser juiz pelo rumo que estava acontecendo no mundo da justiça.

Seja como for, o resultado de nossa experiência passada, da justiça popular, um modelo para muitos países Africanos, praticamente a gente o deitou fora. Olhamos para o mundo ocidental. É verdade: há valores universais, mas não tem nada a ver com o nosso mundo’⁴⁸

[The western world has nothing to do with ours. In the 1990s I ceased to work as a judge because of was happening in the world of justice. The result of our past experience, the popular justice, model for many African countries, we just throw it out the window. We look to the western world. It's true: there are universal values, but they have nothing to do with our world]

1. INTRODUCTION

The Republic of Mozambique, situated in South-eastern Africa, is the thirty-fifth largest country in the world and counts twenty millions inhabitants. Maputo is the capital city also known as Lourenço Marques. The official

⁴⁸ Quote from an interview conducted during the field work in Mozambique, November 2011.

language is Portuguese although other Bantu- languages are spoken in the country.

Mozambique is a member of the African Union (AU), Commonwealth of Nations, the Community of Portuguese Language Countries (CPLP), the Latin Union, the Organization of Islamic Cooperation and the Southern African Development Community (SADC).

The criminal justice system of the country underwent the first changes shortly after independence although significant progress only started after Civil War, in 1992. The contribution of foreign countries, the involvement of international organizations, their pressure on the government as well as the establishment of the first civil society associations assisted the reform of the criminal justice system in the country.

This chapter assesses the reforms that Mozambique has undergone within the criminal justice system. International rule of law such as treaties and covenants have been accessed and/or ratified by the country; the domestication of these norms has reformed national legislation and introduced policies and guidelines that comply with international norms. While an overview of the political and constitutional systems is provided, the chapter explores the progress in reform of criminal justice. The assessment considers the role that international donors have pursued within law enforcement and judicial system reforms. Particular emphasis is, then, given to prison reforms that Mozambique underwent since post-independence era and the programs developed by the international community. The last section of the chapter then captures key elements that were underlined by donors interviewed during the field work conducted in Mozambique.

2. RATIFICATION AND DOMESTICATION OF INTERNATIONAL NORMS

Mozambique's international relations with other countries are regulated by Article 17 of the 2004 Constitution that declares:

1. The Republic of Mozambique shall establish relations of friendship and co-operation with other States on the basis of mutual respect for sovereignty and territorial integrity, equality, non-interference in internal affairs and reciprocity of benefits.
2. The Republic of Mozambique shall accept, observe and apply the principles of the Charter of the United Nations and of the Charter of the Organisation of African Unity.

In its state report to the Human Rights Council submitted for the Universal Periodic Review in 2010, Mozambique stated that it 'has a long tradition on the ratification of basic human rights instruments and it constitutes a priority of its foreign policy. The country is also a full member of the majority of regional and international human rights instruments.'⁴⁹

Of the universal human rights treaties, Mozambique has ratified the UN Convention on the Elimination of All Forms of Racial Discrimination and the UN Convention relating to the Status of Refugee in 1983; the International Covenant on Civil and Political Rights (ICCPR) was ratified together with the UN Second Optional Protocol on the Covenant on Civil and Political Rights

⁴⁹ National report for Universal Periodic Review at Human Rights Council, A/HRC/WG.6/10/MOZ/1, para 29.

aiming at the abolition of the death penalty in 1993. The UN Convention on the Rights of Children (CRC) and the UN Convention on the Elimination of all forms of Discriminations against Women (CEDAW) were ratified in 1994 and in 1997, respectively. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was ratified in 1999.

At the regional level, Mozambique ratified the African Charter on Human and Peoples' Rights in 1989, the African Charter on the Rights and Welfare of the Child in 1998. More recently, in 2005, Mozambique ratified the African Charter on Human and Peoples' Rights of Women in Africa and the AU Convention on Preventing and Combating Corruption in 2006.

The domestication of international treaties through national law is recognised at Article 18 of the Constitution that states:

1. Validly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State.
2. Norms of international law shall have the same force in the Mozambican legal order as have infra-constitutional legislative acts of the Assembly of the Republic and the Government, according to the respective manner in which they are received.

National laws have domesticated international provisions contained in various ratified international treaties and covenants, this is discussed further below discussed. However, Mozambique is not party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol. The First Optional Protocol to the International Covenant on Civil and Political Rights, as well as the Optional Protocol to the UN Convention

against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has also not been ratified.

3. OVERVIEW OF POLITICAL AND CONSTITUTIONAL SYSTEMS

The Republic of Mozambique is a multi-party constitutional republic that achieved independence from Portugal in 1975. The anti-colonial struggle was led by the Mozambican Liberation Movement (Frente da Libertação de Moçambique, FRELIMO).⁵⁰

The post-colonial government established a one-party state allied to the Communist Soviet bloc. It supported the liberation movements of South Africa and Zimbabwe,⁵¹ while Apartheid South Africa financed an armed rebel movement in central Mozambique, the Mozambican National Resistance (Resistencia Nacional Mocambicana, RENAMO).

The Civil war between FRELIMO and RENAMO started shortly after independence and lasted until the Rome General Peace Accords, in 1992. The conflict killed more than one million Mozambicans and displaced two million people into neighbouring countries. The Amnesty Laws no. 14/87 and 15/87 determined that nobody was going to be tried or prosecuted for the atrocities committed during the conflict.⁵²

⁵⁰ Clarence-Smith, W. G. (1985). *The Third Portuguese Empire, 1825-1975: A Study in Economic Imperialism*. Manchester: University Press.

⁵¹ The African National Congress (ANC) and the Zimbabwe Africa National Union (ZANU) fought against the apartheid regime in South Africa and the English colonization in Zimbabwe.

⁵² Igreja V et al. (2008). Gamba spirits, gender relations, and healing in post-civil war Gorongosa, Mozambique. In *Journal of the Royal Anthropological Institute (N.S.)*, 14: 353-371.

Since 2007, the Mozambican economy has been located between “an aid success story in Sub-Saharan Africa and a paradox”.⁵³ While both the World Bank⁵⁴ and the International Monetary Fund⁵⁵ (IMF) consider Mozambique a successfully and rapidly growing economy, UNICEF and other organizations, as well as the same World Bank (2007), noted that poverty is widespread.

The promulgation of the Constitution, in 1990, recognised a multi-party political system, free and fair elections and the separation of the executive and judiciary powers. In 2004, the third Constitution further strengthened individual human rights, the independence of the courts and the recognition of legal pluralism (*pluralismo jurídico*) in the country.⁵⁶ Joaquim Chissano was elected President, in 1994 followed by the current President Armando Guebuza, re-elected in 2008, both belonging to the ruling party FRELIMO.

The political and constitutional systems of post-conflict societies in Africa, as elsewhere, has followed a model that, although good in theory, in practice it has increased the gap between the theoretical approach and the reality faced by limited international resources and weak local governments. The optimism of the post-Cold War era was followed by the scepticism of the

See also Pitcher, M.A. (2006). Forgetting from above and memory from below: strategies of legitimation and struggle in post socialist Mozambique». In *Africa*, 76(1): 88-112.

⁵³ See Hanlon, J. (2007). Is Poverty Decreasing in Mozambique? Paper to be presented at the Inaugural Conference of the Instituto de Estudos Sociais e Económicos (IESE) in Maputo, 19 September 2007.

⁵⁴ See World Bank. (2007). Beating the Odds: Sustaining inclusion in a growing economy, the World Bank 's Poverty, Gender, and Social Assessment for Mozambique. Washington: World Bank. Team led by Louise Fox. Available at http://siteresources.worldbank.org/INTPGI/Resources/Moz_PAGASA_Summary.pdf. Accessed on 28 December 2011.

⁵⁵ IMF. (International Monetary Fund). (2007). Republic of Mozambique: Fifth Review Under the Three-Year Arrangement Under the Poverty Reduction and Growth Facility. IMF, 2007: 4.

⁵⁶ Art. 4. of the Constitution recognised different normative and dispute resolution systems coexisting in Mozambique.

democratic model in the 1990s.⁵⁷ Political and constitutional systems have been built on imported Western democratic principles; these have shown their incompatibility with African contexts. Although positive examples are represented by countries such as South Africa, and Mozambique,⁵⁸ AfriMap has nevertheless argued that:

the greatest challenge that Mozambique faces in establishing a stable and accountable democratic government is the increasing dominance of a single political party in its political system. Thus, as important as ensuring free and fair elections, is the struggle to maintain internal democracy within that dominant party, FRELIMO, the *Frente de Libertação de Moçambique*, that led the country in the struggle for independence from Portugal. This task, moreover, must be placed in the context of a country with high levels of poverty, where national politics risks becoming the province of a wealthy elite, without connections to the ordinary people... FRELIMO has a long history of struggle for liberation and progress in Mozambique, as well as a strong organisational culture: it should build on this tradition to ensure that its own dominance does not harm the long-term development of democracy in the country it helped to liberate.

(Afrimap, 2009: 4)

Thus, although Mozambique is considered a successful post-conflict democracy, where rule of law have been recognised, over the years, the political organization of the country remains an unstable variable that greatly affects the future of the country.

⁵⁷ Ottaway, M. (2003), Promoting Democracy after Conflict: The Difficult Choices. In *International Studies Perspectives*, 4: 314-322.

⁵⁸ Englebert, P. (2008). Postconflict Reconstruction in Africa: Flawed Ideas about Failed States. In *International Security*, 32(4): 106-139.

4. CRIMINAL JUSTICE SYSTEM REFORM AND DEVELOPMENT AGENCIES

Over the last two decades, the international community has supported criminal justice reform in Mozambique. Since the beginning of the 1990s, law enforcement agencies, judicial and prison systems have developed. International rule of law have been ratified and domesticated as national legislation and policies that have reformed the legal and institutional levels of the criminal justice system.

Countries such as Canada, Italy, Sweden, Portugal, Norway, the Netherlands, Denmark, Ireland, Spain and Germany have been the main donors within the criminal justice sector.⁵⁹ Multilateral agencies such as the World Bank, EU, UNDP and UNICEF have also supported reform in this sector. International organizations such as the Danish DANIDA, Community of Sant' Egidio, USAID, the UK Department for International Development (DFDI) and OXFAM, and more recently OSISA, SHARE and MLAL have assisted criminal justice developments.

While UNDP has worked in Mozambique since its independence, the EU and DANIDA have supported criminal justice reforms in the country since the beginning of the 1990s. Starting in 2005, UNICRI, SHARE, OSISA and MLAL have channelled their assistance to particular areas within the criminal justice system.

