Mozambique

Justice Sector and the Rule of Law

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List of acronyms

ACIPOL	Academy of Police Sciences *(Academia de Ciências Policiais)*
AMETRANO	Mozambican Association of Traditional Healers *(Associação dos Médicos Tradicionais de Moçambique)*
AMMCJ	Mozambican Association of Women Lawyers (*Associação Moçambicana das Mulheres de Carreira Jurídica)*
APIE	State Real Estate Administration Office *(Administração do Parque Imobiliário do Estado)*
AU	African Union
APRM	African Peer Review Mechanism
BCM	Commercial Bank of Mozambique (*Banco Commercial de Moçambique)*
BR	Government Gazette (Boletim da República)
CIREL	Inter-ministerial Law Reform Commission (*Comissão Interministerial de Reforma Legal)*
CCLJ	Coordinating Council for Legality and Justice *(Conselho de Coordenação da Legalidade e Justiça)*
CFJJ	Centre for Legal and Judicial Training *(Centro de Formação Jurídica e Judiciária)*
CSMJ	Higher Council of the Judiciary *(Conselho Superior da Magistratura Judicial)*
DANIDA	Danish International Development Agency
DFID	UK Department for International Development
DRNN	National Directorate of Registries and Notaries *(Direcção Nacional dos Registos e Notariado)*
EGFE	General Statute of Public Servants *(Estatuto Geral dos Funcionários do Estado)*
EU	European Union
FIR	Rapid Reaction Force (*Força de Intervenção Rápida)*
FRELIMO	Mozambican National Liberation Front *(Frente da Libertação de Moçambique)*
GAGEI	Office of Real Estate Management (*Gabinete de Gestão de Imóveis*)
GCCC	Central Office for Combating Corruption *(Gabinete Central de Combate à Corrupção)*
GPA	General Peace Agreement of 1992
ICVS	International Crime Victimisation Survey

IGF	Inspectorate-General of Finance (*Inspecção Geral das Finanças)*
IMF	International Monetary Fund
IPAJ	Institute for Legal Assistance and Representation (*Instituto de Assistência e Patrocínio Jurídico*)
LDH	Mozambican Human Rights League (*Liga dos Direitos Humanos de Moçambique)*
MISA	Media Institute for Southern Africa
MP	Public Prosecution Service (*Ministério Público*)
MT	Metical
NEPAD	New Partnership for Africa's Development
OAM	Mozambican Bar Association (*Ordem dos Advogados de Moçambique)*
ORAM	Rural Organisation for Mutual Assistance (*Organização Rural de Ajuda Mútua)*
PARPA I	Poverty Reduction Strategy Paper, 2001–2005 (*Plano da Acção para a Redução da Pobreza Absoluta, 2001–2005*)
PARPA II	Poverty Reduction Strategy Paper, 2006–2009 (*Plano da Acção para a Redução da Pobreza Absoluta, 2006–2009*)
PEI	Integrated Strategic Plan (*Plano Estratégico Integrado)*
PEPRM	Strategic Plan of the Police of the Republic of Mozambique, 2003–2012 (*Plano Estratégico da PRM, 2003–2012)*
PES	Economic and Social Plan (*Plano Económico e Social)*
PGR	Office of the Prosecutor-General (*Procuradoria Geral da República)*
PIC	Criminal Investigative Police (*Polícia da Investigação Criminal)*
POPEI	Operational Plan of the Integrated Strategic Plan *(Plano Operativo do Plano Estratégico Integrado)*
PRM	Police of the Republic of Mozambique *(Polícia da República da Moçambique)*
RENAMO	Mozambican National Resistance *(Resistência Nacional Moçambicana)*
RENAMO-UE	Mozambican National Resistance Electoral Union (*Resistência Nacional Moçambicana-União Eleitoral)*
SISTAFE	State Financial Administration System *(Sistema de Administração Financeira do Estado)*
SNAPRI	National Prisons Service (*Serviço Nacional das Prisões)*
STAE	The Technical Secretariat for Electoral Administration (*Secretariado Técnico de Administração Eleitoral*)
UAC	Anti-Corruption Unit
UEM	University of Eduardo Mondlane
UTREL	Technical Unit for Law Reform (*Unidade Técnica de Revisão Legal*)
UN	United Nations
UNDP	United Nations Development Programme
UTUSP	Technical Unit for the Unification of the Prison System (*Unidade Técnica de Unificação do Sistema Prisional)*

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Preface

The Africa Governance Monitoring and Advocacy Project (AfriMAP) of the Open Society Foundation was established in 2004 to monitor observance of standards relating to human rights, the rule of law and accountable government, by both African states and their development partners.

African states have undertaken increasing commitments to good governance since the African Union replaced the Organisation of African Unity in 2002. Among these commitments are the provisions of the Constitutive Act of the African Union, in which member states agree to promote human rights, democratic principles and institutions, popular participation and good governance. Other newly adopted documents include the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM), as well as the Convention on Preventing and Combating Corruption. AfriMAP's research is intended to facilitate and promote respect for these commitments by highlighting key issues and by providing a platform for national civil society organisations to engage in their own monitoring efforts.

AfriMAP's methodology is based on standardised reporting frameworks that link respect for good governance and human rights to development that benefits poor people. Through a process of expert consultation, AfriMAP has developed reporting frameworks in three thematic areas: the justice sector and the rule of law, political participation, and the delivery of public services. The resulting questionnaires, among them the questionnaire on the justice sector and the rule of law that guided this report, are available at the AfriMAP website: www.afrimap.org.

The reports are elaborated by experts from the countries concerned, in close collaboration with the Open Society Institute's network of foundations in Africa and AfriMAP's own staff. Drafts of this report were reviewed by a range of experts, and their comments and criticisms are reflected in the final content. These reports are intended to form a resource both for activists in the country concerned and for others working across Africa to improve respect for human rights and democratic values.

Foreword

There is no doubt that Mozambique has reaped considerable dividends as a result of the ending of civil war with the agreement of peace in 1992. There have been remarkable and visible gains on the political, social and economic fronts. The 1990 constitution laid the cornerstone for the transition from a one-party political system to a plural form of governance that brought with it increased political freedoms and civil liberties. While distributive challenges remain, there is no doubt that Mozambique's impressive economic growth rate averaging eight per cent per annum over the past decade is evidence of the important nexus between peace, good governance, the rule of law and economic development.

Despite the dramatic developmental gains that the country has achieved, there remain serious challenges in different sectors that need to be addressed to deepen and strengthen the country's democratic governance. This report, *Mozambique: Justice Sector and the Rule of Law,* provides an in-depth analysis of Mozambique's justice sector, examining its capacity and effectiveness in meeting the needs of the country and its citizens in relation to justice and rule of law. The review was undertaken in the context of commitments that Mozambique is party to, primarily at the African Union (AU) level: specifically the African Charter on Human and Peoples' Rights and its associated documents, the New Partnership for Africa's Development (NEPAD) and the Africa Peer Review Mechanism (APRM). It also takes into account international and regional norms related to justice delivery and assesses the extent to which the justice system in Mozambique seeks to comply with such standards.

While the report recognises that not all democratic governance values and institutions can be implemented at the same level simultaneously, especially in a post-conflict situation, it identifies key areas where practical steps can be taken to improve the effectiveness of justice delivery in Mozambique. Some of the key challenges identified in the report include:

- Guaranteeing the independence of the courts and the judiciary, including ensuring that government officials do not interfere with the due process of law and comply with court rulings;
- Maintaining the pace of law reform and ensuring that civil society is involved in the process and that new laws are implemented in practice;
- Improving accessibility to judicial courts by implementing the provisions of the 2004

Constitution that provided for appeal and administrative courts at provincial level;
- Providing free legal aid and legal representation to Mozambicans in need;
- Clarifying the status of community courts and making sure that they are adequately resourced;
- Clarifying and giving effect to the principle of legal pluralism;
- Ensuring the application of constitutional standards and human rights principles in the informal arena, which most Mozambicans rely on for access to justice;
- Improving prison conditions, particularly addressing the issue of overcrowding.

The report is not a score card of Mozambique's justice sector performance. It aims to catalyse an informed national policy dialogue that will help the country identify and implement national priorities. It benefited from input from a wide range of stakeholders and key informants that included judicial and government officials, civil society actors, academics, politicians, ordinary citizens and donors, and the report will be available for all these stakeholders to use in Mozambique's justice sector reform efforts.

For its part, the Open Society Initiative for Southern Africa (OSISA), using its usual tools of advocacy, partnership building and intellectual investment will use the report as a basis for developing programmes aimed at continuing its contribution to Mozambiques's democratic reforms and human development efforts in civil society and the state.

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Executive Director
Open Society Initiative for Southern Africa

Part I

Mozambique: Justice Sector and the Rule of Law

A Discussion Paper

Introduction

This discussion paper is based on a comprehensive report on the Mozambican legal system entitled *Mozambique: Justice Sector and the Rule of Law* (the main report). The main report is the product of a year-long, questionnaire-based research project that solicited views and information from judicial and government officials, civil society actors, academics, politicians, ordinary citizens and donors. It is one of a series of reports on Mozambique to be produced by the Africa Governance, Monitoring and Advocacy Project (AfriMAP), a project of the Open Society Foundation (OSF), and the Open Society Initiative for Southern Africa (OSISA). AfriMAP is also producing reports in South Africa, Malawi, Ghana and Senegal. The idea behind AfriMAP is to conduct an audit of African governments' compliance with African and international standards on human rights and good governance, including the commitments made in national constitutions. The reports are intended to be a resource for practitioners and human rights activists in the countries concerned, and for those working in other African countries, to improve respect for human rights and democratic values on the continent.

This discussion paper is not a summary of the main report, which should be read in its own right. Rather, it aims to draw together information and arguments from the main report, and, on the basis of these, to put forward practical policy recommendations. These recommendations are intended to encourage focused debate around identifying the measures that, as a matter of priority, government needs to implement to address underlying problems in the country's justice sector. While the justice sector has undergone dramatic transformation since the ending of civil war and agreement of peace in 1992, serious challenges remain in ensuring that the sector is capable of meeting the justice and rule of law needs of the country and its citizens. This paper aims to contribute to the debate already underway within the sector and in civil society, proposing practical suggestions that aim to address some of the critical issues the sector is facing.

1. The Constitution, law reform and international law

Mozambique's justice system has undergone major changes since independence in 1975, reflected in changes in the country's Constitution. The 1975 Constitution established a one-party socialist state led by FRELIMO (*Frente da Libertação de Moçambique*), in which there was no separation of powers between executive and judiciary. The 1990 Constitution, drafted as part of the peace negotiations that ended the civil war between FRELIMO and RENAMO (*Resistência*

Nacional Moçambicana), entrenched a multiparty system, widened the recognition of citizens' rights, and recognised the independence of the courts from the executive and party control. Important new laws provided for further changes to the court system during the same period. In 2004, a third post-independence Constitution was adopted, which further strengthened individual rights and the independence of the courts, though the reforms it introduced were not as wide-ranging as some had hoped.

The Mozambican court structure is still governed by the 1992 Organic Law of the Judicial Courts (*Lei Orgânica dos Tribunais Judiciais*), which establishes three main layers of judicial courts (*tribunais judiciais*): district courts, provincial courts, and a Supreme Court in Maputo. This law is in need of revision to take account of developments over the last fifteen years. For example, the 2004 Constitution provided for the possibility of an intermediate level of judicial courts between the provincial level and the Supreme Court, which could deal with appeals from provincial judicial courts. The establishment of such regional appeal courts across the country could make an important contribution in reducing the overwhelming case load of the Supreme Court, and could improve access to justice for citizens living outside Maputo. Similarly, there is a real need to create new administrative courts in the provinces, a possibility also provided for in the 2004 Constitution, which would allow challenges to executive decisions at provincial level. Legislative reform needs to be followed by practical action. In the case of labour courts, for example, implementing legislation was passed in 1992, yet to date these courts have not been created. Although divisions dealing with labour cases have been set up in the Supreme Court and provincial courts, these are insufficient to deal with the huge volume of labour cases awaiting trial within the judicial courts.

Perhaps the most important gap in the Organic Law of the Judicial Courts is its failure to mention community courts. These courts, with their roots in the people's courts established by the FRELIMO government after independence, are the most widespread officially recognised judicial fora in Mozambique, with more than 1 500 reportedly in existence. Although the 1992 Community Courts Law (*Lei dos Tribunais Comunitários*) provided the legal framework for community courts, with jurisdiction to deal with minor civil and criminal disputes, they have no formal links with the judicial courts, and, in practice, have received no financial or material help from the government or judicial courts. Marking an important step forward, the 2004 Constitution recognised their existence, and it is now urgent that legislation be passed to provide a framework for this new integrated status. UTREL is reportedly working on a revised draft of the Community Courts Law, under which the community courts would be linked to the judicial courts by an appeal system.

There has been little or no litigation in Mozambique regarding the constitutionality of laws passed by Parliament or of actions by the executive, though this may change with the new establishment of a Constitutional Council (*Conselho Constitucional*) in 2003 and the expansion of its powers by the 2004 Constitution. Previously, the final arbiter of constitutional matters, as with other cases, was the Supreme Court (*Tribunal Supremo*) acting as Constitutional Council. To date, two proposed laws have been referred to the Supreme Court or Constitutional Council by the president for an opinion on constitutionality prior to enactment: the Islamic Holidays Law

(*Lei dos Feriados Islâmicos de Idul-Fitre e Idul-Adhah*) in 1996 and the Family Law (*Lei da Família*) in 2004. There was serious discussion in the court on the admissibility of both cases. In the first case, the court ruled in favour of the case's admissibility, and subsequently ruled that the proposed law was unconstitutional and should not be enacted. In the second case, the president's request was not accepted. Following this disparity in decisions, the remit of the Constitutional Council to provide opinions on legislation prior to enactment was clarified during the 2004 constitutional review process.

Increased use of the Constitutional Council to create jurisprudence on constitutional issues would contribute to reform of unconstitutional laws and practices. However, such litigation can only achieve gradual results, and there is major need in Mozambique for comprehensive legal reform to ensure the compliance of legislation with constitutional principles. Over the past few years, legal reform in the justice sector has gathered momentum, driven particularly by the creation of the *Comissão Interministerial de Reforma Legal* (CIREL) and its technical unit for implementation, the *Unidade Técnica de Revisão Legal* (UTREL). There have been unfortunate delays in the drafting and implementation of some key pieces of legislation, including the Criminal Code and Criminal Procedure Code, and a more systematic approach could be helpful in identifying priorities; yet, overall, government is making good progress with law reform. Among the laws that are currently outstanding are a new Organic Law for the Public Prosecution Service (*Ministério Público*) proposed by the Office of the Prosecutor-General.

The capacity of members of Parliament (MPs) to comment on and provide input on draft laws urgently needs strengthening. MPs do not have the technical skills needed to properly fulfil their responsibilities of initiating legislation and providing input to laws proposed by the executive, yet oversight of the legislative process is one of their key functions. There is a serious risk of Parliament becoming a bottleneck in the process for legislative reform; the Family Law, for instance, remained with Parliament for several years before it was enacted.

Parliamentary oversight of the legislative process has become particularly important with the increasing use of decree-laws (*decretos-lei*), a new form of legislation introduced by the 2004 Constitution that allows the Council of Ministers to request Parliament to delegate legislative authority (*autorização legislativa*) for defined purposes. A decree-law adopted by the Council of Ministers enters into force automatically if Parliament does not challenge it during the session held after the decree-law's publication. This power has been used by the government to pass significant legislation, including the newly revised Civil Procedure Code. Unless Parliament exercises its oversight responsibilities, the trend will be for decree-laws to be tacitly approved without a proper debate.

In the context of a growing pace of law reform in Mozambique, there is a risk of a widening gap between legislation enacted and legislation applied. For the first time, the December 2005 decree-law enacting the new Commercial Code (*Código Comercial*) established a committee to oversee its implementation. Establishing such committees could be a useful mechanism to ensure implementation of key pieces of legislation, though the seriousness with which the new committee is fulfilling its remit is yet to be tested. There are no general mechanisms in place to monitor the impact of laws that have been passed. A possible solution could be for CIREL to

meet annually to analyse legislation adopted the previous year, and this is an area where civil society could also contribute to monitoring efforts. For instance, CIREL could set up a Legal Commission, including members of the judiciary, government, academia and civil society, to fulfil this remit.

One important tool for legal reform should be the reporting process related to international human rights treaties. Mozambique has a relatively good record in ratifying international and regional human rights instruments without reservation, but across the board is failing to comply with its reporting obligations, with respect to both the United Nations treaty monitoring bodies and the African Commission on Human and Peoples' Rights. This situation may improve with the recent establishment of an ad hoc inter-ministerial committee on human rights, with responsibility for Mozambique's reporting requirements. The committee is due to become a permanent body by the end of the 2006. The tendency in many countries is to see the obligation to report on steps taken to implement human rights treaties as an unnecessary distraction; yet, in Mozambique as in other countries, such reports could provide the analytical framework and an opportunity to review and plan law reform efforts in order to improve respect for human rights at the national level. In addition, Mozambique should subscribe to the various UN treaty provisions allowing for individual petitions to be made to the treaty bodies. The role of civil society in ensuring that government meets its obligations has also been lacking. Mozambican civil society groups have never submitted a shadow report to an international treaty body, and a parallel process could build pressure on the government to improve its own record.

2. Management and oversight of the justice system

In 2001, the Mozambican government created a new Coordinating Council for Legality and Justice (*Conselho de Coordenação da Legalidade e Justiça,* CCLJ), composed of representatives of the relevant government ministries, the prosecutor-general and the courts. In 2003, the Council of Ministers adopted the justice sector's first strategic plan (*Plano Estratégico Integrado*, PEI), based on input from the CCLJ and other players. Despite such developments, the justice sector continues to suffer from a lack of coordination amongst its key institutions, while the lack of comprehensive follow-through to the PEI suggests that commitment to joint planning is still questionable. The first PEI will expire at the end of 2006.

The sector would clearly benefit from the CCLJ better fulfilling its coordinating responsibilities, and, to do so, its membership should be expanded to include representation of the Mozambican Bar Association (*Ordem dos Advogados de Moçambique,* OAM). But it should not evolve into a 'super ministry' co-opting power from the individual institutions of the sector. Above all, the Ministry of Justice needs to play a clearer leadership role, without jeopardising the independence of the courts. The Ministry of Justice should take steps to deliver on a range of existing commitments, including provision of free legal aid and legal representation as well as provision of support to the community courts, as provided for in the Constitution and in the Ministry of Justice by-laws. Responsibilities such as the procurement of goods and services, maintenance of physical infrastructure, and data compilation and dissemination could be undertaken and led

by the Ministry of Justice, as is already happening with the provision of training for judges. The recent announcement by the Minister of Justice that the ministry will hold public hearings on the vision of the justice sector in Mozambique is welcome, and should play an important role in the development of a new strategic plan.

Over the past few years, funding of the justice sector has improved and is no longer a critical issue. However, execution of budget allocations, particularly investment budgets, remains poor (although there is some contention over reporting of budget execution figures). Budgets for district courts are centralised at the provincial court level, and the provincial courts are very slow in disbursing funds to the lower courts. The Supreme Court should improve information provided to the district courts regarding budget allocations that have been made to the provincial courts, thus providing the district courts with a foothold from which to hold provincial courts accountable for funds they have received. The Supreme Court could also provide clearer guidelines to provincial courts on disbursing funds. Currently, allocations from the provincial to the district courts are often determined by the individual relationships between judges in provincial and district courts. Clearer institutional mechanisms are needed to regulate these allocations.

In addition, there is confusion caused by the different sources of funding for the justice sector and their different—or absent—auditing procedures. According to information provided by the Inspectorate General of Finance (*Inspecção Geral das Finanças*, IGF), located within the Ministry of Finance and responsible for conducting internal audits of government accounts, out of a total of 357 inspections and audits it carried out between 2002 and 2005, only one court was included; the provincial court of Sofala in 2002. The Third Section (*Terceira Secção*) of the Administrative Court is also supposed to carry out external control and auditing of public expenditure. Due to a lack of resources, the Administrative Court has found it difficult to fulfil this brief, and it was not able to respond to a request for information on audits undertaken for use in the AfriMAP report. Funding received from external donors often follows a different system. The government is encouraging development partners to channel all funds directly to the state budget, but external project funds are still significant in the justice sector. Donors tend to stipulate their own auditing requirements, usually involving an external auditing firm.

The law that regulates public financial management, the *Sistema de Administração Financeira do Estado* (SISTAFE), stipulates that all institutions should report and include independent sources of revenue in their budget proposals to the Ministry of Planning and Finance. Yet, neither the considerable revenues received by the courts through court fees, which pass directly to the court coffers (*Cofres dos Tribunais*), nor the funds received by the Ministry of Justice from notaries' fees, are subject to any oversight mechanisms, and there is no transparency regarding use of these funds. This must be urgently remedied, and these 'own-source' funds brought within the SISTAFE system. At the same time, the general auditing procedures for the courts must be strengthened; this will need to be part of a broad effort to improve and extend financial auditing for all public institutions.

An important part of improving financial management of the courts will be a strengthening of court administration. Since the 1990 Constitution introduced a formal separation between the judiciary and the executive, court administration has been the responsibility of judges. Although

this decision improved the administrative independence of the courts, there are widespread concerns that administrative responsibilities place too great a burden on judges, cutting into time they should spend adjudicating. Returning all these duties to the Ministry of Justice could potentially risk undermining the principle of independence that underpins the sector, and should be avoided. However, there is a need to ensure that judges are able to spend more time on their core tasks of adjudication and case management.

The president of the Supreme Court has announced that, with the support of the World Bank, the Supreme Court is in the process of hiring and training 'court managers' who will be responsible for court administration. This could make a useful contribution, but the proposal should be discussed fully with all stakeholders. Judges would also benefit from training in management and administration for the tasks that remain within their remit. The more routine type of administration that does not impact directly on casework, such as construction of court buildings and procurement of services and goods, could be tasked to the government without jeopardising the independence of the judiciary.

Despite improvements over the past few years, there is still a critical shortage of court staff, both in quantity and quality. Salaries for court staff are low, even following an increase in 2003. Physical conditions are often very poor in the courts, particularly at the district level. Court facilities tend to be very basic and antiquated. At the district level, many courts share office space with other state institutions, leading to perceptions among citizens that the independence of the courts is compromised. Both government and development partners should direct greater funding to remedying these deficits.

Availability of legislation and jurisprudence is also a major problem in the courts, again particularly at the district level. The majority of courts at the district level do not have copies of key legislative acts; when these are available, they tend to be judges' personal copies that they take with them when they retire or move to another court. The Centre for Legal and Judicial Training (*Centro da Formação Jurídica e Judicial*, CFJJ) is beginning to provide legislation to judges undertaking training at the centre, and this could be an important avenue in ensuring that judges have copies of the legislation they require to undertake their duties. However, these texts only reach newly trained judges, not those who have been in post for a longer time. With the growing pace of law reform, there is a real risk that judges in district courts will not be aware of or have access to new legislation. Although there have been efforts, including those from donors, to improve distribution of legislation, these initiatives have lacked in consistency, and need to be stepped up and made more systematic in order to reach all courts across the country. At the minimum, every court should have an annually updated set of current laws in force.

Beyond the simple text of the law, there is also a critical lack of jurisprudence and expert commentary on Mozambican legal experience. Many judges rely on jurisprudence from the Portuguese courts, which is more widely published. Those who provide financial assistance to the justice sector could consider, for example, sponsoring the development of a journal of Lusophone African law, enabling Mozambican lawyers to learn not only from their colleagues but also from legal experience in Angola, Guinea Bissau, Cape Verde and São Tomé and Principe. Brazilian commentary and jurisprudence, as well as translation and distribution of selected items from the

jurisprudence and commentary of other Southern African Development Community countries could also be helpful.

3. Independence and accountability of judges and lawyers

President Guebuza has clearly emphasised his commitment to the rule of law. Calls to improve respect for the rule of law were a part of the president's electoral campaign, and since taking office in February 2005 he has publicly affirmed this commitment. The government faces a serious task: despite clear codes of conduct, some members of the executive seem to have engaged in deliberate abuse of process including both non-compliance with court rulings and interference in investigations and prosecutions. The extent of the executive's failure to comply with the law has been commented on by the prosecutor-general. In 2001, he reported to Parliament that 'the culture of legality is still a dream, even amongst our leaders'. The high-profile trial of the hired killers of journalist Carlos Cardoso, assassinated in 2000 after reporting on corruption, strengthened the public's perception that organised criminal elements have connections with senior government officials and are able to bribe their way out of the reach of justice. These perceptions were augmented by the repeated escape of Anibalzinho, convicted for the murder of Cardoso, from his high-security prison.

The 2004 Constitution provides for a range of criminal and civil sanctions that can be applied against holders of government office, as well as mechanisms to investigate allegations of abuse. In practice, these mechanisms have not been used, despite frequent allegations within the media that government officials are involved in corruption. The Administrative Court has also reported to Parliament on illegalities and irregularities found in the state's accounts which could have led to investigation by the Office of the Prosecutor-General, but no action has been taken. Serious questions have been raised regarding the integrity and effectiveness of the Public Prosecution Service. The prosecutor-general himself has repeatedly stressed that corruption is rife in relation to criminal investigations. Allegations of obstruction of justice that emerged during the Cardoso investigations and trial, and lack of progress with investigations into the equally high-profile murder in 2001 of Antonio Siba-Siba Macuacua, who was also investigating official corruption, have served to highlight serious problems within the prosecution process.

One of the most obvious ways in which the courts' independence from the executive could be strengthened would be to increase the structural protections for independence of the appointments process for the judiciary, including the prosecution service.

The 1990 Constitution first introduced the principle of judicial independence to Mozambique, and the 2004 Constitution further strengthened guarantees for both administrative and political independence of the courts. Nevertheless, the president has fairly close control over nominations to the higher courts and is directly responsible for the appointment of the president and deputy president of the Supreme Court, with the Higher Council of the Judiciary (*Conselho Superior da Magistratura Judicial*, CSMJ) playing an advisory role. The CSMJ is a 16-member body made up

of the president of the Supreme Court (its *ex officio* chair), the deputy-president of the Supreme Court, two members nominated by the president of the republic, five members appointed by Parliament based on proportional representation, and seven judges elected by their peers. The CSMJ is also responsible for proposing a list of judges for nomination to the Supreme Court and for nominating and managing the careers of judges and court staff in all other judicial courts (provincial, district and specialist courts).

As a balance to executive power, the role of an oversight body within the nomination process for members of the judiciary is extremely important. However, the fact that the president of the Supreme Court is also *ex officio* president of the CSMJ leads to the perception that the council is closely linked to the executive. This duplication of roles is important not only in the judicial appointments process, but also when decisions of the CSMJ may themselves be subject to review by the Supreme Court. The conflict of interest that arises was recognised in a 2002 case before the Administrative Court, *Luís Timóteo Matsinhe v President of the Supreme Court of Mozambique*. The Administrative Court ruled in this case that it was unconstitutional for decisions of the CSMJ to be sent on appeal to the Supreme Court, since the same individuals could judge a case that they had already ruled on. Despite this ruling, in 2005, the president of the Supreme Court appointed three judges of the Supreme Court to hear appeals regarding decisions of the CSMJ.

Among the measures that could begin to address the perceived lack of independence from the executive at the highest levels of the judiciary would be the strengthening of the role of the CSMJ in the process for judicial nomination and appointment, along the lines of the system in South Africa and some other southern African countries. Although it is normal in most countries for the head of government to have an important role in making nominations to the highest courts, the CSMJ's influence could be strengthened, and its own membership widened to include, in particular, representation of the Mozambican Bar Association (OAM). The CSMJ would then select candidates for judicial appointment, including president of the Supreme Court, based on published criteria and a public interview process, and make nominations to the president of the republic. The president of the republic would be able to select from among the candidates proposed but not suggest alternative names. These requirements should be given constitutional protection. In addition, the Administrative Court's ruling on appeals from the CSMJ should be respected, and the Administrative Court should hear appeals on disciplinary rulings rather than the Supreme Court.

Similar measures should be applied to the appointment of the prosecutor-general, who, in the civil law system, is regarded as a member of the judiciary. Currently, the prosecutor-general and his or her deputy are appointed by the president of the republic. The 1989 Organic Law of the Prosecutor-General provides for a Superior Council of the Public Prosecution Service (*Conselho Superior da Magistratura do Ministério Público*), with responsibility for the management and discipline (*gestão e disciplina*) of the Public Prosecution Service. The 2004 Constitution provides for this council to include members elected by Parliament as well as by the Public Prosecution Service. This body has not yet been set up, and should be as a matter of urgency. The new Organic Law proposed by the prosecutor-general should also provide for greater independence in the appointment of the prosecutor-general. In particular, the prosecutor-general and

deputy prosecutor-general should be chosen by the Superior Council of the Public Prosecution Service according to a transparent process, with the president only responsible for formalising their nomination and investiture. This procedure was proposed by the prosecutor-general for inclusion in the 2004 Constitution, but was not adopted.

The problems relating to independence from the executive at the highest level of the courts also occur lower down in the court hierarchy. Both judges and prosecutors interviewed during the course of the AfriMAP research listed specific examples of undue interference with the courts, when members of the public administration had sought directly or indirectly to influence legal decisions. At the district level, where courts tend to face a shortage of funds and lack of physical infrastructure, judges are more vulnerable to outside influence. Among the reasons for this are the history of FRELIMO party authority over all branches of government, especially in the rural areas, and the fact that, despite improvements over the past few years, there is a critical lack of appropriately qualified judges especially at district level.

If judges and prosecutors were more obviously trained to a superior level, it would be easier for them to resist interference from the executive or party authorities. The Coordinating Council for Legality and Justice has undertaken an initiative to recruit and train more judges, and salary increases have helped to attract more candidates. However, the shortage is still severe, and this remains a priority area, though not one easily or quickly resolved. In addition, the CSMJ should strengthen and make more transparent its disciplinary action against judges who are not performing to the expected level. General information on the activities of the CSMJ published by the president of the Supreme Court suggests that the Council has initiated disciplinary proceedings mostly against court administrative staff rather than judges. The information published should be made more detailed so that members of the public are aware of action taken in respect of allegations of judicial misconduct. In addition, the CSMJ could usefully develop criteria to evaluate judicial performance; these criteria could then be made public, to enable closer monitoring of judicial behaviour and wider knowledge of the independence expected from executive interference.

Although there are steps that can be taken immediately, improving the quality of judicial decision making, including its independence from unwarranted executive interference, will depend on a long-term effort to strengthen the legal profession in Mozambique more generally. Even though the availability of legal training has expanded in recent years, including at universities outside of Maputo, there is a shortage of qualified advocates admitted to the OAM to provide legal representation even to those who have means to pay. Moreover, the content of legal training is often too academic and insufficiently practical, with law school graduates having little concept of how to practise. Law graduates are required to undergo a traineeship with a member of the OAM and gain practical experience before they too can be admitted as advocates. However, the OAM has admitted that it does not have the capacity to supervise all potential candidates for training. Meanwhile, as for the judiciary, the enforcement of standards of practice by the profession itself leaves much to be desired. The OAM should move forward with the already proposed development of a code of conduct for its members. There is also a need for more imaginative debate and innovation over the proper structure of legal training to ensure that admitted

members of the bar have attained a minimum standard of qualification. The Bar Association should be supported in its reform efforts, in order to strengthen its ability to play a more proactive role in its oversight capacity.

4. Criminal justice

Mozambique has one of the lowest ratios of police officers to citizens worldwide, with one police officer to 1 089 citizens (compared to one to 450 in South Africa). It is not surprising that, with such thin coverage, it is widely believed that many crimes go unreported and that crime rates are much higher than actual reported figures. Efforts have been made to improve recruitment and also to provide training to the police, particularly with the establishment of the Academy of Police Sciences (*Academia de Ciências Policiais*, ACIPOL). However, in order to make any substantial improvement in policing coverage of the country, greater funding will be required to pay a larger salary roll and provide training. Information is not available from the Ministry of the Interior on budget allocations to the *Polícia da República de Moçambique* (PRM), and the manner in which these funds are spent. Transparency would allow open, public debate on the adequacy of funding to the PRM. With the additional impact of HIV/AIDS on the police force—in 2006, a representative of the Ministry of the Interior said that the PRM was losing 1 000 police officers a year to HIV/AIDS—there is a growing urgency to address this issue.

In 2001, no doubt in part a response to the inadequacy of police coverage, the Minister of the Interior launched an initiative to create police community councils. By the end of 2005, more than 1 000 had been established across the country. These structures, designed to promote dialogue between the police and citizens on problems of public security, and to involve citizens in crime-prevention efforts, could in principle provide a useful mechanism in improving neighbourhood security. However, there have been problems with their implementation. Citizens have been provided with firearms and the authority to use these firearms in upholding neighbourhood security, but without any substantial prior training. Often, those volunteering tend to be unemployed young people with no source of income, opening up a greater likelihood that they will abuse their positions for personal benefit. Police community councils should not be seen as a substitute for trained police officers and, if they are to operate, legislation regulating their functions and responsibilities is critically needed. At the moment, although the PRM provides members of the councils with firearms, it accepts no responsibility for the consequences of their use.

Within the PRM itself, allegations of human rights abuse have steadily declined since the 1990s, and efforts are being made to professionalise the force—for instance, with the creation of ACIPOL. However, there have been some serious incidents which indicate that, in particular, depoliticisation of the police force—which was a fundamental principle of the peace accords ending the civil war—is not yet complete. In November 2000, up to 100 people, almost all opposition supporters, died of asphyxiation in a grossly overcrowded police cell in Montepuez. The deaths followed a round-up after violence broke out during a demonstration by the *Resistência Nacional Moçambicana-União Eleitoral* (RENAMO-UE), against allegedly rigged elections. The Montepuez incident raised serious questions about the extent of the police force's impartiality, and, although

a parliamentary committee and independent initiatives from civil society groups were set up to investigate the events, none has publicly released any report. The role played by civil society groups such as the Mozambican League of Human Rights (LDH) is essential to record and monitor allegations of human rights abuse committed by the police. However, there is no government-funded independent external mechanism established by law to investigate complaints against the police, and implementation of such an oversight mechanism is urgently needed.

The prison system is also in critical need of an independent oversight mechanism. Although parliamentary committees sporadically visit prisons, reporting on conditions of detention, this system is not a substitute for a permanent, external mechanism. The opportunity to implement such a mechanism within the new unified structure of prisons should not be lost. In May 2006, legislation was enacted to unify the dualist structure of prisons in Mozambique, previously split between the Ministry of the Interior and the Ministry of Justice, and the director of the new institution, the *Serviço Nacional de Prisões* (SNAPRI), was appointed in August 2006. SNAPRI now faces the challenge of planning a clear transitional strategy to unify the systems on the ground. Any plan must have a clear time-line with objectives and indicators and must be made public, so that local civil society organisations can monitor and evaluate progress made.

Conditions in Mozambique's prisons raise serious concerns, with severe overcrowding, poor physical infrastructure, and an ensuing lack of sanitary conditions and access to basic healthcare. Diseases are rife, including HIV/AIDS. Many of the prisons are not operating at full capacity, as derelict areas, including those damaged by recent flooding, are out of use. Funds allocated to prisons must be fully executed, and repair work should begin as soon as possible. A large proportion of those in custody are young offenders, yet there are barely any separate facilities for juveniles, resulting in these young offenders mixing with older, hardened criminals. Implementation of separate detention centres for the young, with emphasis on training and reintegration, should be a priority or it will be very difficult to break the cycle of crime. The current legislative framework does not provide for non-custodial sentences, and—particularly in light of the high percentage of young prisoners—more debate involving both the state and civil society is needed on the creation of alternative sentences to imprisonment.

The issue of overcrowding in Mozambican prisons is also linked to the enormous procedural delays in bringing criminal cases to trial. Although the situation has improved considerably over the past few years, in 2005, 53 per cent of prisoners were on remand. The current framework set out by the Criminal Procedure Code allows a suspect to be held for up to six months without being formally charged. A serious backlog of cases in the judicial courts means that the case may then not be heard for several years. This is a serious breach of the fair trial principles adopted by the African Commission on Human and Peoples' Rights under the African Charter. The Criminal Procedure Code is currently under revision, and the drafters should radically reconsider the current framework for detention and charge that allows for such a long period of detention prior to any charge being laid. Any new framework should considerably reduce the time-frames allowed for a suspect to be held without charge; this would force the police and prosecutors to conduct a greater part of their investigations prior to making any arrest. Provisions already exist that, for minor offences, a suspect must be judged a maximum of five days from

when he or she was detained, but currently these are only sporadically applied, and they should be enforced. This would greatly ease pressure both on overcrowding in prisons, where many inmates are awaiting trial for minor crimes, and on the backlog of cases awaiting trial in the judicial courts.

Undue delays in trial would more likely be avoided with a new legislative framework governing the steps from detention to trial, and, critically, enforcement of this framework. The latter is dependent on the efficiency of the police, prosecutors and courts in fulfilling their responsibilities in a timely manner. The Public Prosecution Service has faced serious problems in effectively undertaking its responsibility of overseeing criminal investigations, due both to staff shortages and its reliance on the Criminal Investigative Police (*Polícia de Investigação Criminal*, PIC). The PIC is responsible for carrying out criminal investigations under the supervision of the Public Prosecution Service. Yet, although the Public Prosecution Service is in charge of overseeing the PIC's investigative work, the PIC is ultimately under the command of the Ministry of the Interior. This institutional set-up has created ambiguities in the line of control with regard to criminal investigations, and the issue needs to be resolved. It seems that the prosecutor-general and the Ministry of the Interior have reached consensus for the PIC to remain in the Ministry of the Interior, with greater administrative autonomy and improved resources to enhance the criminal investigative process. If consensus has been reached, this must be fully clarified and confirmed so that the focus of attention can shift to implementing improvements in the investigative process.

Another key component of the right to a fair trial relates to the right to representation, a principle which is constitutionally enshrined in Mozambique. The Institute for Legal Assistance and Representation (*Instituto de Assistência e Patrocínio Jurídico*, IPAJ), was created in 1994, under the supervision of the Ministry of Justice, to satisfy this constitutional requirement. The statutes of the OAM also establish that its members should provide free representation as one of their duties. As a last resort, the law provides that the courts, the Public Prosecution Service or the investigating judge can appoint an ad hoc counsel to represent the accused, if no other representation is available. In practice, the provision of legal representation in criminal cases by the OAM and the IPAJ is seriously lacking, and suspects are often defended by a court-appointed representative lacking in any legal training, and instructed on the day of trial itself.

With the background context of widespread poverty, where the majority of defendants rely on legal aid, this has considerable implications for a fair trial. A major overhaul of the system for legal aid is required. Both the OAM and IPAJ should be provided with better funding—in the case of the OAM, to cover expenses related to providing legal aid, and, in the case of the IPAJ, to cover salaries for staff. More innovative measures should also be implemented, for instance, to utilise the resources of law students, or those in training for admission to the OAM, and to support the growing network of paralegals from civil society organisations providing legal aid.

5. Access to justice and enforcement of rights

As in many other poor countries, it is a challenge to ensure that all citizens can enforce the rights set out in Mozambique's Constitution. The reality for most Mozambicans is that the judicial courts are inaccessible, blocked by a range of obstacles including high costs relative to income, immense distances and poor transport networks. Even if court fees are waived and legal representation provided free, the cost of related expenses such as transport to the courts and accommodation away from home can become an enormous, insurmountable burden.

While detailed measures such as the introduction of a simplified and reduced fee scale for court proceedings could make a contribution, more radical steps will be needed for most Mozambicans to have access to an officially recognised forum where disputes can be resolved before an impartial tribunal.

The 2004 Constitution provides several interesting opportunities to respond to this challenge. The first is its recognition of a right to 'popular action' (*direito de acção popular*) under which individuals and groups can bring a case to court in relation to issues such as public health, consumer rights, environmental conservation, cultural heritage, and public property. Without legislation to implement this right, the modalities of how citizens should bring cases to court remain unclear. UTREL should be mandated and funded to consult widely and prepare legislation for a legal framework giving force to this constitutional provision.

Second, as noted above, the 2004 Constitution also provided new and important recognition to the community courts. These courts represent perhaps the most accessible and rapid forum for dispute resolution with formal state recognition, yet they have never received any financial, material or human resource support (though in some cases they may receive informal assistance from the district courts) and they are under no formal control, including in relation to appointments or to the law applied. The new legislation proposed by UTREL would create a formal link between the community courts and judicial courts. While financial support and integration of the community courts into the judicial system is critical, the funding and administration of these courts should be structured with the same guarantees of independence from executive interference as the judicial courts. Given the current problems in distribution of funds from national to district level within the court system, the CCLJ or CSMJ should urgently give attention to the creation of a system by which funds can be more rapidly received by courts at the lower end of the court hierarchy. The Ministry of Justice could potentially prove a more effective conduit of disbursement of funds to these courts than the current structure. Whatever institutional relationship is set up, this should not compromise the efficacy and relative speed of operation of the community courts.

Finally, for the first time, the 2004 Constitution recognises legal pluralism (*pluralismo jurídico*) in Mozambique, an important step toward an effort to integrate the various coexisting normative and dispute resolution systems into the formal court structure. Yet there is no clear understanding, even in principle, of what this recognition should mean in practice. The Constitution did not expressly recognise traditional fora of dispute resolution operated by traditional leaders (*régulos*) or local leaders appointed by the government (*secretários de bairro* or

the *secretários da povoação*). However, for the majority of Mozambicans, these fora remain a key mechanism for access to justice. The question of how to operationalise the principle of legal pluralism and, specifically, whether these traditional dispute-resolution fora should be incorporated into the formal system needs to be widely discussed and debated, with public consultation.

At the same time, there is a need to consider the possibility of putting in place some mechanism to ensure that these traditional fora apply constitutional principles in their application of customary law. In its ruling in the case of *President of the Republic of Mozambique v Bernardo Sacarolha Ngomacha*, the Supreme Court clearly outlined that customary law must be applied in line with constitutional principles and internationally agreed instruments for the protection of human rights.

Mozambique does not have a national Human Rights Commission, although internal discussions within the government for the establishment of such a body have begun. A Human Rights Commission could play an important role in ensuring, for example, a greater degree of independent oversight of the police and prisons. Legislation creating an ombudsman (*Provedor de Justiça*) was recently approved by Parliament, but the ombudsman has not yet been appointed. The ombudsman would provide an additional mechanism in providing for the defence of rights outside the court system, and should be appointed speedily to enable this work to begin. Civil society should lobby and advocate for its establishment and should be involved in the process of appointment of the ombudsperson by Parliament.

6. Development partners

Mozambique will of necessity continue to rely on donor assistance for the implementation of many of the reforms identified in this document. In general, the trend away from individual project finance to budget support for government-identified priorities associated with a strategic plan is to be welcomed. Coordination among Mozambique's development partners has also improved in recent years, but more could be done towards better transparency so that it is easier for civil society to determine and monitor total aid flows to the sector. The government must take the lead in providing a sectoral plan around which donor assistance can coalesce. Nonetheless, some specific initiatives could usefully receive direct individual donor support, including, for example, publication of law reports and the development and sponsorship of judicial colloquia and collective learning among Lusophone African countries.

Conclusion

Since the end of civil war and the agreement of peace, the Mozambican justice sector has undergone transformation, reflecting the broader political and socioeconomic changes in society as a whole. Mozambique has evolved from a one-party state into a multiparty, constitutional democracy, and the justice sector is no longer an arm of the FRELIMO party apparatus. The 2004 Constitution strengthened the principle of a separation of powers between the courts, executive, and legislature, which had been established by the 1990 Constitution.

However, despite the radical improvements that have been effected, the independence of the courts and judiciary is still not guaranteed. At all levels of government, members of the executive need to abide by court rulings, cooperate with investigative processes, and respect the independence of the courts and their judges. Unless these principles are strictly respected, public confidence in the courts is at risk of being seriously undermined. For judicial independence to be truly guaranteed, judicial oversight bodies also need to play a strengthened role in the appointment process for the president of the Supreme Court, as well as for the prosecutor-general.

The judicial courts are not a reality for the large majority of Mozambican citizens. Provisions in the 2004 Constitution for a new layer of appeal courts at the provincial level and for administrative courts in the provinces should be implemented to improve access to the courts. Most citizens, however, rely on the informal sector—on the community courts or other local dispute mechanisms. Clarification of the status of community courts is urgently required, as is financial support for their operation. Training of community court judges as well as local traditional leaders would improve the likelihood of constitutional principles and human rights standards being observed in these dispute-resolution fora.

