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Judges' incarceration decisions in Mozambique: The need to decolonise the punitive approach to criminal justice

Decisões de Encarceramento dos Juízes em Moçambique: A necessidade de descolonizar a abordagem punitiva à justiça criminal.

LORIZZO, Tina[1]

ABSTRACT
Over the last decade, Mozambique embarked on a comprehensive reform that aimed at improving the conditions of prisons in the country. Legal reform was accompanied by institutional reform. Prison conditions, however, have not improved at the pace they should have developed. Based on the findings of research conducted on prisons by the organisations Africa Criminal Justice Reform and REFORMAR- Research for Mozambique, over the last ten years, this article aims at drawing the attention of the prison issues from the judges' incarceration decisions. In fact, while studies of criminal justice reform have traditionally examined the systematic deficiencies of the prison system, a closer look at the role of judges in the context of prison provides practical understandings, especially where there are substantive non-conformities with the legal framework in place. Solutions are, furthermore, threefold: the use of legal remedies by victims of judicial decisions and the civil liability of the state for illegal detention and the overall decolonisation of the state approach to criminal justice by all actors of the state administration.

Keywords: Mozambique, prisons, judges, criminal justice.

[1]University of Western Cape (UWC). https://orcid.org/0009-0005-1209-8361. Adjunct Professor at the University of Western Cape (UWC), South Africa. Director of REFORMAR – Research for Mozambique. PhD in Public Law from the University of Cape Town (UCT), South Africa. tina.lorizzo@gmail.com

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RESUMO
Ao longo da última década, Moçambique embarcou numa reforma abrangente que visava melhorar as condições das prisões no país. A reforma legal foi acompanhada por uma reforma institucional. As condições prisionais, no entanto, não melhoraram ao ritmo que deveriam ter evoluído. Com base nos resultados da investigação realizada sobre as prisões pelas organizações Africa Criminal Justice Reform e REFORMAR- Research for Moçambique, ao longo dos últimos dez anos, este artigo pretende chamar a atenção para as questões prisionais a partir das decisões de encarceramento tomadas pelos juízes. Na verdade, embora os estudos sobre a reforma da justiça penal tenham tradicionalmente examinado as deficiências sistemáticas do sistema prisional, um olhar mais atento ao papel dos juízes no contexto da prisão fornece entendimentos práticos, especialmente quando existem inconformidades substanciais com o quadro jurídico em vigor. As soluções são, além disso, triplas: a utilização de recursos legais pelas vítimas de decisões judiciais e da responsabilidade do estado por detenções ilegais e a descolonização geral da abordagem estatal à justiça criminal por todos os intervenientes da administração estatal.

Palavras-chaves: Moçambique, prisões, juízes, justiça criminal.

1. Introduction

Since 2013 Mozambique commenced with reforms to improve prison conditions. In the same year the National Correctional Service (*Serviço Nacional Penitenciário*, SERNAP) replaced the previous National Prison Service (*Serviço Nacional das Prisões*, SNAPRI). It was more than a name change, heralding a new approach focusing on improving prison administration as well as prisoners' rehabilitation and reintegration after prison (Law 3/2013 of 16 January). In 2014, the Penal Code (*Código Penal,* CP) introduced alternatives to imprisonment, such as community service orders in addition to those already on the previous code, such as fines and the suspension of the case (Law 35/2014 of 31 December). This progressive framework was further strengthened with the promulgation of the 2020 revised Penal Code (Law 24/2019 of 24 December) and the Code on the Execution of Penalties (*Código de Execução das Penas*, CEP), the new law regulating all aspects of prison administration as well as alternatives to imprisonment (Law 26/2019 of 27 December). The CEP replaced a decree dating back to colonial times and was drafted based on the 2015 UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR), better known as the Mandela Rules. It should be noted that in

2002 the Prison Policy (Resolution 65/2002 of 27 August) had already opened the door for reform by drawing on the Kampala (1996) and Ouagadougou (2004) Declarations.

Despite these encouraging developments, however, prison conditions have not improved as expected. While the total prison population is stable at around 20 000 people, the infrastructure is simply not sufficient and the overall prison occupation rate is at 200% with some prisons (e.g., Provincial Prisons of Maputo and Tete) at 400% to even 800% occupancy level. While the proportion of pre-trial detainees has been stable at around 30% of the total prison population, around 40% of pre-trial detainees have been charged with summary crimes (*crime sumario*) and should not be in custody in the first place as the law does not provide for it. Furthermore, between 2015 and 2019, some 1 000 people were sentenced to community service, while more than 70% of the prison population were eligible for such a non-custodial option.

The state approach to criminal justice has prioritised the application of colonial-based laws and for the criminal justice, imprisonment in detrimental of local mechanisms of conflict resolution that, more respectful of the national context, understand the causes and consequences of the commissions of crimes and have a restorative approach to justice rather that a retributive one.

Based on research conducted on imprisonment in Mozambique over the last ten years, this article aims to draw attention to how the decisions of judges impact on imprisonment and prison conditions. While criminal justice reform research has traditionally examined the systematic deficiencies of the prison system, the role of judicial decision-making is somehow neglected. This is a sore omission, especially when it is observed that there is substantive non-compliance with the legal framework.

The article deals with three main issues. First, it assesses the historical background of the prison law framework as well as developments over the past ten years. Second, available prison data is analysed to note trends. Third, a number of possible solutions are discussed, focussing on the need to decolonise the state approach to criminal justice, re-thinking the purpose and place of imprisonment in the Mozambican society and the use of legal remedies to challenge judicial decisions.