⁵⁹ AfriMap. Open Society Initiative Southern Africa, (OSISA). (2006). Mozambique: Justice Sector and the Rule of Law: A Review. Johannesburg: Open Society Foundation for Southern Africa.

The following three subheadings assess the reforms within law enforcement agencies, the judicial and prisons systems in Mozambique. Donors and their project focuses are also outlined.

4.1. Law enforcement agencies

Protocol V of the Rome General Peace Agreement of 1992 replaced the Mozambique People's Police (PPM) with the Police of the Republic of Mozambique (Policia da República de Moçambique, PRM) and identified key principles such as respect of the law, maintaining public order, as well as preventing and suppressing crime.⁶⁰ Article 254 of the Constitution and Law 19/92 outlined the independence of the PRM, its responsibilities and the obligation to respect rule of law and citizens' human rights. In 1994, the Mozambique Police, consisting mainly of demobilised soldiers, amounted to 18 047 members.⁶¹

In 1997, the Defence and Security White Paper reorganised the existence of internal police, assigning them to the PRM and intelligence police. Specific responsibilities were given to the Criminal Investigation Police (Policia de Investigação Criminal, PIC) and the Rapid Intervention Force (Força de Intervenção Rápida, RIF). In 2001 the Ministry of Interior launched an initiative to combat crime and establish dialogue within communities, between the PRM members and their citizens through the creation of community policing councils (CPC). In 2005, there were 1 125 CPC in the country. Although literature has shown the positive contribution of CPCs in reducing crime, scholars such as Kyed have noted that this model has increased the competition among different layers of policing authorities in

⁶⁰ Rauch, J. and van der Spuy, E. (2006). Police Reform in post-conflict Africa: A Review. Idasa. Pretoria: South Africa.

⁶¹ Baker, B. (2003). Policing and the Rule of Law in Mozambique. In *Policing and Society*, 13(2): 146.

the country.⁶² Furthermore, concerns have also been shown around the volunteer position of CP officers who do not receive subsidies from the government.⁶³

Literature indicates that the country has made significant progresses in adopting the adequate legislation to assure the respect of democratic principles and rule of law.⁶⁴ In 2003 law enforcement agencies adopted the Strategic Plan of the Police of the Republic of Mozambique 2003-2012 (Plano Estratégico da Policia da República de Moçambique, PEPRM). This policy made provision for the analysis of crime trends, as well as budget for the adequate functioning of the PRM, its future objectives and indicators. The policy has also focused on the development of initiatives to demilitarise the PRM and beginning to build relationship with communities and their citizens.

Inadequate Police training as well as the lack of financial resources are considered the biggest challenges of the police in Mozambique; the low level of education of police officers and the lack of intensive quality training have been tackled with the creation of the Police Science Academy (Academia de Ciências Policiais, ACIPOL), established in Michafutene, 15 Kilometres from Maputo. The new members of the PRM must attend at least a nine month basic training course. Human Rights courses have also been included in the PRM curriculum although training focuses particularly on policing duties.⁶⁵

⁶² Kyed, H. M. (2010). The Contested Role of Community Policing 'New' non-state actors in the plural legal landscape of Mozambique. DIIS Working Papers, 26. See also Kyed, H. M. (2009). Community policing in post-war Mozambique. In *Policing and Society*, Vol. 9, No. 4: 354-371.

⁶³ Ibid.

⁶⁴ AfriMap, Open Society Initiative Southern Africa, (OSISA). (2009). Mozambique: Democracy and Political Participation. London: United Kingdom.

⁶⁵ US Department of State. (2004). Mozambique Report on Human Rights Practices. Available at <http://www.state.gov/j/drl/rls/hrrpt/2004/41617.htm>. Accessed on 1 November 2011.

Countries such as Spain, Switzerland, Portugal, Italy and international organizations such as DANIDA, UNICEF and UNDP have implemented police reform projects in the country. Infrastructure, organizational restructuring and provision of equipment represent the framework through which donors have assisted police reform in Mozambique.⁶⁶ International assistance has also focused on the establishment of higher training for the PRM members as well as specific human rights courses, for example, for the implementation of Law 6/2008, against domestic violence.

Although *de jure* the RPM is an independent body, the police have been influenced by the political control of FRELIMO. Furthermore, the absence of oversight and police accountability mechanisms has worried the international community although the National Commission for Police Affairs (Comissão Nacional dos Assuntos Policiais, COMPOL) was created after 1992. This organisation has lacked human and financial resources and has never functioned adequately.⁶⁷

Low salaries, lack of resources or equipment, the high level of corruption⁶⁸ and inadequate flow of information within the police and between the police and other agencies of the criminal justice system play also a negative role on the functioning of the safety and security mechanism in the country.

In this context, Mozambican national organizations such as LDH and international human rights reports⁶⁹ have underlined the involvement of the

⁶⁶ Supra note 12.

⁶⁷ Supra note 65.

⁶⁸ See the work of Mosse, M. (2006). *A Corrupção do Sector da Justiça em Moçambique* [The Corruption of the Justice Sector in Mozambique]. Documento de Discussão 3. Centro de Integridade Pública de Moçambique. Maputo: Moçambique.

⁶⁹ AI (Amnesty International). (2009). *I can't believe in justice any more: Obstacles to justice for unlawful killings by the police in Mozambique* (AFR 41/004/2009). Amnesty International Report 2010, *State of the World's Human Rights*, Human Rights in the

police in acts related to excessive use of force, arbitrary arrests and detention, extrajudicial executions and use of torture and ill-treatments.⁷⁰

Police reforms in Mozambique ensued shortly after 1992. Legislative reforms have inserted international rule of law into the national legal framework. Donors have focused on a ROL approach to police reforms, showing positive results at the legal and institutional levels. A RBA has begun to be pursued by international community through PRM human rights training and the implementation of CPC reform. However, RBA is yet to be fully implemented. Efforts aimed at developing a human rights culture within the police agency and civil society organizations need to be undertaken.

4.2. The judicial system

The Mozambican judicial system is regulated by the Organic Law of the Judicial Courts (*Lei Orgânica dos Tribunais Judiciais*) that was drafted in 1992. It recognises district, provincial courts and Supreme Court of Maputo as well as special courts such as the administrative, customs, fiscal, maritime, and labour courts.⁷¹

The community courts, fundamental players in the resolution of civil and criminal matters such as divorce, and other social and family conflicts in the country, were introduced with Community Courts Law (*Lei dos Tribunais Comunitários*).⁷² Even though recognised by law, these informal methods of justice have not received support or financial assistance, nor were they

Republic of Mozambique (POL 10/001/2009). See also AI (Amnesty International). (2008). *Licence to Kill: Police accountability in Mozambique* (AFR 41/001/2008).

⁷⁰ US Department of State. (2010). *Mozambique Report on Human Rights Practices*. Available at <http://www.state.gov/documents/organization/160135.pdf>. Accessed on 30 December 2011.

⁷¹ *Supra* note 60.

⁷² *Ibid.*

recognised in the Constitution promulgated in 2004. Article 4 of the Constitution states: 'the State recognises the different normative and dispute resolution systems that coexist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution'. It is hoped that with the introduction of alternatives to imprisonment, the community courts will begin to receive adequate support. Once the current reform has been passed as law, these courts will be able to try crimes whose sentences carry up to eight years imprisonment.⁷³

In 2003, government established an oversight mechanism for the justice sector, the Coordinating Council for Legality and Justice (Conselho de Coordenação da Legalidade e Justiça, CCLJ). This organ created the Integrated Strategic Plan (Plano Estratégico Integrado, PEI) but the policy has not improved the efficiency of the system.

Scarcity of financial and human resources to cover the needs of the country, low salaries and poor conditions of the courts, especially at the district level, represent some of the biggest challenges in the judicial system in Mozambique. Further obstacles are the lack of well-trained judges and lawyers, the inadequacy of the training⁷⁴ and the lack of legal reference books and/or interpretative guides for practitioners, academics and students.⁷⁵ Although the number of judges, prosecutors (procuradores) and lawyers has increased over the years, the current 200 judges and 700 lawyers⁷⁶ do not represent a sufficient number of practitioners that can address the needs across the country.

⁷³ Data collected during the interview with a governmental institution, November 2011.

⁷⁴ The Centre of Judicial and Juridic Formation (Centro Formação Jurídica e Judiciária, CFJJ) is the only centre that train judges in the country.

⁷⁵ Greiber, T. (Ed.) 2006. Judges and the Rule of Law. Creating the Links: Environment, Human Rights and Poverty. IUCN, Gland, Switzerland and Cambridge, UK.

⁷⁶ Information collected during the field work in the country.

The challenges to the judicial system and the backlog of cases in the judicial courts in Mozambique limit access to justice. While the Mozambican Bar Association (Ordem dos Advogados de Moçambique, OAM) and the IPAJ are required to provide free representation, in practice access to legal counsel in the country is restricted. Specifically in criminal cases, arrestees and prisoners find themselves trapped in a malfunctioning criminal justice system: starting with the police they experience the weaknesses of the prison and the judicial structures.

Although the separation of the powers was *de jure* recognised in 1990; and although the Constitution of 2004 strengthened the independence of the courts, the President of the country elects *de facto* the president of the Supreme Court with the Higher Council of the Judiciary (Conselho Superior da Magistratura Judicial, CSMJ).⁷⁷

While the international community have urged the country to enhance the independency of the judiciary, the judicial system appears to remain highly politicised. The UN Special Rapporteur on the independence of the judiciary noted 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, including the judicial career, as well as for career advancement and job security'.⁷⁸

Legislative reforms, constructing infrastructure and providing equipment have been key priorities targeted by international aid organisations assisting the judicial system in Mozambique. The EU, UNDP and DANIDA have

⁷⁷ Supra note 36.

⁷⁸ Visit of the Special Rapporteur on the independence of judges and lawyers at December 2010. See data available at <http://www.unhcr.org/refworld/country,,,MOZ,456d621e2,4d071f3f2,0.html>. Accessed on 12 January 2012.

supported an ROL approach since the beginning of 1990 while RBA has lagged behind. Judges and lawyers' training and human rights courses have begun to be implemented in the last few years. The same agencies mentioned above, as well as UNICEF and OSISA, in partnership with IPAJ and LDH have increased lawyers and judges' training on human rights since 2005.⁷⁹ Informal methods of justice and the involvement of civil society organizations have not received particular attention, although the emphasis on funding alternative measures to imprisonment is likely to support community courts and the participation of civil society organizations within the judicial system.