There is currently considerable debate underway within institutions of the justice sector on the future direction of the sector, and such self-reflection and discussion is to be welcomed. It is now essential that the sector is able to work as a whole to implement new strategies and policies, and, critically, that it retains the political will to implement these measures.

Part II

Mozambique: Justice Sector and the Rule of Law

Main Report

Summary

Since the peace agreement that ended the post-independence civil war, the justice sector in Mozambique has undergone transformation. The 1990 Constitution introduced a multi-party system, protections for human rights, and a separation of the courts, the executive and the legislature. The 2004 Constitution further entrenched individual rights and strengthened the independence of the courts, though the reforms it introduced were not as wide-ranging as some had hoped for.

However, Mozambique's laws do not yet reflect these constitutional changes, even though legislative reform has gathered pace in recent years, led by the commendable work of UTREL (*Unidade Técnica de Revisão Legal*), the technical unit for legal reform established by the Ministry of Justice. This pace must be maintained as significant pieces of legislation still in force, including the Criminal Code and the Criminal Procedure Code, are extremely out-of-date. Reform is also still needed of legislation governing court structure. The 2004 Constitution recognised the principle of 'legal pluralism' but definition is still needed on the status of community courts and alternative dispute resolution mechanisms, as well as the creation of intermediate appeal courts between the provincial courts and the Supreme Court.

To contribute to this process, it is essential that the capacity of Parliament to comment on and provide input to draft laws be strengthened. There is a real risk of Parliament becoming a bottleneck in the process of legislative reform. With the growing use of decree-laws by the Council of Ministers since the introduction of this form of delegated authority to legislate in the 2004 Constitution, the trend will be for decree-laws to be tacitly approved without proper debate unless Parliament plays a more pro-active role in fulfilling its oversight responsibilities. In the long-term this could have unsettling consequences for the balance of power between the legislature and executive.

An important tool for legal reform should be the self-examination required for the reporting process related to international human rights treaties. However, although Mozambique has a fairly good record in signing and ratifying international human rights treaties, it is failing to comply with related reporting requirements. This situation may improve with the recent establishment of an ad hoc inter-ministerial committee on human rights, with responsibility for Mozambique's reporting requirements, due to become a permanent body by the end of 2006.

The government has taken important initiatives to improve planning and coordination within the sector, most notably with the creation of a coordinating body, the Coordinating Council for Legality and Justice (*Conselho de Coordenação da Legalidade e Justiça,* CCLJ) and the adoption of the sector's first integrated, strategic plan (*Plano Estratégico Integrado*, PEI). Yet a lack of political will and commitment behind these initiatives means that the results have not been as effective as hoped.

Funding of the sector has improved over the years, but the district courts remain very poorly supported, in large part because they have not received regular allocations from the provincial courts that are responsible for disbursing funds to them. As well as being under-funded, district courts tend to lack copies even of key pieces of legislation, making it very hard for judges to properly fulfil their responsibilities.

Since the introduction of the constitutional principle of separation of powers between the courts and the executive, there has been major progress in executive respect for the principle of judicial independence. Nonetheless, the independence of the courts and judiciary is still not guaranteed. Members of the executive at all levels need to abide by court rulings, cooperate with investigative processes and abstain from applying pressure on judges, prosecutors or lawyers. The system for appointment of judges and prosecutors would also benefit from a greater degree of independent oversight to balance the nomination powers of the executive.

Despite a steady increase over the years, there is still a major deficit in the number of trained judges to meet the needs of the courts. Similarly, there is a serious shortage of prosecutors and advocates. This may in part explain the major backlog of cases in the judicial courts, and the serious delays in trial that ensue. With criminal cases, delays are not helped by a legislative framework that allows suspects to be held for up to six months before a charge is even laid.

Mozambique's criminal justice system is facing some critical issues. The status of police 'community councils' that involve citizens in policing responsibilities requires legislative definition, in the context of a broader debate about the adequacy of police coverage across the country. Legislation unifying the dualist prison system was recently passed, and the new National Prisons Service (SNAPRI) now faces the challenge of implementing the legislation that brought together prisons previously run by the Ministry of Justice or the Ministry of the Interior.

The reality for most Mozambicans is that the judicial courts are inaccessible, due to both financial and physical barriers. In this context, it is imperative that the government support community courts, which are for many Mozambicans much more accessible. In addition, the Ministry of Justice should open up debate on support for alternative dispute resolution mechanisms. Training for judges in these fora would provide for a much greater likelihood of the application of constitutional principles and human rights standards.

Mozambique will of necessity continue to rely on donor assistance for the implementation of many of the reforms identified in this document. Coordination among Mozambique's development partners has improved in recent years, but more could be done to improve transparency so that it is made easier to determine total aid flows to the sector. The government must take the lead in providing a sectoral plan around which donor assistance can coalesce.

1

Legal and institutional framework

A. International law, the Constitution and national legislation

International law

Since independence, Mozambique has ratified most key international and African human rights instruments without reservation.[1] Recently, Mozambique ratified the Protocol to the Court of Justice of the African Union (2004), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005), the UN Convention against Corruption (2006) and the AU Convention on Preventing and Combating Corruption (2006).

One of the most significant international treaties that Mozambique has not yet signed is the International Covenant on Economic, Social and Cultural Rights (ICESCR), although the 2004 Constitution does include provisions for the protection of socio-economic rights. The IESCR was included on a recommendatory list provided by the Ministry of Foreign Affairs and Cooperation, of international and regional instruments that should be ratified by Mozambique.[2] This list also includes the Rome Statute on the International Criminal Court (only signed, 2000), the

1 Mozambique is party to the UN Convention on the Elimination of All Forms of Racial Discrimination (1983); the UN Convention relating to the Status of Refugees (1983); the International Covenant on Civil and Political Rights (1993); the UN Second Optional Protocol to the Covenant on Civil and Political Rights aiming at the abolition of the death penalty (1993); the UN Convention on the Rights of the Child (1994); the UN Convention on the Elimination of All Forms of Discrimination against Women (1997); the UN Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1999); the African Charter on Human and Peoples' Rights (1989); the African Charter on the Rights and Welfare of the Child (1998); and the African Convention Governing Specific Aspects of Refugee Problems in Africa (1989), amongst others.

2 *List of international treaties proposed for accession or ratification by Mozambique in 2005 (Proposta de Lista dos Tratados Internacionas para a Adesão ou Ratificação pela República de Moçambique em 2005)*, received by AfriMAP upon request from the Ministry of Foreign Affairs and Cooperation, April 2005.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (no action yet taken) and the UN Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (no action yet taken). In terms of regional instruments, the list includes the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. This was approved in principle in 2004 by the Council of Ministers for ratification but there has been no further progress since then.

At the regional level, whilst Mozambique generally has a good track-record of signing and ratifying SADC instruments, some protocols are still outstanding. These include the Protocol on Extradition (no action taken as of August 2006), the Protocol on Mutual Legal Assistance in Criminal Matters (no action taken as of August 2006), the Protocol on Legal Affairs (only signed, 2000) and the Protocol against Corruption (only signed, 2001).

Whilst Mozambique has a relatively good record in ratifying international instruments, the government has tended not to subscribe to provisions allowing for individual petitions to be made to the treaty bodies. For example, Mozambique has not signed the Optional Protocol to the International Covenant on Civil and Political Rights.

Across the board, the government is failing to submit reports as required by the international human rights treaties to which it is a party. For instance, Mozambique submitted its first report to the African Commission on Human and Peoples' Rights in 1997, three years after it was initially due, and a second report in 2000, the year its fourth report should have been submitted. Senior staff at the Ministry of Foreign Affairs and Cooperation interviewed in February and March 2005[3] said that the most recent report due in 2003 was almost complete, and would be shortly distributed amongst civil society for consultation. If this takes place, it would signify a positive sign of political will to initiate efforts for discussion. However, to date, the report had not yet been submitted for public consultation, nor to the African Commission. Mozambique is far behind schedule also in reporting to the various UN committees. The government has only submitted a handful of reports so far; in 1983 and 2006 to the Committee on the Elimination of Racial Discrimination, and in 2000 (four years overdue) to the Committee on the Rights of the Child.[4] As of September 2006, 18 reports were overdue.[5]

A number of factors have contributed to the government's failure in meeting its reporting obligations. In interviews, staff in both the Ministry of Justice and Ministry of Foreign Affairs and Cooperation (the two ministries responsible for reporting) spoke of a lack of sufficient human capacity to manage reporting duties, as well as a lack of coordination between the two ministries.[6] An ad hoc interministerial committee on human rights has recently been established with responsibility for Mozambique's reporting requirements, and by the end of the year,

3 Meetings with Ministry of Foreign Affairs and Cooperation on 17 February 2005 and 14 March 2005, Maputo.

4 Meeting with representative of the Ministry of Foreign Affairs and Cooperation, Maputo, August 2006.

5 For further information on reporting status to the UN bodies, see the UN Treaty Body Database at www.unhchr.ch/tbs/doc.nsf/RepStatfrset?OpenFrameSet.

6 Interviews with Mr Geraldo Saranga, deputy director of legal affairs, Ministry of Foreign Affairs and Coopoeration, Maputo, 14 March 2005; and with Mr Samo Paulo Gonçalves, head of office, Ministry of Justice, Maputo, 17 March 2005.

it is expected that this should become a permanent body.[7] The committee could benefit from technical assistance in improving its capacity to research and draft reports, as required by the treaty bodies. The role of civil society in ensuring government meets its obligations has also been lacking. Mozambican civil society groups have never submitted a shadow report to the African Commission, and a parallel process could generate pressure on the government to improve its own record.

The 2004 Constitution sets out that it is the competency of the Council of Ministers to prepare international treaties for signature (art. 204), of the president of the republic to sign international treaties (art. 162), and of Parliament to ratify international treaties (art. 179). Mozambique follows the civil law system, whereby once international treaties or other international instruments are ratified and published, they automatically enter into force in national law as set out in the Constitution:

> Article 18: Validly approved and ratified international treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published, for as long as they are internationally binding on the Mozambican state. [8]

There has been some debate as to the interpretation of article 17.2 of the Constitution:'The Republic of Mozambique shall accept, observe and apply the principles of the Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights.' This provision refers to application of the principles, but not the substantive provisions of the Universal Declaration and the African Charter. However, article 17.2 is complemented by article 43 of the Constitution:

> Article 43: Constitutional principles regarding fundamental rights shall be interpreted and incorporated according to the Universal Declaration of Human Rights and the African Charter of Human and Peoples' Rights.

Article 43 states that constitutional principles in respect of fundamental rights should be 'interpreted and incorporated' in accordance with both the African Charter of Human and Peoples' Rights and the Universal Declaration of Human Rights, hence going much further than article 17 in asserting the centrality of these human rights treaties.

The courts have not yet seriously been put to the test in the application and interpretation of international instruments to which Mozambique is a party. Hence, many of the principles of international law still need to be substantively developed in the Mozambican context. As judges are requested to rule on cases related to norms of international law it will be interesting to see the extent to which they give legal effect to such norms.

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7 Representative of the Ministry of Foreign Affairs and Cooperation, AfriMAP seminar, Faculty of Law at the University of Eduardo Mondlane, Maputo, 28 July 2006.

8 Constitution of the Republic of Mozambique, 2004 (henceforth referred to as 2004 Constitution), art. 18: *'Os tratados e acordos internacionais, validamente aprovados e ratificados, vigoram na ordem jurídica moçambicana após a sua publicação oficial e enquanto vincularem internacionalmente o Estado de Moçambique'.*

Constitution

Since independence from Portugal in 1975, Mozambique has had three constitutions (1975, 1990 and 2004). The 1975 Constitution established a one-party system that confirmed the overwhelming role of the executive—in effect the ruling party, FRELIMO *(Frente da Libertação de Moçambique)*—over all aspects of public life, including the judiciary. This Constitution remained in force throughout the civil war between FRELIMO and RENAMO *(Resistência Nacional Moçambicana)*.

The 1990 Constitution was drafted against the backdrop of peace negotiations, and was part of the process that led to the signing of peace in 1992 between FRELIMO and RENAMO under the General Peace Agreements.[9] The objective was to provide a new constitution under which peace could be agreed and democratic elections could take place. The 1990 Constitution marked a radical break with the past, enshrining the shift away from a centralised economy to capitalism, and from a one-party system to multiparty democracy, and placing the citizen at the centre of the state. It opened up space for legislative reform in all aspects of state organisation and policy.

The 1990 Constitution widened the Bill of Rights to include new individual rights and freedoms that had been denied under the one party state. Whilst the 1975 Constitution did include a chapter on the rights of citizens, the emphasis was on collective rather than individual rights. The 1990 Constitution contained a much more comprehensive Bill of Rights, bringing Mozambique into greater step with international human rights standards. The new Constitution expressly included the right to equality before the law (art. 66), which had not been explicit in the 1975 Constitution. Other new provisions included the right to life, with the abolition of the death penalty (art. 70); freedom of expression and the right to information, not to be limited by censorship (art. 74); freedom of movement (art. 83); and the right to form and participate in political parties (art. 77). The right to contest violation of rights (art. 81) was also included, with particular reference to the right to present petitions or complaints (art. 80) and to recourse to the courts in case of such violations (art. 82).

The Constitution also included a chapter on economic and social rights and duties. Marking a formal move away from FRELIMO's past socialist economic policies, it provided for the right to own property (art. 86); the right to inheritance (art. 87); and the right to work in a free choice of profession (art. 88) with just payment (art. 89). The right to education (art. 92) and to medical and health care (art. 94) were also recognised.

The Constitution was drafted and approved in the run-up to the agreement of peace and in the context of the single party system. The drafting process had broad participation both within and outside the FRELIMO party structure and brought a degree of consensus for the changes required to the political, social and economic structure of the country. Despite some opposition within the party structure and amongst FRELIMO supporters to the introduction of the multiparty system, the party leadership went ahead with this major change.

In October 1995, following the first multiparty elections the preceding year, Parliament

9 General Peace Agreements of Rome, 1992 (approved by law no. 13/92), *Government Gazette (Boletim da República*, BR) no. 42, I Série, 14 October 1992.

passed a resolution to set up an ad-hoc commission for constitutional review.[10] Led by Hermengildo Gamito from the FRELIMO party, the commission was composed of 31 MPs, reflecting the party composition of Parliament, with 16 FRELIMO members and 14 from the electoral coalition, *Resistência Nacional Moçambicana-União Eleitoral* (RENAMO-UE).[11] The first draft constitutional bill was submitted to Parliament on 1 July 1998, and was followed by a national seminar held in October, intended to mark the beginning of a public debate. About 750 individuals—including MPs, judges, lawyers, political leaders and 250 members of civil society from all over the country—participated in the seminar, held in Maputo, in the buildings of Parliament. Between October and December 1998, five public debates were held in the cities of Beira, Nampula, Pemba, Tete and Xai-Xai. In 1999, Parliament held an extraordinary session with the specific aim of approving the draft constitution, but the session collapsed in disagreement. In particular, proposals to change the status quo set out in the 1990 Constitution that allowed the president of the republic to appoint the prime minister[12] in favour of a system whereby the prime minister would be nominated by the winning party in the parliamentary elections, created bitter divisions. A five-year period of silence followed, and the commission only recommenced its work in 2004.[13]

The ad-hoc commission for constitutional review resumed debating in July 2004, and in September 2004 publicly circulated a new draft of the constitutional bill. FRELIMO and RENAMO were unable to reach agreement on whether a referendum on the constitution should be called, or on conducting regional seminars in just a few provinces or in each provincial capital. Finally, the two parties agreed not to call a referendum, and in mid-September, the commission conducted two-day regional seminars in Maputo, Beira and Nampula.[14] Whilst institutions such as the Mozambican Bar Association (OAM)[15] and the Faculty of Law at the University of Eduardo Mondlane had the opportunity to submit papers for consideration, there was not as broad public consultation as had taken place in 1999. The period between September and November 2004 coincided with the final run-up to parliamentary and presidential elections, scheduled for November and December 2004, and public and media attention was largely preoccupied with the election campaign rather than constitutional revision.[16] The new Constitution was formally approved in November 2004 by the existing Parliament as its last action before it was replaced by a new Parliament in January 2005.

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10 **Resolution no. 25 of 1995, 13 October ,** *BR* no. 49, I Série, 6 December 1995.

11 RENAMO-UE is the electoral coalition formed by RENAMO and a group of small opposition parties. The coalition emerged in the 1994 general elections, with the objective of forming a united front to oppose FRELIMO. This strategic unity has proven difficult to sustain. Both in the 1999 and the 2004 elections, a number of small opposition parties continued to run independently or through alternative small coallitions. They have not had any success; Parliament remains divided between FRELIMO and RENAMO-UE.

12 Constitution of the Republic of Mozambique, 1990 (henceforth referred to as the 1990 Constitution), art. 121(b).

13 **The 2004 Constitution did not include any changes to the status quo; the president of the republic retained power to appoint** and dismiss the prime minister **(Constitution of the Republic of Mozambique, 2004, art. 160, no. 1 (b)).**

14 *Jornal Notícias*, Maputo, 22 September 2004.

15 **Mozambican Bar Association,** *Analysis of the Constitutional Revision Process (Parecer sobre o Projecto de Revisão da Constituição da República de Moçambique)*, Publidigital, Queluz, Portugal, 2005.

16 **Gilles Cistac,** *Contributo para o Debate Sobre a Revisão Constitucional,* Eduardo Mondlane University, 2004, pp. 3-5.

Although the 2004 Constitution brought about considerable progress in relation to citizens' rights and organisation of the judicial system, it did not meet the expectations of many in the judiciary. Prior to the recommencement of the constitutional revision process, debate regarding the future of the justice sector had already been underway, initiated by the Technical Unit for Law Reform (*Unidade Técnica de Revisão Legal, UTREL)*. In June 2004 UTREL circulated a draft bill on a new framework for justice administration (*Anteprojeto de Lei de Bases sobre o Sistema de Administração de Justiça)*.[17] Whilst some issues put forward by UTREL were taken up in the new Constitution, an opportunity for more fundamental far-reaching debate and discussion on Mozambique's justice system was arguably lost. Dr Abdul Carimo, director of UTREL, stated in an interview that the constitutional revision process could have been used to debate more fully the structure of the courts and the basis of the system of justice, as inherited from the Portuguese.[18] Some ambiguities were also created in the process of compromise on the Constitution—for instance the unclear status of the Constitutional Council and the Public Prosecution Service—as well as due to the omission of a comprehensive framework for the courts.

Nevertheless, the 2004 constitutional review did bring organisation of the justice system into better step with some of the social realities faced by citizens. Some progressive changes were realised, including the acknowledgement of legal pluralism *(pluralismo jurídico)*—the recognition of different normative and dispute resolution systems coexisting in Mozambique (art. 4). Although alternative dispute mechanisms, for instance in the form of traditional or religious leaders, were not formally recognised, this provision opened up space for future clearer definition of the relationship between formal and informal courts. The justice sector now faces the challenge of providing clarity on exactly what is meant by this principle, and giving it material effect.

In contrast to the major changes between the 1975 and 1990 Constitutions, the 2004 Constitution is quite similar to the 1990 Constitution. Rather than representing a break with the past, it was intended to reinforce changes that had been initiated in 1990. The 2004 Constitution sharpened and clarified a number of provisions related to human rights protection, and also recognised some new rights:

- The 2004 Constitution introduced the right of popular action in court *(direito de acção popular)* (art. 81). Both as individuals or as part of a group, citizens are provided with the right to claim compensation; and the right to act in defence of public health, consumer rights, environmental conservation, cultural heritage and public property;
- Whilst the 1990 Constitution recognised the right of the accused *(arguido)* to legal assistance and aid (art. 100), the 2004 Constitution recognises the right of the accused to a choice of a defence counsel to assist in all parts of the proceedings *(todos actos do processo)* (art. 62).

17 See chapter 1.C, Legislative process, for further information on this bill.

18 Interview with Dr Abdul Carimo, director of UTREL, Ministry of Justice, Maputo, 13 February 2005. Similar views were also expressed by Judge Luis Mondlane, Supreme Court, Maputo, 14 February 2005.

- Regarding preventive detention *(prisão preventiva);*[19] whilst the 1990 Constitution provided that this be permitted only in cases provided for by the law, and that those detained should be brought before a judge within the period fixed by law to decide upon the legality of their detention (art. 101), the 2004 Constitution further added that those detained should be promptly informed of their reason of detention and that their family should be informed (art. 64).
- The 1990 Constitution provided for the right of *habeas corpus* (art. 102), the procedures of which should be fixed by law. The 2004 Constitution added a time limit of eight days within which courts must respond to writs of *habeas corpus* (art. 66).
- The 2004 Constitution introduced the principle that punishment cannot be in perpetuity, is not transmissable, and apart from those cases where their denial is inherent to the punishment, punishments cannot include deprivation of civil, professional or political rights, or any fundamental rights (art. 61).[20]
- The 2004 Constitution provided for new protections for lawyers in the exercise of their functions, including the right to privacy of communication between a lawyer and client when the client is in detention (art. 63).
- The 2004 Bill of Rights binds both private entities and individuals, as well as the state (art. 56.1).

All three constitutions since independence have included a provision that states that previous legislation shall remain in force insofar as it is *not* contrary to the Constitution.[21] When national laws have provisions that are not in accordance with the Constitution, these provisions are regarded as revoked in so far as they contradict the Constitution, and should be reinterpreted in light of constitutional standards. For instance, the Civil Code sets out differences in treatment between legitimate and illegitimate children regarding inheritance.[22] The 1990 Constitution subsequently stipulated that the legal status of one's parents should not affect the enjoyment of rights.[23] Although this provision has not been challenged in the Constitutional Council, in practice it has ceased to be applied by the courts. However, this is not satisfactory, since it leaves room for considerable ambiguity. The interpretation of whether legislation is compliant with constitutional standards is dependent on Mozambican judges, particularly in the higher courts where, in practice, precedents are set for the lower courts, although not technically binding in civil law. For instance, a provision of the Criminal Procedure Code that did not allow bail for certain crimes[24] was challenged in the Supreme Court in 2000, on the grounds that this violated

19 In the Mozambican context, preventive detention refers to the right of the police and prosecutors to hold suspects without charge.

20 The deprivation of political rights was provided for in the Criminal Code, art. 56, no. 3.

21 2004 Constitution, art. 305. (See also art. 71 of the Constitution, 1975, and art. 209 of the Constitution 1990).

22 Civil Code, arts. 2139 and 2145.

23 1990 Constitution, art. 66.

24 Criminal Procedure Code, art. 291.

the constitutional principle of the presumption of innocence[25] and procedural guarantees for individuals facing trial. Although the Supreme Court eventually ruled on the basis of fact rather than law that the applicant should be released, it can be inferred from the ruling that in theory this provision of the Criminal Procedure Code was unconstitutional.[26]

National legislation

There is a major need in Mozambique for comprehensive law reform to ensure the compliance of existing legislation with provisions of the Constitution and international law. Constitutional provisions such as the Bill of Rights and the ratification of international treaties and covenants are ineffective if they are not supplemented with national legislation and regulation relating to human rights.

There have been some successful efforts to revise national law towards greater conformity with constitutional and international standards, for instance with the new Land Law *(Lei da Terra)* of 1997[27] that provided improved protection for women's rights in relation to land. The law provides that norms and practices implemented in each community could be applied by citizens in relation to their land,[28] with the proviso that this should be without discrimination against women's constitutional right to equality. The 2004 Family Law *(Lei da Família)*[29] also provided for improved protection of women's rights, through recognition of religious and customary marriages,[30] and protection for women in informal unions.[31] Protection for children was also improved with provisions increasing the minimum age for marriage.[32] (See Chapter 1.D, Reform in the justice sector).

However, legislation that leads to contravention of international and constitutional standards remains in place, and is in urgent need of revision. One striking example is the Criminal Procedure Code which allows long periods of detention prior to any charge being placed. The Code is currently under revision, and the approach it takes on initiating changes regarding criminal proceedings will be a key area to monitor.[33]

B. Structure of courts

Historical development of the structure of courts

During colonial rule, the formal justice system was limited to colonial courts in urban areas that served the Portuguese and a minority of black citizens who had assimilated with colonial rule *(assimilados)*. The majority of Mozambicans were governed by local customary law adminis-

25 1990 Constitution, art. 98, no. 2.

26 Proc. no. 214/99-C J.C.T, Maputo, 23 February 2000. Brought by appellant *Shafik Kadiwala*.

27 Land Law, 1997 (Law no. 19/1997).

28 Ibid., arts. 12, 13, no. 2-3, 14, no. 2, 15(b), 24, no. 1-2, 29.

29 Family Law, 2004 (Law no. 10/2004), BR no. 34, I Série, Suplemment, 25 August 2004.

30 Previously, women married under customary law could not claim inheritance rights because their marriages were not recognised by formal law. The Civil Code, art. 1587, recognised only civil and catholic marriage, and art. 2133 on inheritance rights defined a 'spouse' in the context of a civil or a Catholic marriage.

31 Family Law, 2004, arts. 16 and 17.

32 Ibid., arts. 202-203.

33 See chapter 5.C, Fair trial, for further details on the steps involved in initiating criminal proceedings.

tered by traditional chiefs and headmen, many of whom were in the pay of Portuguese officials. Traditional justice was widely associated with corruption and oppressive practices.[34]

During the transitional period to independence, as FRELIMO began to gain control of small areas in provinces in the north of the country, they began to set up their own legal structures consisting of courts presided over by four to six lay judges who were popularly elected from the local community.[35] These people's courts reached their decisions through highly consultative mechanisms and were accountable to local popular assemblies.

After independence, in 1978, FRELIMO introduced the *Lei da Organização Judiciária de Moçambique*[36] which restructured the colonial courts, stipulated that customary laws had to be applied in accordance with constitutional principles, and extended the people's court structure throughout the country. The law established a hierarchy of the courts, with a People's Supreme Court, provincial, district and local courts. The local people's courts had judges who were elected from the local community with no formal training, but professional, trained judges were provided for at the district, provincial and Supreme Court level. As necessary, these judges would apply formal law inherited from the colonial era and legislation adopted since then, whilst the elected judges would judge according to common sense, principles of equity and local values.[37] The people's courts were placed under the oversight of local people's assemblies, and for administrative purposes, the courts were controlled by the Ministry of Justice.[38]

Implementation of the people's court system led to improvements in access to justice for Mozambican citizens, but the severe socio-economic impact of the civil war on the country's infrastructure, along with the changed political context as the civil war came to an end, meant that the system was in desperate need of reform by the 1990s. The 1990 Constitution and 1992 Organic Law of the Judicial Courts introduced fundamental changes to the court system. The 1990 Constitution enshrined a clear separation of the judiciary from the executive and legislature.[39] At the district, provincial and Supreme Court level, the people's courts were reconstituted as judicial courts *(tribunais judicias)* [40], whilst at the local level, they were reconfigured as community courts *(tribunais comunitários)*.[41] The 2004 Constitution preserved this same basic structure, as remains in place today.

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34 *Access to Justice in Sub-Saharan Africa*, Penal Reform International, London, January 2001, p.47.

35 Ibid., p.48.

36 Lei da Organização Judiciária de Moçambique, 1978 (Law no. 12/1978).

37 Luis Mondlane, 'Nurturing Justice from Liberation Zones to a Stable Democratic State', in *Human Rights Under African Constitutions: Realizing the Promise for Ourselves*, ed. Abdullahi Ahmed An-Na'im, University of Pennsylvania Press, Philadelphia, 2003, p.196.

38 Luis Mondlane, 'Nurturing Justice from Liberation Zones to a Stable Democratic State', in *Human Rights Under African Constitutions: Realizing the Promise for Ourselves*, 2003, p. 186.

39 1990 Constitution, art. 109: '*Independent state authorities include the president of the republic, Parliament, the Council of the Ministers, the courts and the Constitutional Council*'.

40 Organic Law of the Judicial Courts, 1992.

41 Community Courts Law, 1992.

Structure of courts today

The Mozambican system includes three main different categories of courts: judicial courts *(tribunais judicias)*, administrative courts *(tribunais administrativos)*, and the Constitutional Council *(Conselho Constitucional)*. The judicial courts (the main court structures) comprise the Supreme Court together with provincial and district courts; for the time being the Administrative Court is a specialised jurisdiction currently operating only in Maputo, with no representation at regional or local levels; and the Constitutional Council (which despite its title is also a court) is a specialised jurisdiction for constitutional and electoral matters. In addition to these courts that apply formal law, there are community courts and fora applying traditional or religious customary law. Whilst the 2004 Constitution recognises community courts, traditional and religious courts are ignored, although for the first time the Constitution did recognise the existence of 'legal pluralism' *(pluralismo judicial)* in Mozambique.[42]

The court system in place does not fully reflect either the set of courts that were provided in the 1990 Constitution, or those set out in the new 2004 Constitution. This is in part due to the unclear drafting of the 2004 Constitution in relation to the structure of courts, and also the fact that many of the courts referred to in the Constitution have yet to be implemented.

Article 223 of the 2004 Constitution sets out a systemisation which can be misleading:

> 1. In the Republic of Mozambique there shall be the following courts:
> a) The Supreme Court;
> b) The Administrative Court;
> c) The judicial courts.
> 2. Other administrative, labour, fiscal, customs, maritime, arbitration and community courts can also be established...

Although the Supreme Court and judicial courts are listed as different categories, the Supreme Court *is* a judicial court, and hence not a separate category of court. Meanwhile, the Constitutional Council is not discussed in article 223. Furthermore, the hierarchy between the courts is not fully apparent. The Supreme Court does not have power over all the other courts—only the judicial courts, and (yet to be implemented) labour courts. Appeals from the customs court and (yet to be implemented) administrative, maritime and fiscal courts would be heard by the Administrative Court. Indeed, in prior drafts of the current Constitution, the Supreme Court was called the 'Judicial Supreme Court,' *(Tribunal Supremo de Justiça)* and the Administrative Court, the 'Administrative Supreme Court' *(Tribunal Supremo Administrativo)*[43] as in the Portuguese Constitution. Before approval of the final draft Constitution in November 2004, the names of the courts were changed to 'Supreme Court' and 'Administrative Court.'

The courts system as set out in the Constitution can be conceptualised as below:

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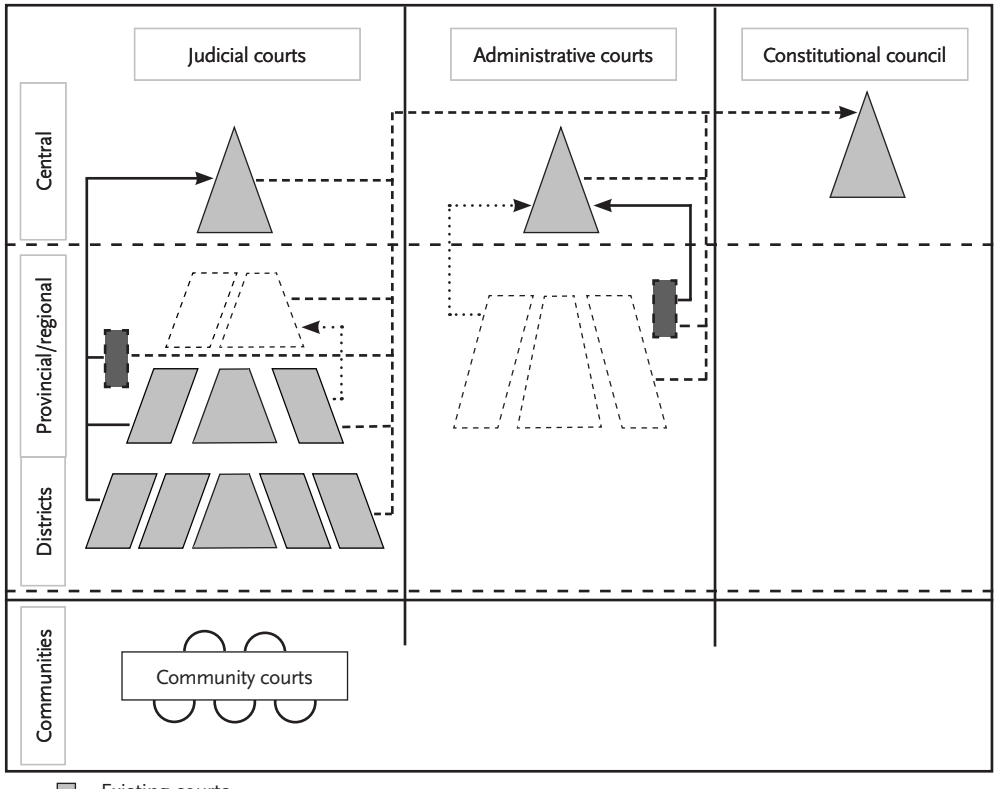
42 2004 Constitution, art. 4. See also, chapter 1.A on the Constitution, and chapter 6.G, Informal and traditional justice.

43 Constitutional draft, 1998, art. 223, and in constitutional draft, July 2004, art. 216: *1) In the Republic of Mozambique there shall be the following courts: a) The Judicial Supreme Court and the courts of the first and second instances; b) The Administrative Supreme Court and the other administrative ,fiscal and custom courts. 2) There may also be labour, maritime, arbitration and community courts.*

Table 1.1: Mozambican court structure



Existing courts
Provided for in the Constitution but not yet implemented (new level of appeal courts between the supreme and provincial courts; provincial administrative courts)
Specialist courts provided for in the Constitution (labour, maritime, fiscal and custom courts)
Internal appeal system
Appeal on decisions related to constitutionality

Source: AfriMAP, according to the 2004 Constitution

Constitutional Council

First provided for in the 1990 Constitution,[44] the Constitutional Council only came into being in 2003, in part owing to a lack of consensus on the structures that should be put in place.[45] Prior to its implementation, its functions were undertaken by the Supreme Court. According to the 2004 Constitution, the Constitutional Council has special jurisdiction to 'administer justice in matters of a legal-constitutional nature.'[46] The Constitutional Council has jurisdiction to rule on the constitutionality of laws and the legality of 'normative acts' of the executive *(actos normativos*

44 1990 Constitution, art. 80.

45 Prior drafts of the 2004 Constitution had called the body 'Constitutional Court' *(Tribunal Constitucional)*. 1998 draft, art. 240, and also in the July 2004 draft.

46 2004 Constitution, art. 241: '*O Conselho Constitucional é o órg o de soberania, ao qual compete especialmente administrar a justiça, em matérias de natureza jurídico-constituciona*'.

dos órgãos do Estado); to settle conflicts arising between independent state authorities *(órgãos de soberania)*; and to assess the constitutionality of proposed referenda.[47] The 1990 Constitution provided a number of bodies with the power to request the Constitutional Council to consider the constitutionality of a law, including the president of the republic, the president of the assembly, the prime minister and the prosecutor-general.[48] The 2004 Constitution expanded this list with the addition of Parliament (with the support of at least one-third of its members), the ombudsman,[49] and ordinary citizens (with the support of a petition with at least 2,000 individual signatures).[50] The president of the republic is also able to request the Constitutional Council to undertake a prior evaluation of the constitutionality of legal instruments approved by Parliament that have been sent to him for ratification.[51] If the Constitutional Council declares a law or normative act of the executive unconstitutional or illegal, it will automatically lose the legal force that it had acquired, and thus any legal effect that it may already have produced will not be considered.

To date, there have been no cases of enacted legislation being challenged before the Constitutional Council. However, there have been two interesting cases of the president of the republic referring legislation to the Constitutional Council for evaluation prior to enactment: the Islamic Holidays Law *(Lei dos Feriados Islâmicos de Idul-Fitre e Idul-Adhah)* in 1996[52] and the Family Law *(Lei da Família)* in 2004.[53] There was serious discussion in the Court on the admissibility of both cases. The Islamic Holidays Law set out to institute two Islamic religious dates as public holidays, with a view to establishing greater equality between Muslim and Christian believers. The Supreme Court, then sitting as a Constitutional Council, ruled in favour of the case's admissibility, and subsequently ruled that the proposed law was unconstitutional[54] and should not be enacted as it infringed principles of the equality of all citizens before the law[55] and freedom of religion.[56] The president referred the legislation back to Parliament, where it was then dropped. In the case of the Family Law, the president's request was not accepted. Following this disparity in decisions, during the 2004 constitutional review process, the remit of the Constitutional Council to provide opinions on legislation prior to enactment was clarified.[57] As a new institution, the Constitutional Council has not yet been fully tested.

The Constitutional Council is also responsible for evaluating electoral complaints and appeals in the last instance.[58] As opposition parties have regularly contested election results, the

47 Ibid., art. 244. With relation to conflicts between state bodies, for example the Constitutional Council could rule finally on different judgements by the judicial courts and the Administrative Court.

48 1990 Constitution, art. 183.

49 A new entity created during the 2004 constitutional review. See chapter 6.H, Official mechanisms to assert rights outside the court system, for further information on the ombudsman.

50 2004 Constitution, art. 245, no. 2.

51 Ibid., art. 246.

52 As mentioned, prior to the implementation of the Constitutional Council, its functions were carried out by the Supreme Court, and hence the Islamic Holidays Law was referred to the Supreme Court.

53 Family Law, 2004 (Law no. 10/2004).

54 Decision of 27 December 1996, Proc. no. 1/96-C.C. A.A.H.F., BR no. 49, III Série 4 December 2002.

55 2004 Constitution, art. 66.

56 Ibid., art. 78.

57 2004 Constitution, art. 246.

58 Ibid., art. 244, no. 2, and art. 181, no. 2.

Constitutional Council has been very active in this regard. Following the November 2004 elections, RENAMO-UE and several other small parties lodged complaints with the Constitutional Council. On the basis of procedural issues related to late submissions of complaints, the Constitutional Council dismissed all cases.[59] The Constitutional Council has in the past issued strong criticisms of the National Elections Commission (NEC), for instance in relation to management of some aspects of the local elections in November 2003,[60] and again during the general elections in December 2004.[61]

The judicial courts

The Organic Law of the Judicial Courts of 1992 (*Lei Orgânica dos Tribunais Judicias)*[62] provides the legal basis for the organisation of the judicial courts. The judicial courts form the backbone of the court system: their jurisdiction covers both civil and criminal matters, and all remaining matters not attributed to other courts.[63] The judicial courts are territorially organised according to the administrative structure of the country.[64]

The judicial courts that have been so far put in place are:

- the Supreme Court (*Tribunal Supremo*), located in Maputo;
- Provincial judicial courts *(Tribunais Judicias de Província)*, located in each of the 11 provinces;
- District judicial courts *(Tribunais Judicias de Distrito)*: whilst there should be a court in each of the 128 districts, in practice there are only 93 courts.[65]

The 2004 Constitution provided for the possibility of an intermediate level of courts between the provincial level and the Supreme Court (art. 223).[66] Although no further specifics are included, this provision has been widely interpreted as opening up space for courts that would specifically deal with appeals from provincial judicial courts.[67] Many within the judiciary favour implementation of these courts as it could help decongest the Supreme Court, and would improve access for citizens living outside of Maputo.[68]

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59 Deliberations of the Constitutional Council, 31/CC/2004, 30 December 2004, and 1-4/CC/2005, 12 January 2005. Mozambique News Agency, 'Constitutional Council rejects Renamo appeal', *AIM Reports*, 19 January 2005.

60 Mozambique News Agency, 'Constitutional Council validates local elections', *AIM Reports*, 19 January 2004.

61 Constitutional Court, Decision no. 16/CC/04, 14 January 2004, ref. Proc.no. 14/CC/03, and Decision no. 5/CC/2005, 19 January 2005, Proc. no. 30/CC/2005.

62 Organic Law of the Judical Courts, 1992 (Law no. 10/1992).

63 2004 Constitution, art. 223, no. 1.

64 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992).

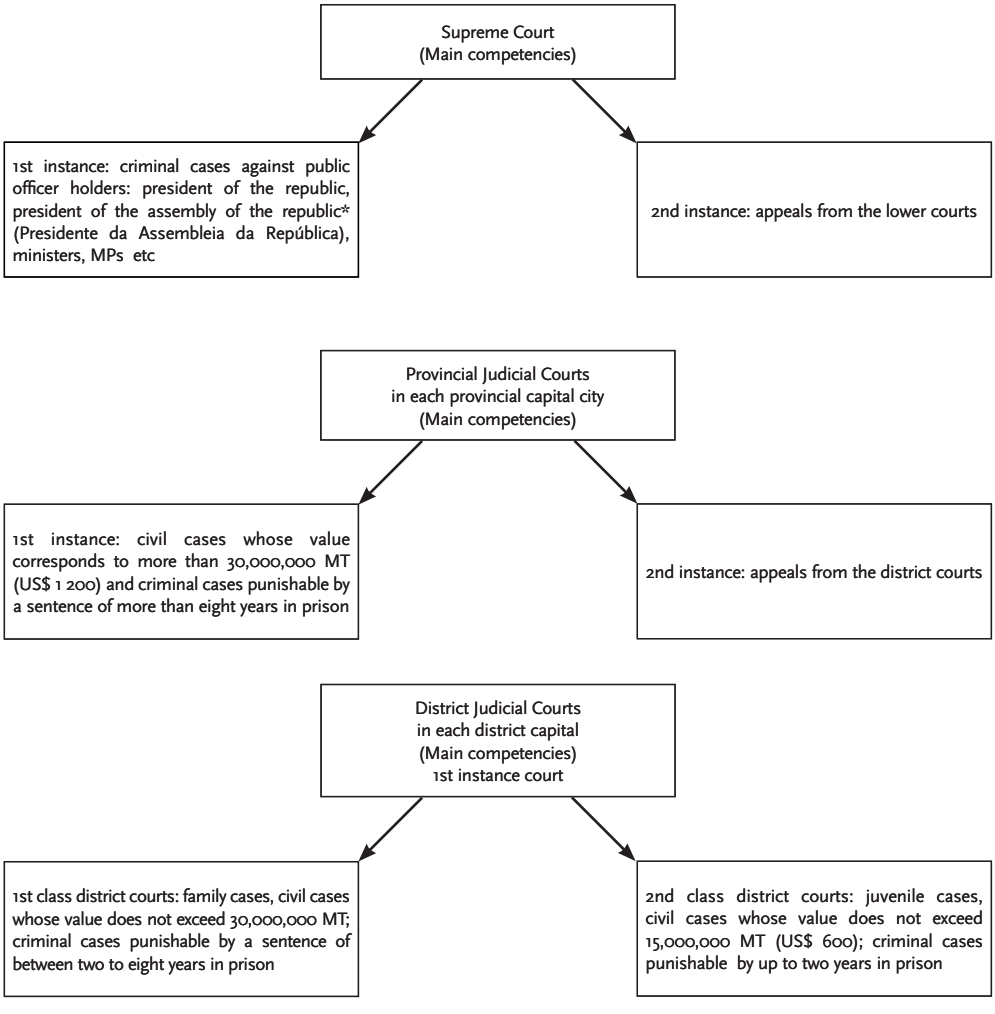
65 Annual address of the president of the Supreme Court on opening of the judicial term, 2006, p.7.

66 2004 Constitution, art. 223, no. 3 '*...que pode prever a existência de um escalão de tribunais entre os tribunais provinciais e o Tribunal Supremo.*'

67 This provision implicitly suggested that the territorial organisation of judicial courts does not necessarily have to coincide with the country's administrative divisions, as this new level of courts would not correspond to an administrative division.

68 The president of the Supreme Court publicly affirmed commitment to implementation of these courts in his annual address on the opening of the judicial term, March 2006, p.8.

Table 1.2: Organisation of judicial courts



Source: Supreme Court, Maputo

Note: Exchange rates to the dollar as of July 2006, www.oanda.com

The metical was revalued in July 2006 at a rate of 1000:1. The new currency is abbreviated as MTn. Values here are given in MT.

* Amongst other duties, it is the responsibility of the president of the assembly to sign laws on behalf of Parliament; 2004 Constitution, art. 190 and 191.

Administrative Court

The Administrative Court has been operating in Maputo since 1992.[69] The specialised jurisdiction of the Administrative Court, as set out in the 2004 Constitution (art. 228), is to oversee the legality of administrative acts *(actos administrativos)*[70] and the enforcement of regulations issued by the public administration, and to oversee state accounts and public expenditure. [71]

Although traditionally perceived as a court of the public administration, the 2004 Constitution conferred the Administrative Court with a new constitutional status, stating that it 'shall be the highest body in the hierarchy of administrative, fiscal and customs courts.'[72] Although prior drafts of the Constitution that referred to the Administrative Court as the 'Administrative Supreme Court' were revised, it is in fact the head of this parallel hierarchy to the judicial courts.