2. The development of prison law

Prisons were imported by the Portuguese colonisers (Martinez, 2008). The first prisons in the country were built to hold Portuguese citizens sentenced in Portugal and exiled to the African colonies. It was only during the last decades of colonisation (from around 1950) that the prisons started accommodating the local population (Enes, 1947). After independence in 1975 prisons were, however, not abolished and the already dilapidated infrastructure remained in use (Martinez, 2008; Rodrigues, 1963).

Under the colonial administration prisons were governed by a legal document originally drafted for the city of Lisbon and later extended to Mozambique (Decree 26.643 of 28 May 1936 extended to Mozambique by Decree 39.997 of 9 February 1954). Despite independence in 1975, the colonial penal legislation was retained in as far as it was not contrary to revolutionary values of the FRELIMO government (Baltazar, 1977). This legislation remained in place until December 2020 when the CEP entered into force (Law 26/2019 of 27 December). Based on the UNSMR, the CEP regulates the conditions of detention and treatment of prisoners as well as the administration and implementation of non-custodial sentences, such as community service orders (Titles I to XIII of Book I deals with custodial sentences while Titles XIV to XVIII of the same Book regulates non-custodial sentences).

The revised Penal Code of December 2020 as well as the 2014-version promoted alternatives to imprisonment. Law 24/2019 of 24 December replaced Law 35/2014 of 31 December. While the Penal Code of 2014 introduced for the first time, for example, non-custodial sentences such as community service orders for crimes punishable between two- and eight-years imprisonment, the revised 2019 Code provides for the application of the same alternative to imprisonment option for crimes up to three years. The new Code provides also for the application of other non-custodial sentences such as suspended or deferred sentencing, fines and prohibition of rights. The entrenched retributive approach to criminal justice started to make space for a restorative justice approach which aims not only at punishing offenders, but also at rehabilitating and reintegrating them into society. With some requirements being respected (i.e the offender should be a primary offender; he/she should have returned the stolen goods and or

repaired the caused damages) currently the judge is compelled to prioritise the application of non-custodial sentences (Article 68 of CP).

Although non-custodial sentences were introduced with the 2014 CP, in 2002, a policy document aimed not only at promoting and protecting human rights in prisons but also at exploring the use of non-custodial options to alleviate the already worrying prisons' overcrowding was already in existence (Resolution 65/2002 of 27 August). The policy document followed the Kampala and Ouagadougou Declarations and aimed at creating a correctional service where the deprivation of liberty goes hand in hand with rehabilitation. The policy defined short, medium and long-term measures to develop a prison system respecting prisoners' rights; ensuring the separation of different categories of prisoners (i.e., male and female, and children and adults); and promoting individual treatment and the cooperation of the different actors of the justice administration and civil society organisations (Guiding Principles of Resolution 65/2002).

In 2013 the SNAPRI (Decree 7/2006 of 17 May) was replaced with the SERNAP (Law 3/2013 of 16 January). As the 2002 Prison Policy intended, the new legal framework changed the nomenclature: for example, prisons became penitentiary establishments and with it also their main mission, towards concepts of rehabilitation and reintegration. Article 2 of Law 3/2013, in fact, states:

> The SERNAP is a force of national security, with a public service nature, that safeguards the execution of judicial decisions on matters related to deprivation of liberty and alternatives to imprisonment, assuring the conditions of rehabilitation and social reintegration of the sentenced citizen (Article 2 of Law 3/2013).

Consequently, Decrees 63/2013 and 64/2013 regulate respectively the Organic Statute and the Statute of the Penitentiary Guards (*Guarda Penitenciária*). Finally, seven years later from the establishment of SERNAP, the CEP entered into force, in January 2020. The CEP contains the Penitentiary Law considered as a set of norms that regulate the execution of prison sentences, including pre-trial detention, but it is not restricted to that. The CEP also regulates the execution of alternative sentences to prison, including security measures in the prison system. As

in the SERNAP legislation, the reference to the rehabilitation mean of the sentence is affirmed in article 2, which establishes:

> The execution of sentences and criminal measures aims at the rehabilitation and social reintegration of the convict, preparing him to lead his life in a socially responsible manner, as well as protecting legal assets and repairing the damage caused by the conduct that justified the conviction. and the defense of society (Article 2 of the CEP).

3. Prison data

The prison population has been at some 20 000 over the past years (Lorizzo, 2012). Following releases in response to COVID-19, the prison population dropped to 15 000 in March 2020, but three months later it had already climbed to 18 000 (Amnesty Law 2/2020 of 6 April and Directive 03/TS/GP/2020 of 1 Abril of the Supreme Court). After the implementation of the two legal documents, around 6 000 people were freed.

In January 2020 there were only 1893 inmates (or less than 10% of the total) with prison terms of longer than 15 years, a number that increased to 1922 in June 2022 (van Zyl Smit and Jimada, 2020). The majority of inmates, in fact, are serving terms of less than eight years. Data from SERNAP (June 2022) showed that 10702 people out of a total 15442 prisoners were serving sentences up to eight years. The most common crimes are theft, robbery, assault and drugs use. Despite the availability of non-custodial options (Lorizzo, Petrovic & Muntingh, 2020),[2] however, prisoners are generally serving terms of less than one year. Data from SERNAP (June 2022) showed that 5923 people were serving sentences up to one year.