4.3. Prison system

During the colonial era, Law Decree 26.643 of 28 May 1936 established the existence of three different centres of imprisonment reserved for Mozambicans: centres of detention,⁸⁰ correctional colonies and farms to serve longer sentences and special institutions. In practice, these centres were never used and Mozambicans condemned to long sentences were sent to the cotton and sisal plantations or deported to the cocoa plantations of Sao Tome and Principe. At the beginning of the 1960s, during the anti-colonial struggle, Mozambicans began to be incarcerated in the centres that were reserved for Portuguese. Some places were designed as detention establishments, the 'comarca' institutions⁸¹ were reserved for sentenced prisoners, while central prisons and penitentiary colonies housed inmates with longer sentences. Schools and hospital prisons as well as centres for political prisoners were

⁷⁹ Data collected during interviews with donors, November 2011.

⁸⁰ Preventive Detention Centres were established only for pre-trial detainees.

⁸¹ After XV century, the Portuguese Empire was divided into six 'comarcas' or administrative units headed by an administrative and judicial magistrate who represented the royal power in each jurisdiction of the Kingdom of Portugal. In the 16th century, the 'comarcas' started to be known as provinces. The 'comarca' is a territorial division in the judicial system. It indicates the area covered by a lower level court. It may correspond to a municipality, or group together several small municipalities under one court.

also created as special institutions. Places of detention were the cells of the Police and Public Security Commands (Comandos da Polícia de Segurança Pública) an exception to this was in the capital city where an establishment operated specifically to detain pre-trial detainees: the Civil prison of Maputo, built during the 1930s and 1940s.

After independence, Law Decree 1 of 1975 subordinated the prisons to the Ministry of Justice through the Inspectorate of the Prisons (Inspeção Prisional). The creation of PIC separated the detention centres, placing them under the Ministry of Interior, from all the other prisons, which were under the Ministry of Justice.

Independence brought changes to prisoners' right to work. Law Decree 15/74 introduced fundamental measures aimed at the rehabilitation of prisoners, such as creating opportunities for them to work outside the prisons, for private entities. Salaries were then paid to the institutions and portion was distributed to the prisoners. This law benefited hundreds of prisoners until the first decade of the 1980s, when criminality in the work place became a problem and private entities stop recruiting inmates.⁸² An Assistance Fund for prisoners (Fundo de Auxílio aos Reclusos) was also created after independence to assist them and their families during the detention and after the release.⁸³

Starting in 1975, Mozambique has attended the international congresses organised by UN around the Prevention of Criminality and Treatment of Prisoners, which promotes the rehabilitation of prisoners. In the years following 1975, the number of prison farms (Centros Prisionais Abertos)

⁸² See Brito, L. & Dauto, U. A. (2000). O Sistema Prisional em Moçambique [The Prison System in Mozambique]. Amaral, Aires do. (coord.) Maputo: Projecto de Apoio ao Sector da Justiça - PNUD.

⁸³ Ibid.

increased and prisoners with good conduct or those who were at the last phase of their sentence were sent to these centres of detention. Agriculture activities handcraft, carpentry and metalwork, as well as wood sculpting, and other activities were taught to the prisoners. The Civil War caused the closure of these centres and prisoners returned to be detained in traditional, closed prisons.⁸⁴

At the end of the 1980s, the government proposed a new law that respected the provisions contained in the SMR, this focuses on prisoners' human rights, but prison reforms were postponed due to the on-going war that ended in 1992.

After the Kampala Declaration on Prison Conditions in Africa, authored in 1996, the first studies⁸⁵ of Mozambican prisons were financed by the UNDP. Research was conducted to explore the history of the penal law of the country and the reforms that the prisons system underwent until the beginning of the XXI century. In 2002 the Council of Ministers released a new prison policy (Política Prisional)⁸⁶ that strengthened prisoners' human rights; it did so through making official policy the respect of human dignity, separation of detainees, cooperation within the CJS agencies and collaboration between the prison organization and civil society. Although not all the ministries were consulted, such as the Ministry of Health and Social Welfare, the policy exposed the necessity of a structural reform within the prison system.⁸⁷

⁸⁴ Ibid.

⁸⁵ Brito, L. (2002). *Os Condenados de Maputo [Condemned of Maputo]*. Maputo: Projecto de Apoio ao Sector da Justiça - PNUD. José, N. And al. (2001). *Os Centros Prisionais Abertos em Moçambique [Correctional Farms in Mozambique]*. Maputo: Projecto de Apoio ao Sector da Justiça - PNUD.

⁸⁶ Resolution n. 65/2002 of 27 August 2002.

⁸⁷ Supra note 12.

The complete unification of the prisons under the Ministry of Justice was legislated with Law Decree 7/2006, creating National Service for Prisons (Serviço Nacional das Prisões, SNAPRI). It fell to the newly formed SNAPRI to reform the prison system. The duties of SNAPRI include; the oversight of the prisons, management supervision as well as execution of security measures and the promotion of labour and work opportunities for prisoners.

In 2009 the UNDP began a project aimed at strengthening national capacity and supporting the legal reform in the prison sector.⁸⁸ The goal of the project was to improve the prison service's efficiency by amending the legislative framework in the prison system, in-line with the Constitution and with universally accepted principles on the treatment of prisoners. Reducing prison overcrowding and social rehabilitation through the introduction of alternatives to imprisonment were further goals of the project, motivated by continued overpopulation, poor conditions of detention and lack of access to justice.

Implemented by the Ministry of Justice, foreign experts were employed. Consulting processes were conducted within SNAPRI, institutions of the justice sector, civil society organisations and other UN agencies. While prisons law has been revised and new legislation on alternatives to prisons was produced and approved by the Council of Ministers, the Assembly of the Republic (Assembleia da República) has continuously postponed the passing of the bill.⁸⁹

⁸⁸ See information available at <http://www.undp.org/mz/en/What-we-do/Democratic-Governance/Ongoing-Projects/Strengthening-National-Capacity-and-Support-to-Legal-Reform-in-the-Prison-Sector>. Accessed on 15 January 2012.

⁸⁹ See data available at <http://www.poptel.org.uk/mozambique-news/newsletter/aim426.html>. Accessed on 15 January 2012.

This reform will bring considerable changes to laws dating back to the colonial period: the Penal Code and the Criminal Procedure Code. The Code of Judicial Costs, too, is under review, to reduce the financial barriers to justice that exist as a result of the high levels of poverty in Mozambique. The expensive court fees that citizens need to pay to access justice and the high costs of legal assistance are long-standing impediments to accessing justice in Mozambique.⁹⁰

International organizations have developed prison reform projects aimed at establishing and supporting the rule of law. Multilateral agencies such as EU, the UNDP and UNICEF and international organizations such as DANIDA and UNICRI have supported prison system development in the post-conflict era.

Law reforms, infrastructure construction, renovations of existing facilities and provision of equipment have been the key areas of focus for international donors. Training officials, improving conditions of detention, and access to justice were only considered at the beginning of 2000. RBA has been pursued at the legislative and institutional level, without due consideration of the needs of prisoners, particularly the needs of pre-trial detainees. Furthermore, informal methods of justice, the involvement of civil society organizations and non-state actors have not been taken into account with the view to expanding access to justice across the country. An exception to this is the Community of Sant' Egidio, that has focused on the access to health of those prisoners affected by HIV/AIDS and the local churches and mosques that have accessed prisons in Mozambique since the 1990s, other organizations have begun to implement prison projects only at the end of 2000.

⁹⁰ Supra note 60.

National organizations such as LDH and the Mozambican Association of Women in Legal Careers (Associação das Mulheres Moçambicanas de Carreira Jurídica, AMMCJ), or governmental institutions such as IPAJ only began to consider these issues after 2000. Organizations such as MLAL and SHARE, among others, have begun to assist prisoners and pre-trial detainees, affording them greater access to human rights and justice. However this has only been since 2007.

Given the above assessment the international community has primarily pursued ROL approach to prison reforms in Mozambique. The legislative and institutional levels of the prison system have undergone fundamental changes since independence; these are commendable and should be noted. Donors have focussed on law reforms and policies that respect international treaties and guidelines. As a result, RBA outcomes are evident only at the legislative and institutional level; the next step in this process would involve non-state actors and civil society organizations.

5. DONORS' VIEWS ON CHALLENGES CONFRONTING CRIMINAL JUSTICE

This section captures the voices of donors interviewed during the field work in Maputo. Meetings with the European Union delegation in Maputo,⁹¹ the UNDP,⁹² UNICRI, DANIDA, OSISA and SHARE were arranged before my

⁹¹ See information available at http://eeas.europa.eu/delegations/mozambique/eu_mozambique/tech_financial_cooperation/governance/index_en.htm. Accessed on 27 December 2011. The EU relationship with Mozambique is governed by the Cotonou Agreement, which was signed with Mozambique in 2000. EU finances projects on the CJS through the governance programming, part which the European Development Funds (EDF) and part is envisaged through the PALOP programme and via the budget line for human rights and democracy

⁹² UNDP has worked in Mozambique since 1976, when the Standard Basic Framework Agreement was signed, establishing UNDP's presence in the country. Justice, Security and the Rule of Law is the fourth focus of the country program

arrival in Maputo. The interviews focused on assessing the roles these various stakeholders played and the challenges they had encountered during the reform process.

UNDP, EU and DANIDA belong to a category of long-standing donors. Since the 1990s these organizations have supported an ROL approach through legal reforms, the construction and rehabilitation of infrastructure, such as courts, prisons and an emphasis on legal, judicial and police training.

UNICRI has focused its programs on minors in conflict with the law and/or at risk. It has created juvenile justice mechanisms in Mozambique.⁹³ Starting in 2006, UNICRI has promoted the rehabilitation, the refurbishment and the opening of the first Criminal Prevention Section of the Tribunal for Minors as well as the first pre-trial Observation Centre and the first post-trial Juvenile Rehabilitation Centre in Boane, 40 Kilometres from Maputo.

SHARE has focused its resources on legal assistance to illegal immigrants detained in the 18th police station in Maputo. OSISA has concentrated its role mainly on research and advocacy. At present OSISA is supporting IPAJ and civil society organizations with judicial and legal training in Maputo as well as in the other provinces of the country.

Donors were asked to outline key projects undertaken to assist the justice sector in Mozambique; and to discuss key challenges confronting access to security and justice in the country. The interviews have particularly focused on views relating to pre-trial detainees as a particularly vulnerable group within the prison system. Finally, the interviews looked at the current efforts

⁹³ Available at http://www.unicri.it/emerging_crimes/youth/mozambique/. Accessed on 1 November 2011.

and best strategies to safeguard protection of detainees' human rights. For the purposes of this discussion we focus on common themes that were underlined by donors.