A continuing source of public discontent with the Administrative Court is its geographic restriction to Maputo, and the consequent implications in relation to access to administrative justice. In response to this, the 2004 Constitution included provisions to allow for administrative courts at provincial and district levels. Concrete legislative and administrative measures[73] should now be taken to implement these courts.

Other courts

The 1990 Constitution, as well as the 2004 Constitution, provided for customs courts, which were implemented by the 2001 Organic Law of the Customs Court *(Lei Orgânica do Tribunal Aduaneiro)*.[74] The Customs Court began operating in 2002 in Maputo. This court operates autonomously, but the Administrative Court has the power to rule on appeals from its decisions.

Courts of specific jurisdiction provided for in the 1990 Constitution, such as the labour, maritime, military and fiscal courts, have never been established, mainly due to lack of financial resources. The 2004 Constitution abolished the provision for military courts, except during war.[75] Thus, the judicial courts now also judge all crimes committed by members of the armed force or police (*Forças de Defesa e Segurança)*.[76]

Over the past few years, there has been mounting public criticism of the government for not advancing with the creation of labour courts in particular. Legislation for implementation of the

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69 Organic Law of the Administrative Court, 1992 (Law no. 5/1992).

70 Administrative acts are decisions or regulations specifically pertaining to a particular individual or a group of individuals (including contracts), as opposed to legislative acts which refer to a general abstract body. Administrative acts are issued by the executive and its agencies, as opposed to the legislature.

71 2004 Constitution, art. 228, no. 2: '*O controlo da legalidade dos actos administrativos e da aplicação das normas regulamentares emitidas pela Administração Pública, bem como a fiscalização da legalidade das despesas públicas e a respectiva efectivação da responsabilidade por infracção financeira cabem ao Tribunal Administrativo*'.

72 2004 Constitution, art. 228, no. 1: '*O Tribunal Administrativo é o órgão superior da hierarquia dos tribunais administrativos, fiscais e aduaneiros*'.

73 2004 Constitution, art. 223.2.

74 Organic Law of the Customs Court, 1992 (Law no. 10/2001).

75 2004 Constitution, arts. 223-224.

76 With regard to agents from the armed forces, police, state information and security services and paramilitary forces (see art. 110, Law no. 17/1987, 21 December, Military Crimes Law).

labour courts was passed in 1992,[77] yet to date these courts have not been set up. Calls for the implementation of the courts were the main theme of the 2000 May Day workers' demonstrations, and since then have been a regular feature of the annual marches.[78] Some progress has been made with the creation of labour divisions within the judicial courts (in the Supreme Court and provincial courts). However these are insufficient to deal with the vast volume of labour cases awaiting decision.[79]

In response to the lack of action from government and faced with the need to respond to citizens' demands, court authorities have begun to initiate moves themselves. Court authorities led the process to create a Juvenile Court *(Tribunal Judicial de Menores)* in Maputo and a Police Court *(Tribunal da Polícia)*, also in Maputo dealing with traffic violations, both of which were approved by decree-law from the Council of Ministers. Debate is underway regarding implementation of similar courts in other provinces.

Community courts

The most widespread courts in Mozambique are the community courts. Their roots are in the former people's courts, which in the early 1990s were reconstituted at the local level as community courts. In July 2004, the Ministry of Justice reported the existence of 1653 community courts, of which 254 were created between 2000 and 2004.[80] Although it is unclear how many of these courts are actually functioning, they are an important mechanism, providing access to justice for many citizens.[81]

Although the 1990 Constitution did not mention them, the 1992 Community Courts Law *(Lei dos tribunais comunitários)*[82] provided the legal framework for these courts. The Community Courts Law defines the objective of community courts as contributing to social harmony by allowing citizens a mechanism to reconcile and resolve small differences within their communities. The law provided for community courts at the local level, in *bairros*[83] and villages,[84] with jurisdiction to deal with minor civil and criminal disputes.[85] In practice, cases dealt with are mainly civil disputes (including small debts, housing issues), family matters, and petty criminal offences not punishable by imprisonment.[86] The law allows community courts to administer

77 Law no 18/1992.

78 **Mozambique News Agency, 'Workers march on May Day',** *AIM Reports*, 4 May 2000. See also, Mozambique News Agency, 'Thousands rally on May Day', *AllAfrica.com*, 1 May 2004.

79 At the beginning of 2001, the provincial courts had 9 755 labour cases pending. During the year, they received a further 3 349 labour cases and ruled on 1 371, hence ending the year with 11 733 labour cases pending. *Estatísticas judiciais*, Supreme Court, 2002. *Jornal Notícias* reported on 29 August 2005 that there were close to 14 000 labour cases pending in the judicial courts.

80 *Jornal Notícias*, 15 July 2004, reporting on the 10th Coordinating Council of the Ministry of Justice, held in Tete between 13 and 15 of July 2004.

81 See also chapter 6.F, Community courts.

82 Community Court Law, 1992 (Law no. 4/1992).

83 An administrative district within a city or province (smaller than a district).

84 **Community Court Law, 1992, art. 1, no. 2:** *'Os tribunais comunitários funcionarão nas sedes de posto administrativo ou de localidade, nos bairros ou nas aldeias.'*

85 Ibid., art. 3.

86 *Access to Justice in Sub-Saharan Africa*, Penal Reform International, London, January 2001, p.58. See also Conceição Gomes et al., 'Community Courts', in *Conflict and Social Transformation*, vol. 2, eds. Santos & Trindade, Afrontamento, Portugal, 2003, pp.189-335.

sentences up to a maximum fine of 10,000 MT (approximately US$0.40) and a maximum sentence of 30 days imprisonment.[87] Cases subject to a more serious sentence should pass to the judicial courts. Article 2 sets out that as a first rule, these courts should attempt to reconcile the parties involved, and if reconciliation is not possible, they should judge according to principles of 'equity, good sense and justice.'[88] Although they were constitutionally recognised for the first time in 2004[89], the community courts do not currently have any formal links with the judicial court system. However, changes are now under debate; UTREL is reportedly working on a revised draft of the Community Courts Law, under which the community courts would be linked to the judicial courts by an appeal system.

Traditional justice fora are not explicitly recognised in the 2004 Constitution, and will be dealt with in chapter 6.G, Informal and traditional justice.

C. The legislative process

The Mozambican system encompasses a number of different types of law: the Constitution, which takes precedence over all other legislation;[90] norms of international law, which are regarded as automatically applicable in any national court; and legislation *(leis)* passed by Parliament. Decree-laws *(decretos-lei)* passed by the Council of Ministers, pursuant to authorisation from Parliament, also have legislative force, but do not have the status of laws passed by Parliament. There are also regulatory acts of the president of the republic or government in the form of decrees *(decretos)*, and regulatory acts also at the municipal level *(posturas e regulamentos municipais)*.

Legislation

The 2004 Constitution sets out four distinct phases in the parliamentary legislative process: (a) the proposal of legislation, (b) its deliberation and voting, (c) promulgation of the law, (d) publication of the law.[91]

(a) Those who have the right to initiate legislation are individual members of parliament (MPs), the MPs of a party as a group (*bancada parlamentares)*, parliamentary

87 Community Court Law, 1992, art. 3. no. 2.

88 **Ibid., art. 2: '***Não se conseguindo a reconciliação ou não sendo esta possível, o tribunal comunitário julgará de acordo com a equidade, o bom senso e com a justiça'*.

89 2004 Constitution, art. 223, no. 2.

90 See chapter 1.A on the Constitution, including information on the general revocation clause whereby pre-existing legislation deemed unconstitutional is regarded as automatically revoked.

91 2004 Constitution, art. 183 (*iniciativa de lei*), art. 184 (*regime de discussão e votação*), art. 163 (*promulgação e veto*), art. 144 (*publicidade*).

committees *(comissões da Assembléia da República)*;[92] the president of the republic, and the members of the executive *(governo)*. The 2004 Constitution saw an important advance in that parliamentary committees were given the prerogative to initiate bills, although this was not extended to citizens, either individually or as a group. A bill proposed by the executive is known as a *proposta de lei* and a bill proposed by Parliament as a *projeto de lei*.

(b) During the deliberative process, all bills need to be deposited with the president of the assembly, who then submits them to the relevant parliamentary committees for an advisory report.[93] Parliament can only deliberate if more than half its members are present, and decisions will be accepted if they carry more than half of the votes of the MPs present.[94]

(c) As head of state, it is the president's duty to promulgate laws within 30 days of their receipt after adoption by Parliament, or if the president refers the law to the Constitutional Council to verify its constitutionality, upon notification of the Council's decision.[95] The president has the power to veto proposed legislation, and return it to Parliament for revision. But if the same law is voted once again without being revised, with a two-thirds majority, the president is obliged to promulgate it. In practice, this veto has not been used by either President Guebuza, or former President Chissano, although on two occasions President Chissano referred proposed legislation to the Constitutional Council (the Family Law and Islamic Holiday Law) for verification of constitutionality.[96]

(d) The Constitution establishes that laws must be published in the Government Gazette (*Boletim da República*).[97] Legislation comes into force 15 days after publication, unless otherwise stipulated.[98]

Since 1975, FRELIMO has maintained a majority in Parliament, and consequently has had a relatively unchallenged grip on the approval of legislation. Although laws have generally followed the correct technical process for approval through Parliament, FRELIMO has used its majority to pass through most legislation without significant efforts to reach consensus with the opposition, as for instance with the Family Law prior to amendment, and most years with the annual budget.

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92 Presently there are eight parliamentary committees: 1. Planning and Budgeting; 2. Social, Gender and Environmental Issues; 3. Agriculture, Regional Development, Public Administration and Local Power; 4. Economic Activities and Services; 5. Defence and Public Order; 6. International Relations; 7. Legal Matters, Human Rights and Legality; 8. Petitions. (*1. do Plano e Orçamento; 2. dos Assuntos Sociais, do Género e Ambientais; 3. da Agricultura, Desenvolvimento Regional, Administração Pública e Poder Local; 4. das Actividades Económicas e Serviços; 5. de Defesa e Ordem Pública; 6. das Relações Internacionais; 7. dos Assuntos Jurídicos e Direitos Humanos e de Legalidade; 8. de Petições*). Other ad hoc and inquiry commissions may be created to respond to specific issues. Presently there are ad hoc committees for: 1. revision of the national flag and emblem; and 2. revision of the electoral system.

93 See Law no. 6, 2001, arts. 30, no. 2, paragraph m), and 87.

94 2004 Constitution, art. 187.

95 2004 Constitution, art. 163, no. 2.

96 See chapter 1.B on court structure, for further detail on the Constitutional Council.

97 See also Civil Code, art. 5, no. 1: 'the law only becomes compulsory after being published in the official gazette'.

98 Law 6/2003, 18 April 2003, art. 1.

As in most countries, the majority of legislation is proposed by the executive rather than Parliament. Whilst it is unrealistic to expect Parliament to generate significant amounts of legislation, without an improvement in its capacity, Parliament risks becoming a major bottleneck in the legislative process. Competition for parliamentary seats is high, yet many candidates lack the necessary skills to fulfil the duties of an MP, and are attracted primarily by the attractive remuneration on offer. Parliament has recognised the problem in its strategic plan for 2004–2008 that states the the need to improve in-house capacity for legislative initiative.[99] In 2005, the Law Faculty at the University of Eduardo Mondlane launched a short course on drafting legislation, and the majority of participants were parliamentarians. Further assistance should be provided to MPs to strengthen their technical capacity to provide better advice and guidance on draft bills. In addition, support could also be provided to MPs and parliamentary committees through the provision of access to outside technical expertise. Although any tender process to source such expertise would need to be carefully managed, this could provide a valuable resource pool for committees that currently lack any technical assistance.

In addition to legislative responsibility, Parliament also has a duty to follow up on implementation and monitoring of new laws, which currently does not happen. In the context of a growing pace of law reform in Mozambique, unless implementation of legislation is enforced, there is a real risk of a widening gap between legislation enacted and legislation applied. For the first time, the December 2005 decree-law enacting the new Commerical Code *(Código Comercial)* also established a committee to oversee its implementation. Establishing such committees could be a useful mechanism in ensuring implementation of key pieces of legislation. The committee established for implementation of the Commercial Code should be monitored by civil society organisations in order to evaluate whether it is seriously fulfilling its remit.

Public consultation does not generally take place during the legislative process. However, there have been some exceptions in the case of legislation with potentially far-reaching impact on citizens' lives, and around which public debate had already gathered momentum. Prior to approval of the Land Law (1997) and the Family Law (2004), the government organised some seminars in Maputo and in a few other main cities. The overall shortfall in public consultation is recognised by the government in its draft strategy on law reform which affirms the need to move towards a more participatory legislative process: 'It is not sufficient that a law is technically well-structured for it to produce the desired effects upon execution. Wider participation in the legislative process ensures a more natural social compliance with the law.'[100]

Civil society organisations and academia could also be more pro-active in initating debate around proposed legislation early on in the process; currently, this tends to happen only when legislation is on the verge of finalisation.

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99 Strategic Plan of Parliament 2004–08 (*Plano Estratégico da Assembléia da República 2004–08, PEAR*), approved by Resolution no. 16/2003, *BR* no. 53, I Série, 31 December 2003.

100 Government of Mozambique, *Legal Reform: Policies and Strategies* (*Política e Estratégia da Reforma Legal*), Maputo, June 2003, p.10.

Decree-laws

With the objective of accelerating the pace of law reform, the 2004 Constitution provided the Council of Ministers with legislative power in the form of decree-laws (*decretos-lei)*. In order to pass a decree-law, the Council of Ministers requires specific permission from Parliament in the form of a law delegating legislative authority (*autorização legislativa)*. [101] This authorising legislation should define the clear objective and extent of the authority delegated.[102] A decree-law enters into force automatically if approval is not demanded by a minimum of 15 MPs during the parliamentary session held after its publication.[103]

There is a growing trend for legislation to be approved through the Council of Ministers in the form of decree-laws, rather than through Parliament. This is the case even for significant pieces of legislation, such as the newly revised Civil Procedure Code, passed by decree-law in December 2005.[104] With the backdrop of a growing pace in law reform, decree-laws are proving to be a useful mechanism in maintaining the momentum of reform (see below, chapter 1.D, Reform in the justice sector). However, an improvement in Parliament's own drafting and technical abilities would allow it to discuss and debate legislation in the form of decree-laws in a more pro-active manner. Without such improvements, there is a risk of decree-laws being tacitly approved without a proper debate. In the long-term, it is critical to strengthen the capacity of MPs to supervise the activities of the executive, in order to ensure that a system of checks and balances is in place.

D. Reform in the justice sector

Since Mozambique gained its independence, there have been two major phases of planned reform: immediately after independence during 1975–1978; and after the promulgation of the 1990 Constitution, in the run-up to the agreement of peace between FRELIMO and the former armed opposition, RENAMO.

Overall, reform in both phases focused mainly on organisational change and modernisation of the court system, the Office of the Prosecutor-General, and the notary and registry services. Other fundamental issues, both structural and performance related, were not addressed. Key priorities for the administration of justice that were neglected (and that will be discussed in greater depth in this report) include reform of the dual reporting system for the Criminal Investigative Police (PIC), the weakness of the prosecution service, the lack of incorporation of informal justice mechanisms, and lack of professional resource capacity.

Law reform

Over the past few years, considerable progress has been made with revision and reform of legislation. The inefficiency of procedural legislation dating back to the colonial period and the inadequacy of substantive legislation in meeting modern needs has been recognised by the government, and committed efforts are being made to address these legislative shortfalls.

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101 2004 Constitution, art. 180 (*Leis de autorização legislativa*).

102 Ibid., art. 180, no. 1: '*As leis de autorização legislativa devem definir o objecto, sentido, a extensão e a duração da autorização*'.

103Ibid., art. 181, no. 2.

104 Decree-law no. 1, 2005, *BR* no. 51, I Série, 27 December 2005.

In 2002, the government created the Inter-Ministerial Law Reform Commission (*Comissão Interministerial de Reforma Legal,* CIREL), with responsibility for supervising legal reform. CIREL is composed of the prime minister (as chair), the minister of justice (as vice-chair), the minister of the interior, the minister of education and culture, the minister of state administration, the minister of planning and development, and the minister of finance. In order to implement CIREL's policies, a Technical Unit for Law Reform (*Unidade Técnica de Revisão Legal*, UTREL) was set up with primary responsibility for drafting and amending legislation.[105] UTREL operates largely by outsourcing drafting work to groups of experts that are commissioned for work on a particular bill. Since its operation, UTREL has succeeded in creating dynamism in the law reform process. Legislation that has recently been revised and approved includes the following:

- A new Family Law was approved by Parliament in 2004;[106]
- A new Civil Registry Code *(Código do Registo Civil)* was approved by Parliament in December 2004;[107]
- A new Code of Civil Procedure was approved by the Council of Ministers by decree-law in December 2005;[108]
- A new Commerical Code *(Código Comercial)* was approved by decree-law by the Council of Ministers in December 2005;
- A new Notorial Code was approved by decree-law in May 2006;[109]
- A new Organic Law of the Judicial Courts was approved by the Council of Ministers as a draft in 2006, however it still needs to be approved by Parliament as legislation.

Drafting work is also underway on both the Criminal Procedure Code and Criminal Code. Revision of these two codes is critical for improvement of Mozambique's criminal justice system, currently wracked with long delays in trial. In a speech at the opening of the 2005 judical term, the president of the Supreme Court recognised the ineffectiveness of substantive legislation, particularly the Criminal and Civil Codes, in meeting the current needs of the Mozambican criminal justice system.[110] The Criminal Code for instance, sets out disproportionately harsh sentences for certain crimes, and allows considerable leeway for judges in determining sentences, in practice often leading to the most severe sentences available being applied.[111] The prosecutor-general has also voiced concerns that the current list of criminal offences as provided by the Criminal

105 UTREL was created by a decree of the Council of Ministers (no. 22/2002). UTREL's website at www.utrel.gov.mz/ includes latest drafts of legislation under revision and new bills. Last accessed 1 April 2006.

106 Law no. 10/2004.

107 Law no. 12/2004, 8 December 2004.

108 Decree-law no. 1/2005, *BR* no. 51, I Série, 27 December 2005. Dating back to 1962 (with amendments in 1967) the Civil Procedure Code was in urgent need of revision.

109 As of May 2006, not yet published in the Boletim da República.

110 Annual address of the president of the Supreme Court on opening of the judicial term, 2005, p.12.

111 For instance, the Criminal Code sets a minimum sentence of 16 years imprisonment for the crime of arson, from Luis Mondlane, "Nurturing Justice from Liberation Zones to a Stable Democratic State", *Human Rights Under African Constitutions—Realizing the Promise for Ourselves*, ed. Abdullahi Ahmed An-Na'im, University of Pennsylvania Press, Philadelphia, 2003, p.194.

Code and other related legislation is inadequate as matters such as domestic violence and rape are not defined as crimes (although they could be prosecuted as other offences).[112] The first draft of the revised Criminal Code was publicly released by UTREL in July 2006 for discussion and debate, and UTREL had originally planned to submit a final draft to the government by the end of August. The draft proposes significant revisions.[113] UTREL has already submitted two drafts of the revised Criminal Procedure Code to the government, also proposing considerable revisions. As of August 2006, neither of these drafts had been publicly released or debated.[114]

Prior to approval of the Constitution in November 2004, UTREL had begun work on a draft law setting out a comprehensive framework for the justice sector, the Justice Administration System Framework (*Anteprojeto de Lei de Bases sobre o Sistema de Administração de Justiça*).[115] The bill initially arose from the need to respond to areas not addressed or resolved by the 1990 Constitution, including the issue of legal pluralism, the status of community courts, organisation of the appeal system within the judicial courts, and the institutional position of the Public Prosecution Service. A draft of the law was first circulated shortly prior to approval of the 2004 Constitution, in a seminar organised by UTREL and the Centre for Legal and Judicial Training *(Centro de Formação Jurídica e Judiciária,* CFJJ*),* in June 2004, held at the faculty of law at the University of Eduardo Mondlane. A second stage of consultation took place between October and November 2004 in the cities of Maputo, Matola, Nampula, Beira, and Inhambane involving representatives from all provinces of the country. However, the final draft of the new Constitution, approved in November 2004, responded to many of the issues that had been raised, limiting the usefulness of the Justice Administration System Framework bill in its then current form. As a result, the bill was revisited with the focus shifting towards developing space for reform created by the 2004 Constitution, such as the constitutional recognition of the concept of legal pluralism[116] and provisions for a new level of appeal court between the provincial and Supreme Court level.[117] The latest version of the bill available on UTREL's website (as of May 2006), provides for considerable changes to the status of community courts, bringing them into the formal court system. In other areas it is more conservative; for instance it makes no mention of traditional justice. As of May 2006, it was unclear what the status of the draft bill was, and indeed, whether it was still being seriously considered. UTREL is also engaged in drafting a separate new Community Courts Law[118] and has also commissioned a study regarding reform of the Institute for Legal Assistance and Representation (*Instituto de Assistência e Patrocínio Jurídico*, IPAJ*)*.[119]

Overall, government is clearly making progress with law reform and the government's draft

112 Annual address of the prosecutor-general to Parliament, AR – V/Infor./17/09.03.2000, p.29.

113 Interview with Dr Abdul Carimo, Director of UTREL, 21 August 2006.

114 Ibid; the technical unit of the Ministry of Justice is analysing the proposals before making them public.

115 Updates on the Justice Administration System Framework draft law are posted on UTREL's website, http://www.utrel.gov.mz/lei.htm, last accessed 18 April 2006.

116 2004 Constitution, art. 4 (see chapter 1.A for further discussion).

117 Ibid., art. 223, no. 3.

118 Updates on draft Community Courts Law at http://www.utrel.gov.mz/word_files/ante.doc, last accessed 18 April 2006.

119 Updates on reform of IPAJ at http://www.utrel.gov.mz/pdfs/lei1.pdf, last accessed 18 April 2006.

strategy includes priority lists of legislation for reform.[120] Nevertheless, delays are occurring with some key pieces of legislation, including the Criminal Code and Criminal Procedure Code, and the government has not yet undertaken a comprehensive, consultative review of existing legislation. A systematic analysis of the legislative landscape would allow a comprehensive, prioritised plan for law reform to be drawn up, and would lend coherence to the efforts underway. Another major issue still to be addressed regards monitoring of implementation of legislation. There are no mechanisms in place to assess the impact of laws that have been passed. CIREL could meet annually to analyse legislation adopted the previous year, and this is an area where civil society could also contribute to monitoring efforts.

120 Government of Mozambique, *Legal Reform: Policies and Strategies (Política e Estratégia da Reforma Legal)*, Maputo, June 2003, pp.13-14.

2

Management and oversight of the justice system

A. Planning and financial management

Despite initiatives to improve planning and management in the justice sector, this still remains an area in critical need of attention. Until 2001, the different institutions of the justice sector (Ministry of Justice, Office of the Prosecutor-General, the courts and the Ministry of Interior) conducted their strategic planning on an individual basis, with almost no inter-office coordination. As a result of the absence of any coherent sectoral policy, and in particular the reluctance of the Ministry of Justice to play a clearer role in leading the sector, planning and coordination between the institutions has been extremely disjointed.

In 2001–2002, two developments suggested a potential new approach to coordinated planning and management: the creation of a coordinating mechanism for the justice sector and the adoption of a strategic plan. Towards the end of 2001, the Supreme Court, Administrative Court, Office of the Prosecutor-General, and Ministry of Justice jointly established the first coordinating supervisory body for the justice sector. Through an act of 'joint deliberation' in 2001, the Coordinating Council for Legality and Justice (*Conselho de Coordenação da Legalidade e Justiça,* CCLJ) was informally created, with the intention of bridging the gaps between the institutions involved in the justice sector (although at this stage, the CCLJ did not include the Ministry of Interior).

The CCLJ's main responsibility is to coordinate and implement integrated strategic planning. However, in practice, the CCLJ has maintained a relatively low profile. There has not been much reporting of its activities, and it is as yet difficult to ascertain any real impact or improve-

ment in coordination. Sources indicate that the decision to create a coordinating body (and also the *Plano Estratégico Integrado*, see below) was highly donor-driven, and this may partially explain some of the uncertainty surrounding the CCLJ and its role in the sector.[121] The CCLJ was finally formally institutionalised by presidential decree in April 2005.[122] At the same time, it was expanded to include the Ministry of the Interior, creating some optimism as to its future role in relation to both inter-institutional and external donor coordination, although despite repeated requests, the Mozambican Bar Association has not been asked to join the CCLJ.

According to the presidential decree, the implementation of the CCLJ´s decisions is the responsibility of a secretariat composed of an executive secretary and two planning specialists, to be funded by the Ministry of Justice. During interviews that coincided with the first months of the new government of President Guebuza, various stakeholders in the justice sector expressed optimism that the new government would provide the justice sector with the necessary backing to advance with new policies and reforms, and that the CCLJ would undertake a pro-active role in this respect.[123] Whilst the sector would clearly benefit from the CCLJ better fulfilling its coordinating responsibilities, it should not, however, evolve into a 'superministry' co-opting power from the individual institutions of the sector.

Around the same time as the informal creation of the CCLJ, the institutions of the justice sector came together to produce the first joint integrated strategic plan (*Plano Estratégico Integrado,* PEI). The PEI was drawn up through 2001 and 2002, with inputs from a strategic planning exercise previously undertaken by the Ministry of Justice, and was formally approved by the Council of Ministers in November 2003. It covers an implementation period of four years, 2002–2006, and identifies several priority strategic areas.[124] The PEI estimated a budget of US$371 million to cover its activities, of which US$114 million was pledged from the state budget and US$69 million from external sources (leaving funding short by US$187 million).[125] In practice, it has been difficult to track the amounts allocated to PEI priorities, as the state budget does not directly allocate money to the PEI; rather, state allocations to the justice sector should reflect PEI priorities.

The PEI represented major progress with regards to sectoral planning, but the lack of comprehensive follow-through suggests that commitment to joint planning is still questionable. When the PEI was approved by the Council of Ministers in November 2003, the introductory 'vision' or broad-level strategy was still missing, as members of the CCLJ had been unable to reach consensus. During 2004, most of the institutions of the justice sector were preoccupied with discussions related to constitutional revision, and the impetus to draft a 'vision' lessened. Whilst the 2004 Constitution addressed some of the broader strategic issues facing the justice

121 Interviews with key members of the donor community and judiciary, Maputo, January – April 2005.

122 Presidential decree no. 25/2005, 27 April 2005.

123 Round-table seminars held in Maputo, 14 February 2005, and Nampula, 23 February 2005.

124 See *Legal and Judicial Sector Assessment*, World Bank, Mozambique, 2004, for further discussion of strategic areas outlined in Section VII of the PEI: sustainable development of human resources; legislative reform; development and modernisation of infrastructure; improvement of mechanisms for the monitoring of legality; development of legal documentation; simplification of legal and administrative acts and formalities; information system planning; coordination within sector; improvement of access to justice.

125 Government of Mozambique, *PEI 2002-2006*, p.13.

sector, the failure to realise a common vision statement suggests a lack of political will within the sector to move towards harmonised policies and action. Recently however, the Minister of Justice announced that it will hold public hearings on the vision of the justice sector. This is a welcome development and should play an important role in the development of a new strategic plan. The PEI has also suffered from the fact that the Ministry of Interior was not originally on board with the process, and hence critical issues under the responsibility of the Ministry of Interior, such as the Criminal Investigative Police and prisons, were not addressed in the PEI. The priority areas set out in the PEI should have assisted in determining budget allocations for the justice sector, made in the government's annual Economic and Social Plan (*Plano Económico e Social,* PES).[126] However, neither PES 2004 nor PES 2005 seem to have reflected the priorities for the justice sector set out in the PEI.

The period covered by the PEI draws to a close in 2006; as of May 2006, there had been no indications of planning towards a second PEI. On the basis of the PEI, each year, the institutions of the justice sector should jointly elaborate an annual operational plan and budget *(Plano Operativo do Plano Estratégico Integrado,* POPEI*)*. In 2003, the Office of the Prosecutor-General, the Ministry of Justice, Supreme Court and Administrative Court delivered a POPEI for the year, although there has been no subsequent monitoring process. Since then, no POPEIs have been released for 2004, 2005 or 2006.

The justice sector could also benefit from a functional analysis of its different institutions. Such a study was undertaken by the Ministry of Justice in 2000, looking at its functional capacity, internal management and organisation.[127] However, to date the recommendations put forward by the study have not been implemented.[128] It is important to note that without real political will and commitment to planning and coordination on the part of the institutions of the justice sector, undertaking planning exercises lacks value; if the results of planning exercises are not implemented, they remain paper recommendations only.

Financial planning

The key institutions of the justice sector have historically negotiated their budgets individually with the Ministry of Planning and Finance,[129] with limited cross-consultation or coordination. With the creation of the CCLJ, PEI and the first POPEI in 2003, there was some expectation that they would come together to negotiate under a common umbrella. In practice, the institutions have continued to negotiate on an individual basis. The process to date suggests that despite some progress, further development of a common platform will be needed before the individual institutions feel able to present a coordinated front beyond their individual agendas.

It is very difficult to state the exact amount of funds received by the justice sector: even within the state budget (*Orçamento do Estado*) it is not wholly clear how much is allocated to the

126 PES is the government's annual program, including policies and budget allocations.

127 Ministry of Justice, Planning Unit, *Report on the analysis of the Ministry of Justice (Relatório sobre o Diagnóstico sobre o Ministério da Justiça)*, 2000.

128 Interview with Dr Abdul Carimo, Director of UTREL, 21 August 2006.

129 In 2004, the Ministry of Planning and Finance was divided; the Ministry of Finance is now in charge of public finances, and a new Ministry of Planning and Development has been created.

sector; for instance, funds earmarked for the Ministry of the Interior are not broken down into sub-allocations for policing or prisons. The *Balanço du Plano Económico e Social de 2005* indicated that 1,055 billion MT (US$42 048 000)[130] had been allocated to the justice system *(sistema judicial)*, representing 2.3 per cent of the total budget.[131] A further 5.9 per cent of the total budget was allocated to security and public order *(segurança e ordem pública)*.[132] The figures below indicate budget allocations to institutions of the justice sector made in the 2005 state budget:

Table 2.1: 2005 State Budget: allocations to institutions of the justice sector

2005 State Budget	Current		Investment	
Institution	**MT (10^6)**	**US$**	**MT (10^6)**	**US$**
Supreme Court	67,024	2 510 048	10,400	389 480
Higher Council of the Judiciary	18,571	695 491	0	0
Constitutional Council	34,813	1 303 755	5,000	187 250
Administrative Court	93,859	3 515 004	13,275	497 163
Prosecutor-General	59,256	2 219 142	9,104	340 926
Ministry of the Interior	1,695,225	63 486 161	89,863	3 365 366
ACIPOL (police training college)	50,572	1 893 905	5,952	222 914
Ministry of Justice	73,760	2 762 325	17,764	665 273
Provincial courts	206,357	7 728 052	513,602	19 234 380
Specialist courts	72,760	2 724 877	3,850	144 183
Provincial Public Prosecution Service	87,697	3 284 258	43,830	1 641 448
Provincial Military Prosecution Service	21,192	793 652	11,620	435 169
Provincial prisons	121,094	4 534 982	283	10 601
Prisons (Penitenciária)	42,453	1 589 869	41,296	1 546 535
Central Prison of Maputo	58,161	2 172 313	3,200	119 520
Female Prison of Ndlavela		15 225	570,165	1 600
Provincial Directorate of Registries and Notaries	72,608	2 719 151	7,738	289 784
TOTAL	2,790,626	104 508 960	778,377	29 150 232
Specialist courts include: Police Court, Juvenile Court, Provincial Military Court and Provincial Labour Court.				
Exchange Rate: US$1 = MT 27,285 (23 March 2006)				

Source: State Budget, 2005, approved by law no. 4/2005, 22nd June 2005

130 Exchange rate as of September 2006, www.oanda.com.

131 Government of Mozambique, *Balanço do PES 2005*, Maputo, p.120. 1,055 billion MT is very close to the total current expenditure in the following table minus the allocation for the Ministry of the Interior. The *Balanço do PES 2005* provides an evaluatory analysis of implementation of the PES for that year.

132 Ibid.

Historically, the Ministry of Justice and Ministry of the Interior have been under-funded, and this in turn has clouded other organisational issues. Over the past few years, funding has improved and is no longer a critical issue; however, execution of budget allocations remains in need of improvement. Again, this is an area where there is some contention over reported figures; the 2006 government and donor Joint Review[133] recommended improved coordination between the sector and the Ministry of Finance with regards to budget execution data.[134] The *Balanço do PES 2005* reports that between January and September 2005, only 52 per cent of allocated funds for the year had been spent.[135]

The individual institutions, including the courts, receive an annual budget with a considerable degree of pre-specification. For instance, the overall budget to be managed by the Ministry of Justice is sub-divided into budget lines: for the Minister of Justice, the Directorate of Registries and Notaries, and individual prisons (for example *Cadeia Central de Maputo, Centro de Reclusão Feminino etc*). The budget to be managed by the Supreme Court is also sub-divided into budget lines including for the Supreme Court itself, individual provincial courts, the Juvenile Court, and the Police Court. As a general rule, the provisions of a given budget line cannot be transferred to another without authorisation from the Ministry of Finance or relevant provincial department of finance.

The state budget has been decentralised to the provincial court level and the country's 11 provincial courts receive their own budget lines. The budget for district courts is managed by the provincial courts. It is the responsibility of the provincial courts to buy and send to the district courts all the equipment they need to operate, and to disburse funds so that district courts can make payments for services and goods that need to be purchased locally (such as postal services). In theory, district courts should not have difficulty in accessing funds, but in practice the provincial courts are very slow in making disbursements. There is a lack of clear guidelines and enforcement of good practices from the Supreme Court regarding disbursements to the district level. In the majority of the 19 district courts visited by AfriMAP between January and August 2005, district court judges and staff indicated that no funds had been received over the past two to three years.[136]

The SISTAFE *(Sistema de Administração Financeira do Estado)* Law[137] that regulates general public financial management set up a centralised system and did not provide scope for much decentralisation of budgets. The 2003 Law for Local State Bodies (*lei dos órgãos locais do Estado*),[138] opened up this possibility, although since approval of the law, decentralised budgets have have not yet been provided for at the district level. The decision on whether to provide decentralised budgets for courts at the district level cannot be separated from broader questions on decentrali-

133 Annual review exercise conducted by government of Mozambique and donors, evaluating government performance against mutually agreed indicators.

134 Government of Mozambique and donors, *Joint Review 2006: Justice Report*, Maputo, May 2006.

135 Government of Mozambique, *Balanço do PES 2005*, Maputo, p.120.

136 AfriMAP visited 19 district courts between 3–16 August 2005 as part of its research. See Annex A for further details.

137 SISTAFE Law, 2002 (Law no. 9/2002), regulated by decree no. 17/2002.

138 Law on Local State Bodies, 2003 (Law no. 8/2003), art. 35, no. 2, and art. 39, no. 1. This provision was further developed in the Regulation of the Law on Local Organs of the State, decree no. 11/2005, art. 44.

sation. In the interim, the Supreme Court should improve information provided to the district courts regarding budget allocations made to the provincial courts, thus enabling the district courts to hold the provincial courts accountable. The Supreme Court should also provide clearer guidelines to provincial courts on disbursing funds. Currently, allocations from the provincial to the district courts are often determined on the basis of individual relationships between judges in provincial and district courts. Clearer institutional mechanisms are needed to regulate these allocations.

Financial review and auditing

The two main sources of funding for the justice sector—the state budget controlled by the Ministry of Finance, and external project funds—are reflected in two budgeting processes, with different accounting, control, inspection and auditing procedures followed in practice. In addition, courts have their own sources of revenue, received from court fees and other payments made directly to them. The Ministry of Justice also directly collects revenues through the Directorate of Notaries and Registries.

State budget

There are both internal (as governed by SISTAFE) and external (the Administrative Court) mechanisms in place for management and oversight of public expenditure from the state budget.

a) Internal mechanisms

Since 2002, internal processes for the administration, management and auditing of funds have followed a new framework as set out in the SISTAFE law.[139] The new legal framework was intended to bring the antiquated system for public financial management into line with the new needs of the state, setting out an integrated, coherent system for public financial management. SISTAFE comprises a set of five sub-systems, including one for the internal control of the use of public resources. SISTAFE covers all state institutions, including those of the justice sector.

The Inspectorate-General of Finance *(Inspecção Geral das Finanças,* IGF*)*, located within the Ministry of Finance, is the key body responsible for conducting internal audits as set out in SISTAFE. Although the IGF has the right to initiate inspection of any state institution, it has tended to carry out inspections at the request of institutions themselves. According to information provided by the Inspectorate-General of Finance, out of a total of 357 inspections and audits it carried out between 2002 and 2005, only one court was included; the provincial court of Sofala in 2002. The IGF has carried out inspection audits in the Ministry of Justice, the Directorate of Notaries and Registries, prisons in Beira and Nampula, and the Ministry of the Interior. Public trust in the justice sector could only benefit from more widespread and frequent auditing of the courts.

Generally, once the IGF delivers its final reports, they are not made public. However, in December 2005, the Ministry of the Interior released the results of an audit that had been carried out in the ministry earlier in the year. The report indicated that approximately 220 billion MT

139 SISTAFE Law, 2002. See UTRAFE's website at www.utrafe.gov.mz for further information on SISTAFE.

(US$8.8 million) could not be accounted for from the time of the former Minister of the Interior, Almerino Manhenje, who had held the post from November 1996 to January 2005.[140] The auditors checked the physical existence of all employees on the payrolls of the ministry, and uncovered 55 'ghost' workers. The current Minister of the Interior, Jose Pacheco handed the audit report to the Public Prosecution Service for further investigations which could lead to criminal proceedings against those found responsible.[141]

b) External mechanisms

The external control and auditing of public expenditure from state funds is executed by the Third Section *(Terceira Secção)* of the Administrative Court.[142] The Third Section is responsible for the overview of public expenditure, including both an annual audit of state accounts to be presented to Parliament for debate, and audits of approximately 800 state institutions.[143] Due to a lack of resources, the Administrative Court has found it difficult to fulfil this brief. The chart below shows the number of audits completed, according to data supplied to the African Development Bank. The Administrative Court was not able to respond to a request for information on audits undertaken for use in this report. No audits by the Third Section have yet led to successful prosecutions.

Table 2.2: The Administrative Court's auditing activities

Auditing activities snapshot	Number	Success rate
Public sector institutions requiring auditing	800	N/A
Accounts received in the first year requested	400	50%
Audits completed in 2001	–	0%
Accounts received in 2002	300	38%
Audits completed in 2003	8	1%
Audits completed in 2005	30	4%
Audits Leading to judicial processes	–	0%

Source: *Country Governance Profile*, African Development Bank, December 2005, p.16.

The Third Section is also responsible for the prior approval of administrative contracts and appointments.[144] This is effected through the *visto* (no objection) procedure, which requires public institutions (including the judicial courts) to submit decisions with financial implications for the state (such as staffing, tendering and procurement), to the court before they are effected. Assuming there are no problems, the Administrative Court will issue a statement of no objec-

140 Mozambique News Agency, 'Audit shows huge sums missing in Interior Ministry,' *allAfrica.com*, 31 December 2005.

141 *Jornal Notícias*, 7 March 2006.

142 Organic Law of the Administrative Court, 1992 (Law no. 5/992), art. 15; Law of Procedures of Third Division of Administrative Court, 1997 (Law no. 16/1997).

143 Law no. 14/1997, on the control of public expenditure, concerning the State General Account, and accounts submitted by state institutions to the Administrative Court. See also *Country Governance Profile*, African Development Bank, December 2005, p.16.

144 Law no. 13/1997, on the prior control of public expenditure.

tion, after which the decision or the contract enters into force and disbursements can be made.[145] There have been some complaints from the public administration that due to a delayed respose from the Administrative Court, at times the *visto* system risks causing a bottleneck in implementation of administrative decisions.

Own source income

SISTAFE stipulates that all institutions should report and include own sources of revenue in their budget proposals to the Ministry of Finance.[146] However, in practice, the courts do not integrate this into their financial planning. The Court Coffers *(Cofres dos Tribunais)* perform the function of a treasury to handle court fees and other income, but there is no transparency regarding use of these funds. The Ministry of Justice does not have any established mechanisms in place for oversight of revenue received by the Directorate of Notaries and Registries. There is no public information available on the annual value of own-source income. There is no clear reason why own source income in the sector is not subject to review by the Inspectorate-General of Finance, and measures should be put in place to establish much-needed transparency and accountability regarding these funds.

External project funds

Although the government is encouraging development partners to channel all funds directly to the state budget, external project funds are still in operation in the justice sector. The Administrative Court has the right to audit and monitor the use of these funds. In practice, mechanisms of the Administrative Court have rarely been used for external project funding, as donors tend to stipulate their own auditing requirements, usually involving a third-party auditing firm. The problem of accounting for project financing is a major one that goes beyond the justice sector: in 2003, more than half of overall public spending came from this source.[147]

In general, some of the key issues related to financial management in the justice sector are that: a) both the Inspectorate-General of Finance and the Administrative Court suffer from a lack of resources, particularly sufficient numbers of trained staff to respond fully to the enormous demands of inspecting the entire public service; b) implementation of the Administrative Court's auditing mechanisms has been very slow in comparison to those of the Inspectorate-General of Finance; c) there is no external control of the financial administration and management of the Supreme Court and other judicial courts, nor of the Court Coffers.

B. Court administration

Prior to the separation between the judiciary and executive established by the 1990 Constitution, the administration of courts was under the control of the Ministry of Justice. Although the 1990 Constitution did not wholly clarify under whose control court administration would fall, the Organic Law of the Judicial Courts clearly provides for the administration and management

145 Some actions are exempt from the administrative *visto*, for instance, nominations made by the president of the republic, although these decisions should still be submitted to the Administrative Court for the court's records.

146 SISTAFE Law, 2002, arts. 24 and 38.

147 *Country Governance Profile*, African Development Bank, December 2005, p.14.

of judicial courts to be undertaken by judges.[148] In the judicial courts, judges are ultimately responsible for supervising court administration, court staff (including the office of clerical staff, *cartório,* attached to each court)[149] and court assets. The Organic Law of the Judicial Courts provides for some additional management support in the Supreme Court, through the position of the General Secretary *(Secretário Geral)*. The General Secretary reports directly to the president of the Supreme Court, and is responsible for the supervision of all support staff.[150] The Organic Law of the Administrative Court also provides for a similar position in the Administrative Court.[151]

Although internal court administration is thus independent of the executive, the current configuration is raising concern within the judiciary as the burden of administrative and management duties is cutting into time judges should spend on substantive work.[152] Returning these duties to the Ministry of Justice would risk undermining the principle of independence that underpins the sector, however, more thinking is needed to ensure that judges are able to dedicate themselves to adjudication and case management. The president of the Supreme Court said in 2006 that in conjunction with the World Bank, new 'court administrators' would be recruited and trained to provide better support to judges.[153] Judges would also benefit from receiving training on management and administration. Many within the justice sector believe that issues beyond the day-to-day management of the courts should be passed to the government, without any risk of undue interference in judicial matters. This could include supervision of building works for the courts, Public Prosecution Service or housing for judges, and procurement of goods and services.

The courts are bound by the principles established for the management of state employees in the National System of Human Resource Management for State Employees (*Sistema Nacional de Gestão de Recursos Humanos do Aparelho do Estado),*[154] and the General Statute of State Employees (*Estatuto Geral dos Funcionários do Estado)*.[155] Supervision of this system in each sector is the responsibility of the Council of Ministers, with the assistance of the National Council of the Public Service (*Conselho Nacional da Função Pública*) and the Ministry of State Administration (*Ministério da Administração Estatal)*. Their supervisory powers critically include the definition and approval of the composition, categories and salaries of the clerical staff of the courts (unless the president of the Supreme Court receives a mandate from the executive for an exception, such as under a decree of 2001 that permitted him to determine staff numbers in some specific areas).[156] Hence, whilst the courts are responsible for administration of their staff, final decisions regarding the quantity and quality of this staff must be approved by the executive. The powers of the president of the Supreme Court are also limited by the Administrative Court, as decisions of the Supreme

148 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992).

