



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



Powers of arrest curtailed by Constitutional Council of Mozambique

– the impact of the 2013 decision



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

REFORMAR is a research, training and advocacy organisation working on criminal justice and human rights in Mozambique and in other Portuguese speaking African countries. Found in 2015, it has engaged in applied research, training and supporting advocacy by governmental, international and civil society organisations.

Executive summary

This report assesses the consequences of the 2013-decision of the Constitutional Council of Mozambique, which limits to judges the authority to order pre-trial detention for cases falling outside of *flagrante delicto*. Although the decision represents a progressive change in the jurisprudence of Mozambique's highest court, judges, prosecutors and police encounter operational challenges in implementing the decision, in a country with a population of more than 28 million people. In 2017, there were 344 judges, 18 of which were Judges of Criminal Instruction, responsible for issuing warrants of arrest for cases outside of *flagrante delicto*. Concerns were raised in relation to lack of financial and logistical resources for prosecutors, which are mandated to monitor the legality of police detention. As the criminal justice system is under-resourced, police officials have to wait for a judge to issue a warrant of arrest for cases falling outside of *flagrante delicto*. Despite the decision, unlawful arrests continue to happen although there is anecdotal evidence that these have decreased. The 2013-decision has clarified who has the power to authorise arrest in these cases, but the situation is far from being resolved.

Introduction

In Mozambique, the Constitutional Council¹ Decision of 2013 dealing with the powers of arrest received positive responses at national and regional levels as it represents progressive case law on human rights and the criminal justice system.² The decision dealt with arrest and pre-trial detention, which generally place arrested persons at the highest risk of human rights violations. Research conducted by international and regional organisations found that respect for human rights of arrested and detained persons are at risk worldwide.³ Across Africa, pre-trial detainees are more likely to suffer from torture and other ill-treatment than sentenced people.⁴

The 2013 Constitutional Council decision restricts to judges the power to order pre-trial detention for cases falling outside of *flagrante delicto*.⁵ In essence this means that when a case falling outside the scope of *flagrante delicto* is reported by a victim, the police must inform a Judge of Criminal Instruction, that has the exclusive power to issue a warrant of arrest, to issue such a warrant for the arrest of the suspect.

Prior to the decision, pre-trial detention could be ordered by judges as well as prosecutors, officers of the Criminal Investigation Service⁶ (i.e. police officers, such as directors, inspectors, sub-inspectors) and even district administrators in places where there were no police officers.

¹ The Constitutional Council is the Mozambique's highest body in matters related to constitutional and electoral law. Established by the Constitution, the Council consists of 7 judges. The President of the Republic appoints the chairperson and five judges are chosen by the Assembly on a proportional basis. The Judicial Council indicates one judge. See website available at: <http://www.cconstitucional.org.mz/> (accessed 4 July 2018).

² Decision No. 4/CC/2013 of 17 September 2013. Lorizzo, T. and Redpath, J. (2014) *Revolution of Pre-trial Detention Law in Mozambique* available at: <http://www.osisa.org/law/mozambique/revolution-pre-trial-detention-laws-mozambique> (accessed 4 July 2018).

³ See the work of the Association for the Prevention of Torture available at: https://www.apt.ch/content/files_res/factsheet-1_pre-trial-detention-en.pdf. (accessed 4 July 2018). See also the campaign on pre-trial detention from Open Society Foundations. See, in particular, research on the following link: <https://www.justiceinitiative.org/uploads/4c3491a1-f7a1-48b2-9afd-3cd0a4f220f6/pretrial-detention-and-torture-06222011.pdf> (accessed 4 July 2018).

⁴ Msiska, C., Mhango, F. and Redpath, J. (2013) *Pre-Trial Detention Custody Time Limits - Ensuring Compliance in Malawi*, OSF & OSISA. Available at:

https://www.prisonstudies.org/sites/default/files/resources/downloads/malawi_custody_time_limit_report_january_2013.pdf (accessed 13 September 2019). At the regional level, see research conducted by the project Africa Criminal Justice Reform of the Dullah Omar Institute of the University of Western Cape:

http://www.prisonstudies.org/sites/default/files/resources/downloads/malawi_custody_time_limit_report_january_2013.pdf.

See Lorizzo, T. (2012) *Prison reform in Mozambique fail to touch the ground. Assessing the experience of pre-trial detainees in Maputo*. Available at:

https://www.researchgate.net/publication/301275781_Prison_reforms_in_Mozambique_fail_to_touch_the_ground_Assessing_the_experience_of_pre-trial_detainees_in_Maputo. See also Redpath, J. (2015) *Constructing pre-trial detention indicators for African contexts. Problems and proposals*. Available at: <https://acjr.org.za/resource-centre/constructing-pre-trial-detention-indicators-for-african-contexts-problems-and-proposals> (accessed on 4 July 2018). Muntingh, L. (2015) *Arrested in Africa. An Exploration of the Issues*. CSPRI. Available at: <https://acjr.org.za/resource-centre/Arrested%20in%20Africa%202.pdf> (all accessed 4 July 2018).

