

# Mozambique

## Justice Sector and the Rule of Law

A DISCUSSION PAPER



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# 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 man-

agement 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 Príncipe. 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 assistance

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.