149 Ibid., art. 44 (e) and 54 (b). See also law no. 10/1991, art. 19(c).

150 Ibid., art. 45 (*Secretário-Geral*) and art. 46 (*Competência do Secretário-Geral*).

151 Organic Law of the Administrative Court, 1992 (Law no. 5/1992), art. 35 (*Secretaria e serviços de apoio*)

152 Round-table held at the Mozambican Bar Association, Maputo, 2 March 2005, and at a regional seminar in Nampula, 7 March 2005.

153 Annual address of the president of the Supreme Court on opening of the judicial term, March 2006, p.4.

154 Approved by decree 40/1992, 25 November 1992.

155 Approved by decree 14/1987, 20 May 1987.

156 Decree 6/2001, 15 May 2001, (art. 2).

Court relating to the disciplining of clerical staff only acquire legal effect upon endorsement from the Administrative Court, and are subject to appeal in the Administrative Court.

Composition and training of court staff

The Organic Law of the Judicial Courts provides for an office of clerical staff *(cartório)* in each section of the Supreme Court and in each provincial and district court, including individual sections of the provincial courts when possible.[157] The *cartório* is headed by a chief clerk *(escrivão)*, under the supervision of the court's presiding judge, and is composed of 'law officials' *(oficiais de justiça)*.[158] In addition to the *cartório*, the Organic Law of the Judicial Courts provides for the position of a 'judicial secretary' *(secretaria judicial)*, if required by the volume of case-work within a court, to assist in internally distributing workload.[159] The effective performance of the *cartório* is fundamental, considering its responsibility for carrying out a range of court activities, including compiling proceedings; communicating with all parties involved; collecting information and data required by the judge; and writing up minutes of hearings and rulings. These tasks require well-trained and qualified staff. Courts also need interpreters, financial and administrative support.

In 2005, there were approximately 1 065 court staff.[160] Although there has been a significant increase over the past decade—in 1996, the courts had only 569 staff[161] —the shortage of well-qualified staff remains a major problem. AfriMAP researchers visited 19 district courts, and composition of the *cartórios* suggests that district courts have been the slowest to see improvements in recruitment. Judges who were interviewed said their courts rarely had sufficient staff; for instance, there were five members of court staff in Angoche, four in Magude, four in Manjacaze, four in Nova Mambone, and one in Murrupula.

In the district courts, a particular concern emerged regarding the bailiff (*oficial de diligência*) whose job is to deliver court summons and other communications. Almost all of the 19 district courts visited had villages within their jurisdiction located up to 50km to 70km away from the location of the court. Given that bailiffs travel on foot or in a few cases by bicycle, they often spend two to three days delivering a single summons. A judge in a district court explained the situation in his court:

> On many occasions our bailiff spends a week or more away from court, delivering documents to different locations. For two or three days he does not stop and is always on the move, travelling in difficult conditions, walking in the rain, sleeping in the bush; it is a highly risky job.[162]

In order to substitute for the lack of sufficient personnel, court authorities rely on favours from state employees who may be travelling from the district capital to smaller localities, for assistance

157 Organic Law of the Judicial Courts, 1992, arts. 44 (e), 54 (b), 55, and 62.

158 Ibid., arts. 44 (e), 53(b), 54(b), 55, 61(b), and 62.

159 Ibid., art. 55, no. 2.

160 Annual address of the president of the Supreme Court on opening of the judicial term, March 2005, p.7.

161 João Pedroso, João Carlos Trindade, Maria Manuel Leitão Marque, 'The movement of cases and appeals through the judicial courts' (*O sistema judicial: os recursos e o movimento processual*) in *Conflict and Social Transformation (Conflito e Transformação Social)*,vol. 1, eds. Santos & Trindade, Afrontamento, Portugal, 2003, p.324.

162 August 2005, Judge requested anonymity.

in fulfilling functions such as delivering court notifications. These alternative methods are not without their own delays, as one judge explained:

> We often send summons via local authorities, but in many of these cases we do not receive confirmation of receipt, and so we don't know if the summons were properly delivered. This leads to situations where on the very day of trial, in the presence of the other party, we have to postpone cases. As we don't know for sure whether the summons was delivered, we cannot advance with the trial or rule by default.[163]

In March 2005, the president of the Supreme Court highlighted the need to improve the skills of court staff, 53 per cent of whom had only primary level education and only three per cent of whom had a degree.[164] Until recently, very little organised training was provided for court staff. In 2000, the Centre for Legal and Judicial Training *(Centro da Formação Jurídica e Judicial,* CFJJ*)*[165] began to offer courses for court staff run in both Maputo city and some provinces. Since its implementation, the centre has trained a total of approximately 115 new court staff, including 52 women (44.8 per cent).[166]

It is crucial that court staff are properly trained and managed. One study reported that in the provincial court of Maputo there was little supervision of the work of the court clerks; they chose which cases to hand to the judge for clearance, and did not properly fill in the court registration books, or properly archive finalised legal suits.[167] Unless it is properly supervised, the *cartório* risks becoming a bottleneck in the effective functioning of the courts. A study from the CFJJ found that over 50 per cent of judges felt that within the courts, court staff were most affected by corruption (versus 12 per cent who said that district judges were the most affected).[168]

The salaries and benefits provided for court staff are insufficient to attract and retain high quality personnel. Although in 2003, the government favourably adjusted the salaries of judges, prosecutors and court staff, [169] the salary levels of court staff remain relatively low.

Record keeping

Under the terms of the Organic Law on Judicial Courts, court proceedings should be recorded and filed by court clerks *(escrivães*) operating at each division of the Supreme Court, and each provincial and district court. The court clerks are directly responsible for record keeping, under the management of the chief judges of their respective division or court.[170] In practice, record

163 Ibid.

164 Annual address of the president of the Supreme Court on opening of the judicial term, March 2005, p.7.

165 The CFJJ begun operating in 2000, see chapter 4.A, Judges, for further detail.

166 CFJJ, Development of Training Courses: A Global Activity Report, 2000–2004 (*Evolução da Actividade Global de Formação por Curso 2000–2004*), 2004; CFJJ, Annual Report 2005 (*Relatório Anual de Actividades 2005*), Maputo, January 2006.

167 João Pedroso, João Carlos Trindade, André Crisiano José and Boaventura de Sousa Santos, 'Characteristics of the Courts' Performance' (*Caracterização do desempenho dos tribunais*), in Conflict and Social Transformation, vol. 1, eds. Santos & Trindade, Afrontamento, Portugual, 2003, p.590-591.

168 CFJJ, *Survey of the Judiciary (Inquérito aos Magistrados Judiciais)*, Maputo, March 2005, p.63.

169 Decree no. 59/2003 (*Cria as funções e carreiras dos Tribunais Judiciais e Procuradoria-Geral da República*) and decree no. 60/2003 (*Funções e carreiras do Tribunal Administrativo*). See also decree no. 64/1998.

170 Organic Law of the Judicial Courts, 1992, art. 44, para e); art. 54, para b); arts. 55 and 62.

keeping is impeded by a serious lack of adequate equipment and facilities. In effect, all of the courts' basic information is kept on paper, case files are still hand-stitched, and are filed and archived manually. Some courts do not even have filing cabinets. AfriMAP researchers who visited the district courts of Sussundenga (Manica province) and Murrupula (Nampula province), found files stacked on the floor of the courts' offices. The NGO *Associação Moçambicana das Mulheres de Carreira Jurídica* (AMMCJ) highlights that these poor storage conditions also lead to the confidentiality of files being compromised.[171]

Counsellor Judge Luís Mondlane summarised the situation of the courts' record-keeping and archiving system:

> ...it is very traditional, manual, old-fashioned and bureaucratic. It is not easy for an interested party to know what stage his proceedings are at. This is one of the areas where the Supreme Court has discussed the fact that urgent action must be taken. The problem is so serious that it is difficult to know how to start, if not in the district judicial courts, then at least here, in the Supreme Court. If it were possible to computerise all the *cartórios*, that would be the best solution.[172]

The Supreme Court has begun a computerisation process that aims for at least all divisions of the Supreme Court and all provincial courts to have use of a computer.[173] However, this is not yet being implemented in the district courts: of 19 district courts visited, only one, in Chókwe, had a computer.

Physical condition and facilities

With the exception of the Supreme Court, court facilities tend to be antiquated, with little equipment such as computers, microfilms, or even office furniture. The problem is particularly serious at the district court level. In their annual reports to the Supreme Court, the presiding judges of the district courts have reported that in addition to buildings in advanced stages of physical disrepair, they also face a lack of electricity, running water, sanitary facilities, archives, office furniture and stationery; in short, the minimum conditions necessary for the courts to function. Some construction and rehabilitation work is taking place; for instance, the *Balanço do PES 2005* reported that over the previous year a new court had been built in the district of Moamba.[174] However, more rapid execution and better management of funds is needed to improve the pace of building work.

Both during colonialism and one-party rule, provincial and district courts often shared premises with government offices. With the nationalisation of land in 1976, the Court Coffers lost many of their physical assets, which were transferred to the State Real Estate Administration Office *(Administração do Parque Imobiliário do Estado,* APIE). Much physical infrastructure was also destroyed during the civil war. As demands on court services developed, including in places

171 Written information provided by AMMCJ to AfriMAP, 28 March 2005.

172 Interview with Judge Luis Mondlane, 14 February 2005.

173 Ibid.

174 Government of Mozambqiue, *Balanço do PES 2005*, Maputo, p.110.

where the justice sector previously had no representation during colonialism, courts began to operate in facilities leased from the APIE or other state institutions. These included offices in the same buildings as district administrations, local registry and notary offices, and private companies.[175] The seriousness of the problem was highlighted by the president of the Supreme Court in 2006, when he said that of the country's 93 district courts, only 29 had their own buildings.[176] Despite the clear constitutional separation of the courts and executive since 1990, such close, physical proximity of the courts with government services has led to some public perceptions that the courts' independence is compromised. The judge of the district court of Chókwe explained of his district:

> ...the court, as you can see, operates in the same building as the district government authorities, the municipal authorities, the registry offices and the district office of the public prosecutor...it has caused quite a few problems in convincing people that the court is not the same thing as government.[177]

The courts' real estate assets have been very poorly managed; for instance, prior to 1996, the Supreme Court did not have an inventory of assets allocated to the provincial or district courts.[178] Management of the courts' real estate assets used to be the responsibility of the Court Coffers. In part as a response to the poor state of affairs, with donor assistance, the Office of Real Estate Management (*Gabinete de Gest o de Imóveis*, GAGEI) was set up to assist the Supreme Court in administering and maintaining infrastructure. GAGEI is now responsible for managing fixed assets of the courts, including monitoring the construction and rehabilitation of courts, and the maintenance of existing courts. However, so far, there are no indications of any significant activity from their offices.[179]

c. Availability of legislation and jurisprudence

Availability of legislation and jurisprudence in Mozambique is extremely poor, to the extent that it constitutes a serious impediment to judges, lawyers and court staff in fulfilling their duties.

Legislation

Court officials suffer a major lack of availability of legislation and jurisprudence.

Key legislation, including codes and texts of revised or new legislation, is generally not available in the district courts, nor in government offices responsible for implementing such

175 João Pedroso, João Carlos Trindade, Maria Manuel Leitão Marque, 'The movement of cases and appeals through the judicial courts', *Conflict and Social Transformation*, vol. 1, eds. Santos & Trindade, Afrontamento, Portugal, 2003, p.329.

176 Annual address of the president of the Supreme Court on opening of the judicial term, March 2006, p.7.

177 Interview with presiding judge of district court of Chókwe, 6 August 2005.

178 Dagnino, quoted by Pedroso et al., 'The movement of cases and appeals through the judicial courts', *Conflict and Social Transformation*, p.330.

179 DANIDA, Mid-term review of Danish programme support to the justice sector in Mozambique 2002–2005, 30 August 2005.

legislation.[180] In many courts, judges have personally brought texts of the legislation they need to use. The presiding judge of Chókwe district court said in an interview:

> When I arrived here, to initiate my career as a judge, I did not find anything. All copies of legislation were brought by me, from the centre or the faculty, as well as other documents that I obtained later on. All the documents here belong to me and when I leave, I will take them with me, and the court will be empty again...[181]

The Centre for Legal and Judicial Training has begun to provide copies of legislation to new judges that participate in training at the centre; however, there are many judges already in the courts that also need copies of legislation. The table below provides an example of the situation in some district courts. The district courts located far from the provincial capital cities (Sussundenga, Manica province; Macanga, Tete province; and Nova-Mambone, Inhambane province), in general, face greater constraints in obtaining updated legislation compared to those nearer the provincial capital cities (Chókwe, Gaza province; Dondo, Sofala province; and Montepuéz, Cabo-Delgado province).

The government is constitutionally obliged to print and circulate copies of an official government gazette, the Boletim da República, containing all new legislative acts (laws and decree-laws), ratification of international treaties, and regulations.[182] In practice, the government printer (Imprensa Nacional) does not adhere to schedule and the gazette tends only to become available after decisions have entered into force. Inadequate printing and distribution of the gazette through the country also limits citizens' access to and awareness of legislation. The majority of districts only receive the Boletim months after publication. From 1974–1995, the Imprensa Nacional used to compile regularly publications of key legislation as well as ministerial regulations, but this was discontinued due to a lack of funds. The Imprensa does bring out small runs of key legislation from time to time, but this is not done on a systematic basis. Recommencing regular publication of comprehensive compilations of new legislation is essential for judges and other court officials, and should be coupled with measures to improve their distribution to district courts. The government occassionally publishes notices in national papers regarding new legislation, but this tends to be related to financial matters such as new customs and excise duties, rather than human rights.

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180 For instance, at an AfriMAP seminar at the Faculty of Law of the University of Eduardo Mondlane, Maputo, 28 July 2006, an example was provided of notarial offices in Maputo that were unaware of the Law of Registration of Entities.

181 Interview with presiding judge of district court of Chókwe, 6 August 2005.

182 The *Boletim* is composed of three series. Series I deals with the publication of the Constitution itself, laws and resolutions by Parliament, presidential decrees either normative or individual, such as appointments, decrees (regulations) and resolutions by the Cabinet or individual ministers, decisions by ministers, granting of citizenship, creation of inter-ministerial or ad hoc bodies, ratification and official version of international treaties and cooperation agreements. Series II is of an administrative nature and deals with events in the civil service (vacancies, appointments, period of service time). Series III deals with decisions regarding land and mining concessions and permits, municipal regulations, approval of associations and foundations as well as their articles of association, and with all acts of corporate life requiring publicity under law, namely articles of association.

Table 2.3: Availability of selected legislation in 10 district courts

Legislation / Court	Chókwe (Gaza)	Nova-Mambone (Inhambane)	Sussundenga (Manica)	Magude (Gaza)	Manjacaze (Gaza)	Massinga (Inhambane)	Murrupula (Nampula)	Montepuez (C.Delgado)	Dondo (Sofala)	Macanga (Tete)
Civil Code	2	2	2	2	3	2	3	2	2	2
Civil Procedure Code	2	2	0	2	3	2	3	2	2	2
Criminal Code	2	2	0	2	3	2	3	2	2	2
Criminal Procedure Code	2	2	0	2	3	2	1	2	2	2
Traffic Code	2	2	0	0	2	2	0	2	2	2
Commercial Code	2	2	0	0	2	2	0	2	2	2
2004 Constitution	3	0	0	0	3	2	0	3	2	0
Family Law	3	2	0	0	3	2	0	3	2	0

Notes:
3: Available and belongs to the court.
2: Available but belongs to the judge.
1: Available when borrowed from other entities /persons.
0: Not available.

The inadequacy of distribution of new legislation is compounded by the country's high illiteracy rate, meaning that the great majority of the public is not informed of legislative developments in the country. The Civil Code however states that 'ignorance or misinterpretation of the law does not validate lack of execution nor does it exempt individuals from the sanctions established'.[183]

The main legal libraries, all located in Maputo, are the National Library, the National Historical Archive, the Library of Parliament, the Library of the Supreme Court, and the Library of the Office of the Prosecutor-General. The Library of the Supreme Court has a service to provide legal references by fax upon request, although in practice the majority of courts, particularly in the districts, are unlikely to have access to a fax machine. Outside Maputo, the law faculty of the Catholic University of Mozambique, Nampula, has a good library. Beyond this, there are very few resources for accessing legal documents outside of Maputo.

A private company, Pandora's Box, has prepared an electronic compilation of all legislation since independence which could potentially be a useful tool. Although the retail price is not affordable to most practitioners, the Centre for Legal and Judicial Training and DANIDA have jointly financed a version of this tool. However, district judges interviewed by AfriMAP were not yet aware of the software. Moreover, most of these courts do not yet have a computer. Different private and public entities (e.g. Banco Internacional de Moçambique) have financed publications

183 Civil Code, art. 6

or reprints of codes such as the Civil Code, Commercial Code, and Criminal Code. Some are distributed for free to libraries, schools and law faculties, but this is generally very rare beyond Maputo.

Overall, in practical terms, it seems that the Centre for Legal and Judicial Training is becoming an important avenue whereby judges and lawyers are able to obtain copies of legislation. Although this may be insufficient to ensure courts have copies of all legislation, as when a judge moves court or retires he may take his personal copies with him, it is still an avenue that should be further encouraged and supported.

Jurisprudence

Compilations of jurisprudence are rare: although there have been some initiatives, these have been isolated efforts lacking in consistency. The Ministry of Justice used to publish selected decisions from the main courts in a bulletin, but this was discontinued in the late 1980s. A few publications are available,[184] but overall, very little information has been compiled and published. In part reflecting this lack of availability, Portuguese jurisprudence, which is easier to obtain, is sometimes quoted in submissions to courts in place of Mozambican jurisprudence, and is used extensively by judges in preparation of their judgements.

Expert commentary

There is very little commentary or analysis available on the Mozambican justice system, with a lack of textbooks and other materials for students and researchers. The Faculty of Law at the University of Eduardo Mondlane produces a legal magazine *(Revista Jurídica da FDUEM)* but it is not regularly published; the last edition was in September 2004. Notable exceptions include Professor Giles Cistac who has published extensively on Mozambican administrative law,[185] a group of legal experts working at the Centre for Legal and Judicial Training who have published on natural resources legislation[186] and the work of Teodoro Waty on tax legislation.[187] It is widely acknowledged that university lecturers do not generally prepare notes or manuals for their students, although there do seem to be some signs of improvement, particularly in the private universities. Institutions including the Law Faculty of the Catholic University in Nampula, the Mozambican Bar Association, Centre for Legal and Judicial Training, and the Office of the Prosecutor-General have discussed the possibility of publishing legal commentary, but to date, no publications have been released.

Public information

Public information regarding the justice sector is limited. Information that is provided is largely limited to the annual address by the president of the Supreme Court at the opening of the judicial

184 E.g. Giles Cistac, *Jurisprudence in the Administrative Court of Mozambique, 1994–-1999 (Jurisprudência Administrativa de Moçambique 1994–1999)*, vol. 1, University Press, Maputo, 2003.

185 Ibid. See also J Guibunda, *Questions on Administrative Law, (Dúvidas em Direito Administrativo)*, Maputo.

186 André Jaime Calengo, *A Commentary on Land Laws (Lei de Terras anotada e comnetada)*, Maputo, 2005; Carlos Serra Jr, *A Commentary on Environmental Laws (Lei do Ambiente anotada e comentada)*, Maputo, 2005; Alda Libombo, *A Commentary on Forestry and Fauna Laws (Lei das Florestas e Fauna Bravia anotada e comentada)*, 2005.

187 Teodoro Andrade Waty, *Introduction to Fiscal Law (Introdução ao direito fiscal)*, 2002.

term, the prosecutor-general's annual report to Parliament, and sporadic data published by the National Statistics Institute (*Instituto Nacional de Estatística,* INE).[188] The police also give weekly press conferences and provide some annual statistical data on crime levels.

Statistical data from the Supreme Court may be available upon request and has been produced annually since 1998 in the form of a printed compilation *(Estatísticas Judiciais)*. Information on the case work of the Supreme Court and provincial courts is tabulated in some detail (e.g. number of cases received, types of cases, number of cases heard etc), although critically, the district courts are not included. The *Estatístícas Judiciais* are usually published one and a half years after the completion of data collection; for example, the statistics for 2002 were only published in April 2004. Statistics on the prison population are available upon request from the National Directorate of Prisons in the Ministry of Justice. Some civil society groups, for instance the Mozambican Human Rights League *(Liga dos Direitos Humanos de Moçambique,* LDH*)*, have developed their own databases, but these are usually not available to the public, and are geographically or thematically limited. It should also be noted that the different institutions of the justice sector do not follow a uniform methodology for the collection and analysis of data within the sector, further complicating the undertaking of coherent sectoral analyses. Even within individual institutions, there is a lack of consistency; for instance the prosecutor-general's annual report does not follow a uniform format each year, rendering comparisons difficult.

Trials are open to the public, apart from in exceptional circumstances.[189] Two trials, concerning the assassination of the prominent journalist Carlos Cardoso, and a seemingly related bank fraud,[190] were televised live in 2003 and 2004, and greatly contributed to increased public discussion regarding access to information, fair trials, and corruption within the justice sector in general. Public interest in justice affairs is running high. In 1999, a total of 49 articles appeared in the national press on the justice sector; while in the first three months of 2005, there were over 50.[191]

There have been some concerns amongst leading members of the judiciary that the media may be overstepping their mark. In 2003, the president of the Supreme Court, stressed to the the media that they risked losing some of their freedoms if they continued aggressive coverage of cases that in his view, violated the rights of individuals involved.[192]

As in other countries in the region, information on the justice sector should be released and made available to the public on an annual basis, with the participation of all institutions within the sector. This would avoid the discrepancies and lack of uniformity in information and statistics released that is currently the case.

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188 **See for instance,** *Statistics on Crime and Justice 1998/99, (Estatísticas de Crime e Justiça 1998/99)*, National Statistics Institute, although this exercise has not since been repeated.

189 2004 Constitution, art. 65, no. 2 and Organic Law of the Judicial Court, no. 10 of 1992, art. 6.

190 For further information on the Carlos Cardoso case see p.88

191 Pedroso, Trindade, Crisiano José and Boaventura de Sousa Santos, 'Characteristics of the Courts' Performance' in *Conflict and Social Transformation*, vol. 1, eds. Santos & Trindade, Afrontamento, Portugual, 2003, p.533, for 1999 figures. AfriMAP, daily analyses of leading national press, for 2005 figures.

192 Annual address of the president of the Supreme Court on opening of the judicial term, March 2003.

3

Government respect for the rule of law

Despite a clear constitutional and legislative framework enforcing respect for the rule of law, including codes of conduct and sanctions applicable against state officials, overall, government compliance with court procedures and rulings leaves much to be desired. The new government has stressed the importance of the rule of law, and more concerted efforts in enforcing this are necessary to ensure that constitutional principles become firmly embedded in practice.

A. Executive compliance with the law

President Guebuza has clearly emphasised his commitment to the rule of law. Calls to improve respect for the rule of law were a part of the president's electoral campaign, and since taking office in February 2005, he has publicly affirmed this commitment.[193]

The new government faces a serious task; despite clear codes of conduct,[194] some members of the executive seem to have engaged in deliberate abuse of process including both non-compliance with court rulings and interference in investigations and prosecutions. The prosecutor-general has highlighted in stark terms, the widespread lack of executive compliance with

193 Mozambique News Agency, 'Presidential candidates predict victory,' *AIM Reports*, 2 December 2004; Mozambique News Agency, 'President Guebuza demands better performance from justice sector,' *AIM Reports*, 4 March 2005.

194 See General Statute of Public Servants (*Estatuto Geral dos Funcionários do Estado, EGFE*), approved by decree no. 14/1987. Article 1 establishes the strict observance of legal norms by all state institutions and organisations, including state employees and officials. Article 2 further establishes that state bodies and their employees should carry out their activities within the law... in conformity with the purposes required by law. Their decisions cannot be contrary to the law, nor can they discount its purposes. The Norms for the Functioning of the Public Administration (*Normas de Funcionamento dos Serviços de Administração Pública*), approved by decree no. 30/2001 sets out in detail the code of conduct that members of the public administration should follow, including in relation to the Administrative Court.

the rule of law. In 2002, he reported to Parliament that 'the culture of legality is still a dream, even amongst our leaders.'[195] The prosecutor-general described a typical scenario involving high-ranking government officials who had failed to cooperate with prosecutors undertaking investigations:

> In one case it was necessary for a minister to give evidence. To begin with, the provincial prosecutor-general requested that the minister indicate a time and place most convenient for him, in accordance with the law, for the deposition. However, over several months, the minister was not available. At this point, the prosecutor-general was obliged to intervene to alert the minister that he was acting illegally and of the consequences of such action. Only then did the minister become available. The same happened with an official being investigated in a case against state employees at the National Institute for Natural Disaster Management, to the point where the official in question accused the investigative team of harassing him.[196]

As well as failing to cooperate with the courts, there have been damaging allegations that members of the executive have been involved in the active obstruction of justice. Following the high-profile murder of investigative journalist Carlos Cardoso, his colleague Marcelo Mosse alleged that prominent business figures, the Satar brothers and Vincente Ramaya (now convicted in relation to the murder of Cardoso), had spent approximately US$2 million in bribing state officials, in order to cover up their tracks.[197] During the Cardoso trial, which began in November 2002, allegations were also made that Nyimpine Chissano, the son of former President Chissano, was involved in ordering the killing.[198]

B. Accountability and review mechanisms

The range of legal sanctions applicable to the executive is discussed here on two levels: in relation to the government as an institution; and in relation to individual officials, particularly the president and his ministers.

If any legislation (law or decree-law) is challenged before the Constitutional Council, and ruled as either unconstitutional or illegal, it is automatically revoked and loses force.[199] If the act or decision is of an administrative nature *(actos administrativos, decisões administrativas)*, it falls to the Administrative Court to scrutinise conformity with the law.[200] The Administrative Court has the right to initiate inspections, although in practice it tends to work reactively, ruling on cases brought before it.

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195 Annual address of the prosecutor-general to Parliament, 2002, AR –, p.23. V/Infor./333/04.03.2002.

196 Ibid., p.22.

197 Marcelo Mosse, cited in Gastrow and Mosse, *Mozambique: Threats Posed by the Penetration of Criminal Networks*, ISS Regional Seminar, 18–19 April 2002.

198 For further information on the Carlos Cardoso case, see p.88.

199 See chapter 1.A for a full discussion of revocation of unconstitutional legislation.

200 2004 Constitution, arts. 228 and 230.

Oversight role of the Administrative Court

The Administrative Litigation Law (*Lei do Contencioso Administrativo)* [201] sets out the procedures for contesting acts of the public administration. Passed in 2001, the law greatly improved mechanisms of access to the Administrative Court.

An individual who wishes to bring a case before the Administrative Court must first exhaust all other avenues for redress within the public administration. If the case is accepted by the Administrative Court and the court finds the government act in question illegal, the Administrative Court can declare the act null.[202] The Administrative Court is limited in further action it can take: once it has ruled on a case, it is the responsibility of the public administration to review its original decision, and the Administrative Court cannot impose a specific penalty. In a 1998 decision regarding the case of *Maria José Teixeira Catarino Petiz v Prime Minister of the Republic of Mozambique,*[203] the Administrative Court confirmed this restrictive interpretation of its role. Whilst the applicants won the first part of their case, with the court issuing a condemnation of the government's actions in illegally nationalising a factory, the court ruled against the claim for restoration of the applicants' financial rights in the factory. Invoking article 7 of the Organic Law of the Administrative Court and article 217 of the General Statute of Public Servants (EGFE), the court outlined that it did not have the jurisdiction to go beyond the first part of its ruling.

However, if the public administration fails to rectify its actions in light of the court's ruling, citizens can apply to the Administrative Court for a second time. The Administrative Court can then rule on the obligation of the public administration to undertake a specific remedy and to provide compensation. The public administration may still be able to gain exemption from providing full compensation by demonstrating either that complete restitution would be damaging to public interests, or a lack of public funds to meet the payment. If the ruling is again not observed, the court can then charge individual officers within the public administration with a 'disobedience crime' *(crime de desobediência)*.[204]

Since implementation of the 2001 Administrative Litigation Law, it has been much easier for individuals to bring cases before the Administrative Court. However, in practice, officials within the public administration have tended not to execute decisions of the Administrative Court voluntarily or promptly, forcing applicants to return to court. Hence, cases may take several years to be resolved, potentially implying considerable financial impact for the applicants concerned.

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201 Administrative Litigation Law, 2001 (Law no. 9/2001), BR. no. 27, I Série, 07.07.2001.

202 Organic Law of the Administrative Court (*Lei Orgânica do Tribunal Administrativo*), 1992 (Law no. 5/1992), art. 7.

203 Decision no. 1/1ª/98, 14 April 1998, on *Ms Maria José Teixeira C Petiz v Prime Minister of the Republic of Mozambique*, file no. 68/94-1ªa (A/3). Ms Petiz, together with other five citizens, including both nationals and foreigners, challenged a government decision that had nationalised their shares and assets in a company formerly known as *Fábrica Nacional de Moagens e Massas Alimentícias, SARL*, in a process that occurred between 1987 and 1991. See G Cistac, *Jurisprudence in the Administrative Court of Mozambique, 1994–1999 (Jurisprudência Administrativa de Moçambique 1994–1999)*, vol. 1, University Press, Maputo, 2003, p.378. See also decision no. 28/1ª/95, 22 June 1995, on case *Siddik Karim vs. Ministry of Construction and Water,* file no. 63/94-1ª(A/28), in G Cistac, ibid., p.85.

204 Administrative Litigation Law, 2001 (Law no. 9/2001), art. 179. 'Disobedience crime' as defined in the Criminal Code, arts. 188,189.

Sanctions applicable to government officials

There are a number of criminal and civil sanctions stemming from the Criminal Code and Civil Code that can be applied to members of government. Legislation in the form of statutes applicable to holders of high government office has reinforced the sanctions provided in these codes.[205]

The 2004 constitutional revision strengthened provisions for sanctions against the president. Under the 1990 Constitution, the president enjoyed immunity from both civil and criminal proceedings in relation to illegal acts carried out during the exercise of his duties. The 2004 Constitution provides that the president can be tried before the Supreme Court for crimes (as defined by the criminal code and other related legislation) committed during the exercise of his duties.[206] Illegal acts of a civil nature committed during the exercise of his duties are not explicitly mentioned, although article 58 of the 2004 Constitution does set out a general principle of state responsibility to compensate for any damage caused by illegal acts of state officials during the exercise of their duties.[207] For acts carried out outside the exercise of his duties, the President enjoys immunity whilst in office, but can be tried upon termination of his mandate.[208]

Article 58 of the 2004 Constitution sets out the right to compensation and state responsibility for damages caused by violation of fundamental rights, or by illegal acts of state officials during the exercise of their duties. Implicitly, state officials are not liable for damage caused by legal acts. The difficulty here is determining which type of acts can be considered as illegal and which can be considered as legal. Neither the 2004 Constitution nor the law has clarified this principle that came into effect with the 1990 Constitution,[209] and the courts have yet to rule and create jurisprudence on what constitutes an illegal action.

Under the terms of the 2004 Constitution, members of the Council of Ministers, including the prime minister, are responsible for criminal acts whether committed during or outside the exercise of their duties, as well as for illegal acts of a civil nature committed outside the exercise of their duties, for which they can be arrested before the end of their mandate.[210] However, they do enjoy certain immunities, including that, unless they are apprehended for a serious crime with a sentence of long-term imprisonment, the president of the republic must give permission for their arrest and detention.[211] During the constitutional revision, there was some debate on this provision and whether it placed too much responsibility on the president for taking decisions which should be in the natural remit of the prosecutor-general. For illegal acts of a civil nature committed during the exercise of their duties, members of the Council of Ministers would also be subject to article 58 of the Constitution.

In practice, these mechanisms and sanctions have not been invoked since the introduction

205 Law no. 4/1990, and Law no. 7/1998 and corresponding regulations, approved respectively by Decree no. 55/2000, and decree no. 48/2000. See also the Anti-Corruption Law, 2004 (Law no. 6/2004).

206 2004 Constitution, art. 153.

207 Ibid., art. 58, (*direito indemnização e responsabilidade do Estado*).

208 Ibid., art. 153, no. 2.

209 1990 Constitution, art. 97.

210 This interpretation is implied in the text of article 211 of the Constitution.

211 2004 Constitution, art. 211, no. 1.

of multiparty democracy. Whilst investigations have been launched against former ministers and holders of high government office, for instance, former Minister of the Interior, Almerino Manhenje,[212] to date, despite intermittent allegations in the media of corruption,[213] there have been no investigations with conclusive findings against high-level officials during their time in office.

Investigations of executive conduct

The law provides several mechanisms to investigate executive misconduct. Parliamentary investigations play a primary role and in addition there are other mechanisms such as an ombusdsman (implementing legislation for this has now been passed, although an ombudsman has yet to be elected).

Parliamentary regulations provide for *ad hoc* committees of inquiry *(comissões de Inquérito)*,[214] and a Petitions Committee *(Comissão de Petíções)*. Both types of committee (ad hoc committees and the Petitions Committee) should be composed of MPs reflecting the proportional representation of parties in Parliament. The Petitions Committee was first implemented in 1994, with the objective of allowing the public an avenue for complaints against the public administration. It has received complaints at a rate of four to five petitions per day, including in relation to land and property issues, pensions, and employment related accidents. Petitions are also received that fall within the competence of other institutions, usually the courts, and that legally cannot be addressed by Parliament, including complaints related to major delays in judicial proceedings.[215] There are no regulations in place to establish timelines within which the Committee should respond to complaints received. Due to this, as well as a lack of adequate support structure, the efficiency of the committee is questionable. In April 2004, more than 400 petitions were pending. The Committee's 2006 Report to Parliament dealt with approximately 80 petitions, although no public information was provided on the subject of these petitions. The Committee did not provide an update on the number of cases pending, although it recognised that the volume of cases pending was a growing problem.[216]

Parliament has the power to create ad hoc committees of inquiry on executive actions. Since 1994, three have been created, all with inconclusive results, in large part due to the lack of commitment from MPs. The first committee was created in 1998 to investigate a complaint of land usurpation by administrative officials in the province of Inhambane, Paidane locality. The committee completed its work and submitted a recommendation that Parliament refer the case to the Office of the Prosecutor-General, with a view to initiating criminal proceedings. No further measures were taken by Parliament. The second committee was created in 2000 to investigate protests that had broken out in November 2000 in Montepuez, Cabo Delgado, and

212 See Mozambique News Agency, 'Audit shows huge sums missing in the Ministry of the Interior,' 31 December 2005, *allAfrica.com*.

213 For instance, *Jornal Savana* (p.2) reported on 7 April 2006 that state housing had been sold to family members of Prime Minister Luisa Diogo and of the Minister of Foreign Affairs and Cooperation, Alcinda Abreu.

214 See also 2004 Constitution, art. 179, no. 4 (c).

215 Interview with the Secretariat of the Petitions Committee, April 2004.

216 Parliament, Petitions Committee, Information provided by the Committee to the 4th Ordinary Session of Parliament, AR-VI/Infor/105/24.02.2006, p.6.

the subsequent deaths in police cells of RENAMO supporters who had been detained during the protests.[217] The committee completed its work in September 2001, but the report was not made public or followed up after RENAMO-UE MPs refused to allow it to be tabled in Parliament. Media leaks suggested that the report had taken a partisan approach focusing primarily on the protests and responsibility for their initiation, rather than the deaths in police custody.[218] The third committee, also created in 2000, investigated an MP, Jeremias Pondeca Munguambe,[219] and again did not reach a conclusion.

In addition, there are provisions for a State Inspector General (*Inspector Geral do Estado),*[220] and General Inspectors for Public Services (*Inspectores Gerais dos Serviços Públicos*).[221] The 2004 Constitution also provides for the implementation of an Ombudsman *(Provedor de Justiça)*.[222] The Public Prosecution Service *(Ministério Público)*, within its responsibility for 'oversight of legality' *(controle da legalidade)*[223] can also appoint investigative teams composed of senior public prosecutors to deal with specific cases of suspicion of misconduct on the part of government officials (see forthcoming AfriMAP report, *Mozambique: Delivery of Public Services* for further information).

Overall, the response to addressing complaints has not been effective: although institutions and mechanisms have been implemented, the actual mandates and organisation of the different institutions is still unclear. There is a lack of coordination between them, and lack of transparency for citizens in terms of whom they need to address. A coherent system with one clear point of entry for citizens would be easier. Underlying these issues, there is also a cultural context. Mozambique needs to develop a more investigative approach towards controversial executive actions or lack of action. Meanwhile, the parliamentary mechanisms lack independence, given the fact that their composition is based on party representation. One possible improvement could be to complement the work of the Petitions Committee and the ad hoc committees with the creation of independent teams of experts that could be commissioned for particularly sensitive investigations. The committees should also provide a more transparent flow of information to the public on their activities, the subject of complaints, and their resolution.

217 For further discussion of events at Montepuez, see p.102.

218 *Mozambique On-line*, 'The 9th November 2000 demonstrations: committee's report gives all the blame to RENAMO' (Manifestações de 9 de Novembro 2000:Relatório da Comissão dá toda a culpa à Renamo), 4 April 2002, at http://www.mol.co.mz/noticias/2002/0404.html, last accessed 22 Feb 2006.

219 Munguambe did not seek to renew his mandate in the following general election and is no longer a MP.

220 Nominated by the president to oversee the functioning of public service (and hence, inspect the ministries).

221 Located within individual ministries.

222 2004 Constitution, art. 256. See Chapter 6.H, Official mechanisms to assert rights outside the court system, for further discussion of the Ombudsman.

223 Ibid., art. 236.

4

Independence and accountability of judges and lawyers

The principle of judicial independence was first recognised in Mozambique in the 1990 Constitution. Since then, there has been considerable progress in ensuring a separation between the executive and the judiciary, however, significant challenges remain. Tension between the judiciary and the executive remains an underlying, fundamental issue that has still not been wholly resolved. In addition to these issues of principle that the sector is facing, there is also a critical shortage of trained and qualified judges, prosecutors and advocates. Despite improvements in provision of training for new judges and prosecutors, there are still far too few to meet the needs of Mozambican citizens, particularly outside Maputo.

A. Judges

Judicial independence

> A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom. (The Bangalore Principles of Judicial Conduct, 2002.)[224]

A formal separation of power between the legislature, the executive and the judiciary was first provided for in the 1990 Constitution. Prior to that, the 1975 Constitution and the Law for the

224 Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the round-table meeting of chief justices, held at the Peace Palace, The Hague, November 25–26, 2002.

Organisation of the Judicial System (*Lei da Organização Judiciária de Moçambique)*,[225] placed judicial courts under the authority of people's assemblies, and for administrative purposes under the authority of the Ministry of Justice, which had the power to appoint, transfer or remove judges.

The 1990 Constitution created the foundations for a new system, defining the courts as a body with independent authority *(órgão de soberania)*, alongside the president of the republic, Parliament, the Council of Ministers and the Constitutional Council.[226] These constitutional principles were further codified in the 1991 Statute of the Judicial Magistracy *(Estatuto dos Magistrados Judiciais)*,[227] and the 1992 Organic Law of the Judicial Courts.[228] Article 4 of the Statute of the Judicial Magistracy clearly states that:

> Judges shall only judge according to the Constitution, the law and their conscience, and shall not be subject to other orders or instructions, aside from the duty of the lower courts to observe decisions on appeal cases pronounced in the higher courts.[229]

An independent oversight body responsible for the judiciary was also provided for in the 1990 Constitution, in the form of the Higher Council of the Judiciary *(Conselho Superior da Magistratura Judicial,* CSMJ*)*.[230] The Council is made up of 16 members: the president of the Supreme Court (who is ex officio president of the Council);[231] the vice-president of the Supreme Court; two members nominated by the president of the republic; five members appointed by Parliament based on proportional representation; and seven judges to be elected by their peers.[232]

The 2004 Constitution further strengthened the framework established by the 1990 Constitution, providing guarantees for both the political and administrative independence of the judiciary. The 2004 Constitution provides that:

- The courts are an institution with sovereign authority, equal to other institutions of independent authority, as based on principles of the separation and interdependence of powers enshrined in the Constitution (arts. 133, 134);
- Judges are independent and owe obedience only to the law. They are impartial and cannot be removed from office (they cannot be transferred, suspended, forced into retirement or dismissed), except in cases established by law (arts. 217, 218, no. 2);

225 Law no. 12/1978.

226 1990 Constitution, art. 109.

227 Statute of the Judicial Magistracy, approved by law no. 10/1991.

228 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992).

229 Statute of the Judicial Magistracy, 1991, art. 4: *(Independência), 'Os magistrados judiciais julgam apenas segundo a Constituição, a lei e a sua consciência, não estando sujeitos a ordens ou instruções, salvo o dever de actamento pelos tribunais inferiores das decisões proferidas, em via de recurso, pelos tribunais superiores.'*

230 1990 Constitution, art. 172.

231 2004 Constitution, art. 221, no. 2.

232 Ibid., art. 221, no. 1.

- Judges may be held responsible in civil, criminal and disciplinary proceedings for acts committed during the exercise of their duties only in cases specified by law (art. 218, no. 1).[233]

The 2004 Constitution also expanded upon the role of the Higher Council of the Judiciary, setting out that it is the Council's responsibility to:

a) nominate, appoint, transfer, promote and dismiss judges, and evaluate professional merit within the judiciary and take disciplinary action or other actions as may be necessary in relation to members of the judiciary;
b) evaluate professional merit and take disciplinary action in relation to other judicial staff *(funcionários da justiça)*, without prejudice to the disciplinary powers assigned to judges;
c) initiate extrajudicial inspections, inquiries and investigations in relation to the courts;
d) give opinions and make recommendations on policy related to the judiciary, on its own initiative or at the request of the president of the republic, Parliament or other members of government.[234]

Despite a clear constitutional framework implementing the principle of judicial independence, in practice there has been tension between the judiciary and executive as the courts attempt to assert their independence, and at times, actions on the part of members of the executive suggest a reluctance to lose their historical control over the judiciary.

Public perception regarding the independence of the judiciary hit a low point in the early 2000s; lack of progress in high-profile cases such as the investigation into the murders of Carlos Cardoso and Antonio Siba-Siba Macuacua heightened belief that the courts were not independent of other interests at a political level.[235] In the *National Survey on Governance and Corruption*, almost half of the total number of households interviewed 'agreed or strongly agreed' (47 per cent) that the courts were wholly subordinate to government *(os tribunais são completamente dependentes do governo)*.[236]

Both judges and prosecutors interviewed during the course of this research spoke of the challenges faced in making their new protections a reality. They gave examples of phone calls received from members of the executive during cases, sometimes with instructions to pass down to lower courts. Advocates interviewed also said that based on personal experience, they had no doubt as to the existence of pressure on judges and prosecutors originating from ministries and other organs of the executive.[237] In part, this situation is the inevitable legacy of a long-standing political tradition of centralised state authority. According to one judge:

> The model of the political power structure in Mozambique, where there is an excessive concentration of power within the executive body, does not

233 See also the Criminal Procedure Code, arts. 82, 284, 302, 319 and 595.

234 2004 Constitution, art. 222.

235 For further detail on the investigations into the murders of Carlos Cardoso and Antonio Siba-Siba Macuacua, see p.88

236 *National Survey on Governance and Corruption*, 2003.

237 Round table held at the Mozambican Bar Association, Maputo, 2 March 2005.

> provide the necessary conditions for the successful independence of the courts, not at the Supreme Court level, nor in the provincial and district courts. [238]

Although it is debatable to what extent there has been real progress, Justice Minister Esperança Machavela spoke of the year 2005 as a turning point in that 'the judiciary no longer fears interference by the executive.'[239] Although this is complex area in which to measure progress, it is critical to attempt some form of monitoring as the independence of the judiciary is a fundamental principle underlying the sector. For instance, the CFJJ could, after a period of a few years, repeat the survey, published in March 2005, that it undertook amongst the judiciary.[240] In addition, it is important to monitor progress that is made with investigations and prosecutions in cases that may involve state officials.

It is important however to distinguish between judicial independence and judicial impunity for poor performance. A measure of accountability is necessary to ensure the quality of justice. The CSMJ should develop criteria to evaluate judicial performance and make these public, as well as using them in its own evaluations of individual judges.