⁵ *Fora flagrante delicto* – cases where a perpetrator is not caught during the commission of a crime (see definitions in the section: Legal framework related to arrest and pre-trial detention in Mozambique).

⁶ Formerly the Criminal Investigative Police (*Polícia de Investigação Criminal*)

The decision followed sustained advocacy efforts led by the organisation *Liga dos Direitos Humanos (LDH)*, which included a petition signed by 2000 Mozambican citizens.⁷ Over a period of 20-years, LDH has noted the high frequency in arbitrary and illegal detention, including other abuses by law enforcement officials.⁸

The decision of the Constitutional Council aims to change the work of the police as well as the courts and the Attorney General's office. Six years has passed since the decision was made and it needs be asked if the decision lived up to its intentions and what has been observed regarding its implementation. In short, what have been the consequences of the decision for the courts, prosecutors and police?

International and regional framework on arrest and pre-trial detention

International human rights law provides a comprehensive framework for the protection of rights of arrested individuals. In Mozambique, ratified international and regional laws automatically become part of domestic law.⁹

Arbitrary arrest is prohibited by article 9(1) of the International Covenant on Civil and Political Rights and article 6 of the African Charter on Human and Peoples' Rights. The UN Working Group on Arbitrary Detention regards arrest and detention arbitrary when the arrestee was not informed of the reasons for the arrest; when the procedural rights of the arrestee were not respected, and when the arrestee was not brought before a judge within a reasonable amount of time.¹⁰

The Luanda Guidelines aim to prevent arbitrary arrests and advance a more rational and proportionate use of pre-trial detention.¹¹ The Luanda Guidelines define arrest as "the act of apprehending a person for the alleged commission of an offence, or to the action of a competent authority to arrest and detain a person as otherwise authorised by law." English case law states that arrest is understood to mean the following, as per *Holgate-Mohammed v Duke*: "First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody (sc. by action or words restraining him from moving anywhere beyond the arrester's control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate's judicial act."¹²

⁷ LDH was the first Mozambican non-governmental organisation established with the aim of giving legal assistance to people and to protect their human rights. Since its establishment in 1995 LDH has lead various campaigns for the recognition and compliance with human rights standards in Mozambique.

⁸ LDH representative, Alice Mabote, during a press conference in Maputo, on 26 September 2013.

⁹ Article 18 of the Constitution of the Republic of Mozambique.

¹⁰ ACJR. Factsheet 16. *Arrest without a warrant - Guidelines against arbitrary and unlawful arrests*. March 2019.

¹¹ ACHPR (2014) Guidelines on the conditions of arrest, police custody and pre-trial detention in Africa (Luanda Guidelines), Available at: http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/conditions_of_arrest_police_custody_toolkit.pdf (accessed 1 November 2018).

¹² [1984] AC 437, [1984] 1 All ER 1054, [1984] 2 WLR 660.

The Luanda Guidelines state that "persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual."¹³ The Luanda Guidelines define pre-trial detention as the period of detention ordered by a judicial authority pending trial, whereas the judicial authorities must clearly demonstrate the reasons for their decisions, as well that they considered all alternatives before ordering pre-trial detention, which is supposed to be the measure of last resort.¹⁴

In the following section domestic legislation is analysed. From there it is shown how the Constitutional Council decision changed the conditions for arrest and pre-trial detention in Mozambique, bringing them more in line with the Luanda Guidelines.

Legal framework related to arrest and pre-trial detention

The Constitution states that "[...] nobody shall be detained [...] except in accordance with the law."¹⁵ The Criminal Procedure Code further regulates arrest and pre-trial detention.¹⁶

Definition of concepts

This section deals with some of the key concepts relevant to civil law systems as some readers may be more familiar with common law systems. Arrest (*detenção*) is the act of seizing someone and taking them into custody. Arrests can be made *in flagrante delicto*, *quase flagrante delicto* or outside of (*fora*) *flagrante delicto*.

Flagrante delicto is "... [a] punishable act that is being committed or has just been committed".¹⁷ The literal meaning of *flagrante delicto* is "obvious offence". Arresting someone *in flagrante delicto* would mean arresting someone in the act of the commission of an offence, or at the beginning, in the middle or at the end of committing it.