The first theme concerned the positive advancement that the criminal justice system in Mozambique has undergone over the last two decades. Donors highlighted that the legal reforms undertaken and the support to formal institutions, through infrastructural construction and rehabilitation have shown positive results. The increase of judicial and legal training has furthermore assisted the development of formal justice in the country. The appointment of Benvinda Levi as Ministry of Justice and her innovative commitment to the respect of the rule of law and prisoners' human rights has been welcomed by donors. Formerly secretive places such as prisons, have opened their doors to civil society, and to mass-media and national NGOs.

In 2009, the LDH signed an agreement with the Minister of Justice to conduct unsupervised visits in all the prisons in the country.⁹⁴ However there are still numerous obstacles encountered working with law enforcement agencies, under the Minister of Interior. Police holding-cells are not yet accessible. However, stakeholders highlighted the generally positive path that Mozambique has walked in pursuit criminal justice reform. Those interviewed underlined that good relationships with governmental institutions are of critical importance to successful work within the criminal justice system. Although long-standing donors consider the cooperation with institutions as a given, new and smaller organizations highlighted that working within the criminal justice system in Mozambique requires diplomatic and relationship-building skills.

⁹⁴ Data collected during the field work, November 2011.

More negative aspects underlined by the international community related to the challenges and weaknesses of the criminal justice reforms. Donors highlighted that although legal reforms had been undertaken, there has been a lack of planning relating to the budget required to implement legal reforms. The ROL approach to criminal justice reform does not go beyond the legislative and institutional levels. Security and justice in Mozambique are not effectively delivered to the people. Although the number of judges, lawyers and prosecutors has increased, their knowledge and training are insufficient to adequately meet the needs of the country and its citizens. Scarcity of financial and human resources, poor financial planning, lack of adequate training for judges, lawyers and prosecutors, low education of police members and generally of people working within the criminal justice system represent, according to the donor community, the biggest challenges. High levels of corruption in the country were also underlined by donors and confirmed also by the last statistics available from TI and Afrobarometer.⁹⁵ Corruption is an endemic 'disease' that donors have experienced over the years, especially with the construction of infrastructure. While international budget allocated to infrastructures has decreased, stakeholders continue to build courts and rehabilitate prisons. It was noted that Chinese companies have become involved in the building of courts, tribunals and ministries in Maputo. Donors highlighted that corruption may decrease in the construction business due to the direct involvement of Chinese companies and the effective bypassing of Mozambican companies well known for corrupt practices.

⁹⁵ See data available at <http://www.afrobarometer.org/>. Accessed 12 December 2011.



Picture 1: Prosecutor General's Office



Picture 2: Palace of Justice

The last two themes that were highlighted during the interviews are the punitive culture of the majority of Mozambican criminal justice practitioners who were trained after independence and the *"invisibility"* of foreign prisoners in the Mozambican prisons. While a new generation of practitioners, trained since the beginning of the XXI century, may be able to shift the punitive mentality, the second, more challenging issue of 'invisible' foreigners was raised during interviews. The ease of regional and global travel and the increase of international crimes have swelled the number of foreign prisoners. Donors expressed concern around the *"invisibility"* of these detainees within the system; this was also evident during the field work in the Civil and Central prisons of Maputo. Illegal immigrants and foreign prisoners disappear into the prison system. International drug trafficking, money laundering and illegal presence in the country are the crimes for which foreigners are arrested and detained. The bureaucracy of diplomatic representation procedures and/or the absence of representatives in the country in which they are imprisoned make assistance very difficult. Language barriers and lack of organizations that support this vulnerable group were highlighted by some of the interviewees.

Finally, the creation of alternative measures to imprisonment has had a positive impact on criminal justice reform in Mozambique. There is the

expectation that this reform will address the biggest problem facing the Mozambican prison system, namely: overcrowding. This reform, once promulgated, will introduce not only alternative measures to imprisonment but it will also modify the Penal and Procedure Criminal Codes, which date back respectively to 1886 and 1929. SNAPRI will be transformed into Penitentiary National Service (Serviço Nacional Penitenciário, SNP) and the new Statute of SNP members as prison officials (Estatuto dos Membros do SNP com Funções de Guarda Prisional) will be introduced.

Once again legal reforms are going to be established but are Mozambique and criminal justice practitioners ready to implement this reform? Have judges, lawyers and prosecutors been trained to apply this law? Has civil society been informed about the changes that this reform will bring in the criminal justice system? Have donors planned the budget to sustain the implementation of this reform? If not, is Mozambique able to directly finance this reform? The reforms envisaged are ambitious and it is not clear to what extent the above-mentioned issues have been properly anticipated.

6. CONCLUSION

The ratification and domestication of international norms has contributed to the development of national legislation that extensively complies with rule of law and individuals' human rights. The reforms that the country has undertaken to enhance the constitutional and political system begun during post-independence era. The judiciary, police and prison systems have progressed since the end of the Civil War, in 1992. Laws, policies and guidelines that respect international standards have been developed over the last three decades.

Since the beginning of the 1990s, donors have pursued ROL approaches towards criminal justice reforms in Mozambique. Police agencies have been restructured and given a revised mandate of protecting the country from crime and defending its citizens' human rights. Three layers of courts have been recognised and the judiciary has been established with *de jure* independence from the Executive.

Since the Conference of Human Rights held in Vienne, in 1993, a new rhetoric has been used to frame and describe criminal justice reform approaches, worldwide, calling it a human rights-based approach. The conceptual framework of RBA, as explained in Chapter Two, appeared at first glance to be completely distinct from ROL. However, in Mozambique, RBA and ROL have overlapped and although new elements set RBA apart from ROL, RBA is also based on similar normative frameworks, such as international treaties and guidelines.

In Mozambique, starting in 2000, donors began to insert human rights commitment to reform of criminal justice in the country. Detention centres were unified under the Ministry of Justice. A prison strategy was established that respects the condition of detention norms contained in SMR and the training of judges and lawyers was prioritised. In 2003, the PRM adopted the first Strategic Plan 2003-2012 PEPRM that contains initiatives to demilitarise the PRM and build relationships between the police, communities and their citizens. The Constitution promulgated in 2004 has strengthened the protection of individual's human rights. Donors and the government pursued RBA only at the legal and institutional level. The involvement of civil society organizations has not considered support for informal methods of justice and non-state actors. The needs of prisoners and their perspectives as well as those of pre-trial detainees and other citizens were not taken into account. Both ROL and RBA to criminal justice reforms

in Mozambique have not gone beyond the reform of law and support of formal justice. Although there are a few new organizations that have begun to support these ideas, implementing projects to ameliorate prison conditions and access to justice, the commitment does not meet the needs of the whole country.

These considerations have also been underlined by donors interviewed during the field work in Maputo. Key themes highlighted by the international community suggest that ROL and RBA have had positive outcomes at the legal and institutional levels but RBA's implementation can be taken further. This will be illustrated, in practice, in the next chapter, through the findings of the field work conducted in the Civil and Central prisons of Maputo.

CHAPTER FIVE

CONDITIONS OF DETENTION AND ACCESS TO LEGAL REPRESENTATION IN THE CIVIL AND CENTRAL PRISONS OF MAPUTO

No one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.

(Mandela, 1994: 187)

1. INTRODUCTION

This chapter analyses the data collected in the field work that took place between 12 November and 15 December 2011, in the Civil and Central prisons of Maputo. This study has chosen the two prisons as case-studies to evaluate the conditions of detention and access to legal representation for pre-trial detainees.

This chapter will explore the following questions: To what extent has RBA been applied to pre-trial, in practice, in the Civil and Central prisons of Maputo? What are developments that have taken place in the conditions of detention and access to legal representation in the two prisons? What are the challenges and the weaknesses that inhibit the implementation of RBA?

Interviews with 20 detainees, 10 officers and the directors of the two detention centres were conducted during a period of two weeks.

The rights to physical and moral integrity, property belonging to a detainee, adequate food and drinking water were analysed together with the right to clothing and bedding. The accesses to health care and to have contact with the outside world were also assessed with particular attention to women and children detained.

The chapter is divided into five headings that introduce the places and the persons interviewed, assess the conditions of detentions, classified in 8 different themes and evaluate access to legal representation for pre-trial detainees.

2. PLACES AND PEOPLE INVOLVED

2.1. The Central and Civil prisons of Maputo



Picture 3: Civil Prison



Picture 4: Central Prison

The Civil and Central prisons of Maputo were built during the colonial era. The Civil prison was built during the 1930s-1940s with a capacity of 250 prisoners while the Central prison was built to hold about 700 prisoners, during the 1960s.

The Central prison is situated in Machava, a mainly residential suburb in the north-western outskirts of the capital city. The Civil prison is located in the city of Maputo, in the diplomatic and residential neighbourhood of Sommerschield. This was the main reason, considered by a multi-technical committee which includes the Ministries of Justice, Public Works and Finance, for suggesting the conversion of the Civil prison into a public utility building.⁹⁶

Statistics collected during the field work demonstrated that the prison population of the Civil prison, on 29 November 2011, counted 143 people and 2,120 in the Central prison. The Civil prison counted 130 men and 13 women, six of whom were foreigners: two Zambians, one Bolivian and three South Africans. Among the male population of the Central prison 917 were awaiting-trial detainees and 1,203 were condemned. Six detainees and seven condemned were foreigners. Detainees were citizens of South Africa, Swaziland, Malawi, Cameroon, Zimbabwe and Congo while those condemned also included two men from Guyana and Portugal. Among the prison population, 167 people were between 16 and 21 years old: 128 were serving correctional sentences whilst 30 were serving sentences longer than two years. Among the detainees, 499 people were detained beyond the legal pre-trial detention term: 276 people for more than three months while 223 people had been detained for more than one year.

⁹⁶ See data available at <http://www.opais.co.mz/index.php/sociedade/45-sociedade/14835-cadeia-civil-de-maputo-podera-ser-transferida-por-estar-localizada-no-centro-da-cidade.html>. Accessed on 1 December 2011.

2.2. The persons interviewed

2.2.1. Pre-trial detainees

Among the twenty detainees, 17 were men and three women. Nine of them were more than 30 years old, seven people were between 22 and 30 years old and four were between 16 and 21 years old.

15 of the interviewees were arrested because they were suspected of robbery or theft; one prisoner was detained for drug trafficking and another for personal offence whilst two people were suspected of murder and the last one was arrested for attempting to vote twice at the presidential election in 2009.

Eight of the detainees had already been in prison for three months; six of them were detained for more than three months and the remaining six had already been in prison for more than one year: one had been detained for around three years.

2.2.2. Directors and prison officials

The director of the Civil prison had been working in the institution for only few months although he had been working in a similar position for more than fifteen years, at different prisons across the country. The director of the Central prison had been there for the last five years, and had experience facing the changes and the challenges of the institution.

Four of the officials interviewed were female and six were male. All of them were between 27 and 43 years old. Six of the officials had been working in prisons for a period of between eight and 14 years while the remaining four had started in the previous six years.