At the district level, judges may be more vulnerable to influence from local state officials. District courts are more likely to face a shortage of funds and physical infrastructure, providing local state officials with a means of leverage over these judges. District court judges are also more likely to be young graduates with limited experience, or to be elderly and have the same position for many years without a qualification. The following interview illustrates some of the obstacles faced by a district court judge in implementing the rulings of his court due to interference from the local district administrator.

Government interference in the judicial courts

As a judge, I have had a difficult relationship with the district government, particularly with the district administrator. For instance, last year in 2004, two sisters lost their uncle, and decided to claim the right to keep his main house. However, the deceased had eight children, and in a family meeting it was decided that the house should be left to the sons of the deceased. The nieces decided to contest the decision with the district administrator who advised them to take the case to court, which they did. They were then informed that they should make an inventory according to the usual procedures. During that process, it emerged that apart from the main house, there was another smaller house that the deceased had built before marrying and having his children. After evaluating the case, the court decided that both houses should be left to the sons. The file was closed and the sisters were ordered to pay their own costs. However, they refused to accept the ruling, and again went to see the district administrator who, in turn, asked

238 Interview with judge, Nampula, 24 February 2005.

239 Mozambique News Agency, 'Judiciary losing its fear,' *AIM Reports*, 17 January 2006.

240 CFJJ, *Survey of the Judiciary (Inquérito aos Magistrados Judicias)*, Maputo, March 2005.

the district director for women and social affairs to find out why the case had been ruled in such a manner. I received the director and explained the basis of the court's decision. After this was relayed to the district administrator, he personally came to the court, accompanied by the two plaintiffs, to demand an explanation. After listening to the basis of the ruling, he requested that the sisters be at least exempt from having to pay the judicial costs because they could not afford the fees. My response was that the sisters should address the Office of the Prosecutor-General to explain this situation. In any case, only a court representative could decide this. My response did not please the district administrator. I then asked if he was aware that according to the law, the sons had priority of succession, to which he replied that in the case of the smaller house the court should have taken the statement from the district authorities into consideration.[241]

A more recent case this year [2005] concerned a woman who had claimed a maintenance grant from her ex-husband. his woman was divorced and wanted to return to her original district. Before doing this, she wanted to ensure payment of a child support grant. She came to the court asking for mediation and assistance in establishing a grant on behalf of the child. I recommended that she could initiate a case against her husband; however, as the child's birth was not registered, that would need to be done first. This did not please the woman and she then went to see the district administrator. The woman's ex-husband was summoned by the administrator to pay the money demanded by the woman and when he did not comply he was sent to jail at the administrator's orders. The administrator then sent for his employer, a freight transporter, and ordered him to pay the woman an amount that would allow her to return home. According to the administrator, if he did not do so, he could order the detention of his trucks until the payment was made. The company belonged to a citizen of Indian origin, and thus coerced he paid a total of three million meticais [US$ 120].

So, I ask myself, what are citizens going to think of us judges or of the court when a state official has that sort of power over a judge? The two cases mentioned here are, as I said, an example of what my daily work as a judge is like. I believe that on the part of the politicians and government, the separation of powers is still not clear.

SOURCE
Interview with a district court judge, 12 August 2005.

In light of the Bangalore Principles and the UN Principles on the Independence of Judges and Lawyers, it is critical to provide clear instructions to state officials at the district level that decisions of the court must be respected. It is also important to ensure that courts at the district level are provided with adequate financial and material support, including training of their judges; strengthened courts are more likely to willingly and effectively assert their independence.

241 The 2004 Constitution explicitly provides that men and women are equal before the law in all aspects of political, economic, social and cultural life (art. 36); the 1990 Constitution contained the same provision. Whichever law the judge was applying could therefore have been subject to appeal; and the judge should have been aware of these constitutional provisions. However, the correct action by the local authorities would have been to encourage an appeal rather than attempt to intervene directly.

Appointment and dismissal of judges

> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, expect that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.
> (United Nations Basic Principles on the Independence of the Judiciary, 1985, principle 10.)

Judicial courts in Mozambique have two different types of judges; professional judges *(juizes profissionais)* and elected, lay judges *(juízes eleitos)*, each of which has their own system of appointment. The Organic Law of the Judicial Courts sets out that all judicial courts should include both professional judges with legal training, and elected judges from the local community.[242] The role of elected judges is to ensure that the courts are representative of local citizens, and that they consider principles of common sense and equality in their judgements when appropriate. According to the Organic Law of the Judicial Courts, elected judges should participate only in first instance trials and in discussions regarding verification of matters of fact (not interpretation of the law). The law also specifies that in a first instance trial in the Supreme Court, there should be two professional judges and one elected judge;[243] and for a first instance trial in a provincial court, there should be one professional judge and four elected judges.[244] The law does not stipulate the exact number of judges at the district level, only that both professional and elected judges should be present.

For professional judges, the process for appointment, promotion and dismissal is established in the Statute of Judges of the Judicial Courts, the Organic Law of the Judicial Courts, and the 2004 Constitution. In practice, as in many other countries, the president of the republic has relatively close control over nominations for key positions in the higher courts, including the power to nominate the president and the vice-president of the Supreme Court (in consultation with the Higher Council of the Judiciary);[245] the president of the Administrative Court (in consultation with the Higher Council of the Administrative Judiciary);[246] and the president of the Constitutional Council.[247] Judges of the Supreme Court are appointed by the president of the republic on the basis of a recommendatory list proposed by the Higher Council of the Judiciary, which is itself based on a public tender, and should include judges with at least eight years

242 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992), arts. 36 (Supreme Court), 49 (provincial courts), 57 (district courts).
243 Ibid., art. 36.
244 Ibid., art. 49, no. 1 (b).
245 2004 Constitution, art. 226, no. 2.
246 Ibid., art. 229, no. 2.
247 Ibid., art. 242, no. 1 (a).

experience.[248] Ratification from Parliament is required to confirm the appointments of the president and vice-president of the Supreme Court, the president of the Administrative Court, and the president of the Constitutional Council.

The 1991 Statute of Judges of the Judicial Courts, as well as the 2004 Constitution, provide for the Higher Council of the Judiciary to play a central role in the appointment of judges to the judicial courts. The Council plays the role of an advisory body to the president regarding nomination of the president and vice-president of the Supreme Court; proposes a list of judges for nomination to the Supreme Court; and nominates and manages the careers of judges in all other judicial courts (provincial, district and specialist courts).[249] As a balance to executive power, the role of an oversight body within the nomination process for members of the judiciary is extremely important. However, there are some perceptions that through the composition of its members the Council is quite closely linked to the executive, in particular as the president of the Supreme Court is ex offico president of the Higher Council.[250] A member of the judiciary said in an interview:

> What assurance is there of the independence of the courts and judges if nominations from top to bottom are controlled by the executive; the president of the republic nominates the president of the Supreme Court, who then in effect nominates all other counsellor judges of the Supreme Court as well as provincial and district court judges.[251]

The president and vice-president of the Supreme Court are appointed on the basis of a five-year term, which can be renewed without any limit.[252] The current President of the Supreme Court, Mario Mangaze, has held the presidency of the Supreme Court since it was first implemented in 1988, and prior to this, was also President of the former Supreme People's Court from 1978. In April 2004, his re-appointment was opposed in Parliament by RENAMO MPs, on the grounds that he had held office for such a lengthy period. At the time, RENAMO MP, Luis Boavida said: 'There is a principle of rotating judges in the provinces, because of fears that they will set down roots, form friendships, and risk corruption. Yet Mangaze has been in the same position for 15 years.'[253]

The Organic Law of the Judicial Courts provides that elected judges should be proposed by social, cultural, civic and professional organisations or associations *(associações ou organizações sociais, culturais, cívicas e profissionais)*.[254] The law sets out that it is the responsibility of Parliament to organise the process of election for judges to the Supreme Court (with the advice also of the Higher Council of the Judiciary); and of the government for judges of the provincial and district courts (also with the advice of the Higher Council of the Judiciary). Commissions to supervise the

248 Ibid., art. 226, no. 3.

249 Statute of the Judicial Magistracy, 1991, art. 19 (b).

250 2004 Constitution, art. 221, no. 2.

251 Judge at AfriMAP workshop, Nampula, 22 February 2005.

252 Statute of the Judicial Magistracy, 1991, art. 43.

253 Mozambique News Agency, 'Renamo objects to Supreme Court appointments,' 6 May 2004, *AIM Reports*, Maputo.

254 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992), art. 78 (*Selecção de candidatos a juízes eleitos*).

process are also provided for.[255] In practice, these mechanisms have never been implemented either by Parliament or the government. In many courts, the elected judges in place are those who were elected to the former popular courts in the 1970s. As existing judges have retired or died, some positions have been left vacant and others have been filled through ad hoc locally managed processes.

Composition of the judiciary

The president of the Supreme Court has spoken of the shortage of judges in Mozambique as one of the most critical problems the country's courts are facing. In 2005, he stated that the country had 184 (professional) judges, or approximately 1 per 100,000 inhabitants, and that almost 500 judges, spread through urban and rural areas, were needed.[256]

The following table provides an indication of the composition and distribution of judges in the judicial courts.

Table 4.1: Distribution of judges by courts and gender

	Supreme Court	Provincial courts	District courts	Police Court	Juvenile Court	TOTAL
Men	6	40	92	3	1	142
Women	1	9	22	-	1	33
Total	7	49	114	3	2	175*

Sources: Supreme Court, CFJJ, UNODOC, Maputo, 2005.
* Information was available from only approximately 95 per cent of the courts, and hence the total number of judges is indicated as 175, whereas in 2005, the acutal reported figure for total number of judges was 184.

Women represented approximately 20 per cent of professional judges in 2005,[257] which compares favourably to South Africa, where only 13 per cent of judges were women in 2004.[258] In 2003, the first woman was appointed as a Supreme Court judge.

In interviews conducted with members of the judiciary and legal profession, no concerns were raised relating to ethnic composition of the judiciary. It should be noted, however, that most law faculties in Mozambique are concentrated around Maputo and the south, which on a practical level could pose an obstacle for those students located in central or northern provinces.

Qualification and training

Requirements for entering the judiciary are defined in the Statute of the Judicial Magistracy, which sets out that to practise as a professional judge in any level of court, candidates should have a degree in law and undertake specialised training.[259] When the statute was approved in

255 Ibid., art. 79 (*Processo eletoral e seu controlo*).
256 Annual address of the president of the Supreme Court on opening of the judicial term, March 2005, p.6.
257 CFJJ, *Annual Report 2005 (Relatório Anual de Actividades 2005)*, Maputo, January 2006, p.37. Based on 163 judges who answered the CFJJ's questionnaire.
258 Information provided by the human resources directorate of the Department of Justice and Constitutional Affairs, South Africa, December 2004, cited in AfriMAP and OSF-SA, *South Africa, Justice Sector and the Rule of Law*, Cape Town, South Africa, 2005.
259 Statute of the Judicial Magistracy, 1991, art. 35.

1991, judges who were already in office were allowed to retain position regardless of their qualifications, on condition that within a stipulated period of time they would obtain the new requirements. Yet in 2005, almost fifteen years since the approval of this law, less than half of all judges had a degree.[260] Particularly at the district level, many of the judges in place, including some of those who are newly appointed, are still underqualified.

The Centre for Legal and Judicial Training *(Centro da Formação Jurídica e Judicial,* CFJJ*)* was established in 1999[261] as a central body responsible for the provision of training for judges and others working in the justice sector. Prior to the creation of the CFJJ, the individual institutions of the justice sector would initiate some ad hoc training: for instance the Supreme Court took responsibility for judges and some court staff, and the Office of the Prosecutor-General for public prosecutors; but these efforts lacked any continuity or coordination. Judges often had to be sent abroad at high cost for training in Portugual and Brazil. The CCFJ is based in Maputo, although it does provide some courses in the provinces. Since its implementation, as of 2005, the centre had trained a total of 115 new judges and public prosecutors, including 32 women (27.8 per cent).[262] The CFJJ organises training courses for judges and public prosecutors entering the profession, as well as refresher courses (*reciclagem)* for existing members of the judiciary. Entrance training courses are intended to provide initial training for those embarking on a career as a judge or public prosecutor (after they have obtained their law degree), and are conducted on an annual basis, lasting nine months. The refresher courses tend to be brief, three-to-five week courses directed at all judges and public prosecutors, including those at provincial and district level. The CFJJ is also beginning to provide training to court staff and members of civil society.

As the CFJJ's activities are relatively recent, it is difficult to assess its impact, although implementation of a central training body for the sector is a much-needed initiative that should be supported. There are some indications that training efforts of the CFJJ are leading to better qualified judges being placed in courts; in 2006, the president of the Supreme Court stated that during the previous year, 15 newly qualified and trained judges were appointed to the district courts.[263] Although this represents an improvement, the shortage of qualified judges is so acute at the district level that the CFJJ will need to train greater numbers of judges, and to high levels of competence, in order to ensure fulfilment of the qualification requirements set out in the Statute of the Judicial Magistracy.

Remuneration

In 2003, the Council of Ministers approved decrees[264] for a more favourable remuneration system within the judicial courts, the Public Prosecution Service and the Administrative Court, leading to salaries at least doubling in value. The initial monthly salary for a judge with a law

260 Annual address of the president of the Supreme Court on opening of the judicial term, March 2005, p.6.

261 Decree-law no. 34/1997.

262 CFJJ, *Development of Training Courses: A Global Activity Report, 2000–2004 (Evolução da Actividade Global de Formação por Curso 2000–2004), 2004; CFJJ, Annual Report 2005*, Maputo, January 2006.

263 Annual address of the president of the Supreme Court on opening of the judicial term, March 2006, p.5.

264 Decree no. 59/2003 on Careers and Functions in the Judicial Courts and the Office of the Prosecutor-General (*Cria as funções e carreiras dos Tribunais Judiciais e Procuradoria-Geral da República*) and decree no. 60/2003 on Careers and Functions in the Administrative Court (*Funções e carreiras do Tribunal Administrativo*). See also decree no. 64/1998.

degree placed in Maputo is now approximately US$800, including housing stipend.[265] In addition, judges can receive up to double their salary from court fees, depending on the number of cases managed by their court within the month. Salaries within the judiciary are now considerably higher than average salaries within other areas of the public service, although they remain (as is the case in most countries worldwide) far below remuneration levels in the private legal sector. In 2005, the president of the Supreme Court noted that quite a few judges continue to divide their time between the courts and lecturing at universities, in order to supplement their income.[266]

Perhaps one means of further attracting candidates to the judiciary, particularly at the provincial and district level, would be to ensure housing incentives, particularly as some judges continue to live in housing provided by the ruling party, FRELIMO. A judge in the district court at Chókwe said of his situation:

> I, as the judge, live in a house that belongs to FRELIMO, the ruling party. My housing is located in the same building as the party's headquarters, and this fact is broadly commented upon. During the last elections, I had to judge a case pertaining to an illegal electoral action involving some members of the opposition party, RENAMO. There were many insinuations along the lines that they would be judged by a judge living on FRELIMO's expense. This is an issue that I have brought to the attention of the president of the provincial court, but it seems that the problem is lack of money to rent or to buy a house near the court.[267]

As for elected judges, the Organic Law of the Judicial Courts provides that the level of compensation should be fixed by government.[268] To date, government has not passed any legislation to regulate payment of elected judges, and as a result they have most often not been paid at all, or paid irregularly and very poorly.

Oversight of the judiciary

According to the law, judges should fulfil their duties with honesty, integrity, impartiality and dignity; should treat all parties in a case with courtesy and respect; and should refrain from providing advice to any parties in a case. [269] It is the responsibility of the Higher Council of the Judiciary (CSMJ) to monitor the conduct of members of the judiciary, and to take any disciplinary action that may be required.[270] The Statutes of the Higher Council were recently approved, indicating that the government is committed to the need for an oversight body for the judiciary. The Higher Council has the right to issue a range of disciplinary proceedings against members of the judiciary, from issuing a warning, to dismissal from their position.[271] In maintenance of the prin-

265 Ibid.

266 Annual address of the president of the Supreme Court on opening of the judicial term, March 2005, p.5.

267 Interview with presiding judge of district court of Chókwe, 6 August 2005.

268 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992), art. 80 (*Compensação aos juizes eleitos*).

269 Statute of the Judicial Magistracy, 1991, art. 49.

270 2004 Constitution, art. 222. Also, Statute of the Judicial Magistracy, 1991, art. 114.

271 Statute of the Judicial Magistracy, 1991, art. 85.

ciple of judicial independence, the Higher Council does not have the power to demote judges or to expel them permanently from the judiciary, and in this respect, is less severe than disciplinary actions provided for other public servants in the General Statute for Public Servants.[272]

Although implementation of an independent oversight body is to be commended, the institutional links that exist between the Supreme Court and the Higher Council (due in large part to the composition of the Higher Council, which is headed ex officio by the president of the Supreme Court), were questioned by a decision of the Administrative Court in 2002. A judge from a judicial court in Maputo city had been subject to disciplinary action by the Council, which had ruled that he should be suspended from his position. Article 28 of the Statute of the Judicial Magistracy provides that appeals against decisions taken by the Higher Council should be referred to the Supreme Court. However, the dismissed judge decided to take his case directly to the Administrative Court, questioning amongst other legal matters, the role that the President of the Higher Council, as president of the Supreme Court, would play in his case if it went to the Supreme Court. He argued that it was unconstitutional to be dismissed by the Higher Council and then ruled on appeal in the Supreme Court by the same individual. The Administrative Court accepted the case and ruled in favour of the judge, reinstating him to his former position. In its ruling, the Administrative Court stated that the Supreme Court could not fulfil its role outlined in article 28 as: 1) the Higher Council was an interested party in the case; 2) the Supreme Court and its members were, in organisational terms, subordinate to the Higher Council; 3) the president of the Supreme Court was also president of the Higher Council; 4) the impartiality and independence of a ruling by judges whose positions were dependent on the body that had passed the initial ruling was bound to be difficult to attain.[273] The importance of maintaining checks and balances within the judicial system, and potential difficulties in doing so due to the close links between the Higher Council and the Supreme Court, was implicit in the Administrative Court's ruling. Despite this ruling, in 2005 the president of the Supreme Court appointed three judges of the Supreme Court to hear appeals regarding decisions of the CSMJ.

It is difficult to assess fully the impact of the Higher Council's oversight role because publicly available information on its activities is limited. The president of the Supreme Court annually provides some indicators of cases that have been received; but this is not comprehensive, critically excluding the names of judges and court staff that have been subject to disciplinary proceedings. According to the president of the Supreme Court (also the president of the Council), over the judicial year of 2004, the Council received only ten cases for investigation: one against a judge, and nine against court staff *(oficiais de justiça)*. This may be compared to an annual average of 20 cases received. The president did not provide any information on factors that could be behind the signficant drop in cases submitted. He went on to say that over the year, the Council had resolved seven cases, issuing penalties against one judge, and six members of court staff.[274]

There are some signs that the Higher Council is improving transparency regarding its

272 In accordance with the General Statute for Public Servants (EGFE) a public servant that has been expelled loses all future possibilities of reintegration into the public service, art. 24, no. 1 (d).

273 *Luís Timóteo Matsinhe v. President of the Supreme Court of Mozambique*, Proc.nº 78, ruling nº 5/2002 - 1ª, I Section of the Administrative Court.

274 Annual address of the president of the Supreme Court on opening of the judicial term, March 2005, p.5.

activities. In June 2005, the president of the Supreme Court issued, for the first time, a separate communiqué providing information on the Higher Council's activities. Whilst efforts are clearly being made to improve the availability of information, there should be greater transparency of proceedings in the Council.

In 2004, to assist the Higher Council in undertaking its oversight responsibilities, a Judicial Inspectorate *(Inspecção Judicial)* was implemented. The Judicial Inspectorate was set up as an auxillary body to the Higher Council, located in Maputo, with responsibility for inspecting the courts. The Judicial Inspectorate has only been operating for a few years, and again, it is difficult to assess its impact, particularly as the Higher Council has not made any of its reports public. In its first year of operation, the Inspectorate had two inspectors who conducted inspections of four provincial courts.[275] The President of the Supreme Court has said that reports so far indicated suggested serious management problems in the courts that had been inspected, although the names of these courts were not specified.[276] As of May 2006, the body had three to four inspectors.

In its oversight role, the Council is also responsible for ensuring that the judiciary is free of corruption. In this respect, surveys amongst the judiciary suggest the Council needs to adopt a more strident approach. In a study from CFJJ, over 25 per cent of judges interviewed said that they knew of cases of corruption that had occurred within the judiciary.[277] In the CFJJ's study on judges, just over 13 per cent of those judges interviewed felt district court judges were most affected by corruption, compared to 5 per cent who said provincial court judges were most affected,[278] suggesting that at the district level, where conditions tend to be very poor, judges are more susceptible.

B. Independence of the Prosecution Service

Legal and institutional framework

The 2004 Constitution defines the Public Prosecution Service (*Ministério Público,* MP) as a 'hierarchically organised magistracy' *(magistratura hierarquicamente organizada)* reporting to the Office of the Prosecutor-General (*Procuradoria Geral da República,* PGR).[279] The 1989 Organic Law of the Office of the Prosecutor-General[280] forms the basis of the system currently in place. The reforms it introduced were intended to guarantee the independence of the Public Prosecution Service from other state authorities in relation to performance of its duties, particularly the investigation and initiation of criminal proceedings. In carrying out their functions, members of the Public Prosecution Service must conduct themselves according to 'criteria of legality, objectivity, impartiality, and exclusive obedience to orders prescribed by law'.[281] In spring 2006, The Office of the Prosecutor-General announced that it had prepared a new Organic Law,

275 Ibid.

276 Ibid.

277 CFJJ, *Survey of the Judiciary (Inquérito aos Magistrados Judicias)*, Maputo, March 2005, p.64.

278 Ibid., p.63.

279 2004 Constitution, art. 234, no. 1 (in Mozambique, public prosecutors are a category of judges (*magistrados*)).

280 Organic Law of the Office of the Prosecutor-General, 1989 (Law no. 6 /1989).

281 2004 Constitution, art. 234, no. 2. See also Organic Law of the Office of the Prosecutor-General, 1989 (Law no. 6/1989), art. 1, no. 2.

although as of September 2006, no further information was available on this draft law. Since 1989, the prosecution services have been run without any internal regulations or statutes.[282]

The Office of the Prosecutor-General is the highest body of the Public Prosecution Service.[283] As set out in article 1 of the Organic Law of the Office of the Prosecutor-General, it has ultimate responsibility for implementing the duties of the Public Prosecution Service: the defence of legality,[284] promotion of observance of the rule of law, representing the state in the courts, managing the preparation of criminal investigations, initiating criminal proceedings and protecting the rights of citizens.[285] The PGR's main office is in Maputo, where the prosecutor-general (*Procurador-Geral*) is based, along with a deputy prosecutor-general (*Vice-Procurador-Geral*) and a group of assistant prosecutor-generals (*Procuradores-Gerais Adjuntos*). The 2004 Constitution provides that the prosecutor-general should report annually to Parliament, and is accountable to the head of state *(O Procurador-Geral da República responde perante o Chefe do Estado*).[286] The assistant prosecutor-generals are responsible for representing the Public Prosecution Service in the Supreme Court and Administrative Court.[287] Article 12 of the Organic Law of the Judicial Courts[288] provides for the Public Prosecution Service to be represented at every court, including the provincial and district level. However, whilst prosecutors are in place in the provincial courts, not all district courts have their own prosecutor.

The Organic Law of the Prosecutor-General provides for a Higher Council of the Public Prosecution Service *(Conselho Superior da Magistratura do Ministério Público)*, with responsibility for the management and discipline *(gestão e disciplina)* of the Public Prosecution Service.[289] The 2004 Constitution provides for this Council to include members elected by Parliament as well as by the Public Prosecution Service.[290] As of May 2006, this body had not yet been implemented.

The Constitution provides the president of the republic with considerable say over prosecutorial appointments, particularly at the top-level. The prosecutor-general and deputy prosecutor-general are appointed by the president of the republic for five-year terms, with the requirement that they should hold degrees in law, and have at least 10 years experience within the legal profes-

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282 Art. 37 of the Organic Law of the Office of the Prosecutor-General, 1989 (law no. 6/1989), provided for a statute for members of the Public Prosecution Service, and art. 30 of the Organic Law stated that the structure and career paths (*estrutura, quadro e carreiras profissionais*) for members of the Public Prosecution Service will be fixed by specific laws, but no laws have yet been approved.

283 2004 Constitution, art. 237.

284 The 'defence of legality' (*defesa da legalidade*) refers to the pro-active, oversight role of the Public Prosecution Service in ensuring the legality of the exercise of public power.

285 Organic Law of the Office of the Prosecutor-General, 1989, art. 1, no. 2: '*A Procuradoria-Geral da Repúblic, no exercício das suas funções de Ministério Público, cabe, nomeadamente, defender a legalidade, promover a observância geral da lei, representar o Estado junto dos tribunais, dirigir a instrução dos processos-crime, exercer a acção penal e proteger os direitos dos cidadãos.*' See also 2004 Constitution, art. 236 on mandate of the Public Prosecution Service: '*Ao Ministério Público compete representar o Estado junto dos tribunais e defender os interesses que a lei determina, controlar a legalidade, os prazos das detenções, dirigir a instrução preparatório dos processos-crime, exercer a acção penal e assegurar a defesa jurídica dos menores, ausentes e incapazes.*'

286 2004 Constitution, art. 239, no. 2.

287 Ibid., art. 240.

288 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992), art. 12.

289 Organic Law of the Office of the Prosecutor-General, 1989 (Law no. 6/1989). Also, 2004 Constitution, art. 238, no. 2.

290 2004 Constitution, art. 238, no. 1.

sion.[291] The assistant prosecutor-generals are appointed by the president on the recommendation of the Superior Council of the Public Prosecution Service, after a public tender open to all qualified citizens.[292] This was a substantial improvement from the prior Constitution which did not provide for a public tender.[293] The provincial and district prosecutors-general, as well as the rest of the prosecutors, are nominated by the prosecutor-general.[294] In discussions prior to the approval of the 2004 Constitution, the prosecutor-general suggested that the position of prosecutor-general and deputy prosecutor-general should be elected by the Superior Council of the Public Prosecution Service, with the president of the republic responsible for formalising their nomination and investiture.[295] This recommendation was not included in the final constitutional draft.

According to the Mozambican legal framework, as a general principle, the prosecution of crimes is the responsibility of the Public Prosecution Service.[296] However, there are some exceptions whereby, proceedings may be initiated by other authorities.[297] These authorities are: judges serving at courts where the Public Prosecution Service is not represented (there may be some district courts where the Public Prosecution Service has still not managed to establish a permanent office); public administrative authorities or state agents, including municipal authorities, with specific responsibilities in relation to enforcement of regulations; and the police for prosecution of contraventions and minor crimes subject to summary judgment (*casos sumários)*.[298]

Issues facing the Public Prosecution Service

(i) Relations with the Criminal Investigative Police

The Public Prosecution Service has faced serious problems in effectively undertaking its responsibility to oversee criminal investigations. In part this has been due to staff shortages, and in part due to problems in the relationship with the Criminal Investigative Police (*Polícia da Investigação Criminal,* PIC), with serious questions over the integrity of the PIC's work. The institutional future of the PIC is unclear, and this is an area in urgent need of clarification.

In the Mozambican criminal justice system, the first step in initiating criminal proceedings entails a preliminary investigation *(instrução preparatória)* to gather evidence and form a *corpus delicti* (body of evidence) as the basis of a charge. It is the duty of the PIC to carry out this preparatory inquiry, under the supervision of the Public Prosecution Service, as well as to follow up with further investigations if a charge is pressed. However, the PIC, as part of the police force, is under the direct command of the Ministry of the Interior, not the Public Prosecution Service.[299]

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291 Ibid., art. 239, no. 1.

292 Ibid., art. 240, no. 2.

293 1990 Constitution, art. 176, no. 4.

294 Organic Law of the Office of the Prosecutor-General, 1989 (Law no. 6/1989), art. 9, no. 1 (i).

295 Annual address of the prosecutor-general to Parliament, AR,V/Infor./429/24.02.2003, p.65.

296 Private prosecutions were abolished by decree-law no. 35007 of 1945, which established the principle that crimes are punishable by the state alone, not private individuals (art. 1). See also 2004 Constitution, art. 236.

297 Decree-law no. 35007 of 1945, art. 2.

298 Punishable with a sentence of up to one year's imprisonment.

299 Up until 1975, investigative functions were carried out by the former Judicial Police (Polícia Judicial), which reported to the Ministry of Justice, but as part of the reform process that took place at independence, the Judicial Police was reconstituted as the PIC, and moved by decree-law (Decree-law no. 25 of 1975, 18 October) to the Ministry of the Interior.

As a means of providing the Public Prosecution Service with the authority it requires to fulfil its responsibilities, the law sets out that in the conduct of criminal investigations, the PIC is 'functionally dependent' on the Office of the Prosecutor-General (whilst still under the command of the Ministry of the Interior).[300] However, in practice, this institutional set-up has not worked well, with prosecutors struggling to assert their authority over investigations. Prosecutor-General Joaquim Madeira has spoken of the problems caused by the PIC's placement within the Ministry of Interior, in particular those relating to the PIC's relationship with the regular police force, the Police of the Republic of Mozambique *(Polícia da República da Moçambique,* PRM*)*:

> What is the meaning, in practical terms, of the functional subordination of the PIC to the Public Prosecution Service? It means that whilst carrying out criminal investigations, PIC should be under the command of the Public Prosecution Service and of no one else. Unfortunately, this is not what is happening. Often, provincial commanders of the PRM who are superior to PIC provincial directors within the hierarchy of the Ministry of the Interior, pass on orders that lead to the obstruction of investigations. In some cases they order PIC officers to stop their investigations in order to take on other tasks that have nothing to do with criminal investigation, even when there are many cases that need to be investigated. Furthermore, some officers in PIC, believing that the supervision of the Public Prosecution Service is at arm's length, exploit cases they are investigating to extort money or other assets. These facts have led us to insist that the PIC be removed from the Ministry of the Interior and be placed in the Ministry of Justice....If we want a more transparent and credible criminal justice, it is necessary for PIC's activities to be carried out following criteria of legality, objectivity, impartiality and exclusive submission to the directives and orders set out in the law.[301]

In his annual report to Parliament in 2006, the prosecutor-general again highlighted problems with the PIC saying, 'chronic situations of gross corruption...leave us in despair and suffocate the work of the honest'. He cited the case of 'manifestly apathetic and negligent' PIC officers who had been removed from the Carlos Cardoso case but were shortly after promoted as provincial directors of the PIC.[302] Other members of the judiciary have also highlighted problems with the PIC and the impact on the effectiveness of investigations and prosecution.

However, in an apparent change of policy, the prosecutor-general in April 2006 told Parliament that the PIC will remain in the Ministry of the Interior, and will be provided with some form of administrative autonomy and better resources to enhance the criminal investigations process. A prosecutor at the head of each PIC brigade will deal with procedural matters

300 Decree-law no. 35007, art. 14, as amended by art. 14 of administrative rule no. 17076, 20 March 1959, and law 2/1993, 24 June 1993, no. 1.

301 Annual address of the prosecutor-general to Parliament , AR – V/Infor./552/03.03. 2004, pp.34-35.

302 *Jornal Notícias*, 'The prosecutor-general of Mozambique proposes a national congress to discuss the future of the country's justice sector' (*Procurador-Geral da República propõe Congresso para reflexão da justiça no país*), Maputo, 3 March 2006.

within each PIC brigade.[303] It is currently unclear what exactly the consensus is regarding the institutional status of the PIC, and institutional clarity is urgently required.

In a move seemingly designed to reduce dependency on the PIC, in 2002, the prosecutor-general announced that a new police unit, the Judicial Police (*Polícia Judiciária)* would be created. In his 2003 report to Parliament, the prosecutor-general said that 30 officers had been trained as the nucleus of this unit. As of May 2006, the status and responsibilities of this body were still unclarified.

(ii) Financial and human resources

The Public Prosecution Service is funded almost entirely through the state budget; unlike the courts, it does not generate any of its own revenue. Funding to the Public Prosecution Service has traditionally been relatively low in comparison to other institutions of the justice sector, and many of the district level offices of the Public Prosecution Service depend on the courts for use of their administrative staff, as well as basic office resources such as typewriters and paper. Other courts, such as those in the districts of Nacaroa and Murrupula in Nampula do not have their own prosecutor.[304] However, there does seem to be a growing commitment to the Public Prosecution Service, with improvemennts over the past few years in budget allocations, and concerted efforts to place more prosecutors at the district level. A study from the African Development Bank indicated that in 2005, of 162 prosecutors, 73 had a degree, suggesting that qualifications of prosecutors are improving.[305]

(iii) Corruption

The Council of Ministers approved Mozambique's first Anti-Corruption Strategy in April 2006, sending a strong signal that the government is serious about the fight against corruption. However, the performance of the Public Prosecution Service in successfully investigating and prosecuting cases of alleged corruption amongst government officials has been poor. Despite frequent reportings in the media of alleged corruption, the Public Prosecution Service has had little impact in successfully prosecuting suspected individuals. In some cases, this may also be due to delays in the courts, as judges deliberate over whether preliminary investigations brought forward by the Public Prosecution Service constitute a case.[306]

In 2002, the Ministry of Justice launched an Anti-Corruption Unit *(Unidade Anti-Corrupção, UAC)*, within the Office of the Prosecutor-General, headed by Assistant Prosecutor-General Isabel Rupia. Whilst Rupia promoted a more open flow of information to the public, the rate of concluded investigations and convictions was very low. Data from the 2005 annual government

303 Mozambique News Agency, '*Prosecutor-general changes his mind about PIC,*' 11 April 2006.

304 AfriMAP visited 19 district courts between 3–6 August 2005. See Annex A for further details.

305 *Country Governance Profile*, African Development Bank, December 2005.

306 *Savana* reported on 27 March 2004 suspected corruption involving donor funds under former Minister of Education Alcido Ngoenha, including granting of scholarships to his relatives. On 1 July 2005, *Savana* reported that the case may go to trial if the investigations conducted by the prosecutor-general were accepted as a sufficient basis for a criminal case. Since then, there has been no further public information on the case. *Savana* reported on 7 April 2006 that state houses had been sold to the sons of the prime minister, and the minister of foreign affairs and cooperation.

and donor joint review exercise indicated that since its operation, the UAC had received 171 cases. There had been 22 criminal proceedings, of which 17 led to charges being pressed, and 5 dropped. Of the remaining cases, 119 were in initial phases of investigation, and the remainder had been distributed to other institutions. There had not yet been any convictions.[307] In 2004, a new Anti-Corruption Law[308] was approved, which set out provisions for a new body in the form of the Central Office for Combating Corruption *(Gabinete Central de Combate à Corrupção, GCCC)*. The UAC has now been disbanded and a new head appointed to the GCCC. It is too early yet to assess the effectiveness of the GCCC, however, it is of concern that limited public information is available on its activities.

There have been allegations of corruption within the Public Prosecution Service itself.

During the 1990s, the prosecutor-general was twice removed from office amid allegations of corruption and obstruction of justice. The second time, in 2000, received much media attention, and although no official reasons were given, seemed to be in connection to the investigations surrounding massive fraud that accompanied the privatisation of the *Banco Comercial de Moçambique*. After allegations that the public prosecutors involved in the case had disorganised files as part of a series of deliberate irregularities aimed at obstructing justice, state investigations were launched.[309] The current prosecutor-general has repeatedly stressed that corruption is rife within both the PIC and the Public Prosecution Service. In 2002, for instance, he spoke of prosecutors who failed to press charges when sufficient evidence had been gathered, saying that 'such tolerance smelt of corruption'.[310] On the performance of prosecutors, he said that some had not appeared in court over an entire year—inevitably leading to overall low rates of conviction. Lack of progress with investigations into the murder of Antonio Siba-Siba Macuacua has done little to dispel perceptions that the PGR is unwilling or unable to go after the most powerful. In 2003, the weekly newspaper *Savana* wrote in an editorial:

> Very often we write, in this same newspaper, that it appears that it is in someone's interest that our PGR is weak, disorganised, incompetent and lacks the courage to act against criminals with weighty financial and political power...[311]

And in 2006, journalist Marcelo Mosse, who worked with Carlos Cardoso until his death, said in an interview:

> I don't see any progress...if you want to assess the rule of law in Mozambique, look at the level of scandals you see in newspapers, and which of them is being investigated and taken to court. You will see nothing.[312]

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307 Government of Mozambique and donors, *Joint Review*, Final Aide-Memoire, May 2005.

308 Anti-Corruption Law, 2004 (Law no. 6/2004).

309 Investigation into the charge made by the Public Prosecution Service during the BCM fraud case (*Inquérito à Acusação dos Magistrados do Ministério Público no caso da fraude do BCM*), Supreme Court, 15 March 2001, Maputo.

310 Annual address of the prosecutor-general to Parliament, AR – V/Infor./333/04.03.2002.

311 Cited in João Pedroso and André Crisiano José, *'A caracterização do sistema judicial e do ensino e formação jurídica'* in *Conflict and Social Transformation*, vol. 1, eds., Santos and Trindade, Afrontamento, Portugal, 2003, p.288.

312 '*The New York Times*, A trial ends in Mozambique, but many questions however remain,' 21 January 2006.

Members of the Public Prosecution Service must continue to act with responsibility and courage, as change will not happen otherwise.

The justice sector would also benefit from a specific sectoral anti-corruption plan; the Anti-Corruption Strategy does not include individual plans for different sectors. A specifc plan of action with concrete steps for implementation would provide clearer direction for the justice sector in fulfilling its critical role in the fight against corruption.

The cases of Carlos Cardoso and Antonio Siba-Siba Macuacua

Investigative journalist Carlos Cardoso was assassinated in the street in Maputo on 22 November 2000. Cardoso, a white Mozambican and supporter of the ruling party Frelimo, founded the independent faxed daily newspaper *Metical* (the Mozambican unit of currency) which probed stories of corruption, including the business dealings of members of President Chissano's family. The last story tackled by Cardoso was the huge bank fraud that accompanied the privatisation of Mozambique's largest bank, the *Banco Commercial de Moçambique* (BCM), in 1996. Initial reports said US$14 million was siphoned off. (Testimony at the Cardoso murder trial put the figure at between US$150 and US$300 million, and alleged that the real beneficiaries were senior bankers with close links to Frelimo.) *Metical*'s reporting on the fraud pointed at serious corruption in the Office of the Prosecutor-General in failing to bring prosecutions against those implicated. Cardoso continued his investigations and at the time of his murder, was pressing for the prosecution of those who seemed to be involved in the BCM fraud.

After nearly two years of investigation and preparation, the trial of six men for Cardoso's murder began in late November 2002 at Maputo's city prison. Three of them were accused as the hit men, while three members of two powerful business families (the Satars and the Ramayas) were said to have contracted the killing. The alleged leader of the hit squad, Anibal dos Santos Junior ('Anibalzinho') 'escaped' from prison and was tried in absentia. The trial was broadcast live on Mozambican radio and TV and was followed closely all over the country. Questions were raised on the alleged role of Nyimpine Chissano, the son of the then President Joaquim Chissano, in ordering the killing.

All six men were found guilty in January 2003 and sentenced to long jail terms. Anibalzinho, who recruited the death squad that murdered Cardoso and drove the car used in the ambush, was sentenced to 28 years and six months in prison. Two other members of the death squad each received a sentence of 23 years and six months. The other three members were found guilty of ordering the assassination and sentenced to 23 and 24 years in prison. Carlos Cardoso's two children were awarded US$588 000 in compensation, and the injured driver, Carlos Manjate, was awarded US$21 000.

Anibalzinho, who had escaped from prison on 1 September 2002, was returned to Maputo the evening of the verdict, having been re-arrested near Pretoria, South Africa, the day before. However, he re-escaped in May 2004, with, it is widely believed, inside assistance from top political levels. He was only returned to Mozambique in January 2005, after being apprehended in Canada and failing to obtain refugee status. In December 2004, the Supreme Court ruled that

Anibalzinho was entitled to a re-trial, which began in December 2005. He was reconvicted and sentenced in January 2006 to 30 years imprisonment. Seven police officers were tried in relation to Anibalzinho's first escape in 2002, but were acquitted due to lack of evidence. The presiding judge said in his ruling that the accused were only scapegoats intended to protect those who were 'untouchable.' As of September 2006, Anibalzinho remained in prison in Maputo, with calls for him to be moved to Portugal (he is a Portuguese national) to serve the rest of his sentence, in order to minimise the risk of any further prison escapes.

The killers of murdered economist Antonio Siba-Siba Macuacua, assassinated in August 2001 in circumstances similar to those in the killing of Cardoso, still remain at large. Siba-Siba was the head of banking supervision at the Bank of Mozambique, appointed to investigate the collapse of the privatised Austral Bank in April 2001. Siba-Siba set about investigating the true state of the Austral finances, and attempting to recover the debts. He also cancelled contracts signed by the previous board, including a contract with Nyimpine Chissano, who had been hired as a consultant on a salary of US$ 3 000 a month, despite his lack of experience in banking.

On 11 August 2001, unknown assailants attacked Siba-Siba as he worked in his office on the top floor of the Austral headquarters. They murdered him and threw his body down the stairwell. Nobody has been arrested for the assassination, and the police have issued virtually no statements, beyond the routine claim that investigations are continuing.

Prosecutors opened an inquiry into Nyimpine Chissano's actions in 2003, but there were no indications of any progress.

SOURCES

Metical, 'Killing the goose that laid the golden eggs', Joseph Hanlon, 17 September 2001;

World Press Review, 'Mozambican journalist Carlos Cardoso's suspected killers on trial', Dave Clemens, 16 December 2002; *Africa Policy E-Journal,* 'Mozambique: Cardoso murder trial', 25 November 2003;

Africa Policy E-Journal, 'Mozambique: Corruption and Murder', 4 March 2003; reports of the Mozambican News Agency (AIM); *The New York Times*, 'A trial ends in Mozambique, but many questions however remain', 21 January 2006.

c. Lawyers

The term 'lawyers' is used here to describe all those whom have successfully completed their law degree *(juristas)*. This definition includes those who have completed the law degree and are not undertaking any further qualifications, those undertaking the two year traineeship required to join the Mozambican Bar Association *(Ordem dos Advogados de Moçambique,* OAM*)*, as well as practising advocates (who by definition are members of the OAM).

Structure and composition of the legal profession

In 2005, a total of 313 advocates were members of the OAM, and in addition there were 196 trainee advocates enrolled in the two-year apprenticeship imposed by the OAM as a condition of admission to the Bar.[313] Trainee advocates can practise many, though not all, of the functions of a

313 Round table held at the Mozambican Bar Association, Maputo, 2 March 2005. Mozambican Bar Association by-laws, no. 7/1994, art. 34, no. 1 The Constitutive Act of the Mozambican Bar Association, 1995, provided that all jurists at the time, regardless of the two-year apprenticeship, automatically obtained the status of advocate.

fully qualified advocate. If they are included in the overall total, in 2005 there were 509 advocates in the country or five advocates per hundred thousand inhabitants (Mozambique has a population of over 19.4 million inhabitants). The number of advocates available in Mozambique is to small to meet the needs of citizens, but over the years, there has been a steady increase in their numbers:

Table 4.2: Number of advocates in Mozambique

Year	Number of advocates
2000	210
2001	216
2002	243
2003	267
2004	299
2005	313

Source: Mozambican Bar Association

Of 313 fully qualified advocates, a total of 47 have had their membership to the OAM suspended. The most common reasons for suspension include failure to pay the OAM's annual subscription fees, and the undertaking of other offices incompatible with the status of a practising advocate (for instance, as a judge or prosecutor). Of the 266 fully qualified advocates able to practice, the number available for immediate legal aid is likely to drop further.

Data from UTREL showed that as of May 2003, over 90 per cent of all advocates were based in Maputo city and its satellite city, Matola.[314] The provinces of Gaza, Inhambane, Zambézia, Cabo-Delgado and Niassa did not have a single advocate resident. As a result of the expansion of new private universities offering law degrees in Nampula (Nampula), Beira (Sofala) and Quelimane (Zambézia),[315] there should be a gradual improvement in the number of advocates in these provinces at least. Still, for citizens in provinces outside of Maputo city and Matola, access to advocates is likely to remain very poor.