Since 2015 the number of children (up to 16 years) and minors (17-21 years) has increased from 9 % to 27% of the total prison population. The most updated data from SERNAP shows that there were (June 2022) 2496 (16-18 years) and 3569 (19-21 years) people incarcerated with a total prison population of around 22 000 people. The number of prisoners aged 16-18 years, however, had decreased from some 1000 (2018) to 400 in 2020 and the number of prisoners aged 19-21 years increased to more than 3000. SERNAP data show also that there are children and minors sentenced to terms of imprisonment beyond the sentence

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jurisdiction of the court (SERNAP, February 2021) showed that there were around 50 children and minors sentenced to prison terms outside those prescribed by law. The CP provides that a person under the age 18 years cannot be sentenced to a term of imprisonment longer than eight years and a person older than 18 years but younger than 21 years cannot be sentenced to a prison term longer than 12 years (Article 131 of CP). While the CP prioritises the application of alternative to imprisonment (Article 69 of CP), research have showed that a prison sentence is the first resort option for judges.

4. Imprisonment during the Covid-19 pandemic

Following the first Covid-19 case reported on 30 March 2020, two legal instruments were used to decongest prisons, being an Amnesty Law (Law 2/2020 of 6 April) and a Directive from the Supreme Court (Directive 03/TS/GP/2020 of 1 Abril). In order to reduce prison overcrowding and thus prevent the spread of the virus, pre-trial detainees charged with crimes punishable with a term of imprisonment of up to one year were granted amnesty and prisoners already sentenced with a term of up to one year were pardoned and thus released (Articles 2 and 3 of Law 2/2020 of 6 April). Simultaneously the Supreme Court issued an internal regulation prompting the expediting of cases to grant parole where the legal requirements had been met. The following results were observed from these two measures (REFORMAR, 2020): a total of 5512 prisoners were released: 98.3% males and 1.7% females; the prison population dropped from 20000 to 15000, the lowest since 2014 and prison occupation dropped from 220% to 190%.

Based on SERNAP data of June 2020 covering April to June 2020:

- More than 1200 people were admitted to prison for the crime of disobedience, presumably related to measures aimed at preventing the spread of the virus;

In May 2020, disobedience in the context of the state of emergency (Decree 26/2020 of 8 May) meant, for example, engaging in acts such as being found without a mask in public places such as public roads, markets and common areas; engaging in cultural, recreational and sporting

activities in public spaces; operating bars and tents selling alcoholic beverages; participating in funeral proceeding exceeding 20 people; and engaging in market selling outside the hours of 6 am to 5 pm (Decree 26/2020 of 8 May).

The crime of disobedience is punishable under the CP with up to three months of imprisonment (Article 412 of CP), and the following observation are made in respect of data from SERNAP: of the 1227 people admitted over the period April to June 2020, more than half (52.2%) were still awaiting trial, and many may have by then surpassed the punishment provided for in law; of the 586 people who were sentenced for disobedience and serving a prison term, 147 received a term of less than 15 days and 408 (70%) a term of less than 45 days.

Imprisoning people for disobedience and committing them to already overcrowded facilities was in direct contradiction to the guidance from the World Health Organisation at the time to decongest prisons and directly undermined the amnesty and early parole programme of government. While 5512 prisoners were released, 1227 were either sentenced for, or held on suspicion of disobedience, making the real gain in decongestion not 5512, but 22% less at 4285. The same prisons that the government intended to decongest with the Amnesty Law, were being overcrowded again. The objectives and intentions of the law, however, were clear:

> There is a need to protect the life and dignity of the Human Person and moved by the spirit of humanism in the face of the COVID-19 pandemic, it is urgent to adopt measures aimed at mitigating the overcrowding of the country's penitentiary establishments, with a view to preventing the spread of the new coronavirus and containment of the pandemic in the penitentiary environment and in society (Preamble of Law 2/2020 of 6 April).

Detention is one way of securing the accused person’s attendance at trial, but there are other less restrictive means to achieve the same result. Prosecutors and judges are the gate keepers to the criminal justice system and in particular the use of detention pending trial. The criminal justice system enables the suspension of proceedings, release on warning, monetary bail and children can be released into the care of their parents. Detention should furthermore be motivated by a real risk that the accused will evade justice or harm the interests of justice by interfering with witnesses and/or evidence, or the justice process itself (Article 245 Criminal

Procedure Code, Law 25/2019 of 26 December). Given the particular context at the time it would have been reasonable to expect that all possible alternatives would be explored and that detention would only be used as a measure of last resort. The data above, presenting the number of people detained and sentenced for disobedience, indicate substantial deviation from this requirement.

5. Excessive bail or no Term of Residence option

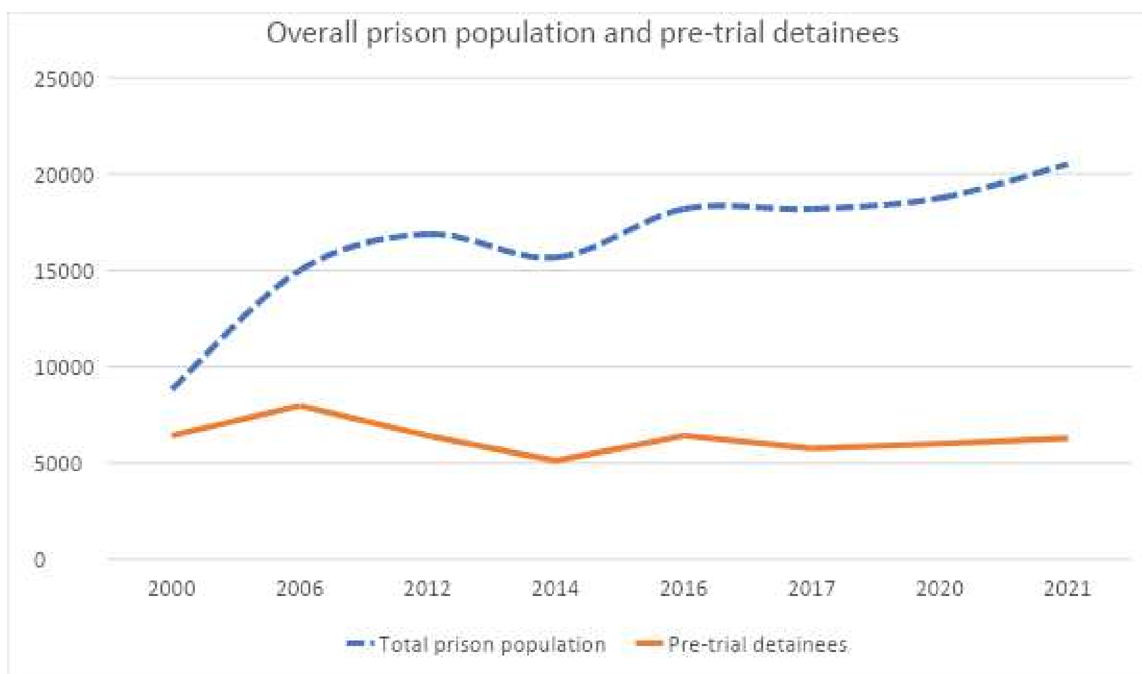
A 2016-study on the use of bail in Malawi, Mozambique and Zambia concluded that Mozambique "should ensure that bail amounts are affordable and do not exceed the economic capacities of accused persons". The same conclusion was shared by the study on the socioeconomic impact of pre-trial detention in 2014 (Lorizzo, Petrovic and Muntingh, 2020).