Three of the officials had attended a month course after serving the military service while the other seven had attended training for a period between seven and nine months, in the PRM schools at Machafutene and Matalane (Escola Prática de Matalane), in Maputo province.

While most of these officials were originally members of the Popular Forces of the Liberation of Mozambique⁹⁷ (Forças Populares de Libertação de Moçambique, FPLB), the remaining three were soldiers.

Interviews with the directors showed that there were between fifteen and thirty officials on duty per shift in the Civil prison, and around forty in the Central prison. The ratio in the Civil prison was 1 official to between 5 and 10 inmates, while at the Central prison it was 1 to 55.

The director of the Civil prison underlined the on-going *de facto* dualistic system of the prison: some officials are employed by the Ministry of Interior while others work for the Ministry of Justice. The first ones are those who were part of FPLB while the second group belong to the new and younger generation, born after independence.

⁹⁷ Tsucana, F.F. (2005). Organização do Estágio Curricular do Curso de Bacharelato em Ciências Policiais [Curriculum organization of the Degree on Police Sciences]. Dissertação apresentada para o cumprimento dos requisitos parciais para a obtenção do Grau de Mestre em Desenvolvimento Curricular e Istrucional. Universidade Eduardo Mondlane. Faculdade de Educação. Available from <http://www.saber.ac.mz/bitstream/10857/1788/1/EduP-032.pdf>. Accessed on 27 December 2011.

During the interviews, the youngest officials were more open to discussing their duties and the conditions of the detainees. Some of them showed a strong belief and commitment to their job and their role. An officer, talking about the relationship with the detainees said:

A situação mudou muito. Antes nos usavamos metodos de tortura e chicote. Agora isso não é mais possível; se fazer-mos, nos somos os primeiros a ser responsabilizados. A nossa missão é regenerar aqueles individuos que cometeram um erro na vida e devolver os à sociedade.

[The situation changed a lot. Before we used methods of torture and sjambok, now it is not possible anymore; we are the first ones to be accountable. Our mission is to rehabilitate individuals who made a mistake in their lives and give them back to the society].⁹⁸

The oldest officials showed more resistance to talking about conditions of detention in prison. Most of them did not want to be interviewed, in the Civil prison, afraid of being reported to media or because of the topic of the research. A detainee, talking about the relationship with these officials said “Nos somos pessoas que estamos noutro lado, ha possibilidade de conversar com eles mas eles são os chefes”. [We are people those who are from the other side, we have possibility to talk with them but they are the chiefs].⁹⁹

⁹⁸ Interview with an official in the Central prison, November 2011.

⁹⁹ Interview with a detainee in the Civil prison, November 2011.

3. CONDITIONS OF DETENTION

3.1. The right to physical and moral integrity

3.1.1. Legalizations of Detention

Article 64 of the Constitution requires that the detention of a person needs to be legalised with a clear remand warrant (*mandado de captura*) released by competent judges, the Public Prosecution Service (Ministério Público) or the authorities of the Police of Criminal Investigation (Polícia de investigação Criminal, PIC), as established at Article 293 of the Criminal Procedure Code.¹⁰⁰

While in case of *flagrante delicto*, the detainee has five days to be brought in front of the investigative judge of the instruction (*juiz de instrução*),¹⁰¹ the detention of people not caught in the commission of a crime needs to be legalised within 48 hours.

Until 2010, detentions were legalised also in the Civil Prison of Maputo. Arrestees were brought to the prison, often waiting days and months before the legalization. Instead, the new practice requires that legalizations are made upon the admission of an arrestee in prisons, and consequently establishments accept only arrestees with a clear remand warrant.¹⁰²

¹⁰⁰ Article modified by Article 6 of Law 3/1993.

¹⁰¹ This study uses the term 'investigating judge' (*juiz de instrução*) as translated by the European Court of Human Rights.

¹⁰² Data collected with the interview conducted during the field work, November 2011.

Although the research could not investigate more about this good practice that began at the beginning of last year, interviews revealed that one detainee was yet to be legalised.

3.1.2. Record Register

As Rule 7 of the SMR notes 'in every place where persons are imprisoned there shall be kept a registration book with numbered pages in which the identity of the detainee, the reasons for his commitment and the authority therefor and the day and hour of his admission and release'.

Both the directors of the prisons noted that, while registrations began five years ago and seriously implemented only since 2007-2008, it is now possible to obtain prison population statistics. Although the lack of adequate training and equipment, the record register has undergone fundamental improvements.

The interviews with officials confirmed the registration practice of new admitted detainees, although interviews with the detainees of the Civil prison showed that it is not clear how this practice is respected. Three detainees said that they had been conducted to the Registration office (Permanencia) before brought to the cells; three answered that they were brought directly to the cells whilst four did not remember.

Nevertheless, often, the registers are filled with the same information contained in the warrant order, but the interviews have shown that there is not clarity on the respect of this practice.

3.1.3. Information provided to detainees

Rule 35 of the SMR requires that detainees shall be provided with written information about the rules of the institutions as well as their rights. The international norm notes also that if a prisoner is illiterate the information shall be conveyed orally.

The interviews with the detainees showed that, in both prisons, information on the rules and the rights of the detainees is given only orally. Interviews in the Civil prison showed that the Head of the Internal Order (Chefe da Ordem Interna) had clarified the rules and the rights of the institution to six of the interviewers while three of them said that no one had share this information; one did not remember.

In the Central prison, seven detainees confirmed that they were informed about the rules and their rights at the admission to the institution; two of them did not remember and only one said that he had not received any information.

It was underlined by some of the detainees that the information given included the rules and disciplinary requirements of the institution rather than their rights.

3.1.4. Vulnerable detainees

Among pre-trial detainees there are particular groups of people who need specific consideration such as persons affected by HIV-AIDS, disabled and people affected by contagious diseases.

The only measures placed to protect vulnerable persons in both prisons were represented by the separation of cells or pavilions. In the Central prison there is a pavilion dedicated to people affected by tuberculosis likewise some cells of the Civil prison.

Whilst some interviews showed that disabled people live in the same situation of other detainees, it is not clear if people affected by HIV/AIDS are separated in specific cells or not. In the Civil prison, the interview with a female detainee showed that she was sharing the cell with other females affected by the virus. Although it is not possible to clarify the information, this practice can produce negative consequences on the stigma and discrimination suffered by people affected by HIV/AIDS in the institution.

3.2. Property belonging to a detainee

Among the detainees interviewed, 12 people did not hand any valuables and cash over to officials upon admission to the Civil and Central prisons of Maputo. Although a register for detainees' valuables and cash is kept, only few detainees carried personal items at the admission to the prison.

Two detainees from both the Civil and Central prisons said that they had hidden money so well that the officials did not take it away. There is an alarming and repeated key theme that was underlined: eight of the detainees interviewed said that all the valuables and cash carried when they were arrested, was retained by the police and never returned back. One detainee said that, at the moment of the arrest, he had around three thousand dollars with him that officials of the PIC took and never returned together with mobile phone, belt and clothes.

The right to the property belonging to a person is unprotected since the moment of the arrest: the modus operandi of the police shows the issue related to this right.

Considering medication a property belonging to the person who needs these medicines, the research has shown that two different practices are followed: some detainees keep the pills with them once authorised by the doctor, while some medications are retained by the Head of Health¹⁰³ of the pavilion where the detainee is situated. This practice is conducted when there are risks that the detainee would attempt suicide.

3.3. The right to adequate standards of living

3.3.1. Cell capacity and prisons occupation

While the Civil prison appeared to hosts only pre-trial detainees, in the Central prison detainees are not separated from the sentenced prisoners. Whilst the current level of occupation of the Civil prison is estimated around 150 people, the Central prison is overcrowded, housing more than 2.000 prisoners.

The Civil prison is divided into the male and female sections. The male area is composed by three wings respectively A, B and C divided per age: juveniles, adults and older people. Each wing contains around fifty cells. The

¹⁰³ In each pavilion of both the Civil and Central prison of Maputo five detainees among the ones considered much mature and responsible are elected heads. There are the head of the wing (Chefe de Ala), the head of discipline (Chefe de Disciplina), the haed of effective (Chefe do efectico) who explains the rules of the institution, place the new arrived and count the detainees every morning and afternoon, the head of health (Chefe da Saúde), and the head of cleaning (Chefe da Limpeza).

total capacity of the prison is around 250 people and each cell can house two to five detainees.

The interviews found that measures of the cells vary although detainees could not be able to tell exactly the sizes of their cells. Two detainees said that the cell measured five meters per three; two said that their cells measured four per four and three of them said two and half meters per four was the dimension of their cells.

Five of the interviewees said that they were sleeping on blankets and mats; two persons were using thin mattresses that the prison arranged for them; one person was sleeping on journals and three were using personal mattresses that families brought to them.

Most of the detainees possessed only a plastic bag in which they keep their clothes or personal items. Only one detainee said that he arranged to mount a shelf on which to lay his personal clothes and eating utensils.

The Central prison is divided in ten pavilions and *laterais*: the first are composed by cells and the *laterais* are represented by big halls. Among the detainees, five were housed in six meters square cells and five people stayed in *laterais* that measured around twelve per fifteen meters. While the cells housed from four to six prisoners, the *laterais* hosted from fifty to eighty people. Most of the detainees sleep on the floor by using blankets and mats found in the prisons. Only three detainees were sleeping on new bunk beds received the year before together with mattresses, pillows and bed sheets, as confirmed by the director. Unfortunately the number of bunk beds cannot cover the high number of prisoners, and many detainees sleep on the floor between or under the beds and in the corridors between the bunk beds.

3.3.2. Time spent outside the cells and recreational activities

Rules of the SMR require that a prisoner shall spend a minimum of an hour per day outside the cell. Interviews in the Civil prison showed not clarity around the regime applied in the institution: both detainees and officials noted a certain flexibility around the time spent outside the cells. After lunch until five o'clock, prisoners are allowed to watch a television located in the yard of the prison. On the day of the visit they spend more time outside the cells than the other week days while Friday is the day dedicated to football.

The Central prison applies an open regime. The overcrowded situation created the necessity to open the cells from seven o'clock to five o'clock, in the afternoon. While most of the prisoners spend passively their days, others perform activities such as carpentry, metalwork, weaving work and wood sculpturing. Prisoners can also attend primary and secondary schools, and use the library, although it is possible to read only old journals.

3.3.3. General cleanliness, hygiene and vectors for diseases

In both prisons, the outside area was very clean and free of rubbish. The presence of lice, cockroaches and ants was underlined by the detainees who noted also that the hot and rainy season had just started and mosquitos were going to increase sooner.