In 2005, of the 313 advocates, just over 25 per cent were women, of whom 12 are currently suspended. This figure represents a gradual improvement; in 2001, just over 20 per cent of all advocates were women. In 2001, those aged 35 or under represented just under 10 per cent of the total number of lawyers, whilst by 2005, this had risen to 20 per cent.[316]

There are a significant number of students who graduate but then do not complete their two-year apprenticeship. Jurists (law graduates) are required to undertake their apprenticeship with a qualified lawyer, and there is a shortage of places available. Moreover, the apprenticeship tends to be very poorly paid, and if a jurist is offered a job upon graduation, for many, it is an offer

314 UTREL, *Justice Administration System Framework Bill - A Rationale (Lei do Sistema de Administração de Justiça –Exposição de Motivos)*, p.13, see http://www.utrel.gov.mz/pdfs/lei1.pdf, last accessed 18 April 2006.

315 The Catholic University of Mozambique, Nampula; ISPU, Quelimane; the University of Eduardo Mondlane has opened a branch of its faculty of law in Beira.

316 Round-table held at the Mozambican Bar Association, Maputo, 2 March 2005.

difficult to turn down. Over the last two decades, due to the acute shortage of lawyers, many students with law degrees have easily been able to find employment both in the public and private sector.[317] Others do not even complete the full duration of their law degree—having studied for two to three years, they find that they are already able to gain employment. However, with the growing number of graduates in law, this demand is starting to ease.

Independence

Although there does not seem to be any systematic interference in the work of advocates, the risk of intimidation or harassment does exist. Threats to their professional integrity and personal security can easily materialise, emanating from influential levels of government, or even the private sector, particularly in relation to cases of organised crime and corruption. An advocate interviewed said:

> Lawyers are often looked upon with hostility, they are seen as wanting to interfere in 'alien territory' be it at the police-station, in court, within the prosecution process, at the registry office, in prisons, or other state departments where we need to represent our clients' interests...[318]

Defense lawyers in the Carlos Cardoso case for instance, had difficulties in meeting with their clients both in the run-up to and during the trial. [319]

In a study by the CFJJ, over 70 per cent of judges said that they felt the relationship between judges and advocates was almost always conflictual.[320]

Legal training

Prior to 1975, Mozambique did not have any facilities to provide legal training; Portuguese lawyers educated at home operated in the formal courts, whilst customary law was applied by traditional chiefs and leaders with no formal legal training. The first legal training course was initiated in 1975 at the new faculty of law of the University of Lourenço Marques (now the University of Eduardo Mondlane).[321]

In its first year of operation in 1975, the faculty of law had 458 students enrolled. Only a year later, this had dramatically fallen by over half to only 200 students,[322] a drop driven by the civil war and the FRELIMO government's ban on private law practices. Many who had enrolled in the first year did not complete their courses.[323] In 1983, the faculty of law was closed and did not re-open until 1986.

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317 João Pedroso, João Carlos Trindade, 'Characteristics of the judicial system, legal teaching and training' (*A caracterização do sistema judicial e do ensino e formação jurídica*), in *Conflict and Social Transformation*, vol. 1, eds. Santos and Trindade, Afrontamento, 2003, p.291.

318 Round-table held at the Mozambican Bar Association, Maputo, 20 February 2005.

319 Ibid.

320 CFJJ, *Survey of the Judiciary (Inquérito aos Magistrados Judicias)*, Maputo, March 2005, p.72.

321 By decree-law no. 7/75. In 1976, the University of Lourenço Marques was renamed the University of Eduardo Mondlane.

322 Eduardo Joaquim Mulémbwè, then Director of the Faculty of Law at the University of Eduardo Mondlane, interviewed by Francesca Dadigno, in *People's Justice Magazine*, 1981, quoted by Fernando J da Cunha, op. cit, p.175.

323 Cfr. Rui Baltazar, Minister of Justice between 1975 and 1978, in notes published in *People's Justice Magazine*, Ministry of Justice, in 3 and 4, April/August and September/December, 1981, quoted by da Cunha, Fernando J, op. cit, p.173.

Liberalisation of the education sector only began in 1992, with the approval of a new National Education System (*Sistema Nacional de Educação),*[324] followed by legislation in 1993 allowing for private sector education. Demand for more places to study law increased sharply after reliberalisation of the legal sector in 1994.[325] Up until 2000, the University of Eduardo Mondlane was the only institution providing legal training. Since then, a number of private higher education institutions have also begun to offer law degrees. Currently, seven higher education institutions in the country provide law courses, covering five of Mozambique's ten provinces:

- University of Eduardo Mondlane (UEM) (Maputo and Sofala-Beira);
- Higher Polytechnic and University Institute *(Instituto Superior Politécnico e Universitário,* ISPU*)* (Maputo and Zambézia-Quelimane);
- Catholic University of Mozambique *(Universidade Católica de Moçambique,* UCM) (Nampula);
- The Higher Institute of Science and Technology of Mozambique *(Instituto Superior de Ciências e Tecnologia de Moçambique,* ISCTEM*)* (Maputo);
- Technical University of Mozambique (Maputo);
- The Higher Institute of Economics and Management *(Escola Superior de Economia e Gestão)*(Manica);
- University of Jean Piaget *(Universidade de Jean Piaget de Moçambique)* (Sofala).

Although private universities are having a positive impact on the provision of legal training, demand still far outstrips capacity. In 2000, for 100 places to study law at the University of Eduardo Mondlane, there were 1 062 candidates.[326] Since 2003, there have been approximately 250 places to study law per annum at the University of Eduardo Mondlane.

Additional challenges to improve the quality of teaching include staffing issues (quality and quantity), lack of infrastructure and learning materials. The number of lecturers available for the existing law faculties is insufficient. In Maputo, for instance, the same lecturers circulate amongst the city's four law faculties. Lecturers tend to be extremely stretched for time: they are working in a number of different universities, and also tend to have other professional engagements (working in advocates' offices, courts, Office of the Prosecutor-General, and other state institutions). For instance, at the faculty of law at the University of Eduardo Mondlane, two-thirds of the 64 lecturers work on a part-time basis, whilst others also carry out administrative functions within the faculty.[327] This problem is in part linked to the low level of wages for lecturers, leading them to seek complementary salaries.

The law course is four to five years long, after which students receive a licentiate degree *(licenciatura)*. Curricula are generally based on theory rather than practice. In particular, interactions between

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324 Law no. 6/1992, art. 23, no. 1.

325 Statues of the Mozambican Bar Association (*Estatutos da Ordem dos Advogados*), law no. 7/994.

326 University of Eduardo Mondlane Entrance Examinations, at http://www.foundation-partnership.org/pubs/mozambique/index.php?chap=tables&tbl=t4. Last accessed 16 March 2006.

327 Interview with Orqudea Massarongo, chief of the administrative department at the University of Eduardo Mondlane, Maputo, 24 June 2005.

the plural legal systems operating in Mozambique are almost totally ignored, with very limited reference to customary law. Some law faculties have begun to take note of the need to adapt the legal training they offer to social needs. For instance, the Catholic University of Mozambique has set up a research centre, *Centro de Pesquisa Konrad Adenauer* (CEPKA), which focuses, amongst other issues, on customary law, and has established links with community courts in Nampula.

Although all the faculties provide some training on human rights, the importance given to this varies. In the Catholic University of Mozambique, and the Institute of Science and Technology, human rights have a central place on the curricula, taught as a separate course. At the University of Eduardo Mondlane, as at the Higher Polytechnic and University Institute, human rights is not treated as a separate subject, but is simply dealt with as part of constitutional law and international public law.

Opportunities for graduates to continue further studies are rare. The University of Eduardo Mondlane first began to offer a masters degree in law in 2003, with assistance from universities in Portugal and South Africa, amongst other development partners. There is no institution in Mozambique offering law courses at doctorate level.

The two-year apprenticeship that jurists must complete in order to qualify is intended to provide students with the practical knowledge needed to practise. The apprenticeship should be undertaken at the firm of an experienced advocate, and should include a placement relating to provision of some form of legal aid, with a salary paid by the state.[328] In practice, this secondment is rarely undertaken, largely because the government has not drafted any procedural legislation to allocate salaries. For those lacking financial means, the undertaking of a two-year apprenticeship, invariably poorly paid, is a heavy burden. Procedures for admittance to the OAM could benefit from review.

Clearly, despite the progress made in the past decade, there are issues related to training that still need to be addressed. Although the creation of new law faculties will help increase the number of jurists, the number of those completing the apprenticeship and joining the OAM is still deeply inadequate for the country's needs. Some changes may be needed in the system to soften the current requirements for joining the Bar Association. The Bar is currently reviewing its statutes, including those governing the admission process for new lawyers. In addition, the type of training provided at the universities is is extremely formal, and arguably lacks practicality. There remains a need for curriculum reform, and the 2004 Constitution, which recognises legal pluralism, could provide a basis for this.

Disciplinary systems

The legal profession is regulated by the Mozambican Bar Association, and its disciplinary entity, the Legal Council *(Conselho Jurisdicional)*. The Legal Council performs a similar function to the Higher Council of the Judiciary: its objective is to guarantee that lawyers confirm with codes of conduct, and to implement disciplinary proceedings against those who violate these rules.[329] However, the functioning of the Legal Council is questionable. Many of the advocates interviewed during the course of this research expressed serious concern at the Bar's failure to

328 Statues of the Mozambican Bar Association, 1994 (Law no. 7/1994).
329 Ibid., art. 27.

enforce compliance.[330] External observers of the Bar's performance have also expressed increasing concern regarding the lack of enforcement of disciplinary control. For example, the prosecutor-general stated in 2002, to Parliament:

> There are cases far removed from the dignity that should be associated with the legal profession ... There are many instances of cases where advocates' interventions in criminal proceedings are an absolute distortion and obstruction to proceedings and to justice. Such irregularities are an affront to the ethics of the legal profession, and rely on the protection, or at least the apathy of the Mozambican Bar Association, which, once informed, does not take a stand.[331]

In a well-known case in 1996, advocate Maximo Dias was sentenced by the Supreme Court to three months suspension as a lawyer, as well as payment of a fine, for obstruction of justice involving illegal use of *habeas corpus*.[332] However, the OAM did not comment on the case, or attempt to conduct a parallel investigation. In 2003, during the Carlos Cardoso case, serious accusations were made by some of the defendants and the Office of the Prosecutor-General, against some the advocates involved in the proceedings. At the time, the OAM promised to investigate the case, but has still not informed the public of its final position.

The OAM is in the process of self-reform: it has begun to elaborate a code of conduct for its members, a new regulatory framework for admission to the OAM, and is also engaged in revision of its statutes, the latter which seems to be the first priority.[333] The OAM should be supported in its reform efforts, to strengthen its capacity to play a more pro-active oversight role.

Notaries

According to Mozambican law, as in other civil law countries, many acts only acquire validity against third parties when they are carried out by public deed, which entails formalising them under notarial procedure and in some cases, registering them.[334] The Ministry of Justice has notary and registry offices through the country, under the management of the National Directorate of Registries and Notaries *(Direcção Nacional dos Registos e Notariado,* DRNN*)*. Although in 2001, the Ministry of Justice cut the charge for certain types of notarial service by half,[335] the fees charged for notarial and registry services are still too high for most Mozambicans. Until recently, the DRNN operated under legislation inherited from the colonial period but new legislation has now been implemented which should lead to improved efficiency and ease of use for citizens. In 2004, Parliament approved a new Civil Registry Code *(Código do Registo Civil)*,[336] and in May 2006, the Council of Ministers approved a new Notarial Code by decree-law.[337]

330 Round table at the Mozambican Bar Association, Maputo, 2 March 2005.

331 Annual address of the prosecutor-general to Parliament, AR – V/Infor./333/04.03.2002, p.38.

332 Supreme Court decision of 28 February, 1996, reported in *Jornal Notícias*, 4 March 1996.

333 Statutes of the Mozambican Bar Association, 1994 (Law no. 7/1994.).

334 See World Bank, *Legal and Judicial Sector Assessment*, 2004, for further detail on notaries and registries.

335 Decree-law no. 150/2001, 3 October 2001, cited by World Bank, as above.

336 Civil Registry Code, 2004 (Law no. 12/2004).

337 Notarial Code, approved by decree-law, 2 May 2006.

5

Criminal justice

A. Protection from crime

Incidence of crime

Following the end of the civil war, there was a major escalation of crime in Mozambique. A number of factors may have contributed to this upsurge, including the mass demobilisation of almost 100 000 former combatants, undeclared arms caches that found their way into criminal hands, and the withdrawal of CIVPOL (the UN police force) after the 1994 elections.[338]

Since then, statistics show a relatively stable level of reported crime, with just below 40,000 reported crimes in 2001, 2002 and 2003.[339] In 2003, of all reported crimes, 63 per cent were classified as crimes against property, 34 per cent against persons, and 3 per cent against public order.[340] Broken down by region, in 2003, 23 395 crimes were reported in the southern provinces, 12 912 in the central region, and 2 323 in the north. Reported crime rates are significantly higher in Maputo city than throughout the country as a whole. For instance, in 2003, over a quarter of all recorded crime occurred in Maputo.[341] This is likely to be a reflection of higher rates of criminality, a greater concentration of firearms, and also of better police coverage in the capital city.[342] As in most developing countries, actual unreported crime rates are likely to be considerably higher that reported crime rates. UNICRI's International Crime Victimisation Survey

338 B. Baker, 'Policing and the rule of law in Mozambique' in *Policing and Society*, vol. 13, no. 2, June 2003, p.146.

339 *Plano Estratégico da Polícia da República da Moçambique*, 2003 – 2012 (PEPRM). Statistics included only up until 2001. *Jornal Notícias*, Maputo, 19 July 2004; statistics for 2002 and 2003.

340 *Jornal Notícias*, Maputo, 19 July 2004.

341 Ibid.

342 Ibid.

(ICVS) indicated that only 24 per cent of female victims of sexual offences reported crimes, and 12 per cent of victims of muggings.[343] Afrobarometer reported in 2006 that 32 per cent of respondents surveyed had items stolen from their home over the past year, rising to 43 per cent in urban areas, and falling to 24 per cent in rural areas. Thirteen per cent of respondents said that they or a member of their family had been physically attacked over the past year.[344]

Arrest, prosecution and punishment of criminal offences

Statistics from the Supreme Court indicate the number of criminal cases received and tried by the courts per annum, although this includes only the Supreme and provincial courts, and not the district courts. The Office of the Prosecutor-General also provides annual statistics that give an idea of the number of cases being dealt with within the Public Prosecution Service.[345] However, on the basis of these data, it is difficult to accurately state the percentage of arrests leading to prosecution.

Overall, the endemic slowness in investigation and prosecution, the frequent dismissal of cases due to poor investigations, and escapes of detainees from prisons have all contributed to a widespread perception that relative impunity exists in the criminal justice system, particularly for the well-connected.

B. Policing

Forces responsible for policing

During the civil war, the police force simply ceased to exist in large parts of the country. Where it did exist, it was paramilitary in nature, operating in effect as an arm of the FRELIMO party.[346] Since the peace agreements of 1992, the police force has undergone major transformation, and any evaluation of the force must take this historical context into consideration, bearing in mind the major changes that have been implemented over the past 25 years.

The Mozambican police force *(Polícia da República da Moçambique,* PRM*)* is divided into three main branches: the main police force responsible for public order and security *(Ordem e Segurança Pública),* the Criminal Investigative Police (*Polícia de Investigação Criminal,* PIC*)*[347] and the Special Forces *(Forças Especiais)*. The Ministry of the Interior does not publish information on the number of officers in each branch, although the majority are located within the main force responsible for public order and security. The Special Forces are sub-divided into a number of specialised units, including the Rapid Reaction Force *(Força de Intervenção Rápida,* FIR), the Forces Responsible for Protection (*Força de Protecção de Responsáveis),* the Border Guards (*Força de Guarda Fronteira),* and special task forces that deal with drugs, car-theft, and organised crime.[348]

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343 UNICRI, *International Crime Victimisation Surveys*, Turin, 2003.

344 João C G Pereira, Domingos de Rosário, Sandra Manuel, Carlos Shenga and Eliana Namburete, *Summary of Results: Round 3 Afrobarometer Survey in Mozambique*, Afrobarometer, 2006.

345 These statistics are annexed to the prosecutor-general's annual address to Parliament.

346 B Baker, 'Policing and the rule of law in Mozambique', *Policing and Society*, vol. 13, no. 2, June 2003, p.145.

347 See chapter 4.B, Independance of the Prosecution Service, for further discussion of the PIC.

348 *PEPRM 2003–2012*, vol. 1, May 2003, p.33.

The PRM is under the control of the Ministry of the Interior. It is headed by a commander general *(Comandante Geral)*, who is supported by a vice-commander general *(Vice-Comandante Geral)*. Each province in the country has a head office that supervises police activities, and represents the Ministry of the Interior. In addition, each district should have a central police station. There are approximately 20 000 police officers in Mozambique, or a ratio of approximately one police officer to 1 089 citizens (compared to an average international ratio of between one to 350 and 450).[349] Considering Mozambique's geographic size, this is inadequate representation to allow all citizens access to policing services, and for those outside of Maputo or other main cities, the problem is likely to be pronounced. Although recruitment has been steadily increasing, with approximately 3 500 new policemen entering the force over the past six years, numbers are still very low. The police strategic plan states that a force of 40 000 would allow adequate representation, almost double the current size of the PRM.[350] HIV/AIDS is also having a serious impact on the force; at a public meeting in 2005, Deputy Minister of the Interior Jose Mandra said that HIV/AIDS was killing approximately 1 000 officers every year.[351] As of 2003, approximately seven per cent of the PRM were women.[352]

As well as lack of sufficient staff, the police also face frequent shortages in equipment and facilities, particularly at the local level, preventing them from properly fulfilling their responsibilities. A police officer in Nacaroa spoke of problems his police station faced:

> Another problem is the lack of a prison, which means that detainees have to be sent to the district of Meconta almost 30km away. Although it is not too far, conditions for the transportation of prisoners are far from ideal due to a lack of vehicles and even money to pay for transport. The cars or taxis are often not secure, and frequently, detainees escape half-way through the journey. The police force is very small and this does not allow us to organise an adequate escort for detainees being moved to Meconta. As an alternative to the prison, we have improvised and co-opted a house to serve as a cell, where we can keep detainees for a few days, or sometimes even one or two weeks. For instance, dangerous offenders are kept there until the district command raises money for the transportation to Meconta, seeing as the local police station does not have a budget.[353]

Legal framework

With the separation of state and party, the 1990 Constitution paved the way for the formal de-politicisation of the police force under the 1992 General Peace Agreement (GPA). Clearly drawing a line under its past as an armed unit of FRELIMO during the civil war, the GPA set out that the police force should perform its 'functions in a manner free from any partisan or ideologi-

349 Ibid., p.34.

350 Ibid., p.11.

351 Deputy Minister of the Interior Jose Mandra, at opening session of a meeting of the managing council of the National Directorate of Immigration, Maputo, 15 August, 2006.

352 *PEPRM 2003–2012*, vol. 1, May 2003, p.39.

353 Interview with Sub-Inspector Francisco Amisse Mucorola, permanent officer, speaking on behalf of the chief of police of the district command of Nacaroa, Nampula, 11 August 2005.

cal considerations'.[354] This principle of depoliticisation was reinforced in the 2004 Constitution, which stated that the police shall not adhere to any particular party, and shall serve the country with impartiality and independence.[355]

Police activities are regulated by constitutional provisions and implementing legislation.[356]

Law 19/1992 reconstituted the police forces as the *Polícia da República da Moçambique* (PRM) and set out its functions, providing that it should guarantee public order, safety and security, respect for the rule of law, and the strict observance of citizens' rights and fundamental liberties.[357] Article 10 of the same law determines that members of the PRM must respect and defend the Constitution and laws of Mozambique.[358] In 1997, new legislation was approved to reorganise the country's defence and security forces, leading to a number of decrees that outlined a revised regulatory basis for the PRM.[359]

Over the last 15 years, the government has made significant progress in adopting legislation intended to modernise the force, and ensure its support for democracy and the rule of law. However, there are three areas where new legislation could be beneficial in clarifying existing ambiguities:

1) defining the status of newly-created bodies exercising policing activities, such as the community police;
2) clarifying the reporting structures of the PIC;
3) harmonising Mozambican laws with regional policing legal instruments.[360]

There is a common misperception that the municipal police are another branch of the PRM, when in fact they are subordinate to municipal councils (Mozambique has 33 municipalities). Each council is responsible for drafting and approving the by-laws for its municipal police, and for their supervision. The municipal police forces have a very poor reputation, particularly in Maputo, contributing to the reputation of the PRM being wrongly tarnished in this respect.

Policing strategy

The Mozambican police force has undergone major institutional change since the 1992 peace agreement, yet there has not been been any accompanying, broader public discussion on man-

354 General Peace Agreement, Rome, 4 October 1992, protocol no. 4, at http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/moz4.pdf. Last accessed 16 March 2006.

355 2004 Constitution, art. 254.

356 A compilation of legal instruments and other information relating to the PRM was received from the Office of the Dean of the Police Academy (*Gabinete do reitor, ACIPOL*), in response to a request from AfriMAP, 9 March 2005.

357 Law 19/1992, art. 2, no. 1.

358 Ibid., art. 10.

359 Law 17/1997 (*aprova a Política de Defesa e Segurança*) created the basis for the reorganisation of the defence and security forces. The following instruments relate to the PRM: decree no. 27/1999 approving the Organic Statute of the PRM, staffing, management and organisation (*Estatuto Orgânico, o Quadro de Pessoal, o Quadro de Funções de Comando, Direcção e Chiefa e os Organigramas da PRM*); decree no. 28/1999 approving the Police Statutes (*Estatuto da Polícia*); decree no. 29/1999 approving remuneration; and decree no. 24/1999, creating the Academy of Police Science (*Academia de Ciências Policiais, ACIPOL*).

360 At the SADC level, the PRM is part of the regional police corporation (SARPCCO). SARPCCO has elaborated a Code of Conduct for its members regarding performance and compliance with human rights standards, but no information was available regarding implementation of this by the PRM.

agement of the police force. In 2003, for the first time, the police force elaborated a strategic plan, *Plano Estratégico da PRM, 2003–2012* (PEPRM).[361] The plan states that consultations were held with members of the community during its formulative stages, but no further information is provided.[362] PEPRM was approved by the Council of Ministers without any accompanying debate in Parliament. As of yet, the PRM has not made any information public on monitoring of the plan, and so it is difficult to comment on its progress.

Police leaders have undertaken several initiatives to build relations with local communities, and are meeting with residents, community leaders, and the staff and local commanders of police stations in the provinces and districts. They have begun to establish public contact lines, as well as complaint books in police stations and at police posts. These initiatives are recent, and researchers were unable to obtain further information.

Police community councils

In 2001, the Ministry of the Interior launched a new initiative to establish police community councils as part of its strategy against crime.[363] The Ministry promoted the police community councils as mechanisms to create dialogue within communities and between local police forces and citizens on problems of public security and order, and to actively involve local citizens in crime prevention efforts. In November 2005, the Minister of the Interior announced that there were 1 125 police community councils in the country.[364]

Although in principle police community councils have the potential to be a useful mechanism for improving neighbourhood security, implementation of the councils has been problematic. In neighbourhoods where community police councils have been set up, they tend to confer policing responsibilities on citizens without their broader participation in formulating strategies to fight crime at the community level. Unemployed youths with no other source of income often form the bulk of those volunteering to undertake policing responsibilities. With very limited training and support from the PRM, these citizens are given authority and firearms in order to undertake their duties. In an interview with the paper *Notícias*, the chief of public relations of the provincial command of the PRM in Sofala said that in his area, 'citizens complain that the performance of police community councils has been inefficient, either due to lack of material support and police attendance, or due to lack of incentives for those involved in community policing'.[365]

There are some allegations that community policing groups can worsen problems of public safety, with recruits abusing their position by renting out their arms, or using them against citizens.[366] For instance, in September 2003, members of the police community council in the

361 The plan includes an analysis of crime trends over the past five years, budgeting, future objectives and indicators, although it does not cover the Criminal Investigative Police (PIC).

362 *PEPRM 2003–2012*, vol. 1, May 2003, p.43.

363 Ministry of the Interior, *12th Coordinating Council 2000 Report*, Maputo, 2000.

364 Mozambique News Agency, 'Interior Minister defends police community councils', in *AIM Reports*, Maputo, 2 November 2005.

365 Raúl Magaíssa, chief of public relations of the provincial command of PRM in Sofala, on the 30th anniversary of the PRM, in *Jornal Notícias*, 19 May 2005, p.6.

366 For instance, see *Jornal Notícias*, 'Residents ask for continued commitment to the fight against crime (*Moradores pedem combate cerrado contra criminalidade*)', 5 May 2005.

Maputo neighbourhood T3 shot and killed a 13-year-old boy, Aderito Francisco Cumbe. According to members of the police community group, stray bullets hit the boy whilst they were trying to scare away suspected burglars raiding a house. The case has not yet been resolved.[367] The Mozambican Human Rights League (LDH) highlights the culture of impunity enjoyed by the police community groups, in part stemming from the fact that whilst the PRM hands out firearms to the community police, they do not accept responsibility for their use.[368]

There is a potential risk of police community councils being perceived as a cheap labour alternative to improve police coverage, without due consideration of the long term consequences of such a force, or its scaling-up. Moreoever, there is no clear legal framework for providing firearms and other security equipment to recruits who do not have specialised training or a constitutional mandate. However, with broader consultation involving civil society and a clearer legal mandate, the councils could improve dialogue between the PRM and local communities, as well as improving neighbourhood security. Local authorities as well as government ministries including the Ministry of State Administration, the Ministry of Finance and the Ministry of Planning and Development should be provided with the opportunity to participate. So far, the community police groups have been set up largely in FRELIMO areas, and it will be interesting to observe the response and attitude of local governments formed in municipalities where the opposition, RENAMO, has won a majority.

The Ministry of the Interior remains committed to police community councils as a central part of its strategy against crime. In 2005, President Guebuza said at a public rally, 'We have defined strategies for the fight against crime. These strategies include a major involvement of the population through community policing. There have been positive results, but they are not entirely satisfactory and we need to improve this mechanism to be able to guarantee transparency on the one hand, and better results on the other.'[369] On a local level, there are some indications that police community councils are being reorganised for better results. In *Notícias,* for instance, it was reported that three members of a police community council in Machava had been dismissed due to involvement in corruption, and in Singhatela, the entire force had been dismissed.[370]

Training and remuneration of police officers

New recruits to the PRM undertake a basic nine month training course, or can apply for a university level degree in police sciences, offered by the Academy of Police Sciences (*Academia de Ciências Policiais,* ACIPOL), established in 2000. The Ministry of the Interior has made considerable efforts to improve training provided to the PRM, in particular by establishing ACIPOL, which is located in in Michafutene, about 15km north of Maputo. ACIPOL was opened to provide intensive technical and professional degree-level training to selected high cadre officers, in the form of a three to four year course on police sciences. As of 2006, approximately 120 police officers had undertaken the degree. Existing members of the PRM are being offered shorter retraining and specialisation courses, and ACIPOL is also offering long-distance learning. ACIPOL is providing good training, including modules on law and human rights, although it is too early

367 The US State Department, *Country Report on Human Rights Practice*, 2004.
368 LDH, *Report on Human Rights in Mozambique 2003*, Maputo, 2005, p.42.
369 *Jornal Notícias*, 18 May 2005.
370 *Jornal Notícias*, 5 May 2005.

to assess meaningfully its impact on improvement in the quality of policing.[371] The PRM's strategic plan also provides for the opening of a new training centre, located in the central region, most likely in Sofala.[372]

The minimum salary of a police officer is around US$60 per month, similar to that for most public servants.[373] With the inclusion of benefits, this rises to around US$100, which is still extremely low. Low salaries lead a large proportion of police officers to seek other work, usually as private security guards. However, holding dual or multiple jobs can lead officers to find themselves in situations where there is a conflict of interest between their two positions.

Police abuses

The legal framework regulating the PRM clearly provides for equal protection to all citizens. Article 67 of decree no. 28/1999 provides that 'any member of the PRM, during the course of his duties, must act with absolute political neutrality and impartiality, in conscience, without any type of discrimination due to race, religion, opinion, colour, ethnicity, place of birth, nationality, political party affiliations, level of education, social or professional position'.

Although reduced since the 1990s, allegations of human rights abuse by the police persist despite the existence of this legal framework. Organisations such as Amnesty International and the Mozambican Human Rights League (LDH) report annually on police abuses, including arbitrary custody, torture, excessive use of force and summary executions. For instance, the LDH reported on 'death squads' within the police force that operated with impunity between 2000 and 2002 in the Maputo suburbs of Matola Rio, Boane, and Costa do Sol, and were responsible for summary executions and other abuses.[374] In its report for 2004, Amnesty International recognised the significant efforts underway to increase police professionalism, but also reported on several incidents involving torture and killings committed by the police.[375]

The most serious allegation of police abuse over the past few years is related to events in Montepuez, in November 2000, when 92 prisoners died of asphyxia in their police cells (see p.102 for further discussion) after being held in extremely overcrowded conditions of detention. The prisoners had been rounded up after a RENAMO-UE demonstration, and were all opposition supporters. The Montepuez case highlighted the poor conduct of the police and their disregard for basic conditions of detention. The incident also raised questions on the actual extent of de-politicisation of the police force. Independence and impartiality of the police force and the army had been a central pillar of the peace agreement. However, some analysts note that whilst RENAMO combatants were integrated into the armed forces, this was not the case with the

371 The US State Department, in its *Country Report on Human Rights Practice*, 2004, stated that approximately 500 officers received human rights training in 2004.

372 *PEPRM 2003–2012*, vol. 1, May 2003, p.59.

373 The remuneration system for the PRM is similar to other areas of the Mozambican public service. Decree no. 29/1999 approved the remuneration structure for members of the PRM, and decree no. 28/1999 approved the Police Statutes, including provisions for career structure.

374 LDH, *Report on Human Rights in Mozambique, 2003*, Maputo, 2005.

375 Amnesty Interntional, *Mozambique Country Report 2004*, London, UK.

police, particularly the Rapid Reaction Force (FIR) which was kept loyal to FRELIMO.[376] During his successful election campaign in June 2004, President Guebuza pledged to disband the armed groups of former RENAMO fighters that still patroled parts of Sofala province, providing protection for RENAMO's leadership. RENAMO leader Dhlakama declined the offer, including for the integration of the former fighters into the police force. Clashes have sporadically broken out between these armed RENAMO groups (also referred to as the 'Presidential Guard' in the media) and FIR. With almost 15 years elapsed since the General Peace Agreement, it is perhaps questionable why the opposition has not used its parliamentary voice to attempt resolving this issue through political dialogue.

Public confidence in the police is low. The 2003 *National Survey on Governance and Corruption* showed that households, public servants and companies rated the police as one of the most corrupt public institutions.[377] In a survey by Ética Moçambique in 2001, of 1 200 people interviewed, 45 per cent said they had been victims of corruption in the past six months. The most common demands for money were in the health sector (30 per cent), education sector (27 per cent), and by the police (21 per cent).[378] It is frequently reported in the media that some officials also rent out their guns and uniforms. In his annual address to Parliament in 2002, the prosecutor-general said:

> If you have watched one of TVM's newscasts recently, you will be aware that there are policemen who rent out their weapons and even their uniforms for criminal purposes... [379]

Montepuez

In November 2000, up to one hundred people died of asphyxiation in a grossly overcrowded police cell in Montepuez, in the far northern province of Cabo Delgado. The deaths followed a round-up of supporters of the opposition party coalition RENAMO-UE, after several days of clashes with police during protests at allegedly rigged elections, in which up to 40 people died (including six or seven policemen). The official death toll in the Montepuez cell was 83, but human rights organisations noted that the police had no proper records of how many people were in the cell, while many were buried in mass graves without formal processing. It is therefore possible that the real death toll was higher.

376 James L Woods, 'Mozambique: The CIVPOL operation', in eds. Robert B Oakley, Michael J Dziedzic and Eliot M Goldberg, *Policing the New World Disorder: Peace Operations and Public Security*, National Defence Univerity, 2002.

377 *National Survey on Governance and Corruption*, 2003, pp.61-63.

378 Ética Moçambique, *Study on Corruption in Mozambique (Estudo sobre Corrupção Moçambique)*, Maputo, 2001.

379 Annual address of the prosecutor-general to Parliament, AR – V /Infor./333/04.03.2002, p.12. See also the speech of General Nataniel Macamo, chief of public relations of the Ministry of the Interior, to the village of Chicualacuala district, to put fear aside and denounce all policemen who rent out their weapons or are involved in other criminal activities, *Jornal Notícias*, 7 June 2005, p.2.

Because of the large number of deaths and the fact that most were opposition party supporters, the incident received a great deal of attention, both nationally and internationally, starting with an initial investigation by a five-person South African team of pathologists that confirmed that the deaths were by asphyxiation (and not by poisoning, as RENAMO-UE had alleged). Two national human rights organisations alleged that local police officials purposely deprived the detainees of oxygen by closing the cell door and that the police commander had threatened that the detainees would not leave the prison alive.

Eleven members of the Criminal Investigation Police were arrested in connection with the deaths, and five put on trial, of whom two were eventually convicted in July 2001, and sentenced to 17 and 18 years in prison. Eighteen of those accused of being 'ringleaders' of the RENAMO-UE demonstration were also tried, and five were found guilty in June 2001 of 'armed rebellion' and several lesser offences, and sentenced to 20 years in prison. The decision was appealed to the Supreme Court, but was finally rejected on the grounds that the time limits allowed for appeal had expired. The defending lawyer has stated that he submitted the appeal within the requisite time-periods, but is unable to prove this.

In December 2000, Parliament established a bipartisan Parliamentary Commission of Inquiry to investigate the violence surrounding the November 9 demonstrations and the subsequent deaths in custody. The parliamentary commission concluded its work in September 2001, but the report was never made public or followed up, after RENAMO-UE MPs refused to allow it to be tabled in Parliament, on the grounds that it was heavily biased. The release of the report was postponed indefinitely. Media leaks suggested that the report focused primarily on the protests that had occurred and responsibility for their initiation, rather than the deaths in police custody.

In 2002, Parliament mandated a new independent committee of civil society groups to investigate the deaths at Montepuez, both during the riots and in custody. The civil society groups who were invited to participate in the Montepuez committee welcomed this parliamentary initiative, and it was viewed as a sign of change on the part of government in relation to greater involvement of civil society. However, the committee did not manage to reach a consensus on findings and no final report was presented to Parliament.

Neither of these reports has been published, and the government has continued to refuse to release the names of those who died at Montepuez.

SOURCES

Reports by the Mozambique News Agency (AIM); **U.S. State Department,** *Country Reports on Human Rights Practice*; Mozambique On-line, 'The 9th November demonstrations: the Commission's report puts all the blame on RENAMO *(Manifestações de 9 de Novembro 2000:Relatório da Comissão dá toda a culpa à RENAMO)*', 4 April 2002, at http://www.mol.co.mz/noticias/2002/0404.html, last accessed 22 Feb 2006.

Investigation of complaints against the police

The PRM's regulations provide for a disciplinary body situated within the central leadership of the PRM.[380] However, there is no independent external mechanism to investigate complaints against the police: implementation of such a body is critically needed. Over the past few years, several police officers have been dismissed, although the PRM does not publish information on

380 Decree no. 28/1999 approving the Police Statutes, arts. 12 and 26.

the exact number of officers dismissed from the force, nor on what grounds. The LDH's 2003 annual report stated that only a small number of complaints received from citizens on police abuse are then submitted to the Public Prosecution Service.[381] The report highlighted cases of proven misconduct filed against police officers that received no official response from the PRM. Months and even years later, the same officers are still working in the force, or have simply been transferred to another post.[382] Providing the public with more transparent information on the disciplinary actions taken against officers would improve the public accountability of the police force.

C. Fair trial

Mozambique is party to the African Charter on Human and Peoples' Rights,[383] which includes protections for the rights of those accused of a criminal offence. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide a more detailed outline of the legal and administrative provisions that governments and legal practitioners should adopt in order to guarantee the right to a fair trial.[384] Mozambique's constitutional framework provides for considerable protections against abuse of process. However, in practice, the state is facing serious difficulties in ensuring that citizens are not subject to arbitrary detention, that they receive the right to legal representation, and a trial without undue delay within the time-limits established by law.

Legal protections against abuse of process

The 2004 Constitution provides that all citizens are equal before the law.[385] In addition, Chapter III of Title III sets out guarantees of individual rights and freedoms, among them:

- Everyone has the right to security and no one shall be detained and put on trial except in accordance with the law (art. 59, no. 1).
- An accused person shall be presumed innocent until final judgment is passed (art. 59, no. 2). (The principle of *ei incumbi probatio qui dicit non qui negati*; the burden of proof of facts lies with the person who alleges the facts, and not with the one who denies them).
- Nobody may be convicted of a crime in relation to an act that did not constitute a criminal offence at the time it was committed (art. 60, no. 1), based on the principle of *nullum crimen sine lege*; if there is no law, there is no crime.[386]
- Preventive detention *(prisão preventiva)* shall be permitted only in cases provided for by law, which must determine the duration of such imprisonment. Individuals held in preventive detention must be brought before a criminal investigative judge (*juiz da*

381 LDH, *Report on Human Rights in Mozambique*, 2003, Maputo, 2005, p.19.

382 Ibid., p.23.

383 African Charter on Human and Peoples' Rights; arts. 7 and 26 in particular relate to the right to a fair trial and legal assistance.

384 Resolution on the Right to a Fair Trial and Legal Assistance in Africa, African Commission on Human and Peoples' Rights, November 1999.

385 2004 Constitution, art. 35.

386 See also Criminal Code, art. 5.

instrução criminal)[387] to establish the legality of their detention within a time-frame prescribed by law (art. 64 no. 2).

- Persons deprived of their liberty have the right to be informed of the reasons for their detention and of their rights in detention (art. 64, no. 3). The relatives of the detainee or another person they indicate should be informed of their detention (art64, no. 4).
- Criminal trials shall be public (with some exceptions) (art. 65, no. 2).
- Evidence obtained by torture is not admissible (art. 65, no. 3).
- The right in case of illegal imprisonment to apply for a writ of *habeas corpus* before a court, which shall hear the application within eight days (art. 66). The right to *habeas corpus* includes situations where:[388]
  - the time limit for submitting a detainee's case to a judge for review of the legality of their detention, or the time limit to formally charge a detainee, has been exceeded;
  - the detention took place in a location outside of those authorised by law or the government;
  - the detention was carried out on the orders of an incompetent authority;
  - the detention was motivated by a fact not classified as crime by law, or classified as a crime that does not correspond to a custodial sentence;
  - the time spent in custody exceeds the final sentence that could be handed down by the courts.

The request for *habeas corpus* can be made by the detainee, or on his or her behalf by a spouse or immediate family member. In addition, a legal representative should be present to co-author the writ.[389] Considering the serious shortfall of adequate legal representation, this latter condition may constitute a serious impediment to exercise of the right to *habeas corpus*.

Types of criminal procedure in Mozambican legislation

The Criminal Procedure Code (*Código de Processo Penal, CPP*), approved in 1929 and implemented in 1931, continues to form the basis of the procedural framework for prosecution of criminal activities. Four types of common procedure are most used by the courts:

- *Processo de transgressões*, used for prosecution of violation of regulations (contraventions), including regulations approved by municipal authorities, generally punishable by fines (art. 66 of the Criminal Procedure Code and art. 56 of the Criminal Code);
- *Processo summário*: for crimes punishable with a sentence ranging from three days up to one year of imprisonment (art. 67 of the Criminal Procedure Code and art. 56 of the Criminal Code);

387 Law no. 2/1993, art. 1.

388 Criminal Procedure Code, arts. 312 and 315.

389 Ibid., arts. 312 and 316.

- *Processo de polícia correccional*, for crimes punishable with a sentence of more than one year up to two years imprisonment (art. 65 of the Criminal Procedure Code and art. 56 of the Criminal Code);
- *Processo de querela*, for crimes punishable with a sentence of more than two years up to 30 years imprisonment (arts. 55 and 63 of the Criminal Code). This is the longest and most complex type of proceeding, for the most serious crimes. According to the Criminal Code, the maximum penalty that can be directly applied to crimes as set out in the Criminal Code is 24 years imprisonment (art. 55), although an aggregation of sentences could lead to a longer imprisonment period than this (art. 73, Criminal Code). The Law against Drug Trafficking and Consumption provides for a maximum imprisonment of 30 years.

According to the principle of presumption of innocence, the Criminal Procedure Code sets out that a person should not be arrested unless there is strong suspicion that they have committed an offence, based on facts that can be proven.[390]

The law stipulates that all detainees should be brought before a criminal investigating judge *(juiz da instrução criminal)* [391] within a maximum of 48 hours from the moment of their detention.[392] The judge will review the legality of their detention,[393] and can extend the period of detention to a maximum of five days, if required by the Public Prosecution Service, with good reasoning. Cases that correspond to contraventions, generally payable by fines (*processo de transgressões)* or with sentences of less than one year's imprisonment (*processo summário)* should be judged and ruled upon at this point, within a maximum period of five days from the time of detention.

If the case corresponds to a more serious type of crime, the investigating judge will either rule that the detention is illegal, and the suspect must be released, or that the detention is legal and allow the Criminal Investigative Police (PIC) and Public Prosecution Service a further period of time to prepare a case. In practice, police officers and prosecutors generally operate by first arresting suspects and then working to gather evidence against them. Lack of evidence means that in many cases, criminal investigating judges must release suspects after reviewing the legality of their detention. This has led to a perception that judges are not acting to fight criminality, which, in turn, is placing pressure on judges to detain suspects, despite a lack of evidence to justify the legality of their detention.

If the detention is found to be legal, the judge will also rule on whether the suspect can be released, and if so whether with or without payment of bail. The table below outlines the steps in proceedings that should then follow:[394]

390 Criminal Procedure Code, arts. 251 and 252.

391 Law no. 2/1993 implemented the criminal investigating judges. In practice, the duties of investigating judges (primarily to verify the legality of all detentions after 48 hours) are assumed by professional judges of the judicial courts; there is no separate position for an investigating judge. The prosecutor-general has spoken about problems with this, as it sometimes leads to situations where the same judge who confirms the legality of a detention, may then have an opportunity to influence the investigation, and ultimately even preside over the trial; annual address of the prosecutor-general to Parliament, 2000.

392 Criminal Procedure Code, art. 311.

393 2004 Constitution, art. 64, no. 2.

394 Information provided by the Ministry of Justice, in letter annexed to the mission report concerning prisons in Mozambique–14-21/12/97 by the Special Rapporteur Professor E V O Dankwa, Maputo, 28 August 1998.

Table 5.1: Steps in bringing a criminal case to trial

	Phase/sub-phase in proceedings	Time periods as established by law
1	Preparatory instruction (*instrução preparatória*): during this period, the prosecutor will gather evidence in order to form the basis of a charge against the suspect. At the end of this period, the prosecutor should form a provisional accusation (*acusação provisória*) against the suspect. (art. 308 of the Criminal Procedure Code)	From the time of detention to notification of charge or the Public Prosecution Service requests a 'contradictory instruction' (*instrução contraditória*) (see below): – 20 days for crimes punishable by a sentence of more than one year and up to two years (*processo de polícia correccional*); – 40 days for crimes punishable by a prison sentence of more than two years and up to 30 years (*processo de querela*); – 90 days for crimes punishable as above, but which, due to their seriousness and complexity, are the exclusive competence of the Criminal Investigative Police (PIC) for the conduct of the preparatory instruction (or when this responsibility has been transferred to the PIC by the Public Prosecution Service), e.g. crimes including murder, robbery, drug trafficking.
2	If the provisional accusation is accepted by the court, both the prosecutor and the accused have the right to appeal, and to ask for a period of further investigation. (*instrução contraditória*) (art. 334 of the Criminal Procedure Code)	From the beginning of the *instrução contraditória* to the close of the *instrução contraditória*: – 60 days for crimes following the *processo de polícia correccional*; – 90 days for crimes following the *processo de querela*; – In both cases the timelines can be extended by a further 30 days if permitted by a judge.
3.	At the end of the period permitted for *instrução contraditória*, the prosecutor will be asked if he maintains his charge, and the judge will decide the 'final object' of the case, at which point the provisional accusation becomes a definite accusation. (*acusação definitiva*) (art. 350 of the Criminal Procedure Code)	From when the the *instrução contraditória* is regarded as finalised (*concluso*) to the formulation of a definite accusation (*acusação definitiva*): – Three days for crimes following the *processo de polícia correccional*; – Five days for crimes following the *processo de querela*; – At this stage of the proceedings, the accused has the right to appeal the object of the case in a higher court.
4	Acceptance of charge by the court and setting of date for trial. (art. 365 of the Criminal Procedure Code)	From the definite accusation (*acusação definitiva*) to the acceptance of charge by the court and setting of date for trial: Eight days for crimes following the *processo de polícia correcional or processo de querela*.
5	Date of trial	For crimes following the *processo de polícia correcional*, the date of trial should be no later than 20 days after the acceptance of charge (art. 528 of the Criminal Procedure Code). For crimes following the *processo de querela*, the law does not prescribe time-frames for trial.