Article 288 of Criminal Procedure Code states that "It is also a flagrant offence when the offender is, following the crime, pursued by any person, or was found following the commission of the offence, with objects or other evidence clearly showing that he committed or participated in the offence."¹⁸ In this case, the offence would be commonly called *quase flagrante delicto* (or almost a flagrant offence). *Quase flagrante delicto* therefore occurs when the person has been caught following a pursuit by law enforcement officials, the victim, or any other person whilst in possession

¹³ See article 11 available at: http://www.achpr.org/files/special-mechanisms/prisons-and-conditions-of-detention/guidelines_arrest_police_custody_detention.pdf (accessed 1 November 2018).

¹⁴ Articles 10 and 11 of the Luanda Guidelines.

¹⁵ Article 59(1) of the Constitution of the Republic of Mozambique.

¹⁶ Law Decree 19 271/1931 of 24 January.

¹⁷ Article 288 of the Criminal Procedure Code.

¹⁸ Unofficial translation of the authors from: *Todo o facto punível que se esta cometendo ou que se acabou de cometer. Reputa-se também flagrante delicto o caso em que o infractor é, logo após a infracção, perseguido por qualquer pessoa, ou foi encontrado a seguir à pratica da infracção com objectos ou sinais que mostrem claramente que a cometeu ou nela participou.*

of property not belonging to him or her. The chase has to be uninterrupted.¹⁹ *Quase flagrante delito* is a definition commonly used in the legal community, but as such does not appear in the Criminal Procedure Code.

Fora flagrante delito are all other cases where the perpetrator had not been caught immediately. For example, when there are no witnesses to the crime, the case would clearly be *fora flagrante delito*. Even when there are witnesses, but they did not apprehend the offender during or immediately after the act (or the offender ran away), and regardless of whether the offender could or could not be immediately identified, the offence would still be considered *fora flagrante delito*. The Criminal Procedure Code does not define the concept *fora flagrante delito*. The concept has been defined through a process of elimination.

Arrest by apprehension or imprisonment

According to the Mozambican Criminal Procedure Code, an arrest can occur by apprehension (*captura*) or imprisonment (*prisão*). The arrest by *captura* occurs only with a written order or arrest warrant and is regulated by article 295 of Criminal Procedure Code.²⁰ These arrests refer to crimes *fora flagrante delito* and *quase flagrante delito*.

Article 295 of Criminal Procedure Code sets out the specific procedures. The warrant of arrest must, firstly, identify the person, mentioning the name and possible location, address and other characteristics that could facilitate the correct identification and arrest. Secondly, the warrant must describe the facts justifying the detention and/or any other circumstances justifying the arrest.²¹

Before the decision of the Constitutional Council, the following individuals in addition to judges, had the authority to issue warrants and detain suspects outside of *flagrante delicto*:

- prosecutors,
- officers of the Criminal Investigative Police (holding the rank of directors, inspectors, sub inspectors);
- police officers;
- district administrators;
- chiefs of administrative areas;
- and chairpersons of Local Executive Councils where there are no police officers.²²

The first attempt to limit the power of these authorities was done through the promulgation of Law 2/1993. Article 1 and 2 of Law 2/1993 state that all activities that have to occur during the instruction phase of

¹⁹ See, for example, Law on Drugs (Law 3/1997).

²⁰ See article 295 of the Criminal Procedure Code – Requirements of warrant of arrest.

²¹ Article 291 of the Criminal Procedure Code.

²² Article 293 of the Criminal Procedure Code.

criminal cases will be exercised by specialised judges (judges of criminal instruction) and that specialised sections dealing with criminal cases will be established in the courts at the provincial and district levels. The instruction phase is the preliminary stage of criminal proceedings and its objective is to establish whether the suspicion of committing a crime by a person is satisfactorily proved. However, article 6 of Law 2/1993 left the power to order pre-trial detention *fora flagrante delicto* to all authorities listed above. This resulted in unnecessary if not arbitrary arrests.

The 2013 Constitutional Council decision provides that arrest and pre-trial detention outside of *flagrante delicto* can only be executed on a written warrant of a judge. Other authorities described were consequently relieved of their powers to issue such warrants. The Constitutional Council declared article 293 of Criminal Procedure Code unconstitutional, violating the doctrine of separation of powers granting the judiciary exclusive authority.²³ Since then, limiting the freedom of a suspect accused of a crime outside of *flagrante delicto* is in the exclusive jurisdiction of a judge.

The arrest by imprisonment is regulated by the Criminal Procedure Code.²⁴ It can be done for cases of *in flagrante delicto* by any public official or by any individual, without needing a warrant of arrest. When the crime committed is punishable by a prison sentence, anyone can arrest the perpetrator. If the crime is not punishable by a prison sentence (misdemeanour), only public agents can arrest the perpetrator and only in cases when they cannot determine perpetrator's identity and residence (for example in the absence of the identity document or any other document to be presented).²⁵ The Criminal Procedure Code states that arrested persons must be brought before a judge immediately after the arrest 'by imprisonment' or as soon as possible thereafter.²⁶

Pre-trial detention

Article 64 of the Constitution reads:

1. Pre-trial detention shall only be permitted in cases provided for in law, which shall determine the duration of such detention.
2. Citizens held in pre-trial detention shall, within the period fixed by law, be brought before a judge who alone shall have the power to decide on the lawfulness and continuation of the detention.
3. Everyone deprived of their liberty shall be informed promptly and in a manner that they understand the reasons for their arrest and detention, and of their rights.
4. The judicial decision by which imprisonment or detention is ordered or maintained shall be

²³ As drafted by Law 2/93, 24 June 1993.