The first months of the Covid-19 pandemic showed, however, that this was a problematic issue and that courts were setting bail at unaffordable and punitive amounts. When bail was granted, it was unaffordable for nearly all people. When suspects appeared in court for disobedience, bail was set at up to 10000 Mt (US$ 156). This exceeded the monthly income for the majority of people which was some 5000 Mt (US$ 79) in 2021. To this should be added that many people and probably all people in the informal economy experienced a significant reduction in income due to the restrictions on trade and movement of people. The net effect was that people were being punished for being poor and then remained in custody.

6. Pre-trial detention

Figure 1 shows the overall trends in respect of imprisonment and the use of pre-trial detention over the past 20 years. From the graph it is clear that the number of pre-trial detainees has remained relatively stable at 5000 to 8000, but that the overall prison population has more than doubled from 8800 to 20500.

Figura 1 - Overall prison population and pre-trial detainees



Source: SERNAP data 2000-2021

While the use of pre-trial detention shall only be used when all other measures are deemed inadequate (Article 243 Criminal Procedure Code) problematic is the use of pre-trial detention when this is not provided by law.

The Criminal Procedure Code (CPC) only permits the use of pre-trial detention for cases where the accused is suspected of committing an intentional crime (*crime doloso*) and is punishable by a prison sentence of more than two years (Article 243 CPC). Therefore, crimes punishable by sentences of less than two years should not be subject to pre-trial detention. The CPC of 1929, which was in force until December 2020, the date of entry into force of the new CPC, established that pre-trial detention could only be used when the accused had committed an intentional crime punishable by imprisonment for more than one year (Article 291 of the 1929 CPC and Decree 28/1975 of 1 March). Under the old regime, such a crime was recognised as summary crime. The old regime, therefore, was more burdensome than the new one in force as

currently more people than before can be eligible to go direct to trial without going through pre-trial detention.

Despite the relevant legislation does not provide for the application of pre-trial detention for summary crimes, research found the contrary. In 2015, for example, a study on children in conflict with the law reported that:

> The provisions of the Decree [Decree 28/75 of 1 March] are very clear and easy to interpret. It is therefore difficult to understand why there are so many systematic breaches of the implementation of these rules, and why so many young people under the age of 18 years are detained awaiting trial, indicted for crimes that do not justify this deprivation of liberty. This is, unquestionably, an area in which the Public Prosecutor's Office has to be much more proactive and use the procedural powers it holds with greater competence and assertiveness (Procuradoria-Geral da Republica, 2018, p. 75).

Two years later, the Human Rights Report of the Mozambican Bar Association raised the same concerns as it verified that some 40% of pre-trial detainees were charged with summary crimes nationally, in violation of domestic law and international human rights standards (Ordem dos Advogados de Moçambique, 2019)

Different reasons have been reported by judges explaining the lack of conformity to the law. The Human Rights Report of the Mozambican Bar Association (Ordem dos Advogados de Moçambique, 2019) and the late 2021 study on Pretrial Detention and Summary Proceedings in Mozambique - A look at the situation of children and minors in Tete (REFORMAR, 2021) mentioned the following reasons related to lacking infrastructure and human resources:

- Lack of transport for detainees from the police stations to the courts;
- Lack of transport for public prosecutors to make due diligence at the police stations;
- Logistical aspects such as lack of electricity;
- Insufficient rooms for holding trials on time and the detainees had to be resent to the cell;
- Lack of public prosecutors in police stations, who can safeguard situations of summary proceedings;
- Lack of judges to see a detainee in 48 hours as prescribed by law;

- Climatic conditions that affect the normal functioning of the courts (hot temperatures in cities as Tete for example).

Other worrying reasons were mentioned such as:

- Applying pre-trial detention for preventing lynching in communities;
- Mistaken interpretation of the law and
- Preferring to detain a person with the assumption that otherwise will flee.

The new CPC that entered into force in January 2020 (Law n. 25/2019 of 26 December) amended the legal framework and since then who has been charged for summary crime can be detained in pre-trial detention as provided by Article 426 CPC. The article states that if the court hearing cannot take place just after the arrest and presentation before the Public Prosecutor, but the process can maintain the form of summary crime, the accused can be freed. If the court hearing, however, cannot take place in 48 hours from the arrest, the accused must be released.