As the table above illustrates, for the most serious crimes treated as *processo de querela*, a detainee could face a period of over six months in custody before being formally charged. Cases corresponding to petty crimes that by law should be judged after a maximum of five days, often do not follow established procedures, resulting in long periods of detention even for minor crimes. Even if a detainee is offered bail, in most cases they are unlikely to be able to afford this.

In practice, the period from arrest to trial may be even longer than prescribed by law, as one of the predominant characteristics of the Mozambican criminal justice system is enormous procedural delay in bringing cases to trial. This is a serious problem, for as President Guebuza said in 2005, 'justice delayed is justice denied'.[395] Once a suspect has been formally charged, the case can then take several years to reach trial, due in large part to the considerable backlog of cases the courts are facing. At the end of 2002, there were approximately 37 700 criminal cases pending trial in the provincial courts (where criminal cases that could receive a sentence over eight years are tried).[396] At a roundtable at the Mozambican Bar Association, advocates said that in their experience criminal procedures can take between two and five years to reach trial in the courts of first instance, and up to 10 to 20 years on appeal to the Supreme Court.[397]

The extent of the problem is reflected in the high number of pre-trial prisoners as a percentage of total prison population, although there have been some recent improvements. In 2000, 72.9 per cent of the total prison population (including both prisons of the Ministry of Justice and of the Ministry of the Interior) were on remand;[398] by 2005, this had dropped to 53 per cent of prisoners.[399] However, the percentage remains high, and is compounded by cases of illegal detention. After conducting prison visits, the Parliamentary Committee on Legal Matters, Human Rights and Legality, for example, reported in June 2003 that four detainees in the prisons it had visited had been held for more than four years, and another four for more than five years without their detention even having been formalised. The committee also found that 33 detainees had been held illegally for periods in excess of two months without being brought before an investigating judge.[400]

Clearly, legislative frameworks and constitutional guarantees are not being consistently implemented. In order to guarantee the right to a fair trial, it is essential that the provisions set out in law are correctly followed and monitored. Crucially, revision of the Criminal Procedure Code, currently underway, has the potential to reform and considerably simplify criminal proceedings.[401]

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395 *Jornal Savana*, 4 March 2005.

396 *Legal Statistics (Estatísticas judiciais)*, Supreme Court, 2002. Statistics are not available for the district courts. Lalá and Ostheimer point out that in reality, due to a number of reasons, including poor data collection, the actual number of cases pending may be lower than official figures suggest.

397 Round table held at the Mozambican Bar Association, Maputo, 2 March 2005.

398 *The Prison System in Mozambique*, UNDP, December 2000.

399 Government of Mozambique, *Balanço do PES 2005*, Maputo, p.107.

400 Report of the Parliamentary Committee on Legal Matters, Human Rights and Legality, Maputo, June 2003.

401 See Section 1.D, Reform in the justice sector.

Right to representation

Article 62 of the 2004 Constitution provides for the right of the accused *(arguido)* to defence, legal assistance and aid: '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 lawyer'.[402] A person may request the right to have their status changed from that of a suspect to an accused in order to have the right to full legal representation and defence.[403]

The law sets out that certain procedural acts, such as interrogation of the accused, may not take place without the presence of a lawyer or proxy, under penalty of becoming null.[404] If the accused cannot afford a lawyer, the state should nominate a representative from the Mozambican Bar Association (OAM). The statutes of the OAM establish that its members should accept nomination for this type of work as one of their duties[405] and should represent their client free of charge, until the end of the case.[406]

If for good reason, a member of the OAM is not available, the state can request legal representation from the Institute for Legal Assistance and Representation (*Instituto de Assistência e Patrocínio Jurídico, IPAJ)*. IPAJ was created by law no. 6/1994[407] to function as a state body, under the supervision of the Ministry of Justice, for the provision of legal aid. As a last resort, the law provides that the courts, Public Prosecution Service or the investigating judge can appoint an ad hoc representative to defend the accused, if no other representation is available.[408]

In practice, there is a persistent pattern of members of the OAM and IPAJ failing to undertake their duties.[409] Very frequently, courts have to rely upon an ad hoc representative to provide defence for those unable to afford private legal representation. This representative is usually a member of the court staff lacking in any formal legal training. Often, he or she is appointed on the day of trial and is unable to present any meaningful defence—usually being limited to 'let justice be done' or 'please decide this cause accordingly'.[410] At a round table discussion held at the OAM, an advocate also raised the issue of members of the Criminal Investigative Police and the Public Prosecution Service immediately nominating an ad hoc representative to a defendant, instead of providing information to defendants on their rights of representation, including choice of counsel.[411]

The statutes of the OAM provide that no member of the OAM should refuse to undertake these duties without good reason,[412] and if judges find the reason given unacceptable, they are

402 2004 Constitution, art. 62 (*acesso aos tribunais*).

403 Criminal Procedure Code, art. 252.

404 Ibid., arts. 98, 253, 264 and 265.

405 Law no. 7/1994, arts. 50, 58 and 61. In some civil proceedings (based on their seriousness), the appointment of an advocate is also compulsory.

406 If the client is enriched (more applicable in civil cases – through winning damages), or if for another reason, the client ceases to be needy, the lawyer is free to collect a fee. See law no. 7/1994, art. 61, no. 3.

407 Law no. 6/1994, regulated by decree no. 54 of 1995.

408 Criminal Procedure Code, arts. 253 and 416.

409 Annual address of the prosecutor-general to Parliament, 2003 (Infor./429/24.02.2003).

410 Ibid., p.24.'*Que se faça justiça*' and '*Faça o merecimento da causa*'.

411 Round table held at the Mozambican Bar Association, Maputo, 2 March 2005.

412 Law no. 7/1994, art. 58. Good reasons, as set out in art. 62, are limited to conflicts of interest with previously assumed obligations to another client, and having an opposing understanding of the law to that of the prospective client, and that the client intends to plead.

entitled to inform the OAM for disciplinary purposes. As of 2002, no disciplinary proceedings had apparently been launched against a member of the OAM for refusing to accept appointment as a defence counsel.[413] Whilst members of the OAM should offer representation free of charge, the statutes of the OAM provide that expenses they incur in undertaking their duty of providing free legal representation should be regulated by further legislation.[414] This legislation has not yet been drafted, and hence, there is no system in place for reimbursing members of the OAM for such expenses. Many members of the OAM argue that it is economically unfeasible for them to undertake defence representation. At a round table held at the OAM, an advocate said:

> In the conditions in which we operate, it would imply constant trips, often unsuccessful, to the courts and prosecutors' offices in search of a file or other information which is never available. Further, in addition to the time spent on cases due to the excessively slow pace of proceedings, we would always incur costs such as petrol, paper, communications, tips for the court staff and other officers...which nobody is able to support themselves...[415]

Lack of funding is an issue that does constrain the OAM in fulfilling its duties of legal representation, and further regulation in this area is urgently needed. Nonetheless, advocates could arguably be more pro-active in fulfilling duties of legal representation, and during cases, in asserting the right of access to their client.

According to data from UTREL, IPAJ had a total of 360 members in 2000, composed of 232 legal technicians (*técnicos jurídicos)* and 128 legal assistants (*assistentes jurídicos*) with the power to provide legal representation.[416] Only 10 of those members had a legal contract with IPAJ, which in effect means that the others are working as private advocates. In the context of a shortage of fully qualified advocates, members of IPAJ have found they are able to charge fees to private clients, and in effect operate as part of the private legal sector, entirely moving away from their original purpose and reason for existence.

An increasing number of citizens using the courts are relying on legal aid provided by civil society organisations.[417] Notable organisations providing assistance through paralegals include the Mozambican Human Rights League *(Liga Moçambicana dos Direitos Humanos,* LDH*)*,[418] the Women's Association for Law and Development *(Associação Mulher Lei e Desenvolvimento,* MULEIDE*)*, the Mozambican Association for Women Lawyers *(Associação Moçambicana das*

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413 World Bank , *Legal and Judicial Sector Assessment*, 2004, p.52.

414 Law no. 7/1994, art. 61, no. 1.

415 Round table held at the Mozambican Bar Association, Maputo, 2 March 2005.

416 UTREL, *Justice Administration System Framework bill; Background and Objectives (Lei do Sistema de Administração de Justiça; Exposição de Motivos)*, at http://www.utrel.gov.mz/pdfs/lei1.pdf, last accessed 18 April 2006. Legal technicians have a law degree and are admitted to IPAJ on the basis of a public tender, whilst legal assistants do not have any previous legal training but have attended a special course certified by the Ministry of Justice.

417 Paralegals from civil society organisations generally provide aid primarily for criminal cases, as well as some labour and family cases.

418 LDH is one of the largest civil society organisations in Mozambique and has been operating since 1995. This organisation operates almost all over the country, with a head office in Maputo and a network of regional and provincial representation, including paralegal centres.

Mulheres de Carreira Jurídica, AMMCJ*)*, Women and Law in Southern Africa (WLSA) and the Rural Organisation for Mutual Assistance (*Organização Rural de Ajuda Mútua,* ORAM*)*. Some law faculties, such as at the University of Eduardo Mondlane, the Catholic University of Mozambique, and the Higher Polytechnic and University Institute have also begun to operate law clinics or similar initiatives. The paralegal work of these organisations is not formally recognised nor significantly supported by the state or the OAM. A few years ago, IPAJ did certify some LDH paralegals as legal assistants so that they could formally represent defendants in court.

Interpretation

As set out in article 10 of the 2004 Constitution, Portuguese is Mozambique's official language, and hence the language that should be used in courts.[419] However, official statistics indicate that only 40 per cent of the population have some knowledge of Portuguese, dropping to 25 per cent in the countryside. Only 7 per cent of the population considered Portuguese their mother tongue.[420] In this context, article 98 of the Criminal Procedure Code requiring courts to appoint an interpreter for non-Portuguese speaking defendants gains a critical dimension.[421]

Generally, courts do attempt to provide interpretation services as required, although the quality of the interpreters used is frequently poor. Particularly at the district level, interpreters are not professionals, and are usually simply drafted in on the day, as ad hoc staff.[422] In practice, in many district courts, if the judge speaks the local language, they will conduct proceedings directly in that language, or play the role of interpreter themselves.

During visits to district courts, the AfriMAP team found that the main constraint to permanently hiring a qualified interpreter was a lack of funds.

Victim and witness protection

There is a serious lack of mechanisms for witness protection. The Criminal Procedure Code's only provision for witnesses concerns reimbursement of costs they may incur.[423] In 2005, the Prosecutor-General spoke of the problems caused by inadequate witness protection hampering the work of the (now reconstituted) Anti-Corruption Unit, as witnesses were reluctant to testify without any guarantee of their personal security.[424] The NGO *Ética Moçambique* has advocated for a witness protection scheme that would allow outsourcing of witness protection to private security companies, including providing vulnerable witnesses with home security, and if necessary, relocation.[425]

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419 2004 Constitution, art. 10. Prior to the 1990 Constitution, the use of other languages was actively discouraged in the interests of national unity. However, the 1990 Constitution included provisions for the promotion and development of national languages as part of the country's cultural and educational heritage (art. 9).

420 *National Population Census*, 1997.

421 It must be recognised that other factors, in addition to language, may equally render what is said during trials and other stages of the proceeding incomprehensible to the defendant, for instance, the use of technical legal vocabulary.

422 The Criminal Procedure Code provides that court interpreters should be properly trained (art. 98).

423 Criminal Procedure Code, arts. 157 and 450. In civil proceedings, provision for witnesses is also limited to reimbursement of costs (Civil Procedure Code, art. 644).

424 Interview with Prosecutor-General Joaquim Madeira, Maputo, 22 February 2005.

425 Jovito Nunes, (author of *Study on Corruption in Mozambique*, Maputo, 2001, Ética Moçambique, Maputo) at seminar, Maputo, 28 September 2004, cited in Mozambique News Agency, *AIM Reports*, Maputo, 1 October 2004.

Greater protection, particularly in the context of fighting corruption, is needed for whistle-blowers. The Media Institute for Southern Africa (MISA) is currently working with Parliament on draft legislation regulating access to information which will include protection for whistle-blowers.

The PRM has made efforts to improve care for victims, particularly women and children. Over the past few years, special consultation rooms for women and children (*Gabinetes de Atendimento à Mulher e à Criança)* have been set up in some police stations. Specialists, including psychologists and NGO staff have provided training to the police officers running these *gabinete*. At the end of 2005, 96 police stations had special consultation rooms, providing assistance mostly to women who had been victims of domestic violence or human trafficking.[426]

At a SADC meeting held in 2004 to discuss the eradication of violence against women and children, the lack of effective measures to protect women and children in the region, particularly victims of domestic abuse, was highlighted. Despite ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa the previous year, as of September 2006, Mozambique does not yet have a domestic violence or sexual offences act.[427] Although cases of gender violence have been brought to the court under the Criminal Code, a member of the NGO AMMCJ said: 'We want a domestic violence act because it would cover more areas of gender violence, such as economic violence and abandonment, and the act will give judges more flexibility in sentencing.'[428]

D. Appropriate remedies and sentencing

Although the 2004 Constitution provides that indefinite prison sentences are not permitted,[429] the Criminal Code prescribes extremely harsh sentences for certain crimes (for example, arson).[430] Others, such as domestic violence, are not directly covered. Revision of the Criminal Code has been underway for several years and a draft bill was proposed by UTREL in July 2006. Mozambique has one of the world's lowest rates of imprisonment[431] and this does raise questions on whether the justice system is working effectively to protect victims. There has been some debate in particular, on the adequacy of protection for women and children, and it is essential that the new Criminal Code includes strengthened provisions in this respect.

The current legislative framework does not provide for alternative non-custodial sentences. Particularly in light of the high percentage of young prisoners, more debate involving both the state and civil society is needed on alternative sentencing. Although a Juvenile Court has been implemented in Maputo, greater priority needs to be given to juvenile justice and reintegration of young offenders in particular. The government's 2002 prison policy recognised the need for futher discussion on alternative sentencing, although since then there has not been any real debate on this area.[432] The most recent draft of the revised Criminal Code available on UTREL's

426 Government of Mozambique, *Balanço do PES 2005*, Maputo, p.131.

427 Irin News, '*Mozambique: More legal protection required for gender violence survivors*', Maputo, 15 December 2004.

428 Ibid.

429 2004 Constitution, art. 61, no. 1.

430 Luis Mondlane, 'Nurturing justice from liberation zones to a stable democratic state', *Human Rights Under African Constitutions – Realizing the Promise for Ourselves*, Abdullahi Ahmed An-Na'im (ed.), University of Pennsylvania Press, Philadelphia, 2003.

431 International Centre for Prison Studies at www.prisonstudies.org.

432 *Prison Policy (Política Prisional)*, approved by resolution no. 65/2002, by the Council of Ministers, 27 August 2002.

website (as of April 2006) introduced two alternatives to custodial sentences in the form of community sentences *(prestação de serviços á comunidade)* and warnings *(admoestação)*.[433] However, no further details were outlined.

The issue of alternative sentencing is complex. Press articles and editorials regularly report on acts of crowd violence against police or suspects who have been released on bail or due to lack of evidence.[434] Imprisonment and use of force is still seen by citizens who suffer from the country's high crime rates as the most effective and satisfactory way to apply and enforce law. In this context, debate on sentencing is undoubtedly a complicated field to negotiate.

E. Pardons and amnesties

The 2004 Constitution, like the 1990 Constitution, provides Parliament with the power to grant amnesty and pardons,[435] and the president with the power to grant pardons and commute sentences.[436] The last act of amnesty took place following agreement of the 1992 General Peace Accords (GPA) that ended the civil war, during which mass atrocities had been committed by both sides. A general amnesty was included in the GPA to allow the reintegration of ex-combatants into society. Since then, there has been limited debate on bringing suspected participants in the violence to justice, with the prevailing feeling that reconciliation over retribution is necessary to maintain peace. From time to time, usually in the run-up to elections, media coverage of past atrocities committed does increase; for instance, regarding the detention camps that FRELIMO operated in remote parts of the country, and the killings ordered from within the FRELIMO hierarchy of well-known dissenters and opponents, both after independence and during the civil war.[437]

F. Prisons

Legal framework

During Portuguese rule, prisons were under the control of the Ministry of Justice,[438] but with independence in 1975, management of the system was divided between the Ministry of the Interior and the Ministry of Justice.[439] Both ministries had a National Directorate of Prisons that was responsible for management and administration of prisons under their ministry. Under this framework, the Ministry of Justice was responsible for central, provincial and district prisons (*cadeias centrais, cadeias provinciais, cadeias distritais)*, a women's prison *(Centro de Reclusao*

433 **See** *Explicatory Notes of the Criminal Code (Notas explicativas)*, p.5 and *Fundamentals of the Criminal Code (Fundamentação)*, p.30, at http://www.utrel.gov.mz/word_files/cpenal_nexpl_fund_laprova.doc, last accessed 18 April 2006.

434 For instance, *Jornal Notícias*, 'Crowd lynches criminals in S.Damaso' (*Populares lincham criminosos no. S. Damaso*), Maputo, 26 January 2005; *Jornal Notícias*, 'Residents invade building complaining about lack of police action – on a Monday of fear, the crowd lynches two criminals' (*Moradores invadem esquadra contestando inoperância polícial – na segunda feira de pavor, populares lincham dois gatunos*), Maputo, 15 September 2005.

435 2004 Constitution, art. 179, no. 2.

436 Ibid, art. 159, (i).

437 See Bernabé Lucas Nkhomo, *Urias Simango, a Man and a Cause (Urias Simango, um Homem uma Causa)*, Maputo, 2004, p.11.

438 The main legislative instruments are decree-law 26.634 of 1936, with some amendments through decree-law 39.997 of 1954.

439 Decree-law no. 1/1975.

Feminina de N´dlavela), penitentiary prisons *(penitenciárias)*[440] and open prisons *(centros abertos)*. The Ministry of Interior was responsible for civil prisons (for prisoners on remand and for less serious crimes such as theft), maximum-security prisons, and police stations. Before a detainee was formally charged, they were housed in a prison of the Ministry of the Interior, and upon charge, either a prison of the Ministry of the Interior or of the Ministry of Justice, depending on the charge laid.

The division of management responsibilities and lack of a coherent planning system led to serious coordination problems in the prison system. In recognition of the critical need for reform,[441] in 2002, the Council of Ministers passed a resolution approving a new prison policy and strategy (*Política Prisional)*.[442] Consultation during the elaboration of the plan was weak; even across government, other ministries, for instance the Ministry of Health and Ministry of Social Welfare, were not consulted. However, the policy recognised many of the key problems facing the prison system, including overcrowding and poor conditions of detention, lack of measures for the reintegration of offenders, human resource issues, and financial and planning difficulties. It stressed the need for total reform of the legal framework governing prisons, and recommended that the Ministry of Interior and Ministry of Justice should work together towards unifying the dualist administrative structure.[443]

Indicating a clear commitment to reunification of the system, the Technical Unit for the Unification of the Prison System (*Unidade Técnica de Unificação do Sistema Prisional*, UTUSP) was set up under the supervision of the Ministry of Justice, with the remit to draft a new legal framework. The new legal framework for a unified prison system was finally approved by decree-law in May 2006, with the creation of the National Prisons Service (*Serviço Nacional das Prisões*, SNAPRI);[444] SNAPRI is now the sole organ responsible for the management and administration of prisons in Mozambique. The main duties of SNAPRI include:

- Oversight of the legality of detentions;
- Execution of security measures;
- Supervision of prison management;
- Reduction of the number of detainees;
- Promotion and management of detainees' labour agreements;
- Creation and implementation of policies and strategies for social reintegration;[445]

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440 Penitentiary prisons house prisoners serving sentences of longer than two years.

441 See for instance, UNDP, *The Prison System in Mozambique*, Maputo, 2000; *Prisons in Mozambique: Report on a visit 14–24 December 1997 by Prof. E V O Dankwa, Special Rapporteur on Prisons and Conditions of Detention in Africa*, African Commission On Human & Peoples' Rights, Series IV N°3; *Prisons in Mozambique: Report on a second visit April 4–14, 2001 by Dr Vera Chirwa Special Rapporteur on Prisons and Conditions of Detention in Africa*, African Commission on Human and Peoples' Rights, Series IV N°8.

442 *Prison Policy (**Política Prisional**)*, approved by resolution no. 65/2002, by the Council of Ministers, 27 August 2002.

443 Ibid., pp.5-6. The policy provides for reform in the following areas: a) institutional organisation and decentralisation; b) institutional communication and cooperation; c) infrastructure and property; d) human resources and professional training; e) treatment of prisoners; f) prison monitoring; and g) legal reform. Commitments were also made to meeting conditions stipulated in the UN Standard Minimum Rules for the Treatment of Prisoners, and the Kampala Declaration on Prison Conditions in Africa.

444 Decree-law no 7/2006, 17 May 2006, creating the National Prison Service.

445 Ibid, art. 3.

The division of prisons will remain in place until implementing legislation is passed. There are approximately 12 central and provincial prisons that house prisoners serving sentences of longer than three months, and approximately 40 open prisons (prison farms where prisoners who have demonstrated good behaviour or are reaching the end of their sentence engage in agricultural or other activities).[446] The Ministry of the Interior has approximately 16 prisons and also two open prisons.[447] The prison system does not provide for separate correctional centres for youth offenders. There are no private prisons in Mozambique.

Rate of imprisonment

In 2000, there were a total of 8 812 detainees in Mozambique's prisons, split between the old prisons of the Ministry of Justice (5 782) and the Ministry of the Interior (3 030).[448] Mozambique's rate of imprisonment is low, with 50 prisoners per 100 000 people, compared to an average among African countries of 112 per 100 000.[449]

A high percentage of the prison population is very young. In 2001, the police launched an anti-crime initiative which resulted in an influx of young prisoners, many of whom are awaiting trial for petty crimes. Just below 30 per cent of convicted prisoners are aged between 16 and 20 years old. Under-25s represent 48 per cent of convicted prisoners, rising to 63 per cent of the total prison population (including detainees on remand).[450] Minors below 16 years of age should not be held in prison; however, during visits to prisons the Special Rapporteur of the African Commission came across cases of young people claiming to be under 16 years of age.[451] Although the police must register the identities of those they are detaining, until recently, many citizens did not have an identity card, so ages registered are not necessarily correct in any event.[452]

In 2000, women represented approximately 6 per cent of the total prison population.[453] More recent data provided by the Ministry of Justice indicated that in June 2002, women formed 3.4 per cent of prisoners in the Ministry of Justice's prisons.

Conditions of detention

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 healthcare.

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446 *Prisons in Mozambique: Report on a visit 14–24 December 1997 by Prof. E V O Dankwa, Special Rapporteur on Prisons and Conditions of Detention in Africa*, African Commission on Human and Peoples' Rights, Series IV N°3. For further information on open prisons, see UNDP, *Open Prison Centres in Mozambique*, Maputo, 2001.

447 Ibid.

448 UNDP, *The Prison System in Mozambique*, Maputo, 2000.

449 International Centre for Prison Studies at www.prisonstudies.org. In southern Africa, South Africa has 402 prisoners per 100 000 people; Botswana 324; Swaziland 327; Nambia 267; Zambia 121; Tanzania 116; and Malawi 70.

450 UNDP, *The Prison System in Mozambique*, Maputo, 2000.

451 *Prisons in Mozambique; Report on a second visit April 4–14, 2001 by Dr Vera Chirwa Special Rapporteur on Prisons and Conditions of Detention in Africa*, African Commission on Human and Peoples' Rights, Series IV N°8. p.31.

452 A new civil registration process has begun to issue identity cards, although there is still some way to go before all Mozambican citizens are registered.

453 UNDP, *The Prison System in Mozambique*, Maputo, 2000.

One of the principal issues in the system is overcrowding: in 2000, the occupancy level was 144 per cent, based on an official prison capacity of 6 119.[454] The Mozambican Human Rights League (LDH) found in September 2004 that there were 2 538 detainees in a facility intended to house 800 prisoners.[455] Many prisons are in a state of extreme disrepair (increased by flood damage in 2000), meaning that the actual capacity of the prison system is far below its theoretical capacity: some areas of prisons are uninhabitable, and other prisons are completely closed.[456]

In these circumstances, prisoners face dismal conditions, with poor food and lack of access to clean water; atrocious sanitation, with lack of soap, cleaning equipment, and limited access to bathroom facilities and water; and lack of basic necessities for living including plates, beds, blankets and clothing. Prisoners often do not receive exercise.[457] Only prisoners that receive outside support from their families manage to maintain slightly better conditions. Quality of medical care varies from prison to prison, but there is frequently a lack of medication and purpose-built hospital wards, or staff are not available to take prisoners to hospitals outside the prison. Tuberculosis, malaria, skin diseases and HIV/AIDS are the main problems that affect the prison populations; sickness and death from HIV/AIDS is an increasing problem. There is no provision for early release of terminally ill prisoners. To provide but a few examples of results of reporting from independent visits to prisons: in 2001, the Special Rapporteur described the conditions at Tete Maximum Security Prison (under the authority of the Ministry of the Interior), as 'life threatening';[458] in 2002, the LDH put forward individual recommendations on improving conditions for each prison;[459] and in 2004, a national team including members of the Bar Association visited several prisons, including Beira Central Prison, and reported on uninhabitable conditions.[460]

Although there is a separate women's prison in Maputo, the *Centro de Reclusão Feminina de N´dlavela*, women are also housed in other prisons. In principle, men and women are kept separate; however, this separation is not always enforced. Other types of segregation foreseen in the UN Standard Minimum Rules for the Treatment of Prisoners, such as separation of awaiting trial prisoners from convicted prisoners; juveniles from adults; or even healthy prisoners from the sick, are rarely implemented.[461] The non-separation of young offenders, including those below 16, from the older ones has the same dramatic effect as in most of the prisons in the world, turning prisons into to a highly efficient 'crime training centre'.[462]

Prison staff are in short supply, particularly trained staff. Some studies suggest that discipline and punishment measures include inhuman treatment and torture. According to a UNDP

454 Ibid.

455 LDH cited by U.S. State Department, *Country Report on Human Rights Practice*, 2004.

456 *Prisons in Mozambique; Report on a second visit April 4–14, 2001 by Dr Vera Chirwa Special Rapporteur on Prisons and Conditions of Detention in Africa*, African Commission on Human and Peoples' Rights, Series IV N°8, p.8-10.

457 Ibid., See also LDH, *Human Rights in Mozambique 2000-2002*, Maputo, p.67.

458 Ibid., p.30.

459 LDH, *Human Rights in Mozambique 2000–2002*, Maputo.

460 *Mozambique News Agency*, 'Hundreds of prisoners awaiting trial', *AIM Reports*, 3 February 2005.

461 *Prisons in Mozambique; Report on a second visit April 4–14, 2001 by Dr Vera Chirwa Special Rapporteur on Prisons and Conditions of Detention in Africa*, African Commission on Human and Peoples' Rights, Series IV N°8, p.10.

462 *The Condemned of Maputo (Condenados de Maputo)*, Luis de Brito, Maputo, 2002.

study of the prison system in Mozambique, approximately one-third of women and under-age prisoners stated that violence occurred.[463] Corruption among prison staff is unmeasured, but appears to be a problem, especially in relation to high-profile prisoners connected to organised criminal networks. The most notorious case is that of Anibal dos Santos Junior (Anibalzinho), now convicted for his role in the Cardoso murder, who managed to twice escape from the high security prison at Machava within a period of two years.[464] Over the past few years two prison directors have been murdered; in 2003, the director of Maputo's maxiumum security prison, and in 2005, the director of Maputo Central prison.[465]

The government has taken some initiatives towards decongesting and improving conditions in prisons. Funds have been allocated through the state budget for rehabilitation of prisons, although execution of these funds has been slow.[466] Over the last few years, there have also been some 'field trials' *(julgamentos em campanha)*, whereby judges visit prisons directly in order to review the legality of detentions, and judge cases related to crimes for which the sentence would not be more than two years imprisonment. The practice of 'field trials' is not established by law and some see a risk of increased corruption in justice being administered outside of the courts, for instance with the risk of bribes being offered to judges. Institutionalisation of this new practice, including a legal framework, would be a way of moving toward standardised good practice.

Fundamental structural issues also still need to be addressed. Overcrowding is linked to a number of issues within the justice sector, particularly the criminal justice system, including: outdated legislation regulating criminal procedures, a lack of provisions for alternative sentencing, and major bottlenecks and delays in bringing cases to trial. Problems with institutions of the justice system (the Criminal Investigative Police, prosecution, courts, Ministry of Justice), should not be seen as issues of individual institutions, but rather as part of the criminal justice system as a whole. Steps have been taken toward improving the efficacy and the capacity of the judiciary, but it seems that the prison sector will be the last link in the chain to benefit from wider reform of the justice sector.

Oversight of prisons

National and international NGOs have reported on prison conditions, but need special permission to visit prisons (which was easier to obtain from the Ministry of Justice than the Ministry of the Interior). The two visits of the African Commission on Human and Peoples' Rights Special Rapporteurs on Prisons and Conditions of Detention in 1997 and 2001 have played an important role in highlighting poor conditions in Mozambique.

An innovative measure has been the implementation of Commissions to Strengthen the Rule of Law *(Comissões de reforço da legalidade)*. These commissions tour prisons and check prisoners' files to review the legality of their detention. They operate at the provincial level and include representatives from the Ministry of Justice, provincial police command, Public

463 UNDP, *The Prison System in Mozambique*, Maputo, 2000.

464 *The New York Times*, 'A trial ends in Mozambique, but many questions, however, remain,' 21 January 2006.

465 *Mozambique News Agency*, 'Prison Director assassinated,' *AIM Reports*, 4 November 2005.

466 Government of Mozambique, the *Balanço do PES 2005* reported that rehabilitation work was still underway on penitentaries in Mabalane, Manica and Nampula, and that work had been completed on a prison in Matutuíne to allow capacity for an additional 1 500 prisoners, p.110.

Prosecution Service, judiciary and the director of the prison under review. In 2004, these commissions visited several prisons.[467]

The 2002 prison policy defined two types of monitoring, internal and external. The Special Rapporteur referred to an internal complaints mechanism in place that prisoners can use, although there is little further information available on how this complaints mechanism operates.[468] The prison policy provides that external monitoring should be carried out by institutions of the justice sector, together with 'other institutions or bodies that have legal competencies for monitoring, within the framework of the Constitution and legislation in force'. The policy does not further specify which bodies should form this external monitoring mechanism. The policy also provides for an 'advisory committee', including civil society groups, to oversee issues related to conditions of detention. As of September 2006, there was no further legislative framework for external monitoring, and there are currently no domestic independent, institutionalised mechanisms for oversight of prison conditions. As with the police force, this is a critical gap that needs to be filled.

G. Non-state action against crime

After independence and in the context of the 'revolution', peoples' vigilante groups (*grupos de vigilância popular,* GVPs*)* were visibly active and linked to the state intelligence service, *Serviço Nacional de Seguranca Popular* (SNSP). Later, during the civil war, volunteers were encouraged to contribute to the security of local communities, often with help from the army, including arms and training.

By and large, the promotion and use of vigilante groups by the state is no longer common practice. It seems the main cause of vigilante activity, when it does occur, is a perception that the police and judiciary are unable to respond to crime, leading citizens to seek justice by their own means. The presiding judge of the district court of Chókwe suggested a correlation between the frequency of vigilante activities in Chilembene and the absence of any accessible court:

> Many cases of vigilante activity occur around Chilembene. The district administrator has begun an awareness campaign, urging citizens to avoid taking the laws into their own hands. I believe that the fact there is no court nearby leads to many of these cases. Chilembene is approximately 60 km away from Chókwe and many people do not know that there is a court there, they only know about the police station. Here in Chókwe, vigilante cases are rare as people go first to the police, and then to the prosecutor. One of the reasons why people do not approach the court from other areas in the district is that it is very far for them—it could take them a day or two to reach the prosecutor or court. The lack of community courts in the district may also be an aggravating fact…[469]

The presiding judge of the district court at Montepuez added that even in areas where courts exist, the poor quality of their service may still lead to citizens taking spontaneous action:

> Yes, we have heard of citizens taking the law into their own hands. For

467 Interview with Executive Secretary of CCLJ, July 2005.

468 *Prisons in Mozambique; Report on a second visit April 4–14, 2001 by Dr Vera Chirwa Special Rapporteur on Prisons and Conditions of Detention in Africa*, African Commission on Human and Peoples' Rights, Series IV N°8, p.19.

469 Interview with presiding judge of district court of Chókwe, 6 August 2005.

example, there was the case of an individual who was caught red-handed burgling a house. The crowd beat him, and after they drove a nail through his head, he died. We are dealing with the case in our court now. The main victims of this type of violence tend to be thieves. These cases occur even here, where we have a court and other law enforcement authorities. In my view the cause of these acts is not only the absence of courts but the fact that these courts do not function properly. There are other causes behind this violence that should also be taken into account; sometimes it is motivated by emotions such as revenge.

Although the government is attempting to discourage vigilante activity by bringing cases against perpetrators, it is very difficult to pin down responsibility for vigilante activity as often potential witnesses are in solidarity with perpetrators.[470]

Vigilante action: citizens take the law into their own hands

On Monday morning, 12 September 2005, a group of inhabitants residing in Mavalane 'B' Quarter, in the city of Maputo, marched to the local police station, located in the Hulene neighbourhood, apparently in order to present the police authorities with a range of complaints related to criminal activity affecting their neighbourhood. Responding to the demonstrators' concerns, the police authorities said that their main problem was a shortage of means in allowing them to fully address criminality. This response infuriated the crowd who retaliated by lynching two alleged criminals that were either amongst the demonstrators or in the police station and had been caught red-handed a couple of hours before. One of the presumed criminals was beaten to death and the other was burned after being tortured by the crowd.

The neighbourhood was experiencing a general sense of terror because of a crime wave, largely due to criminals from nearby neighbourhoods such as Hulene and Laulane, who were shooting, attacking, torturing and raping citizens. These crimes were reported to the local authorities but no action was taken, creating a sense of impunity. It was reported that after the assault and lynching took place in the police station, citizens were heard to say that while the police continue to abide by a culture of 'let it be', ignoring citizens' concerns, indifferent to the unstable situation they face, lynching may become the most effective method to fight the criminality threathening the neighbourhood.

SOURCE
Jornal Notícias, 'Inhabitants invade police station contesting police ineffectiveness', 15 September 2004.

470 Ibid. Also, written information provided by AMMCJ to AfriMAP, 28 March 2005.

6

Access to justice

On balance, despite reform efforts, the state is unable to guarantee access to justice for its citizens, particularly those living in remote areas. The reality for most Mozambicans is that the judicial courts are inaccessible, blocked by a range of obstacles including financial constraints and their physical location. As a result, many citizens continue to rely on alternative mechanisms of dispute resolution, including community courts and traditional or other local leaders. Improving access to justice for the majority of citizens involves addressing obstacles to the formal courts, and paying much greater attention to the informal arena. The government should ensure that constitutional and human rights standards prevail even in the absence of written law, and provide much greater material and technical support to these mechanisms.

A. Knowledge of rights

Awareness and knowledge of rights is extremely low amongst most Mozambicans. There are no systematic surveys or studies that have measured 'levels' of awareness, or identified social groups or geographic regions where the problem is most accentuated. However, the issue is broadly acknowledged by senior figures in the justice sector. For instance, in 2001, the prosecutor-general spoke of the need to raise awareness of rights amongst the broader population in his annual address to Parliament.[471] In 2005, the president of the Supreme Court also spoke of the problem:

> When discussing issues of legality and access to justice, we are tempted to reduce them to the functioning of the courts, the Public Prosecution Service, police, prisons...But there are other factors that limit the degree of access to justice, such as ignorance or lack of knowledge of the law

471 Annual address of the prosecutor-general to Parliament, AR/Infor/156/07.03.2001, p.41.

> by citizens, the absence of legal culture and generalised corruption. Our access to justice presupposes the knowledge of rights and liberties inherent to the condition of citizenship. We live in a society where formally the the law rules, but we are dominated by an enormous lack of knowledge of the law.[472]

Efforts made by the state to disseminate information amongst citizens regarding rights and legislation have been highly sporadic. The Technical Secretariat for Electoral Administration (*Secretariado Técnico de Administração Eleitoral,* STAE), [473] carried out some civic education campaigns in the run-up to elections, informing and encouraging citizens to exercise their right to vote. In the mid-1990s, the Ministry of the Interior ran a successful TV show, *Pela Lei e Ordem* (For Law and Order), that broadcast rights awareness messages. Over the past few years, there has been no real effort on the part of the state to raise rights awareness. The courts have also been inactive in this respect, despite article 213 of the 2004 Constitution, which sets out that the courts should educate citizens and the public administration on observance of the law, thereby promoting 'a just and harmonious social community' *(uma justa e harmoniosa convivência social)*. In particular, citizens need information on the new provisions included in the 2004 Constitution's Bill of Rights; or else these provisions risk becoming mere rhetoric.

Civil society organisations have played a more active role in education on rights. For instance, during the period 1996–1997 when the state was formulating a new land law, NGOs, churches and community leaders campaigned together *(Campanha Terra)* to mobilise citizens for advocacy purposes. After the Land Law was approved, they worked towards informing citizens of their new, improved rights. Nonetheless, despite some notable efforts on the part of civil society, overall, citizen awareness of fundamental human rights remains very poor.

B. Physical access

Poor physical access to courts, particularly for citizens located in districts far from urban areas or provincial capitals, is a real impediment to the realisation of access to the judicial courts. The *National Survey on Governance and Corruption* showed that the physical location of courts is one of the top three obstacles to access to justice, the other two being the financial costs involved and corruption (which, indirectly, also has implications for financial access).[474] Only 5 per cent of families surveyed had resorted to a judicial court in the past year: 2.9 per cent of families in rural areas and 6.9 per cent in urban areas.[475]

The Organic Law of the Judicial Courts provides for each province to have a provincial court and each district to have a distict court.[476] Whilst each of the provinces has a functioning provincial court, there are only 93 operating district courts spread over Mozambique's 128 districts. [477]

472 Annual address of the president of the Supreme Court on opening of the judicial term, March 2005, pp.12-13.

473 STAE is integrated in the Ministry of State Administration (MAE), but is functionally dependent on the National Electoral Committee (CNE).

474 *National Survey on Governance and Corruption*, 2003, p.16.

475 Ibid., pp.176-177.

476 Organic Law of the Judicial Courts, 1992 (Law no. 10/1992).

477 Annual address of the president of the Supreme Court on opening of the judicial term, 2006, p.7.

Moreover, some centrally located districts have more than one district court, further concentrating their geographic spread.

In the context of the immense distances within Mozambique (the country's coastline is almost 2 500km long), compounded by a very poor transport network, the distance citizens need to cover to get to courts is in many cases prohibitive. This is particularly true if a case brought by a citizen needs to be heard in a provincial court, as indeed would apply to any criminal charge punishable by a sentence over two years. Even within districts, distances between settlements and the main village where the court is located can be very far: for instance, Chókwe to Chilembene (55km), or Nova Mambone to Jofane (more than 100km). In reality, the community courts, of which the Ministry of Justice estimated there were 1 653 in July 2004 (although a proportion of these may be functioning only in name), represent a much more accessible mechanism for many citizens.[478] In general, courts do not have access to facilities such as access ramps or parking bays for handicapped individuals. The Supreme Court was rehabilitated in 2002, but no provisions were made for handicapped individuals.

In coordination with the provincial Public Prosecution Service, the court authorities of Inhambane province have begun travelling to remote districts such as Nova Mambone, where they have conducted provincial court sessions as a way of bringing the courts to citizens.[479] As yet, this is an ad hoc mechanism that has not been institutionalised, but it represents a potentially important measure to improve citizens' access to the courts. The president of the Supreme Court has been visiting provincial and district courts to encourage this practice, but it remains to be seen how extensively it will be taken up.

c. Financial access

Financial access to justice in Mozambique cannot be separated from the broader question of the serious level of poverty within the country. As of 2003, 54 per cent of the population was living below the poverty line (living on less than one US dollar a day)[480] and the average annual per capita income was US$259.[481] In 2005, Mozambique ranked 168, or 10th from bottom, in the UNDP's Human Development Index. In this context, even if court fees are waived and legal representation provided, the cost of related expenses such as transport to the courts, and of accommodation away from home can become an enormous, insurmountable burden.

Court fees

For the average citizen, court fees needed to lodge a case are prohibitively expensive. As Counsellor Judge Luís Mondlane said, 'If we analyse the amount citizens have to pay for justice in absolute terms, it is not as high in comparison with courts in other countries; however, for a country as poor as Mozambique, the impact is serious.'[482]

478 Ministry of Justice, Report of the 10th Coordinating Council of the Ministry of Justice, Tete, 13–15 July 2004, as cited in Justice Administration System Framework bill. See also chapter 6.F, Community courts.

479 Interview with presiding judge of the district court of Nova-Mambone, 6 August 2005.

480 President Guebuza, speech to the UN High-Level Plenary Meeting, 15 September 2005, New York, USA.

481 Report on the Millenium Development Goals, Mozambique, August 2005, at http://siteresources.worldbank.org/INTMOZAMBIQUE/Resources/undp_mdg_rptpdf.pdf. Last accessed 21 March 2006.

482 Interview with Judge Luís Mondlane, Maputo, 14 February 2005.

The framework for court fees is set out in the Code of Judicial Court Costs *(Código das Custas Judiciais)*,[483] and is extremely complex and lacking in transparency. An advocate interviewed said:

> I do not know if anyone understands the calculations ... I don't even believe that the judges do ... for example, whenever I complain that the fee is too high, the judge allows a decrease. Once, a judge more than halved the initial value of fees he had prescribed.[484]

For instance, the following costs would apply for lodging a civil case valued at approximately 5,000,000 MT (US$187).[485] The same method of calculating court fees applies to both provincial and district courts:

- The justice tax *(imposto de justiça)* would be calculated at a rate of 9.5 per cent, with the addition of a fixed fee: 5,000,000 MT x 9.5 per cent + 50,000 MT = 525,000 MT; plus
- A fixed fee of 5,000 MT charged for each case submitted to court; plus
- A fee of 500 MT for each sheet of paper used to make up the case file; on the basis of 10 sheets of paper this would be calculated as 500 MT X 10 = 5,000 MT; plus
- An additional tax which may vary up to a maximum amount of 25,000 MT, in this case: 5,000 MT; plus,
- The national defence tax: in this case, 5,000 MT;
- Postage costs would also be included if applicable.

These various costs add up to 545,000 MT (approximately US$20), corresponding to roughly 11 per cent of the value of the case. Although the Code of Judicial Court Costs provides for some specific exemptions regarding payment of fees (as for instance, in relation to inheritance below a certain value),[486] it does not provide any general exemption to those below a certain income level. For those with proof of indigent status, exemption can be granted on a request basis. At a round table, advocates suggested that judicial fees should be calculated in a more simplified manner, with fixed fees according to the value of the case.[487]

Cost of legal advice

The financial barrier posed by court fees is further compounded by advocates' fees. For instance, in Maputo, advocates charge an average of US$25/hour, or a total sum of approximately US$350 for a relatively simple case settled outside of court. For a well-known law firm, the costs would rise closer to US$150/hour or a total minimum sum of US$1 500 for a case.

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483 Code of Judicial Court Costs, updated by decree no. 14/1996, May 1996.