²⁴ Articles 289 and 290 of the Criminal Procedure Code.

²⁵ Article 287 of the Criminal Procedure Code.

²⁶ Article 290 of the Criminal Procedure Code. Unofficial translation of the author from the following: *A entrega dos presos [...] ao Poder Judicial deve ser feita em acto seguido à prisão ou no mais curto espaço de tempo possível.*

communicated at once to a relative or trusted acquaintance of the detainee, as indicated by the detainee.²⁷

The Constitutional Council decision reinforces the constitutional provisions, recognising the exclusive authority of judges.

Article 286 of Criminal Procedure Code states that pre-trial detention can automatically occur (without a previous warrant of arrest) in the following instances:

- In *flagrante delicto*²⁸
- For more serious crimes (*crimes dolosos*) punishable with a prison sentence more than one-year; and
- For not complying with bail conditions.

For *fora flagrante delicto*, pre-trial detention is permitted but not compulsory when all of the following conditions are met: a) if the crime committed is punishable by a prison sentence of more than one year and b) there is enough evidence that the crime had been committed by the accused (*arguido*).²⁹

Pre-trial detention starts from the moment the judicial authority authorises imprisonment. Therefore, the Mozambican legislation follows the Luanda Guidelines, which clearly defines pretrial detention as starting from the moment of the authorisation by a judicial authority.

The Constitutional Council decision found that the requirement of compulsory pre-trial detention for certain types of offences is unconstitutional.³⁰ For example, crimes punishable with more than one-year imprisonment committed by a recidivist and vagrants. The judgement stated that conditional release through bail and/or other conditions that may be set (e.g. house arrest) are always possible since pre-trial detention should only be used as a measure of last resort.

The decision also declared the provision allowing for indefinite pre-trial detention unconstitutional and in violation of article 61 of the Constitution.³¹ The provision provided for a presumption of culpability from the point of arrest until the final decision of the higher court (Court of Appeal). This provision is specifically related to *Querela*³² cases for which neither the Constitution nor the Criminal Procedure Code provided time limits within which the court should make its final decision on the case or a time limit on the decision of the appeal court. Even though the Constitutional

²⁷ Translation as provided by Mozlegal, Lda, Advising Investors, available at: www.mozlegal.com (accessed 1 July 2018).

²⁸ Article 287 of the Criminal Procedure Code.

²⁹ Article 291 of the Criminal Procedure Code.

³⁰ § 2 article 291 of the Criminal Procedure Code.

³¹ Article 61 of the Constitution of the Republic of Mozambique. Restrictions on Penalties and Security Measures 1. Penalties and security measures that deprive or restrict freedom in perpetuity or for an unlimited or indefinite period shall be prohibited. (§3 article 308 of Criminal Procedure Code).

³² According to the Criminal Procedure Code there are three types of criminal procedure processes depending on the seriousness of the offences. These are *Processo Sumário* (which does not prescribe detention), *Policia Correccional* (offences punishable by a prison sentence of more than one year, up to two years) and *Querela* (offences punishable by a higher prison sentence, from two years to the maximum penalty of 24 years).

Council has considered this provision unconstitutional, it is the legislature that should set the time limits within which courts must hand down judgement. This enhanced judicial oversight and makes an important contribution to upholding fair trial rights and enhancing transparency in general.

Reaction to the decision

The decision was welcomed by human rights groups for a number of reasons. Firstly, pre-trial detention is frequently misused by law enforcement agencies and the decision places a limitation in this regard. Secondly, the decision will provide better protection of people's rights as it now only a judge can order arrest and detention outside the scope of *flagrante delicto*.

The Constitutional Council distributed copies of the decision to the relevant criminal justice system stakeholders to enable compliance. However, immediately after the decision, a number of concerns with particular reference to delays in responding to the high volume of crimes falling outside the scope of *flagrante delicto*, were raised.³³

Despite requests for the development of a strategy to comply with the judgement, no such strategy has emerged and each institution that is directly or indirectly responsible for the implementation of the decision (e.g. Supreme Court, Attorney General and the Police), only informed their officials to comply with the decision through circular notices.³⁴ A *vacatio legis* (period between the promulgation of a law and the time the law takes legal effect) would have prepared the different institutions to deal with the changes. A comprehensive strategy would have addressed specific challenges faced by different institutions of the criminal justice process. It also could have provided specific guidelines for the effective implementation of the judgement and better protection of the rights of victims and suspects in criminal matters.