In the Central prison, detainees complained about the enormous quantity of lice due to the lack of personal hygiene and the amount of dirty blankets

present in the pavilions. Consequence of the overcrowded situation, the lack of personal hygiene is worsened by absence of cleaning materials, although the director and officials confirmed that cleaning utensils were distributed and fumigation was often done in the institution.

Most of the detainees said: “Só ageitamos para limpar com água” [We only rig to clean with water].¹⁰⁴ It is not clear if the disinfection is conducted every fifteen or forty-five days because while three officials answered positively to the question about measures taken by the establishment, only two officials gave detailed information.

In the Civil prison only two detainees, one female and one male had the mosquito nets: the first was offered by the institution to a pregnant woman and the second was brought by the family of the prisoner.

3.3.4 Infrastructure

Both prisons are characterised by old and degrading infrastructure. “As paredes estão cansadas” [The walls are tired], said one of the detainees interviewed in the Civil prison. Although roofs were not leaking, walls are cracked: the infrastructure date back to the beginning and middle of the XX century. It was not surprising that two detainees, respectively from the Civil and the Central prisons, had painting the wall of the cell with their own money.

¹⁰⁴ Quotation from the interview with a detainee conducted in the Central Prison.

3.3.5. Lighting and ventilation

The ventilation of the cells is good in both prisons. All the detainees said that their cells had sufficient windows, although two women interviewed in the Civil prison complained the lack of ventilation in their cells suffered during the hot and humid days. Eight of the total detainees interviewed noted that due to the lack of glasses on the windows, water entered when it rained.

While natural light was abundant, all prisoners said that cells had electrical lights which provided sufficient illumination to read, during the night. In the Central prison four detainees said that the lights were on all day long while two said that lights were on from five o'clock, in the afternoon until early morning.

In the Civil prison, one detainee said that lights were on all day long, in his cell; two said that they could switch light off when they needed, while four people said that had bought new bulbs to have light in their cells.

3.3.6. Supervision of prisoners at night

The overall impression is that there is not an active supervision during the night. Officials interviewed in the Civil prison said that number of officials per shift, which last 24 hours, is estimated to be between 15 and 30 warders. In the Central prison one official said that, on the day of the interview there were 38 warders working in the institution, to supervise more than 2,000 prisoners. The director of the prison underlined that the small number of officials working in the establishment represents a risk for the safety and security of the officials and the institution.

3.3.7. Access to sanitation and drinking water

In the female section of the Civil prison there is one toilet, a sink and a shower; although one of the women interviewed said that there was a toilet in her cell. Each pavilion of the male area has four toilets, three taps and one shower. Two detainees said that, in the bathrooms, water runs only in the early morning between seven and nine o'clock, and in the afternoon between five and six o'clock. Buckets, tanks of 200 litres and bottles are filled to have access to water during the nights. One female detainee said that they use plastic bags to relieve themselves during the night.

Although officials said that the institution distributes cleaning materials, the detainees alleged that no detergent is offered to clean, so they use only water and sometimes personal soaps.

The access to sanitation appears to be worse in the Central prison than in the Civil centre of detention. Whilst there is only one toilet in the *laterais* to be shared by a number of prisoners that goes between fifty and more than eighty, the pavilions have between two and four toilets. The director underlined the insufficient numbers of toilets, during the night, although the situation had improved during the day, due to the rehabilitation and the construction of new toilets.

At the Central prison, water runs almost all day as noted by seven detainees interviewed. The director said that the opening of two wells inside the prison improved the access to water, improving as well their access to sanitation. During the night, detainees use buckets, bottles and tanks of 200 litres.

Whilst almost all the prisoners drink water of the prison, two detainees of the Civil prison said that their families provide drinking water from outside and

one prisoner from the Central prison confessed to have an electric stove in the cell, which he uses to boil water. He also said that then possession of this illegal object had created some difficulties with the officials, although they had left the stove under the offer of some money. The detainee expressively said “Everything here is all up to you to do if you have some money; otherwise you need to live with the conditions of the prison”.¹⁰⁵

3.4. Adequate food

In the Civil prison three meals are served while at the Central institution of Machava only two are served, due to the overcrowded situation of the prison. In the Central prison, breakfast is served from six o’clock to ten o’clock, then at ten am the distribution of lunch starts, called reinforced lunch,¹⁰⁶ (almoço reforçado), and starts continues until one o’clock in the afternoon. No other meal is distributed until the day after. While some of the prisoners eat half of the lunch portion immediately and half later, for dinner, a detainee spontaneously said: “Para não ficar podre eu como agora. Quando deixar vai ficar podre. E’ só rezar Deus”. [To not eat when the food is already rotten, I eat it now. If I leave for later it will go rotten. It is only to pray to God].¹⁰⁷

In the Civil institution, breakfast is served around eight or nine o’clock, in the morning; lunch is served from twelve o’clock until three o’clock while dinner is distributed around six o’ clock. Interviews with female detainees showed that they eat less than the men: only twice per day, in the morning and at lunch. The reason for this difference between male and female in the same

¹⁰⁵ Interview with a detainee, November 2011.

¹⁰⁶ Interviews with the officials showed that the reinforced lunch is made of 500 g. of meal instead of the normal 250 g.

¹⁰⁷ From the interview with a detainee of the Central prison, November 2011.

prison is not clear and this distinction was not confirmed by four of the officials or the director.

The time for food distribution is not regular, detainees underlined and the actual diet is a combination of porridge for breakfast and rice, maize, beans or peanut sauce for lunch or dinner. Female detainees in the Civil prison said that they have sugar and hot water for breakfast. Fish and chicken were mainly mentioned by officials and the directors of the prisons, who said that they are served weekly even though the detainees highlighted that these rarely appear in their diet.

While seven detainees of the Civil prison said that they use personal eating materials such as a metal spoon and a plastic bowl, in the Central prison seven people answered that they utilise materials given by the prison or left by other detainees.

3.5. Clothing and personal cleaning materials

Pre-trial detainees in both prisons use their own clothes although female detainees explained that three months ago, uniforms previously distributed to pre-trial detainees were taken away. In the Central prison uniforms are made inside the prison and delivered only to the *brigadistas*.¹⁰⁸

Soaps to wash clothes are irregularly distributed by the institution. It is not clear if they are supplied every two weeks, monthly, or every two months. Whilst detainees said that the soaps distribution is not adequate to regularly

¹⁰⁸ Brigadistas are called the sentenced prisoners who clean the administration offices of the prison.

clean their clothes, the directors and the officials said that soaps are given to the detainees more often, every fifteen days.

The director of the Central prison said that they distribute toothpastes every month, toothbrushes every three months as well as razorblades to shave every day, while in the Civil prison toothpaste is distributed only by the different churches that give religious support in the institution.

The provision of sanitary towels to women is inconsistent: the women interviewed said that they had only heard about their distribution, but they have never received any.

3.6. Health care

Rule 22 of the SMR states that in each prison a medical officer shall be available to the detainees as well as psychiatric services. It also states that sick prisoners shall be transported to hospitals if they cannot be treated in the prison. A dental officer should be also available to every prisoner.

The right to access health in the Civil and Central prisons of Maputo has been identified by the words of a detainee as “a parte mais chata aqui dentro” [the most difficult thing in the prison]”.¹⁰⁹

In both institutions, a health room opens from Monday to Friday, from nine o’ clock in the morning until three o’ clock in the afternoon. The service

¹⁰⁹ From an interview with a detainee, November 2011.

works as a pharmacy rather than a health-care centre. One of detainees of the Civil prison said:

O médico vai te dar paracetamol por todas as doenças. Si tu ficas doente na tarde tu tens de esperar o dia seguinte e nada vai mudar porque ele vai te dar paracetamol. O recluso tem de rezar à Deus para pedir que as doenças nao lhe atacar na Sesta até segunda.

[The doctor gives only Paracetamol¹¹⁰ for all the diseases you have. If you get sick after three o' clock in the afternoon you need to wait the next morning and nothing is going to change because the only thing he is going to give is Paracetamol. A prisoner needs to pray God to not get sick from Friday until Monday].¹¹¹

In the Central prison it is sometimes possible to get tested for malaria and HIV/AIDS, both detainees and officials confirmed this. In both prisons, prisoners said that transportation to the civil hospital is rare and only happens when the detainee is grievously unwell. Due to various escapes of detainees from the hospital when they were sent to get treatment, the transfer of sick detainees to the hospital is seen as increasing the possibility of escape.

¹¹⁰ Paracetamol is a widely used pain reliever and fever reducer.

¹¹¹ From an interview with a detainee, November 2011

3.7. Contact with the outside world

3.7.1. Family visits

Principle 15 and 19 of the Body of Principles affirms the right of a detainee to communicate with the outside world. Rules 37 and 92 of the UNSMR provide for family contact and Rule 38 provides for the right of foreign nationals to contact their consular or diplomatic representation.

The data collected illustrated a common practice in both prisons: while the sixteen national detainees receive visit by their families, the three foreign prisoners highlighted their sense of personal invisibility. The Directors and officials said that the presence of foreign prisoners is reported to the diplomatic representatives, when present in Mozambique and communication with the SNAPRI is undertaken in the cases where there is no representative embassy or consulate.

The right to visit and contact with the outside world for a foreign detainee becomes difficult especially when the person does not have any diplomatic representative in the country. However, the detainees whose embassies and consulates are within Mozambique complained that did not receive visits and they feel forgotten not only by the system but also by their own country. One detainee said that the consulate of his country could not help him because he did not have his passport with him, the document that was retained by the police when he was arrested and because he did not register his arrival at the consulate.

There are no organizations in the country that focus on the issues related to foreign prisoners, except for an Italian organization called SHARE that gives

assistance in the eighteenth police station of Maputo. The holding cells are populated mainly by foreigners who have entered Mozambique illegally.

Two of the Mozambican detainees said that they had not received any visits, one because he was from another province of the country and his family could not afford the expenses of the travel and the other explained that he does not have family and he had forgotten the number of his brother, the one person he could have contacted.

It appears that notifying of a detainee's family is not immediately upon the detainee's admission. Detainees noted that the use of the phone at the state expense is rare, almost non-existent. Half of the interviewers said that they had only heard about the possibility of calling from the institution's phones but no one had experienced it. Although officials noted that there is a possibility to call at the state expenses in an emergency, some detainees said that there was more probability to use officials' personal phones to make calls if they could pay for it. Furthermore, in both prisons detainees said that, although it was illegal, different prisoners had their own phones from which other detainees could call if they could afford. One detainee said that he bought a mobile phone for 1,000 Meticaïs¹¹² inside the prison.