484 Round table held at the Mozambican Bar Association, Maputo, 2 March 2005.

485 Exchange rate as of September 2006, www.oanda.com. Based on World Bank, *World Bank Legal and Judicial Sector Assessment*, 2004.

486 Code of Judicial Court Costs, 1996.

487 Round-table held at the Mozambican Bar Association, Maputo, 2 March 2005.

Whilst in theory, a legal representative is appointed to those who cannot afford a lawyer, in practice, the refusal of most members of the Mozambican Bar Association or of IPAJ to provide legal representation means that they are appointed with an ad hoc representative, or increasingly, rely on paralegals from civil society organisations (see chapter 5.C on Fair trial, Right to representation).

Cost of irregular payments

In addition to the visible costs posed by court and advocates' fees, corruption in the form of bribe-seeking constitutes a further financial hurdle. The National Survey on Governance and Corruption showed that 35 per cent of households believed that if one goes to the courts, a bribe needs to be paid.[488] The Mozambican Association for Women Lawyers (AMMCJ) indicated that they were aware of cases where applicants had been asked for bribes.[489] The Prosecutor-General has publicly spoken of the risks of bribe-seeking discrediting the justice system:

> Employees in the justice system easily succumb to easy profits in the form of gratifications and bribes; and because of this, citizens think that it is pointless to complain about violations of the law if the perpetrator has a financial advantage over them...in such a situation, the rule of law does not, and cannot, exist.[490]

D. Right to appear and jurisdictional restrictions

Civil law systems tend to be weak in comparison to common law systems regarding *locus standi* (the right to appear) and *amicus curiae* (friend of the court) petitions. The two terms are not familiar to the Mozambican legal system. Some civil law countries such as Brazil (although not Portugal), have now extended *locus standi* and introduced *amicus curiae*.

In Mozambique, the closest approximation is the right of 'popular action' *(direito de acção popular*), first introduced in the 2004 Constitution (art. 81). Both as individuals and as part of a group, citizens are provided with the right to claim compensation; and the right to act in defence of public health, consumer rights, environmental conservation, cultural heritage and public property. However, implementing legislation to bring this provision into effect has not yet been approved, and it is unclear what the status of such legislation is. Several years ago, a foreign company was involved in exploration and arguably theft of archaeological treasures, including antique Chinese and Persian porcelain that had been discovered in sunken ships along the coast of the Island of Mozambique. Local residents attempted to bring a case to the courts to stop the company's actions, but the court ruled that they could not bring their case due to lack of a legal framework enabling popular actions.

It is imperative that enabling legislation be passed in order to allow enforcement of this constitutional right. The Land Law implicitly provides for the right of popular action; local communities, as an entity, have the right of use of land without having to form an association, company or other legal status.[491]

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488 *National Survey on Governance and Corruption*, 2003, p.194.

489 Written information provided by AMMCJ to AfriMAP, 28 March 2005.

490 Annual Address of the prosecutor-general to Parliament, AR – V/Infor./156/07.03.2001, p.29.

491 Land Law, 1997 (Law no. 19/1997), art. 12.

As with most court systems across the world, the level of court in which a case is heard depends for civil cases on the value of the case, and for criminal cases on the sentence corresponding to the crime.

Civil cases with a value of less than 30,000,000 MT (roughly US$1 200)[492] should be heard first in the district courts, and of more than 30,000,000 MT in the provincial courts. The district courts should also be used for all family law cases, apart from in instances of non-consensual divorce; these cases should be heard in the provincial court. [493] For those living in rural areas far from the provincial capitials, particularly women, unable to leave their children or home for a period of several days, this may constitute a serious impediment. With regards to labour disputes, cases with a value of 3,000,000 MT (US$120) or more should be heard first in the provincial courts, of 1,000,000 MT (US$40) or more in a first class district court, and of 500,000 MT (US$20) or more in a second class district court.

On the right to appeal, in civil proceedings, restrictions are determined by the amount or nature of the case. Cases of a value below 15,000,000 MT (US$600) submitted to the district judicial courts cannot be appealed in the provincial courts. Cases of a value below 30,000,000 MT submitted to the provincial courts cannot be appealed in the Supreme Court. In practice, due to the financial constraints faced by most Mozambicans, appeal in civil cases is not an option. For criminal cases, family law and cases regarding intellectual rights, there are no limits on the right to appeal.

E. Delays in court proceedings

Lawyers interviewed indicated that in their experience, civil procedures can take between three and four years to reach a court of first instance, and anything up to nine to 11 years if appealed in the Supreme Court.[494] At the beginning of 2005, there were 699 civil cases[495] pending in the Supreme Court and during the year, 484 new cases entered the system. At the the end of 2005, 1 070 cases were still pending; the Supreme Court was able to close only 10 per cent of cases awaiting judgment.[496] As lawyers interviewed recognised, for individuals able to bear the financial costs, the action of lodging an appeal can constitute a useful mechanism in delaying compliance with court orders. Even restraining orders (*providências cautelares*), which by law should be decided upon within 30 days of submission,[497] are being delayed. Data provided by the provincial court in Sofala indicated requests for restraining orders that had been heard but not decided for up to five years.[498]

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492 Exchange rate as of September 2006, www.oanda.com.

493 Law on Consensual Divorce (*Lei do divórcio não litigioso*), 1992 (Law no. 8/1992), 6 May 1992, art. 7, no. 2; Civil Procedure Code, art. 312. See also decree no. 24 of 1998, on jurisdiction of the judicial courts.

494 Round table held at the Mozambican Bar Association, Maputo, 2 March 2005. For procedural delays with criminal cases, see chapter 5.C, Fair trial; this chapter focuses on civil cases.

495 This includes labour cases (362 of 699 cases pending at the beginning of 2005, and 670 of 1 070 cases pending at the end of 2005).

496 Statistical and Legal Information Department, Supreme Court, *(Cases through the Supreme and Provincial Courts 2000-2005) (Movimento Processual do Tribunal Supremo e dos Tribunais Judiciais de Provincia, 2000–2005)*, Maputo, 2006.

497 Civil Procedure Code, art. 381/a, no. 2 as according to law no. 10/2002, on restraining orders (*providências cautelares*), 12 March 2002.

498 E.g. case no. 109/2000 (submitted in 2000, as of 28 February 2005, not decided), case no. 53/2001 (submitted in 2001, as of 28 February 2005, not decided), case no. 104/2002 (submitted in 2002, as of 28 February 2005, not decided).

F. Community courts

In July 2004, the Ministry of Justice reported the existence of 1 653 community courts and approximately 8 265 community judges.[499] (See chapter 1.B on Structure of courts, for further information on the legal framework for community courts). The *Balanço do PES 2005* reported that during 2005, over 120 new community courts had been established.[500] By this measure, community courts are clearly more widespread and accessible fora for most citizens than the 11 provincial courts and 93 functioning district courts. However, the number of community courts may be considerably lower than official statistics indicate. In the 19 districts visited by AfriMAP, it was difficult to ascertain whether community courts functioned. In some cases, the local director of the Office of Notaries and Registries (as a representative for the Ministry of Justice) could not confirm whether community courts functioned or not.[501]

Problems that have led to the demise of these courts in some areas include a lack of financial support and personnel. Although they were not recognised in the 1990 Constitution, the 1992 Community Courts Law set out that implementation of community courts was the responsibility of provincial governors *(governos provinciais)*,[502] and it was widely understood that they would be funded and supported by the Ministry of Justice. However, the legal framework regarding community courts was not followed up with corresponding administrative, procedural or technical measures and the link between community courts and judicial courts was never clearly defined in further legislation. In effect, the courts were abandoned by the Ministry of Justice, receiving no financial, material or human resource support. They are under no formal control, including in relation to appointments, or law applied.

Where community courts exist, they can provide an accessible mechanism for the adjudication of citizens' disputes, particularly in areas where district courts may not be in operation, or are too far away for citizens to reach. In areas without a district court, the community courts are likely to hear a broad range of cases, as suggested by a police officer in Nacaroa:

> The lack of a judicial court in the district is a serious issue: we are forced to refer cases to the community court although we are aware that sometimes they are beyond their competencies. In addition to civil cases, we resort to the community courts for cases involving minor offences; for instance, attempted bodily harm that did not result in any physical injuries.[503]

In areas near district courts, where community courts have been implemented, they ease pressure on the formal system, acting as a buffer zone for the overstretched district courts, and allowing more rapid adjudication of disputes that can be easily decided. The presiding judges of

499 Ministry of Justice, Report of the 10th Coordinating Council of the Ministry of Justice, Tete, 13-15 July 2004, as cited in *Justice Administration System Framework bill*.

500 Government of Mozambique, *Balanço do PES 2005*, Maputo, p.107.

501 AfriMAP visited 19 district courts between 3–16 August 2005. See Annex A for further details.

502 Community Court Law, 1992 (Law no. 4/1992), art. 12. The legal framework of community courts is outlined in chapter 1.B, Structure of courts.

503 Interview with sub-inspector Francisco Amisse Mucorola, permanent officer, speaking on behalf of the chief of police of the district command of Nacaroa, Nampula, 11 August 2005.

district courts in Chókwe and Nova-Mambone (which did not have operating community courts) expressed that for this reason, the implementation of community courts would be desirable in their districts, in order to ease the burden of cases on the district courts.[504]

Community courts were recognised for the first time in the 2004 Constitution and UTREL is currently working on draft legislation to provide a new legal framework for these courts. New legislation is now urgently needed to integrate community courts into the judicial system. It is equally important that the new legal status of the community courts does not impede their efficiency and speed by encumbering them with bureaucratic procedures. Financial commitment is also needed to provide training for community court judges. Considering the broad scope and considerable volume of cases heard by community courts, this is an area in urgent need of attention.

Interview with a community court judge, Nampula province, 11 August 2005

'I have been the presiding judge of this community court for a long time. I come from the time of popular courts. My colleagues and I were elected by the former People's Local Assembly, in 1986. We have never received any specific training for our duties as community court judges. Only once, just after we had been elected, we spent a day in the provincial court and received some information on managing trials and on legalistic terms.

Our community court has eight judges and a clerk. We are all volunteers as there are no salaries. When we manage to raise some money it is distributed amongst the staff as an incentive. As the judges do not receive a salary, and have no other source of income, they are very demoralised.

Our district does not have a judicial court, and so the community court deals with almost all issues including those we know should be dealt with by a judicial court. The majority of issues we deal with come from the *secretarios de bairro*,[505] who refer them to us if they cannot solve them. We also have cases referred to us by the police stations. There are also people who contact the court directly.

We solve cases mainly on the basis of local customs and common sense (*lei costumeira*), but sometimes we refer to written law, especially in criminal cases. The court does not have its own copies of legislation. I personally have some copies of key pieces of legislation, such as extracts from the Criminal Code, the Community Courts Law, the Land Law, the Forest Law, Wildlife Law, and the new Family Law. I still do not have the new 2004 Constitution.

All cases we close are filed; we keep written records. We do not have a typewriter but we do it by hand. The sentences we administer include payment of fines and compensation, community work for the court or the district administration (e.g. sweeping or weeding). We do not have a prison in the district, but there is a cell near the police station where we house those we think

504 Interviews with presiding judges of the district courts of Chókwe and Nova-Mambone, 3–16 August 2006. The *secretario de bairro* in Chaquelane also indicated that the existence of a community court would be extremely beneficial, 7 August 2005.
505 Mozambican term for the government-appointed local leader of a neighbourhood (*bairro*).

should be detained while awaiting verdict, or if we issue a prison sentence. The maximum custodial sentence we can administer is for 30 days. However, we try not to set sentences longer than three to five days due to the poor conditions of the cell. We refer serious criminal offences such as murder to the PIC. In order to file a complaint to the community court, one must pay a fee, which can be from 5,000 to 20,000 MT depending on how serious the case is.

This community court, which is in the district capital, assists the 14 other community courts in the district. Many of these courts have seen a reduction in the number of judges because some have died or have moved to other places. There has never been a replacement process, for instance through elections. These courts do not have laws, only the law that rules the community courts. Sometimes I visit the other community courts in the district. The farthest is in Moria, on the border with Mecula district, which is a half-day bicycle ride away. Apart from the visits I conduct, we also hold two annual evaluation meetings. This year we have already had one in April, as usual at the district administration headquarters.

We do not have formal connections with the judicial courts, but when I go to Nampula, I am welcomed in the provincial court and they try to help me with my requests for technical support. For example, last year I was received by the presiding judge of the provincial court to whom I presented the issue of overload and the difficulties we face in dealing with cases that should be heard by the judicial courts. As regards this matter, I was just told to wait as there were no other instructions on the matter.

We do not have any institutional connection with the local authorities, although here in the district we do deal with the the district administrator. The district's director of notaries and registries is only involved when the provincial courts request data on the community courts. The community courts operate anywhere, at improvised locations, but here at the headquarters we have a building that was burned down during the war and needs to be rebuilt. Still, the space is adequate and we have some furniture, although major constraints include the lack of a typewriter and paper.

Traditional justice is also a reality in this district, especially the *régulos,*[506] who solve social problems and when they are unable to, refer them to us, as do the *secretários de bairro*. *Secretários de bairro* may have their own dispute mechanisms, but these are not related to the community courts. The trend nowadays is for the *régulos*, together with *secretários de bairro*, to approach community courts to find out how to handle their cases, in order to ensure they are making decisions in the right way.'

SOURCE:
AfriMAP interview, Nampula province, 11 August 2005.

G. Informal and traditional justice

Outside the fomal justice system recognised by law, there are a number of different elements that interact, reflecting the coexistence of different loci of authority within communities. Particularly outside of cities, traditional chiefs *(régulos)* often continue to exert influence alongside locally elected leaders recognised by the state; the *secretários de bairro* (neighbourhoods in town) or

506 Mozambican term for traditional chief or leader.

the *secretários da povoação* (in villages). In some areas, the *secretário* may in fact be the *régulo* in which case the two authorities are combined within one person. Both *régulos* and *secretários* are relied upon as arbiters in disputes within many local communities. Traditional healers, religious leaders and other informal bodies may also play a role. Particularly for minor disputes, these informal mechanisms within communities are likely to be used. As the district administrator of Nacaroa, Nampula province said:

> Citizens prefer to solve their social problems privately within the family or neighbourhood, with the help of local leaders, and that is where it ends.[507]

Traditional justice

Despite the 1975 constitutional provision (art. 4) for the elimination of traditional authorities and structures, traditional leaders and their courts have continued to exist and serve many citizens. The persistence of traditional justice is no doubt due in part to inadequate access to judicial and community courts, as well as the sheer rootedness of local customs and practices. Marking a shift from prior policy, the 1990 Constitution recognised 'Mozambican' traditions, culture and values,[508] although traditional authorities were not formally recognised until 1997, through the Local Government Law *(Lei dos Órgãos Locais do Estado)*.[509]

Although the 2004 Constitution did not expressly refer to traditional justice, space was opened up for this in the future through the recognition of legal pluralism[510] and the provision that 'the law may establish institutional and procedural mechanisms for links between courts and other fora whose purpose is the settlement of interests and the resolution of disputes.'[511] To date, traditional justice dispute mechanisms have operated outside of the constitutionally recognised court system and there are no indications that UTREL is working on legislation to alter this status quo. The question of how to operationalise the principle of legal pluralism, and specifically, of whether these traditional fora should be incorporated into the formal system needs to be widely discussed and debated, with public consultation.

Traditional justice dispute mechanisms usually operate through a council of four to six community elders, including women. The traditional chief will preside over the council. These councils operate according to local practices and customs, and hence there are differences between the application of traditional justice in different parts of the country. For instance, some may deal only with very minor issues, others with more substantial disputes; some may administer corporal punishment, others may refrain from this; some may involve other representatives from government-recognised community authorities, others may not. Trial takes place before a group representing the community and everyone has a right to be heard. Witness testimonies as well as other types of evidence are permitted. Very often, parties do not have any representation, but in this informal setting are able to speak for themselves. Generally, similarly to the community

507 Interview with district administrator, Nacaroa, Nampula, 11 August 2005.
508 1990 Constitution, art. 6(g) and art. 53 no. 1.
509 Law no. 2/1997, 18 Febuary 1997.
510 2004 Constitution, art. 4.
511 Ibid., art. 212.

courts, traditional justice fora do not handle cases relating to serious crimes or cases of high value, and consequently, the sentences they administer are not severe.

There are no systematic oversight mechanisms to monitor the processes followed in the administration of traditional justice, and unless a case previously ruled upon by a traditional leader is then taken to the police or the judicial courts, violations of human rights standards are likely to remain undetected. However, some cases of violations have become known, including the application of corporal punishment and with regards to the treatment of women and children.[512] It is not possible to appeal against decisions taken according to traditional justice in the judicial courts, but the case could be lodged as a new process. There have been no efforts by the Ministry of Justice or the judicial courts to ensure that traditional authorities or community courts respect human rights standards.

Customary law, traditional authorities and constitutional standards

Bernardo Sacarolha Ngomacha, 39 years-old, married in accordance with customary law, lived with his five wives and 15 sons and daughters in the province of Inhambane. In 1998, one of his wives, Candida, left the home in order to escape the physical abuse she received from Bernardo. She took her daughter with her, and went to live in Beira City. Bernardo went to Candida's parents' home and threatened to kill them if they did not bring his wife and daughter back. Candida's father went to Beira City and found his daughter, but his granddaughter had caught malaria and had died. On receiving the news, Bernardo demanded to be compensated for her replacement in the form of another female child. He argued that he was justified in asking for such compensation, in order to guarantee the money he would have eventually received as payment for his daughter's *lobolo*.[513]

Bernardo took the case to traditional authorities who ruled that Candida's father had to give Bernardo a female child as compensation for his dead daughter. Candida's father complied, and Quiteria, then six years-old and living with Candida's parents, was given to Bernardo. The court ruled that the female child would stay under Bernardo's authority until she gave birth to another female child, fully compensating the loss Bernardo had suffered. Three years later, Bernardo twice raped Quiteria. Candida was informed of what had taken place and told her father, who called the police. The police arrested Bernardo and took Quiteria away from Bernardo's home. The case was brought to the judicial courts and the provincial court of Inhambane sentenced Bernardo to 12 years imprisonment and to paying Quiteria 10,000,000 MT (approximately US$400) as compensation.

Bernardo appealed the provincial court's ruling, and the case reached the Supreme Court. In its ruling in May 2004, the Supreme Court set out that the original decision of the traditional

512 See Meneses, Mbilana and Gomes 'Traditional authorities in the context of legal pluralism' (*As autoridades tradicionais no contexto do pluralismo jurídico*) in *Conflict and Social Transformation (Conflito e Transformação Social)*, vol. 2, Santos and Trindade, eds., Afrontamento, Portugal, 2003, p.373.

513 Bride price paid by the family of the groom to the bride's family.

authorities, even if in accordance with customary law, was in clear violation of constitutional principles and internationally-agreed standards for the protection of the rights of children. The Constitution guarantees that a child should not be subject to ill-treatment nor be subject to discrimination on the grounds of birth (art. 56, 1990 Constitution). With respect to international treaties, the Supreme Court ruled that in their decision, the traditional authorities had violated article 3 of the Convention on the Rights of the Child[514] and articles 8,[515] 23[516] and 24[517] of the International Covenant on Civil and Political Rights. The Supreme Court clearly stated that decisions concerning children must always be taken in accordance with the best interests of the child, and that customary law has to be applied with respect for fundamental values as enshrined in the Constitution, and for the promotion of human rights, including equality of treatment before the law (1990 Constitution, art. 6(d)).

Bernardo eventually had the length of his imprisonment reduced to eight years, on the grounds that he was under the influence of alcohol when committing the crime. The compensation he had to pay was increased from 10,000,000 (US$400) to 25,000,000 MT (US$1 000). The case underlined that in their rulings, despite applying customary law, traditional leaders must consider constitutional principles and other standards for the protection of human rights, from which they are not exempt. It also highlighted that violations of human rights standards may be occurring in the administration of traditional justice, but with no oversight mechanisms in place it is impossible to know about these cases, unless they are subsequently referred to the formal system.

SOURCES:
President of the Republic of Mozambique v. Bernardo Sacarolha Ngomacha, Proc.5/2004-A, Supreme Court, Criminal Section I.

514 Convention on the Rights of the Child, 1989, art. 3.1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

515 International Covenant on Civil and Political Rights, 1966, art. 8.1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3.(a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.

516 Ibid., art. 23.1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognised. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

517 Ibid., art. 24.1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.

Local community authority dispute mechanisms

In addition to the *régulos,* local community authorities[518] may have their own dispute resolution mechanisms. Leaders within the community authority have small consultative councils, and if they cannot reach resolution on a dispute, they may refer the case to the local community council.[519] For example, the *bairro* of Chaquelane, Chókwe, has a community council of approximately 25 individuals representing various local interests. As with the application of traditional justice, it is difficult to ascertain compliance with constitutional principles and human rights standards. There are indications that some community authorities use measures including corporal punishment. For instance, a judge of the district court of Chókwe said:

> We have had situations where the community authorities try and resolve problems that are above their competency and administer corporal punishment with the *chamboco* (whip). In addition, they have private prisons where they keep suspects. These facts emerge during interrogations or trials of the affected individuals who report that they were detained in the neighbourhood for five to six days. Sometimes these suspects are found to be innocent and then they ask, 'Who will compensate me for the days I was incarcerated, and my lost pay.'[520]

Interview with *secretário de bairro,* Munhenene, administrative outpost of Nacaroa-Sede, Nampula, 11 August 2005

The *bairro* has stuctures in place to handle conflicts that arise amongst locals. I, as *secretário de bairro*, do not handle problems alone. I am aided by a group of advisers, seven in total: three from FRELIMO, four from the community, of which two are women and two are men chosen by the secretary. When we are not able to handle a problem, we refer it to the community court or to the *régulo*. We usually refer crime-related issues to the police, who in turn refer them to the community court. This year [2005], I have not yet referred any cases to the community court, but last year I did. For instance, there was the case of a woman who had married seven months previously, and complained that her husband had abandoned her; he never bought her clothes and did not come home to sleep with her. He was in fact already living with another woman in the district of Moma in Nampula province. The bairro's authorities notified him and he immediately came to discuss the matter. He confirmed that he no longer needed his wife and hence it was ruled that he should at least find a house for her to live in, considering she was old and was living with one of her sons in a house that was in poor condition. The man agreed with our

518 *Secretário de bairro* in a neighbourhood, *secretário da povoação* in a village, *chefe de quarteirão* for every 25 houses, and *chefe de bloco* for every 10 houses.

519 The community council or local council is provided in the Law of Local Organs of the State as a consultative mechanism between the state and local citizens, communities, associations and other forms of organisation of citizens and communities (See decree no. 11/2005, 10 June 2005, regulating the Law of Local Organs of the State, arts. 104 and 110).

520 Interview with presiding judge of district court of Chókwe, 6 August 2005,

decision and rented a house to which she immediately moved. Shortly after, she came back to us and said that the landlord had expelled her as her ex-husband was not paying the monthly rent. At this point, we realised the case was beyond our capacity and thus requested the assistance of the court.

I can safely say that aside from this case and a few others, the majority of our rulings are complied with. We don't receive many cases, for instance over the past few weeks there haven't been any complaints. Usually the judgments we administer involve the restitution of the stolen object or goods to the rightful owner, or compensation in the form of similar goods, cash or food. The cases are generally resolved within the neighbourhood. When the problems are crime-related, we apply punishments such as community service or payment of fines (that do not exceed 25 000 MT). That money is then used to buy notebooks and pens, or food. If the person is uncooperative, a few slaps are not out of order...although punishments can be replaced by fines.

SOURCE:
AfriMAP interview, Nacaroa-Sede, Nampula province, 11 August 2005.

Other traditional dispute mechanisms

Religious groups and traditional healers, including associations such as AMETRAMO (Mozambican Association of Traditional Healers) do exist and can exert a powerful influence, although this tends to be located in specific regions or amongst particular social groups. This is the case with the Islamic congregations, new Protestant churches, and other religious sects.[521]

The following extract is from an interview with a *curandeira* (traditional healer woman) residing in the *bairro* of Mafalala, in Maputo:

> We go to their house; we speak to them about morals...When we are unable to get their attention we take the problem to the chairman of the association (AMETRANO), who lectures them in morals and clarifies what is right and what is wrong, and that is it, the individual begins to relent. We have a counsellor to counsel such people until the problem is solved. When the management of the association is not able to solve the conflict we call upon our *xehe*[522] to come and solve it through Islamic law. We have never come to a situation in which we have had to call the police or take the case to court, never! [523]

521 For instance, Jehovah's Witnesses, *Maziones*, the Assembly of God (*Assembleia de Deus*), Universal Church of the Kingdom of God (*Igreja Universal do Reino de Deus*).

522 Title a Muslim acquires due to age and theological knowledge; in the case of the associations, it is used to designate a chief, independent of age or theological qualification (Carvalho, 1988:65).

523 Tereza Cruz Silva, 'The role of local networks in resolving disputes: the Mafalala case' (*As redes de Solidariedade como Intervenientes na Resolução de Litígios: o Caso da Mafalala*) in *Conflict and Social Transformation*, vol. 2, eds. Santos and Trindade, Afrontamento, Portugal, 2003, p.445. Interview with Bilal Mamudo Bay, by Hilário Diuty, November 1998.

H. Respect for court decisions

The 2004 Constitution provides in article 215 that decisions of the courts are binding for all individuals and other legal bodies, and prevail over any decision taken by other authorities.[524] The same principle was also set out in the Organic Law of the Judicial Courts.[525] However, in civil cases, individuals frequently fail to comply with court decisions.[526] It is difficult to specify particular cases, as this is not an aspect of the justice system that is monitored.

I. Official mechanisms to assert rights outside the court system

Mozambique does not yet have a National Commission for Human Rights, although draft legislation for this body is being circulated by the Ministry of Justice to other key stakeholders in the sector.

The 2004 Constitution introduced provisions for an ombudsman. Implementing legislation for the ombudsman was approved in May 2006, although the ombudsman has not yet been established. The constitutional function of this body is to guarantee citizens' rights, and to uphold legality and justice in the actions of the public administration (art. 256).[527] The ombudsman is elected through a parliamentary vote, with a two-thirds majority needed for successful election.[528] Article 248 clearly sets out that the ombudsman should be independent and impartial in his duties, and report on activities annually to Parliament.[529] The ombudsman's power is limited; he does not have the power to decide on cases, but should submit recommendations to the appropriate authorities.[530]

Opinion amongst stakeholders in the justice sector is divided with regards to the benefits of implementing an ombudsman.[531] There is some wariness about the creation of new institutions, and the consequent drain on resources; some suggest these funds could be better spent on strengthening the courts themselves. However, depending on the social legitimacy and moral authority of the figure elected, in comparison to other complaints and investigative mechanisms, the ombudsman could present a useful alternative in upholding citizens' rights to justice.

A municipal ombudsman was established in Maputo city by the mayor shortly after his election in February 2004. It was set up as a mechanism to receive public complaints, which it accepts by email, phone or post. Further details are not yet known as to the number of complaints received or dealt with.

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524 2004 Constitution, art. 215 (*decisões dos tribunais*).

525 Organic Law of the Judicial Courts, 1992 (law no. 10/1992), art. 7.

526 For instance, see Annual address of the prosecutor-general to Parliament, V/Infor./333/04.03.2002, p.40.

527 2004 Constitution, art. 256 (*Provedor de Justiça, Definição*).

528 Ibid., art. 257.

529 Ibid., art. 258.

530 Ibid., art. 259.

531 AfriMAP seminar, Faculty of Law at the University of Eduardo Mondlane, Maputo, 28 July 2006.

J. Non-state mechanisms and alternative dispute resolution

In 1999, Parliament approved legislation setting out a framework for arbitration in the form of the Arbitration, Conciliation and Mediation Law (*Lei da Arbitragem, Conciliação e Mediação*),[532] which was passed with wide backing from the private sector. The law allows parties to establish arbitration centres, without requiring any prior authorising legislation, although the Ministry of Justice does have the power to shut centres down in exceptional circumstances.[533] The law provides that all disputes apart from those that by a specific law should go to a judicial court, or those that regard fundamental rights[534] can be subject to arbitration. The results of procedures in established arbitration centres have the same legal status as a judicial sentence; in effect an arbitral award is a legal instrument that should be executed.[535] As of March 2006, one major arbitration centre was in operation, the Centre for Arbitration, Conciliation and Mediation (CACM) based in Maputo, with two regional offices, in Beira and Nampula.

The 1998 Labour Law[536] is currently under revision and the new bill provides for a labour arbitration centre *(Centro de Arbitragem e Resolução de Conflitos Laborais)*[537] that would be able to function without any additional regulation, as is the case with the current Labour Law. The centres would complement rather than replace the yet-to-be-implemented labour courts, and would handle both individual and collective disputes. Considering the large backlog of labour cases in the formal system, the implementation of a labour arbitration centre would be a highly positive step toward unclogging the courts and providing more rapid resolution of labour disputes. Arbitration mechanisms could prove a valuable complement to the courts, and the implementation of arbitration centres and training of staff for these centres should be supported.

532 Law no. 11/1999. See World Bank, *Legal and Judicial Sector Assessment*, 2004 for a more in-depth discussion of the law and the Centre for Arbitration, Conciliation and Mediation (CACM).

533 Ibid., art. 69, no. 2.

534 Ibid., art. 5.

535 Ibid., art. 43.

536 Labour Law, 1998 (Law no. 8/1998).

537 Labour Law bill, art. 188. As of May 2006, the bill was open to public consultation, and was scheduled to be discussed in June 2006 at the Labour Consultative Commission (representing government, labour unions and employers). Interview with Mr. Francisco Mazoi, representative of the OTM-Conselho Central Sindical, Maputo, 3 May 2006.

7

Development partners

Financial assistance

Since the end of civil war in the early 1990s, bilateral and multilateral development partners have been heavily involved in reconstruction and reform initiatives through all areas of government, providing financial and technical assistance. Development partners provide assistance to the government of Mozambique through direct budgetary support (estimated at approximately 45 per cent of the total state budget for 2005),[538] as well as project financing.

By comparison with support to other sectors, for instance health or education, donor assistance to the justice sector has been relatively recent and limited.[539] Over the past few years, however, development partners have given increasing attention to the justice sector which was identified as a key priority area in the first joint government and donor Poverty Reduction Strategy Paper for the period 2001–2005 (*Plano da Acção para a Redução da Pobreza Absoluta,* PARPA I). In the second Poverty Reduction Strategy Paper for the period 2006–2009 (PARPA II), governance, including the justice sector, was also identified as a key strategic priority.

Within the justice sector, development partners have supported a wide range of projects, including institutional development (e.g. the Faculty of Law at the University of Eduardo Mondlane, IPAJ, the courts), capacity building (training for members of the judiciary, court staff, police officers, support for strategic planning exercises—notably the *Plano Estratégico Integrado,* PEI), and development of physical infrastructure (rehabilitation of courts and prisons, construction of the judicial training centre (CFJJ), and the police academy (ACIPOL)). The following

538 State Budget, 2005.

539 In 2005, donors contributed 51.1 million euros to good governance, legality and justice; € 77 million to education, and 136 million euros to health. See *An EU View of Grant Disbursements by Donors and by PARPA Priority Sectors in Mozambique 1999–2005,* prepared for the EC Delegation in Mozambique, Maputo, May 2005.

development partners have ongoing or recent projects supporting the justice sector through bilateral programmes: Canada, Denmark, France, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Multilateral donors include UNDP, UNICEF, the EU, and the World Bank. Increasing efforts are being made by development partners to collate information on project flows to the sector; for instance through an online database known as ODAmoz (www.odamoz.org.mz). However, continuing methodological constraints to this effort include the fact that most partners cluster support to the institutions of the justice sector within their broader governance programmes, and thus financial information provided usually corresponds to the overall budget allocated to governance; and that partners use different time -frames and currencies to report their budgets.

See Annex B for a summary of key on-going donor-funded projects in the justice sector. Although funding levels have much improved in recent years, development partners could still more clearly link their projects to critical needs in the sector; for instance, as identified in this report by accelerating and deepening the law reform process; and by supporting measures to improve respect for human rights and access to justice for the average Mozambican citizen.

Coordination of development assistance

In light of the volume of development assistance provided to the government, and the number of agencies involved in Mozambique, donor coordination is critical to ensure coherent sectoral support, and to avoid duplication of efforts on both sides.

As part of a move towards greater coordination of direct budgetary support, donors formalised the Joint Donor Programme (JDP) for Macro-Financial Support in 2000. The number of donors contributing to the budget through this programme has grown from six agencies in 2000 to 18 as of September 2006.[540] At the end of the 2004 Joint Review between government and donors, both sides signed a Memorandum of Understanding (MoU) that sets out the procedural arrangements for budgetary support and outlines respective responsibilities.

Coordination of donor assistance provided through project financing has been slower. Whilst the 2005 government and donor Joint Review recognised that there had been improvements in alignment and harmonisation of aid over the past year, this was highlighted as an area in need of continued improvement.[541] In principle, the justice sector's first integrated strategic plan, PEI, should have provided a focal point for coordination of external project assistance to the sector. However, momentum on PEI has largely been lost.[542] No mechanisms (e.g. fund pools, sector-wide approaches have been created to allow a coordination of external support with PEI objectives in the justice sector. Without a clear sectoral plan in place to provide a base for their own project planning, it is difficult for donors to coordinate their efforts.

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540 Alan Harding and Richard Gester, *Learning Assessment of Joint Review 2004, Final Report*, report to the Government of Mozambique and the Programme Aid Partners (PAP), 2004. The 18 partners (known as the G18) include Belgium, Canada, Denmark, the European Commission, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the African Development Bank, and the World Bank.

541 Government of Mozambique and PAP, *Joint Review*, Final Aide-Memoire, May 2005. For aid harmonisation issues in Mozambique see the PAP website at www.pap.org.mz.

542 see Chapter 2.A, Planning and financial management, for further discussion of PEI.

The Joint Review also stressed the need for donors to improve the predictability of their aid flows, and to reduce the administrative burden placed on government by multiple reporting requirements.[543] The justice sector is a particularly sensitive area, with political implications that do not arise in the same manner in other sectors. Both government and donors may prefer to negotiate such sensitive issues in a bilateral rather than multilateral forum; a bilateral forum may afford the government greater leverage and more rapid access to funds, and for donors it is easier to implement their projects without broader consultation. Arriving at better coordination of project assistance to the sector may not be easy, but it is an essential criterion for the provision of more coherent support to the sector.

Donor-funded projects and human resources

Development partners hire both local and external staff. However, the number of donor funded projects in the justice sector is not at a level where there is a serious risk of human resources being drained from government. The private sector, where well-trained and competent public prosecutors and judges are potentially able to find much higher levels of remuneration, poses a more serious threat in relation to state access to skilled personnel.

Development assistance and promotion of respect for human rights

All development assistance to the justice sector is ultimately intended to improve respect for human rights. However, amongst development partners, there are two particular areas of concern: human rights abuses commited by the police and deteriorating conditions in prison. A substantial proportion of financial assistance to the sector has gone to address these two issues.

There are no examples of aid having been linked explicitly to human rights conditionality. Rather, particularly through the 1990s, funding was linked to financial conditionality stipulated by the World Bank and IMF, including inflation control, caps on public spending and privatisation of key state assets, such as the banking industry.[544] Increasingly however, the importance of governance in achieving pro-poor growth is being stressed, and the justice sector in particular is receiving some criticism from development partners.[545]

Access to information about development assistance to the justice sector

In principle, development partners should provide information on their projects in the sector to any interested party upon request. The African Governance Inventory (AGI) run by UNDP (http://www.unpan.org/agiportal/indexframe.asp) is a comprehensive, though not particularly user-friendly, on-line database providing information on donor funding of governance projects in Africa. It includes information for Mozambique and is updated on a bi-annual basis. The ODAmoz database, funded by the EU, UN and the Netherlands, also provides information on donor projects, organised on a sectoral basis, at www.odamoz.org.mz.

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543 Ibid.

544 Joseph Hanlon, *Are Donors to Mozambique Promoting Corruption?*, Development Research Centre, DESTIN, London, UK, August 2002.

545 See for instance, Government of Mozambique and PAP, *Joint Review*, Final Aide-Memoire, May 2005.

With regards to access to information, it is important to distinguish between information available on on-going projects and information on calls for proposals and funding opportunities. As for the latter, government officials and representatives of civil society complain of a lack of information regarding the funding mechanisms in place and the decision-making processes of international partners on allocation of funds. There is a perception of a lack of transparency on the donor side, and thus of a lack of predictability in their support.[546]

546 This seems to be a general complaint shared by many national stakeholders (for more details see the report *Perfect Partners?* available at www.pap.org.mz).

Annex A: District courts

Selected indicators gathered in 19 district courts visited by researchers on behalf of AfriMAP, 3–16 August 2005,

Indicator	Assessment	Total number of courts
Physical conditions and facilities	Good	7
	Reasonable	1
	Poor	11
Presence of advocates at hearings over the last three years	Frequent	2
	Not Frequent	10
	No Presence	7
Number of court staff **	Sufficient	3
	Reasonable	2
	Deficient	14
Effectiveness of the record keeping system (ease of locating court files)	Easy	14
	Difficult	5
	Very Difficult	-
Access to the Government Gazette (Boletim da República) over the past five years	Regular access	5
	No access in the last two years	11
	No access in the last five years	3
Availability of relevant legislation in the court (Civil Code, Criminal Code, Commercial Code, Labour Law, Land Law, Court Legislation, Civil Procedure Code, Criminal Procedure Code, Commercial Procedure Code***	Available (court's property)	-
	Available (judge's property)	15
	Insufficient	1
	Not available at all	2
Availability of recent legislation approved by Parliament (eg. 2004 Constitution, Family Law)	Available	12
	Insufficient	2
	Not available at all	3
Physical accessibility of courts to citizens (average distance of main, nearby settlements from local district court)	Less than 10Km	1
	Between 10Km to 20Km	1
	More than 20Km	14
Ownership of the court buildings	Court	6
	State (APIE)	5
	Other public institution	7
	Private	1

Notes

** Sufficient: 6 or more; Reasonable: 5; Deficient: less than 5

*** From the provided list; Available: 2/3 of list; Insufficient: 2/3 to 1/3 of the list; Not available at all: less than 1/3 of the list)

Annex B: Donor projects

Summary of main donor-funded on-going projects in the justice sector.[547]

Project title & estimated duration	Donors	Project description	Indicative funding	
			Committed	Disbursed
Rights, Democracy and Governance Fund 01/04/2003 –31/3/2008	Canada	This fund is used to provide assistance to demand-driven initiatives in the area of governance, human rights, democratic reform and elections, gender equality, anti-corruption, strengthening of civil society, public sector capacity building, legal and judicial reform.	Canadian $ 5 000 000	Canadian $ 712 142
Justice sector programme 1/10/2003 –31/1/2006	Denmark	Technical assistance to support law reform, including the organisation of public consultations; gender analysis of proposed legislation; aid to drafting committees.	€8 640 000	€3 411 590
Support to justice sector in Mozambique 22/12/2004 –21/12/2009	EC/UNDP	Support provided focuses on two areas a) penal justice; and b) decentralisation.	€9 760 000	€1 886 107
Map judicial environment 1/4/2005 –31/3/2008	The Netherlands	n/a	€2 050 000	€484 000

547 All the data and information contained in the table were obtained from the European Union: Projects Database: http://www.odamoz.org.mz/reports/rpt_default.asp & http://www.delmoz.cec.eu.int/en/euextra/rpt_sector.asp, last accessed 13 April 2006. The table is based on information available online, and may not be wholly comprehensive as a result.

Project title & estimated duration	Donors	Project description	Indicative funding	
			Committed	Disbursed
Support to the police 1/12/2004 –31/12/2007	The Netherlands/ UNDP/ UNICEF	Following on from two previous phases of support to the police, with project objectives based on priorities identified in the PRM's Strategic Plan. Whilst the previous two phases of support concentrated primarily on rehabiltation of police stations and training, this phase aims to improve the effectiveness of the PRM by supporting four key areas: a) monitoring and implementation of the Strategic Plan; b) organisational and management improvement; c) personnel and training; d) improvement of the PRM's image.	US$1 210 000	

Project title & estimated duration	Donors	Project description	Indicative funding	
			Committed	Disbursed
Decentralised legal support and capacity building to promote sustainable development and good governance at local level 1/4/2005 –1/3/2008	The Netherlands	Immediate objectives include: – Developing and implementing a training package for local community leaders and citizens involved in resource access and utilisation; enhancing awareness of rights, and means to enforce these rights; – Providing training for district level judges and prosecutors on natural resource and other development-related laws; – Improving arbitration and mediation mechanisms; – Promoting understanding on dealing with new 'diffuse' rights created through new natural resource legislation; – Supporting and strengthening the research, monitoring and evaluation capacity of the CFJJ.	US$4 974 110	US$489 960
Support to the juvenile justice system in mozambique 15/10/2005 –14/10/2007	Italy	Focused mainly in Maputo province, core activities include reinforcing the Juvenile Court, defining a Code of Conduct for the community courts on dealing with minors, training for members of the court, police, and social workers.	€2 004 541	€1 002 270

Project title & estimated duration	Donors	Project description	Indicative funding	
			Committed	Disbursed
Promotion of appropriate procedures within the prison reform framework 31/12/2008	Italy	This initiative is part of a broader reform involving the entire penitentiary system. Objectives include a) improving literacy levels of detainees and providing professional training, b) improving health conditions; c) social work and integration.	€1 432 907	€464 685
Internal affairs: cooperation project with the police forces 1/1/2004 –1/12/2007	Portugal	n/a	€337 710	€337 710
Support to the administrative court 1/7/2005 –30/6/2007	Sweden	Capacity development, and institutional twinning support between the Swedish National Audit Office and the Administrative Court.	€2 588 997	€268 824
Democracy and human rights 1/1/2003 –31/12/2007	Sweden	Support to civil society organisations involved in promoting democracy, human rights, and peace. Support to both national and local organisations. Most organisations are Mozambican, with some international ones included.	€13 895 000	€12 244 959
Strengthening integrity and capacity of the judiciary in mozambique 1/6/2005 –31/12/2006	UNDP	Assisting the judiciary in developing a comprehensive National Action Plan, based on a broad survey and consultation on the judicial profession. (this is the second phase of the Court Integrity project).	US$200 000	US$166 238
Legal capacity 1/7/2006 –31/12/2010	World Bank	Strengthen capacity of the judiciary and other legal institutions.	US$5 000 000	US$5 000 000

Other international partners also often contribute with short-term specific interventions; for instance, the Konrad Adenauer Foundation has provided funding for scholarships for governance and rule of law related academic study, and OXFAM has provided human rights training to the police force. Non-governmental actors, most notably NGOs such as the Mozambican Human Rights League (LDH), the Rural Organisation for Mutual Assistance (ORAM), the Mozambican Association for Women Lawyers (AMMCJ) and Ética also receive direct financial support from donors, usually through fund pooling mechanisms.

Recently completed projects in the justice sector

Donor	UNDP co-funded (1)	UNDP co-funded (2)	UNDP co-funded (3)	UNDP co-funded (4)	Denmark (5)
Main support areas	Infrastructure for the CFJJ, prison system reform	Rehabilitation of police training centres, and support for short refresher courses	Rehabilitation of police stations and commands, management, capacity building, strategic planning	Police training, strategic planning, support to civil society for monitoring of crime	Court construction and rehabilitation, law reform, law publications, legal and judicial training
Key national partners	Ministry of Justice & CFJJ	Ministry of the Interior & PRM	Ministry of the Interior & PRM	Ministry of the Interior, PRM & ACIPOL	Ministry of Justice, UTREL, CFJJ, Supreme Court, Office of the Prosecutor-General
Modalities	Technical assistance & funding	Technical assistance & funding	Technical assistance & funding	Technical assistance & funding	Technical assistance & funding
Total budget	US$5,5 million	US$11.2 million	US$12 million	US$1.8 million	US$14 million
Phased out in:	Mid 2002	Mid 2000	Mid 2003	End 2004	End 2002

Notes:

(1) Implemented by UNDP, co-funded by UNDP, Portugal, Ireland, Norway and UNICEF

(2) Implemented by UNDP and UNOPS, co-funded by Netherlands and Spain and Germany.

(3) Implemented by UNDP, co-funded by UNDP, Netherlands, Spain and Portugal

(4) Implemented by UNDP, co-funded by Switzerland

(5) Overall Danish contribution since 1989 (estimate)