In October 2013 the Attorney General's Office released a Joint Memorandum on the Administration of Justice. The document set out anticipated consequences of the decision for different actors in the criminal justice system. For example, a concern was raised that the role of the police and prosecutors would be reduced to administrative bodies by implementing and enforcing the decision. Another fear was that the criminal courts would be overwhelmed and fail to comply with procedural deadlines due to the workload and a shortage of judges. In addition, there was a fear about perceptions of impunity in the eyes of the public and the general lack of trust in justice institutions. The memorandum concludes that the effects of the decision would be devastating, requiring immediate intervention by the Attorney General's Office, the Ministry of Justice and Ministry of Interior, to coordinate the implementation of the decision.³⁵

³³ Attorney General's Office. (2013). Joint Memorandum on the Administration of Justice.

³⁴ Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018. During the event, judges mentioned that in fact they did not receive those circular letters as it is considered their duty to follow and know of all legal changes.

³⁵ Unofficial translation of the author from the following: [...] *conclui-se serem devastadoras os efeitos do Acórdão do Conselho Constitucional [...] o que exige intervenção imediata da Procuradoria-Geral da República, do Ministério da Justiça e do Interior [...]*.

In the remainder of this article the focus is on the capacity of the criminal justice system and the ability to comply with the 2013-decision.

Capacity of the criminal justice system

Judiciary

According to Supreme Court data there were a total of 344 judges in 2017, with an average of seven judges per provincial court and one judge for each district court. This figure corresponds to the ratio of 1 judge per 83 900 inhabitants, since Mozambique has a population of some 28.8 million.³⁶

There are 18 Judges of Criminal Instruction and the rest are trial judges.³⁷ It is the duty of the Judges of Criminal Instruction to issue warrants for arrests made outside *flagrante delicto*. It is clear that there are too few Judges of Instruction. For example, in Maputo, with a population of some 1.1 million people, there are only three Judges of Criminal Instruction. In Nampula province there are only two Judges of Criminal Instruction for a population of some 6.6 million people.

From this data it is evident that it will be difficult, if not impossible, to comply with the decision. This is especially the case in poor, remote and under-resourced areas. However, it must be noted that in districts where there are no Judges of Criminal Instruction (especially in rural areas), the same work is done by trial judges. This creates two problems. The first concerns the impartiality of the judge, who oversaw the case during the instruction phase. Being the same person as the trial judge he or she will likely have formed an opinion of the accused that could influence subsequent decisions. The second problem relates to requirement in law stipulating that Judges of Criminal Instruction should be specialised judges. If the same tasks are done by criminal instruction and trial judges, this means that the law is not being properly implemented.

Police

The police consist of the Border Police; Coastal, Lake and River Police, Public Security Police and Criminal Investigation Service.³⁸ The Criminal Investigation Service is a paramilitary service auxiliary to the administration of justice, with

³⁶ Data from Census 2017, available at: <http://www.ine.gov.mz/operacoes-estatisticas/censos/censo-2007/censo-2017> (accessed 1 April 2019).

³⁷ Between them, two magistrates are assigned to the Maputo court . One magistrate is assigned to the Court of Maputo Province. One magistrate in all province of Gaza. Two magistrates in province of Inhambane. Two magistrates in province of Sofala; one magistrate affection for the Court of the Province of Manica; one magistrate affection for the Court of the province of Tete; one magistrate affection for the Court of the Province of Zambézia; two magistrates in the Province of Nampula; two magistrates in the province of Cabo Delgado and one magistrate in the province of Niassa.

³⁸ Former Criminal Investigative Police.

administrative, technical and tactical autonomy and under the dual accountability of the Ministry of Interior and the Attorney General's Office.

Current data on the number of police officials is not publicly available, but data from 2003 indicated that there were approximately 20 000 police officials.³⁹ If this is still the case it would mean there is one police official per 1 400 of the population. By comparison, neighbouring South Africa has one police official for every 375 of the population.⁴⁰

Prosecution service

According to the Attorney General's Office, the total number of prosecutors in the country was 448, in 2017.⁴¹ It is the Attorney General's Office that determines which prosecutors would be monitoring police detention. In 2017 in Maputo city there were seven prosecutors monitoring the legality of arrests and detention. This number is relatively high considering that there are 24 police stations. However, prosecutors complain about the lack of financial and logistical resources (i.e. transport) to conduct the monitoring.⁴² It must also be noted that there are numerous police posts across the country that are not covered by the monitoring process and the real situation and conditions of detention in these places are unknown.⁴³

While the decision aimed at limiting or putting an end to the gross human rights violations conducted by police, it did not take into consideration the limited number of judges in the country. The overall conclusion, based on the preceding figures presented, is that that Mozambican criminal justice system is hopelessly under-resourced. However, to continue arresting suspects as if prior to the Constitutional Council decision only adds to the woes of the criminal justice system by utilising resources that are already in desperately short supply. Strict abidance with the 2013-decision would not solve the problems of the criminal justice system, but it will bring some welcome relief.