Number 3 and 4 of Article 421 CPC go even further stating that:

> 3. If the Public Prosecutor has the grounds to believe that the deadlines for the summary crime process cannot be respected, he/she determines that the process can continue as a common process. 4. Under the case provided by number 3, the Public Prosecutor immediately frees the accused, subjecting him/her to Term of Identity and Residency or introduce him/her to the criminal instructing judge for the application of coercion and or patrimonial safeguards measures (Article 421 (2 and 3) of the CPC).

It is important to refer, in fact, that, following the new legal framework in place, the process can be common or special. As per Article 305 CPC, the special kind of process is applied to the cases referred by the law. Outside the cases provided by law, the process can only be a common one. Special processes are (Article 306 CPC) summary, *sumaríssimo*, for defamation, slander and insults and transgressions. The *sumaríssimo* type of process is provided by Article 431 CPC for crimes punishable with a prison up to one year and it does not provide for pre-trial detention.

Said so, it is surprising to see that, as per data shared by the SERNAP in June 2022, on a total 6781 pre-trial detainees incarcerated in the Mozambican prisons, 2999 were linked to

sumarissimo process and 1 357 people to the summary crimes, making 64% of the total number of pre-trial detention in the country *(*SERNAP, June 2022).

Furthermore, worrying is the use of pre-trial detention outside the deadlines provided by law. At the Provincial Prison of Maputo, for example, in March 2023 there were around 4000 inmates, 870 of whom were pre-trial detainees and the majority of those in pre-trial detention outside legal terms.

7. Alternatives to imprisonment

The majority of inmates serve prisons terms up to eight years. As at January 2020 there were 1 893 people out of some 14 250 sentenced prisoners (13%) serving a term longer than 15 years (van Zyl Smit and Jimada, 2020).

Theft, robbery, assault and drug consumption constitute the majority of crimes committed by sentenced prisoners. Typically, their sentence is a one-year term despite alternatives being available. Research published in 2019 showed that around 1000 community service orders (CSO) were assigned over the period 2015-2019. The research identified the following problems with the implementation of CSO (Lorizzo, Petrovic and Muntingh, 2020) such as non-compliance with the law; under-utilisation of CSO by courts; role and responsibility confusion; lack of staff training; unclear strategy and organisational and administrative procedures, and scarcity of material resources that affects effective implementation and supervision of CSO.

At the moment in which the research was carried out, however, the CEP that regulates inmates' treatment in prisons and alternatives to imprisonment was yet to enter into force. Judges shared that one of the main reasons why alternatives were not applied as they should have because of the lack of regulation. But although regulation is now in place, judges continue refraining from using alternatives to imprisonment. In general, in a district court around 700 cases enter per year. But data show that judges apply community service orders only in 10-20 cases per year. While the law prescribes that some requirements need to be respected to apply non-custodial sentences, it is questionable such a low trend.

Those serving one-year terms would be ideal candidates for a non-custodial option and the problems identified are not insurmountable and even a modest investment will soon bear fruit in a reduced prison population if these options are truly used as an alternative to prison.

8. Unlawful prison terms

From 2016 to 2021 the proportion of children and minors between the ages of 16 and 21 years has increased from 9 % to 16 %of the total prison population. Data from SERNAP also show that there are children and minors serving prison terms beyond what the law provides for; in other words, the trial court exceeded its sentencing jurisdiction. 2021 data from SERNAP found that:

- The vast majority of children were sentenced to short prison terms;
- More than 90% of 16-year-old boys and 85% of 17-year-old boys were sentenced to prison terms of up to two years in 2020;
- Sentences of up to three months, and three to six months apply to half of the cases. A similar situation also occurs with girls. Data also shows very long prison sentences imposed on children, which even exceed legal limits. The Criminal Code states that children between 16 and 18 years old can be sentenced to a maximum of 8 years in prison, while minors between 18 and 21 years old cannot exceed 12 years in prison;
- in 2020, there were 39 children (16 and 17 years old) serving prison sentences from 8 to 16 years and 7 serving sentences longer than 16 years;
- Data on the types of crimes confirm that the majority of 16- and 17-year-olds (boys and girls) are imprisoned for crimes such as theft, robbery and a very high number of them for illegal driving.

9. Challenging judges' incarceration decisions

9.1 The use of legal remedies

It is important that people use legal remedies in place to challenge judicial decisions. Habeas Corpus and Extraordinary Appeal are two of the legal instruments that can be utilised.

Habeas Corpus is a legal remedy that can be utilised against an illegal arrest or imprisonment by the person victim of the illegality or by any citizen in full enjoyment of his/her political rights. Article 66 of the Constitution of the Republic of Mozambique (CRM)states:

> 2. The writ of Habeas Corpus is brought before the court, which decides on it within a maximum period of eight days (Article 66 of the CRM).

The request for Habeas Corpus takes two forms, namely ordinary and extraordinary. Article 263 CPC regulates the ordinary Habeas Corpus, which can be used in case of an illegal arrest. The article states:

> Those detained at the order of any authority may request the investigating judge of the area where they were found to order their immediate presentation before the judge, on one of the following grounds: a) The deadline for submission to the judicial authority has been exceeded; b) The detention occurred outside legally permitted places; c) The detention was carried out or ordered by an incompetent entity; d) The detention is motivated by a fact for which the law does not allow it. 2. The request may be signed by the detainee or by any citizen enjoying their political rights. 3. It is punishable with the penalties corresponding to the crime of qualified disobedience any authority that raises an illegitimate obstacle to the presentation of the application referred to in the previous numbers or to its referral to the competent judge (Article 263 of the CPC).