The right to be visited is allowed in the Central prison for seven days every two weeks and in the Civil establishment each day is dedicated to a different prison population: female prisoners receive visit on Fridays whilst male visits are divided into the different wings of the prison. The visit timetable is flexible: from twelve o'clock to five o'clock in the Central prison and in the Civil institution detainees can receive visits from nine o'clock to twelve o'clock and one o'clock to three o'clock in the afternoon. Visit time does not

¹¹² The Metical is the current currency in Mozambique. At the moment, one Dollar corresponds at 25 Meticaïs and one Rand at 3.3 Meticaïs.

appear to be limited, especially in the Civil prison, due to the low number of detainees.

Both prisons have a common area dedicated to the visits in which officials only supervise the progress of the visit. Detainees said that two lines of benches divide the detainees from the visitors.

3.7.2. Legal representative visits

Detainees are allowed to see their legal representative until three o' clock in the afternoon, in a room reserved to specifically consult lawyers and /or paralegals. It appears that there is no time limit imposed and conversations with legal representatives are made not in the presence of officials.

3.7.3. Information from outside

Interviews with detainees showed that they could use radios in their cells and television was allowed a few hours per day. Newspapers and magazines are brought in to the prisons by churches and relatives. A visitor encountered outside the Civil prison said that he had brought some papers and a pen to his detained relative but the officials had taken them away without explanation.

3.8. Women and juveniles in detention

The only female prisoners were encountered in the Civil prison. They are separated from males at all the times and supervised only by female officers. Male officers are accompanied to the female area by female officers.

A pregnant detainee was living in the same conditions as the other prisoners, though she had been given a mosquito net. Interviewers said that another prisoner had her child with her and the same amount of food was distributed to her as to other prisoners. The researcher could not investigate this further.

In the Civil and Central prison minors from 16 years old are detained together with adult prisoners, although they stay in separate cells in the Civil prison. Officials said that social workers from the government are informed and visit the prisons; however it was not established how often they would visit and what assistance they would offer to the juveniles detained.

The directors highlighted that, over the last few years, improvement has been made and fewer minors are accepted into the prisons. At the moment the prison cannot accept juveniles younger than 16 years old. Furthermore, on June 2011, the juvenile centre of rehabilitation of Boane, forty kilometres from Maputo, opened to host 200 sentenced people between the ages of 16 and 21 years old.¹¹³ The centre is the first juvenile justice establishment Mozambique.¹¹⁴

4. ACCESS TO LEGAL REPRESENTATION AND LEGAL AID

Article 62 of the 2004 Constitution of Mozambique expresses the right to Access to Courts by stating that:

¹¹³ See information available at http://www.diariomoz.com/index.php?option=com_content&view=article&id=9853:pais-conta-com-prisao-de-recuperacao-juvenil&catid=34:sociedade&Itemid=53. Accessed on 1 December 2012.

¹¹⁴ Law 8/2008 of 15 July gives the Ministry of Justice the responsibility to create adequate conditions for juveniles in conflict with the law.

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.

Ten of the detainees interviewed said that they had not received any legal counsel since their arrest; six persons answered that they had paid personal lawyers and only four people had recently begun to be assisted by lawyers of IPAJ.

Detainees showed a particular preoccupation with their right to access legal representation: most of them cannot afford to pay a lawyer and the role of IPAJ was critiqued. Even when they can pay their personal lawyers, the function of these professionals is considered as a pure business and not also as a moral or ethical role that would assist prisoners. Although several professionals had already been paid to assist, detainees were then left without assistance with the need to pay another lawyer, while the first ones had not done anything to assist their clients.

Considering the role of IPAJ, a detainee said:

Aqui é só falando porque existem poucas hipoteses que aparecer um advogado à chamar pessoas e comunicar. Aparecem aqui para dar uma volta mas não com o interesse à trabalhar. Se eles queriam, tinham de passar cada semana. É assim que funciona a assistência jurídica: tem de conhecer.

[Here there is only a lot of talking because the chance of a lawyer appearing and helping people is very low. Sometimes they pass by but not with the interest to work. If they would really work, they would be here every week. Legal assistance works like this: you need to know someone].¹¹⁵

The directors of the prison noted that the over-crowded prisons make the work of IPAJ really difficult because it does not have the financial and human resource to give legal assistance to the enormous number of prisoners. While the room reserved for IPAJ in the civil prison was closed down, lawyers and legal assistants of the Mozambique legal aid institute have a room reserved to their consultations in the Central prison.

The IPAJ is a governmental institution that, under the supervision of the Ministry of Justice was created by Law 6/1994 to provide legal and judicial assistance to Mozambican citizens. The interview with the director of the IPAJ illustrates that the state did not allocate financial and human resources to the institution until 2008, when the situation began to change.

In 2011, 38 permanent lawyers and 85 legal assistants worked with the IPAJ, against the 17 lawyers and 71 assistants working in 2008. The legal aid institute covered only 44 districts in 2007, while 114 districts have IPAJ representatives in 2011. There is a political will to extend the IPAJ to the 138 districts of the country, until 2014. In 2007, IPAJ assisted 7,320 cases and 53,184 cases were conducted in 2010.¹¹⁶

¹¹⁵ Interview with a detainee conducted in November 2011.

¹¹⁶ Data collected with the interview of the Director of IPAJ, November 2011.

Although numbers have increased, the director of IPAJ has underlined that the institute cannot cover alone the enormous need of citizens to get access to justice. Lack of adequate training and satisfactory salaries are the biggest weaknesses of the institute and challenges are represented by the scarce collaboration between the IPAJ and other agencies within the criminal justice system, such as the police, courts, prosecutors and members of the Mozambican Bar Association (Ordem dos Advogados de Moçambique, OAM). Although partnerships with different stakeholders have improved, these are not sufficient to assist the needs of the citizens.

Collaborations have started with universities and national organizations. The University Eduardo Mondlane (Universidade Eduardo Mondlane, UEM), Superior Polytechnic Institute (Instituto Superior Politécnico e Universitário, ISPU), Superior Institute of Science and Technology of Mocambique (Instituto Superior de Ciências e Tecnologia de Moçambique, ISCTEM); the Centre of Judicial and Legal Formation (Centro de Formação Jurídica e Judicial, CFJJ) and LDH have begun partnership with IPAJ. OSISA, UNICEF and UNDP have also financed projects and training for paralegals working with the institute.

5. CONCLUSION

This chapter has assessed conditions of detention and the access to legal representation for pre-trial detainees, in the Civil and Central prisons of Maputo. These case-studies have not only enriched this research but have added to a comprehensive interpretation of the current prisons situation, in the country.

Differing from the findings reported by the Special Rapporteur, in 2001,¹¹⁷ this study shows an overall progress of conditions of detention. The militaristic and secretive prison system has made space to allow academic research. While, as the Rapporteur showed, it was common to find pre-trial detainees who had been detained for more than five, sometimes eight years, this is currently quite rare. The research found only one detainee who has been detained for three years.

Although infrastructures are old and degrading, the prisons have undergone the renovation and the construction of new facilities to improve the conditions of detention. The legalization of the detentions and record registration upon admission has received fundamental progresses. The existence of national statistics available on the prison population derives from this improvement. The open or semi-closed regime of the two prisons and access to lighting and ventilation of the cells have improved some of the aspects related to the right to adequate standard of living. Access to families' visits and legal representatives, and the support given by churches and NGOs has improved the contact with the outside world. Juveniles in prison have also received positive developments: prisons cannot accept juvenile younger than 16 years old and the opening of the juvenile rehabilitation centre is going to improve the situation, at least, in Maputo province. Although developments are visible, challenges and weaknesses continue to characterise the prison environment.

Overcrowding represents an on-going issue, as seen in the Central prison,¹¹⁸ that cause the negative state of other conditions of detention related for example to the cells capacity, prison occupation and general cleanliness and

¹¹⁷ Supra note 11.

¹¹⁸ The information about the transformation of the Civil prison and the move of numbers of detainees to other detention centres can represent the reasons of the low prison population of this establishment.

hygiene. Furthermore, access to adequate food, sanitation and drinking water, and access to health care is worsened by the overcrowded situation. Prisoners are not separated from detainees; the living conditions suffer from the amount of people who need to cohabit in the same space.

Safety and security of the establishments represent an issue if taken into account the low number of prison officials, those who working for 24 hours, need to supervise the increase number of prisoners. The *de facto* existing dualism between officials under the different responsibilities of the Ministry of Interior and Justice and the lack of adequate officials' training represent realities that produce negative effects on the respect of detainee's rights. The rights to be informed about their rights and the prohibition of torture and other ill-treatments are not fully respected due also to the lack of awareness of the officials.

The conditions of female prisoners appeared to be worse than the males in the Civil prison. The foreign detainees interviewed underlined their invisibility both to the Mozambican justice department but also by their own diplomatic representatives. The lack of extraditions agreements between countries worsens the conditions for this part of the prison population.

Lack of financial resources, adequate training and an insufficient number of prison personnel are the main reasons for the malfunctioning of the prisons system. Access to health in the prisons was considered the most problematic issue within the conditions of detention. Health centres function as pharmacies rather than providing adequate or necessary services to pre-trial detainees and the right to legal representation is almost completely absent.

The important role covered by lawyers and their assistance does not go beyond economical profits and IPAJ cannot cover the legal and judicial needs of all citizens. Access to justice in Mozambique is a right denied: pre-trial detainees find themselves witnessing the malfunctioning of the whole criminal justice system, waiting months and years before seeing a lawyer or a judge.

While Chapter Five has focused on the current situation and practices in the two prisons, the final chapter goes back to the theories, concluding this research and looking forward.

CHAPTER SIX

CONCLUSION

This study has looked at criminal justice reforms in Mozambique. The research has particularly considered the conditions of detention and access to legal representation for pre-trial detainees in the Civil and Central prisons of Maputo, as case studies of pre-trial detention in Mozambique. The introductory chapter of this research sought to embed pre-trial detention as a current issue within the prison system.

The conceptual frameworks which shaped this enquiry included the ROL and RBA to criminal justice reforms in post-conflict African countries. Both approaches have been pursued by international community since the 1990s. Although donors have considered ROL and RBA paradigms as distinct approaches to development, research has shown that in practice these two approaches often overlap.

The ROL and RBA both focus on the recognition of the rule of law and individuals' human rights. Both pursue legal reforms and support to the institutional level within the criminal justice system, and the employment of foreign consultants and experts to criminal justice reforms. However, RBA does go beyond the legal and institutional level, looking at the perspectives and the needs of the most vulnerable groups within the criminal justice system. The active involvement of civil society organizations and support of informal methods of justice and non-state actors sets RBA apart from ROL. These considerations also apply to reforms that have been sought by pursued by donors in pre-trial detention.