Consequences for judges

The responsibility of the Courts is to guarantee and strengthen the rule of law, guarantee respect for the laws, to safeguard the rights and freedoms of citizens, as well as the vested interests of other legal bodies and entities.⁴⁴ Courts are independent from the legislative and executive powers.⁴⁵

³⁹ A. Nuvunga, B. Nhamirre, J. Matine e T. Lorizzo, 'Militarização da Formação Policial em Matalane e na ACIPOL é Preocupante' Centro de Integridade Publica, Newsletter 10/2016 –Maio.

⁴⁰ See data available at: <https://www.gov.za/about-sa/police-and-defence> (accessed 12 September 2019).

⁴¹ Data from the Attorney General's Office 2017.

⁴² Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁴³ The exact number of these police units was not available.

⁴⁴ Article 212 of the Constitution translation as provided by Mozlegal, Lda, Advising Investors, available at: www.mozlegal.com (accessed 1 July 2018).

⁴⁵ Article 133 of the Constitution.

As it was previously explained, prior to the decision, the Criminal Procedure Code⁴⁶ gave judges as well as a wide range of other functionaries, to arrest without a warrant for cases outside the scope of *flagrante delicto*. In practice however, a judge was often the last to perform these duties and his/her role was authorising already implemented detention within the 48-hour rule.⁴⁷ However, the 48-hour rule⁴⁸ is frequently not complied with, resulting in rights violations, especially in instances of illegal or arbitrary detention.⁴⁹

Furthermore, judges seldom set aside arrest warrants drafted by the police and prosecutors, even when these are of poor quality and lacking in setting clear grounds for arrest and detention. The reason for this could be to avoid conflict with officials from the police and prosecution service.⁵⁰

There has been an indication that approximately 100 new criminal cases, per month, enter one section of the Criminal Instruction in Maputo.⁵¹ Roughly half of the judge's time of that section is spent reviewing detention, with the balance spent on issuing warrants of arrest and bail applications.⁵² No particular concerns were raised regarding the amount of work of judges or potential backlog in the courts in Maputo.⁵³ This, however, might not be the case everywhere, especially in under resourced provinces and districts.

With the limited number of judges usually comes an assumption of a high workload, which would delay cases. However, this would need to be investigated. There would certainly be disparities between different Criminal Instruction Sections, with some having a smaller workload, or perhaps being more productive and efficient.

An issue deserving brief mention is the increasing risk attached to the work of Judges of Criminal Instruction. In 2014, Judge Dinis Nhavotso Silica was brutally murdered in Maputo. He was working on kidnapping cases and had issued warrants of arrest for certain suspects.⁵⁴ It is believed that the murder was connected to the case and decisions he had made. The case was eventually dismissed due to a lack of evidence.⁵⁵ As a result, the new Statute of Judicial

⁴⁶ Article 293 of the Criminal Procedure Code as well the Law 2/1993 in its Article 6.

⁴⁷ The authority of judges is already recognised in law (Article 1 and 2 of Law 2/1993): "jurisdictional duties that must take place in the course of preparatory instruction of criminal cases should be exercised by judicial magistrates, designated by *judges of criminal instruction* Judges of Criminal Instruction are therefore responsible for the authorisation (issuing warrants of arrests) and legalisation of arrest and detention, as well hearing applications for conditional release pending trial.

⁴⁸ Article 311 of the Procedure Criminal Code states that the person arrested should be brought to the judicial authority within 48 hours from the arrest. This is informally recognised as legalisation.

⁴⁹ See REFORMAR Mozambique Thematic Report on the Implementation of the ICCPR in relation to criminal justice In preparation for the Civil Society Submission to the United Nations Human Rights Committee (March 2018) available at: <https://reformar.co.mz/publicacoes/moz-iccpr-criminal-justice-reformar.pdf> (accessed 10 February 2019).

⁵⁰ Anecdotal reports from Judges during the workshop organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁵¹ In Maputo, there are only three Judges of Criminal Instruction and in the whole country there are eighteen. Judges of Criminal Instruction lead the Criminal Instruction Sections placed within the Courts. Since of Criminal Instruction Section judges work in shifts, the service operates seven days a week, and 24 hours a day. Establishing of Criminal Instruction Sections was envisaged by the Law 2/1993, but they were officially created only in 2004 through a Resolution of the Supreme Court. From 1993 and 2004, within some Courts in the big cities, sections started to work in shifts to deal with preparatory instruction of criminal cases

⁵² Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁵³ Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁵⁴ See news available at: <https://noticias.sapo.mz/actualidade/artigos/juiz-silica-assassinado-a-queima-roupa-em-maputo> (accessed 1 July 2018).