The extraordinary Habeas Corpus is regulated by Article 265 CPC. It can be formulated through a petition formulated by the inmate or by any citizen in full enjoyment of his/her political rights, by a duplicate request addressed to the president of the Appeal Court, and must be based on the illegality of the arrest: a) Performed or ordered by an incompetent entity; b) Motivated by a fact for which the law does not allow it; or c) Maintained beyond the time limits established by law or court decision.

The Extraordinary Appeal is, furthermore, the second remedy that any person can use to challenge judicial decision and it takes three different forms, as per Article 493 of the CPC:

a) Establishment of jurisprudence;
b) Review; and
c) Annulment of a manifestly unfair and/or illegal sentence.

For the purpose of this article, the second and third options of the Extraordinary Appeal will be presented. Article 506 CPC, in fact, states that:

> 1.A final judgment can only be reviewed: a) If the facts invoked therein as grounds for the conviction of an accused are irreconcilable with those contained in another judgment and the opposition between them may result in serious doubts about the justice of the conviction; b) If another final judgment has considered false means of proof that have been decisive for the decision; c) If another judgment which has become final and unappealable has proven a crime committed by the judge and related to the exercise of his function in the process; d) If, in the case of conviction, new facts or evidence are discovered which, per se or combined with the facts or evidence considered in the proceedings, raise serious doubts about the justice of the conviction […] (Article 506 of the CPC).

Finally, Article 530 CPC establishes grounds for the suspension of execution and annulment of sentences manifestly unfair and/or illegal. The article states:

> 1.The suspension of the execution and annulment of judgments of the lower-level courts that cannot be appealed under the terms of this Code, can only be based on their manifest injustice and/or illegality. 2. Evidence that becomes necessary and cannot be taken by the Supreme Court is requested from the court of 1st instance that issued the decision that is the subject of the appeal (Article 530 of the CPC).

Article 531 CPC states that 1. The appeal may be lodged, at any time, in the Supreme Court, at the request of the Attorney General of the Republic or, in case of absence or impediment, by the Deputy Attorney General of the Republic.

The implementation of the legal framework presented above is, however, limited by the context in which access to justice is, in practice, provided to the general population. The Mozambican Legal Aid Institute (*Instituto de Patrocínio e Assistência Jurídica*, IPAJ) is the institution that provides people free access to justice. Created through Law 6/1994, to provide legal assistance to people who, for economic reasons, cannot freely choose a lawyer, the IPAJ has, over the years, increased its offer. The 2017 Human Rights Report of the Mozambican Bar Association (*Ordem dos Advogados de Moçambique*, OAM) published in 2019, in fact, stated

that, in 2017, there were only around 250 public defenders working for the institution. In 2011, there were around 100 public defenders (Lorizzo, 2012). Considering, however, that the last 2017 national census showed that the Mozambican population stood at around 30 million people, it is easy to comprehend that not even the around 22.000 inmates in the country can be supported by the IPAJ. To this, it is to add that the quality of the service offered by IPAJ has constantly be put under scrutiny by non-governmental organisations and the media. Cases of corruption where the public defenders of the IPAJ demand bribes to perform what should be a free service have been repeatedly publicised. The lack of an efficient and effective access to justice affects the real possibility of the population to use the existing legal remedies against judicial decisions. The IPAJ needs a comprehensive reform that tackles the whole institution and its functioning to provide people a real access to justice.

9.1 Civil liability of the state for illegal

The study "Civil liability of the State for detention in Mozambique" conducted for the Open Society Initiative for Southern Africa (OSISA) by the Africa Criminal Justice Reform and the Centre for Human Rights of the University Eduardo Mondlane in 2017 shed light on the conundrums related to the civil responsibility of the State for detention and to understand possibilities for reform in the country (OSISA, 2017).

Detaining a person is a public administrative act and, in Mozambique, the civil liability legal regime for public administrative acts may be contractual or non-contractual. The civil liability of the state for illegal detention falls under the non-contractual legal regime. The Mozambican legislation establishes substantive institutional and procedural regimes for the civil liability of the state for public administration acts.

The substantive basis for claims against the state is contained in Article 58 of the CRM which provides

> 1. Everyone shall have the right to claim compensation in accordance with the law, for damages caused by a violation of their fundamental rights. 2. The State shall be responsible for damages caused by the unlawful acts of its agents, in the performance of

> their functions, without prejudice to rights of recourse available under the law (Article 55 of the CRM).

Article 13 of Law 14/2011 further provides that the Public Administration is responsible for the unlawful acts of its organs, employees and agents in the exercise of their functions that result to third parties, under the same terms of civil liability of the State, without prejudice to the right of recourse, under the law (Law 14/2011). Referring to pre-trial detention, the study lists the following five situations that may occur:

a) The judge of the preliminary enquiries (*juiz de instrução criminal)* sets free the arrestee because his/her original arrest was unlawful;
b) The judge of the preliminary enquiries confirms the lawfulness of the arrest, ordering pre-trial detention, but the person is acquitted at trial, which only occurs many months later and beyond the time period stipulated in the criminal procedure law (Article 256 of the CPC);
c) The trial court acquits the person because he/she has not committed any crime, within legal time frames, but thereafter it transpires that there was a malicious prosecution unfounded by evidence;
d) The trial court acquits the person within legal time frames and there is no evidence of a malicious prosecution, but the decisions taken were unreasonable and irrational; and
e) The trial court acquits the person within legal time frames and there is no evidence of a malicious prosecution, but the decisions taken were reasonable and rational.