This study considered that the international community in Mozambique has pursued ROL approach to criminal justice reforms; like ROL, RBA has shown outcomes only at the legal and institutional levels of the Mozambican criminal justice system. Thus, RBA has yet to be fully implemented.

The question asked was to what extent have ROL and RBA been incorporated into the national legislation and policies? Here the approach taken by Mozambique in this regard is compared to that taken by other post-conflict societies such as South Africa, Uganda, Rwanda, and Sierra Leone.

Within the criminal justice system, the reforms undertaken by law enforcement agencies, prison and judicial systems were considered. Chapter Four highlighted the positive outcomes of ROL and RBA at the legal and institutional level. Legal reforms have been made and institutions have been reformed to comply with international and regional standards.

Although the *de jure* principles often do not correspond with the *de facto* practices, there is an overall positive sense regarding the reforms undertaken by the country. The 2004 Constitution has further strengthened the protection of individuals' human rights and several laws recognising the division and independence of the courts in the country have been promulgated. The reorganization of law enforcement roles within the PRM and various policies have reformed the police and prison system in Mozambique.

The focus on reforms in Mozambique, as described in Chapter Four, was followed by the presentation of some key themes that emerged in the interviews conducted with several international donors that have been involved in criminal justice reforms in the country.

The interviews with funders outlined key achievements and showed that ROL has yielded encouraging results at the legal and institutional levels but the financial cost of the legal reforms and its implementation have not been considered. Within the criminal justice system, lack of financial resources, inadequate training and the skewed support given only to the formal systems of justice are some of the elements that are causing the malfunctioning of the police, judiciary and prison systems. ROL and RBA have reformed the institutions and the laws; however, RBA has yet to be fully implemented. As if RBA were to be fully implemented this would result in a noted change to the way local citizens' access and receive justice in regards to pre-trial detention. The needs of people *on the ground* have not received the particular attention that it needs: the perspectives of the most vulnerable ones, the support for informal system of justice and the involvement of civil society organizations in the reform process has yet to happen. High levels of corruption and the historically punitive culture of the country are the final key themes that emerged from interviews with donors.

Given the theoretical position taken in this study, the findings are that: while both prisons have undergone some improvements, several challenges and weaknesses continue to characterise the prison system, and undermine efforts to deliver justice more equitably. The rehabilitation of dated facilities, the progresses achieved in the legalization of detentions and in the record register have been observed. Progress has also been observed in terms of right of access to the outside world and the particular attention that detained juveniles have received in recent years. While prisons cannot admit juveniles under the age of 16 years, the recent opening of the Criminal Prevention Section of the Tribunal for Minors as well as the first pre-trial Observation Centre and the first post-trial Juvenile Rehabilitation Centre, close to Maputo, will improve their conditions of detention and access to justice.

However, the RBA paradigm has yet to fully take place. The study has shown that the needs of pre-trial detainees and their human rights are not being taken seriously by the international community, governmental institutions and civil society organizations. Overcrowded and unhygienic prison cells are on-going problems that characterise the conditions of detention in both prisons studied. Furthermore, access to adequate food, sanitation and drinking water, and access to health care is worsened by the overcrowded conditions.

From this research it emerged that the right to property belonging to a detainee is often not respected. Belongings are retained and not returned to the owner. The personal safety and security of detainees and staff at both establishments has been emphasised due to the low number of prison officials working in each the prisons. Vulnerable groups such as detainees affected by various diseases, juveniles, women and foreign detainees do not receive particular attention and specific measures of protection are not taken into consideration. Of particular concern are foreign detainees who become invisible within the criminal justice system.

In addition, access to health and to justice are the most problematic issues facing detainees in both prisons. Health centres function as pharmacies, dispensing basic medicines, rather than providing the adequate and necessary primary health care services to pre-trial detainees, while their need for and right to legal representation is almost completely ignored. Even though some of the detainees have been assisted by private lawyers, their services have also been criticised, as has the role of the IPAJ. Although this study acknowledges that the IPAJ cannot alone cover the legal and judicial needs of all citizens, the findings have shown that access to legal representation for the vast majority of detainees is almost non-existent. Access to justice then in Mozambique is a right denied: pre-trial detainees

find themselves amidst a malfunctioning criminal justice system, waiting months and years before seeing a lawyer or a judge. Although statistics have shown the progress of IPAJ, and its contribution to the criminal justice system, over the last few years lack of adequately trained (legal and paralegal) personnel and financial resources, and the insufficient number of existing paralegals undermine the progress made, and constitute some of the major challenges faced by the institute. Even though private lawyers are paid to represent detainees, too many have not shown the commitment to seriously serve the needs of the detainees.

The conclusion is then that an RBA process that *touches the ground*, or rather, addresses the needs and rights of people at the bottom of the criminal justice system has yet to be implemented. Once legislative reforms have been completed, financial resources should be spent on the improvement of criminal justice personnel, and providing them with education and training, rather than on infrastructure and institutional level. While the formal institutions and the legislative reforms have been established, RBA needs to focus on the bottom of the system, where people wait to be represented and to have access to the full spectrum of legal rights under the law.

The overcrowded situation of the prisons needs to be tackled to enhance the standards of living conditions of pre-trial detainees. The change needs to involve all the different criminal justice agencies and its practitioners. The access to health requires a serious, well-coordinated and sustained collaboration between the Health Ministry and the prison system. The historically punitive culture of the criminal justice system has to be challenged and reformed, starting with the police and working through the judicial system. Police should be trained to defend individual human rights and not to extensively arrest people. Judges, prosecutors and lawyers should be guided and motivated to believe in their social role rather than only in the

economic values of their profession. Imprisonment should be considered as an *ultima ratio* punishment solution, rather than the standard punishment for all accused of crime. All prisons officials should be demilitarised and their training focused on the respect and promotion of pre-trial detainees and prisoners' human rights. Donors need to take seriously the RBA to criminal justice reforms in Mozambique. RBA needs to begin to tackle the education and the professional training of the criminal justice system personnel towards the respect of individuals' human rights.

The long-term development of correctional farms in the country should be supported to ameliorate prisons conditions of detention. Agriculture projects should be promoted, and inmates taught to farm vegetables and foodstuffs, as this reduces the cost of feeding prisoners, adds fresh vegetables to the inmates' diets and consequently increases the health and wellbeing of the inmates. These programs will improve not only conditions of detentions but they will also create activities for prisoners' rehabilitation. Specific projects should seriously consider the development of activities such as carpentry, metalwork, weaving work and wood sculpting.

The current overcrowding in prisons needs to be challenged from outside the prison system. Rather than arrest people, donors and government should develop and implement policies to support the informal system of justice and the involvement of civil society organizations in the criminal justice system.

Through RBA, the international community and government institutions should rethink the promotion of legal pluralism, recognised at Article 4 of the Constitution. Informal systems of justice represent powerful alternatives that assist citizens to access justice, resolving conflicts in less time and at a

lower cost than the formal justice cluster. The scholar De Sousa Santos, invoking the recognition of “Ecologies of knowledges” notes:

...la diversité du monde est infinie: elle inclut des manières très différentes d’être, de penser, de ressentir, de concevoir le temps, d’appréhender les relations des êtres humains et les non-humains, le regarder le passé e le futur, d’organiser la vie collective, la production de biens et des services, et les loisirs. Cette diversité d’alternatives reste largement gaspillée parce que les théories et concepts développés dans le Nord et repris dans tous les lieux de transmission de savoir ne reconnaissent pas ces solutions de recharge ou, quand ils le font, ne le valorisent pas comme des contributions valides pour construire un monde meilleur. Ainsi, à mon avis, ce n’est pas d’alternative dont nous avons besoin mais plutôt d’une manière alternative de penser les alternatives.

(De Sousa Santos, 2011: 39)

[The diversity of the world is infinite: it includes very different ways of being, thinking, feeling, conceiving time, understanding relations of humans and non-humans, looking at the past and the future, organizing the community, the production of goods and services, and recreation. This diversity of alternatives is largely lost because the theories and concepts developed in the North and included in all the places of transmission of knowledge do not recognize these solutions, or when they do, they do not value it as valid contributions to build a better world. Thus, I think, we do not need alternatives but rather an alternative way of thinking about alternatives.]

Over the last years, the academic work of Araújo (2009; 2010; 2011) has investigated and highlighted the fundamental role played by non-state actors in the resolution of conflicts in Mozambique. The existence of these networks and their interaction has continued through the colonial, socialist and new democratic era. Traditional authorities such as *regulos*, the Traditional Healers' Association of Mozambique (Associação da Medicina Tradicional de Moçambique, AMETRAMO), community courts, religious entities and national organizations such as LDH and often IPAJ solve conflicts without referring to requiring formal justice.¹¹⁹ Mozambican citizens, from both urban and rural areas, prefer these informal instances of dispute resolutions not only because they are often free of charge, but also because they are sensitive to local culture. The serious support of informal networks of conflict resolution should be promoted with the development of active civil society organizations that respect and support pre-trial detainees and prisoners' human rights.

Access to justice for prisoners should be as valued as the right to education and health for all Mozambican citizens. The right to be legally represented should be respected from the first moment a citizen is arrested until the judgment. The development of RBA projects in post-conflict societies that support access to justice needs to be seriously considered. PASI in Malawi and Timap for Justice in Sierra Leone have implemented effective processes and practices that have been duplicated in other countries. Paralegals have been trained to assist prisoners and their families to access justice. In the rural areas they represent arrestees at police stations and pre-trial detainees in prisons. Mozambique should seriously take into consideration these practices to empower the people in need at the bottom of the criminal justice system.

¹¹⁹ Araújo, S. (2007). Legal Pluralism and Access to Justice in Mozambique. Paper presented at the annual meeting of The Law and Society Association, TBA, Berlin, Germany.

Furthermore, international organisations, governmental institutions and civil society need to leave their offices and enter police stations, prisons and courts. To ameliorate the situation of the more than 30 per cent of the prison population, in Mozambique, prepared practitioners should listen to pre-trial detainees, their stories and their needs; they should promote their rights and tackle conditions of detention and their access to justice.

At this time, legal reform is waiting to be enacted and passed as law, which will bring innovative changes in the Penal and Procedure Criminal Codes and a new statute for prisons officials. The establishment of alternative measures to imprisonment for crimes whose sentences carry less than eight years imprisonment can greatly reduce the use of pre-trial detention if financial resources are invested at the lowest levels of the justice system for the people *on the ground*. However, it appears that the ROL paradigm continues to be the preferred orthodox approach to criminal justice reforms. Once passed, this reform will first focus on the institutions and the ambitious criminal justice system transformation. Pre-trial detainees will wait a bit more to see RBA *touch their ground*.

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