⁵⁵ See news available at: <https://observador.pt/2018/05/08/juizes-mocambicanos-dizem-que-trabalham-em-clima-de-inseguranca/> (accessed 1 July 2018).

Magistrates⁵⁶ introduced protection measures, such as bringing judges' residences closer to the workplace and assigning fieldwork assistants to judges. The 2013-decision is not directly responsible for this particular risk to judges. However, now that only judges can authorise arrests (and many of the organised crime cases are outside *flagrante delicto*), they have been placed in the spotlight, making them more vulnerable to threats and possible attacks.

The policy of the Higher Council of the Judiciary, the body in charge of the selection, discipline and removal of judges, provides that Judges of Criminal Instruction shall be removed from the Criminal Instruction Section and transferred to a different court, after two years, due to the sensitive work they deal with.⁵⁷ Judge Delio Portugal, who was leading the Criminal Instruction Section in Maputo city, was, for example, recently transferred to the Labour Court of Maputo. Portugal had been in charge of the section for two years and he became well known as he had been authorising the detention of seven of the suspects allegedly involved in the Mozambican debt scandal.⁵⁸ Among the seven people brought to custody, there is the son of the former President, while the former Mozambican Minister of Finance has been in custody in South Africa since he was arrested at the request of the United States.⁵⁹

Regardless of some persistent challenges, there is the perception from the legal community and civil society that the situation related to arrest and pre-trial detention in the country has improved.⁶⁰ Anecdotal evidence indicates that the decision was well-received by judges in Maputo city but this may not be the case elsewhere.

Consequences for the police

The Constitution states that role of police is “to guarantee law and order, to safeguard the security of persons and property, to keep public peace and to ensure respect for the democratic rule of law and the strict observance of the fundamental rights and freedoms of citizens.”⁶¹

As noted, the 2013-decision curtailed police powers and non-compliance with the decision can result in disciplinary action for disobedience for abuse of authority.⁶²

With the limited number of judges discussed previously, there is a real and obvious concern that there is not sufficient capacity to respond timeously to all warrant requests. Regardless of possible delays, the police should have no other option, but wait for a judge to issue a warrant of arrest.

It has been reported that the police often feel that they are not in a position to wait for warrants:

⁵⁶ See Law 8/2018 available at: <http://www.ta.gov.mz/Legislacao/Leis/Lei%20n.%C2%BA%209-2018,%20de%2027%20de%20Agosto.pdf> (accessed 1 July 2018).

⁵⁷ See news available at: <https://www.cartamz.com/index.php/sociedade/item/1717-juiz-delio-portugal-nao-foi-despromovido-diz-carlos-mondlane> (accessed 1 July 2018).

⁵⁸ See news available at: <https://www.cartamz.com/index.php/politica/item/1073-os-metodos-pouco-ortodoxos-do-juiz-portugal> (accessed 1 July 2018).

⁵⁹ See news available at: <https://www.reuters.com/article/us-mozambique-credit-suisse-chang/south-african-court-says-mozambique-ex-finance-minister-can-be-extradited-to-u-s-lawyer-idUSKCN1RK19Q> (accessed 1 July 2018).

⁶⁰ Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁶¹ Article 254 of the Constitution.

⁶² Article 412 of the Penal Code. Article 484 and 485 of the Penal Code.

Members of the Police make arrests and conduct searches under public pressure. The law does not stop these actions. This sentiment comes from our awareness that the inaction of Police members would promote a sense of impunity that result in people taking justice into their own hands.⁶³

It is problematic that the police, regardless of their own internal justifications for such measures, do not comply with the decision from the Constitutional Council and clearly act outside of the ambit of the law. Information that some police officers lie about the charges and events, pretending as if the arrest was made in *flagrante delicto* and even arresting innocent people in order to extort money from them or their families in change of release, has also been reported.⁶⁴

In addition, prosecutors who are in charge for monitoring detention have reported that regardless of the new legal framework, unlawful arrests (including arrests without warrants) continue to happen. Although, it must be noted, there is a perception that these have decreased.⁶⁵

In some instances, police act unlawfully because of ignorance of the law and regulations introduced by the decision. It has been noted that often there is no understanding or a limited understanding about what constitutes offences in or outside *flagrante delicto*.

Reportedly there has been training given to the police on the decision, but it could not be established who facilitated the training, the frequency and how many officials were trained. Written notices and instructions are in general not sufficient to ensure that officials fully understand and comply with court decisions. There is a high turnover of Senior Inspectors at police stations and newly appointed officers may not have been trained.