In the first scenario there is an unlawful arrest and Article 58(2) CRM and Article 13 of Law 14/2011 establish that the arrested person has the right to compensation. In the second scenario, the basis of the claim would be the failure to adhere to the relevant time limits, resulting in rights being infringed, in particular Article 61(2) CRM, which provide that detention must be within the period provided by law. In the third scenario, there may be a claim where the prosecution was filed without an adequate basis or for an improper purpose, such as harassing the defendant, ruining another person's reputation, or to knowingly place blame on someone other than the

actual wrongdoer. If a prosecutor files such a case and the charges are dismissed, the accused can sue for malicious prosecution and seek financial damages. In relation to the fourth scenario, a claim may be possible where the decisions taken had other shortcomings relating to reasonableness and rationality, in addition to circumstances which suggest a malicious prosecution. If reasonableness and rationality are requirements for lawful administrative action in Mozambique, then acts such as these would also be seen as unlawful and therefore result in state liability. On the fifth scenario, all the requirements for a lawful pre-trial detention were met; decisions were reasonable and rational; the person was acquitted, and there was no evidence of a malicious prosecution. However, a range of socio-economic impacts may have occurred resulting in persons losing their job and suffering losses (Muntingh & Redpath, 2016). Here there is an argument that rights have been infringed and the person is due compensation. The counter-argument, however, is that article 56 of the CRM provides for legislative restrictions on rights, and the criminal procedural law is just such a restriction on rights This view would argue that there was no malicious prosecution, and there was enough evidence reasonably and rationally to found an arrest and to order preventative detention, and there was compliance with legal time limits, within the justifiable limitation of rights as provided for in Article 56 of the CRM. This interpretation is supported by Article 58(2) of the CRM that only provides for recourse against the state where there have been unlawful acts, and not lawful acts (OSISA, 2017).

The general institutional regime of public liability of the State for acts of public management is contained in Law 7/2015. The constitutional basis of this law is contained in article 230(1) (a) CRM which provides that the Administrative Court must adjudicate cases concerning disputes arising from administrative legal relations. However, Article 5 (1) (c) of Law 7/2015 provides that the acts relating to the criminal instruction and to the exercise of criminal proceedings in criminal matters are excluded from the jurisdiction of the Administrative Court. Under this rule, the court of administrative jurisdiction do not accept proceedings for the application for

compensation as a result of unlawful detention or imprisonment. Three interpretations of this rule are possible:

a) That the rule is unconstitutional, since it violates article 230 (1) (a) of the CRM;
b) That the aforementioned rule does not purport to exclude in absolute terms the intervention of the administrative court in cases of applications for compensation for unlawful detention. The intervention of the administrative jurisdiction depends on whether a court has declared the detention illegal or has acquitted the preventive detainee;
c) That the administrative court may not adjudicate claims for compensation for unlawful detention or in any matter arising from violation of the citizen's freedom.

It may be necessary to establish, in Mozambique jurisprudence, the reasonableness and rationality requirements for the lawfulness of administrative acts through test cases. Furthermore, the Constitutional Council should be approached to challenge the constitutionality of the provision that excludes administrative jurisdiction for unlawful detention compensation (Article 5 (1) (c) of Law 7/2015).

10. The need for decolonising the state approach to criminal justice

There is another way to challenge judges' decisions by contesting the general state Eurocentric approach to criminal justice. It is defined Eurocentric approach the approach that prioritises the application of colonial-based laws and for the criminal justice, imprisonment in detrimental of local mechanisms of conflict resolution that, more respectful of the national context, understand the causes and consequences of the commissions of crimes and have a restorative approach to justice rather that a retributive one.

In Mozambique, in fact, conflicts are solved through a plurality of local mechanisms of conflict resolution, known as legal pluralism and which involves the elders in more rural areas and local authorities in the most urbanised part of the country. In the country, justice is met by

millions of people under a tree of a remote rural village, in the office of a non-governmental organisation as before a traditional healer (Santos de Sousa and Trindade, 2003). For this article, community courts can be recognised as an important local mechanism that, after periods of institutional silence and those more dynamic, have proven resilient and used by the population in the rural as in the most urbanised areas, to solve their minor civil and criminal disputes. Created through Law 4/1992, community courts are cheaper and faster than judicial courts; they are closer to the people and speak their languages and traditions.

Lorizzo has shown, in particular, that community courts can improve access to criminal justice and improve conditions in the prison system (Lorizzo, 2022). Community courts, in fact, practise and embody the principles of restorative justice. Community courts reach their decisions by forging consensus between the parties. The judges of the community courts act as mediators, involving extended families and local communities where necessary. Community courts apply fines and issue community service orders. Their decisions are monitored not only by the courts, but also by families and the local communities. For community courts, the aim of punishment is the restoration of the social harmony broken by the dispute.

The Eurocentric approach of the state towards criminal justice, instead, has ignored the importance of such mechanisms starting from the legal education given to students at law faculties in the country. At the Law Faculty of the public University Eduardo Mondlane, for example, the curricula focus on the positivist approach to law, prioritising state law. Only the state law (in the written norms of the codes) represents the law in the curricula of the law faculties. Courses on legal pluralism do not form part of the curriculum, not even in the form of short modules. Law faculties at the private universities apply the same approach (*Universidade Católica da Beira and Universidade Técnica de Moçambique*). Law students thus generally graduate from the faculty with no exposure to legal pluralism. If they become aware of the existence of other normative systems outside state law, it is because of their individual experience at home.