Undoubtedly, many police officials abide by the decision, but limited capacity for effective implementation creates the impression that the police do not and cannot guarantee justice.⁶⁶ Even with the full implementation of the decision by the police, other structural and institutional problems remain, such as a shortage of judges in certain areas and delays in issuing warrants, adding to frustrations within the police, and society's perceptions of the police and trust placed in the justice institutions.

Consequences for Public Prosecutors

Following an arrest and subsequent police detention, prosecutors are mandated to verify the legality of the arrest and detention. The same prosecutors also respond to calls regarding arrests through the "Prosecutors' Hotline

⁶³ Unofficial and adapted translation of the authors from: *Na senda da procura da valorização de informações fornecidas pelos cidadãos, os membros da PRM efectuem buscas e capturas para não desapontar o cidadão, sabendo mesmo que a lei não dá cobro a tais acções. Este sentimento decorre da nossa consciência de que a inação dos membros da PRM removeria a certeza jurídica, promoveria o sentimento de impunidade de que poderia resvalar na justiça pelas próprias mãos, tal como acontece um pouco por todo o lado, como acontece em Magude, Matola e Matxamele, na província de Maputo e Munhava na província de Sofala.* Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁶⁴ Information from the discussions. Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁶⁵ Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

⁶⁶ Event organised by REFORMAR in collaboration with the Attorney General's Office. Maputo, 6 July 2018.

Service” and confirm their legality or otherwise. The Prosecutors’ Hotline Service was established in 2000 to improve the oversight of detention, and is now functioning in the main cities. The purpose is to assist people to report suspected unlawful detention to the Attorney General’s Office and is operational seven days a week and 24 hours a day. Quantitative data on the effectiveness is not available making it difficult to assess whether the Hotline Service is facilitating compliance with the decision.

The good intentions of the decision are, however, undermined by the realities of the situation. Detention monitoring at police stations by prosecutors are not carried out with the required regularity and some prosecutors are not sufficiently diligent and strict in enforcing compliance with legislation,⁶⁷ especially in charging police officers who ordered or conducted unlawful arrests.⁶⁸

If the prosecutor has confirmed the legality of the detention, the suspect would appear before a judge, who would confirm pre-trial detention or grant conditional release (e.g. bail or house arrest). Illegally detained people would be released. Non-compliance with the decision would be considered as illegal detention, regardless of the actual culpability of the suspect. While free or while the police awaits the warrant of arrest, suspects might obstruct the course of justice by, for example, interfering with evidence, and further delaying it.⁶⁹ Delays in prosecuting criminal suspects are considered as one of the possible effects of the decision.⁷⁰ A consequence of such delays is apathy on the part of the public and a lack of trust in the credibility of the Public Prosecution Service and judiciary.⁷¹ Even when illegally detained people are released, there is often widespread public disapproval, which may result in vigilante action.⁷²

Conclusion

The Constitutional Council decision brought legal clarity on the powers to detain. Outside *flagrante delito*, it is only a judge who can order detention. Other institutions, particularly the police and prosecution service, at first only reacted to what was perceived to be the removal of powers. These immediate and more emotional reactions were followed by real concerns and challenges at operational level. The most pressing are the lack of judges to deal with the high volume of cases outside of *flagrante delito* across the country; the shortage of prosecutors to monitor police detention, and the growing dissatisfaction and declining trust in the criminal justice system.

Since the introduction of the decision, there is at least a perception that procedures and conditions related to arrest improved and human rights violations in that phase decreased. However, problems are far from being resolved. The

⁶⁷ See REFORMAR Mozambique Thematic Report on the Implementation of the ICCPR in relation to criminal justice In preparation for the Civil Society Submission to the United Nations Human Rights Committee (March 2018) available at: <https://reformar.co.mz/publicacoes/moz-iccpr-criminal-justice-reformar.pdf> (accessed 10 February 2019).

⁶⁸ Article 484 and 485 of the Penal Code prescribe the punishment of up to eight years’ imprisonment for a public servant who conducts or orders the unlawful arrest and/or imprisonment.

⁶⁹ Event organised by REFORMAR in collaboration with the Attorney General’s Office. Maputo, 6 July 2018.

⁷⁰ Event organised by REFORMAR in collaboration with the Attorney General’s Office. Maputo, 6 July 2018.

⁷¹ Event organised by REFORMAR in collaboration with the Attorney General’s Office. Maputo, 6 July 2018.

⁷² Event organised by REFORMAR in collaboration with the Attorney General’s Office. Maputo, 6 July 2018.

police continue to abuse their powers and prosecutors appear to be hesitant, if not reluctant, to establish effective accountability mechanisms at station level. The release of data on criminal justice system performance and rights violations will do much to strengthen transparency and build public trust again in the criminal justice system.