The Eurocentric approach can be seen also at the Judicial Training Centre (*Centro de Formação Jurídica e Judicial*, CFJJ) for those who want to become judges or prosecutors. The

Legal and Judicial Training Centre of Maputo trains judges and other actors in the system, such as prosecutors and legal aid officers. Between 2000-2007, students were introduced to the importance of mechanisms of conflict resolution other than those provided by the state justice system. However, this component of the course gradually shrank, and there are currently few activities around non-state mechanisms of conflict resolution or opportunities to form relationships with members of the judicial apparatus. In 2019, the CFJJ introduced compulsory practical training or internship at the institution (*estagio de imersão e estágio intercalar*), along with visits to different institutions including community courts. The CFJJ only lately inserted, within the initial training, disciplines such as penology and prisoners' rights (2020), which question the use of imprisonment by the judiciary as a mean of first resort. Disciplines such as Penitentiary Law, Penology and Legal Pluralism equip students with knowledge and skills that, not only question imprisonment but sensitise also on the application, for example, of alternatives to imprisonment.

Challenging such an approach would mean decolonising the state approach to criminal justice creating a different culture that understands the socioeconomic impacts of imprisonment and gives solutions to them that are respectful of the context in which they are created.

11. Conclusions

The article showed how the punitive approach of the judges' decisions has been translated into practice. Data from SERNAP and research conducted by REFORMAR and the Africa Criminal Justice Reform over the last decade exposed that the judges' incarceration decisions affected the prison reforms in Mozambique. Solutions are, furthermore, threefold: the use of legal remedies by victims of judicial decisions, the civil liability of the state, and the decolonisation of the state approach to criminal justice by all actors of the state administration.

State power needs to acknowledge and show respect to local knowledge as it is practised in community courts. Such respect needs to spread to all state institutions, including the police, judicial courts, lawyers and, indeed, society in general. This respect can begin by being sensitive to, and changing, the implications of existing terminology. Forms of local knowledge should be

recognised in positive terms, terms which recognise possibilities rather than limitations. This recognition needs to be made in the language of legal documents, the language of policies and in plans of action. It needs to be shared by all the stakeholders who work within the criminal justice system, and this can be achieved through seminars and other meetings where new ideas, terms and meanings can be internalised by all actors.

The Legal Training College and the Universities need to acknowledge and add to their curricula the discipline and insights of legal pluralism and address these in relation to both civil and criminal law. For the state judges and prosecutors already operating in the country, the Legal Training College should organise in-job training through the provision of seminars and workshops. In addition, the public should also be informed about the important role that community courts can have in the criminal justice system, as well as about possible alternatives to imprisonment. Awareness campaigns should be organised across the country.

Law 4/1992 needs to be finally revised, increasing the competences of community courts to deal with criminal offences that are punishable (according to the Penal Code) with terms of imprisonment of up to three years. This would be in line with the norms that already provide for the application, by state judges, of alternatives to imprisonment. Considering that community courts apply only alternatives to imprisonment, broadening their competences will allow cases to avoid entering the criminal justice system and be resolved at community level. A team of experts with a background in legal pluralism and postcolonial studies and knowledgeable on alternatives to imprisonment could create a list of criminal offences that community courts could deal with.

References

BALTAZAR, R. (1977). “Tribunais Populares. A Justiça Nas Mãos Do Povo,” Revista *Tempo*. Maputo.

SANTOS DE SOUSA, B. & TRINDADE, C. (2003). *Conflito e Transformação Social: Uma Paissagem das Justiças em Moçambique.* Oporto, Afrontamento.

ENES, A. (1947). *Moçambique*, Fourth Edition. Lisboa: Imprensa Nacional.

LORIZZO, T. (2012). Prison reform in Mozambique fails to touch the ground. Assessing the experience of pre-trial detainees in Maputo. *South Africa Crime Quarterly*, (42), 29-38.

LORIZZO, T. (2022). Non-state forms of conflict resolution applied to criminal justice: Opportunities for improving criminal justice. The case of community courts in Mozambique. Thesis for the PhD. University of Cape Town. South Africa.

LORIZZO, T. PETROVIC, V. & MUNTINGH, L. (2020). Alternatives to Imprisonment in Mozambique. The implementation of community service orders. *Africa Criminal Justice Reform.* Consulted on 12 January 2024, available at: https://reformar.co.mz/publicacoes/tsu-moz-english.pdf/view.

MARTINEZ, E. S. (2008). O Trabalho Forçado Na Legislação Colonial Portuguesa - O Caso de Moçambique (1899-1926). Tese de Mestrado. Universidade de Lisboa. Portugal.

MUNTINGH, L. & REDPATH, J. (2016). The socio-economic impact of pre-trial detention in Kenya, Mozambique and Zambia. Bellville: Community Law Centre.

ORDEM DOS ADVOGADOS DE MOÇAMBIQUE (2019). *Relatório dos Direitos Humanos 2017*. Maputo

OSISA, (2017). Civil liability of the State for detention in Mozambique. Maputo

Procuradoria-Geral da Republica (2018) *Children in conflict with the law. Looking for a strategy of protection*. Maputo. Consulted on 12 January 2024, available at: https://reformar.co.mz/publicacoes/criancas-em-conflito-pdf.

REFORMAR. (2020). Carta Aberta Sobre o Impacto Do Estado de Emergência No Sector de Justiça Criminal. Consulted on 12 January 2024, available at: https://reformar.co.mz/publicacoes/carta-aberta-impacto-estado-de-emergencia-1.pdf/view

REFORMAR. (2021). Pretrial Detention and Summary Proceedings in Mozambique - A look at the situation of children and minors in Tete. Maputo.

RODRIGUES, L.F. (1963) *Contribuição Para o Estudo Do Sistema Prisional No Ultramar*. Instituto Superior de Ciências Sociais e Política Ultramarina: Universidade Técnica de Lisboa. Portugal.

VAN ZYL SMIT, D. and JIMADA, Z. (2020). *Life imprisonment worldwide revisited.* Centre for Research and Education in Security, Prisons and Forensic Psychiatry.